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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.

______________________________/

JUL 12 1990
Deputy Clerk

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

INITIAL BRIEF OF PLAINTIFFS-APPELLANTS
(PARTIES MOVING FOR CERTIFICATION)

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Preface

The Eleventh Circuit has transferred the entire Record and the parties' previous briefs to this Court with the opinion certifying three dispositive questions of law. In order to preserve consistency, we have used the Eleventh Circuit's record citation system in this brief. Record references to pleadings and other court papers 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.

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I. Statement of the Case and of the Facts

The Procedural Background of the Case

As stated by the Eleventh Circuit Court of Appeals:

> Plaintiffs-appellants Donald and Patricia Blanchard, husband and wife, had an automobile insurance policy, providing $200,000.00 per person for uninsured motorist coverage, with defendant-appellee State Farm Automobile Insurance Company (State Farm). Donald Blanchard suffered permanent bodily injury when he was struck from behind while stopped on his bicycle at an intersection by an automobile driven by an uninsured motorist. Following State Farm's alleged refusal to make a good faith offer to settle the claim, the Blanchards filed a civil suit in the Fourth Judicial Circuit in and for Duval County, Florida.

(Slip opinion at 3118). Pursuant to Section 627.727, Florida Statutes (1985), the claim against the Blanchards' uninsured motorist carrier was brought in the same action as the claim against the tortfeasor (R1-1-3 through 4).

The case proceeded to trial and a verdict was returned in favor of Mr. and Mrs. Blanchard in the amount of $396,990[1] (R1-1-16 through 17; R1-1-Exhibit "E"). Judgment was entered against the tortfeasor in the full amount of damages (R1-1-Exhibit "E"). Judgment was entered against State Farm in the amount of the policy limits of $200,000 (R1-1-Exhibit "E"). As stated by the trial judge in the Final Judgment:

> This cause was tried before a jury which rendered a verdict on July 21, 1988. Said jury verdict fixed the total damages of Plaintiff, Donald E. Blanchard, Jr., at $386,000.00, and the total damages of Plaintiff, Patricia S. Blanchard, his wife, at $15,000.00. The said jury verdict also fixed the percentage of negligence attributable to Defendant [tortfeasor], William Benjamin Powell, at 99% and the percentage of negligence attributable to Plaintiff, Donald E. Blanchard, Jr., at 1%. Thereafter, Defendant, State

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[1]The jury assessed Mr. Blanchard's damages at $386,000 and Mrs. Blanchard's damages at $15,000. After reduction for the finding of one percent comparative negligence on the part of Don Blanchard, the total amount of recoverable damages was $396,990.

> Farm, scheduled a hearing on its motion to limit judgment against it on the grounds that said Defendant's insurance policy coverage limits are $100,000.00 under each of the two insurance policies involved herein, for a total "stacked" coverage limit of $200,000.00. No separate order will be entered on that motion. Plaintiffs do not dispute the said coverage limits; however, they contend that they also have a "bad faith" claim against their insurer, State Farm, in connection with failure to settle their claim prior to trial. That claim is not before the Court and will not be dealt with in any way in this Final Judgment.

(R1-1-Exhibit "E", page 1). No appeal was taken from the state court judgment.

The Blanchards then commenced suit against State Farm in the United States District Court for the Middle District of Florida pursuant to Section 624.155, Florida Statutes (1987) (the Florida "Civil Remedy" statute for first-party insurer bad faith) (R1-1-1 through 6). In the federal diversity action, the Blanchards sought damages for their inconvenience and anguish caused by State Farm's failure to make a good faith settlement offer; and for the excess of the damages assessed in the first action over the policy limits (R1-1-5).

State Farm moved to dismiss, contending that the statutory claim for bad faith under Section 624.155 was required to be asserted in the original state court action against State Farm for the contractual uninsured motorist benefits; and that plaintiffs had "split their cause of action" by not alleging the bad faith claim in the original suit (R1-5). The district court granted the motion (R1-21; R1-22), and Mr. and Mrs. Blanchard appealed to the Eleventh Circuit.

On appeal, the Blanchards and State Farm requested the Eleventh Circuit to certify the case to this Court. The Eleventh Circuit initially denied the motion, preferring to consider the briefs and oral arguments on the merits in order to determine whether the case

was truly appropriate for certification. Following briefing and argument of the case, the Eleventh Circuit ruled that it was "convinced that this question is appropriate for resolution by the Florida Supreme Court" (slip opinion at 3118). The questions certified by the Eleventh Circuit are as follows:

> 1. Does 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 accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits?
>
> 2. If so, is joinder of the claim under Section 624.155(1)(b)1. in the underlying litigation for contractual uninsured motorist benefits permissible?
>
> 3. If so, is joinder of the Section 624.155(1)(b)1. claim with the contractual claim mandatory?

The Eleventh Circuit noted that "[t]he phrasing of these questions is not intended to limit the Florida Supreme Court's consideration of the various problems encountered by parties litigating section 624.155(1)(b)1. claims." (Slip op. at 3120).

The Facts

Donald Blanchard was severely injured by the negligence of an uninsured motorist at a time when Mr. and Mrs. Blanchard had in full force and effect an automobile insurance policy with State Farm providing uninsured motorist ("UM") insurance coverage (R1-1-1 through 2).[2] The Blanchards, who had maintained their coverage with State Farm for

[2]On this appeal from an order dismissing a complaint, all well-pled allegations must be accepted as true. *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 411 (1986); *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *McClain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1980); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988).

several years before the accident, had promptly paid all premiums due under the policy (R-1-2). The policy provided $200,000 in UM coverage (R1-1-2).

Shortly after the accident, the Blanchards informed State Farm that Powell, the negligent motorist, did not have liability insurance coverage on the date of the accident and requested State Farm to submit the UM claim to arbitration (R1-1-2 through 3). Although the insurance policy provided for arbitration (R1-1-Exhibit "A", page 11), State Farm refused to arbitrate (R1-1-3). The Blanchards then requested State Farm to tender the applicable policy limits of $200,000; however, State Farm did not do so and, indeed, did not make any offer of settlement (R1-1-3).

Notwithstanding State Farm's refusal to consent to arbitration and notwithstanding the lack of any settlement offer in response to the Blanchards' request, Mr. Blanchard voluntarily submitted to an independent physical examination on December 10, 1986, performed by an orthopedic surgeon selected by State Farm (R1-1-3). As alleged in the complaint,

> The doctor who performed the examination, Georges El-Bahri, M.D., concluded that Mr. Blanchard had sustained a nineteen percent (19%) permanent impairment of the whole man. Mr. Blanchard's treating orthopedic surgeon, Jerome Jones, M.D. had previously concluded that Mr. Blanchard had sustained a twenty percent (20%) permanent impairment of the whole man.

(R1-1-3). Despite this independent confirmation of the extent of Mr. Blanchard's injuries, and despite State Farm's own investigation of the accident which determined that Mr. Blanchard was hit from behind by a motor vehicle while Mr. Blanchard was stopped on his bicycle at an intersection, State Farm continued to refuse to make any good faith offer to

settle the Blanchards' claims for an amount realistically reflecting the extent of the injuries (R1-1-3).

After State Farm refused to consent to arbitration and refused to make a good faith settlement offer, the Blanchards initiated the state court action against Powell and State Farm jointly (R1-1-3 through 4). While that action was pending, the Blanchards continued to try to settle their UM claim (R1-1-4). However, State Farm persisted in refusing to engage in good faith settlement negotiations (R1-1-4). Mr. and Mrs. Blanchard accordingly notified the Department of Insurance of the State of Florida of State Farm's violation of Section 624.155, Florida Statutes.[3]

During the sixty-day "grace period" under Section 624.155 (during which an insurance carrier may correct the statutory violation without incurring any additional liability), State Farm did not pay the UM benefits, nor did it attempt in good faith to settle Mr. and Mrs. Blanchard's claim (R1-1-4). As alleged in the complaint,

> Thereafter, the defendant [State Farm] continued its course of conduct in refusing to attempt in good faith to settle the claims when it could and should have done so, had it acted fairly and honestly towards the plaintiffs and with due regard for their interests. The defendant continued to engage in its bad faith refusal to make a reasonable offer of settlement ***through, and after, the trial*** of the aforesaid civil action.

(R1-1-4; emphasis added).

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[3]Section 624.155, Florida Statutes (1985), provides, *inter alia*:

> (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 toward its insured and with due regard for his interests.

The jury in the state court action assessed the damages at approximately twice the UM policy limits (R1-1-4).[4] In the bad faith suit, the Blanchards sought the difference between the judgment and their policy limits.[5] In addition, the Blanchards sought compensation for the mental anguish and humiliation caused by the needless litigation of the underlying claim and for the increased attorneys' fees and costs due to the unnecessary trial of the UM claim (R1-1-5).

II. Summary of the Argument

Issue One (Time of Accrual): By definition, a cause of action for bad faith mishandling of an insurance claim cannot occur until the bad faith occurs; the mere denial of a contractual claim does not thereby immediately create a bad faith cause of action (otherwise, every claim for insurance benefits would result in a claim for extra-contractual damages). Rather, a claim for bad faith necessarily requires some wrongful conduct on the part of the insurer *after* the incident giving rise to the contractual claim has occurred. Accordingly, it is impossible for the bad faith cause of action to accrue until sometime after the contractual action has ripened. Indeed, this is consistent with the well-

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[4]As noted above, the judgment against State Farm was limited to the amount of the policy limits ($200,000), without prejudice to the Blanchards' right to bring a separate bad faith action to recover the excess damages over the policy limits (R1-1-4 through 4 & Exhibit "E").

[5]The excess of the actual damages over the uninsured motorist insurance policy limits is recognized as an appropriate element of damages in an action against the UM carrier for its failure to settle in good faith. *Jones v. Continental Ins. Co.*, 716 F. Supp. 1456 (S.D. Fla. 1989). *See also Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263 (Fla. 5th DCA 1987).

established law that a third party bad faith action does not accrue until after an excess verdict has been recovered.

Issue Two (Permissive Joinder): If the Court were to conclude that a cause of action for bad faith failure to settle *does* mature before resolution of the underlying litigation, then under the liberal rules of joinder of claims, the *permissive* joinder of a bad faith claim with a contractual claim should be authorized. However, sound policy reasons would militate against permitting joinder in such situations.

Issue Three (Mandatory Joinder): If the Court were to find that a cause of action for bad faith accrues *before* resolution of the underlying contractual dispute *and* that joinder of contractual and bad faith claims is permitted, then the Court must decide whether such joinder is mandatory. Because permissively joined causes of action need not necessarily be joined, it is clear that there is no reason to mandatorily require the simultaneous litigation of such disputes.

III. Argument

Question One:
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 Insurance Benefits.

As the Eleventh Circuit noted, there is "a division in the reasoning among the Florida district courts of appeal" (slip op. at 3119) on the issue of when a statutory cause of action for bad faith under Section 624.155 arises. On one hand, several courts have held that the conduct which gives rise to the claim for bad faith (i.e., the wrongful failure to settle) is separate and independent from the act which gives rise to the contractual claim (i.e., the

payment of premiums and subsequent injury). *See, e.g., Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263 (5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988); *Rowland v. Safeco Ins. Co. of Am.*, 634 F. Supp. 613 (M.D. Fla. 1986); *State Farm Mut. Automobile Ins. Co. v. Lenard*, 531 So.2d 180 (Fla. 2d DCA 1988). The contrary view has been expressed by the Third District in *Schimmel v. Aetna Casualty & Sur. Co.*, 506 So.2d 1162 (Fla. 3d DCA 1987). *Schimmel* held that a cause of action under Section 624.155 is indivisible from the underlying contractual cause of action and, accordingly, a plaintiff who fails to sue the defendant insurer for bad faith in *any* contractual claim has "split his cause of action" if suit is later brought under Section 624.155. The United States District Court in the present case found the rule in *Schimmel* to be "formalistic," but nevertheless applied *Schimmel* to dismiss Mr. and Mrs. Blanchard's claim. The Eleventh Circuit, on the other hand, found the conflict between *Schimmel* and the other cases to be troubling (Slip op. at 3119), and that "[t]he conflict among the district courts of appeal apparently causes hardship for plaintiffs and insurance carriers: plaintiffs are compelled to raise bad faith claims in all insurance disputes and insurance carriers must defend, at least preliminarily, bad faith claims in routine cases." (Slip op. at 3119).

A. Logic and Established Precedent Dictate that a Cause of Action Under Section 624.155 Arises Independently of the Underlying Contractual Claim.

By certifying this issue as dispositive, the Eleventh Circuit recognized that the present case turns on the issue of *when an action for a violation of Section 624.155(1)(b)1. arises*. For if such a cause of action arises independently of the contractual claim, then a plaintiff cannot "split the cause of action" by bringing separate suits for the two causes of action. On the other hand, if the Section 624.155 cause of action accrues at the same

time that the contractual claim arises, then at least one of the requirements for the doctrine of "splitting causes of action" would apply. Thus, the initial issue is the *timing* of when a Section 624.155 claim matures. This issue was squarely decided in *Rowland v. Safeco Ins. Co. of Am.*, 634 F. Supp. 613 (M.D. Fla. 1986).

In *Rowland*, the plaintiffs originally presented a claim for UM coverage to their insurer, Safeco. When Safeco failed to respond in a timely manner to the plaintiffs' demands, the Rowlands filed suit in state court and obtained a declaratory judgment determining the extent of coverage. The plaintiffs subsequently filed a separate suit in federal district court under Section 624.155. Safeco moved to dismiss, arguing, among other things, that Section 624.155 could not be applied retroactively (Section 624.155 had become effective in 1982, after the Safeco policy was issued and after the accident occurred). Thus, in *Rowland*, the court was presented with the issue of what circumstances give rise to the accrual of a cause of action for a violation of Section 624.155 -- i.e., does the cause of action arise at the same time and out of the same facts as the underlying claim for UM benefits; or does it arise ***independently*** of the underlying cause of action? The court ruled that the cause of action for bad faith refusal to settle arises independently of the underlying claim for UM benefits:

> Safeco first argues that Fla. Stat. § 624.155 may not be applied retroactively to this case. The statute became effective in 1982. Safeco apparently contends that the instant cause of action arose in 1980 when the accident occurred or before 1980 when the policy was issued. The Court need not decide whether the statute can be applied retroactively because ***a cause of action for bad faith refusal to pay first party claims arises when the alleged bad faith actions occur, not when the policy was issued or the accident occurred.*** *See* Couch on Insurance 2d, § 58.7 (1983). In this case, plaintiffs sent the first demand letter in August of 1983. Plaintiffs allege that Safeco's actions in handling the demand, occurring between 1983 and

> 1985, constituted bad faith refusal to pay. ***Therefore, the cause of action arose sometime between 1983 and 1985 when, allegedly, the insurer unreasonably failed to pay the claim.***

Rowland, 634 F.Supp at 614 (emphasis added).

The result in *Rowland* is supported by the holding of the Fifth District Court of Appeal in *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263 (5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988). In *Opperman*, the court was presented with the issue of whether a Section 624.155 claim was distinct from the underlying contractual claim so as to be separately appealable. The Oppermans brought a two count complaint against their uninsured motorist carrier after recovering an arbitration award in excess of the UM policy limits. In one count, they sought enforcement of the arbitration award; in the second count, they sought to recover the excess of the arbitration award over the policy limits and other non-contractual damages under Section 624.155 for the UM carrier's alleged bad faith refusal to settle. The trial court dismissed the Section 624.155 claim, but allowed the count to enforce the arbitration award to remain pending; and the Oppermans took an immediate appeal of the dismissal of the bad faith claim. The appellate court was thus presented with the issue of whether the dismissal of the bad faith count was an unappealable interlocutory ruling, or whether it was instead an appealable final dismissal of a distinct and severable cause of action. The Fifth District held that the bad faith claim was distinct, and that the court therefore had appellate jurisdiction, stating:

> A final order which adjudicates a ***distinct and severable cause of action, not interrelated with the remaining claims*** pending in the trial court is appealable as a final order. *Mendez v. West Flagler Family Association*, 303 So.2d 1 (Fla. 1974).

515 So.2d at 264 n.1 (emphasis added).

The view that the Section 624.155 cause of action arises independently of the contractual claim has also been endorsed by the Second District Court of Appeal. *State Farm Mut. Auto. Ins. Co. v. Lenard*, 531 So.2d 180 (Fla. 2d DCA 1988). In *Lenard*, plaintiffs brought suit against their auto insurance carrier, State Farm, for UM benefits. While the suit was pending, but before a final judgment was obtained, the Lenards were permitted to amend their complaint to state a claim against State Farm under Section 624.155. State Farm sought review of the order permitting the Section 624.155 claim by way of petition for writ of certiorari, contending that the trial court had caused irremediable injury by permitting the amendment.[6] The court was therefore faced with the issue of whether the underlying UM claim and the section 624.155 claim "arose out of a single incident" within the meaning of *Schimmel* so as to require their joinder. The Second District disagreed with *Schimmel* and held that it did **not** require the simultaneous assertion of the bad faith claim in the underlying action:

> The question thus arises: What is a "single incident" for calculating when to file an action under section 624.155? In *Fortson v. St. Paul Fire & Marine Insurance Co.*, 751 F.2d 1157 (11th Cir. 1985), a case the *Schimmel* panel considered distinguishable, the court noted that the legislature, in enacting the statute, had provided no guidance on this point, though the panel concluded that "[a]t the very least" no bad faith action should precede the underlying tort action. 751 F.2d at 1160. Subsequently, another federal court, addressing a claim of retroactive application of the statute, noted that "a cause of action for bad faith refusal to pay first party claims arises when the alleged bad faith actions occur, not when the policy was issued or the

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[6]Ironically, when the shoe is on the other foot, State Farm argues that a Section 624.155 claim is premature until the underlying suit is resolved. If Mr. and Mrs. Blanchard had sought leave to assert the Section 624.155 claim in the first suit, there is little doubt that State Farm would have petitioned for certiorari review, claiming "irreparable injury," as State Farm argued in *Lenard*.

> accident occurred." *Rowland v. Safeco Insurance Co. of America*, 634 F. Supp. 613, 614 (M.D. Fla. 1986).
>
> We have no quarrel with the conclusion in *Schimmel* that the liability of Aetna for bad faith arose contemporaneously with Aetna's breach of the Schimmels' insurance contract. However, the situation in *Opperman v. Nationwide Mutual Fire Insurance Co.*, 515 So.2d 263 (Fla. 5th DCA 1987), *petition for review denied*, 523 So.2d 578 (Fla. 1988), is more akin to the present case in that the insurer and insured failed to reach agreement on the amount of damages suffered. In *Opperman* the matter was referred to arbitration, at which a substantial sum was awarded, and the insured sued to confirm the arbitration award and for bad faith refusal to settle. That second count was dismissed because the trial court believed Florida law did not recognize a first party cause of action for bad faith, and Opperman appealed.
>
> The district court, reversing, described the bad faith claim as "independent," justifying immediate acceptance of jurisdiction pursuant to *Mendez v. West Flagler Family Assn.*, 303 So.2d 1 (Fla. 1974). Although the issue of when the action should be filed was not before the court in *Opperman*, its citation to *Mendez* strongly suggests it did not perceive a "single incident" stemming from the refusal to settle and the underlying tort. *Cf. Rowland.* Although the two actions in *Opperman* could be brought simultaneously, they were distinct and severable.
>
> ***We remain unconvinced that the Lenards had to assert their bad faith claim simultaneously with their other claims.***

Lenard, 531 So.2d at 181-82 (emphasis added).

Therefore, the Second District Court of Appeal has recognized that joinder of a factually independent bad faith claim with an underlying UM claim is ***not*** required. *Lenard* and *Rowland* directly address the issue of when a first party cause of action under Section 624.155 accrues. *Opperman* addresses the issue of whether the Section 624.155 claim is distinct and severable from the underlying UM cause of action. Although this Court certainly has the authority to reject these cases, we respectfully submit that Judge Melton's opinion in *Rowland* and the Second and Fifth District's decisions in *Lenard* and

Opperman are thoughtful and correct statements of the law. They are, moreover, consistent with the decisions regarding the accrual of *third-party* actions under Section 624.155.

In *Fortson v. Saint Paul Fire & Marine Ins. Co.*, 751 F.2d 1157 (11th Cir. 1985), the court affirmed an order dismissing the plaintiff's Section 624.155 claim against a defendant physician's liability insurance carrier as premature -- until the underlying medical malpractice claim was resolved. Likewise, in *Romano v. American Casualty Co. of Reading, Pa.*, 834 F.2d 968 (11th Cir. 1987), the court held that a Section 624.155 claim for a disability carrier's failure to settle an auto accident claim was premature and properly dismissed. This was true despite the entry of a final judgment in excess of the policy limits, because the judgment was still under appellate review:

> The basis of a bad faith suit is a judgment in excess of policy limits, absent which, the very essence of the appellant's claims is lacking, a rule clearly enunciated by this circuit in *Clement v. Prudential Property & Casualty Ins. Co.*, 790 F.2d 1545, 1548 (11th Cir. 1986). "The Supreme Court of Florida clearly held in [*Fidelity & Casualty Co. of N.Y. v.*] *Cope*, [462 So.2d 459 (Fla. 1985),] however, that if an insured is no longer exposed to any loss in excess of the limits of his liability insurance policy, he no longer has any claim he might previously have had against his insurance company for bad faith failure to settle within the policy limits." If Mr. Romano's negligence action is reversed on appeal, he will no longer be exposed to any loss in excess of his policy limits. Since the basis for his bad faith action will have dissipated, his entire claim will be extinguished.
>
> Because the essential element of the appellant's claim may be reversed on appeal, it is logical to require its disposition before it may form the basis for another claim.

Romano, 834 F.2d at 969-70.

Section 624.155 was intended to place UM insurance carriers on the same footing as liability carriers (so that an injured party's own carrier would not be allowed to deny

the claim in bad faith and escape extra-contractual exposure, while the injured party's *adversary's* liability carrier would be induced to enter into good faith settlement negotiations because of potential exposure for damages in excess of the policy limits). Many cases, as well as the legislative history of Section 624.155, indicate that one purpose of Section 624.155 was to hold UM carriers to the same duty of good faith as liability carriers; and to require UM carriers to be subject to the same sanctions as liability insurers -- i.e., payment of the excess verdict plus consequential damages. *See Jones v. Continental Ins. Co.*, 670 F. Supp. 937, 941 (S.D. Fla. 1987), *after appeal and remand*, 716 F. Supp. 1456 (S.D. Fla. 1989); *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263 (5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988); Staff Report, 1982 Ins. Code Sunset Revision (HB 4F; as amended HB 10G) (June 3, 1982). *See also United Guaranty Residential Ins. Co. of Iowa v. Alliance Mtg. Co.*, 644 F. Supp. 339, 342 n.4 (M.D. Fla. 1986); *Rowland, supra*, 634 F. Supp. at 615.

Thus, except for *Schimmel*, the courts have consistently held that bad faith actions (specifically including Section 624.155 actions and even more specifically including first-party Section 624.155 actions) do not accrue until after resolution of the underlying contractual claim -- and clearly, they do not accrue until the bad faith conduct giving rise to the violation occurs. Ironically, the *Schimmel* opinion itself contains an excellent discussion of the *res judicata* principles applicable to the defense of "splitting a cause of action":

> The rule against splitting causes of action requires that 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. *Gaynon v. Statum*, 151 Fla. 793, 10 So.2d 432 (1942). *Beck v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 279 So.2d

> 377 (Fla. 3d DCA 1973). The rule is founded on the sound policy reason that the finality it establishes promotes greater stability in the law, avoids vexatious and multiple lawsuits arising out of a single incident, and is consistent with the absolute necessity of bringing litigation to an end. *McKibben v. Zamora*, 358 So.2d 866, 868 (Fla. 3d DCA 1978)(citing *Mims v. Reid*, 98 So.2d 498 (Fla. 1957)). Application of the rule is ***restricted*** to claims which are part of ***a single and indivisible cause of action***, therefore, a plaintiff who is not authorized to join two or more claims cannot later be met with the defense that he split his cause of action. 1A C.J.S. Actions §179(a) (1985). Moreover, because the rule is one made by the courts, it would not be applied if doing so would frustrate the law or result in injustice. *See generally* 1 Fla. Jur. 2d Actions §58 (1977).

506 So.2d at 1164 (emphasis added). Thus, even under the analysis of the *Schimmel* panel, Mr. and Mrs. Blanchard would have split their cause of action only if all of the damages claimed in the second action and in the underlying lawsuit were sustained as a result of "a single wrongful act" and if both suits were "part of a single and indivisible cause of action." Because the Blanchards' ***cause of action for bad faith refusal to pay first party claims*** did not arise until ***the time that the alleged bad faith actions occurred***, i.e., not only before the trial but ***during*** and ***after*** the trial of the underlying litigation, the Blanchards could not possibly have "split their cause of action" by failing to join the bad faith claims in the suit for UM benefits.

B. The Rule in *Schimmel* Is Not Only Incorrect, It also Causes Absurd Results.

We respectfully submit that, based upon established precedent and the principles of *res judicata* applicable to splitting causes of action, *Schimmel* is incorrectly decided and should be disapproved. However, there are also practical considerations which illustrate the difficulty in mandating litigation of bad faith claims simultaneously with the underlying contractual claims. Shortly after it decided *Schimmel*, the Third District was confronted

with problems created by the logical extension of its holding. Plaintiffs began to assert claims for bad faith in conjunction with routine contract claims, arguing that under *Schimmel* they were not only permitted to do so, but indeed were *required* to litigate the bad faith claims in the same proceeding as the contract claim. Thus, juries would be required to consider not only the underlying issues of fault and damages (in the UM context), but also the reasonableness of the insurance adjuster's offers and conduct, the credibility of the plaintiff's attorneys, and so forth. At the time *Schimmel* was decided, the law was unclear as to whether a plaintiff in a Section 624.155 suit could obtain discovery of the defendant insurer's investigation file. Faced with the intolerable problems caused by trying bad faith claims together with the underlying disputes, the Third District chose not to recede from *Schimmel*, but instead anomalously ruled that, after the bad faith and underlying actions were ***mandatorily joined***, they would be ***mandatorily abated.*** *Allstate Ins. Co. v. Lovell*, 530 So.2d 1106 (Fla. 3d DCA 1988); *Independent Fire Ins. 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). Other courts, however, held that when a bad faith claim could be *permissibly* joined with the underlying claim, abatement was *not* necessary. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Kelly*, 533 So.2d 787 (Fla. 4th DCA 1988).

After *Schimmel* and *Lovell* were decided, this Court ruled that the defendant insurer's investigation file does not automatically lose its status as attorney work product in the Section 624.155 proceeding; and that, if the requested documents otherwise constitute work product, then the Section 624.155 plaintiff must meet the required showing to overcome that discovery privilege. *Kujawa v. Manhattan Nat'l Life Ins. Co.*, 541 So.2d

1168 (Fla. 1989). Several courts have ruled that, post-*Kujawa*, abatement of the bad faith suit is no longer required. *Royal Ins. Co. of Am. v. Zayas Men's Shop, Inc.*, 551 So.2d 553 (Fla. 3d DCA 1989); *Allstate Ins. Co. v. Melendez*, 550 So.2d 156 (Fla. 5th DCA 1989); *United Serv. Auto. Ass'n v. Grant*, 555 So.2d 892 (Fla. 1st DCA 1990).

Thus, to summarize the confusion generated by *Schimmel*: pre-*Kujawa*, the Third District was of the view that a Section 624.155 claim must necessarily be joined with the underlying claim in order to avoid splitting the cause of action, but that, once joined, the Section 624.155 claim must necessarily be abated; other courts were of the view that a Section 624.155 claim might permissibly be joined (although only the Third District ruled that joinder was mandatory), but abatement was not necessarily required; and post-*Kujawa*, the courts have held that, whether joinder is permitted, required or disallowed, there is no longer any need to abate the Section 624.155 claim. The continuing effect of *Schimmel* after *Kujawa* is that not only are "plaintiffs ... compelled to raise bad faith claims in all insurance disputes and insurance carriers [to] defend ... bad faith claims in routine cases," (slip op. at 3119), but these claims are actually ***tried together*** to the jury. This preposterous state of the law has led to the rather unique result that State Farm and the Blanchards agree that a bad faith claim does not accrue before the conclusion of the underlying litigation for UM insurance benefits. We urge the Court to disapprove *Schimmel* and to restore order to this area of the law.

Question Two:
Joinder of the Claim Under Section 624.155(1)(b)1. in the Underlying Litigation for Contractual Uninsured Motorist Benefits May Be Permissible, if the Cause of Action has Accrued; However, It Is Not Mandatory.

In its motion to dismiss the complaint, State Farm relied upon several cases which have allowed the ***permissive*** joinder of a Section 624.155 claim with the underlying claim. *E.g., State Farm Mut. Auto. Ins. Co. v. Kelly*, 533 So.2d 787 (Fla. 4th DCA 1988); *State Farm Mut. Auto. Ins. Co. v. Lenard*, 531 So.2d 180 (Fla. 2d DCA 1988). But the issue of whether separate and distinct claims may be permissibly joined in a single lawsuit under Rules 8 and 18, Federal Rules of Civil Procedure, or Rule 1.110, Florida Rules of Civil Procedure, is, of course, a wholly distinct issue from the question of whether joinder is mandatory and a cause of action has been split. *See* 3A Moore's Federal Practice ¶18.04[1].

Because both the Florida and federal rules allow permissive joinder for virtually any claim that a plaintiff may have against a defendant, this question really turns on whether the cause of action exists in order to form the basis for a claim. Assuming that the Court has answered the first certified question in the affirmative (and held that the Section 624.155 claim accrues *before* the underlying claim is resolved), then permissive joinder would seem authorized by the rules of procedure. However, it would clearly cause the pernicious results discussed in our argument on Question Three below.

Question Three:
Joinder of the Section 624.155(1)(b)1. Claim with the Contractual Claim Is Not and Should Not Be Mandatory Under Florida Law.

While, under the many cases discussed above, it is clear that the claim for bad faith arises independently of the underlying claim, this court should also consider the mischief

that would result from a contrary holding.[5] Requiring (as opposed to permitting) the joinder of a claim for a Section 624.155 violation with the underlying uninsured motorist claim would do the following:

> 1. The trier of fact in the auto collision case would also receive testimony from the defendant's insurance adjusters regarding their opinions as to liability, causation and damages.
>
> 2. The rule prohibiting evidence of offers of settlement in auto cases would be disregarded, as a central issue would be the reasonableness of the defendant's efforts to settle the very claim which is being litigated.
>
> 3. The defendant's own conduct during the trial would be an issue for the trier of fact -- presumably, the defendant's claims representatives would testify as to the current status of negotiations as they occurred.
>
> 4. After the jury's verdict on the bad faith claim, relevant evidence would still continue to be created if the defendant failed to settle the claim -- would the jury be reconvened to modify their verdict based on post-trial conduct?

These absurd consequences of joining a bad faith claim with the underlying claim are no doubt what led the *Schimmel* court to later rule that abatement of the Section 624.155 claim is ***mandatory***. More fundamentally, however, they point out why it was illogical in the first instance to conclude that the bad faith claim under Section 624.155 arises out of the same transaction as the underlying contractual claim for benefits. The two involve completely different types of proof and legal standards for recovery. Indeed, if the bad faith claim must be abated pending resolution of the underlying UM claim (presumably because the bad faith claim has not yet ripened), then by definition one could not be guilty of splitting a cause of action by failing to join the two claims. *See, e.g., Homestead Fire*

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[5]As the *Schimmel* court noted, the rule against splitting causes of action "would not be applied if doing so would frustrate the law or result in injustice." 506 So. 2d at 1164.

Ins. Co. v. Andian Corp., 164 So. 187 (Fla. 1935); 1 Fla. Jur. 2d *Actions* §§ 63, 64. Surely, the interests of the administration of justice would best be served by permitting the resolution of the underlying contractual insurance dispute before requiring the parties to litigate issues of potential bad faith.

IV. Conclusion

For the foregoing reasons, plaintiffs-appellants submit that the first certified question should be answered in the negative; that, if the Court reaches the second certified question, then it should be answered in the affirmative; and that, if the Court reaches the third certified question, it should be answered in the negative.

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V. Certificate Of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Stephen E. Day, Esquire, and Ada A. Hammond, Esquire, Taylor, Day & Rio, 10 South Newnan Street, Jacksonville, Florida 32202, by U.S. Mail this 11th day of July, 1990.

____
Attorney