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

TONY URSUA, JR. and
CHERILYN URSUA,

Plaintiffs,

vs. **Case No.: 51-10-CA-3616-WS**

STATE FARM FLORIDA
INSURANCE COMPANY,

Defendant.
_____/

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND MOTION FOR FINAL SUMMARY JUDGMENT

Plaintiffs, Tony Ursua, Jr. and Cherilyn Ursua ("Mr. and Mrs. Ursua"), by and through their undersigned counsel, hereby file this Response in Opposition to Defendant's Motion to Dismiss and Defendant's Motion for Final Summary Judgment, and as grounds therefore state as follows:

I. RELEVANT BACKGROUND

On December 6, 2004, Mr. and Mrs. Ursua filed an insurance claim with Defendant, State Farm Florida Insurance Company ("State Farm") for damages to their insured home resulting from sinkhole activity on the property. State Farm confirmed that sinkhole activity was the cause of the damages and admitted coverage for the loss.

Aside from State Farm's confirmation of sinkhole activity, State Farm continually refused to provide any estimates for subsurface or cosmetic repairs to the home. Instead, State Farm wrongfully demanded that its insureds, Mr. and Mrs. Ursua, obtain bids for State Farm to review. Despite the obvious and admitted covered damages and necessary repairs, State Farm

refused to continue its obligation to adjust the loss or tender any monies owed under the policy.

The final determination of liability and damages was ultimately determined in the appraisal process. While State Farm did tender the amount of the award thereafter, the full amount owed was not paid until after the expiration of the 60 day "cure period" afforded in Florida Statutes § 624.155.

Because State Farm had not "cured" the Civil Remedy Notice of Insurer Violation filed by Mr. and Mrs. Ursua, the instant lawsuit for statutory bad faith was filed on or about April 22, 2010.

State Farm initially responded to the Complaint on July 12, 2010 by filing the instant Motion to Dismiss. State Farm argues that this Court should dismiss Mr. and Mrs. Ursua's Complaint because it contends that the conditions precedent to this action have not been met and that the Civil Remedy Notice of Insurer violation filed was invalid.

On January 14, 2011, State Farm also filed the instant Motion for Final Summary Judgment in regards to Mr. and Mrs. Ursua's instant action. State Farm's Motion for Final Summary Judgment contains the same allegations alleged in its Motion to Dismiss as well as new arguments not provided in its Motion to Dismiss.

II. LEGAL ANALYSIS

A. The Conditions Precedent to an Action Under Florida Statutes § 624.155 have been satisfied in this case.

In State Farm's Motion to Dismiss and Motion for Final Summary Judgment, State Farm alleges that Mr. and Mrs. Ursua cannot pursue an action for statutory "bad faith" unless a "final judgment" is obtained and it is found that the insurer breached the insurance policy. State Farm's contentions are incorrect and are contrary to Florida law and the purpose of Florida Statute § 624.155.

State Farm cites *State Farm Mut. Ins. Co. v. Brewer,* 940 So.2d 1284 (Fla. 5th DCA 2006) and *Vest v. Travelers Ins. Co.,* 735 So.2d 1270 (Fla. 2000) as support for its claim that a "judgment" must be obtained and that the insurer must have breached the insurance contract for a statutory bad faith action to accrue. A reading of both of these cases, however, shows that they contain no support for this proposition.

Nowhere in *Brewer* or *Vest*, does the opinion state that a "judgment" must be obtained for a statutory bad faith claim to proceed. On the contrary, *Brewer* specifically states that a claim under Florida Statute § 624.155 cannot proceed until there has been a "determination" of liability and the amount of the loss has been established. *See Brewer* 940 So.2d at 1286.

Similarly, in *Vest* the Court never held that a "judgment" must be obtained for a statutory bad faith claim to proceed. In actuality, the Court stated:

> Second, we expressly state that *Blanchard* is properly read to mean that the "determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the [insured's] damages" are elements of a cause of action for bad faith. Once those elements exist, there is no impediment as a matter of law to a recovery of damages for violation of section 624.155(1)(b)1 dating from the date of a proven violation.

(See *Vest* 735 So.2d at 1275). As the Court held, the conditions precedent to an action pursuant to Florida Statutes § 624.155 are a "determination" of liability and the extent of the damages. A "judgment" is not necessary.

In its Motion for Final Summary Judgment, State Farm cites numerous cases from the United States District Courts for the Middle and Southern Districts of Florida as supporting its

position that a "judgment" and finding of breach of contract are conditions precedent to the filing of an action pursuant to Florida Statute § 624.155. Unfortunately, these cases are completely dissimilar to the case at hand and in no way support State Farm's contentions.

In all of the cases cited, State Farm is correct that the statutory bad faith claims were not permitted to go forward because a breach of the insurance contract had not been found. Unfortunately, the applicability to the instant case ends there. In each of these cases, the courts dismissed or abated the statutory claims because there was underlying litigation for breach of an insurance contract. Therefore, in those cases the statutory bad faith claims could not proceed because it was unclear at that stage what, if any, monies were owed under the policy.

Because liability of the insurers and the amount of monies owed was to be determined by the court, under those circumstances only a judicial determination of liability would allow a statutory claim pursuant to Florida Statutes § 624.155 to proceed. State Farm has taken these rulings out of context and is attempting to re-write the requirements for a statutory bad faith claim to avoid liability for its actions. These cases do not deal with a situation, such as this, where liability has been determined outside of litigation and the amount of loss has been set in the appraisal process.

As further evidence of State Farm's misapplication of these cases, State Farm contends that *Bonita Villas Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, 2010 WL 2541763 (S.D. Fla. 2010) supports its position. Interestingly, this case has absolutely no bearing on the instant claim as the court dismissed the statutory bad faith claim because the plaintiff had signed a release which barred any further actions against the insurer.

While State Farm's cited cases lend no support to its position that the instant action cannot go forward, numerous courts have found that a judicial determination of liability or

breach of contract is not necessary for a statutory bad faith suit to proceed.

"Bringing a cause of action in court for violation of section 624.155(1)(b)1 is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract." *Vest*, 753 So. 2d at 1276. The instant case meets such a prerequisite because the specific amount of State Farm's liability under the insurance contract has been determined by an appraisal award, which the carrier subsequently paid, well after the Civil Remedy Notice expired. This satisfies the condition precedent to filing a bad faith suit. *Tropical Paradise Resorts, LLC v. Clarendon Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 66496 (S.D. Fla. Aug. 20, 2008) (appraisal award is sufficient determination of liability and damages for bad faith claim to proceed); *Royal Marco Point 1 Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 2008 U.S. Dist. LEXIS 68909 (M.D. Fla. Sept. 10, 2008) (explaining that the payment of an appraisal award is the equivalent to a confession of judgment); *see also Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1234 (Fla. 2006) (arbitration award satisfies the condition precedent to bad faith claim of a determination with regard to liability and the extent of damages); *Imhof v. Nationwide Mut. Ins. Co*., 643 So. 2d 617, 619 (Fla. 1994) (arbitration award satisfies the condition precedent to bad faith claim of a determination with regard to liability and the extent of damages); *Royal Marco Point I Condominium Ass'n v. QBE Ins. Corp.*, 2010 WL 2757240 (M.D. Fla. 2010) (action for statutory bad faith could proceed after the amount of loss was determined in the appraisal process).[1]

Contrary to State Farm's contention, there is no requirement of a "judgment" or judicial

[1] Courts have found that insurance policy-authorized appraisal awards are similar in many ways to arbitration awards. *See State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996) (applying case law regarding arbitration to matter involving appraisal); *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1362 (M.D. Fla. 2003) (explaining that Florida courts treat appraisal clauses as "narrowly restricted arbitration provisions").

determination of a breach of contract for a statutory bad faith action pursuant to Florida Statutes § 624.155. The prerequisites are 1) a determination of liability and 2) a determination of the amount that is owed. In the instant case, liability has been determined both by State Farm's admission of coverage and the subsequent appraisal process. The amount of the loss has been set by the appraisal panel. As both conditions have been met, this Court must allow Mr. and Mrs. Ursua's action to proceed.

B. The Civil Remedy Notice of Insurer Violation is Valid.

1. State Farm has waived and/or is estopped from arguing that the Civil Remedy Notice is invalid on the basis of anything other than the lack of a "cure amount".

In State Farm's Motion to Dismiss, State Farm contends that the Civil Remedy Notice of Insurer Violation filed by Mr. and Mrs. Ursua is invalid because does not contain a "cure amount" and it does not reference the relevant policy language. State Farm's Motion for Final Summary Judgment contains these same allegations as well as argues that the Civil Remedy Notice is invalid because it does not contain sufficient factual allegations.

While State Farm is incorrect in arguing that the Civil Remedy Notice is invalid for any of these reasons, State Farm has waived its ability to challenge the sufficiency of the Civil Remedy Notice for any reason other than the fact that it does not contain a "cure amount" and/or is estopped from doing so.

In response to the Civil Remedy Notice filed by Mr. and Mrs. Ursua, State Farm filed a response with the Department of Financial Services. Notably, the only deficiency that State Farm alleged in its response was the fact that it did not contain a "cure amount." Nowhere did State Farm allege that it was invalid because it did not contain the factual allegations sufficient to put it on notice of the asserted violations or that it was deficient because it does not contain the

relevant policy language.

If State Farm really believed that the notice was deficient for these reasons, it had an obligation to report as much to the Department of Financial Services and notify Mr. and Mrs. Ursua of the specific information necessary. This would have allowed Mr. and Mrs. Ursua to provide additional information, if necessary, to remedy any perceived deficiencies.

State Farm did not do so, however, and responded to the Civil Remedy Notice without making mention of such alleged problems. Allowing State Farm to come back now, after Mr. and Mrs. Ursua have perfected their right to proceed with a bad faith suit, would be improper and thwart the purpose of Florida Statute § 624.155. By failing to raise specific objections in its Response, State Farm has waived its right to do so now and/or should be estopped from doing so.

2. State Farm has waived and/or is estopped from challenging the validity of the Civil Remedy Notice because it did not challenge the sufficiency of the Notice through the Department of Financial Services.

Florida Statutes § 624.155(b) and (c) provides that a Civil Remedy Notice must be provided on the form provided by the Department of Financial Services and must be accepted by the Department in order to be valid. Further, Florida Statutes § 624.155(c) specifically states that "[w]ithin 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."

It is undisputed that the Civil Remedy Notice was submitted on the form provided by the Department of Financial Services and it is undisputed that the Department of Financial Services accepted the Civil Remedy Notice. By the accepting and not returning the Civil Remedy Notice for lack of the specific information required by the statute, the Department of Financial Services has deemed the Civil Remedy Notice sufficient according to Florida Statutes § 624.155.

Furthermore if State Farm actually believed that the Civil Remedy Notice was insufficient, State Farm was required to challenge the Civil Remedy Notice with the Department of Financial Services. Florida Statutes §624.155(b) solely vests the initial determination of the sufficiency of a Civil Remedy Notice in the Department of Financial Services, not the courts. The Florida Supreme Court recognized this as no mere accident in *Talat Enters., Inc. v. Aetna Cas. & Sur. Co*. 753 So. 2d 1278 (Fla. 2000), explaining that "it is plain the Legislature intended the notice to the DFS to serve as a basis for the DFS to assist in the settling of claims and to monitor the insurance industry." *Talat*, 753 So. 2d at 1283. The notice provision was not intended to allow insurers a means through which they can avoid the remedy provided in the statute despite their failure to cure within the 60-day window. Nor was it enacted to shift the statutory duty to investigate from insurance companies (who are paid premiums expressly for this expert function) to policyholders.

In the instant case, it is undisputed that State Farm did not challenge the sufficiency of Mr. and Mrs. Ursua's Civil Remedy Notice with the Department of Financial Services. Therefore, because State Farm did not challenge the sufficiency of the Civil Remedy Notice with the Department of Financial Services, it has waived its right to such a challenge and cannot do so now through this Court.

3. The Civil Remedy Notice is not invalid because it does not contain a specific "cure amount".

State Farm's contention that the Civil Remedy Notice is invalid because it does not contain a specific "cure amount" is unsupported by Florida law. While State Farm cites some dissimilar case law to support its position, it has ignored the numerous decisions holding to the contrary.

Specifically, the court in *Bullard Bldg. Condominium Association v. Travelers Property*

Casualty Company of America, WL 2423436 (2009), the Middle District came to the opposite decision in regards to this exact argument. In *Bullard,* the defendant argued that plaintiff's Civil Remedy Notice was deficient because, among other things, it did not contain an amount that the defendant could pay to cure the violations. *Id.* at 10. The court disagreed with the defendant's position pointing out that Florida Statute 624.155(3)(B) "does not require an insured to indicate the amount owed." *Id.*

Similarly, in *Tropical Paradise Resorts, LLC v. Clarendon American Insurance Co.*, WL 3889577 (2008), the Southern District found that an insured was not required to state a specific amount that a Defendant could pay in order to cure the Civil Remedy Notice. The court held that "[a]lthough it is clearly the purpose of the notices to alert an insurer of its violations, Florida's statute does not require an insured to indicate the amount owed". *Id.* at 3.

This decision has been mirrored in numerous other decisions. *See Royal Marco Point I Condominium Ass'n v. QBE Ins. Corp.,* 2010 WL 2757240 (M.D. Fla. 2010) (The case law on the subject is clear that "a specific cure amount is not necessary to validate a Civil Remedy Notice."); *Porcelli v. OneBeacon Ins. Co., Inc.,* 635 F.Supp.2d 1312, 1318 (M.D.Fla.2008) (a specific cure amount is not necessary to validate a Civil Remedy Notice).

In all of the above mentioned cases, the insurer argued that the Civil Remedy Notices filed were invalid because there was no specific "cure amount". Likewise, in all of the above mentioned cases, the courts disagreed. As a specific cure amount is not required to validate a Civil Remedy Notice, this Court must disregard State Farm's argument.

4. The Civil Remedy Notice contains sufficient facts to put State Farm on notice of its bad faith actions.

Even if this Court disagrees that State Farm has waived and/or is estopped from arguing that the Civil Remedy Notice is invalid because it purportedly does not contain specific enough

facts to put State Farm on notice of the violations, the Civil Remedy Notice contains sufficient facts to be valid under Florida law.

As a condition precedent to filing a cause of action under §624.155, an insurer must be given sixty (60) days' written notice of the alleged violation. See Fla. Stat. §624.155(3)(a). The notice must state with specificity the "statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated," and "[t]he facts and circumstances giving rise to the violation." *Nowak v. Lexington Insurance Co*., 464 F. Supp. 2d 1248, 1251 (S.D. Fla. 2006), quoting Fla. Stat. §624.155(3)(b)(1) - (2). A review of the language of the Civil Remedy Notice shows that the description of the circumstances that led to the filing of the Notice were sufficient to put State Farm on notice of its statutory violations.

Contrary to State Farm's assertions, the reasons outlined in the Civil Remedy Notice is not vague. The Civil Remedy Notice form, which the Department of Financial Services requires all Notices to be submitted in accordance with, states: "7. Briefly describe the facts and circumstances giving rise to the violations." Mr. and Mrs. Ursua have fulfilled these requirements by specifically stating that the circumstances giving rise to the Civil Remedy Notice.

State Farm contends that the facts and circumstances are nothing more than conclusory allegations and insinuates that Mr. and Mrs. Ursua must have provided a detailed listing of each and every action that gave rise to the complaint. State Farm's position is contrary to the instructions for Paragraph 7 of the Civil Remedy Notice, which states that Plaintiff must "briefly describe the facts and circumstances." As the court stated in regards to this same argument in *Tropical Paradise*, "the statute requires that "the notice shall be on a form provided by the department," and because the department's form gives only minimal space for describing "the

facts and circumstances giving rise to the violation," it would be very strange if an insured was required to incorporate every allegation from its complaint into its notice." *Tropical Paradise,* WL 3889577 at 4.

Furthermore, it is doubtful that State Farm was actually unaware of the allegations set forth in the Civil Remedy Notice. In its response, State Farm never brought up any confusion of lack of knowledge regarding the issues alleged. In fact, State Farm responded by providing a purported factual history of the claim and stated that it had subsequently paid the amounts it believed were due under the policy. If State Farm did not have sufficient knowledge of the facts and circumstances giving rise to the response, how could it have responded?

This Court should ignore State Farm's contention that the factual allegations set forth were insufficient to put it on notice of the violations and should not find that the Civil Remedy Notice is invalid.

5. The Civil Remedy Notice is not invalid because it does not reference the specific policy language.

Even if this Court disagrees that State Farm has waived and/or is estopped from arguing that the Civil Remedy Notice is invalid because it does not reference the specific policy language, the lack of specific policy language does not make the Civil Remedy Notice invalid.

"[A]n action for bad faith is extra contractual in nature and relates to the duties of an insurer as defined by statute, not the express terms of the contract." *Townhouses of Highland Beach Condominium Ass'n v. QBE Insurance Corp*., 504 F.Supp.2d 1307, 1310 (S.D.Fla.2007) (citing *Pastor v. Union Central Life Ins. Co.*, 184 F.Supp.2d 1301, 1306 (S.D.Fla.2002)). Thus, it was not necessary for Mr. and Mrs. Ursua to reference specific policy language. Furthermore, Florida Statutes § 624.155(3)(b)(4) only instructs that notices shall "[refer] to specific policy language that is relevant to the violation, if any." As the court stated in *Tropical Paradise*, "the

clear language of the statute attests to the possibility that it may be impossible to reference any specific, relevant language from the policy agreement." *Tropical Paradise,* WL 3889577 at 4; *see also Bullard,* WL 2423436 at 10 (denying defendant's motion to dismiss the complaint based on plaintiffs failure to provide the specific policy language in the Civil Remedy Notice).

As it was unnecessary for Mr. and Mrs. Ursua to list the relevant policy provisions in the Civil Remedy Notice, the Notice cannot be invalid because they did not do so.

C. The Civil Remedy Notice has not been "cured."

In its Motion for Final Summary Judgment, State Farm asserts that it has somehow "cured" the Civil Remedy Notice filed by Mr. and Mrs. Ursua because it made partial payments within the sixty day "cure period". State Farm asserts that because the Civil Remedy Notice did not contain a "cure amount", State Farm was left with the sole determination of what it could do to "cure" the allegations outlined in the Notice.

While it is true that State Farm did make partial payments during the "cure" period (notably for the first time), State Farm did not "cure" the Civil Remedy Notice. For State Farm to remedy the violations set forth in the Notice, it would have been required to begin treating Mr. and Mrs. Ursua in good faith and pay what was owed under the policy. Unfortunately, State Farm did not do so in this case. Instead, State Farm obtained what Mr. and Mrs. Ursua contend were biased and outcome oriented reports and made payments that were well below the amounts owed under the policy.

This is not, and cannot, be considered a "cure" for the Civil Remedy Notice. Following the reasoning of State Farm, an insurer could simply make some payments during the "cure period" and eliminate all allegations of bad faith.

Finally, whether State Farm paid what it reasonably believed was owed under the policy

or indeed retained biased reports and estimates from outcome oriented vendors is a question of material fact that should be explored during the discovery process and is improper for summary judgment.

D. State Farm could have settled the claim.

In its Motion for Final Summary Judgment, State Farm argues that it never had an opportunity to settle the claim because it was not aware of how much Mr. and Mrs. Ursua would have accepted to settle the claim. This position, however, is incorrect and also must fail.

First, there is no requirement that a Civil Remedy Notice be filed only after the amount of the loss has been determined. *Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1275 (Fla.2000). Thus, whether State Farm believed that Mr. and Mrs. Ursua would have accepted a specific amount as a "cure" is irrelevant. State Farm had an obligation to promptly adjust Mr. and Mrs. Ursua's claim and promptly pay all amounts due and owing under the policy. State Farm failed to do so.

Second, State Farm argues that because the appraisal award was below the policy limit, Mr. and Mrs. Ursua are somehow unable to proceed with a claim for bad faith for failure to settle the claim. This position is equally untenable and contrary to the law and purpose of Florida Statutes § 624.155.

Furthermore, State Farm completely ignores the fact that while the appraisal award was somewhat less than the policy limit, it was more than double what State Farm had paid on the claim. Therefore, even if the appraisal panel did disagree with Mr. and Mrs. Ursua's estimate of damages and repair protocols, the outcome of the appraisal showed that State Farm's estimate and repair protocols were even further from correct.

Mr. and Mrs. Ursua contend that State Farm's underestimation of the damages and repair expenses was the result of an improper and outcome oriented investigation. This is also a question of material fact and does not lend itself to summary judgment.

E. There can be bad faith as a matter of law.

Finally, in its Motion for Final Summary Judgment, State Farm contends that there is no bad faith as a matter of law because it paid what it believed was owed under the policy and participated in the appraisal process. Like the proceeding arguments, State Farm's contention finds no legal support and must fail.

State Farm's argument that it had no obligation to pay monies because the appraisal award had not been completed is directly contrary to the applicable law. As State Farm correctly points out, *Vest* requires the insurer to pay the contractual amounts owed. *Vest,* 753 So.2d at 1275. While State Farm would like the Court to stop reading at this point, the remainder of the quoted paragraph is directly relevant and contrary to State Farm's argument here.

Specifically, the Court in *Vest* goes on to say: "[a]n 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*, 753 So.2d at 1275-1276. As the Court directly pointed out, an insurer cannot simply rely on an appraisal or lawsuit to determine what is owed and avoid bad faith litigation. An insurer has an obligation of good faith and fair dealing which involves paying the amounts due and owing under the policy without forcing an insured to resort to alternative means of resolution. Whether State Farm did so in this case is a question of fact and this action is not precluded by law.

WHEREFORE Plaintiffs, Tony Ursua Jr. and Cherilyn Ursua, respectfully request this Court deny Defendant, State Farm Florida Insurance Company's, Motion to Dismiss and Motion

for Final Summary Judgment, require State Farm to immediately respond to the outstanding discovery, and grant any other such relief as this Court deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lee Craig, Esquire, David B. Krouk, Esquire, Matthew Lavisky, Esquire, Butler Pappas, 777 S. Harbour Island Blvd, Suite 500, Tampa, FL 33602, by Hand Delivery on this _____ day of January, 2011.

_____
WILLIAM C. HARRIS, ESQUIRE
Florida Bar Number: 069023
MERLIN LAW GROUP, P.A.
777 S. Harbour Island Blvd, Ste 950
Tampa, Florida 33602
Telephone: (813) 229-1000
Fax: (813) 229-3692
Attorney for Plaintiffs