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**THE ADVENT OF THE BREACH OF GOOD FAITH AND FAIR
DEALING CLAIM SINCE THE PRECLUSION OF SURETIES
FROM THE DEFINITION OF "INSURER" IN FLORIDA'S BAD
FAITH STATUTE**

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**The Advent of the Breach of Good Faith and Fair Dealing Claim Since the
Preclusion of Sureties From the Definition of “Insurer” in Florida’s Bad Faith
Statute**

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I. Introduction

Prior to 2005, persistent plaintiffs’ attorneys frequently brought bad faith claims against sureties for denying liability in the hopes of reaping the benefits of the extra contractual damages available under Florida’s Bad Faith Statute. In addition, plaintiffs’ attorneys have brought such claims to attempt to obtain sureties’ claims file material, which would not otherwise be discoverable in a normal breach of contract case. Now, however, pursuant to the recent enactment of Section 624.155(9), Florida Statutes, statutory bad faith claims against sureties for their refusal to settle a claim and/or failure to properly investigate a claim are no longer available.

A flurry of recent case law in Florida surrounding an insured’s right to bring a “breach of the implied duty of good faith and fair dealing” claim against an insurer as a result of the insurer’s failure to settle a claim in good faith leads to only one conclusion—plaintiffs’ lawyers in Florida are currently and will continue to assert such claims against sureties for their alleged improper denial of claims or refusal to settle disguised as “bad faith” claims to seek damages that an owner/obligee is not otherwise entitled to bring under Florida’s current Bad Faith statute.

This article will review the historical underpinnings of a common law bad faith claim against insurers in Florida, and will further discuss the nature of the breach of the duty (or covenant) of good faith and fair dealing claim in Florida. This article will also review and analyze the current state of Florida law regarding whether an owner/obligee may maintain a claim against a surety for its breach of the duty of good faith and fair dealing.

II. Dadeland Revisited-No More Bad Faith Refusal to Settle Claims against Sureties in Florida

a. *Dadeland Depot, Inc. v. St. Paul Fire and Marine Insur. Co.*

Florida’s Bad Faith Statute, as contained in Section 624.155, Florida Statutes, provides that an insurer can be liable for “[n]ot attempting in good faith to settle claims when, under all circumstances, it should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests.” §624.155(b)(1). Indeed, § 626.9541(1)(i), entitled “Unfair Claim Settlement Practices,” and incorporated by § 624.155(1)(a)(1), governs the very conduct upon which many plaintiffs’ attorneys attempt to base their claims against sureties. Specifically, the provision prohibits any insurer from committing, among other things, any of the following conduct:

Denying claims without conducting reasonable investigations based upon available information; and

Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement. § 626.9541(1)(i)(3)(d)-(f).

In 2006, to the dismay of many sureties and in response to a certified question from the Eleventh Circuit, the Supreme Court of Florida unambiguously held that an obligee in a surety relationship did indeed constitute an “insured” for purposes of §624.155(1)(b)(1)(1999). *Dadeland Depot, Inc. v. St. Paul Fire and Marine Insur. Co.*, 945 So.2d 1216, 1236 (Fla. 2006). To support its decision, the *Dadeland* court considered a number of factors, including its prior case law, the fact that the surety was defined elsewhere in the insurance code as an insurer, the plain language of the statute in question, as well as other jurisdictions’ treatment of similar questions. *Dadeland Depot, Inc. v. St. Paul Fire and Marine Insur. Co.*, 483 F.3d 1265 (11th Cir. 2007).

b. *Section 624.155(9), Florida Statutes*

The *Dadeland* court based its decision upon the 1999 version of Section 624.155, Florida Statutes, which existed prior to the amendment of the statute in 2005. As amended, Section 624.155(9), Florida Statutes states, in pertinent part, that a “surety issuing a payment or performance bond on the construction or maintenance of a building or roadway project is not an insurer for purposes” of the Bad Faith statute. §624.155(9), Fl. Stat. As *Dadeland* noted:

This amendment to section 624.155 removes all uncertainty for the future as to whether certain specified surety bonds are subject to its provisions. After the passage of Senate Bill 652, those sureties specifically issuing ‘payment or performance bond[s] on the construction or maintenance of a building or roadway project’ are clearly not considered insurers for purposes of Section 624.155 of the Florida Statutes. 954 So.2d 1216, 1230 (Fla. 2006).

Thus, in 2005, the legislature effectively removed sureties from liability under the Bad Faith Statute. Importantly, the application of this statute is prospective, rather than retroactive. 2005 Fla. Sess. Law. Serv. Chapter. 2005-218. Those bond claims in litigation prior to the effective date of the statute will still be affected by *Dadeland*. Because of this amendment, a surety and/or its counsel must now determine what other extra-contractual claims may arise from the sureties alleged unreasonable or unfair dealing with owner/obligees, including, but not limited to, the breach of the duty of good faith and fair dealing claim.

III. The History of the Breach of The Duty of Good Faith and Fair Dealing Claim in Florida

a. *The Breach of the Duty (or Implied Covenant) of Good Faith and Fair Dealing*

“Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract.” *Chalfonte Condominium Apartment Ass’n, Inc. v. QBE Insur. Co.*, 2009 WL 580775 (11th Cir. 2009)(quoting *Insur. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So.2d 1232 (Fla.Dist.Ct.App. 2001)). Courts have held that implicit in all contracts is the covenant of good faith and fair dealing. *Burger King Corp. v. C.R. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999); *Shibata v. Lim*, 133 F.Supp.2d 1311, 1318 (M.D. Fla. 2000) (citing *County of Brevard v. Miorelli Eng’g, Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997)). However, a party can only maintain a cause of action for breach of the implied covenant of good faith when there is a breach of an express term of the underlying contract. *Burger King*, 169 F.3d at 1318. The covenant prohibits one party to a contract from taking any action that inhibits the right of the other party to enjoy the benefits of the contract. *Shibata*, 133 F.Supp.2d at 1318. In essence, the implied covenant governs the conduct of the parties to a contract when the contract is otherwise silent. *Id.*

The *Shibata* decision discussed the nature of a breach of the duty of good faith and fair dealing claim:

To allege a breach of the implied covenant, the party must demonstrate a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. See, e.g., *Cox*, 732 So.2d at 1097 (covenant limits party's ability to act capriciously when exercising his discretion). Just what conduct will meet this criteria must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties.

However, a breach of the implied duty may be dismissed as redundant where the conduct allegedly violating the implied covenant is duplicative of the companion cause of action alleging breach of contract. *Sauer v. Xerox Corp.*, 95 F.Supp.2d. 125, 131 (W.D.N.Y.2000); *Geler v. National Westminster Bank USA*, 770 F.Supp. 210, 215 (S.D.N.Y.1991); see also *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 167 (11th Cir.1997) (suggesting that dismissal is the appropriate method for a duplicative cause of action); *Fikes v. City of Daphne*, 79 F.3d 1079, 1083 n. 6 (11th Cir.1996) (discussing the inherent authority of the district court to narrow issues in a case); *Marx v. Gumbinner*,

855 F.2d 783, 792 (11th Cir.1988) (noting that district courts may invoke their inherent power to narrow the issues for trial). Thus, a party can maintain a claim for breach of the implied duty only if it is based on allegations different than those underlying the accompanying breach of contract claim. If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. *Id.* at 1319.

b. *First-party Insurance Claims v. Third Party Insurance Claims*

Prior to engaging in a discussion regarding whether an owner/obligee may make a claim in common law for a breach of the duty of good faith and fair dealing, it is important to recognize the distinction between the two distinct but very similar types of common law bad faith actions against an insurer: first-party and third-party. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005). Third-party bad faith actions arise from a practice in the insurance industry of rejecting, without sufficient investigation, claims presented by third parties against an insured, thereby exposing the insured to judgments exceeding the coverage limits of the policy while the insurer remained protected by a policy limit. *Id.* With no actionable remedy, insureds in Florida were left responsible for the excess judgment. *Id.* As a result, the concept developed that an insurer had an obligation of good faith and fair dealing to the insured to handle third party claims appropriately. *Id.* Thus, third party bad faith actions have “a long and established pedigree,” and have been recognized at common law in Florida since 1938. *Id.*

Conversely, Florida courts have traditionally failed to recognize a corresponding common law first-party action that would protect individual insureds and allow them to seek redress against their insurers for the wrongful processing or denial of their own first-party claims or failure to deal fairly in claims processing. *Id.* at 1125. As the Supreme Court of Florida succinctly explained: “Florida courts had refused to recognize the tort of first-party bad faith because the type of fiduciary duty that exists in third party actions is not present in first-party actions and the insurer is not exposing the insured to excess liability.” *State Farm Mutual Auto Ins. Co. v. Laforet*, 658 So. 2d 55, 59 (Fla. 1995). Instead, if an insurer acted in bad faith during the settlement process, the first-party insured’s only remedy was a breach of contract action in which damages were limited to those contemplated by the parties in the policy. *Macola v. Government Employees Ins. Co.*, 953 So. 2d 451, 455 (Fla. 2006).

In 1982, the Florida legislature, with the adoption of Section 624.155, Florida Statutes, extended to first-party insureds the extra-contractual protection afforded third-party claimants by the common law duty of good faith and fair dealing. See *id.* at 457

(“Although section 624.155 is in derogation of the common law with respect to first-party bad faith, the statute codifies the common law with respect to third-party bad faith.”); *Laforet*, 658 So. 2d at 59 (citing § 624.155, Florida Statutes (1982)). The Florida Supreme Court, in *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, held the civil remedies provided for in Section 624.155 exist wholly separate from, and in derogation of, the common law and must be strictly construed. 753 So. 2d 1278, 1283-84 (Fla. 2000) (“[S]ection 624.155 creates a statutory ‘civil remedy.’ For [the plaintiff] there is no remedy without the statute.”) (internal citations omitted). The Court further declared not ripe a bad-faith cause of action by first-party insureds for extra-contractual damages, recoverable only because of the statute, unless the statutory requirements are met. *Id.* at 1284.

The *Dadeland* decision certainly likened an obligee in the suretyship context to the “first party” claim scenario discussed above for the purposes of Florida’s bad faith analysis. Indeed, *Dadeland* stated that “the relationship between a surety and its obligee, although unique, is extremely similar to the relationship between an insurer and its insured—one party, the insured/obligee, is seeking to protect itself against a contingency, and the other party, the insurer/surety, has undertaken to provide certain benefits should that contingency occur.” *Dadeland*, 945 So. 2d at 1231. In the traditional surety relationship, the obligee makes a claim to the surety for a loss that it has suffered because of the debt, default, or miscarriage of the principal. *Id.* at 1226. It is reasonable to conclude then, that an owner/obligee, “by requiring that a bond be obtained by a principal, is essentially insuring itself from the potential losses that would result in the event the principal defaults on its obligations required by the underlying construction contract.” *Id.*

Although *Dadeland* recognizes the unique and distinct characteristics of the surety relationship from the traditional liability insurance relationship, one cannot deny the similarities between an insured and an owner/obligee. When an owner/obligee makes a claim against the surety as a result of the principal’s nonperformance and an insured makes a claim against its insurance policy for the loss it suffered as the result of a catastrophic event, either situation may lead the surety or the insurer to deny the claim, the result of which, under the appropriate facts, may cause the owner/obligee or the insured to bring a claim against either the surety or insurer to pay the claim, or otherwise perform its obligations under the bond or insurance policy. If the surety or insurer, as the case may be, fails to properly investigate the claim or fails to settle the claim in good faith, then it follows that a classic “first party” type bad faith action may arise. As such, one can reasonably conclude that, as Florida law does not recognize a common law “bad faith” claim in the first party insurance claim context, Florida law should not recognize a common law “bad faith” or breach of the duty of good faith and fair dealing claim against sureties by owner/obligees.

IV. Breach of Good Faith and Fair Dealing Claims since the Amendment of §624.155

a. Recent Decisions Regarding the Breach of Good Faith and Fair Dealing in the Insurance Context

Recently, there have been a myriad of cases decided in several Florida federal courts regarding an insured's right to maintain a breach of fair dealing claim against an insurer for failure to adjust, pay or settle a claim. These favorable decisions conclusively opine that an insured may not bring an action for breach of the implied duty of good faith and fair dealing against an insurer for failure to settle a claim in good faith pursuant to Florida law. See *Buckley Towers Condo., Inc. v. QBE*, 2008 WL 2490450 (S.D. Fla. June 18, 2008), *QBE Insur. Co. v. Dome Condominium Ass'n, Inc.*, 577 F.Supp.2d 1256 (S.D. Fla. 2008), *Nirvana Condominium Ass'n v. QBE Insurance Co.*, 589 F.Supp.2d 1336 (S.D. Fla. 2008). *Isola Condominium Ass'n, Inc. v. QBE Insur. Co.*, 2008 WL 5169458 (S.D. Fla. 2008). Indeed, one of these recent federal court decisions in the Southern District of Florida examined the historical underpinnings of the common law duty of good faith and held that a claim does not exist against an insurer for breach of common law duty of good faith and fair dealing.

In *Buckley*, the plaintiff filed an action against the insurer defendant arising from property damage that it allegedly suffered due to Hurricane Wilma at the plaintiff's 576 unit condominium complex. *Id.* at *1. The plaintiff then filed a claim against the policy with the defendant insurer and despite the fact that the insurer conducted inspections related to the claim, the plaintiff alleged that the insurer failed to adjust, pay, or settle the claim for approximately two and one-half years. *Id.* As such, the plaintiff failed suit against the defendant insurer for, among other things, breach of the "implied warranty of good faith and fair dealing." *Id.* In dismissing the implied warranty of good faith and fair dealing claim, and determining that the plaintiff's relief for the unreasonable conduct of the defendant insurer was limited to a statutory bad faith claim, the court stated, in pertinent part:

The only reasonable conclusion that can be drawn now is that the Baxter dissent's theory-that there is a contractual duty of good faith against an insurer enforceable at law-was never accepted by Florida courts until the Legislature adopted the very same type of statute in 1982. If, as Buckley argues, there was always an implied duty of good faith enforceable at law under the insurance contract, there would have been no need for the enactment of section 624.155. *But as the Florida Supreme Court has repeatedly made clear, no theory of liability was ever available to an insured against the insurer until 1982. That clearly includes a contractual theory of liability based on the implied covenant or warranty of good faith and fair dealing.*

To argue now, 26 years later, that there was this contractual/implied theory of liability lying in the weeds all along simply flies in the face of historical fact and judicial precedent. And because we in federal court must apply state law in accordance with the decisions of the Florida Supreme Court and its intermediate appellate courts, *McMahan v. Toto*,

311 F.3d at 1079, *it is not possible to conclude in the face of all these cases that Buckley has a contractual cause of action for breach of implied warranty of good faith outside the scope of a section 624.155 bad faith claim*, which indisputably cannot be raised until this coverage case is over.

* * * *

Therefore, based on *Quadomain* and our analysis of the issue once again, Buckley's contractual claim for breach of QBE's implied warranty of good faith and fair dealing must be dismissed as a matter of law. *Id.* at *10-11 (emphasis added); see also, e.g., *Quadomain Condominium Assoc., Inc. v. QBE Insurance Corp.*, 2007 WL 1424596, at *5-6 (S.D. Fla. May 14, 2007) (dismissing a claim because it was a “statutory bad faith [claim] dressed in breach-of-implied-warranty clothing.”); *Trief v. American General Life Insurance Co.*, 444 F.Supp.2d 1268, 1270 (S.D. Fla. 2006) (dismissing a claim for breach of good faith that resembled a statutory bad faith claim and was duplicative of the breach of contract claim).

The *Buckley* Court made clear that § 624.155 provides the sole basis for a bad faith claim. In short, by adding § 624.155(9) in 2005, and effectively removing sureties from the statute's applicability, the Florida legislature arguably limited owner/obligees' claims against sureties to the extent of the bond's contractual obligations. As well, because of the similarities between an insured and an owner/obligee, the argument exists that a breach of the duty of good faith and fair dealing claim does not exist against sureties by owner/obligees.

However, as the Court's decision in *QBE Insur. Co. v. Dome Condominium Ass'n, Inc.* noted, federal courts in Florida are split on the issue of whether, in the context of first-party insurance claims, a claim of breach of the implied covenant of good faith and fair dealing exists separate and apart from a statutory bad faith claim, including a split within the Southern District of Florida. 577 F.Supp.2d at 1260. Specifically, a minority of courts determined that a claim for breach of the implied covenant of good faith and fair dealing is a completely separate cause of action from a statutory bad faith claim and have allowed the claim to proceed, so long as the party alleged an underlying breach of an express contract term. *Id.* at 1260, n.2. (citing *Townhouses of Highland Beach Condo. Ass'n v. QBE Ins. Corp.*, 504 F.Supp.2d 1307 (S.D. Fla. 2007)).

Importantly, the *Townhouses of Highland Beach* decision, in holding that an insured stated a claim for breach of implied warranty of good faith and fair dealing by alleging that the insurer breached an express term of the property insurance policy by failing to investigate and adjust a claim fairly and properly, recognized that a statutory bad faith claim is extra-contractual in nature, and relates to the duties of an insurer as defined by statute, whereas an action for implied warranty of good faith and fair dealing contemplates whether a contractual term was breached and whether the parties' reasonable contractual expectations have been thwarted. *Id.* at 1310-11. Essentially, this is a distinction without a notable difference.

Indeed, there exists only one decision among the Florida federal courts involving a claim by an owner/obligee against a surety for breach of the duty of good faith and fair dealing. *Goodbys Creek, LLC v. Arch Ins. Co.*, 2008 WL 2950112, at *7 (M.D. Fla. July 31, 2008) relied heavily on the reasoning in *Townhouses of Highland Beach* and held that the owner/obligee stated a cause of action for a breach of the duty of good faith and fair dealing because the plaintiff sufficiently identified a contractual provision (in the underlying contract—not the bond) that was allegedly breached by the surety and how its reasonable contractual expectations were allegedly disappointed by the surety's conduct. 2008 WL 2950112, at *7 (M.D. Fla. 2008). As such, the court found that the plaintiff's allegations as to the breach of the duty of good faith and fair dealing were distinct from those of a traditional bad faith action. *Id.* at *8. Importantly, neither the *Townhouses of Highland Beach* nor the *Goodbys Creek* decision discuss the numerous Florida state court decisions, discussed *supra*, which set forth Florida's historical refusal to recognize common law bad faith claims arising from first party insurance actions.

Recently, on March 9, 2009, the Eleventh Circuit Court of Appeals, issued an opinion on a cross-appeal by an insurer and insured to that court, styled *Chalfonte Condominium Apartment Ass'n, Inc. v. QBE Insur. Corp.*, 2009 WL 580775 (11th Cir.) The Eleventh Circuit certified the following question, among others, to the Supreme Court of Florida:

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?

Clearly, these certified questions are important to sureties as they may shed some light on the viability of claims by insureds and owner/obligees for the breach of the duty of good faith and fair dealing under Florida law. Importantly, the second certified question will also effect whether an insured and/or owner/obligee will have access to otherwise privileged and/or irrelevant claims file materials, including, interoffice memoranda and notes regarding the underlying claim that would not otherwise be discoverable in a standard breach of contract claim.¹ The result of this certified

¹ Under Florida law, an insured's statutory bad faith claim pursuant to Section 524.155, Florida Statutes, does not accrue until the insured prevails against the insurer on a claim for benefits under a policy. *Chalfonte Condominium Apartment Ass'n, Inc. v. QBE Insurance Corp.*, 2009 WL 580775 (11th Cir. 2009). Therefore, the statutory bad faith claim is bifurcated from the underlying breach of contract claim. As

question may greatly impact claims against sureties and may very well provide the basis for future treatment on these issues.

V. Conclusion

The cases and opinions discussed above certainly provide some guidance on a topic that is quite controversial and certainly open to debate. The question remains at this time whether the Florida Supreme Court will determine, as matter of law, whether an insured may bring a common law breach of the duty of good faith and fair dealing claim against an insured for improper denial of a claim, or failure to investigate a claim timely. As well, such a decision may not offer sureties a definitive answer regarding whether Florida will recognize such a claim exists against a surety. Recent court opinions in Florida suggest that if there is a claim by an owner/obligee which amounts to nothing more than a “statutory bad faith” claim in disguise, such a claim should be dismissed pursuant to the *Buckley* decision and its progeny. In the alternative, however, a surety should be cautious of the recent decisions which exist that are undesirable to the surety in this context, namely, the *Goodbys Creek* decision.

Absent a conclusive decision with regard to this issue, sureties should be mindful of its duty to investigate and communicate with the owner/obligee. As well, a surety should always undertake an analysis regarding whether a denial of liability or performance is a correct and proper decision under the terms of the bond and underlying construction contract, recognizing the potential risk associated with denying a claim under the bond, including actions against the surety for breach of the bond, and possibly against the surety for its breach of the duty of good faith and fair dealing.

result, the insured is generally not entitled to discovery of the insurer’s claims file material during the litigation of the underlying claim, until the bad faith claim becomes ripe.