IN THE SUPREME COURT OF FLORIDA

Case No. 93,287 (No. 97-2327)

---

TALAT ENTERPRISES, INC., ETC.

d/b/a Billy the Kid's Buffet,

Appellant,

vs.

AETNA CASUALTY AND SURETY CO.

d/b/a Aetna Life and Casualty

Appellee.

---

**ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

# BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS, AMICUS CURIAE, SUPPORTING APPELLANT'S POSITION

---

JEFFREY M. LIGGIO, ESQUIRE
Florida Bar No.: 357741
1615 Forum Place
Barristers Building, Suite 3B
West Palm Beach, FL 33401
(561)616-3333

P. SCOTT RUSSELL IV, ESQUIRE
Florida Bar No.: 750360
DUNLAP & RUSSELL, P.A.
1300 Riverplace Blvd., Suite 601
Jacksonville, FL 32207

Attorneys for Academy of Florida Trial Lawyers, Amicus Curiae

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

This brief is submitted by the Academy of Florida Trial Lawyers ("AFTL"), amicus curiae, in support of Appellant's position. AFTL accepts the statement of the case and facts set forth in the certification from the United States Court of Appeals for the Eleventh Circuit.

## ISSUE PRESENTED FOR REVIEW

(as framed by the certified question)

If an insured suffered extra-contractual damages prior to giving its insurer written notice of a bad faith violation and the insurer paid all contractual damages, but none of the extra-contractual damages, within sixty days after the written notice was filed, has the insurer paid "the damages" or corrected "the circumstances giving rise to the violation," as those terms are contemplated by Florida Statute §624.155(2)(d), thereby precluding the insured's first-party bad faith action to recover the extra-contractual damages?

## SUMMARY OF ARGUMENT

If upheld, the District Court's interpretation of the relevant notice provisions of section 624.155(2)(d) would effectively transform Florida's bad faith law (and associated provisions of the Unfair Insurance Trade Practices Act) from a consumer protection statute into a toothless amnesty program. Under the District Court's interpretation, an insurer could refuse to timely pay benefits, even while acting in blatant bad faith so as to bankrupt an insured, and yet escape liability for extra-contractual damages caused by its bad faith through the simple expediency of paying contractual benefits within sixty days of the bad faith notice. Such an interpretation is contrary to the courts' obligation to interpret legislation so as to give effect to the legislature's intention, since it would protect and encourage, not deter, the type of conduct which the statute was clearly intended to proscribe. A more reasonable interpretation, which is clearly supported by the definition of "damages" set forth in §624.155(7), would permit the insurer to foreclose a bad faith action only by doing more than what it was obligated to do in the first place (pay the contractual damages) and make its insured truly whole by paying extra-contractual damages.

## ARGUMENT

The relevant legislative history has been recently recounted by this Court in Time Ins. Co., Inc. v. Burger, 23 Fla. L. Weekly S309 (Fla. June 12, 1998). For more than half a century, Florida courts have imposed a duty upon liability insurers to act in good faith when defending their insureds against **third**-party claims; they have authorized actions by both insureds and judgment creditors of insureds against insurers who have dealt in bad faith with their insured; and the measure of damages has always been the "excess judgment" obtained against the insured, notwithstanding that such a judgment was in excess of the insurer's contractual policy limits. See e.g. Auto Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938); Thompson v. Commercial Union Insurance Co. of New York, 250 So.2d 259 (Fla. 1971); Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980). However, with respect to **first**-party claims (like the fire loss coverage claim at issue here), Florida courts historically declined to impose a duty of good faith upon the insurer; the insureds were limited to actions for breach of contract; and the measure of damages was therefore limited to the insurer's contractual policy limits and other consequential damages within contemplation of the parties (plus costs and, where statutorily authorized, attorney's fees). See e.g. Life Inv. Ins. Co. of America v. Johnson, 422 So.2d 32 (Fla. 4th DCA 1982); Hobbley v. Sears, Roebuck & Co., 450 So.2d 332

(Fla. 1st DCA 1984); and Baxter v. Royal Indem. Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. disch. 317 So.2d 725 (Fla. 1975).

In 1982, the legislature corrected this anomalous situation by enacting §624.155, Florida Statutes, and requiring insurers to act in good faith at **all** times when dealing with their insureds, whether defending them against claims by third parties or dealing with them directly on first-party claims. The timing and stated legislative intent of section 624.155 establish that, in enacting this statute, the legislature was providing for recovery of extra-contractual damages as a sanction for abuses by insurance companies which were threatening the welfare of Florida insureds.

> [Section 624.155] requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.

Staff Report, 1982 Insurance Codes Sunset Revision (HB4S; as amended HB10G) (June 3, 1982).

> Consequently, the approach taken by the bill is to provide a civil remedy which may be pursued by any policyholder when he has been damaged by the actions of an insurance company which violate the Insurance Code. An insured who successfully sues an insurance company under this provision can recover the amount of damages he has suffered, together with his court costs and attorney's fees.

Bill Analysis, House Committee on Insurance, Bill Number HB607, (Jan. 22, 1982,

app. A, p. 14).

Pursuant to the statute, any person may bring a civil action against an insurer when such person is damaged by the insurer not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests. Section 624.155(1)(b)(1). In addition, pursuant to §624.155(1)(a)1, consumers were empowered to bring civil actions for damages resulting from unfair methods of competition and unfair or deceptive acts or practices of insurers, as proscribed by §626.9541(1)(i), (o), and (x). In 1990, the legislature amended section 624.155 to add the following pertinent subsection:

> (7) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action. *The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits.*

§624.155, Fla.Stat. (Supp. 1990) (emphasis added).

The pertinent portions of the version of that statute which govern the instant case read as follows:

> (2)(a) As a condition precedent to bringing an action under this section, the department and the insurer must have been given 60 days' written notice of the violation.
> ...
> (d) No action shall lie if, within 60 days after filing notice, the **damages are paid** or **the circumstances giving rise to the violation are corrected**.

Section 624.155, Florida Statutes (emphasis supplied).

Section 624.155(2)(d) does not limit the term "damages" which must be paid within the notice period to foreclose a bad faith action to contractual damages. Subsection 7 of that statute expressly defines recoverable damages to include those which are "a reasonably foreseeable result of a specified violation," which "may include... an amount which exceeds the policy limits." In McLeod v. Continental Insurance Company, 591 So.2d 621 (Fla. 1992), the Florida Supreme Court addressed the question of the appropriate measure of damages in a first-party action for bad faith failure to settle an uninsured motorist insurance claim. The court's holding, which is directly applicable to the certified question presented in this case, was as follows:

> [W]e hold that the damages recoverable in a first-party suit under section 624.155, Florida Statutes (1989), are those amounts which are the natural, proximate, probable, or direct consequence of the insurer's bad faith actions, and we reject the contention that first-party bad faith damages should be fixed at the amount of the excess judgment. **The insurer in a first-party bad faith action is subject to a judgment in excess of policy limits if the actual damages resulting from the insurer's bad faith are found to exceed the policy limits.** Such damages may include, but are not limited to, interest, court costs, and

> reasonable attorney's fees incurred by the plaintiffs. The attorney's fees recoverable shall also include any fees incurred in the original underlying action as a result of the insurer's bad faith actions.

591 So.2d at 626 (footnotes omitted) (emphasis supplied).

As part of the analysis which led this court, in McLeod, to define first-party bad faith damages to include "those amounts which are the natural, proximate, probable, or direct consequence of the insurer's bad faith actions," this Court cited Fisher v. City of Miami, 172 So.2d 455, 457 (Fla. 1965) for the proposition that "the primary basis for an award of damages is compensation [and] the objective is to make the injured party whole." 591 So.2d at 624-26. The legislature's subsequent nullification of McLeod by enacting section 627.727(10), authorizing the recovery of the "excess judgment" in first-party bad faith actions against uninsured motorist insurance carriers, makes it clear that the legislature intended the bad faith statute to provide for the recovery of extra-contractual damages in bad faith actions. In this case, Talat can be made whole only through the award of extra-contractual damages alleged to have resulted from Aetna's bad faith delays in paying benefits, as contemplated by McLeod.

More recently, in another first-party bad faith claim, this Court has revisited McLeod in an opinion providing for the recovery of another species of extra-contractual damages, emotional distress, in a first-party bad faith claim against a

health insurance company, under specified circumstances. Time Ins. Co., Inc. v. Burger, 23 Fla. L. Weekly S309 (Fla. June 12, 1998). This Court's analysis in Burger, like its analysis in McLeod, would support a view of legislative intent that, in order to pay "the damages" or correct "the circumstances giving rise to the violation" under §624.155(a)(d), Aetna was required to pay extra-contractual damages as well as contractual damages.

> The fact that the legislature has specifically authorized first parties to recover damages in bad faith actions suggests that it may have contemplated more than the recovery of the same damages already available in a breach of contract action. In view of the possibility that an unjustified refusal to pay an insured's medical or hospital bills could result in the inability to obtain health care, we hold that section 624.155(1)(b)(1) authorizes the recovery of damages for emotional distress in a first-party bad faith claim against a health insurance company.

23 Fla. L. Weekly at S310.

Talat's bankruptcy, which was allegedly caused by the bad faith handling of this claim by Aetna, is analogous to Mr. Burger's emotional distress, **but** Talat's extra-contractual damages are subject to none of the concerns which led this Court to specify heightened standards of proof applicable to claims for emotional distress in

Burger.[1] The plain language of the definition of damages set forth in section 624.155(7) evinces the legislature's unequivocal intent to entitle a first-party bad faith claimant to recover extra-contractual damages in a bad faith action. If Talat is able to prove Aetna acted in bad faith and that, as a natural, foreseeable result of Aetna's bad faith in withholding payment of benefits to its insured, it caused its insured to go bankrupt, clearly the extra-contractual damages associated with the demise of Talat's business would be compensable under the plain, ordinary language of the statute. Accordingly, payment of contractual damages alone prior to the expiration of the notice period is clearly insufficient to immunize the insurer from liability for extra-contractual damages in a subsequent bad faith action.

---

[1] We would respectfully submit that this Court's imposition, in Burger, of rigid evidentiary restrictions on mental distress claims in bad faith actions was not well-founded. We believe that unforeseen implications beyond the ambit of this footnote make this aspect of Burger ill-advised and poorly suited to apply to the wide variety of factual settings in which bad faith may affect insureds. For example, the application of Burger to deny emotional distress recovery where an insured is forced to respond to a bad faith denial of health insurance coverage by depleting retirement savings to obtain timely and necessary healthcare would be unconscionable and contrary to public policy. We would respectfully submit that a more carefully considered analysis of the issue would support the recoverability of mental anguish damages based on lay testimony and the sound judgment and common experience of the jury, and we would urge this Court to recede from this aspect of Burger, consistent with the dissent at 23 Fla. L. Weekly S311. See also Angrand v. Key, 657 So.2d 1146 (Fla. 1995) and cases cited therein.

In Hollar v. International Bankers Ins. Co., 572 So.2d 937 (Fla. 3d DCA), rev. dism., 582 So.2d 624 (Fla. 1991), a first-party bad faith action arising out of an excess verdict entered against the bad faith claimants/insureds, the Third District interpreted section 624.155(2)(d) so as to clearly expose the manner in which the legislative intent behind §624.155 would be undermined by approval of the District Court's decision.

> In the instant case, insurers' self-serving reading of the term "damages" as being confined to policy limits is an illogical interpretation, a radical departure from the decisional law and, further, an explanation in no way consistent with the legislature's stated desire for insurers to act in good faith towards their insureds. See Jones v. Continental Ins. Co., 716 F.Supp. 1456, 1460 (S.D.Fla. 1989). The function of the bad-faith claim is to provide the insured with an extra contractual remedy. Opperman, 515 So.2d at 267, citing 15A Couch on Insurance 2d, §58:1, p. 248 (1983). Thus, the argument that upon a showing of bad faith, damages should be limited to the insured's contractual policy limits is all the more unreasonable. Damages, as both the clear wording of the statute and past Florida case law establish, must be all damages resulting from an insurer's bad-faith actions.
>
> Following the analysis as stated above, we conclude that when the legislature employed the term "damages" in section 624.155(2)(d), it necessarily contemplated the same elements of damages that are viable and extant under the decisional law of the supreme court. Consequently, under the statutory formulation established by section 624.155, a tender of policy limits will not ordinarily satisfy the insured's full claim of damages for a bad-faith claim. Thus, if, upon remand, bad-faith actions by the insurers are proven, the Hollars' damages would equal the amount of the excess judgment for which they are now responsible. See Jones v. Continental Ins. Co., 716 F.Supp. at 1460. That sum, which is in excess of several hundred thousand dollars over policy limits, was never tendered. Therefore, the civil remedy under section

> 624.155(1)(b)1 remains unsatisfied and an action under this section remains available to the Hollars.

572 So.2d 939-940. This analysis directly supports a negative answer to the certified question.

The District Court's concern that Aetna would have no incentive to pay the extra-contractual damages claimed in Talat's notice of violation is easily addressed by the analysis of the Fourth District in Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA), rev. den., 648 So.2d 724 (Fla. 1994).[2] Brookins was a first-party bad faith action against an automobile insurer, based on the insurer's alleged failure to timely pay UM benefits. In that case, the insurer argued that plaintiff's acceptance of the policy limits, although paid after expiration of the sixty-day notice period, precluded a first-party bad faith action. In an opinion authored by Justice Pariente and concurred in by Justice Anstead, the Fourth District rejected this argument, based on an analysis which has direct application to the instant case.

> If an insurer determines that a case should be settled after the expiration of the 60 day statutory period, an insurer should be encouraged to settle even if the insured will not condition the settlement on a release of the bad faith claim. **The insurer would still be mitigating its damages if the insured was successful in the subsequent bad faith case, by reducing the amount of interest, costs, and attorney's fees.** An insurer may also be able to utilize the fact of its voluntary payment of the policy limits to defend the bad faith claim by explaining why it was unable in good faith to tender its limits earlier.

[2] An unrelated aspect of Brookins was overruled by State Farm Mut. Auto Ins. Co. v. LaForet, 658 So.2d 55, 62 (Fla. 1995).

640 So.2d at 115.

The notice period provided under section 624.155 provides the insurance company with a chance to prevent (or at least reduce the scope of) subsequent bad faith litigation, and the consumer is provided with a means to be made whole, without litigation, by the voluntary payment of damages which are the natural, proximate, probable, or direct consequence of the insurer's bad faith. It is axiomatic that law favors settlement of disputes in the avoidance of litigation, and the pretrial settlement of a bad faith claim, or a part of a claim, promotes longstanding public policy and streamlines the issues presented in the subsequent bad faith claim. See Imhoff v. Nationwide Mutual Insurance Company, 643 So.2d 617, 618-19 (Fla. 1994).[3] Aetna's tender and Talat's acceptance of the amounts determined by the arbitrator to represent Talat's contractual damages represents a partial settlement of the claims which would otherwise be presented in the bad faith claim. However, Talat's entitlement to extra-contractual damages directly resulting from the demise of its business and associated interest, costs and fees are properly presented in the bad faith claim and should not be foreclosed by Aetna's payment of contractual damages prior to the expiration of the notice period.

---

[3] An unrelated aspect of Imhoff was receded from in State Farm Mut. Auto. Ins.

Co. v. LaForet, 658 So.2d 55, 63 (Fla. 1995).

Rather than questioning why the insurer would have any incentive to pay any or all of the damages claimed in a bad faith notice under appellant's interpretation of the statute (and overlooking the obvious answer spelled above from Brookins, mitigation), the District Court should have questioned why the insurer would have any incentive to pay the benefits timely in good faith in the first place, under appellee's interpretation. Section 624.155 was intended to protect consumers from abusive insurance practices, not to function as an amnesty program for insurers whose bad faith delays in refusing to pay prior to receipt of notices of violation had resulted in extra-contractual damages such as those presented here. It is a fundamental rule of statutory construction that a statute should be construed so as to ascertain and give effect to the intention of the legislature. City of Boca Raton v. Gidman, 440 So.2d 1277, 1281 (Fla. 1983); see also City of Tampa v. Thatcher Glass Corp., 449 So.2d 578, 579 (Fla. 1984) (citing Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905, 907 (Fla. 1969)). It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result. Wollard v. Lloyd's & Companies of Lloyd's, 439 So.2d 217 (Fla. 1983). An affirmative answer to the certified question, precluding a bad faith claim for extra-contractual damages upon payment of contractual damages only, would only serve to protect and encourage questionable claims handling by giving insurers a second chance to do the

right thing, without sanction; if statutory notice is construed to give the insurer a second chance to dispatch its contractual duty, and gain immunity from liability for extra-contractual bad faith damages, insurers could engage in bad faith or other unfair trade practices with impunity, secure in the knowledge that payment of contractual benefits within the sixty-day notice period would immunize them from bad faith liability for extra-contractual damages. This interpretation would turn a consumer protection law into an amnesty program for bad faith insurers.

## CONCLUSION

The certified question should be answered "no" and the decision of the district court should be disapproved.

Respectfully submitted:

JEFFREY M. LIGGIO, ESQUIRE
Florida Bar No.: 357741
1615 Forum Place
Barristers Building, Suite 3B
West Palm Beach, FL 33401
(561)616-3333

P. SCOTT RUSSELL IV, ESQUIRE
Florida Bar No.: 750360
DUNLAP & RUSSELL, P.A.
1300 Riverplace Blvd., Suite 601
Jacksonville, FL 32207

(904)346-4480

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William F. Merlin, Jr., Esquire, The Merlin Law Group, P.A., 1100 North Florida Avenue, Suite 300, Tampa, Florida 33602 and Philip E. Beck, Esquire, 2600 Peachtree Street, N.W., 2600 Harris Tower, Peachtree Center, Atlanta, Georgia 30303-1530 by US mail this 31st day of July, 1998.

P. Scott Russell IV