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Court lets insured pursue bad faith claim after favorable appraisal award

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In Florida, a bad faith action for first-party benefits under an insurance policy does not accrue unless an insured first obtains a favorable resolution on a claim for benefits under his policy and has filed a civil remedy notice allowing the insurer 60 days to cure its failure to provide all benefits owed.

While a favorable resolution often means a judgment against an insurer in a breach of contract lawsuit, arbitration awards and confessions of judgment also qualify as favorable resolutions for purposes of bringing a claim for bad faith.

The Fourth District Court of Appeal added appraisal awards to this list when it issued an opinion in *Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Co.* , no. 4D11-1376 (Sept. 5, 2012).

The facts of *Trafalgar* are straightforward. After suffering damage from Hurricane Wilma, Trafalgar, the insured, filed a proof-of-loss for approximately $1.8 million in damages. Zurich paid approximately $600,000 before invoking the policy's provision for appraisal.

Fifteen months later, Trafalgar won an appraisal award for just over $1.5 million — less than what it had sought, but substantially more than what Zurich had paid up to that point. Trafalgar then amended its suit for breach of contract and added action for bad faith.

Zurich timely paid the full appraisal award and then moved for summary judgment on the breach of contract claim, which the trial court granted.

Zurich then moved for summary judgment on Trafalgar's bad faith claim. It argued that since it won summary judgment on Trafalgar's breach of contract count, Trafalgar had not obtained a favorable resolution on its claim — a prerequisite for bringing a bad faith action. The trial court accepted Zurich's argument and granted summary judgment in its favor.

But the Fourth DCA disagreed: "A judgment on a breach of contract action is not the only way of obtaining a favorable resolution … We see no meaningful distinction between an arbitration award and [an] appraisal award … for the purposes of deciding whether the underlying action was resolved favorably to the insured."

In other words, an insured may have a bad faith claim even when the insured fails to prove a breach of contract so long as the appraisal award is greater than what the insurer originally offered to pay.

Trafalgar is poised to stir up controversy. After all, Zurich merely availed itself of a contractual appraisal provision. And it did not breach the express terms of the policy requiring payment within 30 days after an appraisal award is rendered.

Should Zurich not be insulated from bad faith if all it did was comply with a policy provision? *Trafalgar* answers no. And properly so.

Florida's bad faith statute is not satisfied merely by the eventual payment of an insured's claim. It requires an insurance company to tender full payment promptly "when, under the circumstances it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for his or her interests." Fla. Stat. 624.155.

While a drawn-out appraisal award may be timely for purposes of the policy's appraisal provision, thus avoiding a breach of contract, the statute gives the insurer no more than 60 days upon the filing of a civil remedy notice to tender payment in full. A failure to do so opens the door to a bad faith claim and any consequential damages caused by the insurer's delay.

The takeaway from *Trafalgar* is that having the contractual right to appraisal does not mean that exercising that right is in all cases reasonable.

Indeed, Florida law has never required that a bad faith action be bottomed on an express breach of contract. A breach of contract may evidence bad faith, but industry standards, course of dealing, regulations, case law and statutes also dictate the manner in which an insurer must conduct itself.

The legislature has deemed delayed payment — amongst other wrongs which may precede the attempt to invoke appraisal — itself a wrong worth redressing so long as the delay is unreasonable given the facts and circumstances known to the insurer at the time the delay took place.

Thus, to avoid a claim for bad faith, *Trafalgar* instructs that the decision to go to appraisal must itself be reasonable at the time appraisal is invoked. If it is not, then technical compliance with policy terms cannot alone insulate the insurer from liability for damages caused by an unreasonable delay.

An insurance policy is a promise of protection invoked at a time of need. In order to alleviate the hardships of calamity, regardless of the form of insurance protection purchased, delivery of the promise requires adherence not only to contractual requisites, but to numerous other rules and practices designed to place the obligation where it was designed — on the insurance company.

Seeking appraisal cannot insulate an insurer from bad faith exposure, any more than could a jury verdict, bench ruling or arbitration award. So long as the insured otherwise has a valid claim, as the *Trafalgar* court properly held, a bad faith action can and should proceed.

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