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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,089

ROBERT McLEOD, individually and
as personal representative of the
Estate of MONZELLE KAY McLEOD,

Petitioner,

vs.

CONTINENTAL INSURANCE COMPANY,

Respondent.

______________________________/

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM
THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

BRIEF OF AMICUS CURIAE,
ACADEMY OF FLORIDA TRIAL LAWYERS

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I.
INTRODUCTION

This brief is filed by amicus curiae, The Academy of Florida Trial Lawyers, in support of the position of the petitioner, plaintiff below, Robert McLeod. It will address only the question certified to this Court by the district court. And because that question will be argued at considerable length by the parties, our argument here will be brief and to the point.

II.
SUMMARY OF THE ARGUMENT

The issue here is the meaning of the ambiguous word "damages" in §624.155, Fla. Stat. (1985). In the classic *third*-party bad faith action, it is clear that the plaintiff's "damages" include the "excess judgment" obtained against the insured, notwithstanding that such a judgment is in excess of the insurer's policy limits. The question presented here is whether the word means essentially the same thing in the context of the new cause of action created by the statute for *first*-party bad faith claims. The District Court held that it did not; it construed the word "damages" narrowly, limiting it to compensatory damages proximately caused by the insurer's bad faith. In our judgment, this construction is inconsistent with the legislative history of the statute; it also renders the statute toothless, and therefore essentially meaningless as a deterrent for the conduct which the statute proscribes.

The legislative history of the statute says nothing about "consequential damages." It says that "the *sanction* [for bad faith in handling first-party claims] is that the company is subject to a judgment in excess of the policy limits" (emphasis supplied). There is a considerable difference between the two things, and recognition of the difference is critical if the purpose of the statute is to be served. Before the statute was enacted, an insurer which breached its contract with a first-party claimant, whether in good faith or in bad faith, was subject only to a common law action for breach of contract in which the insured could recover all the consequential damages caused by the breach. And because the insurer's ultimate exposure was the same whether its breach was in good faith or in bad faith, this remedial scheme obviously provided no deterrent whatsoever to handling first-party claims in bad faith. To deter bad faith, something more was obviously required -- some type of "sanction" (above and beyond the consequential damages recoverable in a breach of contract action) to motivate insurers to conform their conduct to the new duty created by the statute. That, we believe, is what the legislature meant when it stated that "the *sanction* is that a company is subject to a judgment in excess of policy limits," because the statute simply has no teeth in it if the measure of damages is the same for both good faith and bad faith breaches of contract.

Under the district court's reading of the statute, no consequence attaches to an insurer's bad faith, and the duty to exercise good faith has therefore been reduced to a mere paper duty which can be breached at will, without consequence. In our judgment, this reading of the statute defeats its obvious purpose, and the district court should therefore have focused on the word "sanction." And when that word is given the obvious meaning that it conveys, we think this Court must conclude that the result reached in *Jones v. Continental Insurance Co.*, 716 F. Supp. 1456 (S.D. Fla. 1989), *appeal pending* (and question certified to this Court at 4 FLW Fed. C2037), rather than the result reached below, is the *only* result which both squares with the legislative history and effects the purpose of the statute.

III.
ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE "DAMAGES" RECOVERABLE IN A FIRST-PARTY "BAD FAITH" ACTION AUTHORIZED BY §624.155, FLA. STAT. (1985), ARE LIMITED TO CONSEQUENTIAL DAMAGES AND DO NOT INCLUDE THE EXTRA-CONSEQUENTIAL "SANCTION" OF LIABILITY FOR THE INSURED'S TOTAL DAMAGES IN EXCESS OF POLICY LIMITS.

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The legal background to the issue presented here is non-controversial, so it can be summarized briefly without extensive supporting citations. For more than half a century, Florida courts have imposed a duty upon liability insurers to act in good faith when defending their insureds against *third*-party claims; they have authorized actions by both insureds and judgment creditors of insureds against insurers who have dealt in bad faith with their insureds; and the measure of damages has always been the "excess judgment" obtained against the insured, notwithstanding that such a judgment was in excess of the insurer's contractual policy limits. *See, e. g., Auto Mut. Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938); *Thompson v. Commercial Union Insurance Co. of New York*, 250 So.2d 259 (Fla. 1971); *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980). However, with respect to *first*-party claims (like the uninsured motorists coverage claim in issue here), Florida courts declined to impose a duty of good faith upon insurers; insureds were limited to actions for breach of contract; and the measure of damages was therefore limited to the insurer's contractual policy limits (plus costs and, where statutorily authorized, attorney's fees). *See, e. g., Baxter v. Royal Indemnity Co.*, 285 So.2d 652 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d 725 (Fla. 1975).

In 1982, the legislature corrected this anomalous situation by enacting the statute in issue here -- §624.155, Fla. Stat. (1982 Supp.) -- and thereby required insurers to act in good faith at *all* times when dealing with their insureds, whether defending them against claims by third parties or dealing with them directly on first-party claims. The pertinent portions of the version of that statute which governs the instant case read as follows:

> (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:

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> 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;
>
> . . . .
>
> (3) Upon adverse adjudication at trial or upon appeal, the insurer shall be liable for *damages*, together with court costs and reasonable attorney's fees incurred by the plaintiff.

Section 624.155, Fla. Stat. (1985) (emphasis supplied).

We have emphasized two sets of words in the portions of the statute quoted above. At least with respect to first-party claims like the claim in issue here, the first set of words has presented no problems of construction. Courts have held that the phrase "any person" is plain and unambiguous; that it means "any person;" and that the statute therefore authorizes what the courts had theretofore declined to recognize -- a cause of action for bad faith in the handling of *first*-party claims. *See, e. g., Opperman v. Nationwide Mutual Fire Insurance Co.*, 515 So.2d 263 (Fla. 5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988); *Cardenas v. Miami-Dade Yellow Cab Co.*, 538 So.2d 491 (Fla. 3rd DCA), *review dismissed*, 549 So.2d 1013 (Fla. 1989); *Hollar v. International Bankers Insurance Co.*, 15 FLW D2888 (Fla. 3rd DCA Nov. 27, 1990); *Allstate Insurance Co. v. Melendez*, 550 So.2d 156 (Fla. 5th DCA 1989). *Cf. Kujawa v. Manhattan National Life Insurance Co.*, 541 So.2d 1168 (Fla. 1989).[1/]

[1/] There *has* been some confusion as to whether the phrase "any person" brings *third*-party bad faith claims within the ambit of the statute. In *Cardenas, supra*, the Third District held that the statute applied *only* to first-party bad faith claims, and that third-party bad faith claims were governed exclusively by the common law. More recently, however, in *Hollar, supra* at D2888, the Third District held that the statute "provides a cumulative and supplemental remedy for third-party bad faith actions." The Court need not resolve this apparent inconsistency in the instant case, because only a *first*-party claim is in issue here. We mention it simply as a qualification upon our statement in the text. The inconsistency may have been resolved in any event by versions of the statute subsequent to the version initially construed in *Cardenas*, which make specific reference to third-party bad faith actions.

The second aspect of the statute emphasized above -- the word "damages" -- can lay no similar claim to being plain and unambiguous, and it is the meaning of this ambiguous word which is, of course, the issue here. It is clear enough in the classic *third*-party bad faith action that the plaintiff's "damages" include the "excess judgment" obtained against the insured, notwithstanding that such a judgment is in excess of the insurer's contractual policy limits. *See Hollar v. International Bankers Insurance Co.*, 15 FLW D2888 (Fla. 3rd DCA Nov. 27, 1990). Indeed, given the half-century of decisional law on this point, to read the word in any other fashion would be nonsensical. The question presented here is whether the word means essentially the same thing in the context of the new cause of action created by the statute for *first*-party bad faith claims -- i. e., whether a first-party claimant can recover his total damages in excess of the insurer's contractual policy limits when his insurer has handled his claim in bad faith. Because the word is ambiguous, it remains for this Court to examine the legislative history of the statute, and to give the word a construction which is consistent with that intent, and one which will effect the purpose of the statute.

The legislative history of the statute is brief:

> [Section 624.155] requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.

Staff Report, 1982 Insurance Code Sunset Revision (HB 4S; as amended HB 10G) (June 3, 1982).

Although this single paragraph is itself hardly plain and unambiguous on the point, we think it was given a fair reading, and that its thrust was properly discerned, in *Jones v. Continental Insurance Co.*, 716 F. Supp. 1456, 1460 (S.D. Fla. 1989), *appeal pending* (and question certified to this Court at 4 FLW Fed. C2037), as follows:

> The Legislature's comments support the conclusion that it

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intended the full contours of the statute to be determined by reference to general principles of Florida insurance law including third-party doctrine. *Jones v. Continental*, 670 F. Supp. at 944. As this Court stated previously:

> It would be an illogical anomaly to permit an insurance company to proceed to arbitration even though it knew prior to arbitration that it had no reasonable defense to payment, while holding another insurance company liable for bad faith for proceeding to trial when it knew prior to trial that liability was reasonably clear. *The damages to the insured will be the same in either case and the policy reasons for imposing bad faith liability would be easily thwarted.*

Jones v. Continental, 670 F. Supp. at 945 (emphasis supplied).

Thus, the statute's purpose is to provide the same remedy in both first-party and third-party bad faith claims -- the excess award. In fact, Florida courts which have construed the statute have looked to third-party bad faith law as the basis for their decisions. [Footnote omitted]. Moreover, some Florida courts have ruled specifically that an excess arbitration award may be recovered as damages under the statute in a first-party suit. *Wahl v. Insurance Co. of North America*, No. 87-1187-CA-17, (19th Fla. Cir. Ct. June 6, 1989); *Fidelity & Casualty Insurance Co. v. Taylor*, No. 84-1884 (11th Fla. Cir. Ct. Nov. 4, 1988).

Since the jury found Defendant Continental guilty of statutory bad faith, plaintiffs are entitled as a matter of law to recover this excess amount from their insurer. . . .

In short, the court concluded that, without the extra-consequential *sanction* of "the excess award" for bad faith handling of the first-party claim, the duty of good faith imposed by the new statute would be essentially meaningless.[2] We will have more to say about this sensible conclusion in a moment; however, we will digress briefly to examine the reasoning which led to the contrary conclusion reached by the district court in the

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[2] Although the issue was not squarely presented in *Opperman v. Nationwide Mutual Fire Insurance Co.*, 515 So.2d 263 (Fla. 5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988), the conclusion reached in *Jones* is at least implicit in the Fifth District's resolution of that case.

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decision under review.

In the decision under review -- *McLeod v. Continental Insurance Co.*, 15 FLW D2785, D2786 (Fla. 2nd DCA Nov. 14, 1990) -- the district court observed:

> . . . Fundamental differences between third and first-party bad faith actions render damages that are appropriate for one inappropriate for the other. Because of those differences the rationale underlying the measure of damages in a third-party bad faith action does not apply to such an action in a first-party setting.

The district court then explained that the excess judgment which is recoverable in a third-party bad faith action is a *consequence* of the insurer's bad faith and therefore recoverable as *compensatory* damages caused by the bad faith, but the "excess award" sought in a first-party bad faith action has not been caused by the insurer's bad faith and the plaintiff has not suffered any damages because of the bad faith for which he should be compensated. The court then read the word "damages" in the statute narrowly, construing it to be limited to compensatory damages proximately caused by the insurer's bad faith. This analysis of the difference between third-party and first-party bad faith actions, at least with respect to the question of the amount of damages proximately caused by the bad faith, is undeniably correct -- but we think it ignores the legislative history of the statute, and misses the point of the statute altogether.

The legislative history of the statute says nothing about consequential damages or compensating first-party claimants for damages proximately caused by the insurer's bad faith. It says something entirely different. It says that "the *sanction* [for failing to settle in good faith] is that the company is subject to a judgment in excess of policy limits" (emphasis supplied). The district court finessed this sentence as follows:

> . . . In saying "the sanction is that the company is subject to a judgment in excess of the policy limits," it is merely stating that an uninsured motorist insurer may be liable in excess of its policy limits in cases where the insured's underlying tort claim exhausts its policy limits and the insurer becomes liable for additional consequential damages.

15 FLW at D2786-87. The difficulty with this finesse is that the legislative history says nothing about "consequential damages" in excess of policy limits; it says that a "*sanction*" is in order in excess of policy limits to effect the purpose of the statute. There is a considerable difference between the two things, of course, and recognition of the difference is critical if the purpose of the statute is to be served.

Before the statute was enacted, an insurer which breached its contract with a first-party claimant, whether in good faith or in bad faith (and no matter how outrageous the bad faith), was subject only to a common law action for breach of contract in which the insured could recover all the consequential damages caused by the breach (and such a recovery, because it could include both costs and attorney's fees in appropriate circumstances, could exceed the policy limits to some extent). And because the insurer's ultimate exposure was the same whether its breach was in good faith or in bad faith, this remedial scheme obviously provided no deterrent whatsoever to handling first-party claims in bad faith. To deter bad faith, something more was obviously required -- a statutory duty to settle first-party claims in good faith, accompanied by a "sanction" (above and beyond the consequential damages recoverable in a breach of contract action) to motivate insurers to conform their conduct to this new duty. That, we believe, is what the legislature meant when it stated that "the *sanction* is that a company is subject to a judgment in excess of policy limits," because the statute simply has no teeth in it if the measure of damages is the same for both good faith and bad faith breaches of contract.

By defining the word "damages" in §624.155 to mean no more than consequential damages, the district court has effectively held that the statute has no teeth, and it has remitted first-party claimants to the compensatory remedy available to them before the statute was enacted. If the sole purpose of the statute had been to provide compensation to first-party claimants, that construction might have made sense (but then, of course, there would have been no need to enact the statute). But the obvious purpose of the statute was not to provide a merely cumulative remedy for compensation; it was to impose a duty of good faith upon insurers handling first-party claims, a duty which is essentially meaningless unless some consequence attaches to its breach.

Under the district court's reading of the statute, however, no consequence attaches to an insurer's bad faith, and the duty to exercise good faith has therefore been reduced to a mere paper duty which can be breached at will, without consequence. In our judgment, this reading of the statute defeats its obvious purpose, and the district court should therefore have focused on the word "sanction," instead of finessing the rest of the sentence. And when that word is given the obvious meaning that it conveys, we think this Court must conclude that the result reached in *Jones*, rather than the result reached below, is the *only* result which squares with the legislative history and which effects the purpose of the statute.

We should also note in closing that, even if there had been no signpost in the legislative history pointing the way, the conclusion reached in *Jones* is really the only defensible solution to the problem addressed by §624.155. "Policy limits," like all other fixed caps upon damage recoveries, inherently inhibit the process of reaching reasonable settlements. They have this effect because, for *any* claim in which the damages reasonably exceed the limits, there is *rarely* any reason for the defendant to offer the limits themselves in settlement -- because the most for which the defendant can *ever* be liable on the underlying claim, even if it loses in spades, will be those limits. A defendant whose liability is capped in a case where the plaintiff's damages are likely to exceed that amount will therefore *always* offer something less than the limits, because it has nothing to lose if the offer is rejected and the plaintiff proceeds to arbitration or trial. And one out of ten times perhaps (the numbers are, of course, hypothetical), the gamble will pay off with an award less than the limits, so the defendant therefore comes out ahead over the long run. Uninsured motorist carriers recognized this a long time ago, and "low-ball" offers became a general practice as a result. And it is this practice

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which we believe the legislature purposefully set out to prevent with §624.155.

This practice will *not* be prevented if the decision under review is approved, because the "policy limits" will be essentially unbreachable once again. We therefore respectfully submit that the statute must be given the teeth which it needs to effect its purpose -- and that an insurer who gambles in bad faith, by failing to offer policy limits when policy limits are reasonably owing, should suffer the damages "sanction" which the *Jones* court found in the legislative history of §624.155. Most respectfully, the decision under review should be quashed, and the certified question should be answered as it was answered in *Jones*.

IV.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of February, 1991, to: David S. Nelson, Esq., Smith & Fuller, P.A., P.O. Box 3288, Tampa, Fla. 33601, Attorneys for Petitioner; and to Michael M. Bell, Esq., Hannah, Marsee, Beik & Voght, P.A., P.O. Box 536487, Orlando, Fla. 32853, Attorney for Respondent.

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