IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE FLORIDA

CASE NO. SC04-1828

D A D E L A N D S T A T I O N A S S O C I A T E S, L T D. a n d DADELAND DEPOT, INC.,

Appellants,

-vs-

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, et al.,

Appellees.
_____/

INITIAL BRIEF OF APPELLANTS ON THE MERITS

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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PREFACE

This case is before the Court on five certified questions from the United States Circuit Court of Appeals for the Eleventh Circuit. The parties will be referred to by their proper names or as they appeared in the District Court. The following designations will be used:

(A) - Eleventh Circuit Opinion

(R) - Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

Appellants accept the Eleventh Circuit's summary of the underlying and procedural facts of this case, contained in the "Background" portion of its opinion (A2-7). However, there is one error in the Eleventh Circuit opinion which requires correction. On page 7 of the opinion, the Eleventh Circuit states that Dadeland's claims are for bad faith refusal to settle under §624.155(1)(b)(1), Fla. Stat., and §626.9541(1)(a), Fla. Stat. (1999). The latter statutory citation is in error, as the Plaintiffs' Complaint alleged that Defendants violated §624.9541(1)(i), Fla. Stat. (R1-1).[1]

[1]/Section 626.9541(1)(a), Fla. Stat., addresses misrepresentations and false advertising of insurance policies; while §626.9541(1)(i), Fla. Stat., addresses unfair claims settlement practices.

CERTIFIED QUESTIONS

QUESTION I

IS THE OBLIGEE OF A SURETY CONTRACT CONSIDERED AN "INSURED" SUCH THAT THE OBLIGEE HAS THE RIGHT TO SUE THE SURETY FOR BAD-FAITH REFUSAL TO SETTLE CLAIMS UNDER §624.155(1)(b)(1), FLA. STAT.

QUESTION II

DOES THE LANGUAGE IN §624.155(1)(b)(3), FLA. STAT., ELIMINATE §626.9541, FLA. STAT.'S REQUIREMENT OF PROOF OF A GENERAL BUSINESS PRACTICE WHEN THE PLAINTIFF IS PURSUING A §626.9541, FLA. STAT., CLAIM THROUGH THE RIGHT OF ACTION PROVIDED IN §624.155, FLA. STAT.?

QUESTION III

IS AN ARBITRATOR'S FINDING THAT A SURETY'S PRINCIPAL HAS BREACHED ITS DUTY TO THE OBLIGEE, AND THAT THE SURETY IS BOUND TO THE ARBITRATION AWARD TO THE EXTENT THAT ITS PRINCIPAL IS BOUND, SUFFICIENT TO SATISFY THE CONDITION PRECEDENT TO A LATER BAD-FAITH REFUSAL TO SETTLE CLAIM THAT THERE BE A PRIOR ADJUDICATION THAT THE PLAINTIFFS WERE ENTITLED TO A PAYMENT OF A CLAIM FROM THE SURETIES?

QUESTION IV

IS THE ARBITRATOR'S DECISION RES JUDICATA BARRING DADELAND'S LATER CLAIM AGAINST THE SURETIES FOR BAD-FAITH REFUSAL TO SETTLE?

QUESTION V

WILL AN ARBITRATOR'S DENIAL OF THE DEFENDANT'S AFFIRMATIVE DEFENSES IN A BREACH OF CONTRACT CLAIM COLLATERALLY ESTOP THE SAME DEFENDANTS FROM RAISING THE SAME DEFENSES IN A SUBSEQUENT BAD-FAITH REFUSAL TO SETTLE CLAIM AGAINST THE SAME PLAINTIFF?

SUMMARY OF ARGUMENT

The obligee of a surety contract should be considered an insured who is entitled to bring a cause of action for statutory bad faith pursuant to §624.155(1)(b)(1), Fla. Stat. The Florida Legislature has explicitly included surety contracts within the ambit of the Florida Insurance Code, and has clearly stated that sureties are deemed "insurers" for purposes of those statutory provisions. Furthermore, the legislature has specifically provided that obligees under performance bonds should be considered insureds or beneficiaries for purposes of the statutory award of fees when they prevail against an insurer, i.e., surety, see §627.756(1), Fla. Stat. Furthermore, the relationship between a surety and the obligee is essentially identical to that which exists between an insurer and an insured. By virtue of the performance bond, the obligee is attempting to insure itself against the consequences of the principal's failure to satisfy its contractual obligations. Thus, the surety's primary obligation is to protect the obligee, and it has a duty to act in good faith in satisfying that duty. For these reasons, the obligee should be considered the insured in the context of a surety contract. Therefore, the first certified questions should be answered in the affirmative.

The trial court erred in ruling that Plaintiffs had to prove that the unfair claims practices alleged in the Complaint were committed with such frequency as to indicate a general business practice. While that requirement is included in §626.9541(1)(i)(3),

Fla. Stat., the statute authorizing a civil action for violations of that statute specifically states that the plaintiff does not need to prove a general business practice requirement in a private civil action for compensatory damages, §624.155(1)(b)3, Fla. Stat. The only reasonable construction of that statutory language is that the requirement does not apply in a statutory bad faith suit. Therefore, question two should be answered in the affirmative.

By prevailing in the arbitration, the Plaintiffs clearly satisfied the condition precedent to an action for bad faith brought pursuant to §624.155, Fla. Stat. This Court has clearly and consistently held that all a plaintiff needs to obtain as a condition precedent to a statutory bad faith claim is a determination of damages and that there was a valid claim under the insurance contract. This can be satisfied by a judicial determination, an arbitration award, or even a settlement. In the case sub judice, it is undisputed that the Plaintiffs obtained a favorable ruling in the arbitration, which determined that they had a valid claim against Walbridge and the sureties for damages of approximately $1.4 million. Under Florida law that clearly satisfied the requisite condition precedent for a statutory bad faith claim. Therefore, the third certified question should be answered in the affirmative.

Plaintiffs' statutory bad faith claims are not barred by res judicata based upon the arbitration award. As indicated in the previous paragraph, Plaintiffs had to obtain

a favorable determination of their claim against Walbridge and the surety as a condition precedent to bring a statutory bad faith claim. Florida law is clear that until that condition precedent is satisfied, the statutory bad faith claim does not accrue. Therefore, Plaintiffs' bad faith claim could not have been brought in the arbitration proceeding and, as a matter of law, could not be barred by the arbitration award under the doctrine of res judicata. For these reasons, the fourth certified question should be answered in the negative.

Defendants' third and fourth affirmative defenses should be barred by collateral estoppel based on the arbitration award. These exact issues were raised by the sureties in the arbitration proceeding and decided adversely to them. The relitigation of issues raised in arbitration is generally barred, absent exceptional circumstances which clearly do not exist here. Therefore, the sureties are collaterally estopped to raise the identical defenses in this proceeding, which were explicitly rejected in the arbitration award. For these reasons, the fifth certified question should be answered in the affirmative.

ARGUMENT

QUESTION I

IS THE OBLIGEE OF A SURETY CONTRACT CONSIDERED AN "INSURED" SUCH THAT THE OBLIGEE HAS THE RIGHT TO SUE THE SURETY FOR BAD-FAITH REFUSAL TO SETTLE CLAIMS UNDER §624.155(1)(b)(1), FLA. STAT.

Standard of Review

By their nature, certified questions are solely issues of law and, therefore, should be considered under the de novo standard, Blanton v. City of Pinellas Park, 2004 WL 2359991 (Fla. 2004).

Argument

The issue whether the obligee of a surety contract is deemed an insured for purpose of §624.155(1)(b)(1), Fla. Stat., is a question of statutory construction and, therefore, is to be determined by the legislative intent as expressed in the Florida Statutes. There can be no doubt that the Florida Legislature considers surety contracts to constitute a form of insurance, and that sureties are deemed "insurers" for purposes of, inter alia, the Florida Insurance Code, §624.01, Fla. Stat., et seq., for which §624.155, Fla. Stat., provides a "civil remedy." However, since the Florida Insurance Code does not define the term "insured," its meaning must be derived

contextually from applicable legislation and it is clear by the nature of the relationships between the parties to a surety contract that the obligee is the only party which could be properly characterized as an "insured." Thus, consistent with the majority view in the United States, an obligee should be entitled to pursue a cause of action against a surety for bad faith in the claims handling process.

The Florida Insurance Code expressly contemplates that sureties will be subject to its provisions, §624.01, Fla. Stat., et seq. Section 624.03, Fla. Stat., defines "insurer" as including "every person engaged as an indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity" [Emphasis supplied]. This Court has twice noted that "the term 'insurer' is clearly defined under the Florida Insurance Code to include a 'surety,'" Nichols v. Preferred National Ins. Co., 704 So.2d 1371, 1373 (Fla. 1997); David Boland, Inc. v. Trans Coastal Roofing Co., 851 So.2d 724, 726 n.1 (Fla. 2003).

Additionally, the legislature's definition of "insurance" clearly includes surety contracts, such as the one in this case, within its ambit (§624.02, Fla. Stat.):

> "Insurance" is a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies.

In the context of a performance bond, the surety is agreeing to pay certain amounts to the obligee, or to fund compliance with the underlying contract in the event the

principal does not satisfy its contractual obligations. Put another way, the obligee is "essentially insuring itself from the potential losses that would result in the event that the principal defaults on its original obligation," Board of County Road Commissioners v. Michigan Property & Casualty Guaranty Assoc., 575 N.W.2d 751, 760 n.17 (Mich. 1998).

The Florida Legislature also included surety business within the "kinds of insurance" regulated under the Code, see §624.6011(5), Fla. Stat.; and specifically defines "surety insurance" in a manner that includes the contract at issue in the case sub judice, see §624.606, Fla. Stat. Therefore, it appears incontrovertible that sureties are compelled to comply with the provisions of Florida's Insurance Code, see, §624.11(1), Fla. Stat.

The issue whether sureties are subject to the Civil Remedy contained in the Florida Insurance Code was raised by the Defendants in this case in their Motion to Dismiss, which was denied by United States District Judge Kenneth L. Ryskamp (R24). In addition to relying on the plain meaning of the language in §624.03, Fla. Stat. and §624.155, Fla. Stat., Judge Ryskamp concluded under general principles that a statutory bad faith suit could be brought against a surety under Florida law (R24-8-9):

> Defendants first contend that suretyship and insurance are not the same thing. Although differences exist between the two, "it has been the general holding of the

> courts that a bond executed upon a consideration by a bonding company, to secure the performance of a building contract, is in effect a contract of insurance and should be construed as such." 43 Am.Jur.2d Insurance §6 (1982). This makes sense when considering the purpose behind a performance bond, which is "to ensure the physical completion of the work upon default, and to insure against any losses which the owner may suffer if performance default occurs." Fla.Bd. of Regents v. Fidelity & Deposit Co. of Md., 416 So.2d 30, 32 (Fla. 5th DCA 1982), analysis rejected on other grounds, Fed. Ins. Co. v. Southwest Fla. Retirement Center, Inc., 707 So.2d 1119 (Fla. Feb. 12, 1998), reh'g denied (April 2, 1998). In essence, the bond "insures" the obligee that he will not be at risk of non-performance of the contract by the contractor. Thus, although differences exist between suretyship and insurance, those differences do not draw a distinction sufficient to hold that an obligee under a performance bond may not bring a civil action against the surety under §624.155.

Judge Ryskamp also relied on the published opinion of the successor judge in this case, United States District Judge Daniel T.K. Hurley, in Shannon R. Ginn Const. Co. v. Reliance Ins. Co., 51 F.Supp.2d 1347 (S.D.Fla. 1999). In that opinion, albeit in dicta, Judge Hurley stated that (51 F.Supp.2d at 1351):

> Florida treats sureties so much like ordinary insurers that sureties, in certain circumstances, may be liable for bad faith.

Judge Hurley also noted in that opinion that the inclusion of sureties within the Florida Insurance Code was "strong evidence that Florida intended to hold surety insurers to the same standards as ordinary insurers" (51 F.Supp.2d at 1350).

However, in Ginn Construction, the principal on a performance bond was seeking to pursue a bad faith claim against the surety, and Judge Hurley determined that the principal was not an "insured" within the meaning of §624.155(1)(b)1, Fla. Stat. However, he stated that since the obligee looks to the surety for protection from the risk, the surety owes a duty of good faith to the obligee, and that if any party had a claim for statutory bad faith against the surety it would be the obligee, 51 F.Supp.2d at 1352. Judge Hurley stated (Id):

> Because the obligee looks to the surety for protection from calamity, the surety owes a duty of good faith to the obligee.
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> * * *
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> The Fourth District Court of Appeal of California observed that "it is not the duty of the surety to protect the principal as if the principal were the insured under an insurance policy. The surety's duty runs to the third party obligee." Schmitt v. Insurance Co. of North America, 230 Cal.App.3d 245, 281 Cal.Rptr. 261, 269 (1991). Thus, as Reliance contends, if any party has a claim for bad faith failure to settle under section 624.155(1)(b)1, Fla. Sta., it would be the County, the obligee under the performance bond.

See also, Masterclean, Inc. v. Star Ins. Co., 556 S.E.2d 371, 376 (S.C. 2001) ("The [surety] bond is designed to protect the obligee not the principal").

This rationale is consistent with the inclusion of sureties within Florida Insurance Code and, specifically, the legislature's treatment of obligees for purposes of attorney fees awards. Section 627.428(1), Fla. Stat., provides for an insured or "named beneficiary" to obtain an attorney fee award when it prevails in a judgment against an insurer.[2] Section 627.756(1), Fla. Stat. states:

> (1) Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section.

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[2]/Section 627.428(1), Fla. Stat., states:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Thus, clearly, the legislature recognizes that obligees are, as a practical matter, the insured for purposes of performance bonds.

The legislature's recognition that an obligee is the insured in the context of a performance bond is consistent with the majority of courts in the country which have recognized the viability of a bad faith claim by an obligee against a surety, see Dodge v. Fidelity and Deposit Co. of Maryland, 778 P.2d 1240 (Ariz. 1989); TransAmerica Premier Ins. Co. v. Brighton School District 27J, 940 P.2d 348 (Col. 1997); Suver v. Personal Service Ins. Co., 462 N.E.2d 415 (Ohio 1984); Loyal Order of Moose, Lodge 1392 v. International Fidelity Ins. Co., 797 P.2d 622 (Ark. 1990); Szarkowski v. Reliance Ins. Co., 404 N.W.2d 502 (N.D. 1987); K-W Industries v. National Surety Corp., 754 P.2d 502 (Mont. 1988); International Fidelity Ins. Co. v. Delmarva Systems Corp., 2001 WL 541469 (Del. Super. 2001).

The relationship between the surety and the obligee is characterized as being "direct, primary, and absolute," as opposed to the obligation to the principal, which is accessory or collateral, see 74 Am.Jur.2d Suretyship §1 quoted in In the Matter of the Liquidation of Integrity Ins. Co., 657 A.2d 902, 907 (N.J.App. 1995), aff'd, 685 A.2d 1286 (N.J. 1996). As noted by the Michigan Supreme Court in Board of County Road Commissioners, supra, 575 N.W.2d at 760 n.17:

> A special relationship exists between a commercial surety and an obligee that is nearly identical to that involving an insurer and an insured. [Quoting TransAmerica, supra, 940 P.2d at 352.]

See also, Loyal Order of Moose, supra, 797 P.2d at 628 ("In our view the relationship of a surety to its obligee - - an intended creditor third party beneficiary - - is more analogous to that of an insurer to its insurer than to a relationship between an insurer and an incidental third party beneficiary").

The legislature's rationale of including surety insurance within the Florida Insurance Code is also consistent with the policy considerations underlying the regulation of insurance and the existence of a cause of action for bad faith. The Colorado Supreme Court stated in TransAmerica, supra, 940 P.2d at 353:

> Although the parties to a suretyship agreement are on equal footing in terms of bargaining power when they enter into the agreement, it is the commercial surety who controls the ultimate decision of whether to pay claims made by the obligee under the terms of the surety bond. For this reason, the commercial surety has a distinct advantage over the obligee in its ability to control performance under the secondary agreement. As with insurers, commercial sureties must proceed with the payment of claims made pursuant to a surety bond in good faith, Otherwise, the core purpose of the suretyship agreement, which is to insulate the obligee from the risk of a default, is defeated.

The Arizona Supreme Court expressed similar concerns in Dodge, supra, 778 P.2d at 1243. Both courts also recognize that the contractual measure of damages does not

compensate the obligee for the commercial surety's unreasonable failure to pay a claim, and also would not deter such misconduct by sureties in the future, TransAmerica, 940 P.2d at 353; Dodge, supra, 778 P.2d at 1242-43.

It is also significant that while the courts in the cases cited above addressed whether an obligee had a common law bad faith cause of action against a surety, some of them relied, in part, on the fact that their legislatures had included sureties within the regulatory scheme governing insurance, including characterizing sureties as insurers, see TransAmerica, supra, 940 P.2d at 352; Dodge, supra, 778 P.2d at 1241-42. While here the issue is one of statutory construction, the same general principles apply to analyzing the relationship between the obligee and the surety.

This Court's decision in State Farm Fire & Casualty Ins. Co. v. Zebrowski, 706 So.2d 275 (Fla. 1997), which involved a third party bad faith claim does not suggest a different result. In that case, an injured party who had obtained a judgment against the tortfeasor had sued the tortfeasor's liability insurer for bad faith refusal to settle, pursuant to §624.155(1)(b)(1), Fla. Stat. However, the judgment was within the liability limits of the policy, and the insurer had satisfied the judgment. This Court held that the statutory duty provided in that subsection of §624.155, Fla. Stat., only ran to the insured, and that in the absence of an excess judgment, a third party could not demonstrate that the insurer had breached that duty to its insured. For that reason, the

third party in that case could not pursue a statutory bad faith claim against the liability insurer.

In the context of surety bonds, the surety owes an obligation of good faith to the obligee to reasonably investigate and settle claims made under the bond. As noted previously, that duty is not owed to the principal, but only to the obligee. Thus, the statutory duty upon which the Plaintiffs' suit is based in the case sub judice runs directly to the Plaintiffs here (the first party) and, therefore, can be a viable basis for liability against the surety. In Zebrowski, the third party bringing the statutory bad faith claim could not show any breach of that duty, since he had not obtained an excess judgment and, thus, he did not have a viable statutory bad faith claim.

Indisputably, the legislature intended sureties to be treated as insurers, particularly for purposes of the Florida Insurance Code. The civil remedy at issue is a part of that Code, §624.155, Fla. Stat. In the context of performance bonds, the obligee is the party that is, for all intents and purposes, the insured. Thus, it should be permitted to bring the bad faith claim against the surety if it is unreasonable in handling claims. As noted previously, the Florida Insurance Code does not define the term "insured" and, thus, its definition must be derived contextually. Here, however, the obligee is the only party that satisfies the status of an insured in the context of a surety contract, and it is unreasonable to conclude that the legislature intended to treat

surety contracts as insurance policies, but have no entity with the status of an "insured." Therefore, the only reasonable conclusion is that the legislature intended that an obligee could bring a statutory bad faith claim pursuant to §624.155(1)(b)(1), Fla. Stat., against a surety that is unreasonable in handling claims. For these reasons, this certified question should be answered in the affirmative.

QUESTION II

DOES THE LANGUAGE IN §624.155(1)(b)(3), FLA. STAT., ELIMINATE §626.9541, FLA. STAT.'S REQUIREMENT OF PROOF OF A GENERAL BUSINESS PRACTICE WHEN THE PLAINTIFF IS PURSUING A §626.9541, FLA. STAT., CLAIM THROUGH THE RIGHT OF ACTION PROVIDED IN §624.155, FLA. STAT.?

Standard of Review

By their nature, certified questions are solely issues of law and, therefore, should be considered under the de novo standard, Blanton v. City of Pinellas Park, 2004 WL 2359991 (Fla. 2004).

Argument

Section 624.155(1)(a)1, Fla. Stat., specifically authorizes any person to bring a civil action against an insurer for violation of, inter alia, §626.9541(1)(i), Fla. Stat. Section 624.9541(1)(i)(1)-(3), Fla. Stat., is titled "Unfair claims Settlement Practices," and identifies three categories of misconduct. Subsection (1)(i)(3) of that statute begins with the following language: "Committing or performing with such frequency as to indicate a general business practice any of the following...." However, the legislature explicitly provided that when an action for a violation of §626.9541(1)(i),

Fla. Stat., is brought pursuant to §624.155, Fla. Stat., the plaintiff does not have to prove that the misconduct occurred with such frequency as to constitute a general business practice in order to obtain compensatory damages. Section 624.155(1)(b)3, Fla. Stat., states in pertinent part:

> Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

It is well established that statutes must be construed in accordance with their plain meaning, Weber v. Dobbins, 616 So.2d 956, 958 (Fla. 1993); Calliar v. State, 760 So.2d 885, 887 (Fla. 1999). Clearly, the legislature intended that when an action is brought under §624.155(1)(a)1, Fla. Stat., for violation of §626.9541(1)(i), Fla. Stat., it is not necessary to plead or prove that such act was committed or performed with such frequency as to indicate a general business practice.[3]

Defendants contend that the provision quoted above relates only to actions brought under §626.9541(1)(b), Fla. Stat. That interpretation would be contrary to the language in that provision which states that it applies to a person "pursuing a remedy

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[3]/Section 624.155(4), Fla. Stat., states that punitive damages are not available in actions brought under that statute "unless [inter alia] the acts giving rise to the violation occur with such frequency as to indicate a general business practice...." The Plaintiffs have not sought punitive damages in this case.

under this section" (i.e., not subsection), which obviously refers to the entire statute. Moreover, there is nothing in §626.9541(1)(b), Fla. Stat., that mentions or even alludes to a requirement of proving a general business practice. Therefore, it would have been nonsensical for the legislature to start the sentence by stating, "Notwithstanding the provisions of the above to the contrary...." It is a basic rule of statutory construction that the legislature does not enact useless provisions, and courts should avoid construing legislation which would render part of a statute meaningless, State v. Goode, 830 So.2d 817, 824 (Fla. 2002); Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452, 456 (Fla. 1992).

The reference in §624.155(1)(b)(3), Fla. Stat., is obviously intended to address §626.9541(1)(i), Fla. Stat., which is the only statutory provision incorporated in §624.155, Fla. Stat., that imposes a requirement of proving a general business practice.

For these reasons, this certified question should be answered in the affirmative.

QUESTION III

> IS AN ARBITRATOR'S FINDING THAT A SURETY'S PRINCIPAL HAS BREACHED ITS DUTY TO THE OBLIGEE, AND THAT THE SURETY IS BOUND TO THE ARBITRATION AWARD TO THE EXTENT THAT ITS PRINCIPAL IS BOUND, SUFFICIENT TO SATISFY THE CONDITION PRECEDENT TO A LATER BAD-FAITH REFUSAL TO SETTLE CLAIM THAT THERE BE A PRIOR ADJUDICATION THAT THE PLAINTIFFS WERE ENTITLED TO A PAYMENT OF A CLAIM FROM THE SURETIES?

Standard of Review

By their nature, certified questions are solely issues of law and, therefore, should be considered under the de novo standard, Blanton v. City of Pinellas Park, 2004 WL 2359991 (Fla. 2004).

Argument

This issue was first addressed by the Supreme Court of Florida in Blanchard v. State Farm Mutual Automobile Ins. Co., 575 So.2d 1289 (Fla. 1991). In that case, the Eleventh Circuit certified questions to the Supreme Court including, inter alia:

> Does an insured's claim against an uninsured motorist carrier under section 624.155(1)(b)(1), Florida Statutes, for allegedly failing to settle the uninsured motorist claim in good faith accrue before the conclusion of the underlying

> litigation for the contractual uninsured motorist insurance benefits?

At that time, there was a split among the intermediate appellate courts in Florida on this issue, see Blanchard, supra, 575 So.2d at 1291. Some District Courts held that a statutory bad faith claim was an independent cause of action from a claim for the breach of the insurance contract and could be pursued separately, see Opperman v. Nationwide Mut. Fire Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987), rev. den., 523 So.2d 578 (Fla. 1988); see also, State Farm Mut. Auto. Ins. Co. v. Lenard, 531 So.2d 180 (Fla. 2d DCA 1988). However, in Schimmel v. Aetna Casualty & Surety Co., 506 So.2d 1162 (Fla. 3d DCA 1987), the Third District held that the statutory bad faith claim was indivisible from the contract claim and that those causes of action must be brought jointly in one proceeding.

In Blanchard, supra, this Court reasoned that a bad faith claim is grounded upon the legal duty to act in good faith and, therefore, is "separate and independent of the claim arising from the contractual obligation to perform" [575 So.2d at 1291]. This Court rejected the Schimmel decision. The certified question was answered in the negative by this Court, based on the following reasoning (Id):

> If an uninsured motorist is not liable to the insured for damages arising from an accident, then the insurer has not acted in bad faith in refusing to settle the claim. Thus, 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. It follows that an insured's claim against an uninsured motorist carrier for failing to settle the claim in good faith does not accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits. Absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle. [Emphasis supplied.]

Subsequently, in Imhof v. Nationwide Mutual Ins. Co., 643 So.2d 617 (Fla. 1994), this Court clarified Blanchard in response to a certified question from the First District Court of Appeals regarding whether a complaint had to allege a determination of the extent of appellant's damages in order to state a cause of action for bad faith.[4] In Imhof, the insured filed a civil remedy notice pursuant to §624.155(2)(d), Fla. Stat., alleging that Nationwide had acted in bad faith in failing to settle an uninsured motorist claim. The parties proceeded to arbitration, at which the insured prevailed. After the arbitration award, the insured filed a complaint alleging a cause of action under §624.155(1)(b)1, Fla. Stat., but did not allege a specific amount of damages. The trial

[4]/In State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So.2d 55, 63 (Fla. 1995), this Court receded from Imhof, supra, but only as to its adoption, in dicta, of the "fairly debatable" standard for evaluating bad faith conduct of insurers.

court dismissed the complaint for failing to state a cause of action, and the First District affirmed, but certified the following question (643 So.2d at 617):

> Is an action for bad-faith damages pursuant to section 624.155(1)(b)(1), Florida Statutes, barred by Blanchard v. State Farm Mutual Automobile Insurance Company, 575 so.2d 1289 (Fla. 1991), where the complaint fails to allege that there had been a determination of the extent of appellant's damages as a result of the uninsured tortfeasor's negligence?

In Imhof, this Court held that while neither Blanchard nor §624.155(2)(b), Fla. Stat., required the allegation of a specific amount of damages, it was necessary to allege that a determination of damages had been made. The rationale for this decision was summarized as follows (643 So.2d at 619):

> Neither *Blanchard* nor section 624.155(2)(b) requires the allegation of a *specific amount* of damages. Thus, if the First District Court's certified question asked whether a complaint must allege the specific amount of damages determined, we would answer that question in the negative. It follows that there is no need to allege an award exceeding the policy limits to bring an action for insurer bad faith.
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> In the instant case, the amount of the arbitration award shows that Imhof had a valid claim. Imhof thus had a legitimate interest in a speedy resolution of his claim.

In Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA 1994), the court addressed the issue of whether a settlement could constitute the requisite determination

of damages to satisfy the condition precedent for bringing a first party bad faith action pursuant to §624.155(1)(b)(1), Fla. Stat. After discussing the Supreme Court precedent discussed above, the Fourth District answered that question in the affirmative, stating:

> We hold that the payment of the policy limits by the insurer here is the functional equivalent of an allegation that there has been a determination of the insured's damages. It satisfies the purpose for the allegation - - to show that the insured had a valid claim.

The court in Brookins also rejected the contention that the insured had to obtain a judgment or award in excess of the policy limits in order to bring a statutory bad faith claim. The Fourth District noted that §624.155, Fla. Stat., did not require that, and that the insured in Imhof had obtained an arbitration award less than the policy limits, yet was permitted to proceed with his claim.

Brookins was quoted with approval on this issue by this Court in Vest v. Traveler's Ins. Co., 753 So.2d 1270, 1273-74 (Fla. 2000). In Vest, this Court clarified the Imhof decision by characterizing its holding as being (753 So.2d at 1274), "in order to state a cause of action for bad faith, Imhof had to allege that there had been a determination of the extent of his damages covered by the underlying insurance contract." That is, of course, consistent with the rationale of the condition precedent,

i.e., to establish that the insured had a valid claim, thus triggering the duty of good faith on the part of the insurer.

In Vest, this Court also rejected the District Court's conclusion that the insured's bad faith claim for the insurer's failure to settle the uninsured motorists claim timely, could not include damages incurred prior to the settlement with the tortfeasor. This Court stated (753 So.2d at 1275):

> In sum, we expressly hold that a claim for bad faith pursuant to section 624.155(1)(b)1 is founded upon the obligation of the insurer to pay when all conditions under the policy would require an insurer exercising good faith and fair dealing towards its insured to pay. This obligation on the part of an insurer requires the insurer to timely evaluate and pay benefits owed on the insurance policy. We hasten to point out that the denial of payment does not mean an insurer is guilty of bad faith as a matter of law. The insurer has a right to deny claims that it in good faith believes are not owed on a policy. Even when it is later determined by a court or arbitration that the insurer's denial was mistaken, there is no cause of action if the denial was in good faith. Good-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder.

Considered in light of this precedent, it is clear that the trial judge erred in his determination that the Plaintiffs here had not satisfied the condition precedent to bringing a bad faith action against the sureties. The underlying premise of the trial court's analysis is that the Plaintiffs had to obtain a specific finding that the sureties

had breached their obligations under the performance bond in order to satisfy the condition precedent for the bad faith suit. This conclusion draws no support from the controlling precedent.

In the uninsured motorist context, the Florida courts consistently refer to the condition precedent as requiring a determination of liability on the part of the uninsured tortfeasor and the extent of plaintiffs' damages; it does not require a determination of a specific breach of the insurance contract by the uninsured motorist carrier, Blanchard, supra, Imhof, supra, Vest, supra, Brookins, supra. This is consistent with the rationale of the requirement, that is, to demonstrate that the insured had a valid claim under the insurance contract, thus triggering the obligation of good faith on the part of the insurer. This is demonstrated by the fact that the settlement by the insurer of the underlying claim in Brookins was considered sufficient to satisfy the condition precedent. Clearly, a settlement does not prove a breach of any contract, but simply establishes that the insured had a valid claim to which the duty of good faith applied.

It is also significant that the arbitration award in Imhof was sufficient to satisfy the condition precedent to a statutory bad faith suit. Similarly, in Talat Enterprises, Inc. v. Aetna Casualty & Surety Co., 952 F.Supp. 773 (M.D.Fla. 1996), cert. quest. answered, 753 So.2d 1278 (Fla. 2000), aff'd, 217 F.3d 1318 (11th Cir. 2000), the court

specifically determined that the arbitration of the fire insurance claim satisfied this condition precedent to the insured's first party bad faith suit. Thus, there is no reasonable basis to hold that the arbitration award in the case sub judice did not do so as well.

The trial court also erred in its apparent conclusion that since the arbitration award did not impose any liability on the sureties (R137-20): "that did not already exist under the terms of the performance bond," the condition precedent to bad faith was not satisfied. This Court clearly held in Imhof that there was no requirement of an "excess" uninsured motorist award in order to satisfy the condition precedent, Imhof, 643 So.2d at 619 (quoted supra). All that was necessary was that there be a damage award for which there was coverage under the insurance policy, because that demonstrated that the insured had a valid claim. Therefore, whether or not the arbitrators imposed any liability on the sureties that did not already exist under the performance bond is simply irrelevant to this analysis.

In summary, the $1.4 million arbitration award for which Walbridge and the sureties were jointly and severally liable clearly demonstrated that Dadeland had a valid claim which was covered by the underlying performance bond. That is all that was necessary in order to satisfy the condition precedent for this bad faith action. Therefore, this certified question should be answered in the affirmative.

QUESTION IV

IS THE ARBITRATOR'S DECISION RES JUDICATA BARRING DADELAND'S LATER CLAIM AGAINST THE SURETIES FOR BAD-FAITH REFUSAL TO SETTLE?

Standard of Review

By their nature, certified questions are solely issues of law and, therefore, should be considered under the de novo standard, Blanton v. City of Pinellas Park, 2004 WL 2359991 (Fla. 2004).

Argument

Under Florida law, the application of res judicata requires four elements: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the actions; and 4) identity of the person for or against whom the claim is made, McGregor v. Provident Trust Co., 162 So. 323 (Fla. 1935); Topps v. State, 865 So.2d 1253 (Fla. 2004); State v. McBride, 848 So.2d 287 (Fla. 2003). Appellants agree that res judicata applies to all matters actually raised and determined in the initial proceeding, as well as to all other matters which could properly have been raised and determined there, Id. However, Dadeland's statutory bad faith claim

constituted a separate and distinct cause of action from the breach of contract claims pursued in arbitration and, therefore, the first and second prerequisite to application of res judicata is not satisfied here.

Res judicata does not apply in this case because that doctrine cannot operate to bar a cause of action that had not accrued at the time of the initial proceeding. As discussed in Question III, supra, Florida law clearly holds that a statutory bad faith action under §624.155(1)(b)(1), Fla. Stat., does not accrue until the conclusion of the underlying litigation (or settlement) determines that the insured has a valid claim. This Court noted in Blanchard v. State Farm, supra, 575 So.2d at 1291:

> [A]n 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.

See also, Imhof, supra. That requires at least a determination (or settlement) in the first party action regarding coverage, Hartford Ins. Co. v. Mainstream Const. Group, Inc., 864 So.2d 1270, 1272 (Fla. 5th DCA 2004). A bad faith action brought prior to the satisfaction of the condition precedent is premature and must be stayed, abated or dismissed without prejudice, e.g., Allstate Ins. Co. v. Baughman, 741So.2d 624 (Fla. 2d DCA 1999); General Star Indemnity Co. v. Anheiser-Busch Companies, 741 So.2d 1259 (Fla. 5th DCA 1999).

The rationale of the trial court in the case sub judice is essentially that of the court in Schimmel v. Aetna Casualty & Surety Co., 506 So.2d 1162 (Fla. 3d DCA 1987), disapproved, Blanchard, supra. There, the Third District ruled that the statutory bad faith claim should have been brought in the same proceeding as the underlying contractual claim for insurance benefits. Since that claim was brought separately, and after the conclusion of the initial action, the Third District held that the plaintiff had improperly split his cause of action. However, the Schimmel decision was quashed in Blanchard, with the Court holding that the bad faith claim did not accrue until the conclusion of the underlying action. To accept the trial court's rationale would mean that even though Dadeland's bad faith action had not, and could not have, accrued at the time of the arbitration proceeding, Dadeland is now barred from pursuing it. The trial court's order contains no authority justifying that Catch-22 conclusion.

In Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd., 99 F.3d 746 (5th Cir. 1996), the court rejected res judicata as a defense to a tax indemnity claim, stating:

> It is axiomatic that a claim that has not yet accrued is not ripe for adjudication, and hence it is not a claim that "could have been litigated" in a previous lawsuit.

As a result, the court in that case determined that the claim for tax indemnity could not be barred by res judicata, because it had not accrued at the time of the prior lawsuit. Similarly here, Plaintiffs' bad faith claim had not accrued and, therefore, it could not have been litigated in the arbitration proceeding.

In Bank of Lyons v. Schultz, 399 N.E.2d 1286 (Ill. 1980), the Illinois Supreme Court held that res judicata did not apply to bar a claim for malicious prosecution. In that case, the plaintiff had been the subject of two wrongfully issued injunctions obtained by a bank which restrained the distribution of the proceeds of her husband's life insurance. In each of those proceedings, the plaintiff sought and received damages. After the injunction actions had been dismissed, the plaintiff filed a malicious prosecution action against the bank seeking additional damages. The bank contended that that action was barred by res judicata because the plaintiff could have, and actually did, receive some damages in the original action. The Illinois Supreme Court rejected that argument, stating (399 N.E.2d at 1289):

> [T]o have a cause of action for malicious prosecution, the suit which was wrongfully brought must have been determined in favor of the plaintiff. At the time the second injunction obtained by the bank had been dissolved, and when the plaintiff filed her second suggestion of damages, no cause of action for malicious prosecution could have arisen because the litigation brought against her by the bank had not yet been concluded in her favor.

Based on that reasoning, the court held that res judicata did not bar the plaintiff's claim, see also, Rooding v. Peters, 92 F.3d 578 (7th Cir. 1996) (plaintiff's §1983 claim not barred by res judicata based on prior mandamus proceeding, since §1983 claim did not accrue until the plaintiff had prevailed in the mandamus action); Lee L. Saad Const. Co., Inc. v. DPF Architects P.C., 851 So.2d 507 (Ala. 2002) (tort claims not barred by arbitration award under doctrine of res judicata, because they were not within the scope of the submission to the arbitrators).

Similarly here, the Plaintiffs could not have brought the statutory bad faith claim in the arbitration proceeding, because it had not yet accrued. That cause of action could not accrue until the conclusion of the arbitration proceeding which resolved Dadeland's claims against the principal and surety in its favor. That resolution satisfied the condition precedent for Dadeland's statutory bad faith claims, which could then accrue. Only after the arbitrator's decision could Dadeland pursue its bad faith claims and, therefore, as a matter of logic and basic equity, those claims cannot be barred based on the alleged preclusive effect of the arbitration decision. In fact, in its Answer Brief in the Eleventh Circuit, the sureties essentially conceded this point, stating (AB16):

> Clearly, the District Court determined Plaintiffs' claim for breach of contract, not the statutory bad faith action, is barred by res judicata.

Since this suit involves solely Dadeland's statutory bad faith claims, it is equally clear that it cannot be barred by res judicata. This action necessarily involved a different cause of action and a different "thing sued for," see Topps, supra, than the arbitration. As a result, the first two prerequisites for application for res judicata were not present in this case.

Therefore, this certified question should be answered in the negative.

QUESTION V

WILL AN ARBITRATOR'S DENIAL OF THE DEFENDANT'S AFFIRMATIVE DEFENSES IN A BREACH OF CONTRACT CLAIM COLLATERALLY ESTOP THE SAME DEFENDANTS FROM RAISING THE SAME DEFENSES IN A SUBSEQUENT BAD-FAITH REFUSAL TO SETTLE CLAIM AGAINST THE SAME PLAINTIFF?

Standard of Review

By their nature, certified questions are solely issues of law and, therefore, should be considered under the de novo standard, Blanton v. City of Pinellas Park, 2004 WL 2359991 (Fla. 2004).

Argument

Plaintiffs filed a Motion for Partial Summary Judgment, contending that the Defendants' third and fourth affirmative defenses should be barred under collateral estoppel, since those precise defenses were raised, litigated, and decided in the arbitration proceeding (R66). The trial court denied that motion on the basis that it was rendered moot its determination that res judicata barred the Plaintiffs' claims (R137-27-28). As argued in Question IV, supra, that determination was error. However, the issues raised in Defendants' third and fourth affirmative defenses should

be barred the arbitration award, because they were raised, litigated and actually determined in that proceeding.

Defendants' answer to the Complaint in this case included the following affirmative defenses (R36):

> Third Affirmative Defense. "Plaintiffs failed to comply with the provisions of the performance bond."
>
> Fourth Affirmative Defense. "Defendants are discharged from liability under the performance bond to the extent that Plaintiffs made payments to Walbridge for the work performed under the construction contract.

Plaintiffs' Motion for Partial Summary Judgment argued that the issues raised in the sureties' affirmative defense numbers 3 and 4 were actually considered in the arbitration proceeding and specifically rejected by the arbitrators (R66). Attached to Plaintiffs' Motion for Partial Summary Judgment was a copy of "St. Paul's Arbitration Memorandum" which had been submitted to the arbitrators, and contained the surety's summary of the relevant facts and discussion of its defenses (R66-Ex. A). Argument One in that memorandum was entitled "Dadeland's failure to comply with the terms of the bond bars its claim against St. Paul" (R66 Ex. A p.4). Argument One relied upon the provisions in section three of the bond regarding whether Dadeland had given the surety proper notice (R66-Ex. A pp.4-10). Argument Two in St. Paul's Arbitration Memorandum was entitled "Dadeland's improper payments to Walbridge bar or limit

Dadeland's claim against St. Paul" (R66-Ex. A pp.11-14). That argument contended that the Defendants were discharged from liability under the performance bond to the extent that the Plaintiffs had made payments to Walbridge for the work performed.

The arbitration award determined that Plaintiffs were entitled to damages and specifically states, inter alia (R71 Tab 23 p.5):

> The surety is bound to this award to the extent that its principal is obligated under the award and its defenses are denied. [Emphasis supplied.]

Thus, obviously, the arbitrators actually considered and rejected the two defenses presented by the surety, which are the same defenses presented in Defendants' Affirmative Defenses 3 and 4.

The prerequisites for application of collateral estoppel include 1) that the issue must be identical to the one involved in the prior proceeding; 2) the issue must actually have been litigated in the prior proceeding; and 3) the determination of the issue in the prior proceeding must have been a critical and necessary part of the judgment entered in that action, Dept. of Health & Rehabilitative Services v. B.J.M., 656 So.2d 906, 910 (Fla. 1995); DeWeese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir. 1982). An arbitration decision can provide an appropriate foundation for application of collateral estoppel, Greenblatt v. Drexel Burnham Lambert, 763 F.2d 1352, 1360 (11th Cir. 1985); Benjamin v. Traffic Executive Assoc. Eastern Railroads, 869 F.2d 107, 114

(2d Cir. 1989); Ivery v. United States, 686 F.2d 410, 413 (6th Cir. 1982), cert. den., 460 U.S. 1037 (1983); In Re Celotex Corp., 196 B.R. 602 (M.D. Fla. 1996); In Re Hallmark Builders, Inc., 205 B.R. 971, 972-74 (M.D. Fla. 1996); Restatement Second of Judgments, §84 and comment c (1982). Those authorities state that arbitration awards should be granted preclusive effect unless it is shown that the basic elements of adjudicatory procedure were not afforded in that proceeding, Greenblatt, supra, 763 F.2d at 1359; Hallmark, supra, 205 B.R. at 974. There has never been any suggestion in this case that the arbitration did not afford St. Paul a full and fair opportunity to present evidence and be heard on its defenses.

The only other exception to the preclusive effect of arbitration awards is mentioned in Restatement Second of Judgments, §84(3)(a), as being whether applying collateral estoppel or res judicata would be incompatible with a legal policy or law of the judicial tribunal. Again, the applicability of that exception has never been argued in this proceeding. It is important to note, however, that Florida courts have routinely held sureties to be bound by arbitration determinations, even when they have not appeared in that proceeding, if they had actual notice and their principal participated, see, Kidder Electrical of Florida, Inc. v. United States Fidelity and Guaranty Co., 530 So.2d 475 (Fla. 5th DCA 1988); Fewox v. McMerit Const. Co., 556 So.2d 419 (Fla. 2d DCA 1990); see also Von Engineering Co. v. R.W. Roberts Const. Co., 457 So.2d

1080 (Fla. 5th DCA 1984). Therefore, clearly there is no public policy consideration in Florida that mitigates against granting arbitration awards preclusive effect, when the surety has actively participated and obtained a ruling on an issue it raised.

The three prerequisites to application of collateral estoppel indisputably exists here. A comparison of the third and fourth affirmative defenses in the case sub judice with the defenses raised by the sureties in the arbitration proceeding, demonstrates that they are identical issues. Those defenses were actually litigated in the arbitration, and their determination was critical since, if valid, they would have precluded any award to the Plaintiffs. The arbitration explicitly rejected those defenses in the arbitration award. The sureties have never suggested that they were denied an opportunity to litigate those issues in that proceeding. Therefore, collateral estoppel should apply to preclude those issues being raised again in this suit. For these reasons, this certified question should be answered in the affirmative.

CONCLUSION

For the reasons stated above, the Certified Questions should be answered in the affirmative, except Question IV, which should be answered in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to LEE CRAIG, ESQ. and VERONICA D. VELLINES, ESQ., 6200 Courtney Campbell Causeway, Ste. 1100, Tampa, FL 33607-5946, by mail on November 17, 2004.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellants hereby certify that the type size and style of the Brief of Appellants on the Merits is Times New Roman 14pt.

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