IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC-05-1021
11th Circuit Case: 04-10436-AA
L.T. CASE NO. 8:02-cv-1675-T-26MAP
8:03-cv-1349-T-26EAJ

MICHELLE MACOLA and
INGE QUIGLEY,

Appellants,

-vs-

GOVERNMENT EMPLOYEES
INSURANCE COMPANY

Appellee.
___________________________________/

AMICUS CURIAE BRIEF ON BEHALF OF APPELLANTS
On Review of Certified Questions from the
Eleventh Circuit Court of Appeals

BURLINGTON & ROCKENBACH, P.A.
2001 Professional Building/Suite 410
2001 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 721-0400
(561) 721-0465 (fax)
Attorneys for Amicus Curiae
Academy of Florida Trial Lawyers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Introduction

The Academy of Florida Trial Lawyers (AAcademy@), pursuant to Fla.R.App.P. 9.370, hereby moves for leave to appear as Amicus Curiae in this case, to file a brief supportive of the Appellants.

The Academy is a voluntary state-wide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. Members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The Academy has been involved as amicus curiae in hundreds of cases in Florida appellate courts.

The Academy has an interest in this case as it directly affects the interpretation of insurance statutes and interaction of the statutory law with the common law. Because the certified questions relate directly to the settlement of claims, this Court=s decision will affect the amount of litigation in the state. The Academy believes that its member=s experience in litigation and the development of insurance bad faith law will provide this Court with insight and analysis which will be helpful in deciding the certified questions.

CERTIFIED QUESTIONS

The Eleventh Circuit certified the following questions:

(1) IN THE CONTEXT OF A THIRD PARTY BAD FAITH CLAIM WHERE THERE IS A POSSIBILITY OF AN EXCESS JUDGMENT, DOES AN INSURER "CURE" ANY BAD FAITH UNDER ' 624.155 WHEN, IN RESPONSE TO A CIVIL REMEDY NOTICE, IT TIMELY TENDERS THE POLICY LIMITS AFTER THE INITIATION OF A LAWSUIT AGAINST ITS INSURED BUT BEFORE THE ENTRY OF AN EXCESS JUDGMENT?

(2) IF SO, DOES SUCH A CURE OF THE STATUTORY BAD FAITH CLAIM CONSTITUTE A FULL SATISFACTION OF THE JUDGMENT SUCH THAT THE INSURED AND DERIVATIVE INJURED THIRD PARTIES ARE BARRED FROM BRINGING A COMMON LAW BAD FAITH CLAIM TO RECOVER THE DIFFERENCE BETWEEN THE POLICY LIMITS AND THE EXCESS JUDGMENT?

<u>Macola v. Government Employees Insurance Co.</u>
410 F.3d 1359, 1365 (11th Cir. 2005)

SUMMARY OF ARGUMENT

The certified questions present an issue of the insurer=s ability to cure its bad faith conduct by the payment of policy limits. Under Florida law, an insurer owes a fiduciary obligation to its insured with regard to the handling claims against the insured (so-called third party claims), and that duty cannot be satisfied by the mere tendering of policy limits after the injured claimant=s offer to settle claims against the insured has expired. By construing the insurer=s tender of the policy limits as a complete cure for purposes of '624.155(2)(d), Fla. Stat., and extinguishing the insured=s bad faith claim, the trial court›s solution exposed the insured to the excess judgment without protection, and let the insurer escape the ramifications of its own bad faith. That was not the legislature=s intent, and it will only serve to discourage the use of the civil remedy procedure by insureds in the third party context.

In a first party bad faith situation, the relationship between the insurer and the insured is essentially that of a debtor/creditor, and the failure to pay timely can be cured by the payment of the policy benefits. Any additional harm from the insurer=s delay in making payment can be compensated by an award of interest to the insured. However, that reasoning does not apply in a third party context where the harm to the insured is the excess judgment, and the payment of the policy proceeds must be timely with respect to the injured claimant=s demand in order to avoid that harm. As a result, the mere payment of the policy limits after the claimant=s demand has expired does not cure the damage caused by the insurer=s bad faith, and cannot justify extinguishment of the insured=s cause of action pursuant to '624.155(2)(d), Fla. Stat. At that point the horses have left the barn, and closing the door helps no one. For these reasons, the first certified question should be answered in the negative.

The second certified question appears to be an alternate way of stating the same question as the first. Both questions rely on the concept of a complete cure of bad faith conduct through the untimely payment of policy limits to the insured. As a result, the second certified question is either moot or should be answered in the negative.

ARGUMENT

The trial court=s ruling in this case is not consistent with Florida case law, and fails to properly distinguish between the duties owed by an insurer in a third party context and those at issue in a first party claim. Allowing the insurer to cure its alleged bad faith by the simple tender of policy limits nine months after the claimant=s deadline to settle is not consistent with the fiduciary duty owed to the insured, nor does it implement the legislative intent of '624.155, Fla. Stat. The trial court=s analysis allows the insurer to avoid the consequences of its bad faith, and leaves the insured with a judgment which would not have been entered against him if the insurer had not acted in bad faith. This is contrary to the legislative intent, which was to encourage the early resolution of bad faith claims without sacrificing the insured=s interests. For these reasons, the first certified question should be answered in the negative.

Historical Context of the Statute

As noted by the Florida Supreme Court in Talat Enterprises, Inc. v. Aetna Casualty and Surety Co., 753 So.2d 1278 (Fla. 2000), a proper construction of '624.155(2)(d), Fla. Stat. Amust take into account the entire civil remedy statute and place it into historical context.@ This brief will address the historical context first, and then address the statute.

Prior to the enactment of '624.155, Fla. Stat., in 1982, there was no recognized cause of action for first party bad faith in Florida. The insured was limited to a breach of contract claim against the insurer, with the damages limited by common law contractual principles, unless the insurer committed a separate tort in its handling of the claim, Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973). This was based on the rationale that the nature of the relationship between the insured and the insurer in a first party context was essentially that of a debtor/creditor; and, in fact, the interests of the insured and insurer were wholly adverse with respect to the payment of claims, Baxter, supra, and State Farm Mutual Auto. Ins. Co. v. LaForet, 658 So.2d 55 (Fla. 1995). Additionally, as noted in Baxter, claims in the first party context are not controlled by the insurer to the exclusion of the insured, as is the case with third party claims under liability policies. If the insured believes that the insurer failed to pay the first party claim within a reasonable time, the insured can demand arbitration or pursue litigation, and the compensation for the insurer's delay is the payment of interest at the legal rate, Baxter, 285 So.2d at 656-57; Greene v. Well Care HMO, Inc., 778 So.2d 1037, 1042 (Fla. 4th DCA 2001).

An injured claimant's right to bring a claim for third party bad faith against a liability insurer was recognized in Florida in 1938, in Auto Mutual Indemnity Co. v. Shaw, 184 So.2d 852 (Fla. 1938). In that case, the third party claimant was determined to have a right to recover from the insurer the excess judgment against the insured, based on certain provisions in the policy at issue. Subsequently, in Thompson v. Commercial Union Ins. Co. of New York, 250 So.2d 259 (Fla. 1971), the Florida Supreme Court held that the injured claimant was a third party beneficiary of the liability insurance policy as a result of the public policy of Florida as contained in the Florida Financial Responsibility Law.

A claim for third party bad faith is predicated on the breach of the fiduciary duty owed by the liability insurer to its insured, which was described by the Florida Supreme Court in Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980), as follows:

> For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. [Citations omitted.]

These duties, the breach of which can justify a finding of bad faith[1] cannot be satisfied by the insurer's mere tender of policy limits, especially when no release nor satisfaction of judgment is obtained from the claimant. By acting in bad faith, the insurer in a third party

[1]/This list of duties owed by a liability insurer to its insured is not exhaustive. For example, in Powell v. Prudential Property & Casualty Ins. Co., 584 So.2d 12, 14 (Fla. 3d DCA 1991), the court noted that bad faith liability may be predicated on an insurer's refusal to disclose policy limits to the claimant, since it may prevent the claimant from

context causes a judgment to be entered against the insured in excess of the policy limits, see Fidelity and Casualty Co. of New York v. Cope; 462 So.2d 459 (Fla. 1985); Standard Jury Instructions in Civil Cases (No. 03-01), 849 So.2d 1083 (Fla. 2003). It stands to reason that to cure the bad faith, the insurer would have to correct the effects of the bad faith.

The Enactment of ' 624.155, Fla. Stat.

In 1982, the Florida Legislature enacted '624.155, Fla. Stat., which granted insureds a civil remedy, for the first time, to enforce a first party bad faith claim against their insurer, with damages greater than those available under general contractual principles. The statute also creates a civil remedy for any person damaged by a violation of specified sections of the Unfair Insurance Trace Practices Act, and certain unfair claims settlement practices enumerated in '624.155(1)(b), Fla. Stat.

The Florida Supreme Court also deemed the statute to be a codification of the existing common law, enunciated in Thompson and Cope, to the extent it authorized a third party bad faith claim without an assignment from the insured, upon entry of an excess judgment, State Farm Fire & Casualty Co. v. Zebrowski, 706 So.2d 275 (Fla.

---

being able to evaluate the case and, thus, impede settlement.

1997). However, the statute explicitly provides that nothing in it was intended to preempt any other remedy or cause of action, statutory or common law, '624.155(8), Fla. Stat.

As a prerequisite to bringing an action under the statute, it requires that a civil remedy notice be served on the insurer and if Adamages are paid or the circumstances giving rise to the violation are corrected,@ by the insurer, Ano action shall lie,@ '624.155(3)(a) and (d), Fla. Stat. The purpose of that condition precedent is to give the insurer Aone last chance to settle a claim with its insured and avoid unnecessary bad faith litigation,@ Lane v. Westfield Ins. Co., 862 So.2d 774, 779 (Fla. 5th DCA 2003). In 1987, that provision was amended to require more specificity in the civil remedy notice, to permit the Department of Insurance to return civil remedy notices which did not contain sufficient detail, and to require insurers to report to the Department of Insurance the disposition of the alleged violations, Ch. 87-278, '1 Laws of Florida.

Florida Case Law Does Not Support the District Court=s Ruling

In Talat Enterprises, Inc. v. Aetna Casualty and Surety Co., 753 So.2d 1278 (Fla. 2000), this Court answered a certified question from the Eleventh Circuit regarding whether an insurer=s payment of all the contractual damages to the insured within 60 days of a civil remedy notice Aprecluded the insured=s first-party bad faith action to recover the extra-contractual damages@ (753 So.2d at 1280). Not only was the certified question phrased solely in the context of a first party claim, but the Florida Supreme Court=s discussion was limited to that context. Thus, Talat is not on point with the circumstances of this case.

Talat involved a claim for fire damages under a commercial property insurance policy in which the parties= dispute regarding the amount of the contractual benefits was decided by arbitration. Within thirty days of that decision, the insurer paid the insured all the damages awarded by the arbitrators. Thereafter, the insured filed its civil remedy notice and, subsequently, a statutory bad faith suit. The federal magistrate entered summary judgment in favor of the insurer, determining that by timely satisfying the arbitrator=s award it had paid all the contractual damages and had corrected the circumstances giving rise to the bad faith violation within the meaning of '624.155(2)(d), Fla. Stat. As a result, the magistrate concluded that the plaintiff=s statutory first party bad faith claim had been extinguished.

On review of the certified question, this Court specifically limited its discussion to first party claims, although its opinion contained an explicit acknowledgment that third party claims were not subject to the same analysis. The opinion adopted the reasoning of the federal magistrate, that the timely payment of the contractual benefits had satisfied the requirements of '624.155(2)(d), Fla. Stat., and quoted at length from it. That quotation included the following sentence (753 So.2d at 1282):

> To cure an alleged violation and to avoid a civil action, an insurer must pay the claim (sometimes in excess of policy limits in the third-party context) before the sixty days expire. [Emphasis supplied.]

See also, Oak Casualty Ins. Co. v. Travelers Indemnity Co., 778 So.2d 483, 484 (Fla. 3d DCA 2001) (quoting same language). Clearly, that statement demonstrates that third party bad faith claims are not always subject to being Acured@ by the simple payment of the policy limits.

The trial judge=s opinion in the case sub judice did not mention the reference discussed above from Talat, nor attempt to reconcile the decision in Hollar v. International Bankers Insurance Co., 572 So.2d 937 (Fla. 3d DCA 1990), which is consistent with it. In Hollar, the Third District held that the insurer=s tender of the policy limits did not extinguish the third party bad faith cause of action, since those limits were several hundred thousand dollars less than the judgment entered against the insured. The court specifically rejected the insurer=s contention that it had paid the Adamages@ contemplated by '624.155(2)(d), Fla. Stat., by tendering the policy limits (572 So.2d at 939):

> In the instant case, insurers= self-serving reading of the term Adamages@ as being confined to policy limits is an illogical interpretation, a radical departure from the decisional law and, further, an explanation in no way consistent with the legislature=s stated desire for insurers to act in good faith towards their insureds.

That analysis is consistent with this Court=s decision in Cope, which characterizes the damages in a third party claim as primarily the excess judgment, not the policy limits. The Hollar decision is supported by Dunn v. National Security Fire and Casualty Co., 631

So.2d 1103, 1106 (Fla. 5th DCA 1993), in which the court ruled that a common law third party claim could not necessarily be satisfied by the insurer=s payment of the excess judgment:

> Further, although payment of the excess judgment obtained against an insured may satisfy the provable damages in most cases, it is not the sole measure of damages in bad faith cases. Punitive damages, attorney=s fees, and other consequential damages may be recoverable in appropriate cases. If the rule were otherwise, it would permit an insurance company to flagrantly disregard its insured=s interests, and when a bad faith suit is brought, to destroy the cause of action by paying the judgment, despite other resulting damages. [Citations omitted.]

In the case sub judice, the trial court did not describe the insurer=s tender of the policy limits as the payment of Adamages@ contemplated by '624.155(2)(d), Fla. Stat. (perhaps in sub silentio deference to Hollar). However, it did conclude that by tendering the policy limits, the insurer Acured the violation claimed by Mr. Quigley in his [civil remedy] notice@ (Opinion p.10). That, of course, is not the statutory language, which precludes the statutory cause of action if Athe circumstances giving rise to the violation are corrected,@ '624.155(2)(d), Fla. Stat. Clearly, the circumstances giving rise to the alleged bad faith violations were not corrected by the tender of the policy limits more than nine months after the deadline contained in Macola=s offer to settle, especially since the Quigleys were still exposed to an excess judgment. Those circumstances could only be corrected by obtaining a release or satisfaction of judgment from the injured claimant, see Cope, supra; Brooklins v. Goodson, 640 So.2d 110, 113 (Fla. 4th DCA 1994), or reaching some other agreement with the claimant that would protect the insured, see Cunningham v. Standard Guaranty Ins. Co., 630 So.2d 179 (Fla. 1994).

In the third party context, the simple payment of policy limits does not correct the insurer=s bad faith failure to settle the claim after the opportunity for settling within the policy limits has been lost.[2] This is distinguishable from the first party situation in which the delay in payment of benefits can be compensated by an award of interest to the insured, see Baxter, supra. However, unreasonable delay in settlement negotiations in

---

[2]/Clauss v. Fortune Ins. Co., 523 So.2d 1177 (Fla. 5th DCA 1988), does not hold to the contrary. There, the court initially ruled that the insurer=s alleged delay in responding to the claimant=s demand was not, as a matter of law, bad faith. This was based on the unreasonable time limitations imposed by the claimant and the fact that the insurer expressed a willingness to tender the policy limits from the outset, if verification of the alleged damages was provided. After that discussion, in dicta, the court alternatively ruled that the insurer had corrected the circumstances giving rise tot he alleged bad faith violation by Atimely tendering the policy limits.@ Clauss cannot be reasonably be construed as holding that a third party bad faith violation is always cured by the tender of policy limits, no matter what the time period between the claimant=s demand and the tender.

third party cases cannot be so easily remedied, as it can result in the loss of an opportunity to resolve the case with the claimant and, thereby, protect the insured.

As noted previously, the Florida Supreme Court in Boston Old Colony v. Gutierrez, supra, identified the various fiduciary obligations inherent in the insurer's right to control the disposition of liability claims. These include, inter alia, proper investigation of the facts, advising the insured of settlement opportunities, controlling the negotiation process, and advising the insured of steps he or she might take to avoid an excess judgment (Ibid, 386 So.2d at 785). To the extent that any of those duties have been violated by the insurer, the untimely tender of policy limits does nothing to correct them. While, in Talat, the insurer could satisfy its contractual duties by timely paying the entire arbitration award, here the trial court has ruled that the insurer has cured the bad faith without even complying with all its contractual obligations to the insured.

In fact, there are situations in which an insurer's tender of policy limits would be precisely what the insured did not desire, in order to remedy an insurer's bad faith refusal to properly handle settlement negotiations. In Farinas v. Florida Farm Bureau General Ins. Co., 850 So.2d 555 (Fla. 4th DCA 2003), the court addressed a situation in which there were multiple claimants with damages well in excess of the insured's liability limits. The insured alleged that the insurer had arbitrarily paid out the limits to a few of the claimants, without attempting to resolve all claims in a manner that would adequately protect the insured. This issue had been previously addressed by the Florida Supreme

Court in Schuster v. South Broward Hospital District Physicians Professional Liability Ins. Trust, 591 So.2d 174, 177 (Fla. 1992):

> For example, when there are multiple parties to a suit, we do not believe a Adeems expedient@ clause will protect an insurer who, in bad faith, indiscriminately settles with one or more of the parties for the full policy limits, thus exposing the insured to an excess judgment from the remaining parties. Clearly, the intent of the parties would not have been to allow the insurer to escape its primary duty to defend and indemnify the insured merely by paying out the full sum of the policy limits in bad faith.

See also, Liberty Mutual Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969). In Farinas, the court held that the insurer had the obligation to reasonably evaluate the various claims, as opposed to paying claims on a Afirst-come, first served@ basis, and to attempt to settle the claims in a manner that would best protect the insured.

However, under the rationale of the trial court in the case sub judice, the payment of the policy limits in Farinas would satisfy the insurer=s obligations, and thereby insulate it from any claim of bad faith. This would be inconsistent with the fiduciary obligations owed to the insured in that context, and represents a situation in which payment of the policy limits would not cure, but only aggravate, the insured=s situation.

Clearly, the attempt to correct the circumstances leading to the insurer=s bad faith violation in a third party context cannot be based simply on the tendering of policy limits without obtaining any protection for the insured. As noted in Talat, in this situation it may be necessary for the insurer to tender more than the policy limits, in order to obtain either a release from the claimant, a satisfaction of the excess judgment, or some type of agreement which protects the interest of the insured.

<u>**The District Court=s Reasoning Frustrates Legislative Intent**</u>

Finally, to accept the reasoning of the trial court in this case would discourage insureds from utilizing the civil remedy notice in an attempt to cure third party bad faith claims. The only time that procedure would benefit the insured would be in a situation in which it was filed almost contemporaneously with the claimant=s policy limit demand, as occurred in <u>Clauss</u>, <u>supra</u>. In any other situation, the mere tender of policy limits would be ineffective to protect the insured from an excess judgment, and to pursue the statutory remedy under those circumstances could only harm the insured by permitting the insurer to avoid its responsibility for its bad faith conduct. To put it bluntly, an insured would have to be a fool to serve a civil remedy notice under circumstances such as the case <u>sub judice</u>, or in a multiple claimant situation such as <u>Farinas</u>, <u>supra</u>, since there would be virtually nothing to gain and everything to lose as a result.

The District Court=s opinion claims that to accept the Plaintiff=s construction of the statute would render the notice and cure provisions meaningless, because Ahaving complied with these safe harbor provisions, [the insurer] would nonetheless continue to be exposed to a storm of bad faith litigation@ (Opinion p.12). That reasoning, of course, begs the question of whether the insurer has complied with the Acure@ requirement of

'624.155(2)(d), Fla. Stat. The District Court's analysis assumes that the legislature intended to allow the insurer to cure the situation by simply paying policy limits and leave the insured to pay the excess judgment. There is no legislative authority cited for that rationale. Furthermore, the District Court did not acknowledge the necessary result of its decision, which is that an insured cannot reasonably rely on the civil remedy notice because it does not assure any protection from an excess judgment. Instead, a reasonable insured will simply permit the third party common law bad faith claim to proceed to an excess judgment in the manner it would have prior to the enactment of the statute. As noted above, to do otherwise would be self-destructive to the insured.

The Florida Legislature clearly intended that the civil remedy notice procedure would serve a salutary purpose by providing an opportunity to settle the bad faith claims expeditiously and avoid unnecessary bad faith litigation. When the legislature amended the provisions regarding the civil remedy notice in 1987 to require greater specificity, the legislative history reiterated the desire that the condition precedent would encourage resolution of such claims, House of Representatives Committee on Insurance - Staff Analysis - House Bill 428 p.2:

> The greater detail required in the notice of a civil remedy action will improve the record-keeping of the department with regard to insurance company practices and will also increase the likelihood that an insurer will correct a violation, either on its own accord or at the direction of the department.

However, to accept the District Court's reasoning would result in a situation in which the injured claimant and the insured would rely solely on the common law third party bad faith remedy, and would have no reason to invoke the civil remedy notice procedure as a means to resolve the claim. This would frustrate the legislature's intent of encouraging resolution of such claims, maintaining records of complaints against insurers, and permitting the Department of Insurance to participate, when appropriate, in the process. Therefore, for this additional reason, the certified question should be answered in the negative.

CONCLUSION

For the reasons stated above, the first certified question should be answered in the negative. Doing so renders the second certified question moot.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true copy of the foregoing was served to SHEA MOXON, ESQ., DALE SWOPE, ESQ., ANGELA RODANTE, ESQ., 1234 E. 5th Ave., Tampa, FL 33605; RICHARD YOUNG, ESQ. and STEPHEN GILL, ESQ., 226 Palafox Place, Ste. 700, Pensacola, FL 32501; RAYMOND HAAS, ESQ., 1901 N. 13th St., Tampa, FL 33605; PAUL CARDILLO, ESQ., 209 W. Verne St., Tampa, FL 33606; LEFFERTS MABIE, III, P.O. Box 499, Tampa, FL 33601; and ROY WASSON, ESQ., Gables Tower, Ste. 450, 1320 S. Dixie Hwy., Miami, FL 33146-2911; JANIS B. KEYSER, ESQ., 400 Australian Ave. S., 5th FL, West Palm Beach, FL 33401, by mail, on July 25, 2005.

BURLINGTON & ROCKENBACH, P.A.
2001 Professional Building/Suite 410
2001 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
(561) 721-0400
(561) 721-0465 (fax)
Attorneys for Amicus Curiae
Academy of Florida Trial Lawyers

By:__________________________
PHILIP M. BURLINGTON
Florida Bar No. 285862

By:__________________________
BARD D. ROCKENBACH
Florida Bar No. 771783

C:\PMB\AMICUS\P\MACOLA\P\SCT.AMICUS.wpd\GG

CERTIFICATE OF TYPE SIZE & STYLE

Amicus Curiae, Academy of Florida Trial Lawyers, hereby certifies that the type size and style of the Brief of Amicus Curiae is Times New Roman 14pt.

PHILIP M. BURLINGTON
Florida Bar No. 285862