IN THE SUPREME COURT

OF FLORIDA

CASE NO. 77,219

CONTINENTAL INSURANCE COMPANY,
a foreign corporation,

Appellant,

vs.

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

Appellees.

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

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND FACTS

This cause is before this Court on certification from the United States Court of Appeals for the Eleventh Circuit. The question that has been certified for resolution is:

> What is the appropriate measure of damages in a first-party action for bad faith failure to settle an uninsured motorist insurance claim under Fla. Stat. §624.155(1)(b)(1)?

Jones v. Continental Insurance Co., 920 F.2d 847, 851 (11th Cir. 1991).[1] In its initial brief, Continental has raised two additional points: 1) the jury verdict of zero damages was supported by the evidence; and, 2) if the statute is construed as allowing an insurer to be guilty of bad faith for simply exercising its contractual right to arbitrate, then it is unconstitutional.[2]

A. The accident

On January 29, 1984, Karen Jones was killed when the car in which she was a passenger was struck head on by a drunk driver

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[1] Unless otherwise indicated, all emphasis is supplied. "R" refers to the record on appeal. R.E. refers to the Record Excerpts which have been forwarded to this Court. The Record cites are done in accordance with the manner in which the record was prepared in the Eleventh Circuit; first the volume number, then the document number, then the page number within the document cited. A.A. refers to the Appellees' Appendix which is filed herewith.

[2] Amicus curiae Florida Association for Insurance Review has used its brief in this case as a sounding board to present its position on several issues which are far afield from the question certified to this Court for resolution and those raised by appellant Continental. Appellee is certain that this Court will neither address nor be influenced by the Association's proselytizing on these irrelevant issues as to which there is no rebutting advocate since they were never raised by the parties in either the trial court or the Eleventh Circuit Court of Appeals.

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going 70 to 90 m.p.h. (R.1-13-2; R.E. C. p.2). Karen, who was 21 at the time of her death, was survived by her parents, Thomas and Mary Jones. (R.7-73).

B. **The underlying claim**

$600,000 in UM benefits was available to the Jones' for the death of their daughter under their Continental automobile insurance policy. (R.1-13-2; R.E. C. p. 2). The Jones' gave Continental written notice of the accident on February 23, 1984. (R.8-135). A few days later, their attorney sent the insurer a five-page letter detailing: 1) the circumstances of the accident which showed absolutely no fault on the part of Karen; 2) the limited insurance available from the actual tortfeasors ($35,000); and, 3) the extreme nature of the loss suffered by the Jones'. The letter stated that the claim was worth well in excess of policy limits and, therefore, requested payment of those limits. (R.8-136).

Two weeks later, Continental's adjuster informed the Jones' counsel that Continental would not pay policy limits and that the Jones' might as well get ready to arbitrate. (R.8-137). That same month Continental, based on its own judgment as to the claim's value, set up a $600,000 reserve. (R.9-435-436).

Pursuant to Continental's suggestion, the Jones' demanded arbitration. (R.8-138). The depositions of Thomas and Mary were taken on May 4th and shortly thereafter a scrapbook was provided Continental which outlined the high points in Karen's life. (R.8-139, 142). Thus, by the middle of May, Continental knew that Karen

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was a model daughter -- she was a college-level tennis player, a respected piano player, an excellent student, and she had transferred colleges just to be close to her parents. In a letter dated May 7, 1984, Continental's own counsel evaluated the case as follows:

> [B]oth parents made very good witnesses. The girl is a model daughter in all respects. The scrap books and photo albums present a detailed emotional picture of their daughter's life, and the accident is one of aggravated liability.

(R.10-537). Yet, the insurer made no offer to settle the case. (R.10-539).

In June, counsel for the Jones' again offered to settle for policy limits. (R.8-144). Although Continental tried to arrange a meeting to discuss a structured settlement, it still did not offer any specific sum of money. (R.8-217).

At the end of July, Continental's counsel wrote:

> In speaking with Joe Castranakas, I indicated that I felt if the case could be settled for up to five hundred thousand dollars, it would be worthwhile trying to do so; while the case could go for two hundred to two hundred fifty thousand, it is a difficult case because we simply have nothing to hang our hat on aside from the fact that the girl was approaching age of majority.

(R.10-544). Notwithstanding the fact that Continental had no defense as to either liability or damages, it tendered no offer until August 13, the eve of the arbitration hearing. That offer for $500,000, or $250,000 per parent, was refused by the Jones'. (R.8-145).

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At the arbitration hearing, the only defense Continental even attempted to establish was that Karen wasn't wearing a seat belt. Yet it presented no witness to testify that she would have survived the 70-90 m.p.h. impact if only she had been doing so. Further, the only testimony as to the availability of a fully operational seat belt was that, although the belt appeared operational from a visual inspection, no one had actually tested it to make sure it worked. (R.8-246-247, 258-259). The three arbitrators unanimously rejected this defense and awarded each of the Jones $500,000, for a total award of $1,000,000. (R.E.C. (1)(A)).

Several weeks later, Continental sent the Jones' an unconditional general release and a letter stating that if the release were properly executed a check in the amount of policy limits would be tendered. (R.8-148). The Jones' refused to execute the release. (R.8-148). Judgment was entered against Continental for its policy limits and it finally paid that judgment. (R.8-221-222, 227).

C. **The bad faith action**.

The Jones' then filed this action against Continental in Florida state court. The complaint alleged several different counts, including one based on violations of §624.155, Florida Statute. (R.E. B). While the action was pending on a motion to dismiss, Continental removed it to federal court. (R. 1-1). The district court held that §624.155 is neither overbroad nor void for vagueness as applied to first-party bad faith actions and that the

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count based thereon was sufficient to state a claim for relief. (R. 1-11-3-12,18).

The case proceeded and eventually came on for trial. At the close of all the evidence, the Jones' moved for a directed verdict and specifically requested a ruling that, if Continental were found to have acted in bad faith, as a matter of law the Jones' were entitled to the difference between the policy coverage and the arbitration award. (R.10-564-565). The court ruled this element of damages could be argued to the jury. (R.10-568-570).

The jury returned a special interrogatory verdict finding that Continental did not attempt in good faith to settle the claims of the Jones' and that it failed to promptly provide an explanation for its actions. (R.4-84-1, 3). However, the jury assessed zero damages. (R.4-84-3).

The Jones' timely moved for a new trial as to damages only and for judgment notwithstanding the verdict. (R.4-87, R.4-88). The motion for new trial asserted that the verdict of $0 in damages was contrary to the undisputed evidence and grossly inadequate. (R.4-87-1-3). The motion for judgment n.o.v. requested judgment be entered in the amount of $366,750 on the ground that, once bad faith had been found, the proper measure of damages was as a matter of law the excess of the arbitration award over the policy limits which, without contradiction, was $366,750. (R.4-88-1-3). Continental responded to these motions but filed no post-trial motions of its own. (R.4-90, 4-91, 4-96).

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The court granted the motion for judgment notwithstanding the verdict based on the language of the statute, its legislative history, and current state precedent. (R.4-99-61).

First, the court looked to the language of the statute:

> Section 624.155(3) provides:
>
> 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 plaintiff.

(R.44-99-6-7). Then it looked to the legislative history:

The legislative history states:

> [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 motorists coverage; the sanction is that the 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 4F,; as amended HB 10G)(June 3, 1982).

The Legislature's comments support the conclusion that it 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 would 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).

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> Thus, the statute's purpose is to provide the same remedy in both first-party and third-party bad faith claims -- the excess award.

(R.4-99-7). Finally, the court looked to current Florida case law:

> In fact, Florida courts which have construed the statute have looked to third-party bad faith law as the basis for their decisions. 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-CA17, (19th Fla. Cir. Ct. June 6, 1989); Fidelity & Casualty Ins. Co. v. Taylor, No. 84-1184, (11th Fla. Cir. Ct. Nov., 1988).

(R.4-99-7)(footnote omitted). Based on the above, the court concluded:

> 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 addition, having presided at the trial of this matter and being cognizant of all the evidence presented therein, the Court finds the evidence adduced of such weight and quality that a jury in the exercise of impartial judgment could not have returned a verdict of "zero" damages. Therefore, plaintiffs are entitled to a judgment in the amount of $366,750.00 plus pre-judgment interest to be entered in place of the jury's verdict on damages.

(R.4-99-7-8). The court also ruled that the motion for new trial on damages was:

> "Denied as Moot. Although the motion for new trial on damages has merit, the legal and factual bases for entering a Judgment Notwithstanding the Verdict are compelling."

(R.4-99-8).

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Continental appealed this ruling. (R.4-100). After it had filed its initial brief and the Jones' had filed their answer brief, Continental moved to certify three questions to this Court:

> [1] Whether the statute provides a cause of action in Florida for a bad faith claim for first-party insurance benefits for uninsured motorist coverage where the policy provides for arbitration in the event of a dispute between the parties concerning liability of the uninsured motorist and damages; and, [2] if so, whether the damages are the same for the first-party action as they are for a third-party action (the difference between the amount of coverage and the amount of the excess award); and also, [3] if so, whether the statute violates the United States and Florida Constitutions.

This motion was ordered carried with the case. After oral argument, the Eleventh Circuit issued its opinion certifying the following question to this Court for resolution:

> What is the appropriate measure of damages in a first-party action for bad faith failure to settle an uninsured motorist insurance claim under Fla. Stat. §624.155(1)(b)(1)?

Jones v. Continental Insurance Co., 920 F.2d 847, 851 (11th Cir. 1991). This is the identical question certified to this Court as one of great public importance in McLeod v. Continental Insurance Co., 15 F.L.W. D. 2785 (Fla. 2d DCA Nov. 14, 1990), and currently pending in this Court under Case No. 77,089.

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POINTS ON APPEAL

I.

What is the appropriate measure of damages in a first-party action for bad faith failure to settle an uninsured motorist insurance claim under Fla. Stat. §624.155(1)(b)(1)?

II.

When this Court accepts jurisdiction over a cause to answer a question certified by a United States Court of Appeals, should this Court exercise its discretion and also decide questions of federal civil procedure that have not been certified to it for resolution?

III.

Does construing §624.155 as providing a cause of action for first party bad faith render it unconstitutional?

SUMMARY OF ARGUMENT

Before §624.155 was enacted, no claim for first-party bad faith was recognized in Florida. As every Florida case which has addressed this issue has held, this statute was passed specifically to change that rule and provide a cause of action in first-party cases equivalent to that in third-party cases. Given this legislative overruling of prior case law and the establishment of the exact standard of liability that was being used in third-party cases as the standard in first-party cases, it is clear that the legislature intended that the measure of damages in a first-party case be the same as in a third-party one -- the amount of the excess award. This conclusion is required not only by the language

used in the act but also by its history and a recent amendment to the act which expressly includes an award in excess of policy limits as a recoverable element of damages. Further, this interpretation of the statute is the only one which is consistent with the very purpose of the statute.

Second, the statute is not unconstitutional. It is neither vague nor overbroad. Rather, it can be construed using the well-known case law that was in existence at the time of its enactment. Nor does the statute violate an insurer's right to equal protection. Due to the disparity in power and financial resources, the insurer and the insured are not similarly situated. Accordingly, any distinction made by the legislature as to the obligations imposed on the two is rationally related to the statute's purpose of protecting insureds from the overreaching of their insurance companies. The statute also does not impair a party's right to arbitration. All it does is require that in exercising that right, just as in exercising the right to go to trial, an insurer must use good faith.

Finally, it is respectfully submitted that this Court should decline Continental's invitation to decide issues of federal civil procedures. The principles of comity indicate that such decisions should be left to the federal courts.

ARGUMENT

Based on the reasons and authorities set forth below, it is respectfully submitted that the certified question should be answered that the excess award is the appropriate measure of damage

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in a first-party action for bad faith failure to settle an uninsured motorist claim under §624.155(1)(b)(1), Florida Statute, and, if this Court deems it appropriate to address the issue, that said statute is constitutional.

I. The Excess Award is the Correct Measure of Damages.

1. The statute and its history.

It is clear that §624.155 created a statutory cause of action for first-party bad faith where none had existed before.[3] Certainly, the legislature also had the power to establish what remedy was available under this cause of action.[4] The legislature exercised this power by stating in subsection (3) of §624.155 that:

> 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.

However, the legislature did not specify what the appropriate measure of damages was for any specific violation.

This Court has often held that it is the obligation of the court to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that

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[3] After challenging this principle in the trial court and Eleventh Circuit Court of Appeals, even Continental now admits that the cases hold that the statute did create such a cause of action.

[4] Since this is a statutory cause of action, the discussions by Continental and amici curiae of the measure of damages and the proximate cause requirement in breach of contract, tort, and common law first party bad faith actions are not on point. In creating a statutory cause of action, the legislature has the right to allow recovery even though the statutory violation does not proximately cause the damage. E.F. Hutton & Co., Inc. v. Rousseff, 537 So.2d 978 (Fla. 1989).

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exceeds the literal language of the statute. Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099 (Fla. 1989); Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986); State v. Webb, 398 So.2d 820 (Fla. 1981). Thus, the question before this Court is what measure of damages did the legislature intend to apply when an uninsured motorist insurer refuses in bad faith to settle a claim by its insured. In determining that legislative intent, the court must consider the act as a whole -- including the evil to be corrected, the language of the act, its history, and the state of law already in existence bearing on the subject. Webb, 398 So.2d at 824.

The legislative history of this act states:

> [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.[5] This section would apply to all insurance policies.

Staff Report, 1982 Insurance Code Revision (HB4F; as amended by HB10G).(A.A.39-42). Thus, the legislative history indicates that the sanction for failure to settle in good faith should be the same in both first-party and third-party claims.

This is borne out by the very language of the act. The legislature in defining statutory bad faith -- including first-party claims -- used word for word the standard of liability used

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[5] There can be no doubt that by using the underlined language, the Legislature was referring to the insurer's liability for the excess judgment rendered in the tort action. "Judgment in excess of policy limits" is essentially a term of art. Further, no other element of damages could be referred to as a sanction.

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in third-party claims. Having decided that the same standard should apply, the legislature must have intended that the same remedy should also apply, especially since it was aware of that remedy. This was exactly the holding of the district court sub judice. (R.4-99-7; R.E. E, p.7).

It is also the conclusion reached in a recent law review article written on the subject:

> This history combined with the plain language of section 624.155, cannot possibly convey more clearly the intent of the drafters that Florida's Bad Faith Statute applies to first party actions.[174] The language is as plain as it could possibly be.[175]
>
> Therefore, since the drafters of the statue intended, and court decisions held,[176] that the Legislature intended to make section 624.155 applicable to first party actions as well as third party actions, it is logical that the Legislature intended to apply the same remedy.[177]

[174.] Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990(October 1, 1990).(Paraphrasing of statements of Eric Tilton, Esquire).

[175.] Id.

[176.] See, e.g., Rowland v. Safeco Ins. Co. of Am., 634 F.Supp. 613 (M.D. Fla. 1986); Jones, 670 F.Supp. 937; Wahl, No. 87-1187-CA(17)(Fla. 19th Cir. Ct. 1987).

[177.] Brief of Appellees, supra note 111, at 16; Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990(October 1, 1990). Mr. Tilton expressed

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> the opinion that the language could not have been made any clearer to apply the bad faith statute to first and third party claims alike.

Buschman, The Availability of Excess Damages in First Party Bad Faith Cases: A Distinction Without a Difference, 15 Nova L. Rev. 297, 317 (Winter 1991).

This interpretation is also required by the subsequent history of §624.155. During the 1990 session, the Florida Legislature adopted Chapter 90-119, which amends many insurance statutes, including §624.155. The title to this Chapter states in pertinent part:

> amending S624.155 F.S.; clarifying legislative intent with respect to the issues of presumption of other remedies and with respect to the issues of the definition of damages; correcting a cross-reference; providing legislative intent with respect to civil remedies.

Section 30 then adds a new subsection (7) to §624.155:

> (7) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits.

Thus, the legislature has expressly clarified and made a part of the statute its prior intent that the excess award is a proper measure of recovery in both first- and third-party bad faith

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actions. As stated in The Availability of Excess Damages in First Party Bad Faith Cases:

> Because the drafters intended section 624.155 to apply to both first and third party causes of action, it is obvious that the new damages provision applies as well. The drafters could not have made it any clearer. Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990.

15 Nova L. Rev. at 318, n. 180.

This is especially clear when the history of this amendment is itself considered. A prior version of this amendment provided in relevant part that:

> damages recoverable pursuant to this section are those damages which are a reasonably foreseeable of a specified violation by the insurer, including any award or judgment entered against the plaintiff as a result of the violation, which award or judgment is in an amount that exceeds the limits of his insurance policy.

SB 1158, Florida Senate 1990. (A.A.38).

Thus, this history shows three things. First, it proves that the phrase "award or judgment in an amount that exceeds the policy limits" means the excess award entered in the underlying action and not simply other consequential damages that just happen to bring the bad faith award itself to an amount in excess of policy limits. Second, by removing the limitation that the excess judgment or award had to be entered against the insured in order to be recoverable, the legislature shows it intended the recovery of the

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excess award in both third-party and first-party bad faith actions.[6] Finally, by separating the excess award from the preceding part of the sentence, it makes that award a separate element of damages recoverable whenever it exists, even if it does not constitute a damage which is a reasonably foreseeable result of a specified violation. Notwithstanding this, that an excess award will be entered is certainly a reasonably foreseeable result of the bad faith action of the insurer in refusing to settle an action when it should have -- whether that bad faith occurred in the first-party or third-party context. See 15 Nova. L. Rev. at 320, text at n. 200-206.

This Court has held that:

> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. United States ex rel. Guest v. Perkins, 17 F. Supp. 177 (D.D.C. 1936); Hambel v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statue. Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952).

Lowry v. Parole & Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985). Accordingly, the only interpretation consistent with the legislative intent behind §624.155 is that the arbitration award in

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[6] When the language of a statute is changed, it is presumed that the Legislature intended it to have different meaning different from that it had before the amendment. See, Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977).

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excess of policy limits is a proper measure of recovery in a first-party bad faith action.

2. Florida case law supports this interpretation.

The courts of this state have consistently used third-party bad faith principles to determine the details of statutory first party bad faith. In Opperman v. Nationwide Mutual Fire Insurance co., 515 So.2d 263 (Fla. 5th DCA 1987), rev. denied, 523 so.2d 578 (Fla. 1988), the court, in holding that §624.155 does create a cause of action for first-party bad faith, cited with approval the view that the duty of an insurer to act in good faith to settle the claims of its insured is akin to the duty of the insurer to act in good faith in handling claims of third parties against the insured -- that these are merely two different aspects of the same duty. Id.

The Fourth District echoed this in Sarko v. Fireman's Insurance Co., 16 F.L.W. D476 (Fla. 4th DCA Feb. 13, 1991), when it stated "We are of the opinion that the legislature did not intend to limit the common law remedy in any way, but only intended to expand it to cover an insurer's bad faith refusal to settle an insured's first party claim." This same conclusion was reached by the Third District in Hollar v. International Bankers Insurance Co., 15 F.L.W. D2888 (Fla. 3d DCA Nov. 27, 1990):

> Section 624.155 changes neither the case law obligation of good faith nor the measure of the damages due an insured once bad faith is proven. Rather than changing the decisional law, section 624.155 simply expands the cause of action to first-party claims...We agree with the fifth district's observation in Opperman that there is nothing in section

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> 624.155 which indicates an intent to limit a remedy existing under the decisions of the Supreme court. Opperman, 515 So.2d at 266. On the contrary, the statute clearly indicates the legislature's intent to expand that remedy. Id.

This application of third party principles to first-party actions was the basis for the decision by the Circuit Court of Dade County in Fidelity & Casualty Insurance Co. v. Taylor, No. 84-18844 CA-02 (Fla. 11th Cir. Ct. Nov. 1988), that the excess arbitration award was a proper element of damages in a suit identical to the one sub judice:

> 2) The Court denies FIDELITY & CASUALTY's motion for Partial Summary Judgment. In reviewing F.S. §624.155, the Court is of the opinion that the Statute is not clear or unambiguous. However, the Court rules that the cases heretofore decided which concern F.S. §624.155, specifically Rowland v. Safeco Insurance Company, 634 F.Supp. 6134 9 M.D., (Fla. 1986), Opperman v. Nationwide Mutual Fire Insurance Company, 515 So.2d 263 (Fla. 5th DCA 1987) and Jones v. Continental Insurance Company, 670 F.Supp. 937 (S.D. Fla. 1987) and Fidelity & Casualty Insurance Company v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1988), imply that first-party bad faith claims should be considered in conformity with the law of third-party bad faith claims. Since an element of damage in the third-party context is the amount of a judgment exceeds the underlying insurance limits, the Court determines that a proper element of damage in a first-party claim such as that presented by MRS. TAYLOR includes the amount of the excess arbitration award. Therefore, the Court denies Petitioner's alternative Motion for Summary Judgment.

(R.2-51-18-19, A.A. 3-4).[7] This same result was reached in Wahl v.

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[7] Continental is in error in asserting that this decision in Taylor was disapproved of by this Court. See Brief of Continental (continued...)

Insurance Co. of North America, No. 87-1187-CA 17 (Fla. 19th Cir. Ct. June 6, 1989). (A.A. 6-26).

The case of Adams v. Fidelity Casualty Co., No. 88-0629-Civ-Spellman (S.D. Fla. Feb. 12, 1990), relied on by Continental, is not even contrary. The court there recognized that "certain federal and state courts have ruled that an excess arbitration award may be recovered as damages under the statute in a first-party suit. Jones, 716 F.Supp. 1456; Wahl v. Insurance Co. of North America, No. 87-1187-CA-17 (19th Fla. Cir. Ct., June 6, 1989)." (A.A.8-9). The court went on to hold only that the insured could not recover the excess award because that award consisted of punitive damages:

> Under Florida law, an insured cannot recover punitive damages from its insurer based upon the conduct of an uninsured motorist. Suraez v. Aguiar, 351 So.2d 1086 (Fla. 3d DCA 1977), cert. dismissed, 359 So.2d 1210 (1978). Accordingly, it follows that Plaintiffs cannot recover such damages under Section 624.155.

(A.A. 9). Thus, Adams does not support the position of Continental and the insurance industry. (This question has also been certified by the Eleventh Circuit to this Court for resolution by Adams v. Fidelity & Casualty Co., 920 F.2d 89 (11th Cir. 1991)).

Although McLeod v. Continental Insurance Co., 15 F.L.W. D2785 (Fla. 2d DCA Nov. 14, 1990) is to the contrary, it is respectfully submitted that its reasoning should not be followed by this Court. McLeod simply determined what damages would be recoverable in a

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[7](...continued)
p. 27, n. 6. The only ruling in Taylor that was ever appealed was one that dealt solely with discovery.

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common law first party bad faith action and then decided that those are the damages recoverable under §624.155. It disregarded the language and history of the statute -- the factors relied upon by the district court sub judice.[8]

As set forth above, it is clear from the language of the 1982 statute and its 1990 amendment that the legislature intended the remedy to be the same in both first- and third-party bad faith actions. Further, subsection (7) of §624.155 expressly states: "This action shall not be construed to create a common law cause of action." This is additional evidence that the legislature was not simply creating a first-party bad faith action as defined by the common law but instead was creating a statutory cause of action with a statutory remedy -- damages that include an award or judgment in an amount that exceeds the policy limits. Since it is the statute which controls the answer in this case, it is respectfully submitted that those decisions which rely on the statute and its history (rather than looking to the law of other

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[8] The district court's original decision in Cocuzzi v. Allstate Insurance Co., Case No. 89-613-Civ-ORL-19 (M.D. Fla. 1990) suffers from these same problems. Additionally, this decision was modified on rehearing -- a fact amicus Florida Defense Lawyers Association fails to point out, even though it relies on the case. (A.A.43-44). The order on rehearing takes into consideration the 1990 amendment to §624.155 and states that "Proof of damages proximately caused by [the insurer] would include proof of those damages which are a reasonably foreseeable result of a violation of Florida Statutes §624.155." (A.A.44). As set forth above, entry of an arbitration award in excess of policy limits is a reasonably foreseeable result of a bad faith failure by an insurer to offer its policy limits in settlement. Thus, under Cocuzzi, as modified, such an award is recoverable.

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states) are the better reasoned and should be followed by this Court.

3. **This is the only reasonable construction.**

Other factors supporting the insureds' interpretation are the nature of UM insurance and the need to make the legislation effective, not just useless words. The Florida Supreme Court has held UM coverage to be a limited form of third-party coverage:

> In other words, UM coverage is a limited form of third party coverage inuring to the limited benefit of the tortfeasor to provide a source of financial responsibility if the policyholder is entitled under the law to recover from the tortfeasor. It is not first party coverage even though the policyholder pays for it. In first party coverage, such as medical, collision or theft insurance, fault is not an element. The insurance carrier pays even though the policyholder is totally at fault. With UM coverage, the carrier pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor.

Allstate Insurance Co. v. Boynton, 486 So.2d 552, 557 (Fla. 1986). Thus, the UM insurer can raise any defenses the tortfeasor can. The insurer is certainly willing to accept the benefits of being equivalent to third-party insurance -- here, Continental had no hesitancy in raising Karen's failure to wear a seat belt in an attempt to mitigate its damages. It should also accept the burdens -- including being responsible for the amount by which the arbitration award exceeds policy limits if it acted in bad faith in refusing to settle.[9]

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[9] Allowing the excess award as a measure of damages in such a bad faith action places a party injured by an uninsured tortfeasor (continued...)

Further, just as in the third-party context, there is a causal link between the bad faith behavior and the entry of the award. If the insurer had exercised good faith and entered into a settlement, the excess award would not have been entered. See Buschman, 15 Nova L.Rev. at 320. This is really the only causal connection that exists in the basic third-party bad faith situation. In those cases, the courts allow recovery of the excess judgment even though the insured does not actually suffer those damages because there is no possibility he will ever be able to pay off the judgment or the parties have entered into a covenant not to execute the judgment against the insured personally. Shook v. Allstate Insurance Co., 498 So.2d 498 (Fla. 4th DCA 1986), rev. denied, 508 So.2d 13 (Fla. 1987); American Fire & Casualty Co. v. Davis, 146 So.2d 615 (Fla. 1st DCA 1962). Our courts even hold that the injured plaintiff, as a third-party beneficiary of the insurance contact, has a right to maintain his own action against the insurer for recovery of the excess judgment and that, even if such an action is brought by the insured, the damages recovered -- the excess judgment -- belong to and are the property of the injured party. O'Hern v. Donald, 278 So.d 257 (Fla. 1973); Thompson v. Commercial Union Insurance Company of New York , 250 So.2d 259 (Fla. 1971). Accordingly, it is just as reasonable for the excess award to be the measure of

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[9](...continued)
in the same position as if he were injured by an insured tortfeasor. If the insured tortfeasor's liability insurer acted in bad faith, the injured party could recover the entire award including the excess from the insurer. Such should also be recoverable from the injured party's own insurer who is standing in for the tortfeasor's insurer.

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damages in a first-party bad faith action as in a third-party bad faith action.

Finally, to construe the statute any other way is to rob it of its effectiveness. If the remedy afforded is not the excess award, then what is it? Continental and the insurance industry suggest that the available damages would be interest and the increased costs and attorney's fees[10] incurred in the arbitration process. These offers of compensation by the insurers are practically illusory.

Even without §624.155, an insured is entitled to the costs of the arbitration; interest on the arbitration award, both for the unreasonable amount of delay and from the date it is entered until the date it is paid; and in some circumstances, his attorney's fees. United Services Automobile Association v. Smith, 527 So.2d 281 (Fla. 1st DCA 1988); American Indemnity Co. v. Comeau, 419 So.2d 670 (Fla. 5th DCA 1982); Midwest Mutual Insurance Co. v. Brasecker, 311 So.2d 817 (Fla. 3d DCA 1975), cert. denied, 327 So.2d 31 (Fla. 1976); §§627.428 and 627.727(8), Fla. Stat. Thus, the additional damages which the insurers magnanimously point to as being recoverable are only a pittance -- not sufficient to justify enactment of this type of statute nor to assure compliance with it. Insurers faced with the prospect of having these types of damages will have no incentive to modify their behavior.

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[10] Continental does not even agree that all of the insured's increased attorney fees for the underlying action would be recoverable. It argues that only fees representing time spent on coverage issues could be awarded as damages. Brief of Appellant, p. 31 n.7.

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This same conclusion was reached in The Availability of Excess Damages in First Party Bad Faith Cases:

> According to the McLeod court [which adopts the insurers' position in damages], the best an insured can hope for, following lengthy litigation of a bad faith claim, is interest on unpaid benefits (up to the policy limits), attorney fees, and costs. This holding sends a clear message to any insurer who is faced with a legitimate serious damage claim and a large policy: feel free to withhold payment on the policy and litigate. Liability is limited, roll the dice. This was not the legislature's intent when it drafted section 624.155 . . .
>
> The remedial purpose of section 624.155 cannot be satisfied without the imposition of damages, including excess judgments. To do otherwise would take the teeth out of the statute. If excess judgments are not permitted, there is little or no reason to require insurers to act in good faith when handling a first party claim.

15 Nova. L. Rev. at 320-321.

This was also the rationale used by the Supreme Court of South Dakota in finding that the excess award was the appropriate measure of damages in a first-party bad faith action. In Helmbolt v. LeMars Mutual Insurance Co., 404 N.W.2d 55 (S. Dak. 1987), one company insured both the tortfeasor and injured party in an automobile accident. The insurer refused to settle either the liability or UM claim. The injured motorist brought a bad faith action and was awarded the unpaid excess over policy limits. The Supreme Court affirmed this award holding:

> In the present case, it is the tort victims who are suing their own insurance company. The same justification for assessing damages equal to the excess liability does not exist [as in a third party claim] because the

> insured plaintiffs are not subject to a judgment in that amount. However, the court also stated in Crabb, that if an insurance company were not required to pay the excess liability amount its "responsiveness to its well-established duty to give equal consideration to an ... insured's interests would tend to become meaningless." Id. at 638 (quoting Lange, supra). This concept applies with equal force to an insurer's duty to the purchaser of underinsurance. In short, we find the verdict of $55,500 an appropriate amount to be awarded in light of all of the facts and circumstances present.

Id. See also Wahl, supra.[11]

Thus, the interpretation of §624.155 to provide for recovery of the excess award in a UM bad faith claim is supported by the act itself, its history, its purpose and Florida case law. It is respectfully submitted that this interpretation is the proper one and should be adopted by this Court.

II. It Is Not Proper to Submit Questions of Federal Civil Procedure to This Court.

Continental raises as a second point the argument that, notwithstanding the way this Court answers the certified question, the verdict assessing 0 damages to the Jones' should be upheld because: 1) it is supported by the evidence, 2) the Jones' waived the issue of their entitlement to the excess award as a matter of

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[11] Even if recovery of the excess award constitutes a penalty, which is denied, this does not render the statute unconstitutional. The statute assessing attorney's fees against insurers has been held to be both penal in character and constitutional. Empire State Insurance Co. v. Chafetz, 302 F.2d 828 (5th Cir. 1962). Further, there would be no double penalty imposed -- punitive damages can only be assessed under this statute if the insurer performs the acts giving rise to the violation with such frequency as to indicate they constitute a general business practice. §624.155(4). Thus, punitive damages are assessed as punishment for the general business practice -- not the one violation.

law, 3) a judgment n.o.v. was not warranted, and 4) a new trial on damages is not warranted. It is respectfully submitted that these arguments are not properly before this Court.

Continental has obviously forgotten that this case is before this Court pursuant to Rule 9.150(a), Florida Rules of Appellate Procedure. This rule provides that the "United States Court of Appeal may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida." The only question that the Eleventh Circuit chose to certify is "what is the appropriate measure of damages in a first party action for bad faith failure to settle an uninsured motorist insurance claim under §624.155(1)(b)(1)?" This question certainly fits the requirements of the rule.

The additional questions Continental raises, on the other hand, are not even questions of law, much less questions of state law. Rather, questions of preservation of error, sufficiency of the evidence, and whether to grant a new trial are all questions of federal law. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)(en banc); 11 Wright & Miller §2802 (1973); Starr v. J. Hacker Co., Inc., 688 F.2d 78 (8th Cir. 1982).[12] Even Continental admits this, since it cites federal law in support of its arguments. Certainly,

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[12] If Continental desired to have this case tried and decided by a Florida state court in accordance with Florida rules of procedure, it should not have removed it to federal court in the first instance. Having chosen to be in a federal forum, Continental should be satisfied with that system's interpretation of its own rules.

no federal court would certify such questions to this Court for resolution -- nor would this Court accept such a certification under Rule 9.150(a). It is respectfully submitted that under the principles of comity this Court should refrain from answering such questions now.[13]

III. Section 624.155 is Constitutional.

Continental now concedes that the case law recognizes that §624.155 does indeed create a first-party bad faith cause of action.[14] However, it maintains that such a construction of the

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[13] The Jones' do however feel compelled to correct several misstatements: 1) This issue clearly was not waived. At the close of all the evidence and immediately before the charge conference, the Jones' moved for a directed verdict as to the excess award, i.e., that if the jury found Continental had acted in bad faith the Jones' were entitled to the excess as a matter of law. The trial court denied this motion but ruled that the issue should be submitted to the jury. It was in conformance with this ruling that the instructions were submitted and the charge conference was conducted. Additionally, Continental has waived its right to rely on this issue by its failure to raise it in its initial brief before the Eleventh Circuit; 2) The award of zero damages is not supported by the evidence. The jury found that Continental acted in bad faith in refusing to settle this matter. No attack has been (or could properly be) made on this finding. It is well supported by the evidence. This means that, at the very least, the Jones' should have received payment of the $600,000 policy limits sooner than they did. Interest on this amount accrues at the rate of $200 per day. Further, the evidence was uncontradicted that there was an excess award in the amount of $366,750. As long as the court holds that this is a proper element of recovery, there is no justification for the jury not awarding this amount. Under these circumstances, the finding that the Jones suffered $0 in damages is grossly inadequate and contrary to the manifest weight of the evidence. The trial court so found; it only denied the motion as moot on the basis that it had already granted judgment notwithstanding the verdict. (R. 4-99-7-8).

[14] In fact, every court which has addressed this statute has either explicitly or implicitly found that this is its purpose and effect. Adams v. Fidelity Casualty Co., No. 88-0629-Civ-Spellman (S.D. Feb. 12, 1990); United Guaranty Residential Insurance Co. of

(continued...)

statute renders it unconstitutional in that it violates the insurer's rights to due process and equal protection and impairs its contractual right to arbitrate. As will be shown below, none of these arguments has any merit.

A. No due process violation.

As Continental admits, in determining whether a statute is void for vagueness, a court will look to see if it employs special or technical words or phrases well enough known to enable those expected to use them to correctly apply them or if it uses words with a settled common law meaning. If a statute does this, that is sufficient. Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976).[15]

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[14](...continued)
Iowa v. Alliance Mortgage Co., 644 F.Supp. 339 (M.D. Fla. 1986); Rowland v. Safeco Insurance Co. of America, 634 F.Supp. 613 (M.D. Fla. 1986); Kujawa v. Manhattan National Life Insurance Co., 541 So.2d 1168 (Fla. 1989)(holding "the legislature in creating the bad faith cause of action did not evince an intent to abolish the attorney-client privilege and workproduct immunity"); Sarko v. Fireman's Ins. Co., 16 F.L.W. 476 (Fla. 4th DCA Feb. 13, 1991); Hollar v. International Bankers, 15 F.L.W. D2888 (Fla. 3d DCA Nov. 27, 1990); Allstate v. Melendez, 550 So.2d 156 (Fla. 5th DCA 1989); Cardenas v. Miami Dade Yellow Cab, 538 So.2d 491 (Fla. 3d DCA 1989), review discharged, 549 So.2d 1013 (Fla. 1989); Opperman v. Nationwide Mutual Fire Insurance Co., 515 So.2d 263 (Fla. 5th DCA 1987), review denied, 523 So.2d 578 (Fla. 1988); Industrial Fire & Casualty Insurance Co. v. Romer, 432 So.2d 66 (Fla. 4th DCA 1983), review denied, 441 So.2d 633 (Fla. 1983)(holding that there is no common law cause of action for first party bad faith and then stating in dicta that such a cause of action was created by §624.155(1)(b)(1), Florida Statute.

[15] This seems to be a specific application of the general rules that 1) economic legislation is subject to a less strict vagueness test because of its more narrow subject matter and because businesses which face economic demands can be expected to consult relevant legislation in advance of action; 2) legislative acts which adjust the burdens and benefits of economic life come to a (continued...)

Here, as pointed out by the federal district court, the language of §624.155(b)(1) tracks the language of Florida's Standard Jury Instruction on bad faith and failure to settle. (R.1-11-14, R.E. D(5), p. 14). This instruction states:

> The issue for your determination is whether (defendant) acted in bad faith in failing to settle the claim of (name) against (insured). An insurance company acts in bad faith in failing to settle a claim against its [policy holder] [insured] within its policy limits when, under all of the circumstances, it could and should have done so, had it acted fairly and honestly toward its [policyholder] [insured] and with due regard for his interests.

Fla. S.J.I. (Civ) MI 3.1. It, like all of Florida's standard jury instructions, has been approved by this Court as a correct statement of Florida law. Thus, as the district court recognized, there are cases from which these principles were gleaned. (R. 1-11-15; R.E. D(5) p. 15).

In fact, the district court went on to cite cases which could be used to define an insurer's duties in the first-party context:

> ...[I]t has been held that an insurer has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938). Further, the duty of good faith involves diligence and care in the investigation and

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[15](...continued)
court with a presumption of constitutionality; and, 3) if a statute can be made constitutionally definite by reasonable construction, the court is under a duty to give it such a construction. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489,102 S.Ct. 1186 71 L.Ed. 2d 362 (1982); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); United States v. Thomas, 567 F.2d 299 (5th Cir. 1978).

> evaluation of the claim against the insured. American Fidelity and Casualty Co. v. Greyhound Corp., 258 F.2d 709 (5th Cir. 1958); DeLaune v. Liberty Mutual Ins. Co., 314 So.2d 601 (Fla. 4th DCA 1975). See also Chaachou v. American Central Insurance Co., 241 F.2d 889 (5th Cir. 1957)(interpreting Florida law and holding that an insurance contract creates a relationship requiring the utmost of good faith and fair dealing between the parties). The principles drawn from these cases, each of which were part and parcel of Florida insurance law at the time of Florida Statutes Section 624.155(1)(b)(1)'s enactment, could have equal application in the first party context.

(R. 1-11-16-17, R.E. D(5), pp. 16-17). The court even found case law dealing with the phrase "with due regard for the interest of the insured," Boston Old Colony Insurance Co. v. Guetierrez, 386 So.2d 783 (Fla. 1980), and showed how this could be applied in the first-party bad faith context:

> The question of "due regard for the interests of the insured," then, has been recognized by the Florida Supreme Court as a factual issue, dependent upon the facts of the particular case. "Due" regard implies a varying level or degree of regard as appropriate under the totality of the facts presented. The relationship between the insurer and insured, whether fiducial or adversarial, would be one factor to be considered by the trier of fact in determining whether the insurance company had breached a duty of good faith.

(R. 1-11-17, 18; R.E. D(5), pp. 16-17). Based on the above established ability to construe §624.155 using case law in existence at the time the statute was enacted, the district court found that the statute was not vague. (R. 7-11-18, R.E. D(5), p. 18).

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It also found that for an insurer to act with "due regard" for the interest of its insureds does not "require the insurance company to completely forego or ignore its legitimate rights under the insurance policy in favor of the insured's rights." The court concluded, therefore, that the statute is not overbroad.

Certainly, this analysis and these holdings are all in accord with the constitutional principles governing vagueness and overbreadth. Section 624.155 is clearly constitutional.

B. **No equal protection violation.**

Continental next argues that §624.155 violates its right to equal protection. This argument was not raised in the trial court or before the Eleventh Circuit. Therefore, it has been waived. Trushin v. State, 425 So.2d 1126 (Fla. 1982).

Even more importantly, this point is not supportable. Continental admits that the appropriate level of judicial scrutiny to be applied sub judice is the "rational basis" standard. Under this standard of review a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose. Florida High School Activities Ass'n, Inc. v. Thomas, 434 So.2d 306 (Fla. 1983). Further, the one challenging the constitutionality of the statute bears the burden of proof. Here, it is quite clear that the distinction between insurer and insured in §624.155 bears a rational relationship to a legitimate state purpose.

Because of its quasi-public nature and statewide effects, insurance is an appropriate subject for legislative control. As a

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result, the legislature has broad discretion in making distinctions in insurance law. Dealers Insurance Co., Inc. v. Jon Hall Chevrolet Co., Inc., 547 So.2d 325 (Fla. 5th DCA 1989). This is in accord with the general rule, recognized by this Court, that the legislature possesses wide latitude in devising classifications which regulate commercial transactions. Reserve Insurance Co. v. Gulf Florida Terminal Co., 386 So.2d 550, 552 (Fla. 1980). In fact, this latitude is broad enough to allow classifications based upon the financial resources of the parties. Id.

Here, the purpose of the entire statute is to curb abuses inflicted by insurers on their insureds -- whether those abuses are in connection with settlement practices, premium charges, or the insurance coverage provided. Certainly, considering the enormous financial resources insurance companies have and the enormous disparity in bargaining power between such companies and their insureds, it was reasonable for the legislature to impose a duty of good faith upon insurers without imposing a concomitant duty upon insureds. In fact, it can fairly be said that insurers and insureds are not similarly situated. Accordingly, there is no equal protection violation.

C. No unconstitutional impairment of the right to arbitrate.

Continental's final argument on this point is that the statute as construed impairs its contractual right to arbitration. This argument also has no merit because the statute became effective in 1982 -- before the subject insurance policy was issued to the Jones in 1983. The law of Florida in force at the time an insurance

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policy is issued is considered a basic ingredient of the contract and forms a part of the contract as though it were expressly referred to in its terms. Empire State Ins. Co. v. Chafetz, 302 F.2d 828 (5th Cir. 1962); Williams v. New England Mutual Life Ins. Co., 419 So.2d 766 (Fla. 1st DCA 1982); Calio v. Equitable Life Assurance Soc. of the United States, 169 So.2d 502 (Fla. 3d DCA 1964). Thus, this insurance contract does not conflict with §624.155, but instead incorporates its provisions.

Nor is there any conflict between §624.155 and Florida's arbitration code, §682.02, Fla. Stat. Section 624.155 simply establishes that in every insurance policy there is implied by law a covenant of good faith and fair dealing. See Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938); American Fire and Casualty Co. v. Davis, 146 So.2d 615 (Fla. 1st DCA 1962). Accordingly, an insured under an uninsured motorist provision is freely justified in insisting on good faith treatment from his own insurer. The salutory effect of the statute is to recognize this good faith requirement in an insurer's refusal to settle as well as in its demand for arbitration. It cannot be seriously claimed that such duty of good faith inhibits a right to arbitration. As the district court held:

> 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 would be the same in either case and the policy reasons

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> for imposing bad faith liability would be easily thwarted.

(R.1-11-20; R.E. D(5), p. 20).

Finally, Continental's suggestion that the "specific" provision, §682.02, of the arbitration code should take precedence over the "general" terms of §624.155(1)(b)(1), is equally unconvincing. The question here is Continental's bad faith refusal to settle. The arbitration code's provision that two parties may enter into an enforceable written agreement to arbitrate is clearly less specific than §624.155(1)(b)(1), which provides first parties with a cause of action for this particular harm. Section 624.155 is constitutional.

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CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that the certified question should be answered that the excess award is the appropriate measure of damage in a first-party action for bad faith failure to settle an uninsured motorist claim under §624.155(1)(b)(1), Florida Statute and if this Court deems it appropriate to address the issue, that said statute is constitutional.

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