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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 77,219

ELEVENTH CIRCUIT CASE NO. 89-5911

CONTINENTAL INSURANCE COMPANY,
a foreign corporation,

Appellant/Petitioner,

v.

THOMAS F. JONES, as Personal
Representative of the Estate of
KAREN SUE JONES, Deceased,
THOMAS F. JONES, Individually,
and MARY ANN JONES, Individually,

Appellees/Respondents.

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

BRIEF OF AMICUS CURIAE, FLORIDA ASSOCIATION FOR INSURANCE REVIEW SUPPORTING THE POSITION OF CONTINENTAL INSURANCE COMPANY

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<u>TABLE OF CONTENTS</u>

	PAGE
STATEMENT OF THE CASE AND FACTS	2
STATEMENT INTEREST OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW AS AMICUS CURIAE	3
PRELIMINARY STATEMENT	4
SUMMARY OF THE ARGUMENT	5
I. THERE IS NO CAUSE OF ACTION IN FLORIDA FOR A BAD-FAITH CLAIM FOR FIRST-PARTY INSURANCE BENEFITS FOR UNINSURED COVERAGE.	8
II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE MEASURE OF DAMAGES IN A FIRST-PARTY, BAD-FAITH CASE ARISING FROM AN EXCESS UNINSURED MOTORIST ARBITRATION AWARD WAS THE EXCESS AWARD.	12
CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

PAGE

CASES

A.M.R. Enterprises, Inc. v. United Postal Savings Association, 567 F.2d 1277 (5th Cir. 1978) 13

Alexander Underwriters General Agency, Inc. v. Lovett, 357 S.E.2d 258 (Ga. App. 1987) 18

Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. dis., 317 So.2d 725 (Fla. 1975) 16

Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980), cert. den., 450 U.S. 922, 101, S.Ct. 1372, 67 L. Ed. 2d 350 (1981). 9

California Casualty General Insurance Co. v. Superior Court, 218 Cal.Rep. 817 (Cal. App. 1985) 18

Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977) 16

Cheek v. Agriculture Insurance Co. of Watertown, NY, 432 F.2d 1267 (5th Cir. 1970) 17

Jessen v. National Excess Insurance Co., 776 P.2d 1244 (N.M. 1989) 18

DeLaune v. Liberty Mutual Insurance Co., 314 So.2d 601 (Fla. 4th DCA 1975), cert. den., 330 So.2d 16 (Fla. 1976) 8

Douglas Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA 1984) 13

Ellis v. Brown, 77 So.2d 845 (Fla. 1955). 17

Industrial Fire & Casualty Co. v. Romer, 432 So.2d 66 (Fla. 4th DCA 1983) 16

King v. Saucier, 356 So.2d 930 (Fla. 2d DCA 1978) 15

Kovlow v. Allstate Insurance Company, 453 So.2d 1187 (Fla. 1st DCA 1987) 17

Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1977) 15

Lee County Bank v. Winson, 444 So.2d 459 (Fla. 2d DCA 1983) 15

McDonald v. Penn Mutual Life Insurance Co.,
276 So.2d 232 (Fla. 2d DCA 1973) 13

Opperman v. Nationwide Mutual Fire Insurance Company,
515 So.2d 263 (Fla. 5th DCA 1987),
rev. den., 523 So.2d 578 (Fla. 1988) 14

Patrick v. Maryland Casualty Co.,
267 Cal.Rep. 24 (Cal. App. 1990) 18

Public Health Trust of Dade County v. Valcin,
507 So.2d 596 (Fla. 1987) 16

Reliance Insurance Co. v. Barile Exacavating & Pipeline
Co., Inc., 685 F.Supp. 839 (M.D. Fla. 1988) 5, 10

Sand Key Associates, Ltd. v. Board of Trustees of the
Internal Improvement Trust Fund of the State of
Florida, 458 So.2d 369 (Fla. 2d DCA 1984),
aff'd., 512 So.2d 934 (Fla. 1987) 17

Thomas v. Lumbermen's Mutual Casualty Co.,
424 So.2d 36 (Fla. 3d DCA 1982). 8

Wellborn v. American Liberty Insurance Company,
260 So.2d 229 (Fla. 1st DCA),
cert. den., 265 So.2d 372 (Fla. 1972) 9

Zen v. Western Publishing Co.,
573 F.2d 1318 (5th Cir. 1978) 15

STATUTES

Fla. Stat. § 624.155 . . . . 3, 4, 5, 6, 7, 8, 10, 11, 12, 16, 21

MISCELLANEOUS

Couch on Insurance, 2d (rev.ed.) § 51:4 10

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Association for Insurance Review adopts and incorporates by reference Continental's Statement of the Case and Facts.

STATEMENT INTEREST OF THE
FLORIDA ASSOCIATION FOR INSURANCE REVIEW AS AMICUS CURIAE

This Amicus Brief is submitted by the Florida Association for Insurance Review on behalf of the insurer, Continental Insurance Company, Appellant/Petitioner. The Florida Association for Insurance Review is a non-profit organization consisting of insurance companies doing business in the State of Florida.

The purposes and objectives of the Association are two-fold. First, the Association provides a regular educational forum to discuss current developments in Florida law affecting the claims submitted to casualty insurance companies and the insurance coverage typically provided in casualty insurance policies. Second, the Association submits amicus briefing to assist Florida courts concerning major issues which affect casualty insurance coverage and the claims which are payable by that coverage and the companies.

The issues which are presented by this proceeding are of substantial interest to the Florida Association for Insurance Review as it addresses the interpretation of the statute, Fla. Stat. § 624.155, which imposes certain duties and penalties upon insurers for their conduct in the administration of such claims.

PRELIMINARY STATEMENT

Although the Eleventh Circuit has issued this Court a certified question regarding the appropriate measure of damages to be used in a "first party", bad-faith case, Continental had raised in the District Court and in the Eleventh Circuit the preliminary issue of whether Fla. Stat. § 624.155 created a cause of action in Florida for a bad-faith claim for first-party insurance benefits. The Florida Association for Insurance Review would rely upon Continental's argument to the extent that it is made. Assuming it makes that argument here, the Florida Association for Insurance Review would supplement that argument in Issue I.

SUMMARY OF THE ARGUMENT

If this Court is to construe Fla. Stat. § 624.155 as authorizing a cause of action for "first-party" bad faith, then the statute needs to be construed to provide a meaningful standard by which insurers can evaluate their conduct to avoid the penalties provided by the statute. Fla. Stat. § 624.155(1)(b)(1) appears to be little more than a codification of the first paragraph of Florida Standard Jury Instruction MI3.1. Unfortunately, neither that standard jury instruction nor the statute provide an insurer any meaningful guidelines to evaluate its conduct so that it can assure that it satisfies the duties of good faith that the law imposes upon it. Florida case law in the third-party, bad-faith context is not instructive on this issue because the vast majority of the cases to analyze "bad faith" attempt to define it by way of exclusion as opposed to advising insurers how they can meaningfully conform their conduct to legal standards which the courts have never articulated.

One federal case which has construed Fla. Stat. § 624.155 appears to provide some workable guidelines by which an insurer can evaluate its conduct. In Reliance Insurance Co. v. Barile Exacavating & Pipeline Co., Inc., 685 F.Supp 839 (M.D. Fla. 1988), Judge Hodges outlined the burden of an insured in proving bad-faith claims under that statute. For there to be a finding of liability on an insurance company for bad faith, the disputed insurance claim must be determined by a jury to be not fairly

debatable. A claim was not fairly debatable when the facts demonstrated the absence of a reasonable basis upon which to deny the benefits. If there was some reasonable basis for the denial, no bad faith could be proven as a matter of law.

Given the current environment in tort and insurance litigation and the unfortunate reality that Civil Remedies notices are filed as a matter of course by counsel representing insureds and third-party claimants, adoption of such a standard makes practical sense. The insurance industry as a whole needs to know exactly what the law is going to expect from it so that it can conform its conduct at the outset as opposed to attempting to justify its conduct through hindsight. The insurance industry has every desire to comply with the requirements which Florida law imposes upon it. It simply needs a meaningful standard articulated by this court so that insurers can know that its conduct either does or does not satisfy the duties imposed upon them by law.

Assuming that this court were to rule that Fla. Stat. § 624.155 does provide a first-party bad faith cause of action, then the measure of damages which may be properly awarded should include only interest, costs and attorneys' fees associated with the insurer's bad faith. An award of damages measured by an excess arbitration award does not reflect the damages caused by the insurer's conduct. Instead, the excess arbitration award solely measures the damages inflicted by the negligent operation of a motor vehicle by an uninsured driver. The liability of an insurer for damages ought to be commensurate with its conduct, not the

severity of the injury inflicted by a financially-irresponsible tort-feasor.

Construction of the statute to allow an excess arbitration award to be the measure of damages also violates well-established Florida law concerning the construction of statutes which have been enacted in derogation of the common law. Those types of statutes need to be strictly construed. When reviewing such statutes, there is a presumption that it did not intend any changes upon the common law unless they are explicitly stated within the statute. Even the most casual reading of Fla. Stat. § 624.155 does not express a clear legislative statement that the measure of damages should automatically be the excess arbitration award. In the absence of that type of specificity, the Legislature cannot be presumed to have intended that innovation upon the common law, and a construction which ignores that rule of statutory construction should be rejected.

Finally, when determining the method of calculation of damages under the statute, the court should require that a jury also assess the conduct of the insured. Many times, delays are occasioned by the insured's own conduct. Certainly, any measure of damages ought to take into consideration the insured's conduct which contributed to those damages.

I.

THERE IS NO CAUSE OF ACTION IN FLORIDA FOR A BAD-FAITH CLAIM FOR FIRST-PARTY INSURANCE BENEFITS FOR UNINSURED COVERAGE.

A. The Statute Needs To Be Construed To Provide Some Meaningful Standard By Which Insurers Can Conform Their Conduct To Avoid The Penalties Provided By Florida Statutes § 624.155.

Assuming this Court rules that Fla. Stat. § 624.155 authorizes a bad-faith claim for first-party insurance benefits, and further, that as written, the statute satisfies the appropriate constitutional requirements, then the statute needs to be construed in such a fashion to provide insurers with some meaningful standard by which to judge their conduct. Fla. Stat. § 624.155(1)(b)(1) appears to be little more than a codification of the first paragraph of Florida Standard Jury Instruction MI.3.1. Unfortunately, neither the standard jury instruction nor the statute provides an insurer any meaningful guidelines to evaluate its conduct and to assure that its conduct satisfies the duty of "good faith" that the law imposes upon it.

A review of Florida decisions which discuss the duty of "good faith" imposed upon an insurer in the third-party context demonstrates the absence of any meaningful guidelines. For instance, mere negligence by an insurance company is insufficient to impose liability upon the insurer for an excess verdict for the company's failure to settle within its policy limits. See, DeLaune v. Liberty Mutual Insurance Co., 314 So.2d 601 (Fla. 4th DCA 1975), cert. den., 330 So.2d 16 (Fla. 1976). See also, Thomas v. Lumbermen's Mutual Casualty Co., 424 So.2d 36, 38 (Fla. 3d DCA

1982). Likewise, insurers are not strictly liable for their failure to settle a claim within the insured's policy limits. See, Wellborn v. American Liberty Insurance Company, 260 So.2d 229 (Fla. 1st DCA), cert. den., 265 So.2d 372 (Fla. 1972). Essentially, those cases attempt to define "good faith" by exclusion. That is, they discuss what is not encompassed within the concept of good faith.

This Court's decision in Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980), cert. den., 450 U.S. 922, 101, S.Ct. 1372, 67 L.Ed.2d 350 (1981) discusses several duties which are encompassed within the concept of good faith. However, even in Gutierrez, this Court did not advise insurers which of those duties should carry the greatest weight. For instance, an insurer can comply with all of the duties discussed in Gutierrez except settling the case and still be found liable for a resulting excess verdict. Common sense would suggest that in almost all but the really unusual scenario, it is always in the insured's best interests to settle a claim within the insured's policy limits. It is always better not to expose the insured's assets to execution by some judgment creditor. The recognition of that reality, however, should not result in extra-contractual liability upon the insurer. Likewise, this Court's statement that an insurer's negligence was relevant to the question of whether the insurer had acted in bad faith appears to have made even less clear, the standard by which an insurance company's conduct would be evaluated to determine whether it had acted in bad faith.

Case law from other jurisdictions is likewise not helpful when attempting to define the standard by which an insurer should measure its conduct. Indeed, one of the more famous treatise writers on insurance has stated:

> "No single satisfactory test has been formulated as to just what degree of consideration for the insured's interest is entailed by the requirement of "good faith". See, Couch on Insurance, 2d (rev.ed.) § 51:4, Page 386."

The Florida Association for Insurance Review would suggest to this Court that one federal decision which construes Fla. Stat. § 624.155(1)(b)(1) has articulated a standard which would certainly provide a good start in attempting to instruct insurers how their conduct will be measured. In Reliance Insurance Co. v. Barile Excavating & Pipeline Co., Inc., 685 F.Supp 839 (M.D. Fla. 1988), Judge Hodges outlined the burden of an insured in proving bad-faith claims under that statute. Adopting standards from foreign jurisdictions, Judge Hodges ruled that for there to be a finding of liability on an insurance company for "bad faith", the disputed insurance claim must be determined by the jury to be not fairly debatable. A claim was not fairly debatable when the facts demonstrated the absence of a reasonable basis upon which to deny the benefits. If, on the other hand, there was some reasonable basis for the denial, no bad faith could be proven as a matter of law.

Adoption of such a test makes practical sense. Most claims brought pursuant to Fla. Stat. § 624.155(1)(b)(1) involve

disputes regarding the evaluation of an insured's claimed damages. Those situations which involve an insured's medical expenses exceeding the policy limits are rare. Instead, the vast majority of such claims involve situations where the insured's medical expenses represent only a small fraction of the policy limits and the insured or his legal representative are seeking the remainder for intangible damages. Florida Standard Jury Instruction 6.2.(a), advises the jury that there is no exact standard for the measuring of such damages. The amount they are to award should be fair and just in light of the evidence.

In such a situation, Fla. Stat. § 624.155 ought not to be interpreted as exposing an insurer to extra contractual damages merely because an insurer chose to question the value of damages which, under Florida law, are incapable of exact measurement. Yet, the unfortunate reality in today's tort and insurance litigation environment is that insurers routinely receive Civil Remedies notices as a matter of course in the vast majority of such situations. In practice, it is being used as nothing more than a statutory gun to point at an insurer's head with the intention of coercing greater payments for those damages which cannot be precisely calculated. There is certainly nothing in the language or history of the statute to suggest that it was intended to inhibit insurers from raising legitimate questions concerning the value of damages. The absence of a meaningful standard from which an insurer can evaluate its conduct has precisely that effect.

Likewise, Fla. Stat. § 624.155 should not be interpreted to allow an insurer to be exposed to extra contractual damages where there exists a coverage issue which is fairly debatable. The fact that an insured may have been involved in some accident which has left him or her severely injured is a sympathetic and unfortunate event. That situation should not be used in conjunction with Fla. Stat. § 624.155 as a tool to impede an insurer's right to have its contract construed to determine whether any benefits are applicable under its policy. This Court might not agree that Judge Hodges' opinion in Reliance Insurance Company satisfactorily expresses a meaningful standard and may wish to articulate its own. In any event, it is clear that the statute itself provides no meaningful guidelines, and if this Court is to interpret the statute as authorizing a first-party, bad-faith claim, the language of the statute needs to also be interpreted to provide insurers with meaningful instruction to know what the law will require of them and how they can satisfy those duties.

II.

THE DISTRICT COURT ERRED IN DETERMINING THAT THE MEASURE OF DAMAGES IN A FIRST-PARTY, BAD-FAITH CASE ARISING FROM AN EXCESS UNINSURED MOTORIST ARBITRATION AWARD WAS THE EXCESS AWARD.

The Florida Association for Insurance Review suggests that there is only one reasonable interpretation of Fla. Stat. § 624.155 concerning the measure of damages which may properly be awarded upon a finding of its violation. That is, it believes that

the only proper measure of damages is an assessment of interest, costs, and attorneys' fees which are a consequence of the insurer's alleged bad faith. An interpretation of that statute to allow the measure of damages to be assessed on the basis of the amount of an arbitration award which is in excess of the underlying policy limits is contrary to established Florida law concerning the assessment of damages for one's wrongful conduct. Likewise, such an interpretation results in a denial of constitutionally-guaranteed rights to the insurer. Finally, such an interpretation fails to consider the conduct of the insured which should be an essential factor when determining an appropriate measure of damages.

Whether one considers a "bad-faith" cause of action as having been derived from either tort law or contract law, the damages available to an insured are the same. In either a breach of contract or a tort case, the plaintiff is entitled to recover only for all natural, direct and proximate consequences suffered as a result of the defendant's conduct. See, Douglas Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA 1984); McDonald v. Penn Mutual Life Insurance Co., 276 So.2d 232 (Fla. 2d DCA 1973). See also, A.M.R. Enterprises, Inc. v. United Postal Savings Association, 567 F.2d 1277 (5th Cir. 1978).

An award of damages measured by the excess arbitration award does not reflect damages that are assessed because of the consequences that reasonably and naturally follow from the

insurer's alleged bad faith. Instead, that amount of money is determined by an arbitration panel and reflect the damages which have resulted from the negligent operation of a motor vehicle by an uninsured motorist. Florida does not recognize any legal theory which could be creatively relied upon to render an insurer a joint and several tort-feasor with the uninsured motorist whose negligent operation of the motor vehicle inflicted the injury. The cause of action of the insured against the uninsured motorist accrues on the date of the automobile accident in which the injuries were sustained. Even under the Fifth District Court of Appeal's decision in Opperman v. Nationwide Mutual Fire Insurance Company, 515 So.2d 263 (Fla. 5th DCA 1987), rev. den., 523 So.2d 578 (Fla. 1988), the insured's cause of action for "bad faith" would not accrue until the arbitration award was returned. That conduct has transpired long after the injuries are inflicted upon the insured by the uninsured or underinsured tort-feasor. Under no reasonable interpretation of the term "jointly and severally liable", could an insurance company's alleged bad-faith conduct be said to have contributed to those injuries.

Florida law has recognized an exception concerning the assessment of damages where the plaintiff can prove no damages which are the natural and probable consequences of a defendant's conduct. In certain situations, Florida courts have allowed claimants who have proven the existence of a duty and the breach of that duty to be awarded damages to vindicate an invasion of their legal rights. Nominal damages have been awarded where there

have been no physical or financial injuries, but some underlying cause of action which has been proven to the satisfaction of a jury. See, e.g., Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1977). See also, King v. Saucier, 356 So.2d 930 (Fla. 2d DCA 1978). The Fifth Circuit has held that under Florida law, nominal damages are recoverable upon a finding of a breach of contract, even where there is no proof of further damages. See, Zen v. Western Publishing Co., 573 F.2d 1318 (5th Cir. 1978). Nominal damages, by definition, are definitions of an inconsequential amount. See, Lee County Bank v. Winson, 444 So.2d 459 (Fla. 2d DCA 1983). These damages are to be awarded only in the situation where there is an absence of compensatory damages.

Even if a nominal-damage analysis was an appropriate analysis to use in a case such as this one, which F.A.I.R. believes it is not, the assessment of the excess arbitration award can hardly be said to be an inconsequential amount. As important, an application of that analysis ignores the statutory remedy of interest, costs and attorneys' fees which are the compensatory damages authorized under the statute which created the cause of action.

Utilization of the excess arbitration award as the measure of damages against an insurer in a first-party, bad-faith, uninsured motorist situation also results in the impairment of constitutionally-guaranteed rights of the insurer. By adopting the excess award as the measure of damages, the statute would create an irrebuttable presumption regarding the measure of damages. That

is, assuming there was some meaningful standard by which to evaluate the insurer's conduct, and a jury found a violation, the damages imposed upon the insurer would be the excess arbitration award with no consideration as to whether its violation was slight or egregious and no ability of the insurer to mitigate its damages. Article I, Section 9 of the Florida Constitution guarantees to all persons in Florida due process of law. This court has held that conclusive or irrebuttable presumptions violate due process because they fail to provide the adverse party an opportunity to rebut the presumption. See, Public Health Trust of Dade County v. Valcin, 507 So.2d 596, 599 (Fla. 1987). An assessment of damages measured by the excess award creates that irrebuttable presumption which will deny the insurer's due process.

It also needs to be remembered that Fla. Stat. § 624.155 is a statute which has been enacted in derogation of the common law of this state. At common law, there was no first-party action for bad faith. See, Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. dis., 317 So.2d 725 (Fla. 1975); Industrial Fire & Casualty Co. v. Romer, 432 So.2d 66 (Fla. 4th DCA 1983). At common law, the only relief available to an insured regarding a first-party claim was a cause of action for breach of contract. If this Court believes that Fla. Stat. § 624.155 was a legislative enactment which created a cause of action for first-party bad faith, where none had existed at common law, then the statute is required to be strictly construed. See, Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977).

When construing a statute which is in derogation of the common law, there is a presumption that the statute did not intend any changes in the common law unless the statute explicitly states what those changes are. See, Sand Key Associates, Ltd. v. Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, 458 So.2d 369, 371 (Fla. 2d DCA 1984), aff'd., 512 So.2d 934 (Fla. 1987). Statutes which are enacted in derogation of the common law are construed in such a fashion because it is not presumed that the Legislature intended to make any innovations upon the common law other than those which are specified in the statute. See, Ellis v. Brown, 77 So.2d 845, 847 (Fla. 1955).

Even in the common-law, third-party, bad-faith context, an insured is required to show damages proximately caused by the insurer's bad faith. See, e.g., Kovlow v. Allstate Insurance Company, 453 So.2d 1187 (Fla. 1st DCA 1987); Cheek v. Agriculture Insurance Co. of Watertown, NY, 432 F.2d 1267 (5th Cir. 1970). The causation element which is required in a third-party situation has not been specifically removed, nor is it even referred to by the strict terms of the statute. Since the Legislature has not specifically stated that it intended to make such an innovation upon the law, it should not be interpreted as if it had done so. Here, the only reasonable measure of damages which the insured could ever prove were caused by the insurer's conduct is a measure of damages which incorporates, interest, costs and additional attorneys' fees, if any, associated with the alleged bad faith.

The Florida Association for Insurance Review would also suggest to the Court that the appropriate measure of damages should require a jury to evaluate the conduct of the insured. Cases from foreign jurisdictions have recognized this concept. For instance, in California Casualty General Insurance Co. v. Superior Court, 218 Cal.Rep. 817 (Cal. App. 1985), an intermediate California appellate court held that a trial judge had abused his discretion by denying an insurer's motion to amend its pleadings so that the conduct of the insured could also be considered in the bad-faith action. There, the court noted that the duty of good faith and fair dealing in an insurance policy was a two-way street. An insured's failure to act in good faith was conduct which should be considered by the jury in the total assessment of damages. See also, Patrick v. Maryland Casualty Co., 267 Cal.Rep. 24 (Cal. App. 1990). Confer, Jessen v. National Excess Insurance Co., 776 P.2d 1244 (N.M. 1989); Alexander Underwriters General Agency, Inc. v. Lovett, 357 S.E.2d 258 (Ga. App. 1987) (each case finding no error for failure to instruct jury regarding insured's conduct where there was no evidence that insured's conduct might also be considered to have been in "bad faith").

Recognition of mutual duties of good faith, when determining the appropriate measure of damages, is supported by many public policies. In recent years, Florida courts have been forced to resort to many different methods of alternate dispute resolution. Florida's system of justice is simply overwhelmed by the onslaught of litigation in recent years. Recognition of mutual

duties of good faith should result in less litigation. The possibility of two suits arising from one injury should, likewise, be diminished. Especially, in the pre-suit phase of the case, duties of good faith on all of the parties would encourage disclosure of all information reasonably available to the parties, which in many cases would result in settlement long before suit. Even if this was the only benefit recognition of the mutuality of a good-faith duty would provide to society, it is difficult to imagine any logical or practical countervailing reason which would support non-recognition. Simply stated, recognition of the mutuality of the obligation of good faith would encourage less litigation, not more. Certainly, if an insured or his legal representative have contributed to the delay or denial of benefits, that conduct ought to be factored in to the equation of the appropriate measure of damages that insured should receive for the insurer's alleged bad faith.

This Court should recognize that the appropriate measure of damages in a "first party", bad-faith claim to be interest, costs and attorneys' fees caused by the alleged bad-faith. In determining that amount, the insured's conduct should also be evaluated.

CONCLUSION

If Fla. Stat. § 624.155 provides a cause of action for first-party bad faith in Florida, then the statute needs to be construed to give insurers a meaningful standard by which to conform their conduct. This Court should articulate a standard which will allow insurers to accomplish those goals which the statute is intended to fulfill. In the absence of the creation of some meaningful standard, the only way the industry will ever learn whether its conduct has conformed to the duties encompassed within the amorphous concept of good faith will be on an ad hoc case-by-case basis. If the goal of the statute is to require insurers to conform their conduct to certain standards, they have every right to know what those standards are.

Likewise, this Court should construe the statute in conformity with well-established Florida law which requires those laws which are enacted in derogation of the common law to be strictly construed. In the absence of a specific statement by the Legislature authorizing damages to be awarded on the basis of an excess arbitration award, the statute should not be construed as if the Legislature had done so. Likewise, in determining any method of calculation of damages, this Court should require a jury to also evaluate the conduct of an insured.

Respectfully submitted,

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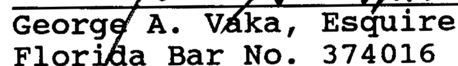
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Robert J. Dickman, Esquire**, 4500 LeJeune Road, Coral Gables, Florida 33146; **Patrice A. Talisman, Esquire,** Suite 2400, 100 North Biscayne Boulevard, Miami, Florida 33132; **Roland Gomez, Esquire,** Suite 400, 8100 Oak Lane, Miami Lakes, Florida 33016; **David B. Shelton, Esquire,** Post Office Box 1873, Orlando, Florida 32802; and **Scott R. McNary, Esquire,** and **Love Phipps, Esquire,** 116 West Flagler Street, Miami, Florida 33130, on March 6, 1991.

George A. Vaka, Esquire