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

INITIAL BRIEF OF APPELLANT CONTINENTAL INSURANCE COMPANY

CORLETT, KILLIAN, OBER,
HARDEMAN & LEVI, P.A.
Attorneys for Appellant CONTINENTAL
116 West Flagler Street
Miami, FL 33130
Tel: (305) 377-8931

BY: LOVE PHIPPS, Fla. Bar No. 508462
& SCOTT R. MCNARY, Fla. Bar No. 201197

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INTRODUCTION

Defendant/Appellant Continental Insurance Co. will be referred to as Continental. Plaintiffs/Appellees will be referred to collectively as Jones.

Continental will cite to the record as it appeared in the 11th Circuit. That is, citations to the record will be by an "R", then the volume number, the document number, and (if necessary) the page number(s) within the document cited. (The index to the record is the first document in the "Record Excerpts" [see below]).

Continental will also cite to the "Record Excerpts" which were submitted to the Eleventh Circuit and which have been forwarded to this court (The Eleventh Circuit requires that certain important portions of the record be submitted bound together as "Record Excerpts" for easy reference. Fla. R. App. P. 30; 11th Cir. R. 30-1). Reference to the Record Excerpts will be made by the letters "RE" and to its corresponding letter in 11th Cir. R. 30-1 [(a) through (e)].

Unless otherwise indicated, all emphasis is original.

STATEMENT OF THE ISSUES

I. THE COURT USED AN INCORRECT MEASURE OF DAMAGES; JONES CAN RECOVER ONLY THOSE DAMAGES PROXIMATELY CAUSED BY CONTINENTAL'S ACTIONS

A. Because the Statute Is Not Ambiguous We Should Not Consult Legislative History

B. Even When Consulted, the Legislative History Adds Nothing

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A. The Jury Could Deny Jones' Three Bases for Compensation

B. By His Proposed Jury Instructions, Jones Waived This Issue

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III. THE INSURER CANNOT BE GUILTY OF BAD FAITH SIMPLY BECAUSE IT ARBITRATES ITS INSURED'S CLAIM FOR UNINSURED MOTORIST COVERAGE

A. In the UM Situation, There Is No Fiduciary Relationship Between the Insurer and the Insured

B. If the Statute Applies in the UM Situation, It Is Unconstitutionally Vague and Violates Due Process

C. If the Statute Applies in the UM Situation, It Violates the Insurer's Right to Equal Protection

D. Continental Has a Right To Arbitrate Without Being Convicted of Bad Faith

STATEMENT OF THE CASE

A. Summary of the Case and Facts

Continental insured the Jones family for uninsured motorist coverage. When the daughter died due to an uninsured driver, Jones demanded the policy limits from Continental. Continental refused to pay the policy limits, and the claim was arbitrated. Jones filed a bad-faith claim against Continental. The jury found that Continental did not act in good faith but also found that Jones had suffered no damages. The trial court granted Jones' motion for JNOV, and reversed the zero damages award. Continental appealed to the Eleventh Circuit, and the Eleventh Circuit certified the question to the Supreme Court of Florida.

B. The Case and Facts

Continental issued a policy of automobile liability insurance to Jones. The policy was in effect on January 29, 1984, when his daughter was fatally injured while a passenger in an automobile. The policy contained uninsured motorist or underinsured motorist coverage in the amount of $300,000 per claim. The policy also covered two separate vehicles. In accordance with Florida law permitting stacking of the limits of coverage based on the number of insured vehicles, the policy provided a total of $600,000 in uninsured motorist benefits to Jones.

Following the daughter's death, Jones demanded Continental settle his claims for the $600,000 policy limits. Continental refused to tender its entire limits. Jones demanded arbitration as provided for in the policy. On the eve of arbitration, Continental offered $500,000, which Jones rejected. The arbitration panel

rendered an arbitration award of $1,000,000, based on an award of $500,000 to each parent.

Continental's attorneys then followed the recognized procedure for limiting the amount of the award to the amount of coverage--it filed a petition authorized by § 682.14, Fla. Stat. (1983), to modify the award and enter judgment accordingly. Meade v. Lumbermens Mut. Ins. Co., 423 So.2d 908 (Fla. 1982); Lumbermens Mut. Ins. Co. v. American Arbitration Assoc., 398 So.2d 469, 471 (Fla. 4th DCA 1981) (insurer entitled to use modification procedure set forth in § 682.14, Fla. Stat., in order to avoid liability for that portion of the arbitration award which exceeded the policy limit); see also Callard v. National Union Fire, 556 So.2d 1141 (Fla. 3d DCA 1989) (insurer filed declaratory action, claiming UM coverage was only $20,000; at arbitration, insured awarded $90,834; award properly reduced to $20,000). [RE (c)(1); R1-13]. Jones responded to the petition to modify the arbitration award, stating that the award was not defective and thus there was no ground for modifying the award. [RE (c)(2); R1-13]. The trial court entered judgment in the amount of $600,000.

Mr. and Mrs. Jones then filed an action in state court seeking damages for Continental's alleged failure to act in good faith in settling their mutual claims for the wrongful death of their daughter, pursuant to Section 624.155(1)(b)(1.), Fla. Stat (1983) [RE (b)]. This statute provides a cause of action for an insured when the insurer does not attempt in good faith to settle claims when, under the circumstances, the insurer could have done so had it acted fairly and honestly toward the insured with due

regard for the insured's interest.

The basis of Jones' action was that Continental knew the accident was not Jones' fault; knew the damages were in excess of the policy limits; knew the Jones were peculiarly susceptible to emotional distress because of their daughter's death; did not conduct a proper investigation of the claim before refusing Jones' offer; and, in sum, employed a course of dealing designed to hold on to its money as long as possible. [RE (d)(5); R1-11].

Continental moved to dismiss Jones' complaint on the ground that the suit violated § 624.155, Fla. Stat. (1983). Continental argued the common law of Florida did not recognize a bad-faith action involving a claim for first-party benefits such as uninsured motorist coverage. Consequently, if the statute were interpreted as Jones suggested, it would be unconstitutional. [RE (d)(1), (2); R1-5]. The case was removed to federal court [R1-1, 2], and Continental submitted a supplemental memo of law on the issue to the federal court. [RE (d)(2); R1-5]. Jones argued the statute did provide him with a cause of action. [RE (d)(3); R1-6]. Judge Aronovitz agreed and denied Continental's Motion To Dismiss, Jones v. Continental Ins., 670 F.Supp. 937 (S.D. Fla. 1987) [RE (d)(5); R1-11], and the case proceeded.[1]

The case went to trial, and the jury returned its verdict. The jury returned a special verdict against Continental, finding that Continental did not attempt in good faith to settle Jones' claim. However, the jury found Jones had suffered zero damages.

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[1] This was a nonfinal order and hence was not appealable at that time.

[RE (e)]. Jones filed a motion for JNOV. [R13-121]. Judge Aronovitz: (1) granted Jones' motion for JNOV on the ground the jury could not have returned a verdict for zero damages; (2) set aside the jury's zero damage verdict; (3) entered a judgment for $366,750 (roughly arrived at by deducting the policy limits of $600,000 and monies received in settlement of claims against third-party tortfeasors from the $1,000,000 amount awarded by the arbitrators), plus prejudgment interest [R10-663]; (4) awarded costs to Jones; and (5) denied Jones' motion for new trial on damages on the ground of mootness.

Continental appealed to the Eleventh Circuit, contesting the correctness of two of Judge Aronovitz's orders. [R4-100]. The first order, a nonfinal order, is his "Memorandum Opinion and Order on Defendant's Motion To Dismiss." Jones v. Continental Ins., 670 F.Supp. 937 (S.D. Fla. 1987) [RE (d)(5); R1-11]. The second order is a final order and is his "Order Granting Motion for and Entering Judgment Notwithstanding the Verdict and Denying Motion for New Trial." Jones v. Continental Ins., 716 F.Supp. 1456 (S.D. Fla. 1989) [RE (e); R4-99]. The Eleventh Circuit certified the question to the Supreme Court of Florida. Continental Ins. Co. v. Jones, 920 F.2d 847 (11th Cir. 1991).

SUMMARY OF ARGUMENT

Florida has traditionally had a cause of action against an insurer when an insurer acts in bad faith in settling the claim of its insured. This cause of action is a so-called "third-party action." In a third-party claim, the insured is claiming that the insurer failed to settle with a third party. This failure to

settle exposes the insured to a judgment in excess of the policy limits. So, in a third-party claim, the measure of damages is the difference between the amount of coverage and the amount of damages awarded.

In 1982, the Florida Legislature passed a bad-faith statute. The question all the courts in Florida have been struggling to answer is this: How does the statute apply to first-party actions? In a first-party action, the insured is claiming that the insurer failed to settle the insured's claim (in this case, for uninsured motorist benefits). However, unlike a third-party action, this failure to settle does not expose the insured to a judgment in excess of the policy limits. It exposes the insured to the extra costs of going to trial and of prejudgment interest.

This case involves a first-party claim for uninsured motorist benefits. When Jones' daughter died at the hands of an uninsured motorist, Jones demanded his policy limits; Continental refused to pay the entire policy limits, and the claim was arbitrated. Jones then instituted a claim of bad faith against Continental for its refusal to settle for the policy limits. The jury awarded Jones no damages, but the trial court ordered Jones could recover for the amount the arbitrator's award exceeded the policy limits, plus prejudgment interest. However, Jones' recovery under Judge Aronovitz' interpretation of § 624.155, Fla. Stat. (1983) is improper. It is improper for three reasons.

First, in this case, as in all first-party uninsured motorist cases, there is no relationship between the amount of damages suffered by the plaintiff and the amount of the excess judgment.

In other words, the insurer's bad-faith actions did not cause in insured's injury, it was the uninsured motorist who caused the physical injury. Awarding the plaintiff the amount of the excess judgment makes no sense. Second, the issue was submitted to the jury, and the jury found there were no damages. There was sufficient evidence to support the jury's finding; therefore, Judge Aronovitz erred in granting the Jones' motion for JNOV. Third, if the statute is deemed to provide a cause of action in this first-party UM action, the statute is unconstitutional. It is unconstitutional because the statute is vague and overbroad and violates the insurer's right to equal protection. It fails to tell an insurer how to avoid acting in bad faith in a UM situation where the insurer has no fiduciary duty towards the insured.

ARGUMENT

I. THE COURT USED AN INCORRECT MEASURE OF DAMAGES; JONES CAN RECOVER ONLY THOSE DAMAGES PROXIMATELY CAUSED BY CONTINENTAL'S ACTIONS

In Florida, there has long been a common law action against an insurance company when it does not attempt in good faith to settle claims it should have. That is, there is a cause of action for third-party bad-faith claims. In a third-party claim, the insured is claiming that the insurer failed to settle with a third party. This failure to settle exposes the insured to a judgment in excess of the policy limits. Consequently, the measure of damages in a third-party bad-faith case is the difference between the amount of coverage and the amount of damages awarded. In contrast, under the common law, there has never been a first-party action. Baxter v. Royal Indem. Co., 285 So.2d 652 (Fla.

1st DCA 1973), cert. dis. 317 So.2d 728 (Fla. 1975); Midwest Mut. Ins. Co. v. Brasecker, 311 So.2d 817 (Fla. 3d DCA 1975).

Florida's bad-faith cause of action was codified by the Legislature in 1982. The codification of the bad-faith cause of action reads 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:
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for his interests.
> ....
> (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.

§ 624.155, Fla. Stat. (1983).

Jones argues the measure of damages is automatically the same as a third-party action, that is, the amount of the excess verdict. The trial court accepted this argument too. "Order Granting Motion for and Entering Judgment Notwithstanding the Verdict and Denying Motion for New Trial," Jones v. Continental Ins., 716 F.Supp. 1456 (S.D. Fla. 1989) [RE (e); R4-99].

However, the trial court's order overlooks something important. In a first-party action, the insured is claiming that the insurer failed to settle the insured's claim, in this case, for uninsured motorist benefits. This failure to settle does not expose the insured to a judgment in excess of the policy limits. Instead, it exposes the insured to expenses which have nothing to do with the injuries incurred. The expenses normally include the

extra costs of going to trial and of prejudgment interest.

However, Jones contended the damage provision of § 624.155(3), Fla. Stat. (1983), required construction and therefore asked Judge Aronovitz to construe this statute by reference to its legislative history. Jones argued the history indicates that the available damages would include the amount an arbitration award exceeds policy limits. Jones is incorrect for three reasons: First, the remedy portion of the statute is clear, unambiguous, and conveys a definite meaning. Thus, there is no need for statutory interpretation and construction. Second, the legislative history is itself ambiguous and cannot be substituted for the express terms of the statute. Third, the construction placed on the statute by Jones is unconstitutional (violative of due process and equal protection) and is an impermissible double penalty.

A. Because the Statute Is Not Ambiguous, We Should Not Consult Legislative History

In Florida, the cardinal rule of statutory interpretation is that the statutory language must be accorded its plain meaning. Roush v. State, 413 So.2d 15 (Fla. 1982); Carson v. Miller, 470 So.2d 10 (Fla. 1979); see Waltman v. United States, 618 F.Supp. 718 (M.D. Fla. 1985). An allied cardinal rule is that the intent of the Legislature is to be obtained from the statute itself and legislative history will only be used to resolve ambiguity. "Where the legislative intent as evidenced by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to the plain meaning of its terms." State v. Egan, 287 So.2d 1, 4 (Fla. 1973), Alligood v. Florida Real Estate Comm'n, 156

So.2d 705 (Fla. 2d DCA 1963).

This is true "[e]ven where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act. [I]t will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, 694 (1918); Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 882 (Fla. 1983); Small v. Sun Oil Co., 222 So.2d 196, 201 (Fla. 1969); State ex rel. Florida Jai-Alai, Inc. v. State Racing Comm'n, 112 So.2d 825 (Fla. 1959); Florida State Racing Comm'n v. McLaughlin, 102 So.2d 574 (Fla. 1958); Egan, 287 at 4. The reason for the plain-meaning rule is that the Legislature is presumed to know the meaning of the words contained in the statute and to have expressed its intent by the words used in the statute. S.R.G. Corp. v. Department of Revenue, 365 So.2d 687, 689 (Fla. 1978).

The term "damages" used in Florida Statute § 624.155(3), Fla. Stat. (1983), is not ambiguous and its definition evinces the legislative intent. Damage is defined by Webster's New Universal Dictionary of the English Language, Unabridged (1976), as follows: (1) Any hurt, injury or harm to ones person or estate causing any loss of property, etc. (2) the loss so caused (3) in law, money claimed or ordered paid as recompense for injury or loss that is the fault of someone else (4) cost or expense. The word, damage, is synonymous with detriment, harm, injury or loss.[2]

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[2] Many Florida Statutes use the term damages or the phrase actual damages to describe the penalties for violation of statutes where civil causes of actions are permitted by the

Compensatory damages are designed to make the **INJURED PARTY WHOLE** to the extent it is possible to measure injury in terms of money. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). Damages are intended to compensate the victim for **INJURY WHICH IS SUSTAINED AS A CONSEQUENCE OF A DEFENDANT'S ACT.** Fisher v. City of Miami, 172 So.2d 455 (Fla. 1965) ("primary basis for an award of damages is compensation"); Hanna v. Martin, 49 So.2d 585 (Fla. 1950). An award of damages is to place the injured party in the position in which he would have been had no wrongful act occurred. Ashland Oil Co., Inc. v. Pickard, 269 So.2d 714 (Fla. 3d DCA 1971), cert. denied, 284 So.2d 18 (Fla. 1973). Damages are compensation for the direct, natural, logical and necessary consequences of injury. Augustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320 (Fla. 1956); Jacksonville Elec. Co. v. Batchis, 54 Fla. 192, 44 So. 933 (1907); Florida Power Corp. v. Zenith Indus., Co., 377 So.2d 203 (Fla. 2d DCA 1979).

That the Legislature chose to use the term "damages" in the statute is itself indicative of its intent to impose a remedy of consequential damages in the event an insurer violates its terms. Recovery of consequential damages for failure to pay a claim by an

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statute. See § 376.205, Fla. Stat. (all damages); § 394.459(13), Fla. Stat. (liable for damages as determined by law); § 400.023, Fla. Stat. (action to recover actual and punitive damages); § 542.22, Fla. Stat. (threefold the damages sustained); § 559.77, Fla. Stat. (actual damages); § 634.3284, Fla. Stat. (actual damages); § 58.65(12)(c), Fla. Stat. (actual damages); § 713.76(2), Fla. Stat. (damages); § 772.104, Fla. Stat. (actual damages); § 768.125, Fla. Stat. (liable for injury or damage); § 812.035(7), Fla. Stat. (actual damages); § 817.706, Fla. Stat. (actual damages). None of these statutes have required interpretation by the courts as to the meaning of damages. The term damages is clearly not ambiguous and construction is not required.

insurer is not a novel proposition and has been allowed in a variety of contexts either imposed by statute or by case law. See generally the cases collected in the annotation on Insurer's Liability for Consequential or Punitive Damages for Wrongful Delay or Refusal to Make Payments Due Under Contracts, 47 ALR 3d 314. When words used in a statute, considered in their ordinary and grammatical sense, clearly express the legislative intent, other rules of construction and interpretation are unnecessary and unwarranted. Rinker Materials v. City of North Miami, 286 So.2d 552 (Fla. 1973).

It must be kept in mind that § 624.155, Fla. Stat. (1983), is not limited to bad-faith refusals to settle uninsured motorist claims. The statute also provides a cause of action for injuries caused by certain conduct, § 624.155(1)(b)(2),(3), Fla. Stat. (1983), and provides a cause of action for violation of certain portions of the Uniform Insurance Trade Practices Act, § 626.9541-.9707, Fla. Stat. (1983). It should also be noted that prior to the enactment of § 624.155, Fla. Stat. (1983), the Uniform Insurance Trade Practices Act did not include a civil cause of action for violation of its terms. Coira v. Florida Medical Ass'n, Inc., 429 So.2d 23 (Fla. 3d DCA 1983); Cycle Dealers Ins., Inc. v. Bankers Ins. Co., 394 So.2d 1123 (Fla. 5th DCA 1981); Accord Keehn v. Carolina Casualty Co., 758 F.2d 1522 (11th Cir. 1985).

Thus, when the statute is considered as a whole, it is clear the intent of the statute was twofold: First to provide a cause of action for damages for violations of the express terms of § 624.155, Fla. Stat. (1983), and, second, to provide a cause of

action for violations of specific sections of the Unfair Claims Practices Act. The damages portion of the statute is not limited to Subsection (1)(b)(1.) but applies to all violations. Limiting the statute's application to uninsured motorist claims where there is an excess award does not comport with the statute's purpose. It is illogical to assume the Legislature intended to provide the specific remedy Jones sought because the statute clearly provides for damages in the general sense for any statutory violation. Simple common sense dictates that the damages available pursuant to the statute may take many different forms because the damages will depend on the nature of the violation.[3]

Judge Aronovitz's interpretation does not apply the entire statute in a realistic, common-sense manner. See First Sarasota Serv. Corp. v. Miller, 450 So.2d 875 (Fla. 2d DCA 1984). As has been seen by all the commentary and caselaw about the meaning of Jones since Jones came out, Judge Aronovitz' interpretation of the statute has only created doubt, it has not dispelled it. See Egan, 287 So.2d at 4; State v. Miami Herald Publishing Co., 479 So.2d 158 (Fla. 4th DCA 1985).[4] The courts are not allowed to

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3 If Plaintiffs' arguments were taken to their logical extreme, in an action for recovery of health benefits or personal injury protection benefits, for example, the insured would be entitled to recover for all his expenses regardless of limitations contained in the policy. Thus, an insurer would be responsible for benefits beyond the amount of the coverage. The damages recoverable pursuant to § 624.155, Fla. Stat., are obviously different.

4 Further, the broad reading of the statute to mean "any person" has been disagreed with. Cardenas v. Miami-Dade Yellow Cab, 538 So.2d 491 (3d DCA 1989) (§ 624.155 creates a cause of action for the insured when the insurer treats the third party badly, but statute does not create cause of action for the third party himself, even though he is "any person"), rev. discharged,

amend or complete acts of the Legislature to supply relief in instances where the Legislature has not provided such relief. Dade County v. National Bulk Carriers, 450 So.2d 213, 216 (Fla. 1984). By his ruling, Judge Aronovitz has improperly supplied relief to Jones in an instance where the Legislature has not provided such relief.

Jones has argued all along that the measure of damages must be the difference between the policy and the award, because, "If the remedy afforded is not the excess award, then what is it?" It is this -- it is attorney's fees incurred in the bad-faith action; the costs incurred in the bad-faith action; the accrued interest, etc.[5] It is quite possible to determine the measure of damages. Granted, it may take a little thought, but it can certainly be done. Seizing upon the difference between the policy and the award is not the answer. As the courts of this state have repeatedly stated, the plaintiff must show that his damages were proximately caused by the breach. Guiles v. United Servs. Auto. Ass'n, No.: 85-11001-CA-J (Fla. 18th Cir. Mar. 8, 1989) (plaintiff's claim that she was entitled to recover the excess amount of the arbitration award as damages must fail **AS A MATTER OF LAW** because they "are not damages legally caused by the alleged bad faith of [the insurer] and are not recoverable ...."); see, e.g., Lyle v.

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549 So.2d 1013 (Fla. 1989).

[5] For example, in Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985), an intentional infliction of emotional distress case, the court had no problem determining the particular plaintiff's damages -- the plaintiff's damages were based upon the particular facts of her case. That is why in § 624.155, the legislature did not specify the damages to be awarded -- the damages will vary from case to case.

National Savings Life Ins. Co., 558 So.2d 1047 (Fla. 1st DCA 1990). Jones cannot blithely push aside this requirement of law by stating that the amount of the excess judgment is the easiest way to decide it. While it may be the easiest way, it is not a correct, constitutional way.

B. Even When Consulted, the Legislative History Adds Nothing

In Judge Aronovitz's Memorandum Opinion and Order on Defendant's Motion to Dismiss, slip op. at 9, he referred to the legislative history. Even if reliance upon the legislative history is correct, it does not answer the question of the damages recoverable in the first-party bad-faith action. [RE (d)(5); R1-11-9]. The reference to the insurance company being subject to a judgment in excess of policy limits simply means an insurer can be held responsible for payments in excess of the policy limits in the event it breaches its duty of good faith. Such damages may include a number of different elements, but it can hardly be said the language used in the Staff Report means the damages available would include the amount an arbitration award exceeds policy limits.

Jones convinced Judge Aronovitz that the statute is ambiguous, and therefore he must consult the legislative history contained in the Staff Report to the 1982 Insurance Codes Sunset Revision. The legislative history is neither relevant nor helpful. In material part, the staff report on § 624.155 states:

> [§ 624.155(1)(b)(1.), Fla. Stat.] 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 Revision (HB4-F; as amended by HB10-G) (e.a.).

This "history" tells us nothing. The brief analysis contained in the staff report does not explain the purpose of the statute nor the Legislature's intent in passing it. This portion of the staff report refers to only one section, Subsection (1)(b)(1.), and not to the remaining provisions of the statute. If Judge Aronovitz had relied upon the cursory explanation contained in the staff report when he ruled on Continental's Motion to Dismiss, his ruling would have been limited to a declaration that the statute only provided for good faith in settling claims <u>only</u> with respect to uninsured motorist claims and <u>not</u> to other kinds of first-party claims. An interpretation that lends itself to an unreasonable or ridiculous conclusion or purpose not expressly stated by the Legislature should be forbidden. <u>See</u> <u>State v. Miller</u>, 468 So.2d 1051 (Fla. 4th DCA 1985); <u>GAC Props., Inc. v. Lanier</u>, 345 So.2d 812 (Fla. 4th DCA 1977).

C. The 1990 "Clarification" of the Statute Changes Nothing

In the federal appeal, Jones also relied heavily on the 1990 amendment of § 624.155, Fla. Stat., which states that it was "clarifying" the legislative intent. The title of the legislation states its purpose and the relevant part reads:

> amending § 624.155, F.S.; clarifying legislative intent with respect to the issues of preemption of other remedies and with respect to the issue of the definition of damages; correcting a cross-reference; providing legislative intent with respect to civil remedies....

(CS for SB 2670); Ch. 90-119, Preamble, Laws of Fla.

Many pages later, the bill adds subsection (7) to § 624.155, which states in relevant part:

> 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.

(CS for SB 2670).

This "clarification" is claimed by Jones to be an intent for plaintiff to recover the exact amount of the excess award as the proper measure of recovery in both first and third party bad-faith actions. In fact, the contention that the change in the statute is just a "clarification" undercuts Jones' argument. This is because it has been true all along that a plaintiff can recover an amount that exceeds the policy limits. That is exactly what a plaintiff does recover in a bad-faith action whenever he recovers attorney's fees for the bad-faith action, interest, costs, etc. These extra-contractual damages may include a number of different elements, but it can hardly be said the language used in the 1990 "clarification" means the damages available would automatically include the amount an arbitration award exceeds policy limits.

Therefore, yes, the amendment of the statute shows that damages in excess of the policy limits can be recovered. That is not disputed. However, there is nothing in the amendment which shows that the legislature's intent is for the plaintiff to automatically receive the excess as his damages. The plaintiff

is still required to prove a connection between the amount of his damages and the amount he can receive. This was true before the 1990 amendment to the statute, and it is no less true after the amendment. The statute does not say, as Jones says it says (ipsi dixit) that recovery will be the exact amount of the excess award. It cannot be so, because, if that is what the statute means, it is an unconstitional penalty statute.

There is another pertinent point to make about the language in the new subsection (7) to § 624.155. In addition to the previous quoted language of subsection (7), subsection (7), additionally states in part as follows:

> The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action.

(CS for SB 2670). As the subsection states, it does not preempt any other remedy or the common law. It provides an <u>alternative</u>. A party can't get both remedies, a party must decide whether to proceed under the common law or under § 624.155. <u>See</u> <u>Sarko v. Fireman's Ins. Co.</u>, 16 FLW 476 (Fla. 4th DCA Feb. 13, 1991).

If a party choose to proceed under the statute, as Jones has, he must comply with <u>all</u> the requirements of the statute. And, when a plaintiff proceeds under the statute, that statute provides a remedy for all different kinds of bad faith conduct. By necessity, the different kinds of bad faith conduct will have

different kinds of damages. The statute says the damages recoverable shall include damages reasonably foreseeable, and the damages reasonably foreseeable will depend upon the particular bad faith which occurs.

D. As the Trial Court Applied the Statute, It Is a Penal Statute and, Thus, Unconstitional

Therefore, neither the legislative history nor the 1990 amendment indicate that the amount of damages in this case would be the amount the arbitration award exceeded the policy limits. Both the legislative history and the 1990 amendment only refer to judgment in excess of policy limits. This simply means that an insurer who violates § 624.155, Fla. Stat. (1983), may ultimately be required to pay to its insured damages over and above the policy limits.

That is not to say the appropriate standard of damages in this case would be the amount of the excess arbitration award. Unquestionably, the statute provides a penalty. See Travelers Indem. Co. v. Chisholm, 384 So.2d 1360 (Fla. 2d DCA 1980) (§ 627.428, Fla. Stat., allowing attorney fees to an insured for disputes with insured is a penalty). The statute itself does not indicate the nature of the damages recoverable, but penal statutes are construed strictly in favor of the person against whom the penalty is imposed. Nell v. State, 277 So.2d 1 (Fla. 1973); Allure Shoe Corp. v. Lymberis, 173 So.2d 702 (Fla. 1965); Lollie v. General American Tank Storage Terminals, 160 Fla. 208, 34 So.2d 306 (Fla. 1948); Main v. Benjamin Foster Co., 192 So. 602 (Fla. 1939); Rosen v. Marlin, 486 So.2d 623 (Fla. 3d DCA 1986).

For example, in the Rosen case, the Third District reversed

a judgment for treble damages -- allowed under section 812.035, Fla. Stat. for civil theft -- against the defendant. The court refused to extend the civil remedy statute to a claim where a contractual relationship existed between the parties where the statute did not so state. The court stated the statute was "clearly a departure from common law which proscribes a penalty which did not exist at common law and should be strictly construed and limited in its application." Rosen, 486 So.2d at 625 (footnote omitted). Similarly, the Legislature's failure to say that the damages awardable under § 624.155 for a refusal to settle is the exact amount of the excess award requires a conclusion that such damages would be a penalty and, thus, are not available.

Judge Aronovitz' construction of § 624.155 and its legislative history make it a penal statute. § 624.155, Fla. Stat. (1983), enunciates specific penalties for its violation: damages, an award of attorneys fees, costs and punitive damages. Judge Aronovitz's decision goes further than the statute and awards damages so that Continental is penalized. It is clear that where multiple damages may be awarded, punitive damages cannot also be awarded because it is considered a double penalty. Stoner v. Houston, 265 Ark. 928, 582 S.W. 2d 28 (1979). An award of both treble damages and punitive damages for the same act amounts to a double recovery or an excessive penalty. Bill Terry's, Inc. v. Atlantic Motor Sales, 409 So.2d 507 (Fla. 1st DCA 1982). In light of the rule of strict construction for penalty statutes, the absence of clear language in § 624.155 -- definitively imposing the penalty in the form of an excess award -- means that the statute

must not be interpreted to do so.

E. Of the Federal Trial Courts' Rulings, Adams Is Better Reasoned Than Jones

There have only been a few cases which have considered the statute. Specifically, no Florida court has considered the statute's constitutionality, particularly as applied to claims involving uninsured motorist coverage. When Judge Aronovitz declined to decide the measure of damages in a first-party action in the first Jones case, Jones v. Continental Ins. Co., 670 F.Supp. 937 (S.D. Fla. 1987). [RE (d)(5); R1-11], he recognized the absence of caselaw in Florida on this issue. Jones, 670 F.Supp. at 939 n.1. The damages Jones allegedly sustained as a consequence of Continental's alleged failure to settle in good faith is clearly not the amount the arbitration award exceeded policy limits.

There is a recent federal case which has considered the proper measure of damages in a first-party case. Adams v. Fidelity & Casualty Co., No.: 88-0629-Civ-Spellman (Feb. 12, 1990). Adams has also been certified to this court. Adams v. Fidelity & Casualty Co., 920 F.2d 897 (11th Cir. 1991), Fla. S. Ct. No.: 77,231. Judge Spellman considered the same issue involved here -- the proper measure of damages in first-party bad-faith actions. Judge Spellman stated:

> In third-party suits, damages ordinarily include the "excess" judgment over the policy limits. Butchikas, 343 So.2d at 817-18. The rationale for awarding such damages is that an insurer undertakes a fiduciary duty when it assumes complete control over an insured's defense. When an insurer breaches this duty by acting in bad faith, exposing its insured to a judgment in excess of policy limits, the insured may recover the excess and other potential compensatory and punitive damages.

> Id..
>
> Damages incurred in suits involving uninsured motorist claims are entirely different. Unlike third-party suits, actual damages in suits involving uninsured motorist claims are limited to the extra costs of going to trial and the interest on money that should have initially been paid. Hence, **BECAUSE THE FIRST-PARTY INSURED IS NOT EXPOSED TO EXCESS LIABILITY, THE RATIONALE FOR ALLOWING RECOVERY IN EXCESS OF POLICY LIMITS IN THIRD-PARTY SUITS IS INAPPLICABLE TO SUITS INVOLVING UNINSURED MOTORIST CLAIMS.**

Adams, No.: 88-0629-Civ-Spellman, slip op. at 8 (e.a.).

Judge Spellman is not the only federal judge who has grasped this distinction. In Weese v. Nationwide Ins. Co., 879 F.2d 115, 121 (4th Cir. 1989), the Fourth Circuit recognized that it was the uninsured motorist, not the insurer who was responsible for the plaintiffs loss: "Nothing that [the insurer] did, or omitted to do, contributed to the damage [the plaintiffs] suffered as a result of the accident." See also Reliance Ins. Co. v. Barile Excavating & Pipeline Co., 685 F.Supp. 839, 841 (M.D. Fla. 1988) (there is no fiduciary relationship in a first-party claim because the interests of the insurer are wholly adverse to those of the insured).

F. McLeod Is Correct; Hollar Is Inapplicable Because Hollar Is a Third-Party Action

This issue is already before this court in McLeod v. Continental Ins. Co., 15 FLW D2785 (Fla. 2d DCA Nov. 14, 1990), Fla. S. Ct. No.: 77,089. Continental agrees with the Second District for the reasons cogently stated in McLeod. The Second District recognized that there are "fundamental differences" between a first- and third-party action because, in a third-party action, the tortfeasor has been exposed to liability for the excess judgment. In a first-

party action, he has not.

On the other hand, the Eleventh Circuit, in its opinion certifying the question to this court, in discussing Hollar v. International Bankers, 15 FLW D2888 (Fla. 3d DCA Nov. 27, 1990), cites it for the following proposition:

> (in first-party action, tender of policy limits will not ordinarily satisfy insured's full claim of damages for a bad-faith claim; "if, upon remand, bad-faith actions by the insurers are proven, the [plaintiffs'] damages would equal the amount of the excess judgment for which they are now responsible."

Jones, 920 F.2d at 850. There is a big problem with this statement -- **HOLLAR IS NOT A FIRST-PARTY ACTION, IT IS A THIRD-PARTY ACTION.** Hollar sued his insurers because, he claimed, they failed to settle with the injured third party. Because Hollar is a third-party action, it has no impact upon our case. It is governed by the well-settled rule that in a third-party action the measure of damages is the amount of the excess judgment.

To the extent Jones might argue the court also decided the measure of damages in a first-party action would be identical to the measure of damages in a third-party action by the following statement in Hollar: "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." Hollar, 15 FLW at D2888, this off-the-cuff statement is merely that. The issue of proximately caused damages in a first-party action was just not considered. And if the Third District does end up concluding that the measure

of damages in both first-and third-party actions is the amount of the excess judgment, it would be just another example of the Third District's recent tendency to consistently err by leaning over too far on the side of the insureds against insurance companies.

The prime example of this bias is AIU Ins. Co. v. Block Marina Inv. Co., 512 So.2d 1118 (Fla. 3d DCA 1987), which was quashed by this court in AIU Ins. Co. v. Block Marina Inv. Co., 544 So.2d 998 (Fla. 1989). AIU Ins. Co. is a prime example because in it the Third District, on the ground of furthering legislative intent, interpreted an insurance statute, § 627.426, Fla. Stat., to the point of "rewriting [the] insurance policy." AIU Ins. Co., 544 So.2d at 1000. This court recognized that the Third District's strained "construction presents grave constitutional questions, the impairment of contracts, and the taking of property without due process of law." Id. These same problems exist in our case and may exist in Hollar -- if Hollar is construed to mean the measure of damages is the same in both first- and third-party actions.

Another example of the Third District's bias is in Berger v. Firemans Fund Ins. Co., 515 So.2d 997 (Fla. 3d DCA 1987), which, like the present case, dealt with an insurance policy's arbitration clause as well. In Berger, the court again refused to follow the provisions of the insurance contract. The policy provided the parties could arbitrate and also provided either party could demand a jury trial if the award was over $10,000. When the arbitration award was over $10,000, the insurer invoked its contractual right to a jury trial. The Third District said no

and held the policy contravened the arbitration statute as well as public policy. This court disapproved the Third District's decision in Roe v. Amica Mut. Ins., 533 So.2d 279 (Fla. 1988), stating that the provision did not violate public policy and that "[w]e fail to discern any logical reason which would or should prohibit such an agreement." Roe, 533 So.2d at 281. Just as in Berger, Continental in this case was just trying to exercise its lawful arbitration rights under the insurance policy.

In Ranger Ins. Co. v. Bal Harbour Club, Inc., 509 So.2d 945 (Fla. 3d DCA 1987), the Third District, sitting en banc, again ruled against the insurer, this time by finding no violation of public policy. The Third District's decision was quashed by this court in Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So.2d 1005 (Fla. 1989). This court held the Third District's decision did violate public policy (holding that an insured cannot be indemnified by an insurer for loss resulting from an intentional act of religious discrimination).

Another excellent example is a case Judge Aronovitz relied upon in his opinion -- The Third District's decision in Fidelity & Casualty Ins. Co. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987) Unfortunately, **TAYLOR WAS DISAPPROVED BY THIS COURT.** In Taylor, the Third District misinterpreted the same bad-faith insurance statute at issue in our case, § 624.155, Fla. Stat. And, as it may have done in Hollar, the court concluded that the statute did away with all the differences between first- and third-party bad-faith actions. Taylor, 525 So.2d at 909.

This court then disapproved the Third District's decision in Kujawa v. Manhattan Nat'l Life Ins., 541 So.2d 1168 (Fla. 1989), once again trying to correct a fundamental misimpression of the Third District. This court stated that there were differences between the two and that the relationship between the insurer and the insured in a bad faith cause of action is adversarial, not fiduciary. Further, this court approved the decision of the Fourth District in Manhattan Nat'l Life Ins. Co. v. Kujawa, 522 So.2d 1078 (Fla. 4th DCA 1988), which had also rejected the reasoning espoused by the Third District Court in Taylor. The Florida Supreme Court recognized what Continental repeatedly pointed out to Judge Aronovitz -- the very nature of a first-party action is quite different from a third-party action and the courts in Florida have long recognized this difference. See Midwest Mut. Ins. Co. v. Brasecker, 311 So.2d 817 (Fla. 3d DCA 1975); Baxter v. Royal Indem. Co., 285 So.2d 652 (Fla. 1st DCA 1973). Cf. Opperman v. Nationwide Mut. Fire Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987) (court found a first-party cause of action, but the measure of damages was not addressed, nor were the constitutional arguments -- which were raised to Judge Aronovitz -- presented to the Opperman court).[6]

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[6] Also of note is the fact that in his appendix and his brief in federal court, one of the primary cases Jones relied upon was the trial court's opinion in Fidelity & Casualty Ins. Co. v. Taylor, No. 84-18844 CA-02 (Fla. 11th Cir. Ct. Nov. 4, 1988). As stated above, while the trial court's decision was upheld by the Third District in Fidelity & Casualty Ins. Co. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987), the Third District's opinion has now been disapproved by the Florida Supreme Court in Kujawa v. Manhattan Nat'l Life Ins., 541 So.2d 1168 (Fla. 1989). Consequently, the trial court's Taylor opinion is hardly persuasive.

And, finally, in Griss v. Aetna Casualty, 554 So.2d 556 (Fla. 3d DCA 1989), the Third District once again found coverage for an insured, notwithstanding a clear exclusion in the policy. This court quashed the Third District's decision, Aetna Casualty v. Griss, 568 So.2d 903 (Fla. 1990), because the insured's act of self-defense was excluded from coverage under the policy exclusion for injury expected or intended by the insured.

These several Third District cases demonstrate how the Third District has recently gotten off-base in the field of insurance law. They offer further proof that this court should decline to approve Hollar and that this court shoud approve the reasoning in McLeod.

G. The Amount of the Excess Arbitration Award Is an Improper Yardstick for Measuring Damages Against a UM Insurer

California has also addressed the issue of damages in first-party bad-faith actions. In Neal v. Farmers Ins. Exchange, 148 Cal. Rptr. 389, 582 P.2d 980 (1978), Mrs. Neal was seriously injured in an automobile accident and sought uninsured motorist benefits from her insurer. Her policy provided medical payments of $5,000 and uninsured motorist benefits of $15,000. Farmers refused to pay the claim, contending: (1) it was entitled to a set-off of the amount it had paid under its medical payments coverage; (2) the accident was solely due to the negligence of Mrs. Neal's husband; and (3) her husband's negligence was imputed to Mrs. Neal.

Mrs. Neal's attorney wrote Farmers urgently requesting a prompt settlement because Mrs. Neal was incurring heavy medical expenses. Farmers then requested the advice of its attorney. Almost three

months passed before the attorney reported his conclusions: (1) the law was unclear on the matter of the set-off; (2) any negligence on the part of Mr. Neal could not be imputed to Mrs. Neal; and (3) at best, the case was 50-50 on liability. Farmers then offered to settle the case by payment of $10,000. Mrs. Neal's attorney responded by again demanding the policy limits. The deadline passed without a response from Farmers.

Eventually, Mrs. Neal demanded arbitration as provided by the policy. The arbitrator submitted his decision in favor of Mrs. Neal on the issue of liability, reserving a decision on the question of a set-off. Farmers then paid $10,000. Subsequently, the arbitrator ruled in favor of Mrs. Neal on the issue of a set-off and Farmers paid the remaining $5,000. Mrs. Neal responded by filing a claim for bad-faith refusal to settle. The jury returned a substantial verdict. Throughout the trial, Mr. Neal's counsel argued the measure of damages should be considered in light of the total value of the injuries sustained by Mrs. Neal in the underlying accident.

At the outset, the court rejected this position by stating:

> In a situation such as that before us, which the parties hereto are pleased to term a "first-party" situation, the injuries of the plaintiff, being sustained prior to the alleged breach, cannot be a proximate result of that breach, and therefore, cannot serve as the proper measure of damages. Only damages proximately resulting from the breach such as consequent economic loss or emotional distress, for example, are recoverable as compensation therefore.

Neal, 582 P.2d at 397.

The Jones' claim for uninsured motorist benefits sought damages for their pain and suffering caused by the death of their daughter. Just as in Neal, the injuries were caused by the actions of an underinsured motorist, not by the insurer. Thus, as in Neal, the Jones' wrongful death claim for damages is not the proximate result of Continental's alleged breach of its duty of good faith. The damages that may be available to the Jones in this action must be separate and distinct from the wrongful death claim. Simple logic says so.

Also instructive is a bad-faith insurance case in an unusual posture -- Fidelity & Casualty Ins. Co. v. Cope, 462 So.2d 459 (Fla. 1985). In Cope, an injured party secured a judgment in excess of the tortfeasor's insurance coverage (coverage was provided by two insurers). Therefore, at that point, the tortfeasor had damages hanging over his head in the amount of the excess judgment. However, a bad faith action against the first insurer was settled, and the tortfeasor was completely released. When the injured party tried to recover in a derivative, bad faith suit against the second insurer, the court stated that, because the tortfeasor was released in the other suit, the tortfeasor no longer had any damages. And since the injured party's action was strictly derivative of the tortfeasor's, the injured party no longer had damages or a cause of action either.

The court also stated that if it were to recognize a duty from an insurer to a third-party who was injured as a result of the insured's conduct to settle the claim within policy limits, the damages of the third-party would be entirely different from the

damages of an insured. "At best such damages would be the extra cost of going to trial and loss of the money that earlier should have been paid." Cope, 462 So.2d at 461 n.5. Logically, the same is true in a first-party claim for bad faith. The damages available to Jones are entirely different from those available if they had been tortfeasors and a judgment entered in favor of an injured party against them in excess of their liability coverage.

Merely because Jones received an arbitration award in excess of Continental's policy limits, it is not axiomatic that Jones is entitled to damages in the amount the award exceeds policy limits. If indeed Continental acted in bad faith by refusing to settle their claim, the Jones' damages for the death of their child was caused by the actions of an uninsured motorist, not the insurance company. Their damages against the insurance company are entirely different. Thus, in a first-party action, the court must consider only the actual damages caused the insurer's actions, not the damages caused by the uninsured motorist. This is what California has held. This court should also so hold, and should hold as a matter of law that Jones is not entitled to damages in the amount the arbitration award exceeded policy limits.[7]

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[7] Continental also agrees with the point made by Amicus Curiae, Prudential, about Moore v. Allstate Ins., 570 So.2d 291 (Fla. 1990). In Moore, this court held that, when an insurer denies coverage and liability under UM provision so the insured forced to sue, but the insurer thereafter concedes coverage so only liability and damages remain at issue, the attorney's fee is limited only to that time during which coverage was at issue. § 627.727(8). Yet, under Jones' interpretation of § 624.155, the first-party insured would continue to recover fees for the entire underlying action, even though it may only have focused only on the reasonable amount of a UM award and coverage may have never been contested. Jones' interpretation conflicts with the reasoning of this court in Moore.

II. BECAUSE THE JURY FOUND NO DAMAGES, JONES HAS NO CAUSE OF ACTION, REGARDLESS OF ALL THE OTHER CASELAW

The most straight-forward way to see that Jones had no cause of action is the language of the statute. The statute states that any person may bring an action against an insurer when he is "damaged." § 624.155, Fla. Stat. (1983). The jury came back with a verdict which found that Jones was not "damaged." [R1-11]. By the very terms of the statute, Jones had no cause of action. Because the jury came back with a finding that Jones was not damaged, Jones cannot recover. This is true regardless of this court's decisions on McLeod, Hollar, et al.

Jones' bad-faith claim addressed two basic assertions: First, that Continental acted in bad faith in refusing to settle their claim for policy limits, and second, that the conduct of Continental's attorney in insisting upon a general release also amounted to bad faith. Neither claim lends itself to the conclusion that Jones was in fact damaged because of Continental's conduct. Neither logic nor common sense dictates that Jones is in fact damaged by the amount the arbitration award exceeded policy limits. Jones received the sum of $600,000 as compensation for the death of Karen Jones. Mr. Gomez, Jones' counsel, admitted in opening statement and closing argument that the case before the jury did not involve Karen Jones' death. [R7-16; R10-593-94]. It is implicit the jury understood that Jones had been compensated for Karen Jones' death and that the only dispute they were to try was whether Continental acted in bad faith, and, if so, and what were the damages. The jury could have easily decided that the amount

of the excess was not a proper element of damage in the context of the case presented them.

A. The Jury Could Deny Jones' Three Bases for Compensation

At trial, Jones based his claim for compensation on three different grounds:

1. The amount the arbitration award exceeded the policy limits;

2. Interest on the policy limits from the date the offer to settle should have been made; and

3. The difference in attorney's fees in the contingency fee contract between Jones and his attorney of 1/3 vs. 40% of the recovery where arbitration was demanded.

R10-663].

In all three, the jury, based upon the evidence presented, correctly decided damages were not proved: The evidence presented at trial showed the arbitration demand was first made on March 19, 1984, within several weeks after the wrongful death claim was presented to Continental. [R8-172-77]. Mr. Dickman, Jones' counsel, testified the obligation to pay forty percent of the amount awarded was activated when the demand for arbitration was made, not when the arbitration was held. Thus, in order to award damages on this claim, the jury would have had to decide that Continental should have paid the settlement demand within a few weeks after Continental first received the claim. The jury was well within its province to decide that Continental was not unreasonable in refusing to settle the case in so short a time.

In order to award interest to Jones, the jury was required to determine when Continental should have offered its policy limits. Under the circumstances where the claim was arbitrated five months after the claim was first presented and only six months after

Karen Jones died, the jury could have decided no interest was due.

In addition, the jury was not presented with any direct evidence regarding when the settlement should have been offered. This element of damage was presented for the first time in closing argument. [R10-611]. The evidence in this regard was not uncontroverted. In fact, no evidence was presented. The jury obviously recognized the lack of evidence on this point. Further, the reality is that this case was arbitrated relatively quickly and, considering the case, the claim was paid pretty quickly. Therefore, the jury was correct in finding Jones was not damaged.

Finally, with the exception of a brief appearance by Mr. Jones on the first day of trial, Mr. and Mrs. Jones did not appear before the jury. They did not testify nor was the jury presented with any evidence from them regarding the damages they suffered as a result of Continental's alleged bad-faith conduct. The jury recognized they were not required to award damages in the amount of the excess, and chose not to.

B. By His Proposed Jury Instructions, Jones Waived This Issue

According to the jury instructions offered by Jones, the jury was asked to "consider" as an element of damage the difference between policy limits and the arbitration award. R10-663]. Jones did not request that the jury be instructed that it **MUST AWARD** that amount as damages, nor did Jones ask for a preemptory jury instruction that, if the jury found bad faith, the jury must award the difference between policy limits and the arbitration award. Federal Rule of Civil Procedure 51 states that no party may

assign as error the giving or failing to give an instruction unless that party objects thereto before the jury retires to consider its verdict. A failure to object to the giving of a jury instruction is fatal to a belated request for the relief from the jury instruction actually given by the Court. Goffstein v. State Farm Fire & Casualty Co., 764 F.2d 522, 525 (8th Cir. 1985); Gulf South Machine, Inc. v. Kearney & Trecker Corp., 756 F.2d 377 (5th Cir. 1985).

C. The JNOV Should Not Have Been Granted

It is important to recognize that the procedural posture of this case is different from other cases considered. In our case, Jones demanded the policy limits from Continental, but Continental refused to pay the full limits. The claim was arbitrated, and then Jones filed a bad-faith claim against Continental. The bad-faith case went to a jury who (1) found that Continental did not act in good faith, but (2) found that Jones had suffered no damages. The trial court granted Jones' motion for JNOV, and reversed the zero damages award.

Consequently, the trial court's decision is governed by the law regarding judgments notwithstanding the verdict. Federal law governs the propriety of motions for JNOV. Miles v. Tennessee River Pulp & Paper Co., 862 F.2d 1525, 1527 (11th Cir. 1989). When considering whether or not a ruling on a motion for judgment notwithstanding the verdict should be upheld, the standard of review to be applied by the appellate court is the same as that applied by the trial court. Miles, 862 F.2d at 1528 (citing Neff v. Kehoe, 708 F.2d 639, 641 (11th Cir. 1983)).

Thus, the appellate court must consider all the evidence, and the inferences drawn therefrom, in the light most favorable to Continental, who is the nonmoving party. Miles, 862 F.2d at 1527-28 (citing Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)). Because there was substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then the motion for JNOV should have been denied, the case should not have been taken away from the jury. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989); Miles, 862 F.2d at 1527-28.

Florida law is basically the same as federal law on JNOV's. Under Florida law, a motion for JNOV, like a motion for directed verdict, should be granted with extreme caution. Stirling v. Sapp, 229 So.2d 850 (Fla. 1969). A trial court should only grant a JNOV where the jury's determination is not supported by the evidence. Skidmore, Owings & Merrill v. Volpe Constr. Co., 511 So.2d 642 (Fla. 3d DCA 1987), rev. denied, 520 So.2d 586 (Fla. 1988); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Anderson, 501 So.2d 635 (Fla. 1st DCA 1986), rev. denied, 511 So.2d 297 (1987). Because there was substantial evidence to support the jury's finding of zero damages, Judge Aronovitz erred in granting Jones' JNOV.

D. There Should Not Be a New Trial on Damages

Jones has argued in the past that there should be a new trial on damages. There should not. In McLeod, the trial court (which ruled in insured's favor) properly refused to go against the jury verdict which did not award the amount of the excess

award as an element of damages, although the jury did find bad faith. By the same token, even if Judge Aronovitz is correct in stating that the amount of the excess award may be recovered, he was incorrect in awarding it when the jury considered awarding it, but chose not to.

III. THE INSURER CANNOT BE GUILTY OF BAD FAITH SIMPLY BECAUSE IT ARBITRATES ITS INSURED'S CLAIM FOR UNINSURED MOTORIST COVERAGE

Continental recognizes that there have been several decisions which have held that the statute creates a first-party bad-faith action. See, e.g., in the state court, Opperman v. Nationwide Mut. Fire Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987); and Sarko v. Fireman's Ins. Co., 16 FLW 476 (Fla. 4th DCA Feb. 13, 1991), and in the federal court, United Guar. Residential Ins. Co. v. Alliance Mort. Co., 644 F.Supp. 339 (M.D. Fla. 1986), and Rowland v. Safeco Ins. Co., 634 F.Supp. 613 (M.D. Fla. 1986). However, this does not end this court's inquiry. This court must consider the posture of this particular case -- This court must consider whether a UM insurer can be guilty of bad faith simply for exercising its contractual right to arbitration. And, if that is so, the statute faces insurmountable constitutional obstacles.

A. In the UM Situation, There Is No Fiduciary Relationship Between the Insurer and the Insured

Liability of an insurer for acting in bad faith with respect to a liability insured has long been recognized in Florida. Commonly, a cause of action for bad faith lies when an insured has been subjected to a judgment in excess of policy limits where the insurance company refused to settle within policy limits. Under these circumstances, the relation between the insurer and

the insured was considered to be a fiduciary one. Thus, an insurer owed a duty to act in good faith when dealing with the insured's interests.

However, this duty to act in good faith has never existed where an insured makes a claim for first-party insurance benefits such as uninsured motorist coverage. Baxter v. Royal Indem. Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. dis. 317 So.2d 728 (Fla. 1975); Midwest Mut. Ins. Co. v. Brasecker, 311 So.2d 817 (Fla. 3d DCA 1975). The Baxter case involved facts very similar to the facts alleged by Jones. The insured's vehicle was struck by another vehicle negligently operated by an uninsured motorist resulting in the death of the Baxters' son and serious personal injuries to their daughter. The Baxters demanded the full amount of uninsured motorist coverage available to them. The insurer refused the demand and insisted on its right to arbitration pursuant to the policy to determine the issue of liability and the amount of damages. The arbitrators awarded the Baxters the full amount of coverage.

The Baxters then sued the insurance company alleging it was guilty of bad faith in negotiating, evaluating and paying the benefits due under the circumstances contending Royal owed them a legal duty to act in good faith. The complaint sought damages, including the full amount of damages suffered by them, in excess of policy limits. They also claimed Royal's bad-faith negotiations caused them to suffer emotional and physical pain and distress. Finally, they asked for punitive damages for the insurer's

alleged malicious conduct. The trial court dismissed the complaint.

On appeal, the court considered the following issue:

> When an automobile insurance policy contains an "uninsured motorist" clause and the insured is involved in an accident with an uninsured motorist; reasonable investigation reveals that the uninsured motorist was solely at fault, and the damages clearly exceed the policy limits; the insured offers to settle with his insurer within the policy limits but the latter willfully, maliciously, and for its own selfish interest and gain, refuses to settle until the existence and amount of liability is fixed by arbitration; is the insurer liable for punitive damages or for actual damages in excess of the policy limits plus legal interest?

Baxter, 285 So.2d at 654-55.

The Baxters argued a fiduciary relationship existed between the parties, imposing a duty upon Royal of acting in utmost good faith. They claimed Royal breached its duty to act towards them in good faith entitling them to compensatory damages in excess of the policy limits and punitive damages for Royal's tortious conduct. The court first noted the Baxters' theory was an acceptable one when applied to bodily injury and property damage provisions of an automobile insurance policy. However, the court rejected its application to a claim involving uninsured motorist coverage. The court rejected the notion a fiduciary relationship between the insured and insurer was created with respect to an uninsured motorist claim:

> Because the interests of the insurer are wholly adverse to those of its insured as to every facet of a claim under the uninsured motorist provisions of the policy, no basis for a fiduciary relationship between the parties exists.

Baxter, 285 So.2d at 656.

Addressing the merits of the Plaintiff's claim, the court stated:

> It is the existence of the fiduciary relationship between the parties under the bodily injury liability provisions of the policy which imposes upon the insurer the obligation of exercising good faith in negotiating for and effecting a settlement of the claim against its insured and which subjects it to an excess liability if it acts in bad faith ....

Id.

Conversely, the court held, because of the absence of such fiduciary relationship, no similar obligation rests upon the insured with respect to claims made against it under the uninsured motorist provision of the policy. The court pointed to the terms of the contract entered into between the parties which provided that if they could not agree with regard to any claim made by the insured under the questioned section of the policy, the dispute would be settled by arbitration. The court stated:

> It is difficult to rationalize how either party could be charged with the commission of a tort **MERELY BECAUSE IT ELECTED TO EXERCISE A LAWFUL OPTION OPEN TO IT UNDER THE CONTRACT.** If a party to a contract exercises an option given to it by the clear and lawful terms thereof, it would appear immaterial whether such election was motivated by good faith, bad faith, self interest, malice, spite, or indifference.

Id.

The court also held the legal relationship between the insured and his insurer on claims for collision damages or damages caused by an uninsured motorist is that of debtor and creditor in which no fiduciary relationship is present.

> It would be a strange quirk in the law to hold that each time a debtor fails or refuses to pay demands made upon it by a creditor, the debtor would be liable for both compensatory and punitive damages even though is failure

> or refusal was motivated by spite, malice, or bad faith.

Id. at 657.

The Baxter decision was later followed by the Third District Court of Appeals in the case of Midwest Mut. Ins. Co. v. Brasecker, 311 So.2d 817 (Fla. 3d DCA 1975). Following an automobile accident caused by an uninsured motorist, Brasecker demanded arbitration pursuant to the terms of his policy with Midwest. After Midwest denied coverage, Brasecker successfully sued and obtained a declaratory judgment that there was coverage. After Midwest allegedly continued to refuse to arbitrate, Brasecker filed an action seeking compensatory and punitive damages for the insurers "willful and malicious breach of contract."

The court agreed with the insurance company's claim the case should have been dismissed:

> On the authority of Baxter v. Royal Indemnity Company, Fla.App. 1973, 285 So.2d 652, we hold the court erred in so ruling. The cases which allow recovery for breach by an insurer of a duty to act in good faith in negotiating, evaluating and paying claims against an insured, under a liability coverage, where the insurer has the control thereof, do not apply to the insurer's handling of a claim of its insured against an uninsured motorist.

Brasecker, 311 So.2d at 818.

B. If the Statute Applies in the UM Situation, It Is Unconstitutionally Vague and Violates Due Process

Now, Jones will argue that § 624.155 has totally done away with Baxter. However, when § 624.155 is considered in light of the concerns expressed in Baxter, the constitutional problems can be seen. First of all, § 624.155 contains no definition of "good faith" or "bad faith." Historically, bad faith arose where an

insurer breached its fiduciary relationship to an insured. As pointed out above, in Baxter, there has never been a fiduciary relationship in UM cases. Consequently, in the UM situation, the statute is unconstitutionally vague because it does not sufficiently warn an insurer of what it must do to avoid being charged with bad faith.

It is axiomatic a statute is unconstitutional if the language used does not convey sufficient definite warnings of the proscribed conduct when measured by common understanding and practice. Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); Newman v. Carson, 280 So.2d 426 (Fla. 1973); Zachary v. State, 269 So.2d 669 (Fla. 1972); Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972); Smith v. State, 237 So.2d 139 (Fla. 1970); Hunter v. Allen, 422 F.2d 1158 (5th Cir. 1970).

Due process of law will not tolerate a statute which "forbids or requires the doing of an act in terms so vague that a man of common intelligence must guess at its meaning." Cline v. Frank Dairy Co., 274 U.S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927); State v. Llopis, 257 So.2d 17 (Fla. 1971); Brock v. Hardie, 114 Fla. 670, 154 So. 690 (1934). Whether the language used in a statute is ambiguous may depend on whether the language has sufficiently well established meaning in trade usage, the common law or federal law (if intended by the Legislature) to explain its meaning. See Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976).

Looking at the entire statute, the bulk of the provisions forbid certain enunciated conduct by insurers for which a civil remedy is provided. In these provisions, the legislature has expressed

proscribed conduct by an insurer in great detail which is easy to understand. On the other hand, the portion of the statute which is in derogation of the common law is vague and ambiguous and overly broad.

When a statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty from the terms of the law itself what would be deemed an infringement of that law, then it must be held unconstitutional. Connor v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968). Section 624.155 does not define any of the terms used in subsection (1)(b)(1.). No Florida court has ever used the language "with due regard for his interest" in reference to a failure by an insurer to act in good faith towards its insured. The cases imposing a duty to act in good faith have only done so on the premise the insurer and insured occupy a fiduciary relationship. Such a relationship is the touchstone of any common law action for bad faith. Further, "with due regard for his interest" is not used in the insurance industry. Nor does it have a counterpart in the federal law. It is, therefore, vague and uncertain in its terms and overly broad in scope.

The logical import of the use of the captioned language is that an insurer must always settle a case to the benefit of the insured. Obviously, it is the insured's best interest that any claim be paid and to the maximum of the coverage available. It could easily be argued the application of the statute would even prevent an insurer from denying coverage as it would not be in the insurer's best interest to do so. If this language was

construed as the trial court has done, a claim made by the insured could never be denied, it must always be paid and to the maximum amount of coverage available even though arguably the claim is for less than the coverage provided. Should an insured have a loss and demand settlement of the claim, the statute would penalize the insurer each time a dispute arose over the value of the claim. The vague terms used by the statute will dramatically alter the relationship between an insured and an insurer in all first party claims and, in effect, serve to negate the effect of literally hundreds, if not thousands, of cases in Florida setting the parameters of that relationship.

C. If the Statute Applies in the UM Situation, It Violates the Insurer's Right to Equal Protection

The statute places upon an insurer the duty to act in good faith. However, there is no reciprocal duty placed upon the insured to act in good faith. This is wrong. "Every contract places upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). If the statute is construed as Jones argues, it would violate equal protection. "The state has no rational/constitutional basis to give rights to one party to a contract while denying that same right to the other party." Driscoll, The Defense of First Party Bad Faith Actions in Florida, 9 Tr. Advoc. Qtrly 12, 16 (Oct. 1990), relying upon Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

D. Continental Has a Right To Arbitrate Without Being Convicted of Bad Faith

All Continental did in this case was exercise its contractual right to demand arbitration in the event there was a dispute concerning the value of a claim for uninsured motorist benefits. Arbitration is a right sanctioned by the Florida Arbitration Code, Ch. 682, Fla. Stat. Section 682.02, Fla. Stat., provides in pertinent part:

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy ....

(e.a.)

Part of Jones' claim of bad faith was based upon Continental's right of arbitration pursuant to the insurance contract and the arbitration code of Florida. Should the statute be given this effect, it is an impermissible impairment of contract in violation of Article 1, Section 10, Florida Constitution which states: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

Arbitration of disputes are favored in the law and a valid agreement to arbitrate and exercise of that right pursuant to contract does not give rise to an action for bad faith. See Roe, 533 So.2d at 281; Baxter; Brasecker. Arbitration is a means of resolving disputes in an expeditious and inexpensive fashion. A claim for uninsured motorist benefits necessarily involves

intangible elements of damage such as pain and suffering, mental anguish and so on which by their nature are difficult to compute. "There is no exact standard for measuring such damage. The amount should be fair and just in light of the evidence." Florida Standard Jury Instructions 6.2(a). Unlike the damages involved in a claim for medical benefits, health benefits, disability benefits or collision damages, there is no readily available formula for measuring damages in a claim for uninsured motorist benefits.

Clearly, an insurance company's exercise of its contractual right to arbitrate as sanctioned by the Florida Arbitration Code is one which conflicts with Judge Aronovitz's interpretation of Florida Statute Section 624.155. It is a rule of statutory construction that an interpretation of a statute will be adopted to avoid objectionable consequences. Simons v. State, 36 So.2d 207 (Fla. 1948). The trial court's application of the statute to deny Continental its right to arbitrate is an objectionable consequence which should be avoided -- Continental is charged with the commission of a tort merely by exercising its lawful option. The statute should not be interpreted in this way.

In addition, § 624.155, Fla. Stat. (1983), conflicts with the arbitration code under the facts of this case. The statutory interpretation rule to be applied in that event is that the statute dealing specifically with the subject matter takes precedence over another statute covering the same subject matter in general terms. Adams v. Culver, 111 So.2d 665 (Fla. 1959). The arbitration code is more specific. A special statute will prevail in the absence

of a clear legislative intent to the contrary. 49 Fla. Jur. 2d Stat. Sec. § 182. Section 624.155, Fla. Stat., should not be construed to conflict with an existing, specific statute such as the arbitration code. Such a construction would be unconstitutional.

CONCLUSION

A first-party action is fundamentally different from a third-party action. It is logical for Florida caselaw to hold, as it does, that the measure of damages in a third-party action is the difference between the amount of coverage and the amount of the judgment. That is the damages sustained by the insured, because the insured is exposed to payment for the excess. However, it is *not* logical (nor constitutional) to hold that the same measure of damages applies in a first-party UM action. The essential difference between a first- and a third-party cause of action requires that the measure of damages be computed differently.

A cause of action for a first-party bad-faith case did not exist under the common law. This is because in first-party actions, the relationship between the parties is adversarial, not fiduciary. Thus, the law does not impose a duty of good faith imposed upon the insurer. The statute as it applies to the UM situation is unconstitutional because (1) it is vague and does not sufficiently instruct the insurer as to what conduct it must avoid, and (2) it violates the insurer's right to equal protection. Previous Florida cases which have been decided adversely have been decided without considering the important constitutional arguments Continental has made in this case, but now that this court has been presented with the issue, this court should find that the

statute is unconstitutional. An insurer has a right to exercise its lawful right to arbitrate a UM claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant, CONTINENTAL INSURANCE COMPANY, was mailed this 6th day of March 1991 to: **PATRICE A. TALISMAN, ESQ.**, DANIELS & TALISMAN, P.A., Counsel for Appellees, Suite 2401, New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132-2513; **ROBERT J. DICKMAN, ESQ.**, Attorney for Appellees, Dickman Building, 4500 LeJeune Road, Coral Gables, FL 33146; **ROLAND GOMEZ, ESQ.**, Co-Counsel for Appellees, Suite 400, 8100 Oak Lane, Miami Lakes, FL 33016; **RAYMOND T. ELLIGETT, JR., ESQ.**, Amicus Curiae for Prudential Property & Casualty Ins. Co., NCNB Plaza, Suite 2600, 400 N. Ashley Dr., Tampa, FL 33602; and **GEORGE A. VAKA, ESQ.**, FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A., Amicus Curiae for Florida Association for Insurance Review, Post Office Box 1438, Tampa, FL 33601.

CORLETT, KILLIAN, OBER,
HARDEMAN & LEVI, P.A.
Attorneys for Appellant
116 West Flagler Street
Miami, Florida 33130
Tel: (305) 377-8931

BY: Love Phipps
LOVE PHIPPS
Fla. Bar. No.: 508462