IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

TONY URSUA, JR. and
CHERILYN URSUA,

Plaintiffs,

v. CASE NO. 51-2010-CA-3616-WS/G

STATE FARM FLORIDA
INSURANCE COMPANY,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the court on February 4, 2011, upon the Defendant's Motion to Dismiss and Motion for Final Summary Judgment. Since the arguments presented to the court involve matters beyond the four corners of the Complaint and the attachments thereto, the court has treated the motion only as a Motion for Final Summary Judgment. The court has had the benefit of the memoranda and arguments of counsel. Based on the foregoing, the court finds the facts to be as follows:

> Plaintiffs own a house located at 6308 Ridge Road in New Port Richey Florida. Defendant, State Farm, insured this property in the amount of $179,300. Plaintiffs first reported a sinkhole to State Farm on December 16, 2004. On December 22, 2005, State Farm inspected the property and saw damage that may have been consistent with sinkhole activity.
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> On December 22, 2004, State Farm retained Geohazards, Inc. to conduct geological testing to determine if a sinkhole was causing damage to the property. Geohazards completed its testing on March 29, 2005, concluding that sinkhole activity could not be ruled out as a contributing source of the conditions Geohazards observed at the property. Geohazards estimated the cost of compaction grouting to remediate would range from $44,125 to $53,125, which did not include any repair to the interior, exterior floors or walls, or damage to walks and drives.
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> On April 6, 2005, State Farm sent the Geohazards report to Plaintiffs. In the cover letter accompanying the report, State Farm asked Plaintiffs to obtain two bids for ground stabilization. No answer was received from Plaintiffs. By letter dated May 12, 2005, but not received until May 23, 2005, a public adjuster representing Plaintiffs requested a copy of the policy and any

engineering reports. By letter dated June 3, 2005, State Farm replied to the public adjuster and pointed out that State Farm had requested, but not received two ground stabilization bids and again request same. No reply was received by State Farm. On June 20, 2005, State Farm wrote to the public adjuster, enclosing a copy of the policy and a copy of the Geohazards report and again requesting bids for ground stabilizations. Once again, State Farm received no reply. On July 1, 2005 and November 16, 2005, State Farm again wrote to the public adjuster and again received no reply. Finally, in response to State Farm's additional letter of December 15, 2005, the public adjuster replied by letter dated December 21, 2005.

In the December 21, 2005 letter, the public adjuster enclosed a report from Billerreinhart Structural Group, Inc. and an estimate by Restorations and Interiors for cosmetic damages in the amount of $123,564.60. The Billerreinhart report estimated that the underpinning, which the report concluded was necessary to stabilize the structure, would cost between $120,000.00 and $150,000.00. The letter concluded that the cost of the underpinning would exceed the value of the house. By letter dated January 6, 2006, the public adjuster sent State Farm a copy of a report from RC Kannon. The accompanying letter requested State Farm to provide the amount of loss determined by State Farm and the basis of State Farm's investigation for repair to the foundation. The Kannon report concluded that the property was beyond repair. In the event any repair would be attempted, the Kannon report concluded the cost would be $224,000.00. The public adjuster also suggested that since there was a clear difference in the recommendations for remediation that it would be prudent to send all three evaluations to someone to make an unbiased report. This suggestion was rejected by State Farm, concluding that their engineer, Geohazards, would not be biased.

On January 16, 2006, State Farm wrote to the public adjuster stating that State Farm would take the adjuster's letter to be a refusal to obtain bids according to Geohazards' recommended remediation plan and would ask Geohazards to obtain bids for the project. State Farm also obtained an estimate for cosmetic repairs from Paul Davis Restorations, in the amount of $22,083.25. On February 22, 2006, Geohazards provided State Farm with its opinion that both the Billerreinhart and Kannon reports were in error and that only grouting would be needed to stabilize the property.

On March 7, 2006 State Farm demanded appraisal under the terms of the policy and named Jeff Burk as its appraiser. The policy required Plaintiffs to name their appraiser within 20 days. The Plaintiffs failed to name their appraiser within the 20 day time period. Although State Farm wrote to the Plaintiffs'

public adjuster on April 5, 2006 and reminded the public adjuster of the 20 day time period to name Plaintiffs' appraiser, the public adjuster failed to respond, and the Plaintiffs failed to name their appraiser. On May 1, 2006, C & N Foundation Technologies sent Plaintiffs copies of estimates it obtained for ground stabilization, ranging from $47,812.50 to $55,312.50. Meanwhile, on May 16, 2006, the Plaintiffs filed a Civil Remedy Notice, which was accepted by the Department of Insurance on May 18, 2006.

State Farm continued to request the public adjuster to name the Plaintiffs' appraiser by letters dated May 1, 2006 and June 23, 2006; however, Plaintiffs failed to name an appraiser until August 28, 2006—well past the time limit within which State Farm was required to act pursuant to the Civil Remedy Notice. Along with its June 23, 2006 letter asking Plaintiffs to name an appraiser and within the time period required by the Civil Remedy Notice, State Farm apparently issued two checks in the amounts of $50,218.75 and $19,083.25 for stabilization and cosmetic repairs to the property. These amounts were within the estimates State Farm obtained for ground stabilization, and in the amount obtained from Paul Davis Restorations by State Farm for cosmetic repairs, less the $3,000.00 deductible specified in the policy. The correspondence between the parties clearly indicates that there were disputes as to the proper method of remediation, as well as the amount to be paid for remediation and that those disputes were obvious by the time State Farm's letter of March 7, 2006 invoked its appraisal rights. The appraisal award of $151,141.00, less previous payments and the deductible, was issued on October 23, 2007. State Farm paid the appraisal award under cover letter dated December 4, 2007.

Based on the facts as found by the court, it is

ORDERED as follows:

1. State Farm argues that Plaintiffs have not satisfied the conditions precedent to an action under Section 624.155. State Farm claims that Plaintiffs must have first obtained a judgment that State Farm breached the policy. A judgment, however, is not necessary in such an action. *See*, Vest v. Travelers Ins. Co., 735 So. 2d 1270 (Fla. 2000). The appraisal award determination is legally sufficient as a condition precedent to filing a bad faith suit. A careful reading of the case law reveals that there is no requirement of a judgment or judicial determination of a breach of contract for a statutory bad faith action. The court rejects State Farm's argument on this point.

2. State Farm next argues that the Civil Remedy Notice was

invalid. Pursuant to 624.155(3)(a), a condition precedent to bringing an action under this section is that the Department of Financial Services and the authorized insurer must have been given 60 days written notice of the violation. The ***department*** may return the notice for a lack of specificity, tolling the 60-day time period until a proper notice is filed. This would seem to indicate that the ***department*** is the sole judge of the sufficiency of the Civil Remedy Notice. Following 624.155(3)(b), the notice must specify certain information:

> 1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
> 2. The facts and circumstances giving rise to the violation.
> 3. The name of any individual involved in the violation.
> 4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
> 5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

Section 624.155(3)(c) through (f) further provides:

> (c) Within 20 days of receipt of the notice, the department may return any notice that does not provide the specific information required by this section, and the department shall indicate the specific deficiencies contained in the notice. A determination by the department to return a notice for lack of specificity shall be exempt from the requirements of chapter 120.
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> (d) No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.
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> (e) The authorized insurer that is the recipient of a notice filed pursuant to this section shall report to the department on the disposition of the alleged violation.
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> (f) The applicable statute of limitations for an action under

> this section shall be tolled for a period of 65 days by the mailing of the notice required by this subsection or the mailing of a subsequent notice required by this subsection.

The department may return a notice for a lack of specificity, but never did in this case. State Farm responded to it, only noting that it was lacking a cure amount, and now claims that it was insufficient and thus invalid. Therefore, State Farm has waived its right to challenge the sufficiency of the Civil Remedy Notice (except possibly the cure amount issue).

The only provision that State Farm challenged was the lack of a cure amount. It is undisputed, however, that State Farm did not challenge the sufficiency of the Notice with the Department of Financial Services. Moreover, Section 624.155(3)(B) does not require an insured to indicate the amount owed. Even if this court was statutorily authorized to consider the sufficiency of the Civil Remedy Notice, it is not deficient.

3. State Farm also argues that it cured itself within the statute's cure period. State Farm claims to have paid $19,083.25 (Paul Davis Restoration estimate, less the $3,000.00 policy deductible) and $50,218.75 (within the ground stabilization proposals obtained by State Farm), during the cure period. State Farm further argues that since Plaintiffs did not provide an exact amount which they would accept as a cure, the cure amount was in State Farm's discretion. This would suggest that any insurer in their situation could make *any* payment during the cure period to dispose of the bad faith allegations. Plaintiffs were not required to give a specific cure amount in the notice. There is no requirement that a notice be filed only after the amount of loss or even the proper method of remediation has been determined. Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000). For State Farm to have cured, it must have paid Plaintiffs, in good faith and fair dealing, what they were owed. Vest, at 1275. Whether or not State Farm actually paid Plaintiffs in good faith is a question of material fact, which cannot properly be considered by summary judgment. Vest, at 1275.

4. State Farm next argues that bad faith cannot be predicated on a failure to settle because Plaintiffs never gave State Farm the opportunity to settle since it did not know how much Plaintiffs would have accepted to settle the claim. There is no requirement, however, that a Civil Remedy Notice be filed only after the amount of loss has been determined. Vest, at 1275. Section 624.155(1)(b)(1) provides that an insurer must attempt 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. As such, it is not relevant whether State Farm thought that Plaintiffs would have accepted a

certain amount. And State Farm's argument that since the appraisal award was below the policy limit somehow makes it impossible for Plaintiffs to proceed on a bad faith claim for failure to settle is against the purpose of section 624.155. Whether or not State Farm attempted in good faith to settle with Plaintiffs in a fair and honest manner is also a question of fact that does not lend itself to summary judgment.

5. State Farm last argues that it did not act in bad faith as a matter of law. State Farm invoked appraisal before Plaintiffs filed the civil remedy notice, but Plaintiffs did not name their appraiser until after the cure period had expired. On the other hand, Plaintiffs did request that all three reports be given to an unbiased entity to evaluate—three months before State Farm demanded appraisal and six months before filing their Civil Remedy Notice. Although Plaintiffs may not have made a formal request for appraisal, their suggestion was substantially similar. State Farm, however, rejected the Plaintiffs' suggestion and declared that State Farm's engineer (Geohazards) would not be biased. Instead, State Farm insisted that its engineer, Geohazards, evaluate Plaintiffs' two reports. Geohazards determined that both the Billerreinhart and Kannon reports were in error and that only grouting would be needed to stabilize the property.

Vest requires an insurer to pay the contractual amounts owed. "An insurer, however, must evaluate a claim based upon proof of loss required by the policy and its expertise in advance of a determination by a court or arbitration." Vest, at 1275-6. An insurer cannot merely rely on an appraisal to determine what is owed to avoid bad faith litigation. State Farm had the obligation of good faith and fair dealing, and whether or not State Farm attempted in good faith to settle the claim is a question of fact that is not appropriate for summary judgment. "Good-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder." Vest, at 1275.

6. Based upon the foregoing, the Defendant's Motion for Final Summary Judgment is hereby **DENIED**.

DONE AND ORDERED in chambers in New Port Richey, Pasco County, Florida this _____ day of February, 2010.

STANLEY R. MILLS
Circuit Court Judge

Copies furnished to:
William C. Harris, Esq.
Matthew Lavisky, Esq.

ORIGINAL SIGNED
FEB 18 2011
STANLEY R. MILLS
CIRCUIT JUDGE