IN THE SUPREME COURT OF FLORIDA

Case No. SC09-441

QBE INSURANCE CORPORATION,

Appellant,

v.

CHALFONTE CONDOMINIUM APARTMENT ASSOCIATION, INC.,

Appellee.

ON REVIEW OF CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLANT

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INTRODUCTION

This case arises from an insurance claim for property damage suffered in Hurricane Wilma, which struck South Florida in 2005. The condominium buildings of the insured were among the buildings in Boca Raton affected by the hurricane. A week after the hurricane, the chairman of the insured's association advised the unit owners that the majority of units had no damage. Nevertheless, after a six-day trial in federal district court, a jury awarded $8,140,099.68 in damages. The insurer submits that this anomaly occurred because the court allowed the insured to present evidence, as part of its breach of contract claim, that in failing to fairly and expeditiously settle the claim, the insurer breached a duty of good faith and fair dealing—in other words, that it acted in bad faith. The court also allowed the jury to consider that the insurer had violated a statute, which contains no penalty provision, requiring that policy language warning of hurricane deductibles be stated in boldfaced 18-point type. The notice here was in boldfaced 16.2 point type (this brief is in 14-point) and in capital letters.

Both parties appealed the judgment. After hearing oral argument, a panel of the United States Court of Appeals for the Eleventh Circuit certified to this Court five separate questions, which can be separated into three categories: questions about an action for the breach of the implied warranty of good faith and fair dealing (I and II); questions about the statutory language and type-size

requirements in section 627.701(4)(a) (III and IV); and a question about whether the policy waived the insurer's right to stay execution of a judgment (V). The specific questions were:

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?

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 section 624.155, Florida Statutes?

III. May an insured bring a claim against an insurer for failure to comply with the language and type-size requirements established by section 627.701(4)(a), Florida Statutes?

IV. Does an insurer's failure to comply with the language and type-size requirements established by section 627.701(4)(a), Florida Statutes, render a noncompliant hurricane deductible provision in an insurance policy void and unenforceable?

V. Does language in an insurance policy mandating payment of benefits upon "entry of final judgment" require an insurer to pay its insured upon entry of judgment at the trial level?

STATEMENT OF THE CASE AND FACTS

In 2005, Hurricane Wilma struck Boca Raton, causing damage to the condominium buildings owned by Chalfonte Condominium Apartment Association, Inc. (Chalfonte). Chalfonte filed a claim for damages with its insurer, QBE Insurance Corporation (QBE), under an insurance policy covering

commercial property (the Policy). (D.E. 6 ¶¶ 2, 3). During QBE's investigation of the claim, Chalfonte filed suit against QBE. The extent of damages was greatly in dispute. QBE's investigation revealed that the property suffered relatively minor damages, below the deductible amount, while Chalfonte contended the buildings sustained extensive, albeit subtle, damages requiring replacement of all the windows and sliding glass doors.

The Amended Complaint asserted, among others, claims for (1) breach of contract (Count 2), alleging that QBE failed to provide coverage under the Policy, and (2) breach of the implied warranty of good faith and fair dealing (Count 3), alleging that QBE failed to act in good faith by, among other things,

(a) failing to pay for the loss or damages to Chalfonte's property;
(b) failing to fairly and promptly investigate Chalfonte's property damage claim;
(c) failing to fairly and promptly pay Chalfonte's property damage claim;
(d) failing to fairly and promptly settle Chalfonte's property damage claim; and
(e) otherwise failing to provide coverage for Chalfonte's property damage claim.

(D.E. 21 ¶¶ 17-25, 26-35). Chalfonte alleged the identical damages for Counts 2 and 3, namely, "general compensatory damages," as well as "special damages, including but not limited to, the expenses of procuring and paying for loans and/or lines of credit so that Chalfonte could make repairs and/or rebuild its property." (D.E. 21 ¶ 33). QBE moved for summary judgment on Count 3, arguing the claim

was really one for statutory bad faith and was therefore premature. (D.E. 51 at 6). The district court denied QBE's motion. (D.E. 107).

At trial, Chalfonte's breach-of-contract case focused considerably on QBE's alleged bad faith. For example, in setting the theme of the case during the opening statement, rather than highlighting the central issues of whether the buildings had suffered damage and whether that damage was covered by the Policy, Chalfonte's counsel highlighted QBE's behavior during the adjustment process:

> The minute they heard there was a public adjuster involved what they did was instead of negotiating with the public adjuster, instead of returning the phone calls of Ms. Jordan, the property manager at the Chalfonte . . . they pretty much ignored them totally and they put their attorneys on the case as of February of 2005. (D.E. 210 at 110:10-16).
>
> And what did the attorneys do? They didn't come out and adjust the claim. . . . (D.E. 210 at 110:17-18).
>
> . . . .
>
> Well, they came out, but it wasn't until April or May. . . . (D.E. 210 at 110:23-25).
>
> . . . .
>
> So what this case is about, it's about 378 families who to this day, almost two years now, have been waiting to get their money. It's about the obligation of good faith and fair dealing that applies in insurance contracts. You have a timely and prompt adjustment, which is also an ethical canon of adjusters. ***It's about an insurance company who dragged their feet every step of the way***, including today and tomorrow and the ten days that you're sitting here and [they] are going to tell you that we didn't give them records, we didn't do this, we didn't do that. In the meantime, they had not only every opportunity to do it, they did it [sic]. (D.E. 210 at 114:20-25, 115:1-5).
>
> . . . .
>
> The public adjuster hired by the Chalfonte had his report done, and he's just as busy as they were, in mid December. He gave that report to the insurance

> company. . . . Let's settle this claim. Let's get these families some money. (D.E. 210 at 115:15-22).
>
> And you know what [the insurance company's] response was? We're not talking to you. Here is a letter from our lawyer. We said, well, why wouldn't you talk to me? I want to try to settle this claim. No, you're going to go with our lawyer and they're going to bring in all of these people to copy your records for 30-some-odd years. Okay. He said I'll do it. And they came out and they came out and they copied and they copied and they took records and they continued to take records. ***Even after all of that they still don't give us a number.*** (D.E. 210 at 115:23-25, 116:1-7).
>
> ***This is about not promptly adjusting a claim. It's about taking people's money for four or five years, hundreds of thousands of dollars in insurance premiums, and not paying them when in their time of need when a hurricane—the third worst hurricane in the history of the United States ravaged through this community and uprooted these people, and it's wrong.*** And we now need for you to rectify it. (D.E. 210 at 116:8-14).
>
> . . . .
>
> And all of the excuses that are offered by all of the unqualified people that they had go out there, and the I was busy, and the dog ate my homework, and all of that stuff, why that evidence doesn't mean anything. (D.E. 210 at 117:15-19).

(D.E. 210 at 110-117) (emphasis added).

The testimony Chalfonte elicited from many of its witnesses likewise emphasized QBE's alleged bad faith conduct. For example, Chalfonte asked Robert Sansone, QBE's corporate representative, several questions suggesting that QBE had delayed in providing an adjustment of damages to Chalfonte. (D.E. 210:175-76, 179). Chalfonte also asked Sansone questions about the Florida code of ethics applicable to adjusters, such as whether he had complied with his duty to

"act promptly and diligently and fairly to guard [the insured's] best interests." (D.E 210: 180, 184-85).

Chalfonte elicited similar testimony about QBE's behavior from Stephen Sarasohn, the public insurance adjuster. Sarasohn testified that after Chalfonte submitted a detailed estimate, QBE "refused to talk to us and never discussed the claim with us . . . ." (D.E 210:252). He also testified that after making a good faith effort to settle the claim with Sansone, who had no authority to do so, he was not able to contact QBE's counsel and would have to resort to "involv[ing] an attorney" because he was "at a loss for how to get the insurance company to respond at all." (D.E. 210: 263. 266-67).

Chalfonte presented the testimony of John Wareham, who was a construction consultant assisting Sansone with the inspection of the property. (D.E. 184:23). Chalfonte dedicated the majority, if not all, of that examination to exposing a 20 year-old charge of insurance fraud (involving a "grey market" automobile), for which adjudication had been withheld. (D.E. 184:24-36). Chalfonte did not ask Wareham substantive questions on the central issues of damages and coverage.

Chalfonte's excessive emphasis of QBE's alleged bad faith is also evidenced by the testimony of Janet Jordan, the association manager. (D.E. 184:37). Jordan explained that Sansone was "difficult to get a hold of," despite her several attempts

to contact him, and "it took a while for him to come to the property." (D.E. 184:59-60). She testified that, almost a year after the hurricane, QBE was doing "absolutely nothing" with Chalfonte's claim and that there was "dead silence" from QBE. (D.E. 184:71, 72).

In summarizing the case to the jury during closing arguments, Chalfonte's counsel did much more than simply comment on whether the evidence had proven hurricane damage and in what amount. Rather, he repeatedly emphasized QBE's alleged delay and other bad faith conduct in handling Chalfonte's claim:

> Now, where things went wrong here is that people like Janet Jordan and all of the 378 families at the Chalfonte, most of whom, unfortunately, are in their senior year, in their 80s, ***and they trusted QBE that they would come out and do the right thing and adjust their loss and pay for the damages that had been sustained.*** They put their trust in their insurance carrier. That's what is supposed to happen. ***And the carrier is supposed to come out and pay the damages caused by the storm.*** (D.E. 212 at 10:5-13).
>
> . . . .
>
> You see, the game is very clear. You get your close group of people, not trustworthy . . . . All of the time you're trusting them that they're going to do the right thing and they're going to adjust your claim promptly and expeditiously as required by the laws and the ethics of adjustment. . . . (D.E. 212 at 13:6-13).
>
> . . . .
>
> It's a number game, ladies and gentlemen. This is a total numbers game. ***And the people in control of the numbers is a very close knit group of people, some of whom can't tell the truth no matter how obvious it is.*** (D.E. 212 at 16:4-7)
>
> . . . .
>
> Now, while all of this is going on, Chalfonte and 378 families have to take out a $15 million loan because there's no adjustment of their claim. . . . ***It is over $400,000 to date, because this carrier is holding onto their money and won't give it to them***. . . . (D.E. 212 at 20:1-8)

They didn't even have an adjustment of their claim. They didn't have an adjustment. They had to file suit to get the money. And they had to now go through this entire legal proceeding to get coverage for what they pay every year in a premium which is hundreds of thousands of dollars and which is now over a million dollars in order to have coverage for their buildings . . . . (D.E. 212 at 20:9-15).

. . . .

But, unfortunately, on the other side in this case there is a planned effort to make sure no matter what happens . . . that adjustment of the claim is going to be left open until we even got into the litigation. . . . (D.E. 212 at 20:19-22).

. . . .

You've got to decide who you believe. And what Chalfonte is suggesting to you is ***don't be fooled by the smoke and the mirrors, because the game is delay and don't pay. Delay, delay, delay. And keep that number in the adjustment always low enough so even if they find some other stuff . . . you won't pass the deductible.*** You keep that number low enough and you never have to pay the claim. ***And if you don't have to pay the claim, you've done a wonderful job on your bottom line.*** (D.E. 212 at 22:7-16).

. . . .

They've mixed and matched everything to fit their case. ***But it is their attitude that is most important, because it's the attitude that we have had to deal with and it is that we're not human beings and we don't count.*** We count. We pay a lot of money to get coverage for exactly what they knew it was, windstorm. They knew the door and sliders were in bad condition. (D.E. 212 at 62:20-25, 63:1).

And what you really saw here in those minutes is a board of directors, elderly, the people who fought our wars, ***the people who went to Korea, the people who went to World War II, people who died for us*** and their relatives . . . . (D.E. 212 at 63:2-5).

. . . .

Every unit owner file they went through. The personal private information of every unit owner. ***People who have AIDS or people who are infirmed or people that have financial information. It's all gone through all so they can deny the claim and come to court and say you didn't cooperate, or look what we found.*** (D.E. 212 at 67:10-15).

. . . .

> ***This is a situation where the insurance company wasn't there to protect and defend and help. They became the enemy because they were watching out for them and not for us.*** (D.E. 212 at 73:22-24).

(D.E. 212 at 10-73) (emphasis added).

In addition to the breach of contract claims, Chalfonte also asserted a claim for QBE's alleged violation of section 627.701, Florida Statutes. (Count 4). (D.E. 21 ¶¶ 36-48). Chalfonte alleged that the hurricane deductible provision in the Policy did not comply with the statutory type-size and language requirements, and sought general compensatory and special damages. (D.E. 21 ¶¶ 39-48). QBE moved to dismiss Count 4 because section 627.701 does not provide a private right of action. (D.E. 23). The district court agreed and dismissed the count. (D.E. 75). The court nevertheless submitted to the jury the question of whether the Policy complied with the requirements of section 627.701(4)(a). (D.E. 165).

The jury found for Chalfonte on all claims, awarding it $8,140,099.68 and finding, among other things, that QBE breached both the Policy and the implied warranty of good faith and fair dealing. (D.E. 165). Of the total judgment award, the jury allocated $7,868,211.00 to QBE's breach of the coverage provision and $271,888.68 for breach of the implied warranty of good faith and fair dealing. (D.E. 165). The jury also found that the Policy did not comply with section 627.701(4)(a). (D.E. 165). The court entered a Final Judgment for Chalfonte (D.E. 166).

QBE filed a Motion for Judgment Notwithstanding the Verdict and/or Motion for Judgment as a Matter of Law and a Motion for New Trial, challenging Chalfonte's claim for breach of the implied warranty of good faith and fair dealing. (D.E. 172-1, 175). The district court denied both motions. (D.E. 208, 225). The court did grant, however, QBE's Motion to Alter or Amend the Final Judgment to Apply the Hurricane Deductible. (D.E. 222). The court found that, although QBE did not "strictly comply" with the statutory type-size and language requirements of the statute, there was no express penalty attached to section 627.701(4)(a). (D.E. 222 at 5). It concluded, therefore, that the hurricane deductible provision was valid and enforceable, and it entered an Amended Final Judgment in the amount of $7,237,223.88. (D.E. 222 at 11; D.E. 226). The Amended Final Judgment also accounted for prejudgment interest. (*See* D.E. 223). Chalfonte moved for attorneys' fees and costs, which the district court granted in part and denied in part. (D.E. 255).

QBE appealed. Chalfonte cross-appealed, challenging the court's order enforcing the deductible provision. To stay execution of the Judgment pending appeal, QBE filed a supersedeas bond representing 110% of the Judgment. (D.E. 227, 265). Chalfonte nevertheless moved to enforce the Judgment, claiming that the Policy waived QBE's right to stay execution and obligated QBE to pay

Chalfonte within 30 days of the Judgment. (D.E. 231) Chalfonte relied on the following provision in the Policy:

> 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 final judgment . . . .

(D.E. 231-2 at 29). The district court rejected Chalfonte's argument, finding that QBE had complied with the applicable procedural rules in filing its supersedeas bond and had not waived its right to a stay under the Policy. (D.E. at 2). Chalfonte appealed.

The Eleventh Circuit consolidated all the appeals and, after hearing oral argument, certified the five questions previously described.

SUMMARY OF THE ARGUMENT

Florida common law has never imposed a duty of good faith on an insurer when investigating and ultimately settling its insured's own claim. Rather, an insurer's common law duty to settle a claim in good faith exists only with respect to a third party's claim, given the unique fiduciary relationship between an insurer and insured in the third-party context. Thus, a common law action for bad faith, or for breach of the implied warranty of good faith and fair dealing, does not exist in the first-party context. While Florida case law recognizes that an "implied warranty of good faith and fair dealing" applies in every contract, no Florida case has ever applied the duty to a first-party insurance claim. The Court should

therefore clarify that Florida does not recognize a claim for breach of the implied warranty of good faith and fair dealing based on an insurer's failure to settle its insured's own claim "fairly" or "promptly."

Indeed, recognizing the non-existence of a first-party, bad faith cause of action under the common law, the Florida legislature enacted section 624.155, Florida Statutes. Section 624.155 allows an insured to recover for its insurer's failure to settle a claim in good faith, whether in the first-party or third-party context, and therefore adequately protects an insured against its insurer's failure to fairly or promptly investigate, assess, or pay a claim. A claim under section 624.155, however, accrues only after the insured has proven liability and the extent of its damages in the underlying coverage claim. This is because permitting references to an insurer's alleged bad faith during the trial of the contractual claim will prejudice the jury and distort the jury's view of the coverage issue. That is exactly what happened in this case, where the judge allowed the "lack of good faith" case to be tried at the same time, and before the same jury, as the breach of contract case. Thus, even if this Court decides that Florida common law does recognize an action for good faith and fair dealing in the first-party context, the Court should find that the common law claim does not accrue until the insurer's liability and the amount of damages have been determined.

Section 627.701(4)(a) of the Insurance Code, which requires that a hurricane deductible provision in an insurance policy contain certain language and be printed in a particular type-size, provides neither a private right of action nor a penalty for the failure to strictly comply with its requirements. The Court should not infer one. Neither should the Court speculate whether the Legislature intended to impose a penalty for an insurer's failure to strictly comply with section 627.701(4)(a). Throughout the Insurance Code, the Legislature expressly included penalties for violations of other sections. Here, although the language did not strictly comply with the statute, which required the clause to be printed in 18-point type, it was printed in bold, with all letters capitalized, and in a size substantially larger than the surrounding text. Therefore, the statute's purpose was fulfilled; Chalfonte was aware of the hurricane deductible. In such circumstances, a hurricane deductible provision should not be rendered void merely because the notice was not in the precise size prescribed.

A payment provision in an insurance policy requiring payment within 30 days after "entry of final judgment" does not waive an insurer's right to stay execution of a judgment by posting a bond pending appeal. Under both federal and Florida law, an insurer has a right to stay execution of a money judgment by filing a bond. It does not waive that right simply by agreeing to pay within 30 days of a

final judgment. Further, a judgment does not become "final" under Florida law until the appellate process is complete.

STANDARD OF REVIEW

This case is before the Court on certification by the United States Court of Appeals for the Eleventh Circuit. Fla. R. App. P. 9.030(a)(2)(C). The Eleventh Circuit certified five questions of law to be answered by the Court.

ARGUMENT

I. FLORIDA COMMON LAW DOES NOT RECOGNIZE A CAUSE OF ACTION FOR LACK OF GOOD FAITH AND FAIR DEALING BASED ON AN INSURER'S FAILURE TO INVESTIGATE AND SETTLE ITS INSURED'S CLAIM WITHIN A REASONABLE TIME.

The Eleventh Circuit's first certified question was, "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?" We submit the answer is no for the following reasons, on which we elaborate below: (A) no common law cause of action exists for an insurer's bad faith in the first-party insurance context; (B) section 624.155 was designed to remedy that void by creating a civil remedy for an insurer's lack of good faith toward its insured; (C) in the first-party insurance context, Florida courts have not inferred a contractual cause of action for lack of good faith; and (D) section 624.155 adequately protects

insureds from their insurers' lack of good faith during the claims settlement process.

A. Florida common law does not recognize a cause of action for bad faith in the first-party insurance context.

Florida common law has never recognized an insurer's duty of good faith in investigating and assessing, or ultimately settling, a first-party claim. Rather, under the common law, an insurer has a duty to act in good faith only with respect to third-party claims. *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58-59 (Fla. 1995); s*ee also Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005) ("Traditionally and historically, the courts in this state did not . . . recognize a corresponding common law first-party action that would protect insured individuals and enable them to seek redress of harm against their insurers for the wrongful processing or denial of their own first-party claims or failure to deal fairly in claims processing.").

Courts began to recognize third-party bad faith claims when liability policies replaced traditional indemnity policies as the standard insurance policy. *Laforet*, 658 So. 2d at 58. Under a traditional indemnity policy, the insured would defend a claim brought by a third party, and once the claim was settled or adjudicated, the insurer would indemnify the insured. *Id.* Under a liability policy, however, the insurer assumed the insured's defense, and therefore had the power to settle and foreclose an insured's exposure, or to refuse to settle and leave the insured exposed

to liability in excess of policy limits. *Id*. Because this placed insureds and insurers in a fiduciary relationship, courts began to recognize that insurers owed their insureds a duty to "exercise good faith" or "avoid bad faith." *Ruiz*, 899 So. 2d at 1125 (explaining that third-party bad faith actions arose in response to insurers' practice of rejecting claims presented by third parties against insureds).

The common law has not, however, recognized an insurer's duty to act in good faith when handling and settling its insured's own claim. *Laforet,* 658 So. 2d at 58-59; *see also Opperman v. Nationwide Mut. Fire. Ins. Co*., 515 So. 2d 263, 265 (Fla. 5th DCA 1987) ("[E]stablished Florida law also held that an insured had no right to proceed against his own insurer for failing to settle in good faith the insured's own claim."). Unlike a third-party action where the insured depends on its insurer, in a first-party action the interests of the insurer and insured are wholly adverse. *Laforet,* 658 So. 2d at 58-59. In fact, this Court has recognized that the insurer/insured relationship in a first-party bad faith action is "the very antithesis" of that in third-party actions:

> It is singularly important to . . . note that regardless of the bad faith of the insurer in refusing to settle a claim against it by its insured under this provision of the policy, such action of the insurer can never result in a judgment against the uninsured motorist for any excess liability . . . . Because the interests of the insurer are wholly adverse to those of its insured as to every facet of a claim under the uninsured motorist provision of the policy, no basis for a fiduciary relationship between the parties exists.

Id. at 59 (omissions in original) (quoting *Baxter v. Royal Indemnity Co.*¸ 285 So. 2d 652 (Fla. 1973), *superseded by statute*, § 624.155, Fla. Stat.). Because the fiduciary relationship that exists in third-party actions is not present in first-party actions, Florida has refused to impose on insurers a duty to act in good faith, or to avoid bad faith. *Id*.; *Ruiz*, 899 So. 2d at 1125-26. Consequently, at common law, an insured has no remedy for its insurer's bad faith, unless the insurer's bad faith refusal to pay amounted to an independent tort such as fraud or intentional infliction of emotional distress. *See Talat Enters., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1281 (Fla. 2000) (noting that, under the common law, "[i]f an insurer acted in bad faith in settling a claim filed by its insured, the only remedy available to the insured, in the absence of an independent tort committed by the insurer such as fraud, was to file a breach of contract claim against its insurer and recover only those damages contemplated by the parties to the policy").

B. Section 624.155 was intended to remedy the common law deficiency by creating a civil remedy for an insurer's lack of good faith toward its insured.

Recognizing that the common law does not provide an insured a claim against its insurer for failing to settle its claim in good faith, the Legislature enacted section 624.155, Florida Statutes (1983). Under section 624.155(1)(b)1, an insured may bring a civil action against an insurer for, among other things, "[n]ot 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 or her interests." § 624.155(1)(b)1, Fla. Stat. (emphasis added). The purpose of section 624.155 was to "extend[ ]" the duty of an insurer to "act in good faith and deal fairly" to instances where an insured sought first-party coverage, thereby filling the common law void. *Ruiz*, 899 So. 2d at 1126; *see also Fidelity & Casualty Ins. Co. of New York v. Taylor*, 525 So. 2d 908 (Fla. 3d DCA 1987) ("In a first-party action against an insurance carrier founded upon section 624.155(1)(b), *which affirmatively creates a company duty to its insured to act in good faith in its dealings under the policy*, liability is based upon the carrier's conduct in processing and paying a given claim." (emphasis added)). In other words, rather than *implying* duty of good faith and fair dealing, the statute makes that duty explicit.

This Court itself has recognized that, before the Legislature enacted section 624.155, no "civil remedy" existed for an insurer's bad faith in the first-party context. *See Ruiz*, 899 So. 2d at 1124 (noting that "[s]ection 624.155 was intended and designed to *provide* a *civil remedy* . . . ." (emphasis added)). As at least two federal judges from the Southern District of Florida have noted, it is significant that in describing the common law, this Court used the term "civil remedy." *See Buckley Towers Condo., Inc. v. QBE Ins. Co.*, No. 07-22988-CIV, 2008 WL 5505415 (S.D. Fla. Oct. 21, 2008); *Isola Condo. Ass'n, Inc. v. QBE Ins. Corp.*, No.

08-21592-CIV, 2008 WL 5169458 (S.D. Fla. Dec. 8, 2008). This Court did not distinguish between *contractual* and *tort* remedies; rather, the Court explained that no civil remedy existed at all. It is therefore irrelevant whether a claim for "breach of the implied warranty of good faith and fair dealing" is a contractual claim while a bad faith claim is extra-contractual. The fact remains that the common law does not recognize any first-party action.[1]

C. Florida courts have not inferred a separate common law duty of good faith and fair dealing in the first-party context.

In certifying the question to this Court, the Eleventh Circuit was not convinced that Florida courts had definitively concluded whether an insured could assert a "good faith and fair dealing" claim for an insurer's failure to investigate and assess its insured's claim. The court recognized that Florida common law does not provide a first-party action for "bad faith failure to settle a claim," but

[1] Indeed, the statute's legislative history demonstrates that the statute was designed to fill the common law void. The House Committee's Report indicates that a cause of action under section 624.155 for not attempting in good faith to settle claims is "newly created." Bill Analysis, House Committee on Insurance (H.B. 4-F) (April 9, 1992). Similarly, the Staff Report explains that the statute requires insurers to deal in good faith to settle claims with respect to "all insurance policies," and notes that "current case law requires this standard in liability claims, but not in uninsured motorist coverage." Staff Report, 1982 Insurance Code Sunset Revision (H.B. 4F; as amended by H.B. 10G) (June 3, 1982). Like property damages claims, uninsured motorist claims are first-party claims. *Progressive Exp. Ins. Co. v. Scoma* 975 So. 2d 461, 466 (Fla. 2d DCA 2007). Thus, in enacting section 624.155, the Legislature "chose[ ] to impose" on insurance companies a duty that did not otherwise exist. *Ruiz*, 899 So. 2d at 1128.

questioned whether an insured could nevertheless bring a "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." The latter claim, however, is premised on the same duty of good faith that Florida common law has refused to impose

It is true that general contract law implies a warranty of good faith and fair dealing in all contracts. In fact, some insurance cases affirm the general contract rule. *See, e.g., N. Am. Van Lines, Inc. v. Lexington Ins. Co*., 678 So. 2d 1325, 1330-31 (Fla. 4th DCA 1996). However, no Florida court has recognized a claim for "breach of the implied warranty of good faith and fair dealing" based on an insurer's conduct in investigating or settling a first-party claim. *See id.* (recognizing a claim for breach of the implied warranty of good faith and fair dealing "in all insurance contracts," but addressing it in a third-party context).[2]

[2] A handful of federal district courts considering first-party insurance cases have, at least implicitly, recognized a cause of action for breach of the implied covenant of good faith and fair dealing based on the insurer's bad faith conduct in settling a claim. However, no case reconciles the existence of such a claim with the historical limitation on the common law duty "to exercise good faith" or "avoid bad faith" to *third-party* actions. For example, in *Langhorne v. Fireman's Fund Ins. Co.*, 432 F. Supp. 2d 1274, 1277 & n.5 (N.D. Fla. 2006), a property insurance action, the district court acknowledged in a footnote that the plaintiff had alleged a claim for breach of the duty of good faith and fair dealing. Without assessing the viability of such a claim, the court simply quoted language from *Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F. 3d 1146, 1149 (11th Cir. 2005), a non-insurance action, that "every contract contains an implied covenant of good faith and fair dealing." *Id.*; s*ee also Stallworth v. Hartford Ins. Co.*, No. 3:06cv89/MCR/EMT, 2006 WL 2711597 (N.D. Fla. Sept. 19, 2006) (recognizing a claim for breach of the implied covenant of good faith and fair dealing); *Stallworth*

Nor does any Florida case support a claim for "breach of the duty of good faith" (or lack of good faith) separate from a claim for "bad faith." With respect to the duties of an insurer when investigating and settling its insured's claim, the actions are identical. In fact, this Court has characterized a bad faith action precisely as an action for breach of a duty of good faith and fair dealing. *See Ruiz,* 899 So. 2d at 1128 ("The Legislature has clearly chosen to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have had in dealing with third-party claims."); *see also id.* at 1129 (recognizing the "Legislature's mandate that the insurer's good faith obligation to process claims establishes a similar relationship with the insured requiring fair dealing, as has arisen in the third-party context").[3]

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v. Hartford, No. 3:06cv89/MCR/EMT, 2007 WL 805610 (N.D. Fla. Mar. 14, 2007) (same); *Townhouses of Highland Beach Condo. Ass'n Inc. v. QBE Ins. Co.*, 504 F. Supp. 2d 1307 (S.D. Fla. 2007) (same); *Dennis v. Nw. Mut. Life Ins. Co*., No. 3:06-cv-43-J-20MCR, 2006 WL 1000308, at *3 (M.D. Fla. Apr. 14, 2006) (same); *Quadomain Condo. Ass'n, Inc. v. QBE Ins. Corp.*, No. 07-60003-Civ-Moreno, 2007 WL 1424596 (S.D. Fla. May 14, 2007) (same); *Escambia Treating Co. v. Aetna Cas. & Sur. Co*., 421 F. Supp. 1367 (N.D. Fla. 1976) (same).

[3] To the extent that an action for breach of the implied covenant of good faith and fair dealing (lack of good faith) may address the parties' reasonable expectations about the parties' obligations under the policy, as some courts have held, *see Cibran v. BP Prods. N. Am., Inc.,* 375 F. Supp.2d 1355 (S.D. Fla. 2005), this Court has held that the doctrine of reasonable expectations does not apply in the insurance context. *See Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.,*711 So. 2d 1135 (Fla. 1998); *see also State Farm Fire & Cas. Co. v. Castillo,* 829 So. 2d 242 (Fla. 3d DCA 2002) (noting that it is the policy's terms which define insurance coverage, not the insured's reasonable expectations).

In certifying the question to this Court, the Eleventh Circuit suggested that *O'Shields v. United States Auto. Ins. Co.*, 790 So. 2d 570 (Fla. 3d DCA 2001) "implicitly recognized" that in a first-party action a good faith and fair dealing claim can be distinct from a statutory bad faith claim. But *O'Shields* does not undermine QBE's assertion that no Florida court has recognized a first-party, common law bad faith claim based on the insurer's bad faith failure to settle. In *O'Shields*, after the insured's automobile was stolen, the insured filed an insurance claim. *Id.* at 571. The insurer initially denied coverage, but eventually agreed to settle the claim and sent payment to the lienholder without advising the insured of the amount or terms of the settlement. *Id.* The insured sued for breach of contract based on the insurer's failure to inform him of the settlement and provide him the settlement documents, as the policy required. *Id.* The suit was therefore based, not on the insurer's alleged bad faith in settling the claim, but on the insurer's failure to comply with the policy's express terms. *See id.* In addition to finding that the insurer had breached the policy, the court found the insurer had breached its duty of good faith and fair dealing to the insured. *Id.* The court reversed the entry of summary judgment for the insurer. *Id.*

While *O'Shields* does recognize a claim for breach of the implied warranty of good faith and fair dealing, it was not a first-party action based on the insurer's alleged bad faith, or lack of good faith, in handling or settling the insured's claim,

as is this case. *O'Shields* is simply a breach of contract action based on an insurer's breach of a policy's express terms. *Id*. at 571 ("According to the terms of the insurance contract, [the insured] . . . had a right to the settlement documents, and a right to be informed regarding the settlement with the lienholder." (emphasis added)). Given that the case was governed entirely by the policy's terms, it is unclear why the court even discussed the implied duty of good faith. Nevertheless, *O'Shields* does not change the fact that no Florida court has recognized a claim for breach of the implied warranty in a first-party action based on the insurer's bad faith in not settling its insured's claim. Any alleged bad faith conduct by the insurer in *O'Shields* arose from its failure to inform the insured of the terms of the settlement and provide the insured with the settlement documents, and not from the actual settlement of the claim.

The impossibility of distinguishing between an action for lack of good faith and one for bad faith is evidenced by inconsistent rulings from two federal district courts confronted with almost identical allegations. *See Arlen House East Condo. Ass'n, Inc. v. QBE Ins. (Europe) Ltd.*, 2008 WL 4500690, (S.D. Fla. Sept. 30, 2008); *Quadomain Condo. Ass'n, Inc. v. QBE Ins. Corp.*, No. 07-60003-Civ-Moreno, 2007 WL 1424596 (S.D. Fla. May 14, 2007). In both cases, the plaintiffs alleged claims for lack of good faith. In both, the allegations supporting those claims concerned the insurer's "failure to pay," "failure to promptly adjust,"

"failure to fairly and promptly pay," and "failure to fairly and promptly settle." One court dismissed the action, finding it was a bad faith claim dressed in breach-of-implied-warranty clothing; while the other found that the claim was for lack of good faith not for bad faith.

D. The civil remedy statute adequately protects against insurers' failure to settle claims in good faith.

Section 624.155 covers a broad spectrum of insurer conduct that encompasses the duty of good faith. In fact, the most commonly cited provision does not even refer to an insurer's "bad faith" per se, but to its lack of good faith. It grants a civil remedy for an insurer "[n]ot 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 her or his interests." § 624.155(1)(b)1, Fla. Stat. (2008) (emphasis added). The statute also grants a remedy for violation of a host of other statutes. *See* § 624.155(1)(a), Fla. Stat. (2008) (listing several statutes within the Florida Insurance Code for violation of which civil remedies are available). These include unfair claims settlement practices, such as "[f]ailing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, . . ." § 626.9541(1)(i)(4), Fla. Stat. (2008). Under the statute, therefore, a lack of good faith equals bad faith.

The same conduct that supports an action for "failing to act in good faith and deal fairly" supports an action for bad faith. A separate common law cause of action is unnecessary.

Not only does the statute make explicit what in other contexts is only implicit (the duty of good faith), the statute is the exclusive remedy for an insurer's failure to act in good faith in settling a first-party claim. *See, e.g., Talat Enters.*, 753 So. 2d at 1283 (explaining that "the civil remedy provided in subdivision (1)(b)1 was not in existence for first-party insureds before the adoption of the civil remedy statute" and therefore "there is no remedy without the statute"); *see also Indus. Fire & Cas. Ins. Co. v. Romer*, 432 So. 2d 66, 70 (Fla. 4th DCA 1983) ("Although it need not be decided here, it is arguable that with the passage of this legislation, Florida has joined the ranks of those states which impose an implied covenant of good faith and fair dealing in insurance contracts.").

Section 624.155 adequately protects an insured from bad faith actions by its insurer. For example, Chalfonte's claim is based on QBE's alleged failure to "fairly" and "promptly" perform its obligations under the Policy. Such conduct is precisely what section 624.155(1)(b)1 protects an insured against. *See, e.g., Quadomain*, 2007 WL 1424596, at *6 (explaining that an insurer's failure to "fairly" settle a claim is analogous to a "wrongful" failure to settle, which implies a statutory bad faith claim under section 624.155). Section 624.155 requires that

insurers act "fairly and honestly" toward their insurers and with "due regard" for their interests. *Id*. Because the statute adequately protects an insured against a lack of good faith by its insurer, the implied duty of good faith need not be read into an insurance policy.

II. ANY CLAIM BASED ON AN INSURER'S LACK OF GOOD FAITH DOES NOT ACCRUE UNTIL THE INSURED HAS PROVEN LIABILITY AND EXTENT OF DAMAGES IN THE UNDERLYING CONTRACTUAL CLAIM.

The Eleventh Circuit's second certified question was, "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 section 624.155, Florida Statutes?"[4] We submit the answer must be yes, as this case demonstrates. At the same trial and before the same jury that heard Chalfonte's coverage case, the district court allowed Chalfonte to present evidence of QBE's alleged lack of good faith in settling this claim. Chalfonte's closing argument focused on QBE's alleged character and conduct. Its counsel described QBE as a

[4] QBE submits that the more accurate question is, not whether a claim based on an insurer's lack of good faith should be "*bifurcated*," but whether the claim should be *dismissed without prejudice* until the insured has proven liability and damages in the underlying coverage suit. A claim based on an insurer's lack of good faith does not accrue until the insured has proven liability and damages; phrasing the question in terms of "bifurcation," however, suggests that the good faith claim exists contemporaneously with the coverage claim.

company with an attitude that the Chalfonte residents are "not human beings" and "don't count." Such argument and evidence prejudiced the jury against QBE because it focused the trial on QBE's character, rather than on whether Chalfonte sustained hurricane damage, and if so, how much. These circumstances demonstrate why, even if the Court concludes that a common law cause of action exists based on an insurer's lack of good faith in settling a first-party claim, such claims, like bad faith claims, should be dismissed as premature until the underlying case is decided.

A statutory bad faith claim under section 624.155 accrues only *after* the insured has proven liability and extent of damages in its underlying contractual claim. *Michigan Millers Mut. Ins. Co. v. Bourke*, 581 So. 2d 1368, 1369-70 (Fla. 2d DCA 1991). Florida courts have explained the many reasons for requiring dismissal without prejudice of the breach of contract and bad faith claims:

> If there is no 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. Similarly, if there is no coverage, then the insured would suffer no damages resulting from its insurer's unfair settlement practices. In addition, the carrier would clearly be prejudiced by having to litigate either a bad faith claim or an unfair settlement practices claim in tandem with a coverage claim because the evidence used to prove either bad faith or unfair practices could well jaundice the jury's view of the coverage issue. Finally, as an insured is not entitled to discover an insurer's claim file or documents relating to the insurer's business policies or claims practices until coverage has been determined, it is inappropriate to run the bad faith and unfair settlement practices claims conjoined with coverage issues.

Hartford Ins. Co. v. Mainstream Constr. Group, Inc., 864 So. 2d 1270, 1272-73 (Fla. 5th DCA 2004) (citation omitted); s*ee also Dennis v. Nw. Mut. Life Ins. Co*., No. 3:06-cv-43-J-20MCR, 2006 WL 1000308, at *3 (M.D. Fla. Apr. 14, 2006) ("[A]llowing 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."). Accordingly, where an insured asserts a breach of contract claim and a bad faith claim simultaneously, the bad faith claim should be dismissed without prejudice until the underlying coverage dispute concludes. *See Ruiz*, 899 So. 2d at 1130; *Hartford Ins. Co*., 864 So. 2d at 1273. In fact, given the highly prejudicial nature of bad faith allegations, Florida law also acknowledges that even where a plaintiff does not assert a separate cause of action for bad faith, but instead includes bad faith allegations within a breach of contract claim, the bad faith allegations may be stricken. *See Dennis*, 2006 WL 1000308, at *3-4.

This case demonstrates why such procedures are necessary. During the trial, Chalfonte was allowed simultaneously to present evidence both of QBE's breach of contract and of its alleged "lack of good faith," and indeed Chalfonte relied heavily on allegations of QBE's bad faith. In summarizing the case to the jury during opening and closing arguments, Chalfonte's counsel did not simply comment on whether the evidence showed hurricane damage and in what amount.

Rather, he repeatedly emphasized QBE's alleged delay and other bad faith conduct in handling Chalfonte's claim. The statements are detailed in the statement of facts, but the most egregious ones are repeated here:

> It's about an insurance company who dragged their feet every step of the way, ... (D.E. 210 at 114:25, 115:1).
>
> . . . .
>
> This is about not promptly adjusting a claim. (D.E. 210 at 116:8).
>
> . . . .
>
> But, unfortunately, on the other side in this case there is a planned effort to make sure no matter what happens . . . that adjustment of the claim is going to be left open until we even got into the litigation. . . . (D.E. 212 at 20:19-22).
>
> . . . .
>
> [D]on't be fooled by the smoke and the mirrors, because the game is delay and don't pay. Delay, delay, delay. And keep that number in the adjustment always low enough so even if they find some other stuff . . . you won't pass the deductible. . . And if you don't have to pay the claim, you've done a wonderful job on your bottom line. (D.E. 212 at 22:7-16).
>
> . . . .
>
> But it is their attitude that is most important, because it's the attitude that we have had to deal with and it is that we're not human beings and we don't count. (D.E. 212 at 62:20-23).
>
> . . . .
>
> This is a situation where the insurance company wasn't there to protect and defend and help. They became the enemy because they were watching out for them and not for us. (D.E. 212 at 73:22-23).

The opening statement and closing argument—together with the testimony elicited from many of its witness—demonstrate that in presenting its case Chalfonte blended the claim for lack of good faith (i.e., bad faith) with the breach of contract claim, thereby realizing the fears expressed by Florida courts that evidence of an

insurer's lack of good faith is likely to "jaundice the jury's view of the coverage issue." *Hartford Ins. Co.*, 864 So. 2d at 1272-73.

For these reasons, even if the Court recognizes a common law, first-party claim for "bad faith" or "lack of good faith," it should apply the same rationale for segregating the "lack of good faith" component from the question of coverage, as it does with bad faith claims, and direct that such claims be dismissed without prejudice pending a determination of the underlying coverage issue. Otherwise, in litigating the coverage claim, an insured could poison the jury's view of the insurer by simultaneously presenting evidence that the insurer breached its duty of good faith. An insured should not be able to circumvent established law regarding the ripeness of a section 624.155 claim by simply labeling its claim as one for "breach of the implied warranty of good faith."[5]

[5] In its order denying QBE's post-trial motions for judgment notwithstanding the verdict and/or judgment as a matter of law, the district court recognized this problem. It acknowledged that, if an insured were able to bring either a good faith and fair dealing claim or a statutory bad faith claim, the insured would be able to "get around" the "bifurcation requirement" under section 624.155 by simply alleging breach of the implied warranty. (D.E. 225 at 6). The trial court also acknowledged that the same rationale for "bifurcation" in the statutory bad faith context should apply to the implied warranty context. (D.E. 225 at 6).

III. BECAUSE SECTION 627.701(4)(A) DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION, AN INSURED MAY NOT BRING A CLAIM AGAINST ITS INSURER FOR FAILURE TO STRICTLY COMPLY WITH ITS LANGUAGE AND TYPE-SIZE REQUIREMENTS OF SECTION 627.701(4)(A).

The Eleventh Circuit's third certified question asks, "May an insured bring a claim against an insurer for failure to comply with the language and type-size requirements established by section 627.701(4)(a), Florida Statutes?" We submit the answer is no, because the statute does not provide a private right of action.

In Count 4 of its Amended Complaint, Chalfonte asserted a claim based on QBE's alleged violation of section 627.701(4)(a).[6] That section provides in pertinent 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.'

In this case, the statement was in boldfaced type, in all capital letters, and in 16.2 point type—a size that, although not 18-point as the statute prescribes, is still considerably larger than the surrounding text. (*See* App. at Tab 2).

While section 627.701(4)(a) requires that a hurricane deductible provision be printed in a certain font and contain certain language, it does not provide a

[6] Count 4 also alleged a violation of the co-insurance provision requirement under section 627.701(4)(a); however, QBE agreed it would not pursue a co-insurance penalty, and thus, that portion of Count 4 was not at issue in the appeal.

private right of action based on the failure to strictly comply with those requirements Indeed, no subsection of section 627.701 supports a separate right of action based on the failure to strictly comply. Rather, the only recognized remedy for the violation of certain subsections of section 627.701 (albeit not the one at issue here) is to void the noncompliant policy provisions. *See, e.g., United States Fire Ins. Co. v. Roberts*, 541 So. 2d 1297, 1299 (Fla. 1st DCA 1989) (finding that a co-insurance provision that did not contain the language required by section 627.701(1), either on the face of the policy or on a form attached to the policy, was void). No court has recognized an independent cause of action based on the failure to strictly comply with any subsection of section 627.701.

As this Court has noted, when a statute does not expressly provide a cause of action, the primary factor in determining whether one exists is the legislative intent. *See Murthy v. N. Sigha Corp.,* 644 So. 2d 983, 985 (Fla. 1994); *see also Aramark Uniform & Career Apparel, Inc. v. Easton,* 894 So. 2d 20, 23 (Fla. 2004) ("Whether a violation of a statute can serve as the basis for a private cause of action is a question of legislative intent"). Courts must determine legislative intent from the plain meaning of the statute. *Aramark Uniform*, 894 So. 2d at 23. Where the plain language of a state statute does not establish a private right of action, courts should not infer one. *See Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394, 396 (Fla. 4th DCA 2009) ("When the legislature creates a regulatory statute

that does not expressly create a private right of action against the private individuals who are regulated by the statute, the courts have been cautious about concluding that the statute creates a private right of action against them.").

Nothing in the language of section 627.701(4) creates a cause of action. The statute merely prescribes the form that a notice of a hurricane deductible should take. Nor does the statute imply that a cause of action is available. It simply states that a hurricane deductible provision "must" on its face include a specific statement; it does not impose a duty on the insurer (i.e., "an insurer shall…."), nor does it contemplate an insurer's liability for failure to comply. Therefore, nothing in the statute itself evidences any legislative intent to create a private right of action.

While Florida courts have at times provided remedies where a statute fails to specify one, they have done so only when the statute clearly imposes a duty and contemplates liability for a violation. For example, in *Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 182 (Fla. 1983), this Court addressed whether an employee who had been discharged in retaliation for pursuing a workers' compensation claim could sue under section 440.205, Florida Statutes. *Id.* at 183-84. That section provided that "[n]o employer shall discharge . . . any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." *Id.* at 183 (emphasis

added). This Court found that a cause of action existed despite the statute's failure to provide one, "because the legislature enacted a statute that clearly imposes a duty." *Id.* at 184; *see also Gracey v. Eaker,* 837 So.2d 348 (Fla. 2002) (concluding that a civil action for damages arose from the breach by a psychotherapist of a statutory duty of confidentiality and privacy). *Cf. Murthy,* 644 So. 2d at 985 (finding that even though two statutes imposed a duty on the qualifying agent to supervise construction projects, the failure to meet that duty did not give rise to a private cause of action).

The Legislature knows how to create a cause of action when it wants to. Section 624.155, discussed above, not only imposes liability when an insurer fails to settle a claim in good faith, but also allows private suits for violations of a host of other sections of the Insurance Code. *See* 624.155(1)(a), Fla. Stat. (2008) (allowing a civil action for violations of sections 626.9541(1)(i), (o), or (x); 626.9551; 626.9705; 626.9706; 626.9707; and 627.7283). Section 627.701 is not among them. This is evidence enough that the legislature did not intend to create a private right of action for its violation. This Court should not create one.

IV. AN INSURER'S FAILURE TO METICULOUSLY COMPLY WITH THE LANGUAGE AND TYPE-SIZE REQUIREMENTS OF SECTION 627.701(4)(A) DOES NOT VOID A HURRICANE DEDUCTIBLE PROVISION.

The fourth certified question asks, "Does an insurer's failure to comply with the language and type-size requirements established by section 627.701(4)(a),

Florida Statutes, render a noncompliant hurricane deductible provision in an insurance policy void and unenforceable?" We submit the answer should be no, at least where the actual notice substantially complies with the statute. Below we propose that (A) the legislature has not provided a remedy for noncompliance with this statutory provision, and courts should not insert one; and (B) QBE's substantial compliance with the statute fulfilled its purpose to assure that insureds have notice of the hurricane deductible.

A. Where the legislature does not provide a penalty for noncompliance with a statutory provision, courts should not insert one.

Section 627.701(4)(a) does not specify a penalty for the failure to comply with its type-size and language requirements—probably because most violations (such as the one here) will be minor. Because the Legislature knows how to provide a remedy where it wishes to do so, the Court should not infer that it intended to provide one here. Indeed, in many sections throughout the Insurance Code the Legislature has expressly included penalties for violations of the Code. In certain sections, the Legislature specifically mandates that a policy provision that does not comply with the applicable statutory requirements is void. For example, section 627.6474, concerning health insurance provider contracts, provides that "[a]ny contract provision that violates this section is void." § 627.6474, Fla. Stat. (emphasis added). Section 627.415, governing the

incorporation of an insurer's bylaws or charter provisions into insurance policies, similarly provides that "[a]ny policy provision in violation of this section is invalid." § 627.415, Fla. Stat. (emphasis added). In other sections, the Legislature penalizes noncompliance with a fine. *See* § 624.310(5), Fla. Stat. (allowing the Department of Insurance to impose a fine against any person "found to have violated any provision of the Insurance Code"); § 624.4211, Fla. Stat. (allowing Department of Insurance to impose a fine on an insurance company instead of suspending or revoking a certificate of authority).

These sections demonstrate that where the Legislature wishes to void a policy provision for failing to comply with statutory requirements, it does so. This Court should not infer that, despite the Legislature's silence, it intended that provisions that do not strictly comply with section 627.701(4)(a) would be void.[7] *See Friends of Matanzas, Inc. v. Dep't of Envtl. Prot.*, 729 So. 2d 437, 440 (Fla. 5th DCA 1999) (noting that although there may have been an oversight with respect to specific statutes, the court "cannot provide a remedy where the Legislature has failed to do so" (emphasis added)); *see also Jolley v. Seamco Labs., Inc.*, 828 So. 2d 1050, 1051 (Fla. 1st DCA 2002) ("We cannot provide a remedy where the legislature has failed to do so.").

[7] QBE also recognizes that several sections expressly provide that policies remain valid despite noncompliance with specific requirements. *See, e.g.,* § 627.637, Fla. Stat. (stating that if any insurer writes a health insurance contract that does not comply with the statute, the contract remains valid).

Indeed, section 627.418(1) of the Insurance Code suggests that in the absence of an express penalty, the Court should assume that noncompliant provisions remain valid. Section 627.418(1), which addresses the validity of noncomplying contracts, provides that

> [a]ny insurance policy . . . otherwise valid which contains any condition or provision not in compliance with the requirements of this code shall not be thereby rendered invalid, . . . but shall be construed and applied in accordance with such conditions and provision as would have applied had such policy . . . been in full compliance with the code.

§ 627.418(1), Fla. Stat. (emphasis added). While section 627.418(1) may have been intended to protect insureds, *see Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979), the language is general and applies to all provisions.

B. QBE's substantial compliance fulfilled the statute's purpose to assure that insureds have notice of the hurricane deductible.

When a noncompliant provision does not deceive or mislead an insured, and where the Legislature did not provide a remedy, section 627.418(1) acts to preserve it. For example, in this case, the obvious purpose of the typeface and language requirements is to assure that insureds are notified of the hurricane deductible. Here, Chalfonte was neither deceived nor misled, as it was on notice of the existence and terms of the hurricane deductible in its Policy.

The Policy conspicuously states on the first page, in boldfaced type, in all capital letters, and in a font larger than the other information on the page, "THIS POLICY CONTAINS A SEPARATE DEDUCTIBLE FOR WINDSTORM WHICH MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU." (D.E. 21 at 18; App. at Tab 2). At trial, Chalfonte's expert opined that the deductible statement was in 16.2 Arial bold font. (D.E. 184 at 137:23-24). Chalfonte's corporate representative acknowledged that if the property damage were below the $1.6 million deductible amount, QBE would not owe Chalfonte any money. (D.E. 210 at 263:21-24). Chalfonte's public adjuster also testified that he was aware of and, in fact, applied the hurricane deductible when he submitted the sworn proof of loss to QBE. (D.E. 210: 263). While the provision in the Policy used the broader term "windstorm," instead of "hurricane," this difference is inconsequential as a hurricane is a type of windstorm. Indeed, Chalfonte knew the "windstorm" deductible applied to the losses it suffered from Hurricane Wilma because it applied that deductible in submitting its proof of loss. This is not a case, therefore, where the insurer attempted to hide the deductible provision in small print or where the insured was unaware of its obligation when it purchased the Policy.[8]

[8] The first page of the Policy, which notifies the insured of the hurricane deductible, is included in the Appendix to this Brief. As is readily apparent, the required hurricane deductible notice is set forth in boldfaced capital letters as

The purpose of the provision—to place the language conspicuously enough so that insureds will notice it and read it—was fulfilled. While the type size should have been slightly larger and the more narrow term "hurricane" should have been employed, the violation was *de minimis*. Where QBE substantially complied with the statute, and where the insured had notice of the provision, QBE should not be penalized by having the provision voided.[9] *See Prida v. Transamerica Ins. Finance Corp*., 651 So. 2d 763, 764 (Fla. 3d DCA 1995) (finding that requirement in § 627.848(3) (1993) that certain language in a notice of cancellation to be "in a type or print . . . no[ ] smaller than 12 points" was permissive and that, because statute did not provide consequences for a violation, the notice was effective even though the print was in 9.5 point type").[10] The Court should give "true effect to the

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required by the statute. Although the warning is in a font of 16.2, it clearly stands out from the rest of the text. Moreover, it is strategically placed immediately above the insured's signature line so as to maximize its visibility.

[9] What is more, in a large commercial policy as here, an insured would be acutely aware of the deductible. The premium and deductible terms are quoted by the insurer's agent and then negotiated by the parties' representatives until the parties are satisfied, a deal is struck, and coverage is bound. The deductible is thus part of the bargain.

[10] In a specially concurring opinion, Judge Cope explained that the insurer had substantially complied with the notice requirement. *Prida*, 651 So. 2d at 764. ("Although the notice was in [9.5] point type instead of [12] point type, the notice was (1) prominently displayed; (2) printed in a contrasting red color (which is an extra step not required by the statute; and (3) was the largest type size used for text on the notice of cancellation. I think that substantial compliance with the type-size requirement is sufficient.")

intentions of the parties, which is the central concern of the law of contracts even in the realm of insurance where there are unique public policy considerations." *Excelsior Ins. Co.*, 369 So. 2d at 942.

Chalfonte has suggested that *Roberts*, 541 So. 2d 1297, governs the interpretation of section 627.701(4)(a). In *Roberts*, the First DCA considered whether a co-insurance provision in a policy was void for failure to include the language required by section 627.701(1). *Id.* at 1298-99. In determining whether the noncompliance rendered the provision void, the court relied heavily on the statute's legislative history. *Id.* at 1299 ("Our view of the correctness of the trial court's order is based in significant part upon the legislative history of Section 627.701."). The court noted that the prior version of the statute provided that a co-insurance provision that failed to include the required language would be "null and void, and of no effect." *Id.* Although the penalty provision was removed from the amended version, the legislative history of the amendment made clear that no substantive change was intended. *Id.* The amendment was intended merely to clarify the language to make it more readable. *Id.* Therefore, the court concluded, the legislature intended that failure to comply with section 627.701(1) would continue to render the provision void. *Id.* at 1299-1300. In contrast, section 627.701(4)(a) does not contain, and never has contained, a penalty for

noncompliance. Thus, *Roberts* cannot govern the construction of section 627.701(4)(a).

The Court should not provide a remedy where the Legislature has failed to do so. *See Friends of Matanzas, Inc.*, 729 So. 2d at 440 (stating that the court "cannot provide a remedy where the Legislature has failed to do so"); *see also Jolley*, 828 So. 2d at 1051 ("We cannot provide a remedy where the legislature has failed to do so."). Accordingly, a hurricane deductible provision that fails to strictly comply with section 627.701(4)(a), particularly one that substantially complies with it, should not be rendered void.

V. THE POLICY LANGUAGE EXPLAINING WHEN CLAIMS WILL BE PAID DOES NOT WAIVE QBE'S RIGHT TO STAY EXECUTION BY FILING A BOND

The fifth and final certified question asks, "Does language in an insurance policy mandating payment of benefits upon 'entry of final judgment' require an insurer to pay its insured upon entry of judgment at the trial level?" The question is based on Chalfonte's argument that, because the policy provided for payment upon entry of a final judgment, QBE waived its right to stay execution with a supersedeas bond. The answer to the certified question must be "no" because (A) the Loss Payment Provision does not voluntarily and intentionally relinquish the right to stay execution by filing a bond; and (B) under Florida law, a judgment

does not become "final" until the appellate process is completed. We discuss each point below.

A. The Loss Payment Provision does not explicitly waive rights under the applicable rules of procedure.

As is routine with money judgments, and as is explicitly authorized by both the federal and local rules, s*ee* Fed. R. Civ. P. 62(d); S.D. Fla. R. 62.1, QBE filed a supersedeas bond to stay execution of the judgment. Chalfonte argued, however, that QBE had waived its right to stay execution and that QBE was required to pay the judgment immediately. Chalfonte's argument was based on the policy's Loss Payment Provision, which states in part that QBE will pay for covered loss or damage within 30 days after it receives the sworn proof of loss and "there is an entry of a final judgment." (D.E. 231-2 at 29) (emphasis added).

A waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). Under both federal and Florida law, when a defendant posts a supersedeas bond, a stay of execution is a matter of right. *See United States v. Dornbrock,* No. 06-61669-CIV, 2008 WL 4927013, at *1 (S.D. Fla. Nov. 17, 2008) ("If the judgment debtor posts a supersedeas bond, the judgment debtor may obtain the stay of execution of the judgment as a matter of right."); *Island Silver & Spice, Inc. v. Islamorada, Villa of Islands*, 486 F. Supp. 2d 1347, 1352 (S.D. Fla. 2007)

("Defendant has the right under Rule 62(d) to stay execution of the monetary [j]udgment against it by posting a supersedeas bond."); *Dixon v. Dixon*, 184 So. 2d 478, 482 (Fla. 2d DCA 1966) (noting that the party who filed a notice of appeal "became entitled, as a matter of right, to stay execution of the judgment upon the posting of supersedeas bond"). Any intent on the part of QBE to relinquish the right to a stay of execution therefore must be intentional. That intent may be expressed through oral or written words or implied from conduct. *Carnival Corp. v. Booth*, 946 So. 2d 1112, 1114 (Fla. 3d DCA 2006); *Appelbaum v. Fayerman*, 937 So. 2d 282, 284 (Fla. 4th DCA 2006).

When determining whether a party intended to relinquish a right by the written terms of a contract, courts look to "the actual language used in the contract" as "the best evidence of the intent of the parties." *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)); *Acceleration Nat'l Serv. Corp. v. Brickell Fin. Servs. Motor Club, Inc.*, 541 So. 2d 738, 739 (Fla. 3d DCA 1989). This is true of insurance contracts as well. *See Swire Pac. Holdings v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003) (noting that "insurance contracts must be construed in accordance with the plain language of the policy").

Rights granted in statutes "may not be waived except by *clear, explicit language*." *Dist. No. 1-Marine Eng'rs Beneficial Ass'n, AFL-CIO v. GFC Crane*

Consultants, Inc., 331 F.3d 1287, 1293 (11th Cir. 2003) (emphasis added); *Tapp v. Tapp*, 887 So. 2d 442, 444 (Fla. 2d DCA 2004) ("Parties to a marriage may waive their statutory right to seek modification of alimony provisions in a settlement agreement if the language in the agreement clearly and unambiguously expresses waiver or if the 'interpretation of the agreement as a whole can lead to no other conclusion but waiver.'") (citations omitted); *DeJesus v. State*, 848 So. 2d 1276, 1277 (Fla. 2d DCA 2003) (noting that the waiver of statutory rights "must be knowing, intelligent, and voluntary"). The same must be true with rights granted in rules of procedure because, at least with respect to the federal rules, they have the force and effect of statutes. *See United States for Use of Tanos v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir. 1966) ("[T]he Federal Rules of Civil Procedure have statutory effect."); *Wilkes v. United States*, 192 F.2d 128, 129 (5th Cir. 1951) (holding that Federal Rule of Civil Procedure 6(a) "has the force and effect of a legislative enactment"). Both the Florida and the federal rules grant defendants the right to stay execution pending appeal by filing a bond. *See* Fla. R. App. P. 9.310(b)(1); Fed. R. Civ. P. 62(d).

The Loss Payment Provision contains no clear, explicit language waiving the right to a stay of execution. To the contrary, it is silent about rights conferred by law or under applicable rules of procedure. Therefore it cannot affirmatively waive any such rights. A court is "not empowered to rewrite a clear and

unambiguous provision, nor should it attempt to make an otherwise valid contract more reasonable for one of the parties." *N. Am. Van Lines v. Colyer*, 616 So. 2d 177, 178-79 (Fla. 5th DCA 1993). The Loss Payment Provision does not waive QBE's right to stay execution by posting a bond.

The language used in the Loss Payment Provision has been used in policies for over twenty years, and probably longer. *See, e.g., Underwriters Ins. Co. v. Kirkland,* 490 So. 2d 149, 154 (Fla. 1st DCA 1986) (provision stated that "losses are payable within 60 days after Underwriters receives proof of a loss and: (a) reaches an agreement with its insured, or (b) there is an entry of a final judgment, or (c) there is a filing of an appraisal award with the insurer"); *Allen v. Safeco Ins. Co. of Am.*, 782 F.2d 1517, 1520 (11th Cir. 1986) (same); *see also Das v. State Farm Fire & Cas. Co.*, 713 S.W.2d 318, 323-24 (Tenn. App. 1986) (same).[11] In the interim, insurers have appealed hundreds of final judgments awarding policy proceeds. Yet no court anywhere has held, or even implied, that the Loss Payment Provision waives an insurer's right to stay execution by filing a bond.

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[11] The policy is a standard insurance policy drafted by Insurance Services Office, Inc. (ISO). D.E. 231-2 (noting copyright by ISO at the bottom of each page). ISO is a national insurance organization that "develops standard policy forms and files or lodges them with each State's insurance regulators; most [commercial general liability] insurance written in the United States is written on these forms." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). Therefore, provisions like the one at issue can be found in policies used by dozens, if not hundreds, of insurers.

B. Under Florida law, a judgment does not become "final" until the appellate process is complete.

The Loss Payment Provision expressly conditions payment on entry of a *final* judgment. Because the policy was executed in Florida, this state's law applies to its interpretation. *See State Farm Mut. Auto. Ins. Co. v. Roach,* 945 So. 2d 1160, 1163 (Fla. 2006) (describing the rule of lex loci contractus, under which the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties, and applying the rule to insurance policies). Under Florida law, "a judgment becomes final either upon the expiration of the time for filing an appeal or post[-] judgment 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." *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 n.2 (Fla. 1998); *see also Law Office of David J. Stern, P.A. v. Sec. Nat'l Serv. Corp.*, 969 So. 2d 962, 966 (Fla. 2007) (noting that a judgment becomes final when it "includ[es] exhaustion of appellate rights"); *Gaines v. Russo*, 723 So. 2d 398, 298-99 (Fla. 3d DCA 1999) (relying on *Silvestrone* for the definition of when a judgment becomes final); *Porter Lumber Co. v. Tim Kris, Inc.*, 530 So. 2d 398, 399 (Fla. 4th DCA 1988) (stating that "the judgment will not be final until [the appellate process] is completed"). In this case, QBE has appealed the final judgment. Therefore, under Florida law, the judgment has not become final, and the Loss Payment Provision is not yet effective.

The Eleventh Circuit panel thought Florida law on this issue was unclear. It cited *Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002) as somehow in tension with *Silvestrone*. But the two cases are perfectly consistent. In *Silvestrone,* the issue was whether the limitations period for legal malpractice actions begins to run when the jury returns the verdict against the client or when the final judgment is entered. *Id.* at 1174. The Court held it does not commence to run until "the final judgment becomes final." *Id.* The Court noted that "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 1174 n.2. In other words, a judgment is not "final" until the appeal has been either waived or concluded.

Caufield, the case the Eleventh Circuit believed to be in tension with *Silvestrone*, considered a different issue. In that case, the plaintiff voluntarily dismissed its complaint. The defendant then filed a motion for attorneys' fees, which the trial court denied. *Id.* at 373. The sole issue was whether the order denying fees was reviewable as a plenary appeal or by certiorari. *Id.* at 373-74. To decide that issue, this Court had to determine "whether an order determining costs after a voluntary dismissal is final." *Id.* at 375. It was in that context that the Court made the statement the Eleventh Circuit quoted: "[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." *Id.* The Court held that the order denying the request for fees left no further judicial labor and therefore was a final, appealable order. *Id.*

Caufield and *Silvestrone* are consistent. *Silvestrone* confirms that a judgment is not "final" until appeals have been exhausted; *Caufield* simply held that, for purposes of determining which orders are appealable as "final" orders, an order is "final" if no further judicial labor is required *in the trial court*. The judgment in this case is not "final" because QBE has appealed it. QBE had every right to stay execution by posting a bond.

CONCLUSION

For the foregoing reasons, the Court should answer certified questions I, III, IV and V in the negative, and question II in the affirmative (if it is not rendered moot by the answer to question I).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure because it has been prepared in Times New Roman 14-point font.

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