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

APPELLANT'S REPLY BRIEF

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I.

Florida Common Law Does Not Recognize a Claim for Lack of Good Faith Based on an Insurer's Failure to Investigate and Assess its Insured's Claim Within a Reasonable Period of Time, but the Statute Does.

Based on the general rule that an implied warranty of good faith and fair dealing inheres in all contracts, Chalfonte claims that Florida common law recognizes a claim based on an insurer's failure to timely settle its insured's own claim. (Appellee's Br. at 9-14). QBE acknowledged the general rule in its Brief. However, as QBE noted, no Florida court has applied the general rule to a first-party action based on the insurer's bad faith failure to settle its insured's claim. Indeed, the Florida cases recognizing a common law claim for breach of the implied warranty of good faith do not involve insurance or do not involve a *first-party* action based on an insurer's bad faith failure to settle. The cases on which Chalfonte relies confirm this. *See O'Shields v. United Auto. Ins. Co.*, 790 So. 2d 570 (Fla. 3d DCA 2001) (finding a breach of the *express* terms of an insurance contract requiring the insurer to inform the insured of the terms of settlement and to provide settlement documents); *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232 (Fla. 4th DCA 2001) (addressing a claim for breach of implied warranty in a *master broker's contract*); *County of Brevard v. Miorelli*

Eng'g, Inc., 703 So. 2d 1049, 1050 (Fla. 1997) (recognizing implied covenants in a *construction contract*).

Given the absence of any Florida case recognizing an implied warranty of good faith in the first-party context, Chalfonte relies on federal cases—in particular, on *Townhouses of Highland Beach Condo. Ass'n v. QBE Ins. Corp*., 504 F. Supp. 2d 1307, 1312 (S.D. Fla. 2007) and *Stallworth v. Hartford Ins. Co*., No. 3:06cv89/MCR/EMT, 2006 WL 2711597, at *6 (M.D. Fla. Sept. 16, 2006). Both cases recognize a first-party claim for breach of the implied warranty based on the general contract principle that the warranty is "implied in every contract." Neither case acknowledges, however, that Florida law treats insurance contracts differently. Indeed, this Court has specifically stated that the doctrine of reasonable expectations, on which the federal courts relied, does not apply in the insurance setting. *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co*., 711 So. 2d 1135, 1140 (Fla. 1998); *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 246 (Fla. 3d DCA 2002) (noting that it is the policy's terms, not the insured's reasonable expectations, that define insurance coverage). Consequently, the implied warranty of good faith and fair dealing, which is specifically intended to protect the "reasonable expectations" of the contracting parties, has no place in the context of insurance policies. *Mid-Continent Cas. Co. v. Royal Palm Estate Builders, Inc.*, No. 07-80468-CIV, 2007 WL 4225801, at *1 (S.D. Fla. Oct. 2,

2007). The federal cases on which Chalfonte relies are thus based on an inapplicable principle of law.

The federal cases also fail to reconcile their finding of an implied warranty with Florida's historical limitation on an insurer's liability for lack of good faith. As QBE explained in its initial brief, the common law imposed a duty of good faith on the insurer only with respect to *third-party* claimants. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005). Indeed, amici for Chalfonte concede the absence of a common law duty in the first-party context. (United Policyholders' Br. at 3) ("Florida should join the majority of states that recognize a common law remedy for damages caused by first party insurers breaching their recognized obligations of good faith and fair dealing."). And while Florida may not be in the majority in not recognizing a first-party duty of good faith, it is not alone. As amici note, several states—Georgia, Illinois, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, New York, Oregon, Pennsylvania, and Tennessee—also do not recognize a common law first-party claim. (United Policyholders' Br. at 9). In fact, the Florida Legislature enacted section 624.155 specifically to extend the duty of good faith and remedy the disparity between the third-party and first-party contexts. *See Ruiz*, 899 So. 2d at 1126 ("[T]his statutory remedy essentially extended the duty of an insurer to act in good faith and deal fairly in those instances where an insured seeks first-party coverage or benefits under a policy of

insurance."). Because the Legislature has filled the void, this Court need not alter the common law by creating an implied warranty of good faith for first-party claims.[1]

Contrary to Chalfonte's assertion, a first-party claim for breach of the implied warranty of good faith and fair dealing is unnecessary to protect insureds. Chalfonte maintains that because the insurance policy does not set a deadline for QBE to determine the value of the loss, the warranty of "good faith and fair dealing" is required to fill that "gap" and prevent the insurer from adjusting a claim "in perpetuity." (Appellee's Br. at 13-14). The bad faith statute itself, however, fills any gaps. Specifically, section 624.155 requires insurers to attempt to settle claims in good faith and to act fairly and honestly toward the insured. It thus limits whatever discretion the language of a policy might afford an insurer. Consequently, an insurer cannot adjust a claim in perpetuity without facing liability under section 624.155.

Chalfonte also maintains that if the implied warranty of good faith were not available, the insured would have no remedy for the insurer's lack of diligence and

[1] To support its argument that a first-party common law claim for breach of good faith exists, Chalfonte relies on section 624.155(8), which provides that the statutory remedy does not preempt other remedies. (Appellee's Br. at 19). But that section presupposes the existence of other claims. As noted above, and as conceded by Chalfonte's amici, the common law did not recognize such a claim in the first-party context. Subsection (8) was enacted to protect the third-party claims that the common law has always recognized.

the insurer would have no incentive to value the loss. (Appellee's Br. at 16). But section 624.155 provides a civil remedy for an insured's failure to "fairly" and "promptly" perform its obligations under a policy "when, under all the circumstances it could have and should have done so . . . ." *See Quadomain Condo. Ass'n, Inc. v. QBE Ins. Corp.*, No. 07-60003-CIV-MORENO, 2007 WL 1424596, at *6 (S.D. Fla. May 14, 2007) (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). In fact, if an insured believes that the insurer has unjustifiably delayed payment of a claim, the statute allows the insured to file a civil remedy notice. *See* § 622.155(3), Fla. Stat. The insurer then has 60 days to either pay the claim or risk a bad faith claim under the statute. § 624.155(3)(d), Fla. Stat.; *see, e.g., Talat Enter. Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1280 (Fla. 2000) (insured filed civil remedy notice when insurer had not paid the claim); *Explorer Ins. Co. v. Van Bockel*, 948 So. 2d 845, 846 (Fla. 2d DCA 2007) (insured filed civil remedy notice when insurer refused to tender the policy limits); *Scott v. Progressive Express Ins. Co., Inc.*, 932 So. 2d 475, 479 (Fla. 4th DCA 2006) (insured filed civil remedy notice when insurer failed to pay benefits under the policy). Indeed, if it does not promptly investigate and assess a claim, an insurer has more to lose under section 624.155 than it does for breach of the warranty of good faith. Under the statute, the insurer would be liable not only

for consequential damages flowing from the bad faith conduct (as well as prejudgment interest, attorney's fees and court costs), but also for punitive damages in appropriate circumstances. § 624.155(4), (5), (7), Fla. Stat. Section 624.155 thus creates a greater incentive to pay promptly than the contractual implied warranty of good faith and fair dealing would.

II.

Any Claim Based on an Insurer's Lack of Good Faith Does Not Accrue Until the Insured Has Proven Liability and the Extent of Damages in the Underlying Contractual Claim.

Even if this Court were to recognize a first-party claim for breach of the implied warranty of good faith, the claim should be dismissed without prejudice until the insured has proven liability under the policy and the damages sustained. The rationale for dismissing statutory bad faith claims as premature is equally applicable to common law bad faith claims: an insurer would be prejudiced by having to litigate a bad faith claim in tandem with a coverage claim because the evidence used to prove bad faith could well jaundice the jury's view of the coverage issue. *Hartford Ins. Co. v. Mainstream Constr. Group, Inc.*, 864 So. 2d 1270, 1272-73 (Fla. 5th DCA 2004).

Chalfonte nevertheless contends that the rationale for dismissing a statutory bad faith claim as premature does not apply to its common law good faith claim because "coverage" was not an issue. (Appellee's Br. at 21-22). But coverage was

indeed an issue in this case. QBE maintained throughout trial that the damages Chalfonte suffered from Hurricane Wilma did not exceed the Policy's hurricane deductible and therefore there was no coverage. If the jury had agreed that the damages did not exceed the deductible, it would have found that QBE did not breach the Policy. And, if QBE were not liable under the Policy, Chalfonte could not have suffered any damages resulting from QBE's alleged bad faith or lack of good faith. Instead, the jury found that the damages did exceed the deductible and that QBE was therefore liable under the Policy.

In presenting evidence to the jury on the coverage issue, Chalfonte also presented evidence on QBE's alleged delay and unfair practices. But it is precisely this type of evidence that Florida courts have determined can jaundice a jury's view of the coverage issue. *Id.* at 1272 ("[E]vidence used to prove either bad faith or unfair practices could well jaundice the jury's view of the coverage issue.").[2] The jury should be able to determine, free from any allegations of bad faith

[2] The extent of damages Chalfonte suffered from Hurricane Wilma was also at issue. A bad faith claim would be premature for this reason too, as evidence of bad faith could also influence a jury's determination of damages. *See Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991) ("Absent a determination of the existence of liability . . . *and the extent of the plaintiff's damages*, a cause of action cannot exist for a bad faith failure to settle." (emphasis added)); *see also Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275 (Fla. 2000) ("[D]etermination of the existence of liability . . . *and the extent of the insured's damages* are elements of a cause of action for bad faith." (internal quotation omitted) (emphasis added)).

conduct, whether the insurer is liable to the insured under the terms of a policy. Only *after* the jury makes that determination should the jury be permitted to hear evidence that the insurer acted in bad faith in investigating, assessing, and indemnifying that loss.[3]

III. & IV.

Where the Legislature Has Remained Silent, an Insured May Not Bring a Claim Against its Insurer for a Violation of Section 627.701(4)(A) and a Hurricane Deductible Is Not Rendered Void for Failing to Strictly Comply with Section 627.701(4)(A).

Chalfonte would have this Court step into the shoes of the Florida Legislature and write into section 627.701(4)(A) both a private right of action and a penalty for noncompliance. Failing to find support for its position, Chalfonte

[3] Chalfonte misses the point for which QBE cites portions of the opening statement and closing argument. (Appellee's Br. at 23). QBE highlighted those portions not to argue that the closing was objectionable *per se*, but to demonstrate the consequence of permitting an insured to try a claim for lack of good faith together with its breach of contract claim. Here, while trying to determine the cause and extent of Chalfonte's damages, the jury also heard evidence attacking QBE's character.

It is unclear why Chalfonte gratuitously cites portions of QBE's closing argument that are irrelevant to any issues on appeal. (Appellee's Br. at 23, n.6). In a transparent attempt to portray QBE in a negative light, Chalfonte quotes the comments out of context. QBE did not refer to the residents as "old senile people" or "old farts," as Chalfonte suggests, which would have been a strategic blunder. It was simply refuting Chalfonte's *own* characterization of its residents. (D.E. 212 at 51:91-21, 52:1-3) ("Yesterday it was suggested that these are just a bunch of old senile people and you can't trust what they write down. That's another absurdity in this case. . . . And it's ridiculous to suggest that you shouldn't believe these minutes because they're a bunch of old farts who don't know what they're doing.").

draws inconsequential distinctions between the cases QBE cited in its initial brief and this case. Florida law is clear, however, that where the plain language of a statute does not establish a private right of action and where the Legislature has not provided a remedy, courts should not infer one. *See Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394, 396 (Fla. 4th DCA 2009); *Jolley v. Seamco Labs., Inc*., 828 So. 2d 1050, 1051 (Fla. 2d DCA 2002).

No part of section 627.701 supports a private right of action. Rather, the only remedy for violations of certain sections of 627.701—albeit not section 627.701(4)(A)—is to void the noncompliant provision. *See United States Fire Ins. v. Roberts*, 541 So. 2d 1297 (Fla. 1st DCA 1989) (voiding a noncompliant co-insurance provision under prior version of section 627.701(1)). This makes sense, given that section 627.701(4)(A) does not provide a private right of action. It simply states that the hurricane deductible provision "must" on its face include a specific statement. It does not impose a duty on the insurer, nor does it contemplate an insurer's liability for failure to comply. Nothing in the statute itself evinces a legislative intent to create a private right of action.

Likewise, the plain language of the section 627.701(4)(A) does not provide a penalty for noncompliance, particularly one as harsh as voiding a noncompliant hurricane deductible provision even though the insured knew about it. Chalfonte attempts to enhance QBE's violation of the statute. But it cannot and does not

dispute that, notwithstanding the 16.2 bold font and use of the term "windstorm," it knew that the Policy contained a hurricane deductible of $1.2 million. The purpose of the language and type-size requirements of the statute was thus effected.[4]

The Legislature knows how to create a cause of action and impose a penalty when it wants to. Indeed, throughout the Insurance Code, the Legislature expressly included penalties for noncompliance. *See* §§ 624.6474, 627.415, 624.310(5), 624.4211, Fla. Stat. And in section 624.155, the Legislature created a private right of action against the insurer for violations of several sections of the Insurance Code. It did neither in section 627.401(4)(A). But that does not render the statute "meaningless," as Chalfonte suggests (Appellee's Br. at 25-26) because insurance companies are subject to administrative regulation and potential fines.[5]

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[4] Notably, the Florida Legislature recently enacted § 626.9374 (2009), providing that surplus lines residential property policies containing a separate hurricane or wind deductible must include on its face, in at least 14-point**,** boldface type, a statement advising the insured of the deductible. Section 626.9374 is part of a bill (signed into law on June 11, 2009) that exempts surplus lines insurers from the regulations of Chapter 627 applicable to admitted insurers. 2009 Fla. Sess. Law Serv. Ch. 2009-166 (C.S.H.B. 853) (West). The Legislature nevertheless chose a handful of regulations to apply to surplus lines carriers, one of which is section 626.9374 concerning the disclosure of hurricane or wind deductibles. In enacting a similar provision to § 627.701 but requiring only 14-point font (rather than 18-point font), it is clear that the Legislature is only concerned with adequate disclosure of the deductible and not the technical aspects of the font size.

[5] Amici rely on *Republic National Life Ins. Co. v. Hiatt*, 400 So. 2d 854 (Fla. 1st DCA 1981) (Florida Justice Association's Br. at 15-16). In *Hiatt*, the court concluded that a policy provision that failed to comply with § 627.635(2) was void. *Id.* at 855. That statute required that the words "excess insurance" be imprinted or

V.

The Policy Language Does Not Waive QBE's Right to Stay Execution by Filing a Bond.

Under Florida law, insurance policies are interpreted according to their plain language, as bargained for by the parties. *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003); *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So.2d 467, 470 (Fla. 1993). It is difficult to comprehend how a plain reading of the contract would produce the interpretation Chalfonte suggests—that is, that "final" judgment actually means "final regardless of post-judgment and appellate proceedings." Chalfonte's interpretation relies on rules that define finality strictly for purposes of appeal. Indeed, Chalfonte even relies on the mere title of the lower court's order to support its argument. But Chalfonte fails to acknowledge that that the Judgment is termed "Amended *Final* Judgment" for purposes of appeal, and that the title does not mechanically make the judgment a "final judgment" under the Policy for purposes of payment.

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stamped "conspicuously" on the face of the policy. *Id.* at 855 & n.1. The policy did not do so. In concluding that the excess insurance provision was void, the court stated that "[i]t has generally been held that where such statutes are violated, the violative provision should be given no effect." *Id.* *Hiatt*, however, is unpersuasive for several reasons. First, it addressed a different statute. Second, the *Hiatt* court did not cite any Florida caselaw to support finding the provision void. Third, the provision at issue was not conspicuously imprinted on the policy, whereas the hurricane deductible in this case appeared prominently on the first page of the Policy in large bold font.

Rather, Florida law has defined "final judgment" in the same manner in a host of contexts. 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").

Accepting Chalfonte's interpretation would mean that QBE waived its right to stay execution of the judgment without intending to do so. However, under both federal and Florida law, a party is entitled as a matter of right to post a supersedeas bond to stay execution of the judgment. Fed. R. Civ. P. 62(d); Fla. R. App. P. 9.310(b)(1); *see also 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"). Only if the party specifically and intentionally relinquishes that right is there a "waiver." *Dist. No. 1-Marine Eng'rs Beneficial Ass'n, AFL-CIO v. GFC Crane Consultants, Inc.*, 331 F.3d 1287, 1293 (11th Cir. 2003) (stating that rights granted in statutes "may not be waived except by clear, explicit language"). Thus, QBE did not have to affirmatively acknowledge its right to stay execution in the Policy in order to preserve it, as Chalfonte suggests. On the contrary, because the Loss Payment Provision did not contain clear, explicit language waiving the right to stay execution, QBE retained that right. Otherwise, QBE would have waived any and all other rights it is afforded under the state and Federal Rules of Civil Procedure that it did not specifically incorporate into the Policy.

The district court for the Southern District of Florida recently adopted QBE's position. *Buckley Towers Condo. v. QBE Ins. Corp*., Case No. 07-22988-CIV-Goldberg/Torres (Aug. 20, 2009).[6] In *Buckley Towers*, the plaintiff asserted the same argument as Chalfonte, namely, that the "Loss Payment" provision in a policy requiring "payment within 30 days of final judgment" waived QBE's right to post a bond. *Id.* at 2. In rejecting the plaintiff's argument, the court explained that the decision to stay a federal court's own judgment is based solely on federal

[6] The opinion is included in the Appendix to this Brief.

law. *Id.* at 3. Thus, to the extent that the policy made the federal judgment immediately due and payable contrary to the provisions of Rule 62, the court found that Rule 62 controlled and QBE had a right to stay execution. *Id.* at 3-4. The court also found Judge Middlebrook's analysis in this case persuasive, finding that the Loss Payment provision in the policy did not explicitly waive the right to stay execution of the a judgment. *Id.* at 4.

Forcing insurers to pay a judgment when they have not waived their right to file a bond and stay execution pending an appeal would essentially render such appeals moot. Once an insurer pays a judgment, it would be prohibitively difficult to recover it. The very purpose of a supersedeas bond is to allow appeals to proceed without the defendant having to pay the judgment but, at the same time, "preserve the status quo while protecting the non-appealing party's rights pending appeal." *Prudential Ins. Co. of Am. v. Boyd*, 781 F.2d 1494, 1498 (11th Cir. 1986). Chalfonte's interpretation of the Loss Payment Provision would eviscerate a fundamental right every litigant possesses—the right to post a bond to stay execution of a judgment—without any explicit waiver of that right in the Policy. Chalfonte does not dispute that the language in the Loss Payment Provision has been used in policies for over twenty years, and probably longer (Appellee's Br. at 34), and that 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. This should not be the first.

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).

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