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BAD FAITH BLOG

There is No First Party Common Law Bad Faith Cause of Action Declares Florida Supreme Court

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Summary: Hurricane Wilma caused over $7,000,000 of damage to the Chalfonte Condominium complex in 2005. The property damage, subject to a substantial hurricane deductible, was covered, but the condominium association was not entitled to more than $270,000 for "breach of the implied warranty of good faith and fair dealing" which had been awarded by a federal court jury.

QBE Insurance Corporation v. Chalfonte Condominium Apartment Association, Inc., Slip Opinion No. SC09-441, May 31, 2012 (Supreme Court of Florida)

Hurricane Wilma struck Boca Raton, Florida on October 24, 2005 and significantly damaged Chalfonte Condominium Apartment Association property. QBE Insurance had issued an insurance policy for the calendar year beginning January 1, 2005. The condominium association presented its damage estimate about two months after the loss and then submitted its Sworn Statement in Proof of Loss about nine months after the loss. When Chalfonte became dissatisfied with QBE's handling of the case, it filed suit in federal court. The counts were for declaratory judgment, a failure to provide coverage breach of contract, a breach of the implied warranty of good faith and fair dealing, breach of contract, and violation of a Florida statute imposing notice requirements when an insurer limited hurricane coverage.

The court dismissed the statutory violation count holding that it did not provide a private right of action. The jury awarded more than $7.8 million on the coverage claims and over $270,000 for breach of the implied warranty of good faith and fair dealing. After post-trial motions, the judgment was amended to enforce the hurricane deductible reducing the award by approximately $1.6 million. The court amended the judgment despite a jury finding that the QBE policy failed to comply with the hurricane deductible statutory requirements. Chalfonte had also moved to amend the final judgment to allow for pre-judgment interest. The court granted that motion allowing both pre-judgment and post-judgment interest. Thereafter, QBE appealed to the Eleventh Circuit Court of Appeals.

The case was before the Supreme Court of Florida on five certified questions from the Eleventh Circuit. One of the certified questions was whether the policy language requiring QBE to pay Chalfonte upon entry of a final judgment required payment to Chalfonte as soon as the trial court had entered its amended final judgment. Relying upon Florida (including Eleventh Circuit) procedural law, the Supreme Court of Florida had no problem concluding that QBE's contractual provision mandating payment of benefits upon entry of a final judgment did not waive its procedural right to post a bond to stay execution of the money judgment pending resolution of the appeal.

The court was challenged somewhat more by the questions whether the failure to comply with the statutorily mandated language and type size requirements first, allowed a private cause of action for that violation and, second, whether the jury's finding that the hurricane deductible provision was non-compliant, rendered the provision void and unenforceable. The Supreme Court of Florida pointed out first that although the jury could correctly find that the provision was non-compliant, the non-compliance was technical. Chalfonte had received notice of the hurricane provision. The violations were using 16.2 type instead of 18 point type and the statement in the notice provision used the term "wind storm" instead of "hurricane." Furthermore, the court stated that the notice was on the first page of the policy all in capital letters and that those capital letters were in a larger font than any other type on the rest of the page.

In concluding that there was no private right of action for this non-compliance, the court relied upon its prior ruling in *Murthy v. N. Sinha Corp.*, 644 S.2d 983 (Fla. 1994). Relying upon *Murthy*, the court stated that the primary focus must be whether the legislature intended for there to be such a cause of action. In trying to determine that legislative intent, the primary guide is the "actual language used in the statute." (Quoting *Borden v. East European Ins. Co.*, 921 S.2d 587, 595 (Fla. 2006) (Pg. 20)). The Supreme Court found nothing in the legislative text nor in the legislative history suggesting that a private right of action was intended. The legislative history showed that a major objective of changing the number of the statute and inserting the word hurricane in the place of wind storm, was to "restore [the Florida] homeowner insurance marketplace" and to make sure that there was in Florida "adequate hurricane catastrophe insurance at an affordable price." (Quoting the Senate Staff Analysis, April 5, 1996 (Pg. 21)).

An objective of the hurricane deductible notice was to "put [] the insurance purchaser on notice of the higher deductibles." (Pg. 22) Accordingly, based upon that legislative history, the court concluded that there was no private right of action for QBE's non-compliance. Similarly, noting that Chalfonte had received actual notice, and the only complaint was technical non-compliance, the court refused to declare the non-compliant deductible provision void and unenforceable. Declaring it void would "have the effect of altering the terms of the insurance contract, because the insurance contract bargained for by the parties and the lower premiums paid by Chalfonte included this hurricane deductible." (Pg. 27) The Supreme Court of Florida was unwilling to void an insurance policy exclusion, which would not only alter the terms of the deal between the parties, it would require QBE to provide coverage for an uncontracted risk for which Chalfonte had not paid. (Pg. 27) Accordingly, the court held that the district court appropriately enforced the non-compliant hurricane deductible provision.

A major focus of the Supreme Court's attention was on the issue of whether Florida "recognize[d] 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." (Pg. 4) After an extensive review of Florida law at the Supreme and Appellate Court level (as well as the federal courts discussing the issues), the court ruled that no such claim was recognized in Florida. Doing so resulted in a reduction in the final judgment by $271,888.68.

In its review of Florida law, the court noted many prior opinions which showed that in the 20th Century, courts in Florida first recognized a difference between a breach of a standard contract and a breach of an insurance contract. The Supreme Court of Florida first recognized a "third party bad faith action [] involving insurance as early at 1938." (Pg. 6) Although Florida courts then expanded the third party bad faith cause of action to allow the injured plaintiff to bring a bad faith action directly against the insurer without an assignment, "no analogous bad faith action existed for first party claimants in Florida common law." (Pg. 6)

The Florida Legislature first enacted a bad faith statute to allow a first party civil remedy for an insurance company's bad faith conduct in 1982. It was codified in Section 624.155 of the Florida Statutes, the "so called Bad Faith Statute." (Pg. 7) Thereafter, the courts in Florida consistently refused to recognize a first party common law bad faith cause of action. Even though some federal court cases had suggested that there was such a remedy, the Supreme Court of Florida in *Chalfonti* stated, "It is clear that there is no common law first party bad faith action in Florida." (Pg. 9) The Supreme Court cited a series of Florida Appellate Court decisions, some including QBE Insurance, which stood for the proposition that any cause of action for "breach of the implied warranty of good faith and fair dealing is subsumed in a bad faith action" arising under Florida's Bad Faith Statute. (Pg. 10) The Supreme Court stated that even though Florida contract law recognizes an implied covenant of good faith and fair dealing in every contract, and is intended to protect the reasonable expectations of the contracting parties, Florida courts had consistently ruled that "this implied covenant [does not] create [] a separate first party action against an insurance company based on his bad faith refusal to pay a claim." (Pg. 13) There could be a common law extra-contractual cause of action against an insurance company only if "the bad faith refusal amount[ed] to an independent tort such as fraud or intentional infliction of emotional distress." (Quoting *Indus. Fire & Cas. Ins. Co. v. Romer*, 432 S.2d 66, 67 (Fla. 4th DCA 1983).) (Pg. 13)

The Supreme Court also noted that its prior decisions "specifically declined to adopt the doctrine of reasonable expectations in the context of insurance contracts," because doing so would only lead to greater uncertainty and unnecessary litigation. (Pg. 15) In light of that reasoning, the Supreme Court held that "first party claims are actually statutory bad faith claims that must be brought under" Florida's Bad Faith Statute. (Pg. 16)

The lessons for insurers, first of all, is to make sure that your policy complies with the specific statutory requirements in place when the policy is issued. QBE's actual notice which came close to the statutory requirements saved it in this case. However, it is doubtful that it would have been as fortunate if the notice was somewhere else in the policy and if the Florida Legislature had either allowed a separate remedy or simply stated that any non-compliant exclusions or deductible provisions or similar provisions would be void and unenforceable. Essentially, the Supreme Court of Florida ruled that there was no harm to Chalfonti and, hence, they were not going to call a foul. Fortunately for QBE, its nearly compliant hurricane deducible provision came close enough to save it more than $1.6 million.

Likely the more significant ruling for Florida insurers was its holding that first party bad faith claims must be brought under the Florida Bad Faith Statute. Insureds who fail to bring their first party bad faith claim under that statute are precluded from any bad faith recovery. Although Florida insureds might be able to have a common law recovery in first party cases, it's only if they can establish an independent tort, such as fraud or the intentional infliction of emotional distress. The *Chalfonti Condominium* case is noteworthy because it clarifies Florida law in the first party bad faith context.