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 NATIONWIDE MUTUAL FIRE INSURANCE CO. and UNITED SERVICES AUTOMOBILE ASSOCIATION, AMICUS CURIAE, SUPPORTING APPELLEE'S POSITION

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STATEMENT OF THE CASE AND FACTS

This Brief is submitted by NATIONWIDE MUTUAL FIRE INSURANCE COMPANY ("NATIONWIDE") and UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") as Amicus Curiae, in support of Appellee's position. NATIONWIDE and USAA accept 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 section 624.155(2)(d), thereby precluding the insured's first-party bad faith action to recover the extra-contractual damages?

NATIONWIDE and USAA believe a preliminary issue exists that is not stated in the certified question. Therefore, NATIONWIDE and USAA restate the certified question as follows:

I. There was no Breach of Contract and no "Underlying First-Party Action for Insurance Benefits Against the Insurer... Resolved Favorably to the Insured...." and so no Bad Faith Claim Ever Accrued.

II. Even if There was a Breach of Contract and Resolution of an Insured's Underlying First-Party Action for Insurance Benefits by Virtue of the Appraisal Award, AETNA's Payment of the Appraisal Award Constituted Payment of the

"Damages" and the Correction of the Circumstances Giving Rise to the Violation as Set Out in Section 624.155(2)(d).

SUMMARY OF ARGUMENT

The question certified to this Court by the Eleventh Circuit Court of Appeals contains an implicit and erroneous assumption: i.e, that AETNA has breached its contract with TALAT. The facts, as taken from the Eleventh Circuit's opinion, would dictate a finding that there has been no breach of the insurance contract. This Court held in Blanchard v. State Farm Mutual Auto Insurance Company, 575 So.2d 1289 (Fla. 1991) that "an insured's underlying action for first-party insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue." Id. at 1291. TALAT's claim was resolved through the contractual appraisal process which is not an "action for first-party insurance benefits." Without a breach of contract, or resolution of an "action" as set out in Blanchard, supra, no cause of action for bad faith ever arose in the first instance.

But even if this Court presumes there was a breach, and further presumes the appraisal process is an "action" satisfying Blanchard, supra, AETNA's payment of the appraisal award prior to the expiration of the sixty-day cure period set out in section 624.155, Fla.Stat. (1997), satisfied both of the statute's requirement that the carrier either pay the "damages" or correct the circumstances giving rise to the violation, as those terms are used in section 624.155(2)(d), Fla. Stat.(1997). The Legislature

intended to provide a cause of action for extra-contractual damages in a first-party context, but a right that is limited by a sixty-day cure period in which the carrier may pay the contractual damages, and avoid liability for extra-contractual damages. The district court's ruling on the operation of the statute was correct, promotes the Legislature's intent to reduce litigation and to induce prompt settlement of insurance claims.

The Appellants urge a construction of the statute that makes no sense: i.e., that a carrier is to be insulated from extra-contractual liability only if it pays all the extra-contractual damages. Further, according to Appellant, the carrier must pay all the damages demanded by the claimant even though it may have no ability to investigate the demands, and it must pay the demand within sixty days or be sued. Under this reading of the statute the insurer would improve its legal position by allowing the matter to go to suit so that it could use discovery tools to determine its liabilities. The Appellant's urged construction of the statute thus promotes litigation, discourages settlement and would gut the Legislature's intention for the statute to provide a limited remedy and a condition precedent to liability for extra-contractual damages.

ARGUMENT

Introduction

The certified question from the Eleventh Circuit presents issues of first impression to this Court. Although this Court has addressed the meaning and operation of section 624.155, Fla. Stat., on numerous occasions, it has never done so in the context of a property insurance claim.[1] Certain aspects of this Court's precedent are applicable to analysis of the instant case. As discussed below, some precedent is not.

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[1] **Life Insurance** - Kujawa v. Manhattan National Life Insurance Company, 541 So. 2d 1168 (Fla. 1989);

Uninsured Motorist - Blanchard v. State Farm Mutual Automobile Insurance Company, 575 So. 2d 1289 (Fla. 1991); Continental Insurance Company v. Jones, 592 So. 2d 240 (Fla. 1992); McLeod v. Continental Insurance Company, 591 So. 2d 621 (Fla. 1992); Imhof v. Nationwide Mutual Insurance Company, 643 So. 2d 617 (Fla. 1994); State Farm Mutual Automobile Insurance Company v. Laforet, 658 So. 2d 55 (Fla. 1995);

Liability Insurance - Shuster v. South Broward Hospital District, 591 So. 2d 174 (Fla. 1992); Cunningham v. Standard Guaranty Insurance Company, 630 So. 2d 179 (Fla. 1994); Auto-Owners Insurance Company v. Conquest, 658 So. 2d 928 (Fla. 1995); State Farm Fire and Casualty Company v. Zebrowski, 706 So. 2d 274 (Fla. 1998);

Health Insurance - Time Insurance Company, Inc. v. Burger, 712 So. 2d 389 (Fla. 1998).

Property and casualty insurance is fundamentally different, in many ways, from both liability insurance and uninsured motorist insurance. Broadly stated, both commercial and residential property insurance policies contain coverages for damage to identified structures, personal or business contents and various expenses for relocating or carrying on a business or maintaining an alternate household during the time the repairs to the structures are completed. Commercial property insurance often contains components of coverage for loss of business income while the structural repairs are undertaken. Samples of standard property insurance forms are provided in the Appendix. The principal terms and concepts pertinent to this Court's adjudication of this case are as follows:

Adjustment - The process by which the insurer investigates the claim of the insured to determine the nature and scope of the loss and its obligations to the insured. See Couch on Insurance, 3d (Rev. ed.) § 39:13.

Appraisal - A contractual process provided in the policy to resolve, without litigation, disputes between the insurer and the insured as to the amount of the loss. See, e.g., page 11 of 18, tab A, Appendix.

Loss - Refers to injury or damage to property for which the insurer may be liable. Couch on Insurance, 2d (Rev. ed.) § 49:62.

Proof of Loss - A form provided by the insurance company to the insured who states and swears under oath to the amount of loss and the amount of claim. See Couch on Insurance, 2d (Rev. ed.) § 49:2. See page 10 of 18, tab A and tab D, Appendix.

The typical property policy provides the insurer the right to take the examination under oath (recorded statement under oath) of the insured, to inspect the premises and request documents and other information from the insured to facilitate the adjustment process and provides the insured has a duty to cooperate with the insurer in this process. See page 9 of 18, tab A, Appendix. In sum, property insurance creates a contract of indemnity. Couch on Insurance, 2d (Rev. ed.) § 54:4. Glens Falls Insurance Company v. Gulf Breeze Cottages, Inc., 38 So. 2d 828 (Fla. 1949).

Liability insurance contains different promises and protects different financial interests of the insured than does property insurance. Modern liability insurance contains two separate and distinct obligations of the carrier to the insured: 1.) the duty to defend against a lawsuit (i.e. provide lawyers to represent the insured) and to settle the case within policy limits and otherwise defend the lawsuit; and 2.) the separate duty to indemnify the insured up to the contractual limits of liability. Trizec Properties, Inc. v. Biltmore Construction Co., 767 F.2d 810 (11th Cir. 1985). The

duty to defend arises upon the filing of a lawsuit against the insured. The duty to indemnify does not arise until a judgment or settlement had been reached. See Trizec, supra.

Uninsured motorist insurance is an amalgam combining elements of both third party liability coverage and first party insurance protection.

> [UM] coverage is designed to protect the insured, members of his family and others normally covered under the family automobile policy as permissive users. This is not an additional liability coverage but rather is direct compensation to the insured who is injured by an uninsured motorist who is at fault. This concept of fault is crucial to the ability to recover under UM....

Couch on Insurance, 2d (Rev. ed.) § 46:62. "The purpose of uninsured motorist coverage is to protect the insured just as if the third party tortfeasor had liability insurance." Moore v. Allstate Insurance Company, 570 So. 2d 291 (Fla. 1990).

For all these types of policies, not to mention life and health policies, the obligations the insurer takes on to its insured is different. But for all of them, Florida jurisprudence applies one principle universally: there is no cause of action for extra-contractual damages without first there being a breach of the insurance contract. Blanchard, supra.

ISSUE I.

There was no Breach of Contract and no "Underlying First-Party Action for Insurance Benefits Against the Insurer... Resolved Favorably to the Insured...." and so no Bad Faith Claim Ever Accrued.

a. Summary.

The facts set forth in the Eleventh Circuit's opinion demonstrate AETNA did not breach its contract with TALAT. This Court has ruled "an insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue." Blanchard v. State Farm Mutual Auto Insurance Company, 575 So. 2d 1289, 1291 (Fla. 1991). The Eleventh Circuit's question is premature because there is no breach of contract. Therefore, there is no cause of action, ab initio, for extra-contractual damages.

b. AETNA did not breach the contract.

A few months after the fire, TALAT demanded appraisal, then submitted its proofs of loss and, within approximately thirty days, filed suit against AETNA. The appraisal resulted in an award that AETNA promptly paid. Talat Enterprises, Inc. v. Aetna Casualty & Surety Co., 952 F. Supp. 773, 777 (M.D. Fla. 1997).

AETNA's obligation to TALAT, generally stated, was to indemnify TALAT for losses covered by the policy. Although TALAT's inchoate contract rights to indemnity arose at the moment of loss, its right to be paid by AETNA did not. The right to be paid is regulated by the contract of the parties. In this case, the AETNA policy issued to TALAT included the following agreement:

> Loss Payment
>
> We will pay for covered loss within 30 days after we receive the sworn proof of loss, if:
>
> a. You have complied with all of the terms of this Coverage Part; and
>
> b. (1) We have reached agreement with you on the amount of loss; or
>
> (2) An appraisal award has been made.

This "Loss Payment" provision is nearly universal in property insurance policies issued in this country. Substantially the same policy provision appears in the standardized forms issued by the Insurance Service Organization ("ISO") whose policy forms are widely used throughout the insurance industry. See Appendix, tab A-residential (page 11 of 18), tab B-commercial (page 6 of 11), tab C-business interruption (page 5 of 8).

This Loss Payment provision is a part of the overall contractual procedure for the resolution of the claim. Following the loss, the insured gives notice to the carrier. The insured may submit a Proof of Loss. Alternatively, the insurer may require the insured to submit a Proof of Loss. In either event the policy provides that the insurer then investigates the loss to determine its obligation. During the adjustment period, the carrier may exercise the specific rights granted under the policy to accomplish its investigation. The insurer may require the examination under oath of the insured, require inspection of the premises, or of books or documents. Once agreement with the insured is reached and a Proof of Loss is submitted, the carrier is obligated to pay within thirty days. If there is no agreement and the parties proceed to resolve the difference with appraisal, the carrier is obligated to pay within thirty days of the appraisal award. In some policies, the insurer retains the right to deny the claim. See State Farm Fire & Cas. Co. v. Licea, 685 So. 2d 1285 (Fla. 1996).

Florida jurisprudence recognizes the efficacy of the loss payment provisions. For example, prejudgment interest on an insurance award is measured from the date the proceeds are due under the policy, and are not calculated from the date of the loss. "[I]n contract actions, interest is allowable from the date that the debt is due." Lumbermens Mutual Casualty Company v. Percefull, 638 So. 2d 1026, 1029 (Fla. 4th DCA 1994), aff'd. 653 So. 2d 389 (Fla. 1995). See also Golden Door Jewelry

Creations v. Lloyd's Underwriters Non-Marine Association, 117 F.3d 1328 (11th Cir. 1997). Where an insured seeks recovery of insurance proceeds for a property loss, the date from which prejudgment interest accrues is the date "the proceeds would have been due under the policy." Columbia Casualty Company v. Southern Flapjacks, Inc., 868 F.2d 1217, 1219 (11th Cir. 1989). Florida courts always rely "on the particular policy's language to determine when an insurer becomes obligated to pay the proceeds." Id. at 1219-20.

c. No liability for extra-contractual damages.

Further, an insurer's exercise of its contractual right to appraisal, even if it causes extra-contractual damages, is not a breach of the insurance contract under Florida law. Shuster v. South Broward Hospital District, 591 So. 2d 174 (Fla. 1992). In Shuster, a medical malpractice liability insurer exercised its option under the contract to settle a malpractice claim against its insured doctor. The doctor did not consent to the settlement, desiring instead to contest the lawsuit in order to exonerate his reputation. The insurer settled the claim and the doctor subsequently filed an action for bad faith against the carrier claiming his reputation had been damaged by the settlement, which could be viewed as an admission of his liability. This Court

ruled that the insurer held the discretion to exercise its contractual rights and that no cause of action would lie against the carrier in that case.

The jurisprudence of this State, and others, recognizes that contractual rights must be exercised in good faith. Here, the good faith of AETNA in participating in the appraisal, because it was initiated by TALAT, is not an issue. When the insured demands or participates in an appraisal, the insured cannot also claim that the extra-contractual losses accruing during the pendency of the appraisal are the fault of the insurer.[2]

d. Appraisal is not an "action" under Blanchard, supra.

This court held in Blanchard, supra, that "an insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith and settlement negotiations can accrue." Id. at 1291 (emphasis supplied). Appraisal under a property insurance policy is not "an insured's underlying first-party action for insurance benefits against the insurer...." Id. Rather, it is a contractual mechanism

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[2]If an insured believes that the initiation of the appraisal process by a carrier is made in bad faith, the insured has the option to file a Civil Remedy Notice and to bring suit. But participation in the process would constitute a waiver that the demand was made in bad faith. American Somax Ventures v. Touma, 547 So. 2d 1266 (Fla. 4th DCA 1989)(action recognizing continuing validity of contract amounts to a waiver of breach).

to resolve a dispute between the parties over the value of the loss. See Appendix, tab A (page 11 of 18), tab B (page 5 of 11) and tab C (page 3 of 8). The appraisal process is not a substitute for a full adjudication of the insurer's obligations and the insured's rights under the policy. That is the function of the courts. See Licea, supra, at 1287-88. Further, it is not an "action" under Florida law.

> In any legal sense, "case," "cause," "action," and "suit" are convertible terms each meaning a proceeding in court. (Citations omitted.)

State Road Department v. Crill, 128 So. 412, 415 (Fla. 1930). See generally, 1 Fla. Jur. 2d, Actions, section 1. It would be highly undesirable for this Court to deem the resolution of a property insurance dispute over the amount of loss through the appraisal process to be "a first-party action for insurance benefits against the insurer" under Blanchard. This deeming would result in the Court attaching a penalty (i.e., the satisfaction of a condition precedent to bringing a bad faith action) to the parties' exercise of a contractual dispute resolution mechanism designed to resolve disputes and eliminate litigation.

Further, what would this Court deem to be a “favorable” resolution? An amount greater than the amount offered by the insurer? An amount greater than zero? What if the insurance company demands appraisal to resolve a difference of opinion? Honest people may have genuine differences of opinion as to the amount of loss. In

this case the amount of loss, as determined by the appraisers, was not the amount demanded by TALAT. The contract simply worked as it was intended in this case and there was no action resolved favorably or unfavorably to either party: there was only a determination of the amount of loss.

Amicus does not assert that there must be a court's judgment establishing a breach of contract prior to institution of a bad faith lawsuit under the rules of Blanchard, supra. This Court may determine that settlement of an underlying claim which does not resolve the bad faith claim, or an admission by the carrier of a breach of the contract, as well as adjudication by a court of the existence of a breach will suffice. Please note all these "resolutions," i.e., settlement amounting to a confession of judgment, admission of the insurer and adjudication, are extra-contractual, and must be distinguished from the contractual method of dispute resolution, i.e., appraisal.[3]

e. Summary.

The Eleventh Circuit's question presumes there has been satisfaction of this Court's requirement that there be a resolution of an action by the insured against the

[3]Amicus urges the Court to recognize that an amicable settlement of a claim should not be presumed to constitute an admission of breach of contract or liability for bad faith.

insurer for benefits favorable to the insured. Blanchard, supra. In fact, the record presented shows no breach of contract and no satisfaction of the condition precedent set forth in Blanchard.

ISSUE II.

Even if There was a Breach of Contract and Resolution of an Insured's Underlying First-Party Action for Insurance Benefits by Virtue of the Appraisal Award, AETNA's Payment of the Appraisal Award Constituted Payment of the "Damages" and the Correction of the Circumstances Giving Rise to the Violation as Set Out in Section 624.155(2)(d).

a. Introduction.

Only by presuming that the appraisal award somehow constitutes a "first-party action for insurance benefits against the insurer" as set forth in Blanchard, supra, and further presuming that the appraisal award was resolved favorably to the insured, can we reach the certified question. And in that event, we must conclude that AETNA's payment of the appraisal award fulfilled both of the alternative requirements of section 624.155(2)(d) which provides that "no action shall lie if, within sixty days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected" (emphasis supplied). This Court's conclusion that the payment fulfilled either of the alternative requirements would be sufficient to answer the certified question in the affirmative. Use of the word "or" implies a choice

between two alternatives. Telophase Soc. of Florida, Inc. v. State Board of Funeral Directors, 334 So. 2d 563 (Fla. 1976).

b. Section 624.155(2)(d) "damages" means contractual damages.

First and foremost, the reference in section 624.155(2)(d) to "damages" certainly means contract damages. If the insured is not paid when it should be paid and files a Civil Remedy Notice, the intention of the insured is to be paid that which it is owed under the policy, i.e. the contract damages. Certainly the Legislature, in drafting section 624.155(2)(d), meant for the insurer to pay the contract damages, and did not contemplate that the insurer's duty could be executed without payment of the contract damages.

The question presented by the Eleventh Circuit is whether section 624.155(2)(d) "damages" also refers to extra-contractual damages. TALAT asks this Court to add to the clear intent and meaning of the statute and rule that the reference to "damages" also includes extra-contractual damages. However, there is nothing in this statute that provides a hint that the term encompasses extra-contractual damages. Amicus urges this Court to be mindful that the subsection 624.155(2) is a limitation on the rights created in subsection 624.155(1), and that subsection (2) should be read as narrowing the remedy, not expanding it. Further, the entire statute is in derogation

of the common law and so should be construed narrowly. Ady v. Amer. Honda Finance Corp., 675 So. 2d 577, 581 (Fla. 1996). Likewise, the statute is punitive in nature, and so should not be extended by judicial construction. Fla. Indus. Com'n. v. Manpower, Inc., 91 So. 2d 197, 199 (Fla. 1956).

Finally, all the circumstances that give rise to the violation of section 624.155, boil down to the withholding of payment of money due under the contract. Thus, payment of money due under the contract will correct the circumstances giving rise to the violation. This plain language of the Legislature means, in common understanding, that payment of the contract damages will bar the arising of a cause of action for extra-contractual damages. Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996)("Courts should avoid readings that would render part of a statute meaningless... and give full effect to all statutory provisions...").

c. TALAT's view that section 624.155(2)(d) “damages” must include both contractual damages and extra-contractual damages is illogical, unworkable, conflicts with the Legislature’s intent and the public policy of this State and the precedent of this Court.

Foremost, the argument of TALAT is illogical because it purports that the only way for the insurer to avoid liability for extra-contractual damages is to pay the claimed extra-contractual damages. Further, TALAT urges this Court to adopt a

rationale that does not require an insured to file its Civil Remedy Notice until sixty days prior to the date it desires to commence its bad faith litigation. TALAT's rationale would provide that resolution of the claim by appraisal would satisfy the prerequisite announced in Blanchard that first there must be an action resolved favorably to the insured. The rationale of TALAT would allow the insured to wait for up to five years from the date of the alleged breach to file its Civil Remedy Notice, and so not be vigilant or even prompt, in asserting and protecting its rights, or mitigating its damages.

If the argument urged by TALAT is adopted, the carrier would have sixty days from the date of the filing of the Civil Remedy Notice, (which, again, may be years after the case was resolved by settlement or appraisal), to pay whatever the insured said its extra-contractual damages were. This includes any form of consequential damages imaginable, interest, punitive damages and, in the context of health insurance only, tort liability for emotional distress (see Time Ins. Co. v. Burger, supra). In fact, the insured's attorney may be duty-bound to claim all damages that remotely may be provable. It may be malpractice for the plaintiffs' attorneys to do otherwise. The carrier, upon receiving this claim, would have sixty days to decide between its two options: Pay the demand or be sued.

During this sixty-day period, the carrier may have no ability or right to ask for an examination under oath, a Proof of Loss, or for documents or the cooperation of the insured because if the carrier had brought the claim to conclusion by payment of an appraisal award or through settlement with the insured, there may be a question as to any remaining contractual responsibility of the insured to comply. The carrier would have little, if any, incentive to pay anything "in the blind" and would do better to allow the matter to go into litigation so as to acquire the right to the discovery tools available under the rules of procedure and so conduct its investigation and defense. This rationale urged by TALAT is one that will promote litigation and discourage settlement.

The Legislature intended to provide that an insurer is not liable for extra-contractual damages if it pays its contractual liability within the sixty-day period. This is the "cure period" that provides the incentive to the insurer to settle the claim. Florida's insureds had no cause of action for any extra-contractual damages prior to section 624.155 (Fla. Stat. 1982). This statute now provides such a remedy. But the Legislature has limited the remedy so that no extra-contractual damages are recoverable if the carrier pays its contractual damages within sixty days. The statute requires that the insured be vigilant and prompt in asserting its rights under the contract and abide its duty to mitigate its damages, a duty the law imposes on all

plaintiffs. The statute takes away from the insurer the common-law immunity to extra-contractual and punitive damages. See Conquest v. Auto-Owners Ins. Co., No. 96-05141(Fla. 2d DCA April 6, 1998) 1198 Fla. App. LEXIS 3642, (insurer may be liable for extra-contractual damages that have a nexus to the carrier's conduct) citing to Butchikas v. Travelers Indemnity Corp., 343 So. 2d 816 (Fla. 1976). If the carrier does not pay the contractual damages within sixty days, or otherwise correct the circumstances giving rise to the violation, then it becomes liable for all extra-contractual damages with a nexus to its conduct. It is within the power of the Legislature to create, destroy, modify or limit remedies available to the public. See McLeod, supra, at 623.

d. The case of Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990), rev. dism., 582 So. 2d 624 (Fla. 1991) does not support TALAT's position.

TALAT cites to Hollar, supra, for the proposition that the term "damages" as used in subsection (2)(d) "could not be interpreted to refer merely to policy limits." Id. Hollar involved a claim on a liability policy. The insured was sued and the carrier refused to defend, losing the opportunity to settle within the policy's indemnity limits. Id. at 938. A judgment in excess of policy limits was entered against the insured. The insured filed a Civil Remedy Notice and the carrier then

tendered its indemnity limit. The Third District Court of Appeals held that the tender did not satisfy subsection (2)(d) requirement of payment of "damages" so as to insulate the carrier from liability.

In the context of a liability policy, this holding makes sense, but the reasoning does not carry over to a first-party property insurance claim. Obligations of the insurer to the insured under a liability policy are two-fold: to defend and to indemnify. Trizec, supra. The duty to defend includes the duty to settle within policy limits. See Hollar, supra at 939 (identifying the aspects of the duty to defend). If settlement within the indemnity limit is not possible, the carrier is still obligated to defend and, by a separate promise, to indemnify to the extent of the indemnity limits of the policy. By contrast, in a property policy, the carrier agrees only to indemnify the insured. See Glens Falls, supra.

In Hollar, the carrier's breach of its duty to defend thus caused certain contractual damages. The measure of those damages was greater than the amount of indemnity provided in the policy. But, unless specifically provided in the contract, the duty to defend is not, and cannot, be satisfied by payment of the policy's indemnity limit, which would satisfy only the duty to indemnify. Contractual damages for breach of duty to defend have no relationship, unless specifically provided in the policy, to the indemnity limits of the liability policy. For instance, the

duty to defend may obligate the insurer to spend millions of dollars defending the insured even when the indemnity limit is only a fraction of that sum. Therefore, tender of the indemnity limit would not necessarily satisfy the contractual damages arising out of the breach of the defense obligations. This is why the Hollar court held that payment of the policy indemnity limit would not satisfy the statute's call for payment of "damages" arising out of breach of the duty to defend.

Had the insurer in Hollar defended and settled the case within the policy's indemnity limit, and then refused to fund the settlement, and the insured filed a Civil Remedy Notice, the carrier's obligation or opportunity to "pay the damages" would have been limited to the indemnity limit, and tender of the limit would have satisfied the statute. Therefore, Hollar, supra, is simply not applicable. Analysis of the questions presented in this property insurance case cannot be based on liability cases that regard the duty to defend and settle within policy limits.

e. Summary.

A ruling that section 624.155(2)(d) "damages" are limited to contractual damages will promote settlement of insurance claims and avoid litigation. The law, of course, favors settlement of insurance claims. Imhof, supra at 618. Further, section 624.155 was designed, and should be interpreted in such a way, so that litigation is avoided and settlement promoted. Imhof, supra at 618. Limiting section

624.155(2)(d) “damages” to “contractual” damages is practical because it allows the carrier a limited period of time to complete its investigation, by using the tools provided in the policy, and to pay what it owes. Further, this reading of the statute accords with the obvious intention of the Legislature to create a remedy in section 624.155(1) and to limit that remedy by section 624.155(2).

CONCLUSION

The certified question of the Eleventh Circuit contains a presumption that is both unsupported and contradicted by the undisputed facts in the record, i.e., that AETNA breached its contract with TALAT. There was no breach of contract by AETNA. Therefore, pursuant to Blanchard, supra, no cause of action for extra-contractual damages ever arose.

But even if the appraisal award constitutes a resolution of an action for benefits favorably to the insured, AETNA's payment of the award satisfied both of section 624.155(2)(d), Fla. Stat. (1997) alternative requirements for either payment of the "damages" or correction of the circumstances giving rise to the violation.

The certified question should be answered in the affirmative and the district court's opinion affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to WILLIAM F. MERLIN, JR., ESQ., THE MERLIN LAW GROUP, P.A., 1100 North Florida Avenue, Suite 300, Tampa, Florida 33602; PHILIP E. BECK, ESQ., WILLIAM L. BAGGETT, JR., ESQ., SMITH, CURRIE & HANCOCK, LLP, 2600 Harris Tower-Peachtree Center, 233 Peachtree Street, N.E., Atlanta, Georgia 30303-1530; and to JEFFREY M. LIGGIO, ESQ., 1615 Forum Place, Barristers Building, Suite 3B, West Palm Beach, Florida 33401, this _____ day of March, 2000.

_____
ANTHONY J. RUSSO, ESQUIRE