IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 76,243

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

Plaintiffs-Appellants,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation,

Defendant-Appellee.
______________________________/

ON CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
TO THE SUPREME COURT OF FLORIDA
PURSUANT TO ARTICLE 5, SECTION 3(b)(6)
OF THE FLORIDA CONSTITUTION

ANSWER BRIEF OF DEFENDANT-APPELLEE
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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III. STATEMENT OF THE CASE

Defendant-Appellee, State Farm Mutual Automobile Insurance Company (hereafter denominated as "State Farm"), agrees with the statement of the case as set forth in the initial brief filed in this Court by plaintiffs-appellants, as stated in the section of their brief entitled "The Procedural Background of the Case", which begins at page 1 of their brief and ends at page 3 thereof. Therefore, no additional statement of the case will be made by State Farm herein.

IV. STATEMENT OF THE FACTS

As noted in the Blanchards' initial brief herein, the Eleventh Circuit has transferred the entire record and the parties' previous briefs to this Court with the opinion certifying questions of law to this Court. To prevent confusion, State Farm will follow the same procedure used by the Blanchards and will use the Eleventh Circuit's record citation system in this brief. Record references are made by referring to the volume number, document number and page number within the document. Volume numbers and document numbers are shown on the docket sheet in the record. For example, the reference R4-9-6 indicates a citation to volume 4, document 9, page 6 of the record.

Because this is an appeal from an order dismissing the Blanchards' complaint for failure to state a claim upon which relief can be granted, the well pled allegations of the complaint

are accepted as true and the complaint may be dismissed if no relief can be granted under the facts, as alleged therein. Hishon v. King and Spalding, 467 U.S. 69 (1984). Therefore, the only facts which are relevant herein are those pled in the complaint. Accordingly, State Farm will not quote the allegations of the complaint herein, but rather refers the Court directly to the complaint in the record (R1-1). To the extent that the Blanchards, in their statement of the facts, have recited "facts" not alleged in the complaint and therefore, not before the District Court, those facts have no bearing on this appeal.

State Farm notes its disagreement with the statement made in footnote 4 of the Blanchards' statement of the facts in their initial brief herein, that the judgment against State Farm in the State Court action was without prejudice to the Blanchards' right to bring a separate bad faith action to recover the excess damages over the policy limits. The judgment specifically provides that it does not in any way deal with the Blanchards' contentions regarding their right to bring a separate bad faith action (R1-1-Exhibit "E"). In addition, the argument of the Blanchards made in footnote 5 of their initial brief regarding their ability to recover the excess of the actual damages over the uninsured motorist insurance policy limits was the subject of State Farm's motion to strike and memorandum of law in support thereof (R1-4) which motion was not reached by the District Court because of the dismissal of the complaint. Therefore, the

argument made in footnote 5 is irrelevant to the issues on this appeal. Although State Farm disagrees with this assertion, the issue is not presently before this Court.

The relevant allegations of the Blanchards' complaint for purposes of the legal issues that were before the Federal Courts and that are present herein are as follows. The Blanchards' entitlement to the uninsured motorist benefits claimed by them under their uninsured motorist insurance policy with State Farm was disputed and therefore, the Blanchards instituted an action in State Court against State Farm to recover the uninsured motorist benefits (R1-1-3). The Blanchards alleged that State Farm refused to make any good faith offer to settle their claims for those benefits **prior to the time that they instituted** their State Court action for recovery of the benefits (R1-1-3) (emphasis added). However, the Blanchards never made any attempt to join their claim against State Farm under Florida Statutes §624.155 for State Farm's alleged refusal to make any good faith offer to settle the claims in that State Court action, and instead, allowed the State Court action to go to verdict and judgment before they initiated a separate action in Federal Court to pursue their §624.155 claims (R1-1-3, 4, 5).

V. STATEMENT OF THE ISSUES (CERTIFIED QUESTIONS)

CERTIFIED QUESTION ONE:

> Does an insured's claim against an uninsured motorist carrier under §624.155(1)(b)1., Florida Statutes, for allegedly failing to settle the uninsured motorist claim in good faith accrue

> before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits?

CERTIFIED QUESTION TWO:

> If so, is joinder of the claim under §624.155(1)(b)1. in the underlying litigation for contractual uninsured motorist benefits permissible?

CERTIFIED QUESTION THREE:

> If so, is joinder of the §624.155(1)(b)1. claim with the contractual claim mandatory?

VI. SUMMARY OF THE ARGUMENT

Under currently existing Florida intermediate appellate law, a first party bad faith claim under §624.155(1)(b)1., must be joined with the underlying action by the insured for uninsured motorist benefits, under the rule which precludes the splitting of causes of action. In this case, the Blanchards did not join their bad faith and uninsured motorist claims in one action, but rather, litigated the uninsured motorist case to conclusion in State Court and subsequently initiated a separate action on their §624.155 claim in Federal Court based on diversity of citizenship jurisdiction. Federal Courts, sitting in diversity, are bound to apply currently existing Florida law, and are not authorized to modify or overrule the decisions of Florida's District Courts of Appeal in determining issues of state law. Consequently, the Federal District Court properly dismissed the Blanchards' complaint, under existing Florida law which mandates the joinder of the claims.

Because the dispositive issues in regard to this case have been certified to this Court by the Eleventh Circuit Court of Appeals, the parties appropriately may for the first time in these proceedings argue for a reexamination of Florida law in regard to the issues which have been certified to this Court.

A. ACCRUAL

An insured's underlying first party action for uninsured motorist benefits against the insurer necessarily must be resolved favorably to the insured, before a cause of action under §624.155 for failure to settle the uninsured motorist claim in good faith can accrue. Absent liability for payment of insurance benefits on the part of the insurer, it cannot be argued that the insurer failed to exercise good faith by not settling the insured's claim. Hence, an essential element, or prerequisite, to the maintaining of an action under §624.155 for failure to settle a claim in good faith is that the insured be legally entitled to the insurance benefits sought, since without such a legal entitlement to insurance benefits, the insurer would have no duty to settle an insurance claim for such benefits. Under Florida law, a cause of action must be complete and all elements thereof must be in existence at the time that the action is filed. Otherwise, the action is premature and must be dismissed. If all of the elements of a cause of action are not present at the time of filing suit, the defect cannot be remedied by the accrual of one of the elements of a cause of action while the suit is pending. Accordingly, until the underlying uninsured

motorist dispute is resolved favorably to the insured, an essential element or prerequisite to the bad faith cause of action is not present and therefore, the bad faith action has not accrued and cannot be maintained.

B. PERMISSIVE JOINDER

Should this Court find that the first party bad faith cause of action does accrue prior to resolution of the underlying action for uninsured motorist benefits, joinder of the bad faith cause of action with the underlying insurance action nevertheless should not be permitted, because such joinder results in irremediable prejudice to the parties. The evidence that must be presented in the bad faith case is inherently prejudicial and inadmissible in the underlying uninsured motorist case. Moreover, the attorneys for the parties would be material witnesses in the bad faith case, and as such, would have to withdraw from representation of their respective clients if the bad faith and uninsured motorist actions are litigated jointly. Joinder of the actions is unworkable and in the interest of effective judicial administration, should not be permitted.

C. MANDATORY JOINDER

Should this Court find that the bad faith action does accrue prior to resolution of the underlying uninsured motorist action, and further find that joinder of the two actions is not prejudicial and that the actions can be jointly litigated, then this Court would be in agreement with currently existing Florida

law and therefore, joinder is mandatory under the doctrine prohibiting the splitting of causes of action.

VII. ARGUMENT

HISTORY OF THE ISSUE

There is only one Florida decision which squarely addresses the mandatory joinder of an insured's first party claim against an insurer under §624.155(1)(b)1., Florida Statutes, with the underlying action for insurance benefits. This is the decision of the Third District Court of Appeal in Schimmel v. Aetna Casualty and Surety Company, 506 So.2d 1162 (Fla. 3rd DCA 1987). Schimmel involved a first party claim by an insured against his own insurance carrier for property damage insurance benefits. The Schimmels asserted that their insurance carrier had not settled their insurance claim in good faith, and therefore filed an action against the insurer alleging breach of the insurance contract. After receiving a favorable judgment on their insurance claim, the Schimmels instituted a separate action against the insurer, under §624.155(1)(b)1., Florida Statutes, for the insurer's alleged failure to settle the underlying insurance claim in good faith.

The Third District Court of Appeal held that the §624.155 claim was barred, under the rule which precludes the splitting of causes of action, finding that the Schimmels were required to assert their §624.155 action against the insurance carrier at the same time that they asserted their underlying insurance claim.

The Third District reasoned that the two claims were part of a single cause of action and that therefore, under the rule against splitting causes of action, all damages sustained or accruing to one as a result of a single wrongful act must be claimed and recovered in one action or not at all.

Subsequently, in State Farm Mutual Automobile Insurance Company v. Lenard, 531 So.2d 180 (Fla. 2d DCA 1988), the Trial Court extended the Schimmel holding to an uninsured motorist claim and allowed joinder with a claim under §624.155. On Petition for Common Law Certiorari, the Second District Court of Appeal did not reach the Schimmel issue, however, holding instead that the Trial Court did not depart from the essential requirements of law in determining that the Lenards could (rather than must) assert all of their claims at one time. The Lenard Court noted that the Trial Court may have had no discretion to do otherwise, in light of the holding in Schimmel. The Lenard Court expressed concern about the potential unworkability of the Schimmel holding, but reserved those issues for later appellate review, as necessary. While the Lenard Court did not have to determine, for purposes of the splitting a cause of action issue, whether the statutory claim and the uninsured motorist claim must be asserted at the same time, inherent in the Court's decision is a finding that the bad faith claim accrued prior to resolution of the underlying uninsured motorist claim.

Subsequently, the Third District applied its decision in Schimmel to a case involving joinder of an uninsured motorist

claim with a §624.155(1)(b)1. claim in the case of Colonial Penn Insurance Co. v. Roslyn Mayor, 538 So.2d 100 (Fla. 3rd DCA 1989), finding in this case that the insured had properly joined the claims, **"as required by Schimmel"**. 538 So.2d at 101 (emphasis supplied) Somewhat inconsistently, the Court also required abatement of the statutory bad faith claim.

In addition to the Third District and the Second District, the other Florida District Courts of Appeal that have considered first party bad faith claims filed under §624.155 have, following Schimmel, at least permitted joinder with the underlying first party claim for insurance benefits. Of necessity, each has found, albeit without directly addressing the issue, that the bad faith claim accrues before resolution of the underlying insurance claim. Allstate Insurance Company v. Lovell, 530 So.2d 1106 (Fla. 3rd DCA 1988); State Farm Mutual Automobile Insurance Company v. Kelly, 533 So.2d 787 (Fla. 4th DCA 1988); Independent Fire Insurance Company v. Lugassy, 538 So.2d 550 (Fla. 3rd DCA 1989); Allstate Insurance Company v. Melendez, 550 So.2d 156 (Fla. 5th DCA 1989); Royal Insurance Company of America v. Zayas Mens Shop, 551 So.2d 553 (Fla. 3rd DCA 1989); U.S.A.A. v. Grant, 555 So.2d 892 (Fla. 1st DCA 1990). In each case, the issue reached the Appellate Court at an interlocutory stage, and in no case was the Court confronted with questions arising out of the inherent inconsistency and prejudice from joint litigation of the claims. Many recognized the difficulties necessarily encountered

with the approach[1] and some required abatement as a solution.[2] In each case decided, however, the problems addressed to this Court by the parties sub judice, were reserved for later consideration on appeal.

Based upon currently existing Florida law, as cited above, the Federal District Court in this diversity case found that it was bound to hold under Florida law, that because the Blanchards failed to assert their Florida Statute §624.155 claim in the prior action that they had prosecuted to judgment in the State Court for uninsured motorist benefits, they could not assert the claim now in the separate federal action, under the rule against splitting causes of action.

The District Court noted that a number of the Florida Appellate decisions subsequent to Schimmel had held that while the bad faith claim was properly joined with the underlying insurance contract claim, the bad faith claim had to be abated, pending resolution of the underlying insurance claim and stated its belief that it may be formalistic to have to bring a claim only to have that claim abated. However, the District Court properly found that it was bound by the precedents of the State of Florida, since it is clear that a Federal Court sitting in diversity has no authority to overrule or modify the state law

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[1] See State Farm Mutual Automobile Insurance Co. v. Lenard, supra; Allstate Insurance Co. v. Lovell; supra; Colonial Penn Insurance Co. v. Roslyn Mayor, supra.

[2] See Allstate Insurance Co. v. Lovell, supra; Colonial Penn Insurance Co. v. Roslyn Mayor, supra; Independent Fire Insurance Co. v. Lugassy, supra.

which it must apply in resolving state law issues. In a diversity of citizenship case involving Florida law, where the state's highest Court has not addressed the issue in question, the Federal Courts are bound by the decisions of the Florida District Courts of Appeal. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Maseda v. Honda Motor Company, Ltd., 861 F.2d 1248 (11th Cir. 1988); Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231, 1235 NT.7 (5th Cir. Unit B, 1982) ("We are bound by the decision of the District Court of Appeal as we would be by a decision of the Florida Supreme Court."); Bailey v. Southern Pacific Transportation Company, 613 F.2d 1385, 1388 (5th Cir. 1980) ("In diversity cases Erie teaches us that where state law has been announced by the state's highest Court - it is to be followed. Intermediate State Court decisions are also to be followed in the absence of a decision from the highest Court, unless this Court is convinced that the highest Court would decide otherwise."); Allen v. A.G. Edwards & Sons, Inc., 606 F.2d 84, 86 (5th Cir. 1979) ("We are bound by these [appellate court decisions] absent indication by Florida's highest Court that the decisions do not reflect the law of the state.").

It is only this Court, through the mechanism of certification of questions by the Federal Courts of Appeal, that can overrule or modify currently existing Florida decisions by the District Courts of Appeal in resolving issues of Florida law presented to the Federal Courts. Therefore, this is the first time in these proceedings that it is appropriate for the parties

to argue for a reexamination of currently existing Florida law. The Eleventh Circuit Court of Appeals has asked this Court for guidance in this case, because of the lack of consistency in the reasoning among the Florida District Courts of Appeal on the issue presented herein and because the decisions of the District Courts of Appeal cause hardship for plaintiffs and insurance carriers in that plaintiffs are compelled to raise bad faith claims in all first party insurance disputes (to avoid the Schimmel rule in regard to splitting of causes of action) and insurance carriers must defend bad faith claims in virtually all routine cases.

QUESTION ONE:

AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST CARRIER UNDER §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.

As noted above, only the Schimmel Court has directly addressed when a first party cause of action under Florida Statute §624.155 accrues and must be asserted, and that Court has held that the action accrues contemporaneously with the accrual of the underlying first party insurance action and must be joined with that action. As it did in Lenard, when the issue is addressed in the context of an uninsured motorist claim, State Farm respectfully disagrees.

In an uninsured motorist claim, the better reasoned approach is that the insured's underlying first party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured, before the cause of action for bad faith in settlement negotiations can accrue. Absent a jury's determination of the existence of liability on the part of the uninsured tortfeasor, and the nature and extent of plaintiffs' damages, it cannot be determined that the insurer failed to exercise good faith by not settling the insured's claim. One element of the cause of action questioning the good faith conduct of settlement negotiations is the threshold issue comparing the positions taken by the parties during settlement negotiations to the result achieved at trial of the claim. Although an adverse jury verdict in the trial of the underlying claim does not per se rise to the level of bad faith during settlement negotiations, a jury's vindication of the insurance company's settlement position is the threshold sine qua non to the accrual of the bad faith action.

Thus, an essential element, or prerequisite, to the maintenance of an action under §624.155(1)(b)1. for failure to settle a claim in good faith is that the insured be found to have been legally entitled to the insurance benefits in the amounts demanded. This can be seen in the language of the statute itself. The statute provides as follows:

Section 624.155 Civil Remedy. -

(1) Any person may bring a civil action against an insurer when such person is damaged:

> (b) By the commission of any of the following acts by the insurer:
>
> > 1. Not 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 towards its insured and with due regard for his interests;

(Emphasis supplied)

It can be said that an insurer "should" have acquiesced to the settlement demands of an insured, only when the insured is legally entitled to the insurance benefits in the amounts that he demanded. When a first party insurance claim is disputed and is therefore litigated, it is not until after judgment has become final against the insurer that it can be said, without speculation, that there existed liability on the part of the insurer for payment of the insurance benefits in the amounts sought by its insured. Of course, the fact that an insurance company fails to settle a case and is subsequently adjudged liable for payment of insurance benefits does not, by itself, result in liability on the part of the insurance company for failure to settle in good faith. Otherwise, every disputed insurance claim that was resolved in favor of the insured would give rise to bad faith on the part of the insurer, whether or not the insurer had a reasonable basis for disputing the claim. Where disputed evidence exists in regard to the underlying claim, it may well be reasonable, and not in bad faith, for an insurer to rely upon a trial to determine the issues. In order to prevail in the **subsequent** bad faith action, the insured must show

that the dispute was not in good faith, based upon arguable facts in evidence. Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980).

It is only where the insurance company has had a verdict rendered against it finding it liable for insurance benefits that the question of its good faith or lack thereof in regard to settlement can arise. Even the Third District Court of Appeal seemed to agree with this in its decision in Colonial Penn Insurance Company v. Roslyn Mayor, supra. There, a first party claim for uninsured motorist benefits and a §624.155 bad faith claim were joined. While the Third District held that the petitioner had, as required by Schimmel, properly joined both the first party claim for uninsured motorist benefits and the bad faith claim the Court also stated as follows:

> 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 and Marine Insurance Company, 751 F.2d 1157 (11th Cir. 1985). It therefore follows, as we recently and squarely held in Allstate Insurance Company v. Lovell, 530 So.2d 1106 (Fla. 3rd 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 points 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 Insurance Guaranty Association, Inc. v. Ebehart, 354 So.2d 1265 (Fla. 3rd 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 resolved as a condition of the bad faith case, is succinctly stated in Allstate Insurance Company v. Shupack, 335 So.2d 620, 621 (Fla. 3rd 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.

Id. at 101. (emphasis in the original)

Notwithstanding that the Third District Court of Appeal in Colonial Penn v. Mayor found it apparent, as a matter of pure logic, that the bad faith claim is premature until the underlying insurance dispute has been resolved, it continued to follow its earlier Schimmel decision in requiring joinder of the two claims. Adopting the "formalistic" solution to this dilemma referred to by the United States District Court below, the Third District abated the bad faith claim, pending resolution of the underlying insurance claim.

Abatement, however, is the procedural postponement of an already existing cause of action until a later time. In re Peck's Estate, 336 So.2d 1230 (Fla. 2d DCA 1976). Abatement, therefore, would appear to be inappropriate in a case where the cause of action being abated has not yet accrued, because an essential element or prerequisite to the cause of action has not

yet occurred. The more appropriate course of action would have been to recognize that the bad faith cause of action had not yet accrued and therefore, could not be joined with the action for the insurance benefits. The question of bad faith settlement negotiations must await resolution of the underlying claim.

A "cause of action" has been defined as some particular legal right of plaintiff against defendant, together with some definite violation thereof which occasions loss or damage. It does not consist of facts, but of unlawful violation of a right which facts show. Luckie v. McCall Manufacturing Company, 153 So.2d 311 (Fla. 1st DCA 1963). Under §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 failure to attempt in good faith to settle a claim of the insured which the insurer should have settled. The "right" of the insured to settlement is based upon the "right" of the insured to be paid the insurance benefits in the amount sought. Hence, the insured's cause of action under §624.155(1)(b)1. requires that the insured show both a legal entitlement to the insurance benefits in the amounts sought and an unreasonable withholding of payment of those benefits, or lack of good faith settlement, by the insurer.

A cause of action must be complete and all elements thereof must be in existence at the time that the action is filed. Otherwise, the action is premature and must be dismissed. If all of the elements of a cause of action are not present at the time of filing suit, the defect cannot be remedied by the accrual of

one of the elements of a cause of action while the suit is pending. Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607 (Fla. 4th DCA 1975); Hasam Realty Corporation v. Dade County, 178 So.2d 747 (Fla. 3rd DCA 1965). Accordingly, abatement is not the proper remedy when an incomplete cause of action is filed. Rather, dismissal without prejudice of the non-accrued cause of action is appropriate, so that it can be filed later, if and when all of its essential elements are in existence.

That resolution of the underlying primary action for the insurance benefits in favor of the insured is a necessary element of the insured's bad faith cause of action, is demonstrated by the anomalous result that obtains if the bad faith action is filed contemporaneously with the action for entitlement to insurance benefits, and the entitlement action is resolved against the insured. For example, it may be determined that there is no liability on the part of the uninsured motorist who was involved in the accident that injured the insured and therefore, the insurer would have no legal duty to pay uninsured motorist benefits to the insured. It may be determined that while the uninsured motorist was liable for the insured's injuries, the insured's damages may not be in excess of the uninsured motorist's existing liability coverage and therefore, the uninsured motorist carrier would have no legal duty to pay uninsured motorist benefits to the insured. It may be determined that the insured's injuries do not meet the no-fault threshold,

and therefore, no uninsured motorist insurance benefits would be payable to the insured.

In such cases, the issue of bad faith refusal to settle does not arise. There being no duty on the part of the insurer to pay, there cannot be any unreasonable refusal on the part of the insurer to settle. It is only after the insured's entitlement to insurance benefits and the amount thereof has been determined, that there is any basis to determine whether or not the refusal to settle the case in the amount sought by the insured before legal resolution of the underlying insurance claim was in bad faith. As a result, a bad faith claim cannot accrue until after a judicial resolution of the underlying claim in favor of the insured has been made.

This has long been the rule in the context of third party bad faith claims. A third party bad faith claim arises when a liability insurer unreasonably fails to settle a liability claim made against its insured by a third party, thus causing the insured to suffer a personal judgment against him in excess of his liability insurance coverage. In Fidelity and Casualty Company of New York v. Cope, 462 So.2d 459 (Fla. 1985), this Court noted that the Fifth District Court of Appeal in Kelly v. Williams, 411 So.2d 902 (Fla. 5th DCA 1982), had correctly stated:

> The essence of a "bad faith" insurance suit (whether it is brought by the insured or by the injured party standing in his place), is that the insurer breached its duty to its insured by failing to properly or promptly defend the claim (which may encompass its failure to make a good

> faith offer of settlement within the policy limits) - all of which results in the insured being exposed to an excess judgment.

Id. at page 460.

As recognized in the 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, giving rise to the liability insurer's duty to pay the liability claim. The Eleventh Circuit Court of Appeals recognized this in the case of Romano v. American Casualty Company of Reading, Pennsylvania, 834 F.2d 968 (11th Cir. 1987). Romano was a diversity case wherein the Eleventh Circuit was applying Florida third party bad faith law to settle the dispute before it. In that case, Mr. Romano had entrusted his automobile to another who was involved in an accident that severely injured three people. At the time of the accident, Mr. Romano had a policy of liability insurance. The claims of the injured parties were not settled and the case proceeded to trial, after which a judgment was entered against Romano in excess of his liability insurance policy limits. The liability judgment was appealed. Prior to disposition of the appeal, Romano filed a complaint against his insurer alleging bad faith failure to settle a claim that resulted in a final judgment in excess of his policy limits. The Eleventh Circuit Court of Appeals, relying on Fidelity and Casualty Company of New York v. Cope, supra, held that under Florida third party law, Mr. Romano's action for bad faith

failure to settle the claim was premature, even though a final judgment in excess of policy limits had been entered against him in the underlying negligence action, because the appellate process as to that final judgment had not been completed and therefore, if the judgment in the underlying action were reversed on appeal, the action for bad faith failure to settle would be extinguished. Consequently, because the underlying action had not been finally resolved, the defendant's legal duty to pay was not yet established, and therefore, the question of whether or not the insurer had failed to settle the liability claim in good faith was premature.

Similarly, in Fortson v. St. Paul Fire and Marine Insurance Company, 751 F.2d 1157 (11th Cir. 1985), the Eleventh Circuit was faced with a diversity case wherein the question was whether under this same Florida statute, a third party bad faith claim could be brought prior to resolution of the underlying medical malpractice action against the insured. The Eleventh Circuit affirmed an order dismissing the bad faith claim against the insurance carrier as premature, until the underlying medical malpractice claim was resolved, noting,

> Allowing plaintiff to proceed first against the insurer under a §624.155 good faith failure to settle claim could lead to the insurer being held liable for bad faith failure to settle even though its insured might later be found not liable in the underlying tort action. Nothing in the statutory language of §624.155 suggests that the Florida legislature intended such an anomalous possibility.

Id. at page 1161.

First party and third party bad faith cases are analogous, particularly in the context of uninsured motorist claims, in that before the bad faith claim accrues in either case, the underlying dispute must be finally resolved in order that the existence and amount of the insurer's duty to pay be determined. However, as noted by this Court in Kujawa v. Manhattan National Life Insurance Co., 541 So.2d 1168 (Fla. 1989), there are distinctions between the two types of cases. For example, in the third party cases, the measure of damages for an insurer's bad faith refusal to settle within policy limits is the amount of the judgment against the insured in excess of the policy limits. Fidelity and Casualty Co. of New York v. Cope, supra. This is so because a consequence of the insurer's unreasonable failure to settle is that its insured is exposed to a personal judgment over and above his policy limits, which the insured will be responsible to pay out of his own pocket. The same is not true in a first party case since a consequence of an insurer's bad faith failure to settle a first party uninsured motorist case is not an excess judgment against the insured for which the insured will be personally responsible. See Fidelity & Casualty Co. v. Cope, supra, at footnote 5. Hence, the consequential damages that result from bad faith in the first party and third party context are different[3]. Nevertheless, first party uninsured motorist

[3] As noted at the outset, there is no issue presented to this Court regarding the nature and extent of allowable damages in actions of this kind. That issue, although raised at the trial level, was never reached by the Trial Court. Because it was mentioned by appellants in their initial brief, however, a

claims and third party liability claims are analogous in that in

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brief response is offered.

The only case to date that has squarely addressed the measure of damages in a first party bad faith case under §624.155 is Jones v. Continental Insurance Co., 670 F.Supp 937, 941 (S.D.Fla. 1987), after appeal and remand, 716 F.Supp 1456 (S.D.Fla. 1989). In that case, the District Court held that the measure of damages was payment of the excess verdict plus consequential damages. For the reasons stated, State Farm respectfully disagrees with the Court's conclusion in that case. Indeed, during the 1990 legislative session, the legislature amended §624.155, for purposes of clarifying the damages which are available under the civil remedy statute. The amendment to that statute, at §624.155(7), provides as follows:

> The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action. **The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits.**

1990 Fla. Sess. Law Serv. Chapter 90-119 (West) (emphasis supplied)

Hence, it is clear that only consequential damages are available in a §624.155 case and in the context of a first party bad faith action, it is clear that a consequence of an insurer's bad faith failure to settle is not an excess judgment against the insured for which the insured will be personally responsible, as is the case in third party bad faith actions. Indeed, the "excess" judgment in the context of an uninsured motorist case is a judgment in favor of the insured in excess of his UM policy limits, for which the insurer would not have been liable to pay, had the policy limits been paid upon the insured's first demand so that no argument regarding lack of good faith settlement could have been made. In this regard, see State Farm's motion to strike damages, and memorandum of law in support thereof (R1-4) which was not reached by the District Court because of the dismissal of the complaint.

each, resolution of the underlying dispute is a necessary prerequisite to the determination of the existence and amount of liability.

Because, in an uninsured motorist context, the bad faith claim does not accrue until after resolution of the underlying tort action, State Farm would respectfully submit that the decision of the Third District Court of Appeal in Schimmel v. Aetna Casualty and Surety Company, supra, and the subsequent cases that have extended its reasoning to uninsured motorist cases, thus permitting joinder of the claims, are incorrectly decided. State Farm would urge this Court to answer the first certified question in the negative.

QUESTION TWO:

JOINDER OF THE CLAIM UNDER §624.155(1)(b)1. IN THE UNDERLYING LITIGATION FOR CONTRACTUAL UNINSURED MOTORIST BENEFITS IS NOT PERMISSIBLE, WHETHER OR NOT THE BAD FAITH CAUSE OF ACTION HAS ACCRUED.

If this Court agrees that, in the uninsured motorist context, the first party bad faith action under §624.155(1)(b)1. does not accrue prior to resolution of the underlying tort litigation, then the issue regarding joinder is never reached. The bad faith cause of action would not be complete, with all elements thereof being in existence, at the time of the filing of the action for the underlying insurance benefits. Orlando Sports Stadium, Inc. v. Sentinel Star Company, supra; Hasam Realty Corporation v. Dade County, supra.

However, should this Court agree with Schimmel and its progeny, and find that the first party bad faith cause of action may accrue prior to resolution of the underlying action, joinder of the bad faith cause of action with the underlying insurance action nevertheless should not be permitted, because such joinder results in prejudice to both the insured and the insurer, and indeed, to the uninsured tortfeasor who may be a party to the underlying uninsured motorist case and such prejudice cannot be cured.

As noted above, the Third District Court of Appeal originally held, notwithstanding its decision that the two actions should be joined, that the bad faith action must be mandatorily abated pending resolution of the underlying uninsured motorist case. Allstate Insurance Co. v. Lovell, supra; Independent Fire Insurance Co. v. Lugassy, supra; Colonial Penn Insurance Company v. Mayor, supra. The Court reasoned that for purposes of the bad faith case, the insurance company's claim file should be discoverable, but that because the information contained in the claim file was not relevant to and should not be admissible in the trial of the underlying uninsured motorist action, the bad faith case and the concomitant discovery permissible in such a case would be abated, pending resolution of the uninsured motorist case. Additionally, the Court in Colonial Penn v. Mayor noted that the bad faith case does not "come into existence" until after resolution of the uninsured motorist case. Id. at 102

Subsequent to these decisions, this Court in Kujawa v. Manhattan National Life Insurance Co., supra, held that first party bad faith cases differ from third party cases in that no fiduciary relationship exists between the insured and insurer in a first party case, whereas such a fiduciary relationship does exist in the third party cases. Therefore, the rule followed in third party cases that the claim file is discoverable by the insured in the bad faith case was not applied by this Court to first party cases, and instead, this Court held that the insurer's claim file continued to be subject to the attorney/client and work product privileges. As a result of this Court's holding in Kujawa, the Third District in Royal Insurance Co. of America v. Zayas Mens Shop, Inc., 551 So.2d 553 (Fla. 3rd DCA 1989), receded from its earlier decisions mandating abatement of the bad faith case, on the grounds that because the insurer was not subject to discovery of its claim file, the insurer would not be prejudiced by joinder of the bad faith and uninsured motorist cases, since the scope of discovery in the two cases would be the same. To the same effect on the abatement issue are the cases of Allstate Insurance Co. v. Melendez, supra; United Services Automobile Association v. Grant, supra; and State Farm Mutual Automobile Insurance Co. v. Kelly, supra. All of these cases were considered at an interlocutory stage, and did not directly consider the inherent conflict in joint resolution of the two causes of action.

In the above cited District Court decisions, however, none of the Courts were presented with circumstances where, under this Court's decision in Kujawa v. Manhattan Life Insurance Company, supra, the attorney/client and work product privileges which might preclude discovery of the claim file were arguably overcome or waived. However, in a bad faith case, arising out of an uninsured motorist claim, the insurer must in all probability waive these privileges as the result of the insurer's need to admit into evidence the contents of the insurance claim file, for purposes of its own defense. As noted in this Court's decision in Boston Old Colony Insurance Co. v. Gutierrez, supra, and in Cotton States Mutual Insurance Co. v. Trevethan, 390 So.2d 724 (Fla. 5th DCA 1980), in a bad faith case, the insurer's conduct in regard to investigation of the facts of the underlying case, and its consideration and making of reasonable settlement offers, are facts that come into evidence and are presented to the jury for its consideration of whether or not the insurer acted in good faith in regard to the interests of its insured. In addition, the advice given to the insurer by its attorneys in regard to their evaluation of the issues of liability, damages and settlement is also evidence to be considered by the jury. Cotton States Mutual Insurance Co. v. Trevethan, supra. Evidence of all of these matters is contained within the insurance company's claim file. The claim file also would contain evidence of insurance policy limits. It may contain evaluations by the insurer's attorneys of the underlying claim through

correspondence between the attorneys and the insurer's adjusters, memoranda of telephone conversations with the insurer's attorneys in which the attorneys have analyzed, evaluated, made recommendations and given advice concerning the issues of negligence, damages, settlement value and likely jury verdicts. The claim file also will contain evidence of settlement demands made and received and may contain evaluation by the insurer's attorneys and by the insurer's adjusters of the settlement demands made and received. It also would contain work product on which both the adjusters and the insurer's attorneys base their evaluation of the underlying claim and defenses.

While under Kujawa, such materials may not be subject to compelled disclosure (except to the extent the work product privilege is found outweighed by the need for its production), the very essence of a bad faith case requires that disclosure be made by the insurance company for purposes of defending itself against the bad faith claim. Hence, requiring joinder of the bad faith case and the underlying uninsured motorist case would force the insurer to disclose information which is otherwise subject to the attorney/client and work product privileges in pretrial discovery and at the trial of the uninsured motorist case. Such a result would be highly prejudicial. The issues for trial in an uninsured motorist case are the same as the issues for trial on a negligence claim against a third party tortfeasor. It has long been the law in Florida that policy limits have no bearing on the issues of liability and damages, and such evidence should not be

considered by the jury. Odoms v. Travelers Insurance Co., 339 So.2d 196, 199 (Fla. 1976); Beta Eta House Corporation, Inc., of Tallahassee v. Gregory, 237 So.2d 163 (Fla. 1970); Utica Mutual Insurance Co. v. Clonts, 248 So.2d 511 (Fla. 2d DCA 1971). This rule has been specifically applied in the trial of a claim for uninsured motorist benefits in the case of Auto-Owners Insurance Co. v. Dewberry, 383 So.2d 1109 (Fla. 1st DCA 1980). As stated by the Court in that case, the inherent effect of injecting policy limits into the trial of a claim for uninsured motorist benefits is "to influence the jury to award the policy limits ... rather than to fairly assess the damages." Id. at 1110. While this evidence is inadmissible in the uninsured motorist action, evidence of policy limits is directly relevant in the bad faith action, and the parties would need to introduce it to present their cases. Hence, joint trials would result in the admission of policy limits evidence in the uninsured motorist trial, where it is prejudicial, and should not be considered by the jury.

As noted, a central issue in the bad faith case would be the settlement negotiations that occurred between the parties, inasmuch as the central issue in a bad faith case is whether the insurer made reasonable attempts to settle the case. However, the Florida Evidence Code at §90.408 (1989) clearly makes such evidence inadmissible on the issues of liability and damages, which are central to the underlying uninsured motorist case. This section of the Evidence Code provides:

> Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as

> any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.

This section of the Evidence Code is strongly adhered to by the Florida Courts. Sea Cabin, Inc. v. Scott, Burk, Royce & Harris, 496 So.2d 163 (Fla. 4th DCA 1986); Benoit, Inc. v. District Board of Trustees of St. Johns River Community College of Florida, 463 So.2d 1260 (Fla. 5th DCA 1984); Atwater v. Gulf Maintenance and Supply, 424 So.2d 135 (Fla. 1st DCA 1982). The policy behind Evidence Code §90.408 (1989), is that settlement offers as much reflect the offeror's desire to avoid litigation costs as the offeror's evaluation of the claim. Evidence of settlement offers is made inadmissible because such evidence would improperly influence the jury's impartial consideration of liability and other evidence of damages which the jury should properly consider.

While evidence of settlement negotiations between the parties is inherently a part of the bad faith case and must be introduced into evidence by both the insured and the insurer, such evidence should play no part in the underlying uninsured motorist case. Permitting the joint trial of the bad faith and uninsured motorist actions would result in the destruction of years of the jurisprudence of our state making evidence of settlement negotiations inadmissible in regard to liability and damages issues. This should not be permitted by this Court. Indeed, this Court has recognized that the question of whether or not an insurance carrier exercised good faith in the settlement

of a claim against its insured should be determined by a separate trial after the determination of the liability case on the merits. Beta Eta House Corporation, Inc. of Tallahassee v. Gregory, supra, at page 165. Hence, requiring that the bad faith case be tried with the underlying uninsured motorist case will force the insurer to decide whether to risk the prejudice inherent in such evidence on the liability issues, for purposes of a proper presentation of the bad faith case. This result is intolerable.

Equally intolerable and unworkable is the fact that both the attorneys for the insured and the insurer are material witnesses to the bad faith case and will want and need to testify therein, thus requiring them to withdraw from representation of their respective clients in the underlying uninsured motorist case. For example, the insured's attorney will undoubtedly have engaged in settlement negotiations with the insurer and the insurer's attorneys prior to filing suit for the uninsured motorist benefits. If a claim for bad faith is joined in that litigation, both the insured's attorneys and the insurer's attorneys become material witnesses in regard to those negotiations in the bad faith case, and both parties may need to waive any attorney/client or work product privileges for purposes of the presentation of such evidence in support of their respective positions in the bad faith case. As such, the attorneys would not only be witnesses at trial, but would be subject to deposition during pretrial discovery proceedings.

The problem would not stop with the withdrawal of the initial attorneys in the case, because the analysis, evaluations, advice and recommendations of new counsel in regard to the underlying case would likewise become relevant to the bad faith case, Cotton States Mutual Insurance Co. v. Trevethan, supra, causing new counsel also to be material witnesses and be disqualified from representation. This results in a never ending dilemma which only could be partially stemmed if the parties refused to further engage in settlement negotiations, so that those negotiations would not be the subject of evidence that would be a part of the joint bad faith and uninsured motorist trials. This results in the discouraging of settlement negotiations between the parties and directly flies in the face of the purpose of §624.155(1)(b)1., which is to encourage the good faith settlement of insurance disputes. Moreover, even if no further negotiations were had, the attorneys would still be material witnesses in regard to their evaluation of the underlying case and the advice given to their respective clients as to the issues of liability and the value of the case, in light of the extent of damages, as this directly relates to the issue of good faith settlement. Even if they ceased negotiations, their status as witnesses on these other issues would require that they withdraw. This presents a difficult and unworkable situation, which State Farm urges this Court to address and resolve for the benefit of both insureds and insurers.

The prejudice issue is not only present for the insured and insurer, but also attaches to the uninsured motorist who may be liable for the insured's injuries, and who may be a party to the uninsured motorist case. Obviously, the uninsured motorist would not want his case prejudiced by issues involving insurance policy limits, settlement offers and so forth, since this individual stands to suffer a personal judgment against him that not only could be in excess of any existing liability coverage which he might have, but also could be in excess of the plaintiffs' uninsured/underinsured motorist insurance policy limits.

Where the rights of any or all of the parties to a case in which causes of action are joined will be prejudicially affected by joinder of the actions, the Courts have broad discretion in the interest of effective judicial administration to sever the causes of action. Bernstein v. Dwork, 320 So.2d 472 (Fla. 3rd DCA 1975); Roberts v. Keystone Trucking Co., 259 So.2d 171 (Fla. 4th DCA 1972). Based upon the high degree of prejudice and unworkable results that obtain from the joinder of the bad faith action and underlying uninsured motorist action, we would respectfully urge this Court to find that joinder of the actions is not permissible, and that the two actions must be litigated separately. The second certified question, if reached, should be answered in the negative.

QUESTION THREE:

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.

If this Court is not persuaded by the arguments made in the prior sections that the bad faith cause of action does not accrue prior to resolution of the underlying uninsured motorist action and further finds that the two actions can be jointly litigated, then State Farm would respectfully submit that this Court has agreed with the Third District's holding in Schimmel v. Aetna Casualty and Surety Company, supra, as applied to uninsured motorist cases in subsequent cases and therefore, the Schimmel case should be upheld and joinder should be mandatory. As noted by the Court in Schimmel, if the insurer's liability for bad faith failure to settle the underlying claim existed at the time that the underlying action was commenced, because the bad faith action had already accrued, and if joinder will not be prejudicial, then the actions must be joined. The rule announced in Schimmel is founded on the sound policy reason that the finality it establishes promotes greater stability in the law, avoids vexatious and multiple lawsuits and is consistent with the absolute necessity of bringing litigation to an end. Therefore, should this Court be persuaded that the bad faith action not only accrues prior to resolution of the underlying action, but in addition can be joined with the underlying action, then mandatory joinder should be required for the reasons stated in Schimmel. For the reasons expressed above, mandatory abatement of discovery

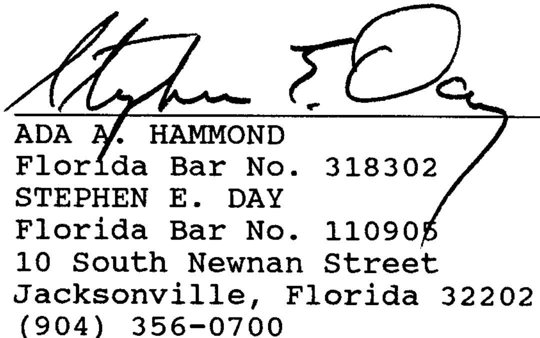
and trial on the bad faith case should also follow. The third certified question, if reached, should be answered in the affirmative, with the additional requirement for mandatory abatement of discovery and trial of the bad faith cause of action.

VIII. 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 and the Order of Dismissal of the Trial Court should be affirmed.

Respectfully submitted,

TAYLOR, DAY & RIO



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IX. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Rodney S. Margol, Esquire, C. Rufus Pennington, Esquire, Margol & Pennington, Suite 1702, American Heritage Tower, 76 South Laura Street, Jacksonville, Florida 32202, by U.S. Mail, this 6th day of August, 1990.

Attorney