IN THE SUPREME COURT OF FLORIDA

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

TALAT ENTERPRISES, INC.
d/b/a Billy the Kid's Buffet

Appellant,

v.

AETNA CASUALTY & SURETY CO.
d/b/a, Aetna Life and Casualty

Appellee.

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

APPELLANT'S REPLY BRIEF

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1. **"DAMAGES" AS DEFINED BY THE CIVIL REMEDY STATUTE ARE NOT LIMITED TO "CONTRACTUAL DAMAGES."**

Recently, this Court found that emotional distress damages were recoverable as a result of an insurance company's violation of Fla. Stat. §624.155. Time Ins. Co. v. Burger, 712 So.2d 389 (Fla.1998). Emotional distress damages were not covered under that first-party insurance policy. Accordingly, it is obvious that this Court has previously passed on the issue that the term "damages" mean something other than the claims that can be made under the policy of insurance.

Further, the Appellant did not need Fla. Stat. §624.155 to obtain the contract benefits. It could enforce those provisions through common law contract theories and through statutory remedies regarding the enforcement of arbitration awards. The Florida Legislature must have intended to afford policyholders greater rights other than those already provided under the insurance contract when it passed the statute. Otherwise, the statute is meaningless because all it would do is provide a duplicate remedy to the common law remedies of contract.

II. **FLA. STAT. §624.155 PROMOTES THE PUBLIC POLICY OF PROMPT AND GOOD FAITH CLAIMS HANDLING BY MAKING INSURERS RESPONSIBLE FOR DAMAGES THEY CAUSE.**

Appellee and Amicus insurance companies wrongfully argue that this statute should be limited to contract damages because a different interpretation would "chill" prompt claims settlements. Essentially, the insurance companies argue that policyholders should not have a right to sue for extra-contractual damages caused

by insurance companies because the policyholder lawsuits somehow prevent insurance companies from promptly and fairly paying claims. While this argument is appealing to the insurance industry, as it provides them with virtual immunity from their acts, the very purpose of this statute was to provide an additional remedy so that policyholders could collect back extra-contractual damages. Bill Analysis, HB 607, Appendix A at 12-14 (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 violates 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.

Id.

Clearly, the threat of liability for extra-contractual damages provides an incentive for insurance companies to establish management procedures which prevent wrongful claims conduct which results in damage to policyholders. In 1995, the Tort and Insurance Practice Section of the American Bar Association held a national institute entitled "Good Faith on Trial." Winston Hankins, Vice-President of Amicus U.S.A.A. Property & Casualty Insurance, presented a speech and paper which detailed the concern of insurance companies held accountable for damages they caused:

I. Before the Lawsuit.

The majority of the claims handling takes place long before the bad faith lawsuit is filed. In most of the cases, I think the first 90 days is the most critical time period. It is during this time that decisions are made, or avoided, which set the tone and direction of the claim file. Relationships, good or bad, are established with the policyholder. The activity form which lasting appearances can be created occurs during this time. If unreasonable delays occur, they start here. This is also the time when an adequate, or inadequate investigation is conducted. The evidence of good faith, or the evidence of bad faith is mostly developed during this time period.

II. General Claims Handling Philosophy

Since the elements with which to build a good faith case, or a bad faith case are there at the time the lawsuit is filed, the attitude or company philosophy toward handling claims will have a substantial impact on the quality of claim handling and the condition of the claim file at the time of the lawsuit…I also think that handling a claim in good faith, from a management point of view, should mean something more than just the absence of bad faith. The core of a good claim handling attitude is to recognize that the policyholder who submits a claim is just as much a customer of the company as he was when he bought the policy and paid the premium.

The policyholder has paid the premiums, and that means he has lived up to his part of the bargain. We made some promises in return for that premium, and now it is time for us to live up to our part of the bargain. And our part is to pay an appropriate amount of money on covered losses, to make a good faith effort to resolve disputes, and to do these things in a spirit of providing good service.

While it is true that the claims department has an obligation not to overpay claims, and certainly has a public obligation not to pay fraudulent claims, it has at least an equal obligation to timely pay amounts which are owed within the bargain.

W. Hankins, Avoiding Bad Faith: Implementing Good Faith and Claims Handling, A-1, A-2 (A.B.A. 1995).

Placing insurance companies at risk for the damage they cause as a result of improper claims conduct violative of Florida Statute promotes insurance company standards which will result in good faith claims conduct. Management and its employees will be held accountable for the manner in which they treat policyholders. Without such enforcement, little incentive exists for the insurance company to promptly and fairly pay claims.

Indeed, Amicus Nationwide was nationally exposed for mistreating even one of its own following Hurricane Andrew. "What to do When Your Insurer Won't Pay," Smart Money Magazine, 106,109 (November,1996). In this instance, a Nationwide insurance agent had a Homeowner's insurance claim following Hurricane Andrew. An Engineer selected by Nationwide examined the house. Subsequently,

> "…A Nationwide attorney faxed a copy of the Appraisal to Nationwide's Adjuster with a handwritten note: *Encl. is Engineer's report. Pls. do not disclose to Mr. Weintraub."*

Id.

The account of this conspiracy to conceal favorable information to Nationwide's policyholder/agent was revealed in a Federal Magistrate's report, although the parties reportedly quietly settled on confidential terms. Id.

It is obvious that if the representatives of insurance companies are going to find ways to wrongfully reduce claims to their own, the citizens of the State of Florida need the remedial statute to be enforced.

Respectfully, the Appellee and Amicus seem to miss the entire point of the statute. That is, if an insurance company "damages" a policyholder as a result of various statutory violations, it will be held responsible for the damages it causes. It must pay those damages, or somehow correct the circumstances. If it does not, it will be subject to suit with the additional penalties of attorney's fees, costs and possibly punitive damages. Fla. Stat. §624.155. The statute obviously provides incentive to insurance companies to prevent wrongful claims practices so that they will not cause damage to the policyholder.

Currently, in the majority of jurisdictions, policyholders can sue immediately for breach of contract and extra-contractual damages through common law theories of bad faith. Ashley, Bad Faith Actions, § 2:14 (1996). Nowhere has it been established that in those jurisdictions recognizing common law bad faith claims that insurance companies now act worse toward their policyholders. Indeed, logical management would be to prevent such bad faith conduct because those carriers are responsible for damages they cause.

Respectfully submitted.

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I HEREBY CERTIFY that a copy of this motion was sent by U.S. MAIL to PHILIP E. BECK, ESQUIRE, WILLIAM L. BAGGETT, JR., ESQUIRE, 2600 Harris Tower-Peachtree Center, 233 Peachtree Street, N.E., Atlanta, GA, 30303, JEFFREY M. LIGGIO, ESQUIRE, 1615 Forum Place, Barristers Building, #3B, West Palm Beach, FL, 33401 and ANTHONY J. RUSSO, ESQUIRE, 6200 Courtney Campbell Causeway, Tampa, Florida, 33607, this ___day of October, 1998.

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WILLIAM F. MERLIN, JR., ESQUIRE