

July 15, 2009

Insurance Coverage Law News Alert

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Eleventh Circuit Certifies Questions to Florida Supreme Court: Does Florida Law Allow Claims Against Insurers for Breach of Good Faith and Fair Dealing, or Does Such Claim Constitute An Unrecognized Common Law Bad Faith Claim?

In *Chalfonte Condo. Apartment Assoc. v. QBE Insurance Corp.*, 561 F.3d 1267, C.A.11 (Fla. March 9, 2009), the United States Court of Appeals for the Eleventh Circuit certified to the Florida Supreme Court the following questions:

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?
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?
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)?
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?
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?

In *Chalfonte*, the insured sustained significant property damage due to Hurricane Wilma, which struck in October 2005. Shortly thereafter, Chalfonte filed an insurance claim, and later submitted an estimate of damages in December 2005 and a sworn proof of loss in July 2006. Dissatisfied with the insurer's investigation and processing of its claim, Chalfonte filed suit in federal court.

Chalfonte's complaint alleged a violation of Florida Statute § 627.701 (4)(a), which requires any policy with a separate hurricane deductible or coinsurance provision applicable to hurricane loss to include certain language using a bold, minimum-size typeface. The district court concluded that § 627.701 (4)(a) does not authorize a private right of action, and dismissed the count. The jury later awarded \$8,140,099.68 to Chalfonte on its counts for breach of contract for failing to provide coverage, and breach of the implied warranty of good faith and fair dealing for failing to investigate and assess its insured's claim within a reasonable period of time. The trial court reduced the award by the amount of the hurricane deductible, despite the jury's finding that the policy did not comply with the statutory requirements of § 627.701 (4)(a). The insurer appealed, and Chalfonte cross-appealed.

In its appeal, the insurer argued that § 624.155, which authorizes a statutory first-party action for bad faith failure to settle a claim, provides the exclusive remedy for an insurer's failure to investigate and assess a claim within a reasonable period of time. The Eleventh Circuit acknowledged that the Florida Supreme Court has repeatedly observed that Florida does not recognize a common law first-party action for bad faith failure to settle a claim. See, e.g., *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1125 (Fla. 2005). However, Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract. The Eleventh Circuit noted that several Florida federal district courts and at least one state appellate court have held that common law good faith and fair dealing claims are distinct from statutory bad faith claims in the context of a first-party claim. The Eleventh Circuit recognized, however, that no Florida court has explicitly held that an insured may bring a common law claim for breach of the implied warranty of good faith and fair dealing for an insurer's failure to investigate and assess its insured's claim within a reasonable period of time. The court thus found that certification of these issues is appropriate.

In its cross-appeal, Chalfonte argued that the insurer waived the hurricane deductible by failing to comply with the language and type-size requirements of Fla. Stat. § 627.701(4)(a). Chalfonte further argued that the policy's requirement

for payment at the “entry of final judgment” referred to the conclusion of proceedings at the trial court, not the appellate court level. The Eleventh Circuit found that the Florida Supreme Court has not yet directly addressed the consequences of noncompliance with § 627.701(4)(a). The court further found that the Florida Supreme Court has defined “final judgment” different ways in different contexts, and thus found certification appropriate for these issues as well.

[Click here for a copy of the court's decision.](#)