

ALERT

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Florida Supreme Court Confirms: No Common Law First Party Bad Faith Cause of Action

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On May 31, 2012, the Florida Supreme Court rendered its 32 page, long-awaited decision in *QBE Insurance Corp. v. Chalfonte Condominium Apartment Association, Inc.* The court reaffirmed that Florida does not recognize the common law duty of good faith and fair dealing in the context of a first-party claim, a claimant only has a statutory first-party bad-faith cause of action, and Florida courts shall not rewrite insurance contracts.

The federal trial court found that QBE complied with the applicable procedural rules in filing its supersedeas bond and had not waived its right to stay execution of the trial court's judgment during appeal, despite the policy provision stating it would pay within 30 days of proof of loss and entry of final judgment (interpreting final to mean after appeals were exhausted). On appeal, the 11th Circuit certified five questions to the Florida Supreme Court. Along with providing a summary of Florida's development of the case law and legislative history for both third-party and first-party bad-faith law, the Florida Supreme Court, answered each certified question in the negative, with the exception of Question #2 which was rendered moot by the "no" answer to Question #1:

1. 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? **No.**
2. If Florida law recognizes a claim for breach of the implied warranty of good faith and fair dealing based on an insurer's failure to investigate and assess its insured's claim within a reasonable period of time, is

the good faith and fair dealing claim subject to the same bifurcation requirement applicable to a bad faith claim under Fla. Stat. § 624.155? **Florida does not, so no answer necessary.**

3. May an insured bring a claim against an insurer for failure to comply with the language and type-size requirements established by Fla. Stat. § 627.701(4)(a)? **No.**
4. Does an insurer's failure to comply with the language and type-size requirements established by Fla. Stat. § 627.701(4)(a) render a noncompliant hurricane deductible provision in an insurance policy void and unenforceable? **No.**
5. Does language in an insurance policy mandating payment of benefits upon "entry of a final judgment" require an insurer to pay its insured upon entry of judgment at the trial level? **No.**

The effect of the *Chalfonte* decision is that, in Florida, there is no common law remedy for first-party bad-faith conduct (although there still is common law bad faith for third-party claims). What is more, if an insurer fails to comply with the language and type-size requirements of section 627.701 concerning notification of a separate hurricane deductible, such noncompliance with the statute does not give rise to a separate private cause of action by the claimant. Nor does inclusion of a noncompliant hurricane deductible provision in an insurance policy (at least in this case where the insurance company substantially complied with the notice requirements) render the hurricane deductible void or unenforceable, e.g. the separate hurricane deductible is

still valid and enforceable. Finally, the court held that policy language that requires payment of a judgment upon “entry of a final judgment” does not waive the insurer’s procedural right to post a bond to stay execution of a money judgment pending resolution of the appeal.

Underlying Facts

On October 24, 2005, Hurricane Wilma struck Boca Raton, Fla., causing significant damage to property owned by Chalfonte. Shortly thereafter, Chalfonte filed a claim with QBE, its property insurer, pursuant to an insurance policy (the policy). Chalfonte submitted an estimate of damages to QBE on December 18, 2005, and then submitted a sworn proof of loss to QBE on July 12, 2006. Chalfonte then filed suit in the U.S. District Court for the Southern District of Florida asserting claims for declaratory judgment (Count I), breach of contract — failure to provide coverage (Count II), breach of contract — breach of the implied warranty of good faith and fair dealing (Count III), and violation of Fla. Stat. § 627.701(4)(a) (Count IV). The district court dismissed Count IV of the complaint, concluding that § 627.701 does not provide a private right of action, and then held a jury trial on Chalfonte’s remaining claims. The jury found for Chalfonte on all of its claims, awarding Chalfonte \$7,868,211 for QBE’s failure to provide coverage (\$2,000,000 of which was awarded for “ordinance or law” coverage) and \$271,888.68 for breach of the implied warranty of good faith and fair dealing, for a total award of \$8,140,099.68. The jury also concluded that the policy did not comply with § 627.701(4)(a), thus bringing into question the application of the \$1,605,653 hurricane deductible. On December 18, 2007, the district court entered an amended final judgment in favor of Chalfonte in the amount of \$7,237,223.88, with post-judgment interest accruing in accordance with 28 U.S.C. § 1961. With the amended final judgment, the court applied the hurricane deductible contained in the policy despite the jury’s conclusion that the policy did not comply with the requirements for hurricane deductible provisions. The amended final judgment also included prejudgment interest and calculated prejudgment interest for the period beginning August 1, 2006, 20 days after Chalfonte submitted a sworn proof of loss, and ending September 6, 2007, the date that judgment was entered.

QBE appealed the amended final judgment and posted a supersedeas bond amounting to 110 percent of the amended final judgment. Chalfonte moved to enforce the judgment, claiming that the policy language waived QBE’s right to stay execution and obligated QBE to pay Chalfonte within 30 days of the judgment. In support of this motion, Chalfonte relied on the following provision in the insurance policy:

Provided you have complied with all the terms of the 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

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.

On appeal, the 11th Circuit deemed it necessary to certify five questions to the Florida Supreme Court, noting that “Florida courts have not definitively answered these questions.”

“Good Faith” and “Bad Faith” – “Two Sides of the Same Coin: Certified Questions 1 and 2

Chalfonte argued that its claim for a violation of the implied contractual warranty of good faith and fair dealing is not the same as a bad-faith claim by a first party, relying upon a number of federal cases recognizing a separate common law claim for breach of the implied warranty of good faith and fair dealing. The Florida Supreme Court found no support within the opinions of the cases cited by Chalfonte. In fact, the court criticized the cases relied upon by Chalfonte for failing to explain how such a private cause of action “fits into Florida insurance jurisprudence.” In making its determination, the court journeyed through the history of first-party bad-faith law in Florida. Based on the history of bad-faith case law and legislative history of section 624.155, the Florida Supreme Court found no common law first-party bad-faith cause of action in Florida. The Florida Supreme Court concluded that first-party claims for breach of implied covenant of good faith and fair dealing are actually statutory bad-faith claims that must be brought under section 624.155 of the Florida Statutes.

No Revisionist Insurance Policy Writing: Certified Questions 3 and 4

The QBE policy in question in this matter contained a separate hurricane deductible. Accordingly, QBE was statutorily required per section 627.701(4)(a) to include notice of the deductible in all capital letters on the first page of the policy. It did. However, Chalfonte argued for voiding the deductible clause because it failed strictly to comply with the statutory requirements in two ways: (1) the font used was 16.2-point instead of 18-point, and (2) the disclosure contained the word “windstorm” instead of “hurricane.”

Looking at the plain language of section 627.701(4)(a), the Florida Supreme Court found that an insured does not have a private cause of action against an insurer for failure to comply with the language and type-size requirements established by section 627.701(4)(a). In analyzing the legislative purpose and history of the statutory notice requirement, the court noted that the hurricane deductible notice was a “by-product” of the Legislature’s intent to increase the availability of homeowner’s insurance in Florida at an affordable price through higher hurricane deductibles. The hurricane deductible notice is the means of putting the insurance purchaser on notice of the higher deductibles. Interestingly, Chalfonte did not argue that it was not on notice of the hurricane deductible, but rather that the notice provision did not strictly adhere to the statutory font and text requirement.

In an effort to preserve the distinction between the creation and interpretation of statutory law, the court pointed out that “the Insurance Code supports the conclusion that the Legislature is perfectly capable of crafting an express penalty for section 627.701(4)(a) and that there is no good reason for the courts to select one penalty over another.” The court also reasoned that to accept Chalfonte’s argument to void the hurricane deductible provision to permit coverage under the remaining policy without applying a deductible, was not acceptable as it would have the effect of altering the terms of the policy in a manner that was not bargained for by the parties as Chalfonte received the benefit of a reduced premium for the inclusion of a higher hurricane deductible and to do so would change the nature of the risk insured by QBE.

Final Means Final ... The End: Certified Question 5

Prior to receipt of a final non-appealable judgment, Chalfonte attempted to force QBE to pay the amended final judgment in the amount of \$7,237,223.88 arguing that the language in the policy only required a final judgment and not a final non-appealable judgment. Conversely, QBE argued that the appeal and posting of a supersedeas bond stayed any collection of the judgment until all determinations by all appellate courts were rendered.

The policy contained the following language:

Provided you have complied with all terms of this Coverage Part, we will pay for covered loss or damage: (1) Within 20 days after we receive the sworn proof of loss and reach written agreement with you; or (2) Within 30 days after we receive the sworn proof of loss and: (a) There is an entry of a final judgment; or (b) There is a filing of an appraisal award with us.

The Florida Supreme Court reviewed both Federal Rule 62(d) governing a stay on appeal by posting a supersedeas bond, and Florida’s counterpart, rule 9.310(b), concluding that the posting of a “good and sufficient bond” as provided by these statutes results in an automatic stay pending appeal of an adverse money judgment and that a trial court has no discretion to change this amount or deny a stay when the bond requirements have been met. The court, therefore, held that a contractual provision mandating payment of benefits upon “entry of final judgment” does not waive the insurer’s procedural right to post a bond pursuant to rule 9.310(b) to stay execution of a money judgment pending resolution of the appeal.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact:

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