IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-441

QBE INSURANCE CORPORATION.,

Appellant,

vs.

CHALFONTE CONDOMINIUM APARTMENT ASSOCIATION, INC.,

Appellee.

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

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APPELLEE'S ANSWER BRIEF

DANIEL S. ROSENBAUM
KATZMAN GARFINKEL ROSENBAUM
250 S. Australian Ave., FL 5
West Palm Beach, FL 33401
(561) 653-2900

BRUCE S. ROGOW
CYNTHIA E. GUNTHER
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394
(954) 767-8909

Counsel for Appellee

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INTRODUCTION

The United States Court of Appeals for the Eleventh Circuit certified five questions to this Court. We set forth the questions below, with the answers that we believe comport with Florida law. The reasons for the answers are explained in the argument section of this Answer Brief.

I.

DOES FLORIDA LAW RECOGNIZE A CLAIM FOR BREACH OF THE IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING BY AN INSURED AGAINST ITS INSURER BASED ON THE INSURER'S FAILURE TO INVESTIGATE AND ASSESS THE INSURED'S CLAIM WITHIN A REASONABLE PERIOD OF TIME?

ANSWER: YES

II.

IF FLORIDA LAW RECOGNIZES A CLAIM FOR BREACH OF THE IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING BASED ON AN INSURER'S FAILURE TO INVESTIGATE AND ASSESS ITS INSURED'S CLAIM WITHIN A REASONABLE PERIOD OF TIME, IS THE GOOD FAITH AND FAIR DEALING CLAIM SUBJECT TO THE SAME BIFURCATION REQUIREMENT APPLICABLE TO A BAD FAITH CLAIM UNDER FLA. STAT. § 624.155?

ANSWER: NO

III.

MAY AN INSURED BRING A CLAIM AGAINST AN INSURER FOR FAILURE TO COMPLY WITH THE LANGUAGE AND TYPE-SIZE REQUIREMENTS ESTABLISHED BY FLA. STAT. § 627.701(4)(a)?

ANSWER: YES

IV.

DOES AN INSURER'S FAILURE TO COMPLY WITH THE LANGUAGE AND TYPE-SIZE REQUIREMENTS ESTABLISHED BY FLA. STAT. § 627.701(4)(a) RENDER A NONCOMPLIANT HURRICANE DEDUCTIBLE PROVISION IN AN INSURANCE POLICY VOID AND UNENFORCEABLE?

ANSWER: YES

V.

DOES LANGUAGE IN AN INSURANCE POLICY MANDATING PAYMENT OF BENEFITS UPON "ENTRY OF A FINAL JUDGMENT" REQUIRE AN INSURER TO PAY ITS INSURED UPON ENTRY OF JUDGMENT AT THE TRIAL LEVEL?

ANSWER: YES

The questions, and the proposed answers, arise from litigation seeking insurance payments for damages caused by Hurricane Wilma in October 2005.

STATEMENT OF THE CASE AND FACTS

A. THE CASE

Chalfonte sued QBE on November 7, 2006 because QBE failed to adjust Chalfonte's insurance claim for damages caused by Hurricane Wilma on October 24, 2005. DE1. An Amended Complaint (DE21) contained four counts: (1) declaratory judgment; (2) breach of contract – failure to provide coverage; (3) breach of contract – breach of implied warranty of good faith and fair dealing; (4) violation of section 627.701, Florida Statutes (failure to conform to statutory notice requirements). The latter count was dismissed and became one of the subjects of Chalfonte's cross-appeal, which was filed in response to QBE's appeal of the trial verdict and the Amended Final Judgment entered against it for $7,237,223.88. DE226.

The actual jury award was for $8,140,099.68, allocating $7,868,211 to QBE's breach of the coverage provision of the contract and $271,888 for breach of the implied warranty of good faith and fair dealing. The jury also found that a violation of the notice provisions of section 627.701(4)(a) occurred. DE 165. The trial court, over Chalfonte's objection based upon the violation of section 627.701(4)(a), allowed the policy deductible to be applied to the breach of coverage damages and reduced the judgment by the $1,605,553 deductible,

resulting in the Amended Final Judgment of $7,237,233.88, including interest. Chalfonte's cross appeal addressed the denial of its argument that the statutory violation precluded application of the deductible. Oral argument in the United States Court of Appeals was held on January 14, 2009, and on March 9, 2009 that court certified to this Court the five questions that are the subject of the parties' briefs.

B. THE FACTS

QBE's insurance contract with Chalfonte required QBE to "pay for direct physical loss of or damage to covered Property at the premises described in the Declaration caused by or resulting from any Covered Cause of Loss." DE21, p. 46. Under the contract, QBE was obligated to "determine the value of loss or damaged property, or the cost of its repair or replacement," and payment was to be made within 20 days after receiving the sworn proof of loss and a written agreement between the insured and insurer. If there was no agreement, then QBE promised to pay within 30 days after receiving the sworn proof of loss and "entry of a final judgment." *Id.* at 44, 55.

Chalfonte notified QBE of its damages immediately after Hurricane Wilma and filed a claim (DE21, p. 2), but QBE did not agree, and it was nearly a year and a half (500 plus days) before QBE offered its estimate of Chalfonte's loss.

R8, DE210; 175-76; R16, DE236:13-14. Having delayed determining the loss, QBE avoided payment, necessitating Chalfonte's lawsuit. The trial judge, responding to QBE's contention that the delay could only be asserted in a separate bad faith claim, not a good faith and fair dealing claim in addition to the claim for loss, had this exchange with QBE's counsel:

> THE COURT: Can an insurance company just wait. Say instead of a couple years as it is here, say eight years, at some point isn't there, couldn't you just sue for breach and say, look, you are just not treating this, or you got to wait 'til you get recovery of your insurance policy and come up with a second suit later.
>
> MR. BERK: That is pretty much the way it works.

R16, DE236:133.

The first time that QBE stated its adjustment figure for Chalfonte's damages was at trial, via the testimony of its corporate representative, who conceded QBE's duty to adjust an insured's claim. R16, DE236: 9-10; 13-14. As QBE acknowledged in its Brief, the "extent of damages was greatly in dispute." QBE Brief, p. 3. While the Complaint claimed, *inter alia*, lack of coverage, there was no doubt of coverage and the case was tried on the question of the amount of damages to Chalfonte, the breach of contract failure to pay that amount, and the breach of good faith and fair dealing to promptly value the damage and the loss.

The QBE Brief statement of the facts (and argument) quotes extensively from Chalfonte's counsel's opening and closing arguments (QBE Brief, pp. 4-9, 29-30) in an effort to paint a "bad faith" trial record. Given the fact that this case is here on certified questions of law, the "facts" of the arguments are not responsive to the questions of law. Moreover, we address the use of the arguments in the argument section, *infra*, at 22-23, and point out there (and here) that no objections were made at trial by QBE counsel, so they have been waived.

We turn now to the reasons why the certified questions should be answered in the manner we have posited in the Introduction to this Brief.

SUMMARY OF THE ARGUMENT

I. Florida contract law has long recognized the covenant of good faith and fair dealing that attaches to all contracts in this State. Insurance contracts are no exception. Here, the good faith and fair dealing claim relates to an express contractual provision that requires QBE to "determine the value of loss." Can an insurance company "adjust" a claim in perpetuity, or must it act in good faith and do so promptly? That is the question posed by the good/faith fair dealing claim here. The claim is not one regarding coverage or settlement, exposing an insured to excess liability. That is a classic "bad faith" cause of action, but it is not the cause of action in this case and therefore a good faith/fair

dealing claim can be asserted under Florida law.

II. Because the good faith/fair dealing claim is not a "bad faith" claim, there is no bifurcation necessity. The bifurcation requirement that attaches to bad faith claims seeking damages for rejecting coverage or failing to settle with third parties has no application in the context of a first party insured's assertion of a right to insist on good faith and fair dealing with regard to an express term of the insurance contract. No prejudice to the insurance company is inherent in such a claim, nor is there any risk that discovery will intrude upon any work product or attorney client privileges. The question is whether it is fair for an insurance company to fail to act promptly in determining the insured's loss. The contract required that determination, but QBE took over 500 days to make it. Because a good faith/fair dealing implied covenant serves to fill a gap where one party (QBE) has discretion under an express contractual term, trying that claim with the breach of contract claim is proper and not subject to bifurcation under either statutory or case law.

III. and IV. Florida Statute section 627.401(4)(a) requires an insurer to comply with certain notice provisions regarding hurricane deductibles. Hurricane deductibles are higher than general deductibles. Here, QBE failed to comply with two aspects of the notice requirement – size of type and inclusion of

the word "hurricane." In light of the mandatory language of the statute ("must on its face include"), the failure to comply is actionable and renders the hurricane deductible void and unenforceable. Any other result would make the statute meaningless.

V. QBE's insurance contract, drafted by it, required it to pay within 30 days of "entry of a final judgment." Entry of a final judgment means entry of the judgment rendered at the conclusion of the trial court proceedings. Any other definition flies in the face of the Florida Rules of Civil Procedure, the Florida Rules of Appellate Procedure, the Florida (and federal) accepted notions of what "entry of a final judgment" means. Had QBE written a contractual provision that provided for delay of payment until all appeals or discretionary review proceedings were concluded, then "finality" would have to await the termination of those proceedings. But that is not the case here, and QBE is hoisted on the petard of its own language. It was required to pay the judgment within 30 days of the entry of a final judgment by the the United States District Court for the Southern District of Florida, the trial court in this case.

ARGUMENT

I.

FLORIDA LAW RECOGNIZES A CLAIM FOR BREACH OF THE IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING BY AN INSURED AGAINST ITS INSURER BASED ON THE INSURER'S FAILURE TO INVESTIGATE AND ASSESS THE INSURED'S CLAIM WITHIN A REASONABLE PERIOD OF TIME

A. GOOD FAITH AND FAIR DEALING IN FLORIDA

"Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract." *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. 1st DCA 2001); *County of Brevard v. Miorelli Eng'g., Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997) ("Virtually every contract contains implied covenants and conditions, for example, every contract includes an implied covenant that the parties will perform in good faith.").

Many of the Florida federal judges who have addressed the question of whether an insured can assert a first party good faith and fair dealing cause of action against an insurance company have said "yes" to the claim, even where the court viewed the complaint allegations as not meeting the legal requirements for a good faith and fair dealing cause of action. In Florida, *O'Shields v. United Automobile Ins. Co.*, 790 So. 2d 570, 571 (Fla. 3d DCA 2001), recognized the

concept in the insurance context ("An insurance company owes a duty of good faith and fair dealing to its insured under the terms of the insurance policy.")[1]

The federal trial judge in this case – Judge Middlebrooks – wrote:

> Chalfonte has properly alleged a breach of the implied covenant of good faith and fair dealing in count three where it alleged breach of an express term of the contract, QBE's failure to pay a covered loss, and then goes on to allege QBE failed to act in good faith as required by Florida law by . . . failing to fairly and promptly investigate the damage claim.

Chalfonte Condominium Apartment Assoc. v. QBE Insurance Corp., 2007 WL 2225972 *3, (S.D. Fla. 2007). Judge Ryskamp was in accord with the application of good faith and fair dealing. *Townhouses of Highland Beach Condominium Assn. v. QBE Insurance Corp.*, 504 F.Supp. 1307, 1312 (S.D. Fla. 2007) ("The Amended Complaint subsequently alleged that Defendant failed to act in good faith by failing to investigate the damages claim fairly and promptly. The claim is one for breach of the implied duty of good faith and fair dealing. . . .). *See also Stallworth v. Hartford Ins. Co.*, 2006 WL 2711597 *6 (M.D. Fla. 2006)

[1] Recently the Third District recognized Chalfonte's pendency in this Court. That court denied a certiorari petition presenting issues regarding good faith and fair dealing and bifurcation "without prejudice to the right of Citizens to pursue these legal theories to the extent appropriate following the Florida Supreme Court's determination of the certified questions." *Citizens Property Ins. Co. v. Bertot*, 2009 WL 1532631, 24 Fla. L.Wkly. D1109 (Fla. 3d DCA 2009).

("[T]o the extent Plaintiffs are asserting a common law claim of breach of the implied warranty of good faith and fair dealing, the claim may be maintained but Plaintiffs' allegations are insufficient to state a claim.").

United States District Judge Adalberto Jordan wrote:

> The defendants argue that Counts III and IV are premature because they attempt to bring an action for bad faith under Fla. Stat. § 624.155. I disagree . . . . [T]he defendants provide a lengthy recitation of case law and legislative history regarding bad faith claims in Florida, and in doing so, they attempt to equate "bad faith" with lack of "good faith." However a cause of action for breach of the implied warranty of good faith and fair dealing is separate and distinct from bad faith claims.

Arlen House East Condominium Assoc., Inc. v. QBE Insurance (Europe) Ltd., 2008 WL 4500690 *2 (S.D. Fla. 2008). Judge Jordan distinguished *Quadomain Condo. Ass'n. v. QBE Insurance Corp.*, 2007 WL 1424596 *6 (S.D. Fla. 2007), in which Judge Moreno found the claim to be a bad faith claim '"dressed in breach of implied warranty clothing,"' noting that Judge Moreno *did* see a difference between good faith and bad faith: "'An action for bad faith alleges an insurer's wrongful refusal to settle a claim . . . while an action for breach of the implied covenant of good faith and fair dealing relates to whether the parties' reasonable expectations have been met in regard to the implied obligations of an express

contractual provision."' *Arlen House*, *id.* at *2, quoting *Quadomain* at *6. In a footnote, Judge Jordan pointed out that the Magistrate's Report and Recommendation adopted by Judge Moreno in *Buckley Towers Condo. Inc. v. QBE Insurance Corp.*, which followed *Quadomain*, "also acknowledges that *Quadomain* held that a breach of implied warranty could theoretically be asserted together with an express breach of contract claim . . . ." *Id.* at *2.[2]

It is not surprising that the courts have recognized the good faith and fair dealing claim, because this case is a paradigmatic example of its utility and necessity. The express contractual provision that triggered the claim was QBE's express promise to "determine the value of loss or damaged property, or the cost of its repair or replacement." DE21, p. 44. No time limit was set for that determination. It left it to the unfettered discretion of QBE. Good faith and fair

[2] Other favorable federal decisions include *Dennis v. N'Western Mut. Life Ins. Co.*, 2006 WL 1000308 *4 (M.D. Fla.2006) ("Nothing in Florida Statute § 624.155 prevents plaintiff from asserting a claim for breach of the implied covenant of good faith and fair dealing."); *Lee Mem'l Health Sys. v. Med. Sav. Ins., Co.*, 2005 WL 2291679 (M.D. Fla. 2005) "[w]here there is a breach of the express terms of an agreement between the parties, a plaintiff may bring a separate claim for breach of implied covenant of good faith."); *Royal Surplus Lines Ins. Co. v. Coachmen Industries, Inc.*, 2002 WL 32894915 *16 (M.D. Fla. 2002) ("the duty of good faith and fair dealing is a mutual obligation, which is implied in every insurance contract in Florida."). United States District Judge Patricia Seitz recognized that "several courts have held that a claim for breach of the implied covenant of good faith is a completely separate cause of action from a statutory bad faith claim," but declined to follow those decisions. *QBE Ins. Corp. v. Dome Condominium Assoc., Inc.*, 577 F.Supp. 1256, 1260 (S.D. Fla. 2008).

dealing provided the remedy; it is a "gap-filling default rule" that applies when "a question is not resolved by the terms of the contract," or "one party has the power to make a discretionary decision without defined standards." *Speedway Superamerica, LLC v. Tropic Enterprises, Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007) (citations omitted). *See also PL Lake Worth Corp. v. 99 Cent Stuff – Palm Springs LLC*, 949 SO. 2d 1199, 1201 (Fla. 4th DCA 2007) (finding breach where lessor refused to provide lessee information essential to lessee's lease renewal where contract did not explicitly require such disclosure).

Here, the "gap" is how long could QBE take to determine the damages caused by Hurricane Wilma? Good faith and fair dealing filled the gap.

The Magistrate Judge's Report accepted by Judge Graham in *Isola Condo. Assn. v. QBE Ins. Corp.*, 2008 WL 5169548 (S.D. Fla. 2008), which is mirrored by *QBE*'s brief in this Court, was wrong. It concluded that Isola's allegations that QBE failed to "fairly and promptly investigate, pay or settle the damage claim" could only be asserted, if at all, together with the extra-contractual bad faith claim under section 624.155." *Isola, supra*, at *3. That is the argument QBE makes here, based on section 624.155 and *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). It is an argument that has not succeeded with most courts that have addressed it, and as we argue below, this Court should not embrace it

because it misconceives the difference between gap filling good faith and fair dealing, as distinguished from bad faith failure to settle or provide coverage.

> QBE resorts to a series of conclusionary statements that reveal its failure to see the difference, claiming "[t]he impossibility of distinguishing between an action for lack of good faith and one for bad faith;" that "[u]nder the statute, a lack of good faith equals bad faith;" that "the same conduct" supports a bad faith or a good faith action. QBE Brief, pp. 23-25. As we show below, there is a difference – a bad faith failure to provide coverage or to settle a claim is different from the good faith and fair dealing obligation to promptly determine the loss – and neither statutory or case law bars the good faith/fair dealing action for that delay. There must be such a remedy, otherwise an insurer could "adjust" a claim in perpetuity.[3]

[3] Florida Statute section 627.70131(5)(a) was amended in 2007 to require an insurance company to value a loss "[w]ithin 90 days," absent extenuating circumstances. That statutory change underscores the need to use good faith/fair dealing in pre-statute situations where the insurer's discretion was not bounded.

B. NEITHER § 624.155 OR *ALLSTATE INDEMNITY CO. v. RUIZ*, PRECLUDED A CAUSE OF ACTION FOR GOOD FAITH AND FAIR DEALING

Section 624.155(1)(b)(1) provides in relevant part :

> (1) Any person may bring a civil action against an insurer when such person is damaged:
>
> * * *
>
> (b) By the commission of any of the following acts by the 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 with due regard for her or his interests;
>
> * * *
>
> (8) The civil remedy specified in this section *does not preempt any other remedy* or cause of action *provided* for pursuant to any other statute or *pursuant to the common law of this state.* Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action. (emphasis supplied).

The firmly established Florida implied covenant of good faith and fair dealing is a "remedy provided for . . . pursuant to the common law of this state."

The existence of that remedy and its application is beyond dispute. *See Cox v. CSX Intermodal*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999) and its antecedents and progeny.[4] Florida's "bad faith" remedy is not a synonym for the contractual duty of good faith and fair dealing that "attaches to the performance of a specific contractual obligation." *Id.* at 1097. If the duty of good faith and fair dealing were not available here, the insurance company would have no incentive to act, and the adjustment process would be meaningless. Absent the ability to pursue the good faith/fair dealing remedy, an insurance company could perpetually "adjust" the claim, running it out past the statute of limitations, so there could

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[4] While ornamental, *Cox's* quotation of Justice Souter's explanation of the good faith warranty while on the New Hampshire Supreme Court, is apt here:

> [U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting. *Centronics v. Genicom Corp.*, 132 N.H. 133, 562 A.2d 187, 193 (N.H. 1989).

Cox, 732 So. 2d at 1097.

never even be a traditional bad faith claim because the underlying case would never be reached.

Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005), *State Farm Automobile Ins. Co. v. LaForet*, 658 So. 2d 55 (Fla. 1995) *Talat Ent. Inc. v. Aetna Casualty & Surety Co.*, 753 So. 2d 1278 (Fla. 2000) and 624.155(1)(b)(1) do not carry the weight assigned to them by QBE, and do not undermine the answer we posit: that there is a good faith/fair dealing remedy for an insured based on the insurer's failure to investigate and assess the insured's claim within a reasonable time.

The Court has described the purpose of section 624.155 as "creat[ing] a statutory first-party bad faith cause of action for first party insured" and explained:

> [T]his statutory remedy essentially *extended* the duty of an insurer to act in good faith and deal fairly where an insured seeks *first-party coverage or benefits* under a policy of insurance.

Allstate v. Ruiz, 899 So. 2d at 1126. (emphasis supplied). Section 624.155's purpose and reach were first set forth in *Operman v. Nationwide Mut. Fire Ins.*, 515 So. 2d 263, 266 (Fla. 5th DCA 1987) "We agree that the plain meaning of section 624.155(1)(b) extends a cause of action to the first party insured against its

insurer for bad faith refusal to settle." *Id.* at 266. The court continued: "The function of the bad faith claim is to provide the insured with an extra-contractual remedy." *Id.* at 267. In *Allstate*, this Court agreed with *Operman*: "*see also Operman*. . . (quoting legislative history which provides "[section 624.115] requires insurers to deal in good faith to settle claims. . . ."). *Allstate* 899 So. 2d at 1126.

The good faith and fair dealing claim here is not extra-contractual and is not actually tied to coverage or settlement. It is tied to promptly, under an express contractual provision, determining the loss; coverage is clear and settlement cannot even be discussed until the company discharges its duty to determine the loss. *Allstate* recognized that there is a difference when it spoke of the statutory remedy "extend[ing]" an insurer's duty to act fairly where an insured seeks first party "coverage or benefits under a policy. . . ." *Id.* 899 So. 2d at 1126.[5] Indeed, the historical analysis contained in *Allstate, Talat Enterprises, Inc. v. Aetna Casualty and Surety Co.*, 753 So. 2d 1278 (Fla. 2000) and *State Farm*

[5] "Coverage" is defined this way: "*Insurance*, protection provided against risks or a risk, often as specified: *Does the coverage include flood damage*?" Webster's Encyclopedic Unabridged Dictionary of the English Language, Random House (1994) (emphasis in original). Benefits means the protection provided by the coverage. Failure to provide coverage or benefits can constitute bad faith. Failure to act promptly to determine loss where there is coverage is inconsistent with good faith/fair dealing. That is what is in issue here.

Mutual Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995) confirms that first party claims were statutorily authorized to rectify the "inequity" created by Florida court made law:

> As this Court previously explained, "Florida courts had refused to recognize the tort of first

> party bad faith claims because the type of fiduciary duty that exists in third party actions is not presented in first party actions and the insurer is not exposing the insured to excess liability." *Laforet*, 658 So. 2d at 59.

Allstate, 899 So. 2d at 1125-26 (footnote omitted).

Thus "bad faith" claims have an accepted historical and legal meaning. The classic "bad faith" claim is based on an insurer's refusal to settle thus exposing an insured to excess liability, or an insurer denying coverage and exposing an insured to damages as a result of an improper denial of coverage. With the advent of § 624.115, first party claims gained traction if an insurer did "[n]ot attempt [ ] in good faith to settle claims, when, under all the circumstances, it could and should have done so, had it acted fairly and honestly. . . ." (§624.155(1)(b)(1)) (emphasis supplied), but that use of "good faith" did not supplant the Florida common law covenant of good faith and fair dealing based on an express term of an insurance contract. Indeed, the statutory plain language preservation of other remedies confirms the viability of the good faith/fair dealing claim made here: "The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state." Section 624.155(8).

QBE and its *amici* have sought to make the extra-contractual "bad faith" concept a synonym for a contractual good faith and fair dealing claim by seizing on the legislature's use of "good faith" in section 624.155. But as the statute makes clear, other common law remedies are still extant – like good faith/fair dealing – and as the case law makes clear, the statutory scheme sought to redress the inequity between third party and first party bad faith claims, not do away with an insured's ability to seek a remedy where an insurer has not acted in good faith *vis a vis* an express contractual provision.

II.

THE WARRANTY OF GOOD FAITH AND FAIR DEALING CLAIM BASED ON AN INSURER'S FAILURE TO INVESTIGATE AND ASSESS ITS INSURED'S CLAIM WITHIN A REASONABLE PERIOD OF TIME IS NOT SUBJECT TO THE BIFURCATION REQUIREMENT APPLICABLE TO A BAD FAITH CLAIM UNDER FLA. STAT. § 624.155

QBE and its *amici* argue that if there is a good faith/fair dealing claim it must be bifurcated or "dismissed without prejudice until the insured has proven liability and damages." QBE Brief, p. 26, n.4. The *amici* urge bifurcation, saying the "bad faith remedy does not accrue until the insured successfully concludes its breach of contract or coverage claim." Brief of *Amici Curiae* Florida Defense

Lawyers Association and Federation of Defense & Corporate Counsel, p. 8.

The common error of QBE and its *amici* is equating contractual good faith and fair dealing with ex-contractual bad faith, and the cases offered help make our point.

QBE proffers an extensive quote from *Hartford Ins. Co. v. Mainstream Constr. Group, Inc.*, 864 So. 2d 1270, 1272-73 (Fla. 5th DCA 2004) as its main support for bifurcation. QBE Brief, p. 27. The whole quotation makes our point because it makes clear that the Chalfonte claim is not a bad faith claim. *Hartford* starts off this way: "If there is not insurance coverage, nor any loss or injury for which the insurer is contractually obligated to indemnify, the insurer cannot have acted in bad faith in refusing to settle the claim." *Id.* at 1272. That description defines the bad faith concept. But here, there was coverage and injury that QBE was contractually obligated to indemnify; the only issue was "how much?" *Hartford* voiced concern that "evidence used to prove either bad faith or unfair practices could well jaundice the jury's view of the coverage issue." *Id.* Again, here, actual coverage was not the issue, so the proof relating to the lack of diligence, *i.e.*, good faith/fair dealing, in determining the value of the damaged property, could not jaundice the jury on a coverage issue.

QBE's offer of *Dennis v. NW Mut. Life Ins. Co.*, 2006 WL 1000308 at

* 3-4 (M.D. FLa. 2006) for the proposition that "'references to an insurer's alleged bad faith actions into evidence during litigation involving a coverage dispute will prejudice the insurer and could distort the jury's view of the coverage issue"' (QBE Brief, p. 28), reinforces the point – this is not a true coverage case and no "bad faith" claim was ever raised in this case. The issue here is the duty to value the loss. By improperly conflating good faith/fair dealing with bad faith cases QBE and its *amici* miss the point of the bifurcation requirement. *Allstate v. Ruiz* is instructive in our favor: "[W]here the coverage and bad faith actions are initiated simultaneously, the courts should employ existing tools, such as the abatement of actions and *in camera* inspection, to ensure full and fair discovery in both causes of action." 899 So. 2d at 1130. Here, we do not have coverage and bad faith issues, only breach of contract and good faith duty to promptly value a loss. The latter comment in *Allstate* regarding discovery and *in camera* inspection also counters the *amici* claims of potential discovery problems. First, since coverage is not the issue, that inquiry will not be affected. Second, discovery can be tailored to the good faith/fair dealing issue and any privileges will not be compromised. The *Allstate* decision's careful treatment of discovery avoids the *amici's* concerns about a "collision of principles." *Amici* Brief, p. 15.

Finally, QBE seeks to use portions of Chalfonte's opening and closing arguments and snippets of testimony in order to bolster its "bad faith" claim and

potential for prejudice arguments. QBE Brief, pp. 4-9, 29-30. But the arguments and the testimony directly related to the good faith/fair dealing obligation to determine the value of the damage to the Condominium: "It's about an insurance company who dragged their foot every step of the way" (DE 210 at 114); "This is about not promptly adjusting a claim" (*id*. at 116); "Delay, delay, delay" (DE 212 at 22). Aside from the fact that a lawyer may forcefully argue based on evidence that has been presented to the jury, QBE's failure to object at trial to the arguments it reproduces in its Brief, renders its complaints meaningless. The failure to timely object to a lawyer's opening or closing arguments constitutes waiver under both Florida law and federal law. *See, Budget Rent A Car Systems, Inc. v. Jana*, 600 So. 2d 466, 467 (Fla. 4th DCA 1993), citing *Potashnick v. Tito*, 529 So. 2d 764 (Fla. 4th DCA 1988); *see also Denis v. Liberty Mutual Insurance Company*, 791 F.2d 846, 848-49 (11th Cir. 1986).[6]

[6] There was one objection that was overruled (DE212, p.63), likely because QBE provided Chalfonte's counsel with some argument latitude when QBE called Chalfonte's claim a "sham," a "stupid insurance case," and referred to the residents of Chalfonte as "old senile people" and "old farts." R8, DE210, p. 120, p. 7; R7, DE212, p. 47-52.

III.
A CLAIM MAY BE BROUGHT FOR FAILURE TO COMPLY WITH THE LANGUAGE AND TYPE SIZE REQUIREMENTS OF FLA. STAT. § 627.701(4)(a)

AND

IV.

THE FAILURE TO COMPLY WITH THE PROVISIONS OF FLA. STAT. § 627.701(4)(a) RENDERS A NONCOMPLIANT HURRICANE DEDUCTIBLE PROVISION VOID AND UNENFORCEABLE

These two certified question issues are linked by the undisputed fact that QBE did not follow the mandate of section 627.701(4)(a). That section provides in relevant part:

> Any policy that contains a separate hurricane deductible *must on its face include* in boldfaced type no smaller than 18 points the following statement: 'THIS POLICY CONTAINS A SEPARATE DEDUCTIBLE FOR HURRICANE LOSSES, WHICH MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU.'

(italicized emphasis supplied). The QBE policy was deficient both in the size of type used (16.2 not 18) and the language used ("windstorm," not "hurricane"). QBE maintains that the non-compliance is not actionable because "[n]o court has

recognized an independent cause of action based on the failure to strictly comply with any subsection of section 627.201." QBE Brief, p. 32. And it contends that it should suffer no sanction, because the Legislature did not provide a remedy and QBE "substantially" complied.

QBE is wrong on both fronts.

A. WITHOUT A REMEDY THE STATUTE IS MEANINGLESS

First, the cases it cites for the proposition that its violation carries no penalty are completely inapposite. Neither address facial non-compliance with plain statutory insurance code language and to pluck from them "cannot provide a remedy where the legislature has not done so" (QBE Brief, p. 36) simply demonstrates the dearth of support for QBE's argument. *Friends of Matanzas, Inc. v. Dept. of Environmental Prot.*, 729 So. 2d 437 (Fla. 5th DCA 1999) is a standing case, and its comment about not providing a remedy where the Legislature has not done so related to administrative challenges to a county's Comprehensive Land Use Plan in the context of a "development orders" challenge under section 163.3215, Fla. Stat. *Id.* at 440.

Jolley v. Seamco Laboratories, 828 So. 2d 1050 (Fla. 1st DCA 2002) could not provide a wrongful death cause of action for "equitably adopted

children" in the face of statutory language that omitted them in "the definition of survivors. . . ." *Id.* at 1051.

QBE's analogies to other statutory sanctions are equally flawed. Section 627.6474 voided contracts that required health care practitioners to accept terms of contracts of companies managed and controlled by the insurer. Section 627.415 rendered invalid a policy provision that required an insurer's charter or bylaws to be a part of the contract unless it was set forth in full. Those provisions are not notice to insured provisions, and the fine statutes offered by QBE do not address the instant situation – a statutory provision that goes to the heart of hurricane deductible notice.

QBE's argument that no penalty should be attached to the violation is contradicted by *Industrial Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337 (Fla. 1984) (policy deductible ineffective because it was offered in violation of statutes); *Government Employees Ins. Co. v. Douglas*, 654 So. 2d 118, 120 (Fla. 1995) (strict compliance with statutes necessary; failure to do so prohibited asset coverage limitation, otherwise non-compliance would be "rendered meaningless."). So there must be a remedy for the violation. *See also United States Fire Ins. v. Roberts*, 541 So. 2d 1297 (Fla. 1st DCA 1989), recognizing that the consumer protection concepts embodied in section 627 must be construed liberally, and the

court found that a coinsurance clause that failed to comply with notice provisions was void and unenforceable. *Id.* at 1299.

B. THERE WAS NO COMPLIANCE; THERE IS A REMEDY

QBE seeks to soften its patent violation by saying it did not "meticulously comply" and that it "substantially" complied. QBE Brief, pp. 34-35.

Clearly, 16.2 point type is not 18 point type. This Court requires briefs to certify the required point type (14) and failure to comply is penalized. In addition, words have meaning. A "hurricane" is not a "windstorm." Contrary to QBE's belief, the difference is not inconsequential, either in the force of nature involved or the purpose for which the Legislature mandated compliance with the form and substance of the notice.

Calling the double violation of the statute "*de minimis*" (QBE Brief, p. 39) does not make it so, and *Prida v. Transamerica Ins. Finance Corp*., 651 So. 2d 763 (Fla. 3d DCA 1995) does not support QBE's effort to minimize its mistake. In *Prida* the court found the type size to be "permissive" and that an extra step (notice in red) was taken. Here, the statute is mandatory ("must on its face"), not permissive, and there was no extra step, only two steps backward from the statute's mandate.

Finally, section 627.418(1) does not save the day for QBE. That

statute provides that any "*insurance policy* . . . otherwise valid which contains any condition or any provision not in compliance with the requirements of this code shall not be thereby rendered invalid." The fact that the statute is for the protection of insureds, not insurers (*Excelsior Ins. Corp. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979)) is one reason why it does not aid QBE. The other reason is that the consequence of non-compliance here is not invalidation of the "insurance policy," it is precluding the application of a deductible because the deductible notice was wholly deficient. The consequence fits the plain purpose of the statute. A hurricane deductible is larger than a general loss deductible. Here, the difference was substantial: $1,605,653 versus $2,500 for general loss. Providing clear notice of that higher deductible was the purpose for the statute, and that purpose can only be fulfilled by making the higher deductible unenforceable.

V.

AN INSURANCE POLICY'S PROVISION THAT MANDATES PAYMENT UPON "ENTRY OF A FINAL JUDGMENT" REQUIRES AN INSURER TO PAY ITS INSURED UPON ENTRY OF THE JUDGMENT AT THE TRIAL LEVEL

QBE's policy contained this promise:

> Provided you have complied with all the

> terms of this Coverage Part, we will pay for covered loss or damage: . . . (2) Within 30 days after we receive the sworn proof of loss and (a) There is an entry of a final judgment.

DE:231-2 at 29.

QBE filed a supersedeas bond with the United States District Court, but Chalfonte maintains that the contractual provision obligated payment of the judgment obtained within 30 days of its entry.

The certified question poses the issue of whether that policy language means what it says – "entry of a final judgment" – or whether QBE can postpone "finality" until all appeals are exhausted. We contend that the words, drafted by QBE, have only one meaning: the judgment must be paid within 30 days after the trial court enters a final judgment. QBE counters with two arguments: (a) the language "does not explicitly waive rights under the applicable rules of procedure," and (b) that under Florida law "a judgment does not become 'final' until the appellate process is complete." QBE Brief, pp. 42, 46. Neither argument is right. The Eleventh Circuit found it unnecessary to even address QBE's waiver argument, certifying only the question of the meaning of "entry of a final judgment" under Florida law. We start there.

A. "ENTRY OF A FINAL JUDGMENT" MEANS THE JUDGMENT ENTERED BY A TRIAL COURT AT THE CONCLUSION OF A TRIAL

QBE relies upon a footnote in *Silverstrone v. Edell*, 721 So. 2d 1173, 1175, n.2 (Fla. 1998). The issue in *Silverstrone* was "when the limitations period for legal malpractice in a litigation–related context begins to run." *Id.* at 1175. The Court held "that the statute of limitations does not commence to run until the *final judgment* becomes final." *Id.* (emphasis supplied). The footnote to that sentence, upon which QBE seizes, says this:

> For instance, a judgment becomes final either upon the expiration of the time for filing an appeal or postjudgment motions, or, if an appeal is taken, upon the appeal being affirmed and either the expiration of the time for filing motions for rehearing or a denial of the motions for rehearing.

Id. at n.2. That must be read in the context of the statute of limitations issue in the *Silverstrone* case: "a judgment becomes final *[for the purpose of the statute of limitations in a legal malpractice case]* either upon . . . ." (emphasis provided). No fair reading of *Silverstrone* (or any of the other offered cases) stands for the proposition that "entry of a final judgment" means anything other than the judgment entered at the conclusion of the trial court proceedings.[7]

[7] Indeed, to accept QBE's view would mean that an insured would have to suffer the burden of having no funds for repairing his or her dwelling for years while the insurance company pursues years of appeals and writs of certiorari. This case is a good example. The Amended Final Judgment was entered on December 18, 2007; the appeal was argued in the United States Court of Appeals

We start with Rule 1.500(e), Florida Rules of Civil Procedure, entitled "Final Judgments," relating to "enter[ing]" final judgments after default. Rule 1.570 is entitled "Enforcement of Final Judgments." Rule 1.560(c) requires judges to include a "Final Judgment Enforcement Paragraph." Forms 1.986, 1.990, 1.991, 1.995, 1.996 of the Florida Rules of Civil Procedure all include the term "Final Judgment." Rule 9.110(k), Fla. R.App.P., provides that "partial final judgments are reviewable either on appeal from the partial final judgment or on appeal from the final judgment in the entire case."

"Final judgments" are not difficult to divine:

> The most common final order in civil cases is a judgment rendered in favor of the prevailing
> party in a jury or nonjury trial. The adjudication is final because it is made after consideration of the evidence in a trial or hearing on the merits of the case. If the judgment is styled as a final judgment, and if it disposes of all of the issues between the parties, there will be little question regarding its finality.

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on January 14, 2009. That court issued its certified questions opinion on March 6, 2009. Briefing in this Court will be complete (presumably) in August 2009 and argument and decision sometime thereafter. There is no doubt that at least four years will have passed since Hurricane Wilma, and QBE's promises of adjusting and payment will still not be resolved.

Philip J. Padovano, *Florida Appellate Practice*, 2006 Ed., §21.4. Addressing ***trial court finality,*** this Court has said: "A final judgment is one which ends the litigation between the parties and disposes of all issues involved such that no further action by the court will be necessary." *Caulfield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002).[8]

Because this was a diversity case pursuant to Title 28 U.S.C. § 1332, it was tried in United States District Court, and that court entered a "Final Judgment." Rule 58, Fed.R.Civ.P. is entitled "Entering Judgment." Rule 54 defines "Judgment" as a decree and any order from which an appeal lies. QBE's appeal to the United States Court of Appeals was, as it acknowledged, taken after the District Court "entered an amended final judgment in the amount of $7,237,223.88," which "QBE appealed." QBE Brief, p. 10. That appeal,

[8] QBE offers law office of *David Stern, P.A. v. SEC. Nat'l. Serv. Corp.*, 969 So. 2d 962, 966 (Fla. 2007) and *Gaines v. Russo*, 723 So. 2d 398, 399 (Fla. 3d DCA 1999), lawyer malpractice cases. Both refer to *Silverstrone* and leave no doubt that the lawyer malpractice cases address only when a malpractice claim accrues, not the meaning of entry of a final judgment. The cite to *Porter Lumber v. Tim Kris, Inc.*, 530 So. 2d 398, 399 (Fla. 4th DCA 1988) is equally inapposite. That was a mechanics lien case in which a satisfaction of judgment was premature because the appellate process had been invoked and "the judgment will not be final until it is completed." *Id.* *Porter Lumber* does not interpret the meaning of "entry of final judgment," it only stands for the proposition that one cannot finesse a judgment being appealed by trying to satisfy it to foreclose the appeal. The fact that a judgment can be stayed pending appeal does not mean that there has been no entry of a final judgment.

pursuant to Rule 4, Fed.R.App.P., had to be filed "within 30 days after the judgment. . .is entered." Thus there was a final judgment entered. Had there not been, there would not have been an appealable order. The fact that there is the right to appeal and to post a supersedeas does not trump the plain language use of "final judgment" and the legal understanding of that term.

Simply put, "entry of a final judgment" occurred here, and the plain words of the policy required payment within 30 days because those words were written by QBE and it cannot escape the consequences of its own contractual language. *See Swire Pacific Holdings, Inc. v. Zurich Insurance Co.*, *supra*, 845 So. 2d 161 (Fla. 2003).

B. POSTING A BOND DOES NOT COUNT

QBE's alternative argument is that it did not "waive" its right to post a supersedeas in order to stay the judgment: "The Loss Payment Provision contains no clear, explicit language waiving the right to a stay of execution." QBE Brief, p. 44.

We have no quarrel with the general proposition that one may, under Florida law, or federal law, obtain a stay pending appeal by posting a supersedeas bond. But this is not a "waiver" case; it is a plain language case. "When a contract is clear and unambiguous, the actual language used in the contract is the

best evidence of the intent of the parties, and the plain meaning controls." *Anthony v. Anthony*, 949 So. 2d 226, 227 (Fla. 3d DCA 2007), quoting *Maher v. Schumacher*, 605 So. 2d 481, 482 (Fla. 3d DCA 1992). And in the insurance context, the rules are especially favorable to the insured.

> In considering this clause we must follow the guiding principle that this Court has consistently applied that insurance contracts must be construed in accordance with the plain language of the policy. Further, we consider that "[i]f the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous." An ambiguous provision is construed in favor of the insured and strictly against the drafter.

Swire Pacific Holdings, Inc. v. Zurich Insurance Co., supra, 845 So 2d at 165. (internal citations omitted). Therefore, if the language is plain, as we contend, or even if the language is ambiguous, as QBE contends, the result is the same. "Within 30 days after we receive the sworn proof of loss and (a) There is an entry of a final judgment" means that QBE had to pay the judgment.

The fact that the language is often used by insurers, or that "insurers have appealed hundreds of final judgments awarding policy limits" (QBE Brief, p. 45) proves nothing. It would have been a simple matter for QBE to have included

language that preserved the ability to supersede an entered final judgment. For example, it could have said "within 30 days of the entry of a final judgment, or if timely appealed and superseded, within 30 days of the entry of an appellate mandate, resolving the appeal." Then it would be clear that the insured would have to await a final appellate ruling. But a final appellate decision is not the same as the "entry of a final judgment," so QBE is bound by the language it chose.

QBE's *ipse dixit* – "[t]he judgment in this case is not 'final' because QBE has appealed it" (QBE Brief, p. 48) – contravenes every accepted notion in Florida (and federal) law regarding the meaning of entry of a final judgment. This case will not be over until this Court and the United States Court of Appeals publish their decisions and a mandate ultimately issues. But that mandate is not to be confused with the entry of a final judgment. That has occurred, and the answer to the certified question should be "yes," language in an insurance policy mandating payment of benefits upon "entry of a final judgment" requires an insurer to pay its insured upon entry of a judgment at the trial level. In this case, the policy provided for payment within 30 days of the entry of a final judgment, so QBE is entitled to that grace period, but no more.

CONCLUSION

For the reasons set forth above the Court should find good faith and

fair dealing to be cognizable and triable in one breach of contract action; that the failure to comply with the hurricane notice deductible precludes application of the deductible; and that "entry of a final judgment" means the trial court's final judgment.

Respectfully submitted,

BRUCE S. ROGOW
Florida Bar No. 067999
CYNTHIA E. GUNTHER
Florida Bar No. 0554812
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
Fax: (954) 764-1530
guntherc@rogowlaw.com
and
DANIEL S. ROSENBAUM
RICHARD C. VALUNTAS
JOHN M. SIRACUSA
KATZMAN GARFINKEL ROSENBAUM
250 S. Australian Ave., FL 5
West Palm Beach, FL 33401
Ph: (561) 653-2900
Fax: (561) 820-2542
drosenbaum@kgrlaw.com

By:_____
BRUCE ROGOW
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail this 9th day of July, 2009 to the following:

MONICA VILA
RODOLFO SORONDO, JR.
HOLLAND & KNIGHT LLP
701 Brickell Ave., Suite 3000
Miami, FL 33131

WILLIAM S. BERK
BERK, MERCHANT & SIMS, PLC
2100 Ponce de Leon Blvd. PH 1
Coral Gables, FL 33134

RAOUL G. CANTERO, III
WHITE & CASE
200 S. Biscayne Blvd., Suite 4900
Miami, FL 33131

_____
BRUCE S. ROGOW

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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BRUCE S. ROGOW