

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC21-707
L.T. CASE NO. 4D19-2478

STATE FARM FLORIDA
INSURANCE COMPANY,

Petitioner,

v.

STANLEY ZALESKI and DENISE
ZALESKI,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review From a Decision
of the Fourth District Court of Appeal

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STATEMENT OF THE ISSUES

The issue on which this Court's jurisdiction is invoked is:

WHETHER THE FOURTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT BY HOLDING THAT THE ONLY WAY AN INSURER CAN CURE ALLEGED VIOLATIONS UNDER SECTION 624.155 AND AVOID A BAD FAITH SUIT IS TO PAY SOME UNKNOWN "FAIR AMOUNT" DURING THE 60-DAY PERIOD AFTER THE FILING OF A CIVIL REMEDY NOTICE EVEN THOUGH NO CONTRACTUAL AMOUNT IS DUE DURING THAT PERIOD UNDER THE TERMS AND CONDITIONS OF THE INSURANCE POLICY.

Should the Court grant review, an issue independent of the issue on which jurisdiction is invoked that Petitioner intends to raise is:

WHETHER THE FOURTH DISTRICT ERRED IN CONCLUDING THAT PLAINTIFFS' CIVIL REMEDY NOTICE WAS LEGALLY SUFFICIENT TO COMPLY WITH THE SPECIFICITY REQUIREMENTS OF SECTION 624.155.

STATEMENT OF THE CASE AND FACTS

A. Review Sought – Conflict Asserted.

Respondents, Stanley and Denise Zaleski (“Plaintiffs”), filed a first-party statutory bad faith action against Petitioner, State Farm Florida Insurance Company (“State Farm”), under section 624.155, Florida Statutes. The trial court entered summary judgment for State Farm. On appeal, the Fourth District reversed the summary judgment in *Zaleski v. State Farm Fla. Ins. Co.*, Case No. 4D19-2478, 2021 WL 718122 (Fla. 4th DCA Feb. 24, 2021). State Farm seeks review of the Fourth District’s decision because it directly and expressly conflicts with decisions of this Court in *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278 (Fla. 2000), and *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000).

B. The Facts.

In 2017, Plaintiffs reported a claim under their homeowners policy with State Farm for water damage to their home. *Zaleski*, 2021 WL 718122, *1. State Farm acknowledged coverage, investigated and estimated the amount of the covered loss, and made payment to Plaintiffs based on its estimate. *Id.*

On June 21, 2017, Plaintiffs filed a civil remedy notice of insurer violations (“CRN”), alleging State Farm had violated various provisions of sections 624.155 and 626.9541, Florida Statutes. *Id.* The notice alleged State Farm “performed a cursory inspection of the property, failing to retain experts necessary to identify the repairs necessary to restore the property to its pre-loss condition” and gave a “low-ball estimate” that “failed to encompass all covered damages.” *Id.* Two weeks after filing the CRN, Plaintiffs first provided State Farm an estimate from their public adjuster that greatly exceeded State Farm’s estimate. *Id.*

By letter of July 20, 2017, State Farm acknowledged a disagreement between the parties as to the amount of the loss and invoked appraisal as provided for in the parties’ insurance contract. *Id.* The matter proceeded to appraisal and, on October 31, 2017, an appraisal award was issued for an amount between the parties’ respective estimates. *Id.* Six days later State Farm paid Plaintiffs the amount determined due by the appraisal award. *Id.*

C. The Case Proceedings.

After State Farm paid the amount determined due by the appraisal award, Plaintiffs filed the instant first-party statutory bad

faith action against State Farm under section 624.155, Florida Statutes (2017). *Id.* State Farm moved for summary judgment. *Id.* One of the grounds argued by State Farm was that, because the parties did not agree to the amount of the loss, the filing of the appraisal award with State Farm was a condition precedent to State Farm's obligation to make any additional payment pursuant to the policy's loss payment condition and, thus, under this Court's interpretation of the statutory notice and cure provisions in *Talat*, the 60-day cure period under section 624.155 had to be tolled pending the filing of the appraisal award with State Farm. *Id.* at *3.¹ The trial court agreed and entered summary judgment for State Farm, given that it was undisputed that State Farm paid the amount due within the tolled cure period.² *Id.* at *2, *3.

¹ The Fourth District recast State Farm's argument in various ways, but the foregoing is the most accurate contained in the opinion. State Farm never argued that merely invoking appraisal and timely paying the appraisal award cured the allegations in the CRN and precluded the bad faith action. *See id.* at *1, *3.

² The trial court also entered summary judgment for State Farm because Plaintiff's CRN was not legally compliant with the specificity requirements of section 624.155. The Fourth District disagreed. *Id.* at *2, *4.

The Fourth District reversed, disagreeing with the trial court's interpretation of this Court's holdings in *Talat*. *Id.* While quoting a portion of the holdings in *Talat*, the Fourth District did not consider their implications to the legal issues presented, but rather simply distinguished *Talat* on its facts given the appraisal award in *Talat* was paid before the CRN was filed. *Id.* As discussed below, this factual distinction is not material to the legal argument that was presented by State Farm, accepted by the trial court, and seemingly misunderstood by the Fourth District. As a result, the Fourth District's decision is in express and direct conflict with this Court's decisions in *Talat* and *Vest*, as discussed below.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *TALAT* AND *VEST*.

The trial court's summary judgment was premised on two key holdings of this Court in *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278 (Fla. 2000), interpreting the notice and cure provisions of section 624.155, Florida Statutes. First, this Court held: "Pursuant to the statute, there is no remedy until the notice is sent by the insured and the insurer has the opportunity to 'cure'

the violation.” *Id.* at 1283-84.³ Second, this Court held that, to cure, the insurer must pay “the contractual amount due” pursuant to the terms and conditions of the insurance contract:

[W]hat ha[s] to be “cured” is the non-payment of the contractual amount due the insured. In the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy after all the conditions precedent of the insurance policy in respect to payment are fulfilled.

Id. at 1283.

The policy here contained the same loss payment condition addressed by the Fourth District in *State Farm Fla. Ins. Co. v. Silber*, 72 So. 3d 286, 287 (Fla. 4th DCA 2011):

8. **Loss Payment.** . . . Loss will be payable:

- a. 20 days after we receive your proof of loss and reach an agreement with you, or
- b. 60 days after we receive your proof of loss and:

- (2) there is a filing of an appraisal award with us.

³ All emphasis is added unless otherwise noted.

Id. at 287. Thus, because the parties did not agree on the amount of the loss and appraisal was invoked to determine the amount of the loss, the filing of the appraisal award with State Farm was a contractual condition precedent to any further payment being due. *See Silber*, 72 So. 3d at 290 (examining the same loss payment condition in a State Farm policy and holding it established when payment was due - within 60 days of the filing of the appraisal award with State Farm, stating “[i]t is the terms of a contract for insurance which determine the date from which the coverage payment is due”) (citing and quoting *Ellie’s 50’s Diner, Inc. v. Citizens Prop. Ins. Corp.*, 54 So. 3d 1081, 1082 (Fla. 4th DCA 2011), *Citizens Prop. Ins. Corp. v. Mallett*, 7 So. 3d 552, 556 (Fla. 1st DCA 2009), and *Green v. Citizens Prop. Ins. Corp.*, 59 So.3d 1227, 1228–29 (Fla. 4th DCA 2011)). In words from *Talat*, the filing of the appraisal award with State Farm here was a “condition precedent of the insurance policy in respect to payment [that needed to be] fulfilled” before any further payment was due Plaintiffs. 753 So. 2d at 1283.

The Fourth District inexplicably stated that “[t]he appraisal award is not a condition precedent to State Farm’s obligation to pay

the Homeowners a fair amount due under the policy,” without ever acknowledging the loss payment condition in the policy. *Zaleski, supra*, at *3. The Fourth District created the concept of a “fair amount” purportedly due before an appraisal award, but what has to be paid to cure is “the contractual amount due the insured,” which has been defined by this Court as “the amount owed pursuant to the express terms and conditions of the policy after all the conditions precedent of the insurance policy in respect to payment are fulfilled.” *Talat*, 753 So. 2d at 1283.

As this Court held in *Talat*, “there is no remedy” under section 624.155 for Plaintiffs until State Farm has had “the opportunity to cure” the alleged violations. 753 So. 2d at 1283-84. The only way State Farm could cure was by paying the “contractual amount due,” that is, “the amount owed pursuant to the express terms and conditions of the policy after all the conditions precedent of the insurance policy in respect to payment are fulfilled.” *Id.* at 1283. At the time Plaintiffs filed their CRN and during the 60 days thereafter, there was no “contractual amount due” because the parties did not agree on the amount of the loss and no appraisal award was filed with State Farm during that period. Thus, the only way to give effect

to the notice and cure provisions of the statute in order to give State Farm the required “opportunity to cure,” absent which “there is no remedy” for Plaintiffs under the statute, *Talat*, 753 So. 2d at 1283-84, is to hold that the cure period was tolled until the appraisal award was filed with State Farm – a condition precedent to any additional amount being owed by State Farm to Plaintiffs under the policy.

The trial court entered summary judgment for State Farm based on the foregoing analysis and application of this Court’s holdings in *Talat*. That is, the trial court held that tolling of the cure period must occur here in order to provide State Farm the opportunity to cure. State Farm had no opportunity to cure during the 60-day period after the filing of the CRN because a condition precedent to payment of any additional contractual amount owed was the filing of an appraisal award with State Farm, and that did not occur until more than 60 days after the filing of the CRN. Thus, the trial court properly applied this Court’s holdings in *Talat*, whereas the Fourth District ignored them, creating conflict.

Conflict also exists with this Court’s holding in *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000). In *Vest*, the Court

held that, once the insured sends the CRN, the insurer has 60 days to respond and, “if payment is owed on the contract, [the insurer can] cure the claimed bad faith by paying the benefits owed on the insurance contract.” *Id.* at 1275. Like it did in *Talat*, this Court in *Vest* held that “[w]hat is owed on the contract is in turn governed by whether all conditions precedent for payment contained within the policy have been met.” *Id.*

What this Court held in *Vest* was that, “if payment is owed on the contract” at the time the CRN is filed, the insurer can cure by paying the amount owed within 60 days of the filing of the CRN. What the Court necessarily acknowledged by the qualifying language of “if payment is owed on the contract” is that there can be circumstances where “payment is [not] owed on the contract” at the time the CRN is filed or during the 60 days thereafter. That is the situation here. In this circumstance, the only way to give any effect to the notice and cure provisions of the statute and provide the insurer an opportunity to cure is to toll the cure period until “payment is owed on the contract.”

In this case, no contractual amount was due Plaintiffs at the time they filed their CRN on June 21, 2017, or during the 60 days

thereafter. An amount first became due when the appraisal award was filed with State Farm on or about October 31, 2017, a “condition precedent of the insurance policy in respect to payment” pursuant to the loss payment condition in the policy. Six days later, on November 6, 2017, State Farm paid the amount due pursuant to the appraisal award. State Farm cured the alleged violations, not by invoking appraisal and ultimately paying the appraisal award as the Fourth District misconstrued the trial court’s holding and State Farm’s argument, *Zaleski, supra*, at *1, *3, *4, but by paying the contractual amount due within the tolled-then-restarted 60-day cure period, which began running on October 31, 2017 when the condition precedent to any further payment being due under the insurance policy was fulfilled.

How else was State Farm afforded an opportunity to cure? To suggest that State Farm must evaluate a claim based on the proof of loss required by the policy and its expertise in advance of a determination of the amount through issuance of the appraisal award, *id.* at *3 (citing *Vest*), is no answer here. State Farm had already made that evaluation. The parties simply disagreed on their individual assessments of the amount of the loss, a situation

specifically contemplated by the parties' contract and addressed via the appraisal process as the parties agreed in the policy. The parties also agreed in the insurance contract that any additional payment would not be due until after the filing of the appraisal award with State Farm.

To ignore these important provisions of the contract, as the Fourth District did, leaves an insurer in an untenable position. The only way insurers could "cure" to avoid bad faith suits would be to pay whatever amounts insureds demanded, regardless of the merits of the demands. Such a standard would provide incentive to insureds to be unreasonable and would be the antithesis of any concept of good faith and fair dealing on the part of insureds in the bilateral contractual relationship. Needless to say, this would further damage the legal and insurance environments of the State of Florida.

Insureds such as Plaintiffs should not be able to avoid their contractual commitments through the simple expedient of filing a CRN. Certainly, there is nothing in section 624.155 that says a CRN or anything in the statute supersedes and overrides the contractual rights and obligations of the parties set forth in their insurance

contract. Indeed, this Court in *Talat* and *Vest* upheld the sanctity of the parties' contract by tying the cure payment contemplated by section 624.155 to the "contractual amount due . . . pursuant to the express terms and conditions of the policy after all the conditions precedent of the insurance policy in respect to payment are fulfilled." 753 So. 2d at 1283; *see also* 753 So. 2d at 1275. The Fourth District's decision in this case expressly and directly conflicts with this Court's decisions in *Talat* and *Vest* by holding that the terms and conditions of the contract can be ignored and an insurer must pay some unquantifiable "fair amount" within 60 days of the CRN being filed in order to cure and avoid a bad faith suit even though no contractual amount is due under the terms and conditions of the policy during that time period.⁴

CONCLUSION

Based on the foregoing, State Farm requests that this Court grant review, order briefing on the merits, and, ultimately, quash the Fourth District's decision.

⁴ To cure under the Fourth District's decision, the insurer would have to clairvoyantly predict the amount of the later appraisal award or pay whatever amount is demanded by the insured, regardless of the merit of the demand.

Respectfully submitted,

s/ Paul L. Nettleton

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(A). The font is 14-point Bookman Old Style. The word count is 2,485. It has been calculated by the word-processing system and includes any footnotes, but excludes the content authorized to be excluded under the rules.

s/ Paul L. Nettleton

PAUL L. NETTLETON

APPENDIX

2021 WL 718122

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida, Fourth District.

Stanley ZALESKI and Denise Zaleski, Appellants,

v.

STATE FARM FLORIDA INSURANCE COMPANY, Appellee.

No. 4D19-2478

[February 24, 2021]

Synopsis

Background: Homeowners filed a first-party bad faith suit against insurer alleging failure to pay damages within 60 days of filing of civil remedy notice (CRN) alleging insurer failed to comply with loss settlement provision of insurance policy following appraisal award of \$163,479.10. The Circuit Court, 17th Judicial Circuit, Broward County, [Nicholas Lopane, J.](#), granted summary judgment to insurer. Homeowners appealed.

Holdings: The District Court of Appeal, [Damoorgian, J.](#), held that:

[1] insurer's invocation of appraisal process and payment of appraisal award after cure period expired did not cure alleged bad faith claim, and

[2] homeowners' civil remedy notice of insurer violations (CRN) sufficiently put insurer on notice of facts and circumstances giving rise to violations and corrective action required to remedy violations.

Reversed and remanded.

[Klingensmith, J.](#), concurred with opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

[1] Insurance — Notice, proof, and demand by insured

As a condition precedent to bringing an action against an insurer for bad faith, both the insurer and the Department of Financial Services (DFS) must be given 60 days' written notice of the violation; the 60-day window provides insurers with a final opportunity to comply with their claim handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed. [Fla. Stat. Ann. §§ 624.155\(1\)\(b\), 624.155\(3\)\(a\), 624.155\(3\)\(d\).](#)


[2] Insurance — Prerequisites for Claim of Breach or Bad Faith

In an action against an insurer for bad faith, if payment is owed on the contract, insurer can cure claimed bad faith by paying benefits owed on insurance contract. [Fla. Stat. Ann. §§ 624.155\(1\)\(b\), 624.155\(3\)\(a\), 624.155\(3\)\(d\).](#)


[3] Insurance — Prerequisites for Claim of Breach or Bad Faith

A statutory bad faith claim is ripe for litigation when there has been (1) a determination of the insurer's liability for coverage; (2) a determination of the extent of the insured's damages; and (3) the required notice is filed. [Fla. Stat. Ann. § 624.155.](#)

[4] **Insurance** — Notice, proof, and demand by insured

Language of statute stating that no action for bad faith against an insurer shall lie if, within 60 days after insurer receives notice, the damages are paid or the circumstances giving rise to the violation are corrected does not toll cure period until appraisal is completed.  Fla. Stat. Ann. § 624.155(3)(d).


[8] **Insurance** — Questions of law or fact

Determination of good faith or bad faith on part of insurer is usually question for finder of fact.  Fla. Stat. Ann. § 624.155.


[5] **Insurance** — Settlement Duties; Bad Faith
Insurance — Prerequisites for Claim of Breach or Bad Faith

An insurer must evaluate a claim based upon proof of loss required by policy and its expertise in advance of a determination by a court or arbitration; when an insurer receives a claim, it has an independent duty to evaluate claim in advance of a determination of damages and take timely, independent action.



[9] **Insurance** — Notice, proof, and demand by insured

If invocation of appraisal process cured a bad faith violation as a matter of law, then there would be no need to impose a 60-day time limitation on when an insured can file civil remedy notice of insurer violations (CRN) following appraisal process.  Fla. Stat. Ann. § 624.155(3)(f).


[6] **Insurance** — Reasonableness of insurer's conduct in general

The focus in a bad faith case is not whether insurer ultimately paid amounts due under policy, but whether it acted reasonably in evaluating claim prior to determination of damages.  Fla. Stat. Ann. § 624.155.

[10] **Insurance** — Notice, proof, and demand by insured

Insurer's invocation of appraisal process and payment of appraisal award for water damage to homeowners' residence after cure period expired did not cure homeowners' alleged bad faith claim; although insurer paid appraisal award six days after it was entered, it did so over 60 days after civil remedy notice of insurer violations' (CRN) cure period had expired.  Fla. Stat. Ann. §§ 624.155(3)(d),  624.155(3)(f).

[7] **Insurance** — Settlement Duties; Bad Faith

Fair evaluation would be evidence that insurer did not act in bad faith, but low ball offer made in bad faith is not cured by insurer ultimately paying what it is later found to owe via appraisal process.  Fla. Stat. Ann. § 624.155.

[11] **Insurance** — Notice, proof, and demand by insured

Homeowners' civil remedy notice of insurer

violations (CRN) sufficiently put insurer on notice of facts and circumstances giving rise to violations and corrective action required to remedy violations, where homeowners' CRN listed specific statutory provisions that insurer allegedly violated and gave a detailed recitation of facts surrounding violation, CRN stated that insurer performed a cursory inspection of property, failed to retain experts necessary to identify repairs necessary to restore property to its pre-loss condition, and gave a "low ball" estimate that failed to encompass all covered damages, and prior to insurer invoking appraisal, homeowners provided insurer with their detailed estimate. [Fla. Stat. Ann. § 624.155](#).

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; [Nicholas Richard Lopane](#), Judge; L.T. Case No. CACE 17-022448 (03).

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Opinion

[Damoorgian, J.](#)

*1 Stanley Zaleski and Denise Zaleski ("the Homeowners") appeal the trial court's entry of final summary judgment in favor of State Farm Florida Insurance Company ("State Farm") in their first-party bad faith action. For the reasons outlined below, we reverse.

The Homeowners own a home insured by State Farm. In 2017, while the subject policy was in effect, a water supply line burst in the Homeowners' home, causing significant damage throughout. The Homeowners subsequently filed a claim under the policy. State Farm acknowledged coverage, investigated the claim, determined the amount of the loss, and, after subtracting the applicable deductible, tendered payment to the Homeowners in the amount of \$43,708.01.

On June 21, 2017, the Homeowners filed a civil remedy notice of insurer violations ("CRN") with the Florida Department of Financial Services ("DFS"), alleging violations of [sections 624.155](#) and [626.9541, Florida Statutes \(2017\)](#). One of those allegations was that State Farm failed to comply with the policy's loss settlement provision because it "performed a cursory inspection of the property, failing to retain experts necessary to identify the repairs necessary to restore the property to its pre-loss condition" and gave a "low-ball estimate" that "failed to encompass all covered damages." The Homeowners asserted that State Farm could cure the violations alleged in the CRN "by issuing a payment for all contractual damages owed." It is undisputed that DFS accepted the CRN. Two weeks after filing the CRN, the Homeowners, through their public adjuster, submitted a detailed estimate to State Farm valuing the total amount of the loss at \$168,575.11.

In a letter dated July 20, 2017, State Farm acknowledged receipt of the estimate, maintained that its initial evaluation was reasonable, and invoked appraisal pursuant to the policy. Section 1 of the policy provides that if the parties "fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal." The policy further provides that no action shall be brought against State Farm "unless there has been compliance with the policy provisions." On July 25, 2017, State Farm filed its response to the CRN with DFS, which consisted of the following statement: "[o]ur CRN response letter was sent to the insured's attorney on July 20, 2017." In neither its letter to the Homeowners nor its official response to the CRN did State Farm object to the sufficiency of the CRN. Aside from its initial payment, State Farm did not issue any further payments within sixty days of the CRN's filing and did not settle the claim.

The matter proceeded to appraisal and, on October 31, 2017, the appraisal panel determined that the total amount of loss was \$163,479.10. Six days later, State Farm paid the Homeowners the amount of the appraisal award, minus the prior payment made.

Shortly thereafter, the Homeowners filed a first-party bad faith suit against State Farm. In the complaint, the Homeowners alleged that State Farm violated [sections 624.155](#) and [626.9541, Florida Statutes \(2017\)](#), by not engaging in good faith attempts to settle the claim. They further alleged that State Farm had failed to pay damages within sixty days from the date the CRN was filed. State Farm responded to the complaint by filing a motion to dismiss or, in the alternative, a motion for summary judgment. In its motion, State Farm primarily argued that

by invoking appraisal and timely paying the appraisal award, it cured the allegations in the CRN, thus precluding a bad faith action. State Farm also argued that the CRN lacked the requisite specificity to provide State Farm with an opportunity to cure, including providing a specific cure amount.

*2 The trial court ultimately granted summary judgment in favor of State Farm on two grounds. First, relying on [Talal Enterprises, Inc. v. Aetna Casualty & Surety Co.](#), 753 So. 2d 1278 (Fla. 2000), the trial court concluded that the sixty-day cure period provided by [section 624.155, Florida Statutes](#), was tolled until the appraisal award was filed and “State Farm timely cured any alleged bad faith and statutory violations by paying the full amount owed to [the Homeowners] pursuant to the appraisal award within six days after the appraisal award was filed with State Farm.” Second, the trial court concluded that the CRN was deficient because it did “not ‘state with specificity ... [t]he facts and circumstances giving rise to the violation[s]’ alleged in the civil remedy notice, as required by [Fla. Stat. § 624.155](#), so as to have given State Farm an opportunity to cure.” The trial court did not elaborate as to what information exactly was missing from the CRN. This appeal follows.

[1] [2] [Section 624.155, Florida Statutes](#), governs bad faith claims and provides that a person may bring a civil action against an insurer when the person is damaged by the insurer’s violation of “[n]ot attempting 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 and with due regard for her or his interests.” [§ 624.155\(1\)\(b\) 1.](#), Fla. Stat. (2017). As a condition precedent to bringing such an action, both the insurer and DFS must be given sixty days’ written notice of the violation. [§ 624.155\(3\)\(a\), Fla. Stat.](#) The statute further provides that “[n]o action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.” [§ 624.155\(3\)\(d\), Fla. Stat.](#) As reiterated by our supreme court, “[t]his sixty-day window provides insurers with a final opportunity to comply with their claimhandling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.” [Fridman v. Safeco Ins. Co. of Ill.](#), 185 So. 3d 1214, 1220 (Fla. 2016) (internal quotation marks and citation omitted). “[I]f payment is owed on the contract, [the insurer can] cure the claimed bad faith by paying the benefits owed on the insurance contract.” [Vest v. Travelers Ins. Co.](#), 753 So. 2d 1270, 1275 (Fla. 2000).

[3] “[A] statutory bad faith claim under [section 624.155](#) is ripe for litigation when there has been (1) a determination of the insurer’s liability for coverage; (2) a determination of the extent of the insured’s damages; and (3) the required notice is filed pursuant to [section 624.155\(3\)\(a\).](#)” [Demase v. State Farm Fla. Ins. Co.](#), 239 So. 3d 218, 221 (Fla. 5th DCA 2018).

It is with these principles in mind that we first address the trial court’s conclusion that State Farm’s invocation of the appraisal process tolled the sixty-day cure period until the appraisal award was entered.

We begin our analysis by addressing the trial court’s misplaced reliance on [Talal](#). In that case, our supreme court held that:

for there to be a “cure,” what had to be “cured” is the nonpayment of the contractual amount due the insured. In the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy after all of the conditions precedent of the insurance policy in respect to payment are fulfilled. [Section 624.155\(1\)\(b\), Florida Statutes \(1993\)](#), then, is correctly read to authorize a civil remedy for extra contractual damages if a first-party insurer does not pay the contractual amount due the insured after all the policy conditions have been fulfilled within sixty days after a valid notice has been filed under [section 624.155\(2\)\(a\), Florida Statutes \(1993\)](#).

[Talal Enters., Inc.](#), 753 So. 2d at 1283.

*3 Based on this language, State Farm argued below—and the trial court presumably agreed with the argument—that because the parties did not agree to the amount of the loss, the appraisal was a condition precedent to State Farm’s obligation to make payment under the policy; thus, the sixty-day cure period under [section 624.155](#) necessarily had to be tolled pending

the filing of the appraisal award. We disagree with this interpretation. In [Talut](#), the CRN was filed *after* the insured obtained an appraisal award that was paid in full. Therefore, the insured did not have a statutory bad faith claim because the insurer remedied the claim within the sixty-day period. [Talut](#) did not address tolling of the sixty-day period when appraisal is invoked.

Recently, in [Fortune v. First Protective Insurance Co.](#), 302 So. 3d 485 (Fla. 2d DCA 2020), the Second District considered whether the invocation of the appraisal process tolled the sixty-day cure period until appraisal was completed. In concluding that it does not toll, the court held that:

[e]ven if a policy requires the mediation or appraisal process to occur prior to suit being filed, an appraisal is not a condition precedent to the insurer fulfilling its obligation to fairly evaluate the claim and to either deny coverage or to offer an appropriate amount based on that fair evaluation.

Id. at 490. In support thereof, the [Fortune](#) court relied on [Vest](#) wherein our supreme court expressly stated:

[T]here is no statutory requirement which prevents the insured from sending the statutory notice before there is a determination of liability or damages. Nor is the insurer's appropriate response to that notice dependent on such a determination. The insurer's appropriate response is based upon the insurer's good-faith evaluation of what is owed on the insurance contract. What is owed on the contract is in turn governed by whether all conditions precedent for payment contained within the policy have been met. *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](#), 753 So. 2d at 1275–76 (emphasis added); [accord Landers v. State Farm Fla. Ins. Co.](#), 234 So. 3d 856, 859 (Fla. 5th DCA 2018) (“The plain language of [section 624.155\(3\)\(d\)](#) provides no time limitation for when a CRN may be filed and does not require a final determination of coverage and damages before it is filed. The statute simply states that ‘no action shall lie’ if the bad-faith allegation is corrected or the damages are paid within sixty days of the insurer receiving the notice.”).

¹⁴We agree with [Fortune](#) and hold that “[t]he language of [section 624.155\(3\)\(d\)](#) does not toll the cure period until an appraisal is completed.” 302 So. 3d at 490. The appraisal award is not a condition precedent to State Farm’s obligation to pay the Homeowners a fair amount due under the policy. To allow the sixty-day cure period to toll at the invocation of the appraisal process would allow insurers to cause delay or otherwise act in bad faith while escaping liability as long as it makes payment within the sixty-day time period of the appraisal award. This would negate and frustrate the purpose of the statute. See [Landers](#), 234 So. 3d at 859 (“[T]he purpose of the CRN is to facilitate and encourage good-faith efforts to timely settle claims before litigation, not to vindicate continuing efforts to delay.” (internal citation omitted)).

¹⁵ ¹⁶State Farm nonetheless maintains that because it did ultimately pay the appraisal award, the alleged violations in the CRN were effectively cured, and no bad faith action ever accrued. We reject this argument. As noted above, an insurer “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 1275–76. In other words, when an insurer receives a claim, it has an independent duty to evaluate the claim in advance of a determination of damages and take timely, independent action. See [id.](#) Thus, the focus in a bad faith case is not whether the insurer ultimately paid the amounts due under the policy, but whether it acted reasonably in evaluating the claim prior to the determination of damages. See [Harvey v. GEICO Gen. Ins. Co.](#), 259 So. 3d 1, 7 (Fla. 2018) (reiterating that “the critical inquiry in a bad faith [case] is whether the insurer diligently, and with the same haste and precision as if it were in the insured’s shoes, worked on the insured’s behalf to avoid an excess judgment”).

*4 ¹⁷ ¹⁸For example, “[a] fair evaluation would be evidence that an insurer did not act in bad faith. But a lowball offer made in bad faith is not cured by an insurer ultimately paying what it is later found to owe via the appraisal process.” [Fortune](#), 302 So. 3d at 490. The determination of good faith or bad faith, however, “is

usually a question for the finder of fact.” *Id.*; see also *Landers*, 234 So. 3d at 858 n.5 (“Statutory bad-faith claims generally involve fact-intensive disputes that are resolved under a totality of the circumstances standard. It is the rare case where the facts ... allow a court to rule on a bad faith claim as a matter of law at summary judgment.” (internal quotation marks and citations omitted) (alteration in original)).

^[9]Moreover, as the court in *Fortune* pointed out, [§ 624.155](#) has since been amended and now includes a new subsection providing that a CRN “may not be filed within 60 days after appraisal is invoked by any party in a residential property insurance claim.” [§ 624.155\(3\)\(f\)](#), Fla. Stat. (2020). If the invocation of the appraisal process and subsequent payment of the appraisal award cures a bad faith violation as a matter of law, then this new provision would be rendered meaningless. Stated differently, if the invocation of the appraisal process cured a bad faith violation as a matter of law, then there would be no need to impose such a time limitation on when an insured can file the CRN following the appraisal process. See *Fortune*, 302 So. 3d at 490 (referencing the amendment and concluding “[t]his new provision affects the time when an insured can file a CRN but does not treat an appraisal or payment of an appraisal award as a cure of any violations alleged in the CRN”).

^[10]Here, after the Homeowners filed the CRN, and State Farm received the Homeowners’ estimate, State Farm invoked appraisal. Aside from its initial assessment, State Farm made no further effort to settle the claim. Although State Farm paid the appraisal award six days after it was entered, it did so over two months after the CRN’s sixty-day cure period had expired. Consistent with the holding in *Fortune*, we hold that State Farm’s invocation of the appraisal process and payment of the appraisal award after the cure period expired did not cure, as a matter of law, the alleged bad faith claim. *Id.* at 492; see also *Harper v. GEICO Gen. Ins. Co.*, 272 So. 3d 448, 452 (Fla. 2d DCA 2019) (finding summary judgment was improper and insurer “was entitled to pursue her action for GEICO’s alleged bad faith” where GEICO did not pay the claim within the sixty-day cure period). Whether State Farm’s initial evaluation of the claim and actions during the sixty-day cure period were reasonable remains an issue of fact for a jury to resolve.

^[11]We next address the trial court’s vague determination that the CRN was deficient because it failed to state with specificity the facts and circumstances giving rise to the violations. [Section 624.155](#) provides that the CRN must set forth, among other things, “the facts and

circumstances giving rise to the violation.” [§ 624.155\(3\)\(b\) 2.](#), Fla. Stat. Here, the Homeowners’ CRN listed the specific statutory provisions that State Farm allegedly violated and gave a detailed recitation of the facts surrounding the violation. In relevant part, the CRN stated that State Farm performed a cursory inspection of the property, failed to retain experts necessary to identify the repairs necessary to restore the property to its pre-loss condition, and gave a “lowball” estimate that failed to encompass all covered damages. Moreover, prior to State Farm invoking appraisal, the Homeowners provided State Farm with their detailed estimate. Thus, the CRN sufficiently put State Farm on notice of the facts and circumstances giving rise to the violations and the corrective action required to remedy the violations.

*5 Accordingly, we reverse the final summary judgment entered in favor of State Farm and remand for further proceedings in which the Homeowners can pursue their bad faith action.

Reversed and remanded.

KLINGENSMITH, J., concurs with opinion.

Ciklin, J., concurs.

Klingensmith, J., concurring.

I concur in the majority’s holding to reverse based on the existing case law regarding bad faith as enunciated by the Florida Supreme Court as well as by our sister courts in reliance on those decisions. Under those decisions, an insurer can be forced to trial for bad faith even when it exercises its contractual rights under the policy or seeks to use due diligence in investigating a claim. See, e.g., *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1 (Fla. 2018) (insurer’s tender of policy limits within days of an accident did not bar a bad faith claim). While we are constrained by those decisions, I believe that Justice Wells was correct when he noted in his dissent in [§ Berges v. Infinity Ins. Co.](#), 896 So. 2d 665 (Fla. 2004), that it is not “acceptable ... to merely say that bad faith is a jury question.” [896 So. 2d at 686](#) (Wells, J., dissenting); see also *Harvey*, 259 So. 3d at 13 (Canady, J., dissenting) (same). Therefore, clearer guidelines are needed to outline the parameters of a bad faith action. See [§ Berges](#), 896 So. 2d at 686 (Wells, J., dissenting).

In this instance, the current statutory amendment to § 624.155 tolls the sixty-day cure period when an appraisal is requested, but only if the CRN is sent by the insured *after* the insurer requests appraisal. See § 624.155(3)(f), Fla. Stat. (2020). In the event the insured wins the race to the mailbox and sends its CRN *before* the insurer invokes the appraisal process to evaluate the extent of covered damage, then no tolling occurs.

While it would make sense for the insurer’s election of the appraisal process to stay the CRN’s sixty-day cure period, regardless of when the insurer seeks the contractual right to an appraisal, the language of the statute—as it existed either before or after the amendment—does not provide for this. Further, it is not our role to re-write the statute to create this result by judicial fiat. “Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the

language which is free from ambiguity.” *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992); see *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted” (footnote omitted)); *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989) (“Our task is to apply the text, not to improve upon it.”). Therefore, any correction of this possible statutory defect should come from the Legislature and not the courts.

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