IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-1021
11th Circuit Case No.: 04-10436

MICHELLE MACOLA and INGE QUIGLEY,

Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Appellee.

AMICUS CURIAE BRIEF OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IN SUPPORT OF APPELLEE, GOVERNMENT EMPLOYEES INSURANCE COMPANY

Proceeding to Review Questions Certified from the
United States Court of Appeals for the Eleventh Circuit

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae, State Farm Mutual Automobile Insurance Company ("State Farm"), is an Illinois corporation with its principal place of business in Bloomington, Illinois. State Farm is authorized to issue and is in the business of issuing automobile insurance policies in the State of Florida. By market share, State Farm is the largest writer of automobile insurance policies in Florida. State Farm's policies typically include liability coverage whereby State Farm assumes the defense of its insureds who are involved in automobile accidents and sued by third-parties as a result. The certified questions involved in this case are of vital interest to State Farm in the conduct of its business as an insurer in Florida as well as in its conduct of the defense of its insureds in litigation instituted by third parties in Florida.

SUMMARY OF THE ARGUMENT

Section 624.155 provides that "[n]o action will lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected." As this Court has held, tender of the amount available and owed under the insurance contract is all that is required to effect a cure under this provision and extinguish a potential bad faith claim under the statute. Talat Enterprises, Inc. v. Aetna Cas & Sur. Co., 753 So. 2d 1278 (Fla. 2000).

Accordingly, GEICO's tenders of its policy limits before expiration of the 60-day cure period extinguished any potential third-party bad faith claim under the statute.

Under Florida law, satisfaction of a right asserted will estop a plaintiff from pursuing other consistent remedies or, stated otherwise, satisfaction of a claim by one remedy puts an end to all other remedies. Even assuming third-party bad faith claims asserted under section 624.155 and the common law are consistent remedies, GEICO's satisfaction of the right Plaintiff Quigley asserted under section 624.155 by curing within the statutory cure period necessarily extinguished and put an end to the identical common law claim.

ARGUMENT

The United States Court of Appeals for the Eleventh Circuit certified the following two questions to this Court:

> (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?

Macola v. Government Employees Ins. Co., 410 F.3d 1359, 1365 (11th Cir. 2005). As discussed below, both questions should be answered in the affirmative.

I. AN INSURER CURES AND EXTINGUISHES ANY POTENTIAL THIRD-PARTY BAD FAITH CLAIM UNDER § 624.155 WHEN, IN RESPONSE TO A CIVIL REMEDY NOTICE, IT TIMELY TENDERS THE POLICY LIMITS.

The first question certified to this Court is whether a third-party bad faith claim under section 624.155 is cured and extinguished when the insurer tenders the policy limits before expiration of the 60-day cure period following the filing of a civil remedy notice.[1] In Talat Enterprises, Inc. v. Aetna Cas & Sur. Co., 753 So. 2d 1278, 1283 (Fla. 2000), this Court already effectively answered this question in the affirmative, albeit in the context of a first-party bad faith claim. But, as explained below, this Court's holding in Talat, interpreting the legislative intent behind and the meaning of the cure provision in section 624.155, necessarily applies to a third-party bad faith claim as well.

In 1982, the Legislature enacted section 624.155, which provides in pertinent part:

> (1) Any person damaged . . .
>
> * * * *

[1] There is no distinction between GEICO's tenders and actual payment of the policy limits since an insured or third party certainly can not avoid the cure provisions of the statute by simply refusing to accept a tender that would otherwise cure and extinguish a potential bad faith claim under the statute.

> (b) By the commission of any of the following by an insurer:
>
> 1. 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;
>
> * * * *
>
> may bring a civil action against such insurer . . . .

§ 624.155(1)(b)1, Fla. Stat. (Supp. 1982).

In section 624.155(1)(b)1, the Legislature codified the third-party bad faith cause of action previously recognized under Florida common law and provided for a statutory remedy as an alternative to the existing common law remedy.[2] See State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275, 277 (Fla. 1998)(holding this section codifies the common law third-party bad faith action discussed in Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla.

[2] Although irrelevant here, section 624.155 also expands, by statutory duty, the duty of good faith to first-party claim handling. In this regard, however, it is important to recognize that the statutory duty of good faith in the handling of a first-party insurance claim imposed by section 624.155(1)(b)1, while a codification of the common law duty in the third-party bad faith context, is a purely statutory creation and does not give rise to any common law fiduciary relationship or common law duties related thereto. See § 624.155(7), Fla. Stat. (Supp. 1990)("This section shall not be construed to create a common law cause of action."). Thus, first-party bad faith claims can be brought only under the statute and must be brought in accordance with the procedures provided in the statute. See Talat, 753 So. 2d at 1283-84 (there is no remedy for first party bad faith without section 624.155, and the procedural requirements of the statute must be complied with in order to pursue such a claim).

1971), and Fidelity & Cas. Co. of New York v. Cope, 462 So. 2d 459 (Fla. 1985)). See also Farinas v. Florida Farm Bureau General Ins. Co., 850 So. 2d 555, 559 (Fla. 4th DCA 2003)(holding the duty of good faith as explained and defined by the Court in Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), is incorporated into section 624.155(1)(b)1). Like the common law claim, the duty of good faith underlying the statutory claim runs from the insurer only to the insured; thus, the injured third party's statutory claim, like a common law claim, is derivative of the insured's claim. Zebrowski, 706 So. 2d at 277; Cope, 462 So. 2d at 460-61. See also State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995); McLeod v. Continental Ins. Co., 591 So. 2d 621, 625 (Fla. 1992). Unlike a common law third-party bad faith claim, however, a third-party bad faith claim brought under section 624.155 allows a successful insured or third-party claimant to recover attorneys' fees. Zebrowski, 706 So. 2d at 277.

In creating section 624.155, the Legislature imposed a presuit notice requirement and a cure opportunity. Specifically, "[a]s a condition precedent to bringing an action under this section, the department and the insurer must have been given 60 days written notice of the violation." § 624.155(2)(a), Fla. Stat. (Supp. 1982). And, "[n]o action will lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected." § 624.155(2)(d), Fla. Stat.

The purposes of the notice and cure provisions are at least two-fold. First, "it is plain that the Legislature intended the notice to the Department to serve as a basis for the Department to assist in the settling of claims and to monitor the insurance industry." Talat, 753 So. 2d at 1283. Second, it "also is plain that the sixty-day period was a time in which the insurer could act to 'cure' a violation of subdivision (1)(a) or (b) about which it had been served notice." Id. Thus, by these provisions, the Legislature intended to provide insurers an opportunity to avoid any subsequent bad faith litigation by making payment under the insurance contract when compliance with their good faith claim handling obligations called for such payment. Id. at 1281-84. That is, the purpose of the notice and 60-day cure period is to give the insurer one last chance to settle a claim and avoid unnecessary bad faith litigation – not to give an insured or third-party claimant a right of action against the insurer. See Lane v. Westfield Ins. Co., 862 So. 2d 774, 779 (Fla. 5th DCA 2003).

In Talat, the insured submitted a claim to its insurer for property damage and loss of business income arising out of a fire at its restaurant premises. As a result of the insurer's unjustified delays and other bad faith conduct, the insured was forced into bankruptcy and ultimately had to shut down its business. An arbitration ultimately led to a determination that the insurer owed the insured $331,930 under the insurance contract, which the insurer paid within 30 days of the

arbitration award. Thereafter, the insured issued a civil remedy notice under section 624.155(2)(a) and filed an action for bad faith against the insurer, alleging a violation of section 624.155(1)(b)1. 753 So. 2d at 1279-81.

On certification from the Eleventh Circuit, this Court, in a unanimous decision, agreed with the federal district court that the insurer's payment of the arbitration/appraisal award (reflecting the "contractual damages" due under the insurance policy) before expiration of the 60-day cure period established payment of the "damages" and correction of the "circumstances giving rise to the violation" within the meaning of section 624.155(2)(d). Id. at 1279-84. This Court also expressly rejected the insured's and the Academy of Florida Trial Lawyer's ("AFTL") argument, repeated in this case, that, in order to cure a violation of the good faith provision of the statute, the insurer is required to pay not only the contractual damages due under the insurance contract, but also the extra-contractual damages caused by its bad faith conduct. Id.

In reaching this result, this Court agreed with the following reasoning of the federal district court, which is equally pertinent in a third-party bad faith context:

> The Court rejects as unsupported [the insured's] contention that the insurer must not only pay the claim within the sixty-day window, but must also pay all compensatory damages that flow from any delay in settling the claim. Section 624.155 does not impose on an insurer the obligation to pay whatever the insured demands. The sixty-day window is designed to be a cure period that will encourage payment of the underlying claim, and avoid unnecessary bad faith litigation. Surely an insurer need not immediately pay 100% of the damages

> claimed to flow from bad faith conduct in order to avoid the chance that the insured will succeed on a bad faith cause of action. If the insurer may avoid a bad faith action only by paying in advance every penny of the damages that it faces if it loses at trial, the insurer would have no reason to pay. . . . Section 624.155(2)(d) would have no effect or purpose under such an interpretation. The law does not support such an expansive and illogical reading of Fla. Stat. Ann. § 624.155(2)(d).

Id. at 1281-82.

Although noting that the Legislature was less than precise in its use of the word "damages" in the statute, this Court held that "section 624.155(2)(d), Florida Statutes (1993), cannot reasonably be construed to require payment of extra-contractual damages to avoid bad-faith litigation." Id. at 1283 (emphasis added). Thus, this Court held that a "statutory cause of action for extra-contractual damages simply never comes into existence until expiration of the sixty-day window without the payment of the damages owed under the contract." Id. at 1284 (emphasis added).

Much of the Court's discussion in Talat is phrased in terms of the first-party insurance claim underlying the first-party bad faith action involved there. The Court's holding and reasoning as to the proper interpretation of the statutory cure provision, however, is equally applicable to a third-party bad faith claim brought under the statute. As this Court has noted on a number of occasions, section 624.155 "does not differentiate between first- and third-party actions." McLeod, 591 So. 2d at 623. See also Allstate Ind. Co. v. Ruiz, 899 So. 2d 1121, 1126 (Fla.

2005)("section 624.155 does not distinguish between statutory first- and third-party actions"); Laforet, 658 So. 2d at 60, 62 (section 624.155 does "not distinguish between first- and third-party actions" and "provides remedies for both first- and third-party causes of action"). There is nothing in the notice and cure provisions of section 624.155, or in the legislative history to the statute, that suggests the Legislature intended the provisions to be interpreted and applied differently in first-party versus third-party actions brought under the statute.

It necessarily follows that, since "section 624.155(2)(d) . . . cannot reasonably be construed to require payment of extra-contractual damages to avoid bad-faith litigation" in the first-party context, as this Court held in Talat, 753 So. 2d at 1283, the same must be true in the third-party context. Again, there is nothing in the statute or its legislative history that could lead this Court to interpret the single cure provision of the statute in one fashion for first-party claims, and in another fashion for third-party claims. Accordingly, payment or tender of the policy limits – the most contractual damages that could be owed under the insurance contract – before expiration of the 60-day cure period necessarily cures and extinguishes any potential third-party bad faith claim under the statute.

This was the holding of the Fifth District in Clauss v. Fortune Ins. Co., 523 So. 2d 1177 (Fla. 5th DCA 1988). There, the insurer tendered the policy limits to the injured third party one day after expiration of a time-limit settlement demand

and issuance of the civil remedy notice under section 624.155, but the tender was declined as untimely. Id. at 1177-78. The injured party then filed suit against the insured and obtained an excess judgment. Id. at 1177 n. 2. Thereafter, the injured party brought a third-party bad faith action against the insurer, asserting claims under both the common law and section 624.155. Id. at 1178. The Fifth District held that summary judgment was properly entered for the insurer because the tender of the policy limits satisfied the cure provision of the statute by correcting "the circumstances giving rise to the violation" thereby precluding a third-party bad faith action under section 624.155. Id. at 1179.

Plaintiffs and AFTL in the present case rely on Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990), to argue that the "damages" contemplated in section 624.155(2)(d) that must be paid to cure an alleged violation of the statute and extinguish a third-party bad faith claim under the statute are the extra-contractual damages caused by the bad faith conduct, i.e., the excess judgment. Hollar does, indeed, support that argument, provided the excess judgment is entered before the filing and service of the civil remedy notice. But Hollar was decided 10 years before this Court's decision in Talat and directly conflicts with this Court's later interpretation of the same statutory provision in Talat, where this Court held that "section 624.155(2)(d) . . . cannot reasonably be

construed to require payment of extra-contractual damages to avoid bad-faith litigation." 753 So. 2d at1283.

It is significant that this Court cited Clauss, a third-party bad faith claim involving an excess verdict, with approval in Talat for the proposition that the cure provision does not require payment of extra-contractual damages in order to avoid bad faith litigation. See Talat, 753 So. 2d at 1282. In contrast, no where in this Court's Talat opinion did the Court cite Hollar as reflecting a correct interpretation of the statutory cure provision. This is telling given Hollar was the principal authority relied upon by the insured and AFTL in Talat for the argument that the statute required payment of the extra-contractual damages caused by the insurer's bad faith conduct in order to effect a cure – an argument expressly rejected by this Court.[3] See Talat.

It also bears mentioning that the policy arguments Plaintiffs and AFTL make here were also made by the insured and AFTL and rejected by this Court in Talat.

[3] See Appellant's Initial Brief in Talat at 9, 11-12, 22 n. 46; Brief of AFTL in Talat at 11-12. This Court can take judicial notice of and examine briefs filed with it in this previous case to determine the arguments previously presented and considered. See, e.g., Salters v State, 758 So. 2d 667, 669 n. 6 (Fla. 2000); Gorham v. State, 494 So. 2d 211, 211-12 (Fla. 1986). See generally Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310, 313 (Fla. 1983)(it is proper for party to refer a court to its own previous decision, even if unpublished, where the same issue was addressed to suggest to the court how it previously viewed the issue since the court has the records of such decisions to review and the opportunity to discuss such cases collegially).

In Talat, the insurer's bad faith actions drove the insured into bankruptcy and caused the closing of its business – substantial extra-contractual damages caused by the bad faith conduct certainly akin to the excess judgment the insured faces in the present case. 753 So. 2d at 1280. The insured and AFTL argued in Talat, as they do here, that interpreting the cure provision to allow extinguishment of a bad faith claim by mere payment of the amount due under the contract within the 60-day cure period rather than payment of the extra-contractual damages caused by the bad faith conduct "turns what was intended to be a consumer protection law into an amnesty program for bad-faith insurers." Id. at 1281.

Indeed, the "parade of horribles" presented in Talat far exceeded the excess judgment exposure posited in this case and, like here, the insured and AFTL argued in Talat that the legislature must have intended the payment of the extra-contractual damages caused by the bad faith conduct in order to cure or the statute provided no protection to the insured.[4] Nevertheless, this Court unanimously rejected these arguments and held that to interpret the statute to require an insurer

[4] For instance, the insured in Talat posited that a holding that an insurer could cure by mere payment of the amount due under the contract would allow an insurer, in a medical insurance context, to literally kill an insured or cause an insured needless pain and suffering by withholding payment for needed medical care content that it could avoid bad faith exposure by merely paying the bills within 60 days of a civil remedy notice. See Appellant's Initial Brief in Talat at 28. See generally Appellant's Initial Brief in Talat at 23-30; Brief of AFTL in Talat at 14-15. See supra note 3.

to pay in advance the extra-contractual damages it would have to pay if it lost a later bad faith suit in order to avoid the bad faith suit would be illogical and render the notice and cure provisions meaningless. Id. at 1282. The same reasoning is equally applicable in a third-party claim context.

Finally, but significantly, it is important to note that the Legislature has reenacted and even amended section 624.155 a number of times since this Court's holding in Talat, as well as the Fifth District's holding in Clauss, construing the cure provision of section 624.155 to require payment of only contractual and no extra-contractual damages to effect a cure and extinguish a bad faith claim under the statute. Yet the Legislature has not amended the statute in any way to modify this construction.[5] Accordingly, the Legislature is presumed to have approved, endorsed and accepted this interpretation of the cure provision in the statute. See Malu v. Security National Ins. Co., 898 So. 2d 69, 75-76 (Fla. 2005)(Legislature is presumed to be aware of judicial construction of a statute when it reenacts or amends a statute and where it fails to modify that construction it is deemed to have accepted and approved that construction).

[5] In this regard, it is significant to note that the Legislature has not been shy about overruling this Court's interpretation of section 624.155 if it disagrees with that interpretation. See Ruiz, 899 So. 2d at 1128 n. 2 (noting that this Court's holding in McLeod as to the damages recoverable in a first-party bad faith action under section 624.155 was immediately rebuked by the Legislature by enactment of section 627.727(10)); Laforet, 658 So. 2d at 60-61 (same).

Based on the foregoing discussion and authorities, this Court should answer the first certified question in the affirmative. That is, this Court should hold that a liability insurer's payment or tender of the policy limits before expiration of the 60-day cure period following issuance of a civil remedy notice under section 624.155 amounts to a cure under that statute and extinguishes any potential third-party bad faith claim under the statute.

II. AN INSURER'S CURE AND EXTINGUISHMENT OF ANY POTENTIAL THIRD-PARTY BAD FAITH CLAIM UNDER § 624.155 ALSO EXTINGUISHES ANY COMMON LAW THIRD-PARTY BAD FAITH CLAIM.

The second question certified to this Court is whether an effective cure and extinguishment of any potential third-party bad faith claim under section 624.155 also results in extinguishment of any common law third-party bad faith claim. This question turns on application of the principles that define Florida's election of remedies doctrine to the unique circumstances presented in these types of cases as well as the language of section 624.155. As discussed, since a third-party bad faith claim brought under section 624.155(1)(b)1 is identical in substance to a common law third-party bad faith claim, extinguishment of the former through the statutory cure mechanism must necessarily extinguish the latter, especially given the express legislative expression that "no action will lie" upon such a cure.

In Barbe v. Villeneuve, 505 So. 2d 1331 (Fla. 1987), this Court set forth Florida's century-old doctrine of election of remedies as follows:

> Where the law affords several distinct, but not inconsistent, remedies for the enforcement of a right, the mere election or choice to pursue one of such remedies does not operate as a waiver of the right to pursue the other remedies. In order to operate as a waiver or estoppel, the election must be between coexistent and inconsistent remedies. . . . If more than one remedy exists, but they are not inconsistent, only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies.

Id. at 1333 (quoting American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942, 944 (1908))(emphasis added). Thus, assuming claims of third-party bad faith under section 624.155 and the common law are consistent remedies, satisfaction of either necessarily extinguishes the other.[6]

As this Court has held, section 624.155(1)(b)1 codified the common law third-party bad faith theory of recovery, and allows the same claim recognized at common law to be brought under the statute. See Zebrowski, 706 So. 2d at 277. In the third-party context, the statute does not change in any fashion the duty of good

[6] State Farm's discussion herein assumes that the common law and statutory third-party bad faith claims are consistent remedies as held by the Eleventh Circuit in this case. Macola, 410 F.3d at 1364. If this Court were to determine these common law and statutory remedies are inconsistent, however, Plaintiff's decision to invoke the civil remedy under section 624.155, followed by GEICO's timely cure, would indisputably preclude Plaintiffs common law remedy. See Barbe, 505 So. 2d at 1333-34; Scott v. National Airlines, Inc., 150 So. 2d 237 (Fla. 1963)(by invoking statutory grievance procedures incorporated into contract, plaintiff/employee elected his remedy and could not thereafter bring a common law suit for breach of the employment contract).

faith established at common law or the measure of damages recoverable if a plaintiff is successful on such a claim. Id.; Laforet, 658 So. 2d at 63. See also Farinas, 850 So. 2d at 558; Hollar, 572 So. 2d at 939. That is, the statutory duty that a liability insurer act "in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for her or his interests," § 624.155(1)(b)1, incorporates this Court's discussion in Boston Old Colony of the non-exclusive list of factors to be considered in determining whether an insurer has acted in bad faith. See Farinas, 850 So. 2d at 559. See also Laforet, 658 So. 2d at 63. Under both the common law and the statute, the jury is to consider the totality of the circumstances, such as those duties discussed in Boston Old Colony, in determining whether an insurer has acted in bad faith. Id. at 62-63; Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063, 1068 (Fla. 5th DCA 1991). See also Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004)(duty to inform insured of settlement opportunities, as well as the other duties subsumed within the duty of good faith and described in Boston Old Colony, are all factors for the jury to consider in determining whether the insurer acted in bad faith and failure of insurer to comply with any one of them does not automatically establish bad faith).

As Plaintiff Quigley concedes, it would be illogical to hold that an effective cure and extinguishment of a third-party bad faith claim under section 624.155

does not also extinguish the identical third-party bad faith claim under common law. (Corrected Initial Brief of Quigley at 24-25) Because the claims are identical, satisfaction of the statutory claim necessarily extinguishes the common law claim. Or, in other words, "satisfaction of the claim by [the statutory] remedy puts an end to [the] other [common law] remed[y]." See Barbe, 505 So. 2d at 1333.

Indeed, the Legislature, having codified the third-party bad faith claim in section 624.155(1)(b)1, at the same time, expressly provided an "opportunity for insurers to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate contractual benefits are owed" by tendering payment of those contractual benefits within the 60-day cure period and thereby avoiding even the exposure to a potential bad faith claim. Talat, 753 So. 2d at 1283-84. In this regard, it is significant that, unlike other portions of the statute which refer to a remedy or action "under this section," see, e.g., § 624.155(1), (2)(a), (2)(f), (4), (7), Fla. Stat. (Supp. 1982), in the statutory cure provision, the Legislature provided that "[n]o action will lie if, within 60 days [of the notice], the damages are paid or the circumstances giving rise to the violation are corrected," § 624.155(2)(d), Fla. Stat. (Supp. 1992)(emphasis added), indicating a broader reach to the cure provision than simply to actions "under this section."

It simply makes no difference that Plaintiffs did not recover all the damages they might have recovered if the insured's claim had not been satisfied in accordance with the statute and they had successfully prosecuted a statutory or common law third-party bad faith claim to judgment. The fact remains that the statutory claim was satisfied in accordance with the statute, which does not require payment of all the extra-contractual damages flowing from the bad faith conduct in order to extinguish the claim. See Talat, 753 So. 2d at 1281-84. It necessarily follows that any consistent common law remedy was extinguished in light of the satisfaction of the statutory claim in accordance with the statute upon Plaintiff Quigley's invocation of the statute by sending the civil remedy notice. See § 624.155(2)(d), Fla. Stat. (1999)("no action will lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected"). See also McCormick v. Bodeker, 119 Fla. 20, 160 So. 483 (1935)(even if a claim for specific performance is not inconsistent with a claim for breach of contract, once specific performance remedy was invoked and provided, plaintiff was precluded from pursuing a breach of contract claim even where plaintiff was not fully compensated for his damages). See generally Barbe, 505 So. 2d at 1333 ("satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies").

Contrary to Plaintiff Macola's and AFTL's argument, section 624.155(8), Fla. Stat. (2004), has no bearing on this result. It is a given that the civil remedy specified in section 624.155 does not "preempt" a common law third-party bad faith claim. But such has no relevance to the fact that Plaintiff Quigley elected to serve a civil remedy notice under the statute, which provided GEICO the opportunity to cure and extinguish any potential third-party bad faith claim by tendering the policy limits within 60 days of the notice.[7] GEICO's tendering of the policy limits during the 60-day cure period had the effect of satisfying the right of the insured to a statutory third-party bad faith claim. See § 624.155(2)(d). This satisfaction of the right to the statutory claim "estop[s] [Plaintiffs] from pursuing [the] other consistent [common law third-party bad faith] remed[y]" and "puts an end to [the] other [common law] remed[y]." See Barbe, 505 So. 2d at 1333.

[7] State Farm does not quarrel with the proposition that providing a civil remedy notice of insurer violation under section 624.155 is not a condition precedent to bringing a common law third-party bad faith claim to recover for an excess judgment. But Plaintiff Quigley did elect that remedy here and thereby provided GEICO the opportunity to cure and extinguish any potential bad faith claim. Insureds and third-party claimants may have any number of reasons to invoke their rights under the statute instead of relying solely on a potential future common law bad faith action, e.g., to enlist the assistance of the Department in settling the claim, to encourage a recalcitrant insurer to engage in settlement discussions, or to establish a right to attorneys' fees in a later statutory bad faith suit if the insurer fails to cure the alleged violations within the 60-day cure period.

CONCLUSION

Based on the foregoing discussion and authorities, State Farm suggests that this Court should answer both the first and second certified questions in the affirmative. The very purpose of the cure provision of the statute is to allow an insurer to avoid a potential future bad faith action by timely tendering the amounts available and properly payable under the insurance contract. An insured is entitled to no more than what he or she bargained for in terms of coverage in the insurance contract. Thus, tender of the contractual limits within the statutory cure period necessarily extinguishes any potential third-party bad faith claim under the statute. The satisfaction of the insured's right under the statute by curing in accordance with the statute, in turn, necessarily puts an end to the any potential consistent (or inconsistent) and identical common law bad faith claim. This necessarily includes the derivative claim of the injured third party. Any other interpretation would, indeed, render the cure provision of the statute meaningless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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