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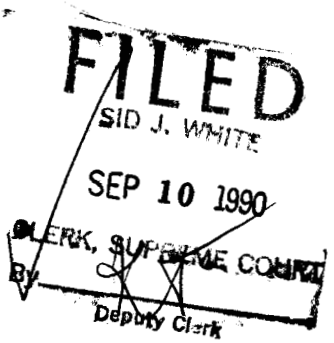
THE SUPREME COURT OF FLORIDA

Case No. 76,243



DONALD E. BLANCHARD, JR.
and PATRICIA S. BLANCHARD, his wife,

Appellants,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellee.
_____/

ON CERTIFIED QUESTIONS FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION

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PRELIMINARY STATEMENT

The respondent, Florida Defense Lawyers Association ["FDLA"], is an organization of defense attorneys statewide that are filing this brief on behalf of the position advocated by the respondent, State Farm Mutual Automobile Insurance Company. Consequently, FDLA adopts the Statement of the Case and Facts as set forth in the Answer Brief of State Farm Mutual Automobile Insurance Company.

SUMMARY OF THE ARGUMENT

A first-party bad-faith claim, like a third-party bad-faith claim, is predicated upon an insurer breaching the insurance contract's implied covenant of good faith and fair dealing. In order to have a first-party bad-faith cause of action under section 624.155, Florida Statutes, a plaintiff must first make a showing of the absence of reasonable basis for denying benefits of the policy and the insured's knowledge or reckless disregard of a reasonable basis for denying the claim. Logically, then, a plaintiff must first show that he or she is entitled to recover on the contract before he or she can prove that the insurer dealt with him or her in bad faith.

A bad-faith claim, therefore, cannot accrue or arise until the insurer's liability under the contract is resolved. Should the breach-of-contract claim terminate adversely to the insured, then it can only be assumed that the bad faith claim must fall. Whether one refers to the principle as "accruing" or "maturing," the fact remains that a bad-faith claim is not ripe for determination until after there has been a determination of the underlying contractual dispute.

This court's holding in *Kujawa v. Manhattan Life Insurance Company,* 541 So.2d 1168 (Fla. 1989), is limited to a situation wherein there has been a determination of the underlying contractual litigation [in *Kujawa*, the insured paid the proceeds and then the insurer proceeded on the bad-faith claim]. This court in *Kujawa*, then, only decided the issue of whether or not

privileges and immunities attach to an insurance company's claim file in bad-faith litigation. *Kujawa* does not stand for the proposition that the underlying contractual dispute and the bad-faith claim must be brought together. Courts that relied on *Kujawa* for so holding misconstrued *Kujawa*.

Even assuming that a bad-faith claim accrued when the insured denied benefits, the two claims would have to be bifurcated or the bad-faith claim abated until after the trial on the contract terminated. When both claims are brought simultaneously, the insurer is entitled to a qualified privilege against discovery on the breach-of-contract claim in regard to all materials in the claim file that the insurer can demonstrate were prepared in anticipation of litigation. Allowing full disclosure of the insurer's claim file based solely on the plaintiff's allegation of bad faith would invite all plaintiffs to include a bad-faith claim with every breach-of-contract claim. The only way to deal with this problem is to separate the bad-faith claim from the breach-of-contract claim and first determine the insurer's liability under the contract.

CERTIFIED QUESTIONS 1 AND 2

AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST CARRIER UNDER SECTION 624.155(1)(b)(1), FLORIDA STATUTES, FOR ALLEGEDLY FAILING TO SETTLE THE UNINSURED MOTORIST CLAIM IN GOOD FAITH DOES NOT ACCRUE BEFORE THE CONCLUSION OF THE UNDERLYING LITIGATION FOR THE CONTRACTUAL UNINSURED MOTORIST BENEFITS, BUT EVEN ASSUMING IT DID ACCRUE, CANNOT BE JOINED WITH UNDERLYING ACTION IN LITIGATION.

Prior to 1968, first-party litigation over an insurance policy was much the same as litigation over any contract. The insurance policy was merely a contract between the insurer and the insured. As with any contract, a party found to have breached the agreement was held liable for the amount of the contract. An insurer, having breached its agreement to pay the proceeds of an insurance policy, was held liable for the amount payable under the terms of the policy.

Gradually, the courts began to allow consequential and punitive damages to be awarded in suits on insurance policies by applying traditional tort concepts. These theories include the following. The allegation that the insurer's conduct constituted actionable fraud. This theory often related to pre-policy activities as agents. The case generally recognized as the first significant instance of extra contractual damages in the area of first-party insurance was *Wetherbee v. United Insurance Co. of America*, 71 Cal.Rptr. 764 (Cal. App. 1968) *after remand*, 95 Cal.Rptr. 678 (Cal.App. 1971), upholding the imposition of

punitive damages based upon the theory of fraud.[1]

Liability has also been imposed upon the theory of intentional infliction of mental distress even without the traditional protection of requiring bodily injury or a loss of property. *Fletcher v. Western National Life*, 89 Cal.Rptr. 78 (Cal.App. 1978). Other theories include extra-contractual exposure for defamation which may arise from communications with others regarding the insured during investigation of the claim; outrageous conduct. *See, e.g., Green v. State Farm Fire and Casualty Co.*, 667 F.2d 22 (9th Cir. 1983).

While all of the above concepts are collectively referred to as "bad faith," the term is specifically derived from the breach of implied covenant of good faith and fair dealing. The landmark case which is generally considered to have created the field of extra-contractual liability in first-party cases is *Gruenberg v. Aetna Insurance Co.*, 510 P.2d 1032 (Cal. 1973). *Gruenberg* and its progeny created and annunciated the so-called tort of bad faith which has become the theory of choice upon which to predicate a "bad faith" case. The principle importance of *Gruenberg* is that it "elevates" the breach of the implied contractual covenant of good faith and fair dealing into a <u>tort</u>, which dramatically expanded the scope of permissible damages.

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[1]Extra-contractual liability came to the field of third-party insurance before it was applied to first-party cases. Communale v. Traders and General Insurance Co., 328 P.2d 198 (Cal. 1958) (holding that an insurer's wrongful refusal to settle a liability case within policy limits constituted a breach of the implied <u>contractual</u> obligation of good faith and fair dealing).

Under California statutes, damages recoverable under the tort theory need not be foreseeable as is the case for those awarded for breach of contract. *Chrisci v. Security Insurance Co.*, 426 P.2d 173 (Cal. 1967).

Gruenberg has been responsible for the rapid and extensive development of bad-faith actions and extra-contractual damages throughout the nation. The *Gruenberg* court held both parties to the contract have a duty not to do anything that will injure the right of the other to receive the benefits of the agreement. These duties, however, are independent of each other. Even though an insured may breach its duty to the insurer under the contract, the insurer, nonetheless, is still obligation under its duty of good faith to the insured. Should the insurer breach its duty under the situation, it may be liable for extra contractual damages.

The *Gruenberg* rationale has been adopted in about one-half of the states in the nation. But in addition to the various tort remedies, approximately thirty-five states now have statutes whereby an insurance commissioner may penalize an insurer for misconduct. In some jurisdictions, such as Florida, these statutes also provide an insured with a private right of action against the insurer for this misconduct. Typically, these statutes are variations of the Unfair Claims Practice Act. State statutes affecting bad-faith conduct include the following: Ala. Code § 27-12-24; Alaska Stat. § 21.36.125; Ariz. Rev. Stat. Ann. §20-461; Ark. Stat. Ann. § 66-3005 (9); Cal. Ins. Code §

790.031(h); Colo. Rev. Stat. § 10-3-1104(h); Conn. Gen. Stat. § 38-61(6); Del. Code Ann. tit. 18, § 2304(16); Hawaii Rev. Stat. § 431-647; Idaho Code § 41-1329; Ind. Code § 27-4-1-4.5; Iowa Code § 507B.4(9); Kan. Stat. Ann. § 40-2404(9); Mass. Gen. Laws Ann. ch. 176D, § 3(9); Mich. Comp. Laws § 500.2026; Minn. Stat. § 72A.20; Mo. Rev. Stat. § 375.936(10); Mont. Code Ann. § 33-18-201; Neb. Rev. Stat. § 44-1525(9); Nev. Rev. Stat. § 686A.310; N.H. Rev. Stat. Ann. § 417:4; N.J. Rev. Law § 40-d; N.C. Gen. Stat. § 58-54.4(11); N.D. Cen. Code § 26.1-04-03(9); Or. Rev. Stat. § 746.230; PA. Stat. Ann. tit. 40, § 1171.5(a)(10); Tenn. Code Ann. § 56-8-104(8); Tex. Ins. Code Ann. art. 21.21-2; Vt. Stat. Ann. tit. 8, § 4724(9); Va. Code § 38.1-52(9); W.Va. Code § 33-11(9).

The most dramatic revolution in the area of insurance law has been in the field of bad-faith discovery. This court in *Kujawa v. Manhattan Life Insurance Company*, 541 So.2d 1168 (Fla. 1989), declared that the statute that created the first-party bad faith cause of action did not abolish the attorney-client privilege or work product immunity. The work product privilege doctrine was first established in *Hickman v. Taylor*, 329 U.S. 459 (1947), where the Supreme Court held that written statements of witnesses obtained by an attorney and the attorney's notes prepared in the course of his legal duties and in the anticipation of litigation were non-discoverable.

As declared by the Eleventh Circuit in the instant case, there is a conflict in the district courts as to the reasoning in

denying abatement of bad-faith claims until conclusions of contract and tort claims. *See, e.g., United Servs. Auto. Ass'n. v. Grant*, 555 So.2d 892 (Fla. 1st DCA 1990); *Royal Insurance Co. of America v. Zayas Men's Shop, Inc.*, 551 So.2d 553 (Fla. 3d DCA 1989) (denying abatement of insured's bad-faith claim until the underlying claim or breach of insurance contracts was resolved in its favor based upon *Kujawa* and concluding that *Independent Fire Insurance Co. v. Lugassy*, 538 So.2d 550 (Fla. 3d DCA 1989), *Colonial Penn Ins. Co. v. Mayor*, 538 So.2d 100 (Fla. 3d DCA 1989), and *Allstate Ins. Co. v. Lovell*, 530 So.2d 1106 (Fla. 3d DCA 1988), all of which require abatement of the bad- faith claim were no longer viable); *Allstate Ins. Co. v. Melendez*, 550 So.2d 156 (Fla. 5th DCA 1989) (denying abatement of bad-faith claim until after resolution of coverage claim following *Kujawa*); *State Farm Mut. Auto. Ins. Co. v. Kelly*, 533 So.2d 787 (Fla. 4th DCA 1988) (approving joinder of bad-faith claim in the underlying contractual claim as well as denial of abatement of the bad-faith claim); *cf., State Farm Mut. Auto. Ins. Co. v. Lenard*, 531 So.2d 180 (Fla. 2d DCA 1988) (denying quashing complaint amendment to include bad-faith count before the court was unconvinced that the bad-faith claim had to be simultaneously asserted with the other claims); *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263 (Fla. 5th DCA 1987), *rev. denied*, 523 So.2d 578 (Fla. 1988) (finding a bad-faith claim to be an independent cause of action in first-party, contractual insurance litigation).

As correctly acknowledged by the Eleventh Circuit, the

conflict among the district courts of appeal apparently causes hardship for plaintiffs and insurance carriers as plaintiffs are compelled to raise bad-faith claims in all insurance disputes and insurance carriers must defend bad-faith claims in routine cases. The solution to the "hardship" is a holding that the cause of action for bad faith does not accrue until the end of the underlying contractual litigation. *Bartlett v. John Hancock Mut. L. Ins. Co.*, 538 A.2d 997 (R.I. 1988); *Interinsurance Exchange v. Superior Court*, 213 Cal.App.3d 1442, 262 Cal. Rprt. 392 (Cal.App. 2d Dist. 1989); *Weese v. Nationwide Ins. Co.*, 879 F.2d 115 (4th Cir. 1989); *Jefferson v. Allstate Ins. Co.*, 673 F.Supp. 1401 (D.S.C. 1987); *cf., Moskos v. National Penn Franklin Ins. Co.*, 60 Ill.App.3d 130, 17 Ill. Dec. 389, 376 N.E.2d 388 (1st Dist. 1978) (because the jury decided the defendants did not breach their contract with the plaintiff, the plaintiff could hardly contend that the defendants acted in bad faith in relying on a defense which ultimately prevailed at trial).

In *Bartlett*, the defendant insurance company petitioned for certiorari seeking review of a superior court's order granting the plaintiff's motion to compel production of the defendant insurance company's claim file. The plaintiff alleged that the defendant both breached its duty under a contract of life insurance and acted in bad faith by denying liability for accidental death benefits under the policy in which the plaintiff was named as sole beneficiary. The Rhode Island Supreme Court quashed the order of the superior court.

The court declared that the question before it was whether the trial justice erred in ordering defendant to produce its entire claim file upon plaintiff's mere allegation of bad faith while the underlying breach-of-contract claim for accidental-death benefits was still pending. In quashing the order of the superior court, the Rhode Island Supreme Court declared, "There can be no cause of action for an insurer's bad-faith refusal to pay a claim until the insured first establishes that the insurer breached its duty under the contract of insurance." *Id.* at 1000.

In so holding, the court cited to its prior decision in *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313 (R.I. 1980), wherein the court held that "[t]o show a claim for bad faith, a plaintiff must show the absence of reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of a reasonable basis for denying the claim." 417 A.2d at 319 (quoting *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368):

> Clearly plaintiff could never show an absence of a reasonable basis for denial of benefits if the insurer can prove that no benefits were owed under the policy. If the insurer prevails on the breach-of-contract action, it could not, as a matter of law, have acted in bad faith in its relationship with its policyholder. There cannot be a showing of bad faith when the insurer is able to demonstrate a reasonable basis for denying benefits. [*See also*, "if a claim is 'fairly debatable' no liability in tort will arise." *Bibeault*, 417 A.2d 319. Since the evidence

> gives rise to a valid question of coverage, it follows that [the insurer] could not have acted in bad faith. *Calenda v. Allstate Ins. Co.*, 518 A.2d 624, 629 (R.I. 1986)].

Id. Logically, then, a plaintiff must first show that he or she is entitled to recover on the contract before he or she can prove that the insurer dealt with him or her in bad faith.

The court continued that other courts have reached the same conclusion when faced with a discovery problem presented by simultaneous breach-of-contract and bad-faith claims against an insurer. The court then cited *In Re Burgenson,* 112 F.R.D. 692 (D. Mont. 1986), wherein a bankruptcy trustee filed a two-part complaint against an insurer for failing to fulfil its obligations under the insurance contract and for acting in bad faith in refusing to tender the full amount of coverage to the debtors under the contract. The plaintiff sought production of the insurer's entire claim file. The insurer objected on the grounds of attorney-client and work-product privilege. The court decided that an insurer's claim file should be disclosed in a bad-faith action. However, it would not allow discovery of the entire claim file until the breach-of-contract claim had been resolved. For the claims file to be discoverable, the underlying claim must first be resolved either by settlement or litigation. Otherwise, privileged material may be disclosed which would jeopardize the insurance company's defense. *Id.* at 697.

The *Bartlett* court then cited to *Allstate Insurance Company v. Swanson*, 506 So.2d 497 (Fla. 1st DCA 1987), where the insurer

was sued for breach of contract under a homeowner's policy. The insured also alleged bad faith refusal by Allstate to settle within policy limits. The court decided that a bad-faith claim could not arise until the insurer's liability under the contract was resolved. "[A] claim for bad faith cannot be prosecuted when the parties simply disagree over the coverage issue." 506 So.2d at 498. The *Swanson* court would not allow discovery of the insurer's claim file based on plaintiff's bad-faith allegation while the contract action was still pending. "Until the right of coverage is first established, a plaintiff claiming to be an insured cannot compel disclosure of the insurer's work product and privileged matters in its claim file....Otherwise, a discovery rule established by the courts in these cases could be circumvented by simply combining the two causes of action." *Id.*

The *Bartlett* court next cited to a footnote in *Brown v. Superior Court in and for the County of Maricopa*, 137 Ariz. 327, 670 P.2d 725, 728 n.1 (1983). In *Brown*, the supreme court of Arizona pointed out that the bad-faith claim was before it on a special-action proceeding. Consequently, it was unable to determine if the plaintiff was simultaneously claiming breach of the insurance contract. The justices pointed out:

> Should [the breach of contract claim] terminate adversely to Brown, one would assume that the bad-faith claim must fall. Obviously, there are many problems involved in allowing a claimant simultaneously to pursue both a claim under the coverage provided by the policy and a bad-faith claim based upon the insurer's

> refusal to pay the policy claim. One could plausibly argue that the law should not allow such simultaneous actions and that a bad-faith claim can be pursued only after disposition of the underlying policy claim.

FDLA submits that it should not only be noted but emphasized that in *Kujawa*, although the petitioner did sue on the policy and for bad faith processing of the claim under section 624.155(1)(b)(1), the respondent had paid on the policy before the petitioner served a request to produce all files pertaining to the handling of the claim. Consequently, when the case reached the Fourth District in *Manhattan National Life Insurance Company v. Kujawa*, 522 So.2d 1078 (Fla. 4th DCA 1988), and when it reached this court, there was no issue as to whether or not the claims could be brought together or whether the bad-faith claim accrued at some later point in time. Therefore, this court only decided the issue of whether or not the bad-faith cause of action created by section 624.155(1)(b)(1) abolished the attorney-client privilege or work-product immunity. FDLA further submits then that any reliance by district courts for the proposition that *Kujawa* mandated that the breach-of-contract claim must be brought with the bad-faith claim and could not be abated, finds no support in the *Kujawa* opinion.

The only issue decided by this court in *Kujawa* was whether or not a defendant insurance company was entitled to the privilege and immunity to the same extent as any other litigation in a bad-faith case. Some cases have taken the extreme position

that a suit for bad faith destroys the work-product privilege. *E.g., Hall v. Goodwin*, 775 P.2d 291 (Okl. 1989); *O'Boyle v. Life Ins. Co. of North America*, 299 F.Supp. 704 (W.D. Mo. 1969). However, there are also other cases holding the opposite view and the view held by this court in *Kujawa*. *E.g., Maryland American General Ins. Co. v. Blackmon*, 639 S.W.2d 455 (Tex. 1982); *Carver v. Allstate Ins. Co.*, 94 F.R.D. 313 (S.D. Ga. 1982).

In *Maryland American General Ins. Co. v. Blackmon, supra,* 639 S.W.2d 455, for instance, the court stressed the prejudicial effect of complete disclosure of the claim file on the insurer's right to defend the breach-of-contract action. In *Blackmon*, a bank sued its fidelity insurer, alleging both breach of contract and bad-faith dealing causes of action. The court held that the insurer's qualified privilege against discovery and contract cause of action was not vitiated by the plaintiff's allegation of bad-faith dealings. The insurer had a right to assert this privilege as long as its liability on the contract remained undetermined. The court stated:

> Regardless of the reasons which might justify the use of this information, it would be impossible to limit the prejudicial effect of disclosure on [the insurer's] right to defend the contract cause of action. Moreover, if a plaintiff attempting to prove the validity of a claim against an insurer could obtain the insurer's investigative files merely by alleging the insurer acted in bad faith, all insurance claims would contain such allegations.

Id. at 457-458.

The United States District Court for the district of Montana in *In Re Burgenson, supra,* 112 F.R.D. 692, when faced with a similar problem, concluded that the only way to deal with this problem was to separate the bad-faith claim from the breach-of-contract claim and first determine the insurer's liability under the contract. "Given the need for complete discovery to be afforded to all parties to the action, the interest of justice would best be served by bifurcating the bad-faith claims from the remainder of the case in determining the liability issue first." *Id.* at 697.

The *Bartlett* court agreed with *In Re Burgenson* and suggested that trial judges exercise their authority and severe the contract claim from the bad-faith claim and limit discovery to the contract claim until that claim was resolved in the plaintiff's favor. *Bartlett v. John Hancock Mut. Life Ins. Co., supra*, 538 A.2d at 1002.

> We recognize that a plaintiff may have an overwhelming need for the information in the claim file to enable him or her to prove his or her bad-faith claim. That need, however, is outweighed by (1) the right of the insurer to defend itself first against the claim of breach of contract pursuant to the rules of civil procedure and (2) the fact that a bad-faith claim may not be maintained until the insurer has proven to have breached the contract of insurance.

Id.

Since a bad-faith insurance claim is dependent on the underlying tort claim, *Fode v. Farmers Insurance Exchange*, 719 P.2d 414 (Montana 1986), a bad faith cause of action cannot legally accrue until there has been a final adjudication of the underlying contractual litigation. As declared by the court in *Colonial Penn Ins. Co. v. Mayor, supra*, 528 So.2d at 101:

> It is apparent, almost as a matter of pure logic, that the right to proceed in a so-called "bad faith" settlement claim against an insurer cannot mature until the primary action--which it is accused of improperly defending--is terminated favorably to the insured. *Fortson v. St. Paul Fire & Marine Ins. Co.*, 751 F.2d 1157 (11th Cir. 1985). It therefore follows, as we recently and squarely held in *Allstate Insurance Co. v. Lovell*, 530 So.2d 1106 (Fla. 3d DCA 1988), that the "bad faith" case itself, together with the concomitant rights to discovery as to the manner in which the initial action was defended must be postponed pending the completion of that action. Wrenching the word from its context, the respondent point to the statement in *Lovell* that the "bad faith" case must be abated and discovery postponed while an issue of "coverage" of the initial claim is pending; she then correctly states that the involvement of a phantom vehicle in a UM case is *not* one of "coverage." E.g., *Florida Ins. Guar. Ass'n, Inc. v. Eberhart*, 354 So.2d 1265 (Fla. 3d DCA 1978). But *Lovell* clearly does not confine or limit the issues which precede determination of the initial claim to those of insurance coverage (which was the question actually involved in that

case). Instead, the very basis of the *Lovell* decision refers to the broader concept of an unresolved claim "for uninsured motorist benefits." *Lovell*, 530 So.2d at 1106. Put another way, the "true rule," which reflects the self-evident proposition that the basic insurance claim must itself be first resolved as a condition of the bad faith case, is succinctly stated in *Allstate Insurance Co. v. Shupack*, 335 So.2d 620, 621 (Fla. 3d DCA 1976) to the effect that:

> until the merits of respondent's claim to benefits have been determined, it is a departure from the essential requirements of law to require petitioner to produce its entire file and all correspondence with its attorneys relative to the claim. [e.s.]

Accord *Fidelity & Casualty Ins. Co. v. Taylor*, 525 So.2d 908, 910 n.6 (Fla. 3d DCA 1987), citing *Shupack* and *Maryland Am. Gen. Ins. Co. v. Blackmon*, 639 S.W. 2d 455 (Tex. 1982).

Since a bad-faith claim is predicated upon a finding that the insurer breached the contract in either failing to pay or settle when it was legally liable to under the contract, there can be no cause of action for bad faith against an insurer until there is that determination. Consequently, the cause of action does not come into being and, therefore, cannot be abated as there simply is no existing cause of action. *See In Re: Estate of Peck*, 336 So.2d 1230 (Fla. 2d DCA 1976).

Under section 624.155(1)(b)(1), Florida Statutes, an insured

has a cause of action against an insurer when the insured is damaged by the insurer's failing to attempt in good faith to settle a claim with the insured which the insurer should have settled. The statute gave an insured a private cause of action for bad faith against its insurer which the insured did not have at common law. The statute, however, did not nullify the existing principle of law that a cause of action must be complete and all elements thereof must be in existence at the time that the action is filed. *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607 (Fla. 4th DCA 1975). Since the insured's cause of action under 624.155 requires that the insured show both a legal entitlement to the insurance benefits and an unreasonable withholding of payment of those benefits, or lack of good faith settlement by the insurer, that cause of action cannot have accrued until there has been a determination of the underlying contractual litigation. The bad-faith cause of action cannot accrue in the same trial with the contractual litigation since all elements must be in existence when the action is filed. The courts in Florida, therefore, that have held that the right to proceeds under the contract must be filed along with the bad-faith claim have created a legal impossibility.

Section 624.155 changed the common law that had held there was only a bad-faith claim in third-party suits. A third-party had a bad-faith claim when a liability insurer unreasonably failed to settle a liability claim made against its insured by a third party. *Fidelity and Casualty Co. of New York v. Cope*, 462

So.2d 459 (Fla. 1985). In *Cope*, this court held that the essence of a "bad faith" insurance suit is that the insurer breached its duty to its insured by failing to properly defend the claim--all of which resulted in the insured being exposed to an excess judgment. *Id.* at 460.

Accordingly, in third-party cases, absent resolution of the underlying dispute against the insured, the question of bad faith does not arise since an essential element of a third-party bad faith case is that the insured suffer a judgment against him. Reading section 624.155 in conjunction with the common law as to third-party bad-faith claims, a first-party bad-faith claim likewise cannot accrue until there has been a final judicial determination of the insured's liability.

CERTIFIED QUESTION 3

IF THE CAUSE OF ACTION FOR ALLEGEDLY FAILING TO SETTLE THE UNINSURED MOTORIST CLAIM IN GOOD FAITH ACCRUES BEFORE THE CONCLUSION OF THE UNDERLYING LITIGATION FOR THE CONTRACTUAL UNINSURED MOTORIST BENEFITS AND IF THE ACTIONS CAN BE JOINTLY LITIGATED, THEN JOINDER OF THE ACTIONS SHOULD BE MANDATORY.

FDLA relies on the respondent's position advocated in their answer brief.

CONCLUSION

For the foregoing reasons, State Farm submits that the first certified question should be answered in the negative. If the Court reaches the second certified question, it also should be answered in the negative. If the Court reaches the third certified question, and has found that the bad faith cause of action accrues prior to the resolution of the underlying action for uninsured motorist benefits and that the bad faith action and the uninsured motorist action can be jointly litigated, then the third certified question should be answered in the affirmative.

Respectfully submitted,

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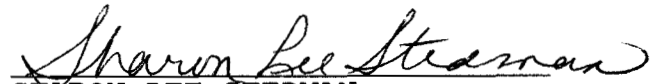
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 7th day of September, 1990, to C. Rufus Pennington, III, Esquire, MARGOL & PENNINGTON, P.A., Suite 1702, American Heritage Tower, 76 South Laura Street, Jacksonville, Florida 32202; Stephen Day, Esquire and Ada A. Hammond, Attorney at Law, DAY & RIO, 10 South Newman Street, Jacksonville, Florida 32202, and Roy D. Wasson, Esquire, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130.



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