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 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 APPELLEE

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ISSUE PRESENTED FOR REVIEW

The United States Court of Appeals for the Eleventh Circuit certified the following 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 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.

The Eleventh Circuit also noted that the phrasing of this certified question was not meant to restrict this Court's scope of inquiry.

STATEMENT OF THE CASE

This certified question involves a case where a policyholder attempts to pursue a bad faith action under Florida law against an insurer, which has timely paid the full claim amount pursuant to the policy of insurance prior to any notice of bad faith. The United States District Court correctly determined that Florida law does not recognize a bad faith cause of action under these circumstances and entered summary judgment in favor of the insurer.

Appellee accepts the statement of the case and facts set forth in the certification from the United States Court of Appeals for the Eleventh Circuit.

Talat, as the Eleventh Circuit noted, submitted proofs of loss for $432,814 in personal property damage and loss of business income in July and August, 1994. Aetna disagreed with Talat about the amount of Talat's personal property and business interruption damages. (R1-32-8). The policy expressly provided for an appraisal process in the event of such a disagreement. (R1-27-6). Under this procedure, each side was entitled to select an appraiser and the appraisers would select an umpire, to whom they would submit their differences as to property damage and business interruption expense, if the parties' appraisers could not agree. (R1-27-6). A decision agreed to by any two of these three persons would be binding. (R1-27-6). Talat invoked this appraisal process. (R1-32-8).

On September 7, 1994, less than one month after its appraiser submitted Talat's proof of loss of business income, Talat filed for bankruptcy under Chapter 11 of the Bankruptcy Code (Case No. 94-4638-BKC-6B1). (R1-32-8). On October 21, 1994, Talat sued Aetna in Bankruptcy Court for business property and income loss, but did not allege any bad faith claim. (R1-32-8). On December 29, 1994, the Bankruptcy Court granted a motion to dismiss Talat's breach of contract suit and required arbitration pursuant to the very appraisal clause in the insurance policy that Talat had originally invoked. (R1-32-8). On February 3, 1995, the arbitrators returned an appraisal award in favor of Talat for $331,930.47. (R1-32-8). The award was for $119,007.47 in personal property loss and $212,923.00 for business interruption loss. Aetna paid the entire amount of the award one month later on March 3, 1995. (R1-32-8). Twelve days later Talat gave notice of Aetna's alleged bad faith violation. (R1-32-9).

SUMMARY OF ARGUMENT

Florida Statute § 624.155 provides a civil action against an insurer when the insurer fails to settle claims in good faith when, under all the circumstances, it could and should have done so. A condition precedent to bringing an action under the Florida bad faith statute is that the claimant must provide both the Florida Department of Insurance and the insurer 60 days' notice of an alleged violation. Fla. Stat. § 624.155(2)(a). If the insurer, within 60 days after the filing of the notice, pays the insured's damages or corrects the circumstances giving rise to the statutory violation, no action lies under the statute. Fla. Stat. § 624.155(2)(d). In this action Aetna paid all of Talat's damages which were awarded pursuant to an appraisal process described in the contract. The award represented both property damage and business damages interruption and was over $100,000.00 less than Talat's appraisal. Aetna made this payment before any bad faith claim was noticed pursuant to the statute and before any further extra-contractual damages were claimed. Thus, the insured has no action under the bad faith statute.

Florida case law supports Aetna's position that this full payment of a contractual claim before the notice of bad faith extinguishes any bad faith action under Fla. Stat. § 624.155(2)(d). To hold otherwise would render meaningless the provision in Fla. Stat. § 624.155, which requires, as a precondition to a bad faith action, notice by the party harmed and a 60-day window of opportunity for the

insurer to cure any alleged bad faith by paying the damages or correcting the circumstances giving rise to the violation. Thus, the United States District Court correctly construed Fla. Stat. § 624.155(2)(d), and the certified question must be answered in the affirmative.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT FLA. STAT. § 624.155 PROVIDES NO CAUSE OF ACTION WHEN AN INSURER SATISFIES ITS CONTRACTUAL OBLIGATION TO AN INSURED PRIOR TO THE INSURED'S WRITTEN NOTICE OF BAD FAITH VIOLATIONS.

The District Court granted summary judgment in favor of Aetna and dismissed Talat's action under Fla. Stat. § 624.155. That the record viewed most favorably to Talat may show extracontractual damages does not render the District Court's ruling erroneous. Indeed, the District Court assumed that Talat suffered extracontractual damages. (R1-32-10). The District Court then concluded that no cause of action under section 624.155 exists given the assumption of extracontractual damages. As demonstrated below, the District Court's interpretation of section 624.155 is correct, and its grant of summary judgment in favor of Aetna was correct. Therefore, the certified question, under these undisputed facts, should be answered affirmatively.

A. FLA. STAT. § 624.155 PROVIDES THE BAD FAITH REMEDY FOR FIRST PARTY ACTIONS UNDER FLORIDA LAW AND MUST BE STRICTLY CONSTRUED.

Florida law, until the enactment of Fla. Stat. § 624.155, did not recognize an insured's right to recover damages in excess of its insurance coverage for its insurer's failure to settle the insured's own claim in good faith. Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla. 1998); Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 265 (Fla. 5th DCA 1987), rev. denied, 523 So. 2d 578 (Fla. 1988). Talat's claim in this action is a "first party" claim. It is, therefore, a statutory creation and the statutory requirements must be met in order for the cause of action to be viable.

In this instance, Fla. Stat. § 624.155 does not recognize a cause of action for bad faith failure to settle an insurance claim under the undisputed facts of this case, because Aetna paid all contractual damages to Talat and corrected the circumstances giving rise to any alleged violation before any notice was ever given. The statute requires only that the insurer do one or the other. Fla. Stat. § 624.155(2)(d). Accordingly, the District Court's grant of summary judgment in favor of Aetna must be affirmed.

Under Florida law, an insured may bring a civil action against its own insurer when such insured is damaged by the commission of the following act of

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.

Fla. Stat. § 624.155(1)(b)(1). The Florida bad faith statute also requires a claimant to give the Florida Department of Insurance and the insurer 60 days' written notice of the violation. Fla. Stat. § 624.155(2)(a)-(b). This notice is a condition precedent to bringing an action under the statute. Id.

The statute also allows the insurer to "cure" the alleged violation:

> 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.

Fla. Stat. § 624.155(2)(d) (emphasis supplied). This provision is the foundation of the District Court's ruling.

If the insurer does not pay the damages or correct the circumstances giving rise to the alleged violation during the 60-day period following notice, the insured's action may proceed and the insured may, if successful, recover "damages, together with court costs and reasonable attorneys' fees incurred by the plaintiff." Fla. Stat. § 624.155(3). The statute also authorizes punitive damages under certain limited circumstances. Fla. Stat. § 624.155(4). At trial the plaintiff can recover 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." Fla. Stat. § 624.155(7).

The statute generally breaks down into three separate areas. First, section 624.155(1) describes the kind of conduct which gives rise to a civil action. Second, the statute sets forth a notice requirement that is a condition precedent to any action and a provision that enables the insurer to cure the alleged violation, thereby extinguishing any right of action the plaintiff may have otherwise had. Fla. Stat. § 624.155(2). Finally, the statute describes the remedies available to the plaintiff if it can prove a violation at trial if the insurer fails to cure the alleged violation. Fla. Stat. § 624.155(7).

In this case, Aetna paid the entire contractual claim, which was awarded by an arbitrator pursuant to the appraisal process that Talat demanded.[1] Aetna participated in the process that Talat demanded, and there is nothing in the record to indicate that Aetna's participation in the appraisal process was not in good faith. Thus, it discharged its contractual obligations under the insurance policy within 30 days of a determination of the amount of Talat's claim and before any notice of bad faith. Any bad faith claim Talat may have had did not accrue until the arbitrator

[1] Once Talat filed bankruptcy, it abandoned this contractual procedure and filed suit. Ultimately the bankruptcy court dismissed the suit and ordered the parties to engage in the appraisal procedure. Thus, much of the delay in claim settlement that Talat complains about is a result of its own actions, not Aetna's.

made his award. Imhof v. Nationwide Mutual Insurance Company, 643 So.2d 617, 618 (Fla. 1994). Because Aetna paid the full amount of this arbitration award within 30 days of award and before Talat filed its notice of intent to proceed with a bad faith claim, the District Court correctly determined that Aetna had complied with Fla. Stat. § 624.155(2)(d) by paying the damages and correcting the circumstances giving rise to the violation within 60 days of the notice. The statute requires Aetna to meet only one of these requirements. Therefore, Talat has no cause of action as a matter of law, and the certified question must be answered "yes."

B. THE DISTRICT COURT CORRECTLY DETERMINED THAT AETNA'S PAYMENT OF THE CONTRACTUAL DAMAGES BEFORE THE BAD FAITH NOTICE CORRECTED THE CIRCUMSTANCES GIVING RISE TO THE VIOLATION.

The holding in Clauss v. Fortune Ins. Co., 523 So.2d 1177 (Fla. 5th DCA 1988) requires this Court to answer the certified question in the affirmative. In Clauss, a third party alleged bad faith against his tort-feasor's insurance company in the settlement of the third party's personal injury claim. Id. Three weeks after an automobile accident involving the insured and the third party, the third party's attorney demanded the insurer tender within twenty days the policy limits of its insured's bodily injury liability coverage. Id. Three weeks later the attorney again

demanded the tender of policy limits within five days or the offer would be revoked. The insurance company promptly wrote back asking for medical records so that it could verify the claim. Id. The third party complied with the insurer's request, but six days later revoked his offer to settle for the policy limits and filed suit against the insured. Id. at 1178. The third party also notified the insurer that it intended to pursue a bad faith claim. The next day the insurer tendered the policy limits, but the injured party refused to accept it. Id.

The trial court granted summary judgment in favor of the insurance company and the Florida District Court of Appeals affirmed. 523 So.2d at 1178-79. The Court of Appeals held that no statutory action for bad faith was available to the third party because the insurer complied with then Fla. Stat. § 624.155(2) whose provisions are virtually identical to section 624.155(2)(d):

> No action shall lie if, within 60 days [of the bad faith notice], the damages are paid or the circumstances are corrected.

Accordingly, the Clauss court held that the insurer's tender of the policy limits to the third party within sixty days of the notice "corrected 'the circumstances giving rise to the violation'." Id. at 1179.

The undisputed facts of this case reveal circumstances substantially similar to Clauss. The insurer in Clauss required verification of the third party's damages, which were based upon medical injuries. 523 So.2d at 1177. This claims

processing procedure is consistent with an insurer's duty to its other policyholders to contest illegitimate claims. Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 393 (Fla. 1998). Once the medical records in Clauss were provided, and the bad faith notice received, the insurer tendered the policy limits. 523 So. 2d at 1178. In this case, Aetna investigated, advanced money to its insured, but was unable to agree with its insured about the amount of damages. The parties anticipated these very difficulties, and the appraisal process was the agreed solution. Once the appraisal award was issued, Aetna paid the full amount determined pursuant to the contractually specified procedures before Talat notified it of its intent to pursue bad faith remedies.

Talat could have easily notified Aetna of any alleged violations of Fla. Stat.. § 624.155 in advance of the appraisal decision, or immediately thereafter. Its counsel essentially conceded this point at the hearing on Aetna's motion for summary judgment. (R2-25-59). Instead, Talat said nothing, went through the appraisal process, and received an award far less than what Talat claimed but more than Aetna's appraised value of the claim. Aetna then promptly paid the appraisal award. This payment, as a matter of law, corrected the circumstances of any alleged violation.

Talat's attempt to distinguish the Clauss decision in its Brief is unpersuasive. First, Talat argues that the court held that there were insufficient allegations of bad faith conduct. Brief of Talat at 19. This argument is a classic half truth. Indeed, the Clauss court held that the claimant made insufficient allegations to support his common law cause of action. The common law recognized no such remedial period like Fla. Stat. § 624.155(2)(d). Second, as discussed above, the Clauss court went on to hold that the tender of the contractual limit within the statutory period corrected the circumstances giving rise to the alleged violation. The District Court correctly held that Clauss' corrective measures rationale applies in this case.

Finally, Talat attempts to avoid Clauss by arguing that Aetna's failure to acknowledge extracontractual bad faith damages distinguishes it from the insurer in Clauss. Again, Talat misapprehends Clauss' meaning. The Clauss insurer's tender of the policy limits did not acknowledge extracontractual amounts. Clearly, there were excess damages; otherwise, there would have been no basis for the claimant to pursue excess amounts. The lesson of Clauss is that if the insurer acts promptly, no bad faith liability will lie pursuant to Fla. Stat. § 624.155(2)(d). The only thing Aetna has done differently than the Clauss insurer for purposes of the statute is to act more promptly: it paid the full contractual amount prior to the bad faith notice.

C. THE DISTRICT COURT CORRECTLY DETERMINED THAT AETNA PAID "DAMAGES" PURSUANT TO FLA. STAT. § 624.155(2)(d) WITHIN THE SIXTY DAY PERIOD, WHEN IT FULLY PAID THE CONTRACT APPRAISAL AMOUNT PRIOR TO THE BAD FAITH NOTICE.

The District Court determined that Aetna's full payment of the contract appraisal award, which included both property damage and business interruption damages, constituted timely payment of "damages" under Fla. Stat. § 624.155 and, therefore, Talat has no action under the Florida bad faith statute. (R1-32-9). Talat again argues, as it did to the District Court, and the Eleventh Circuit, that "damages" pursuant to section 624.155(2)(d), must include damages it could recover at trial or on appeal pursuant to section 624.155(7). The Academy of Florida Trial Lawyers ("AFTL") makes the same argument. Talat's and AFTL's arguments are inconsistent with the statutory scheme and Florida precedent, and would render section 624.155(2)(d) meaningless.

Under Talat's reading of the statute, the only payment of damages that would extinguish a bad faith cause of action under Fla. Stat. § 624.155(2)(d) is payment of all damages available to a plaintiff at the trial of an action under the statute itself. Fla. Stat. § 624.155(7). The notice and cure period is designed to promote expeditious and fair settlements and to avoid litigation. Both Talat and AFTL

appear to acknowledge this goal but then proceed to make arguments that would subvert it. Requiring an insurer to pay all "bad faith" extracontractual damages to "avoid" a bad faith claim does not serve that end. Logic compels the conclusion that it is the underlying contractual claim that must be settled within the cure period in order for the bad faith claim to be avoided.

The "violation" Talat contends in its statutory notice that forms the basis of its bad faith claim is the alleged failure by Aetna "to settle insured's claim for loss of contents, including equipment, and loss of business income, from fire damage, when it could have done so, and should have done so . . . ." (R1-28-25). Thus, Talat's policy claim, and the damages that flow from it, are property damages and loss of business income. Aetna paid these damages within thirty days of the conclusion of a contractual process that Talat demanded. (R1-32-8). These were the only damages Aetna had been asked to pay until the March 15, 1995 bad faith notice.[2] Further, nowhere in the notice does Talat quantify any additional damages; indeed, the notice form does not provide for such a description. In a first party case like this one, the section 624.155(2)(d) damages are necessarily contractual damages because failure to settle the insured's claim is the basis for the violation.

[2] Aetna denies receiving the statutory notice. For the purposes of the District Court's ruling on its motion for summary judgment only, Aetna assumed that Talat did in fact give the notice.

Only when the insurer fails to satisfy its contractual obligations, after notice, can the additional extracontractual damages under Fla. Stat. § 624.155(3)(4) and (7) be awarded.

This reading of the statute, as the District Court concluded, finds support in the Florida decisions. In Brookins v. Goodson, 640 So.2d 110, 112-113 (Fla. 2d DCA 1994), rev. den., 648 So. 2d 724 (Fla. 1994)[3], a first party action, the court observed:

> The only way for an insurer to avoid an action being brought for statutory bad faith is set forth in section 624.155(2)(d).... It follows that an insurer cannot escape liability for a violation of section 624.155 by the simple expedient of a belated payment of the policy limits after the 60 day time period provided in section 624.155(2)(a) has expired. The belated payment by the insurer neither automatically proves nor disproves first party bad faith. The insured must still establish that the insurer's failure to pay *the policy limits* by the expiration of the 60 day window period constituted bad faith as defined by statute.

(Emphasis supplied.)

The District Court concluded that the logic of Brookins reasonably leads to the conclusion that payment of the contractual claim within the sixty day period

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

extinguishes any bad faith liability pursuant to section 624.155(2)(d). A timely payment by the insurer in Brookins would have invoked section 624.155(2)(d).

Talat's reliance on Hollar v. International Bankers Ins. Co., 572 So.2d 937 (Fla. 3d DCA 1990), rev. den., 582 So. 2d 624 (Fla. 1991), for the proposition that "damages" have the same meaning under sections 624.155(2)(d) and 624.155(7) is misplaced in the first party context. Principally, the facts of Hollar differ dramatically from the undisputed facts here. The Hollar decision arises out of a bad faith claim by an insured tort-feasor against his liability carrier for bad faith failure to accept a settlement offer from the injured third party that was within policy limits. Id. at 938. This failure exposed the insured tort-feasor to an excess verdict. Id. Under these circumstances, the Hollar court determined that a tender of policy limits within the sixty day period would not constitute the payment of "damages" pursuant to section 624.155(2)(d) where an excess verdict of several hundred thousand dollars had been entered. Id. at 939-940.

Unlike Clauss, supra, the tender of policy limits in Hollar occurred after an excess verdict. 572 So.2d at 939-940. In Clauss, supra, the insurer offered to pay policy limits the day after its tort-feasor insured was sued. 523 So.2d at 1177-78. More important, in Hollar, the insurer refused to settle within policy limits after the plaintiff offered to settle within those limits. Under these circumstances, it is understandable that the court would hold that the insurer's tender of policy limits,

pursuant to section 624.155(2)(d), in a bad faith failure to settle a third party claim context, would frustrate the purpose of the bad faith statute. Here, there is no such concern because Aetna fully compensated Talat prior to the bad faith notice and part of the compensation, i.e., business interruption, constitutes the very damages Talat now seeks to collect again through bad faith. Hollar must be limited to its facts in the third party context. If not, an insured could only avoid a first party bad faith claim by paying all extracontractual damages available under the statute. Section 624.155(2)(d) would then lack meaning. To say that one may avoid something only by doing that which he seeks to avoid is nonsense. This Court's precedent requires statutory construction that avoids absurd results. City of Boca Raton v. Gidman, 440 So. 2d 1277, 1281 (Fla. 1983).

D. PUBLIC POLICY CONSIDERATIONS REQUIRE THIS COURT TO ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE.

The purpose of Fla. Stat. § 624.155, and other bad faith remedies in general, is to promote fair, honest and prompt settlements of policy claims in the insurance arena. Talat's construction of the statute would not promote that purpose. Talat would require insurers to pay, at a minimum, all damages allowable under section 624.155(7) in order to comply with section 624.155(2)(d). In other words, Talat would have this Court hold that an insurer

must pay all bad faith damages a plaintiff could possibly prove at trial within sixty days of the notice to avoid additional exposure for attorneys' fees, costs, and punitive damages. See Fla. Stat. § 624.155(3) and (4). Such a regime would chill, rather than encourage, fair and prompt settlements.

This reading of the statute would force insurance companies to shift their analysis from settling their accounts fairly within the terms of the policy to determining whether payment of all the claimant's bad faith damages makes economic sense in the face of what a jury might award. Contrary to AFTL's assertions in its amicus curiae brief, the mitigation of damages is not the primary policy consideration in section 624.155(2)(d). The statute allows an insurer to pay the damages or correct the circumstances within 60 days before the bad faith cause of action accrues. AFTL's mitigation of damages argument assumes bad faith rights have already accrued within the 60 day cure period. In essence, AFTL argues that the 60 day period is an opportunity for the insurer to confess judgment to extra-contractual damages so that additional interest and attorneys' fees may be avoided. This argument is inconsistent with the "condition precedent" nature of the notice and cure period. Further, as a policy matter, this kind of mitigation analysis will rarely, if ever, promote the prompt settlement of claims and the avoidance of litigation.

Talat's interpretation would also make the language of Fla. Stat. §

624.155(2)(d) superfluous. In essence, Talat's argument would make that provision's meaning as follows: no action will lie against an insurer for bad faith when an insurer pays all possible bad faith damages within 60 days. If an insurer pays all damages at any time, there is no action because there would be no possible damages left to seek. Fla. Stat. § 624.155(1).

Further, there is no principled reason under Talat's reading to limit the "damages" required to extinguish the bad faith claim under section 624.155(2)(d). The statutory scheme also provides for punitive damages and attorneys' fees. These are "damages." With all due respect to opposing counsel, Talat's interpretation ultimately is analytical nonsense. More alarming, it would likely lead to a notice of bad faith in virtually every insurance dispute and provide a disincentive for settlement. This result benefits neither policyholders nor insurers in the long run.

Finally, the statutory construction urged by Talat will encourage abuse in policies that have appraisal or similar processes to determine the amount of a property or business interruption. The value of such claims are often subject to very reasonable debate. "Lost income," for example, by definition is somewhat speculative. Under Talat's regime, every insured who receives an award that does not amount to the insured's claim will be able to assert bad faith, even after the lesser amount is paid. The Legislature could not possibly have intended such

a result.

The argument that Aetna's interpretation will convert the bad faith statute into an amnesty program for insurers is alarmist and inaccurate. "Amnesty" is after all a governmental pardon according to Webster's. Thus, wrongdoing is necessary before a pardon is even relevant. The notice and cure period must occur as a condition precedent to the bad faith action. Thus, there is no wrongdoing recognizable as a cause of action until the insurer has an opportunity to cure. Both Talat and AFTL's arguments attempt to render this statutory component meaningless.

The District Court recognized the fallacy of Talat's position in both its memorandum opinion and at the hearing on the motion for summary judgment. (R1-32-10; R3-35-32). Reversal of the grant of summary judgment will frustrate, rather than promote the goals of Fla. Stat. § 624.155. The certified question should be answered in the affirmative.

CONCLUSION

There are no material facts in dispute in this action. Aetna has demonstrated that it is entitled to summary judgment as a matter of law on the issue of Talat's right to bring a cause of action pursuant to Fla. Stat. § 624.155. Accordingly, Aetna requests that this Honorable Court answer "yes" to the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the within and foregoing BRIEF OF THE APPELLEE upon the below named counsel by placing a true copy thereof in the United States Mail, properly addressed, with adequate postage thereon to:

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