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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,231

WILLIAM ADAMS and DOROTHY ADAMS, his wife, and THOMAS SHELTON and ELIZABETH SHELTON, his wife,

Plaintiffs/Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Defendant/Appellee.

On Discretionary Review of Certified Question from the United States Court of Appeals for the Eleventh Circuit

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INITIAL BRIEF OF APPELLANTS/MOVANTS

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STATEMENT OF THE CASE AND FACTS

Plaintiffs/Appellants Thomas and Elizabeth Shelton purchased an automobile insurance policy in their home state of North Carolina from the Appellee, The Fidelity and Casualty Company of New York ("F & C"). (R. 1-23-2, 3).[1] The policy provided $200,000 in uninsured motorist coverage. (R. 1-23-3).

In 1982 the Sheltons, along with Plaintiffs William and Dorothy Adams, were traveling in Broward County, Florida in the Sheltons' automobile when they were struck and injured by Sylvia Brannan, an uninsured motorist. (R. 1-23-2, 3). Brannan was driving in a willful and reckless manner and was intoxicated, thus giving rise to a claim for punitive damages. (R. 1-23-2).

Good faith efforts were made to settle within the uninsured motorist policy limits. F & C, however, rejected these efforts, forcing the Plaintiffs to file suit against Sylvia Brannan and F & C in Florida circuit court in accordance with the terms of the policy. Adams v. Brannan, 500 So.2d 236, 237 n.1 (Fla. 3d DCA 1986), rev. denied, 511 So.2d 297 (Fla. 1987). The Adams and Sheltons sought compensatory damages for their injuries and punitive damages based upon the willful misconduct of the intoxicated driver, Sylvia Brannan. While the action was pending, the Plaintiffs made repeated good faith offers to settle their claims within the policy limits, but F & C rejected all of these offers. In May of 1985 a Florida jury awarded compensatory damages of $70,000 to the Adams and $750,000 in punitive

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[1]Citations to the record are designated by "R" and refer to the record before the Eleventh Circuit, which is being transmitted to this Court. The first number following the symbol "R" refers to the volume number, the second number refers to the document number, and the third number refers to the page number(s) within the referenced document. The parties will be referred to by name or as they appeared below.

damages to all of the Plaintiffs. (R. 1-23-4).[2]

The Florida trial court limited F & C's liability on the judgment to the $70,000 awarded to the Adams as compensatory damages, holding that the uninsured motorist policy did not provide coverage for punitive damages awarded on the basis of the uninsured motorist's conduct. (R. 1-23-4). On appeal, the District Court of Appeal of Florida, Third District, reversed. First, the Third District held that questions of coverage under F & C's policy were governed by North Carolina law, and that under North Carolina law insurers are responsible for punitive damage awards. Adams v. Brannan, supra at 237-238. Second, the Third District held that the public policy of Florida did not preclude the application of North Carolina law affording coverage for punitive damages in an uninsured motorist context:

> UM protection insures only the injured plaintiffs rather than the wrongdoer. Because of this, decisively unlike a liability carrier, which may not recover any payment from the tortfeasor because he is its own insured, the uninsured motorist insurer becomes subrogated to the rights of his insureds, the plaintiffs, against the wrongdoer. Thus, in the present circumstances, the carrier, upon payment of the loss, may recover the punitive damages award against the wrongdoer, just as the plaintiffs could. She remains personally and fully liable for their payment - albeit (and irrelevantly) to a different entity. Florida's asserted interest in preserving the punishment and deterrence functions of punitive damages is therefore not in the least comprised by the recovery of punitive damages against an uninsured motorist carrier, and there is consequently no basis for declining to apply the law of North Carolina that its carriers are responsible for these losses under policies paid for and issued within its borders.

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[2]Smaller compensatory awards were made to Mr. and Mrs. Shelton (R. 1-23-4), but were set aside by the trial court because their claims failed to meet the no fault threshold. Adams v. Brannan, supra. This did not, however, effect the Shelton's right to recover punitive damages. Nales v. State Farm Mut. Automobile Ins. Co., 398 So.2d 455 (Fla. 2d DCA), rev. denied, 408 So.2d 1092 (Fla. 1981).

Adams v. Brannan, supra at 239 (footnotes and citations omitted).

Following this Court's denial of discretionary review, F & C satisfied the compensatory damage award and $130,000 (up to its $200,000 policy limits) of the punitive damage award. (R. 1-23-2). The Plaintiffs then filed a bad faith action in Florida state court pursuant to Section 624.155, Florida Statutes, seeking to recover their excess judgment, i.e., $620,000, together with interest. (R. 1-23-1, 5). F & C removed the action on the basis of diversity (R. 1-1-1) and moved for summary judgment on two grounds: that an excess judgment was not a recoverable element of damages under Section 624.155; and that, in any event, the Plaintiffs' excess judgment was not recoverable because it was based upon a punitive damage award which would not have been covered by an uninsured motorist policy under Florida law. (R. 1-9-1-9).

At oral argument, the United States District Court for the Southern District of Florida questioned whether an excess judgment was a recoverable element of damages under Section 624.155 (R. 2-19, 20), but ultimately held that it was. (R. 1-40-7, 8). The Plaintiffs' excess judgment in this case, however, was held not recoverable under Section 624.155 because it was comprised of an underlying award of punitive damages. The district court reasoned that, since Florida law does not permit recovery of punitive damages from the insurer in uninsured motorist cases, and since Florida law governs questions of performance of insurance contracts in Florida, an excess award based upon punitive damages could not be recovered in a first party bad faith action even though punitive damages were recoverable against the insurer in the underlying action. (R. 1-40-9).

The Plaintiffs appealed the district court's summary final judgment to the United States Court of Appeals for the Eleventh Circuit, which correctly recognized that there was no controlling Florida precedent on the dispositive question of whether an excess judgment made up of punitive damages could be recovered in a first party bad faith action. Adams v. Fidelity and Cas. Co. of New York, 920 F.2d 897 (11th Cir. 1991). Likewise, the Eleventh Circuit correctly recognized that there was no clear, controlling Florida precedent on another potentially dispositive question subsumed in this appeal - whether an excess judgment is a recoverable element of damages in a first party bad faith action under Section 624.155 irrespective of whether it is made up of punitive damages. Id. at 899 n.4.

The Eleventh Circuit certified the latter question to this Court in Jones v. Continental Ins. Co., 920 F.2d 847 (11th Cir. 1991)[3], and made an affirmative answer an assumption in the question it certified to the Court in this case pursuant to Article V, Section 3(b)(6) of the Florida Constitution, Section 25.031, Florida Statutes, and Rule 9.150 of the Florida Rules of Appellate Procedure, to wit:

> Assuming that Fla. Stat. Section 624.155 (1)(b)(1) provides for a first-party bad faith claim in an uninsured motorist case, and assuming that damages exceeding the limits of the insurance policy may be collected against an uninsured motorist insurance carrier, can the measure of damages properly include an award of punitive damages against the insurer?

The Certificate of the Eleventh Circuit was filed with this Court on January 14, 1991.

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[3]The question is also currently before the Court in McLeod v. Continental Ins. Co., Case No. 77,089.

SUMMARY OF ARGUMENT

I

The elements of damages, including punitive damages, which are recoverable in an uninsured motorist action and thus may be part of an excess judgment are determined by the law applicable in the uninsured motorist case. An insurer must negotiate in good faith based upon these elements of damages. The fact that Florida law, had it been applicable in the underlying case, may not have permitted recovery of or coverage for the same elements of damages, including punitive damages, does not mean that these damages are to be eliminated from the excess judgment in a subsequent first party bad faith case. The only legitimate issue concerning the underlying judgment in an action brought pursuant to Section 624.155, Florida Statutes, is whether it was the result of a bad faith refusal to settle. If punitive damages are covered by the insurer's policy and a recoverable element of damages under the law applicable in the underlying uninsured motorist action, as they were here, payment of an excess judgment comprised of punitive damages may be sought in a first party bad faith action under Section 624.155.

II

In enacting Section 624.155, the Florida Legislature created a previously non-existent right of action for bad faith in a first party context, including in an uninsured motorist context. The legislative history of Section 624.155, as well as a 1990 amendment adding subsection (7) thereto, demonstrates that the Legislature intended that insurers be liable for excess judgments that result from a bad faith refusal to settle first party claims, including uninsured motorist claims. The common law causation

arguments raised in opposition to this intended result ignore the intent of the Legislature, are based upon faulty notions of proximate cause, and, if accepted, would render Section 624.155 meaningless.

ARGUMENT

I

A PUNITIVE DAMAGE AWARD WHICH EXCEEDS THE LIMITS OF UNINSURED MOTORIST COVERAGE CAN BE RECOVERED IN A BAD FAITH ACTION UNDER SECTION 624.155, FLORIDA STATUTES, WHEN THE INSURER WAS OBLIGATED TO PAY PUNITIVE DAMAGES IN THE UNDERLYING ACTION

The purpose of an action for bad faith, be it first or third party, is to enforce an insurer's obligation to act fairly and honestly toward its insured by settling claims in good faith when, under the circumstances, it could and should do so. §624.155(1)(b)(1), Fla. Stat.; Fla. Std. Jury Instr. (Civ.) MI 3.1. The scope of the insurer's obligation in any given case is determined, inter alia, by the terms of its coverage and the elements of damages recoverable in that case. See Tully v. Travelers Ins. Co., 118 F.Supp. 568, 569 (N.D. Fla. 1954) ("an insurer must act in good faith towards its insured in the... settlement of claims which, under its policy, it has the exclusive right to ... settle".); Auto Mut. Indemnity Co. v. Shaw, 134 Fla. 815, 184 So.852, 859 (1938) ("The provisions of the policy are a guide to control the conduct and action of all parties claiming interests under the same.").[4] Thus, if a particular claim for damages, including punitive

[4]This is equally true with regard to coverage for punitive damages. For example, unless expressly excluded, casualty policies cover vicarious liability for punitive damages. U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1064 (Fla. 1983).

damages, is recoverable in a given case and covered by the terms of the insurer's policy, the insurer must attempt to settle that claim in good faith.

While Florida law will determine whether a cause of action for bad faith exists when the underlying case is a Florida case, Government Employees Ins. Co. v. Grounds, 332 So.2d 13 (Fla. 1976), the question of what claims for damages are covered under the insurer's policy, and thus must be negotiated in good faith in the underlying case, is determined by the law of the state in which the policy was issued. Adams v. Brannan, supra.

The Federal district court in this case, however, mistakenly eliminated F & C's obligation to negotiate a covered punitive damage claim in good faith by concluding that Grounds requires that Florida law control both issues. To the contrary, neither Grounds nor any other case holds that coverage for or the recoverability of the elements of damages making up the underlying excess award are to be revalidated or invalidated in a subsequent bad faith action based upon Florida law when the underlying claim and judgment are based upon a different choice of law.

In short, bad faith actions concern themselves with whether or not the excess verdict was a result of the insurer's failure to settle within policy limits when it could and should have done so, not with rewriting or dissecting the underlying verdict. And if punitive damages are a covered and legitimate element of damages in the underlying case, as everybody admits and the Third District held they were in this case, then an excess award made up of punitive damages should be recoverable in a subsequent bad faith action upon proper proof.

That this is so, and that the Eleventh Circuit's certified question

should be answered in the affirmative, is easily demonstrated by analyzing the effect of a negative answer in this and analogous contexts.

In this case, the Plaintiffs had a claim for punitive damages against an intoxicated, uninsured driver. This claim was covered by F & C's uninsured motorist policy as a matter of applicable North Carolina law. Adams v. Brannan, supra. While the punitive damage claim would not have been covered if Florida law applied, Florida law did not apply. F & C had an obligation in the underlying case to attempt in good faith to settle the Plaintiffs' claims. §624.155(1)(b)(1), Fla. Stat. This duty extended, perforce, to all of the Plaintiffs' covered claims, not just some of them. A negative answer to the Eleventh Circuit's certified question, however, would mean that, while F & C had a duty to negotiate the compensatory damage claims in good faith, it had no duty to negotiate the Plaintiffs' covered punitive damage claim in good faith because any excess damages awarded on that claim could be eliminated in the subsequent bad faith action on the basis of Florida law. An incongruous and unacceptable result.

By way of analogy, suppose an uninsured motorist claim for wrongful death is brought in Florida by the parents of a deceased 26 year old child. The law of another state applies and, unlike Florida law, permits the parents of a child this age to recover for the pain and suffering occasioned by his death.[5] Can it be suggested with a straight face that the carrier could refuse to negotiate this claim in good faith because it would not have been cognizable under Florida law, or that the carrier's refusal to do so would not subject it to liability for the resulting excess judgment in a bad faith

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[5]Florida law limits this right to children 25 or younger. §§768.18(1), (2); 768.21(4), Fla. Stat.

action? Yet a negative answer to the Eleventh Circuit's certified question leads directly to this result by requiring that Florida damage law, where different, be retroactively substituted in a subsequent bad faith action as the measure of the insurer's conduct even though it did not apply in the underlying case.

Finally, Florida public policy concerning punitive damages in no way suggests the incongruous result urged by F & C and reached by the Federal district court. Florida law relieving insurers of liability for punitive damage awards is based upon the belief that the punitive purpose of such awards will be thwarted if the tortfeasor is allowed to shift the burden of payment to his insurer. U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1064 (Fla. 1983). This principle, however, has no application in an uninsured motorist context, where the victim (not the tortfeasor) has purchased insurance to protect himself and the tortfeasor remains liable to the subrogated insurer for full payment of the award.[6]

This reality led the Third District to question the correctness of its prior decisions holding that uninsured motorist coverage did not extend to punitive damages. Adams v. Brannan, supra at 239 n.3. More to the point here, however, the same reality led the Third District to hold as the law of this case that Florida public policy was not offended by the application of North Carolina law requiring F & C to cover punitive damage awards. Adams v. Brannan, supra.

The fact is that F & C has already paid $130,000 of the punitive damage

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[6]The same type of reasoning led this Court to hold that Florida public policy does not preclude coverage of punitive damages when the insured himself is not personally at fault but is merely vicariously liable for the wrong of another. U.S. Concrete Pipe Co. v. Bould, supra.

award in the case. The question of whether its liability extends to the rest of the award or ends at the limits of its policy depends not on Florida's public policy concerning punitive damages, but upon whether F & C acted in bad faith.[7] For this additional reason, the Eleventh Circuit's certified question should be answered in the affirmative.

II

A JUDGMENT WHICH EXCEEDS THE LIMITS OF UNINSURED MOTORIST COVERAGE CAN BE RECOVERED IN A BAD FAITH ACTION UNDER SECTION 624.155, FLORIDA STATUTES

Both the assumptions contained in the question certified to the Court in this case, and the question certified to the Court in Jones v. Continental Ins. Co., supra, raise the issue of whether an excess judgment in an uninsured motorist case is a recoverable element of damages in a bad faith action brought pursuant to Section 624.155(1)(b)(1), Florida Statutes.

At common law, Florida, unlike many states, refused to recognize first party bad faith actions, i.e. actions by an insured against his own carrier claiming that the insurer failed to settle a claim made under his policy in good faith. The rationale was that, unlike third party bad faith claims where the insurer owed the insured a fiduciary duty to make reasonable settlements in actions brought against him, first party actions were purely adversarial contests between the insurer and the insured, and no fiduciary duty was owed. E.g., Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. dismissed, 317 So.2d 725 (Fla. 1975).

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[7]Although not at issue in this case, it is also worth noting that Florida has no public policy against recovering punitive damages in bad faith actions. Section 624.155(4), Florida Statutes, specifically provides for them based upon certain kinds of bad faith conduct.

In response to this situation, the Florida Legislature enacted Section 624.155, imposing upon insurers a duty of good faith in the handling of first party claims and creating what and all courts have agreed is a first party bad faith cause of action. See Cocuzzi v. Allstate Ins. Co., Case No. 89-613-CIV-ORL-19 (M.D. Fla. 1990); Jones v. Continental Ins. Co., 716 F.Supp. 1456 (S.D. Fla. 1986); United Guaranty Residential Ins. Co. of Iowa v. Alliance Mortgage Co., 644 F.Supp. 339 (M.D. Fla. 1986); Rowland v. Safeco Ins. Co. of America, 634 F.Supp. 613 (M.D. Fla. 1986); Kujawa v. Manhattan Nat'l Life Ins. Co., 541 So.2d 1168, 1169 (Fla. 1989); Hollar v. International Bankers Ins. Co., 15 F.L.W. D2888 (Fla. 3d DCA Nov. 27, 1990); McLeod v. Continental Ins. Co., 15 F.L.W. D2785 (Fla. 2d DCA Nov. 14, 1990); Allstate Ins. Co. v. Melendez, 550 So.2d 156, 157 (Fla. 5th DCA 1989); Cardenas v. Miami-Dade Yellow Cab, 538 So.2d 491, 495 (Fla. 3d DCA), rev. dismissed, 549 So.2d 1013 (Fla. 1989); Fidelity and Casualty Co. of New York v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987), rev. denied, 528 So.2d 1181 (Fla. 1988); Opperman v. Nationwide Mut. Fire Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987), rev. denied, 523 So.2d 578 (Fla. 1988); Industrial Fire & Cas. Ins. Co. v. Romer, 432 So.2d 66, 69 n. 5 (Fla. 4th DCA), rev. denied, 441 So.2d 633 (Fla. 1983).

Section 624.155(3) specifically provides 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.

The question thus becomes what "damages" the Florida Legislature intended to be recoverable when a bad faith action was brought based upon an insurer's handling of an uninsured motorist claim.

The legislative history of Section 624.155 provides important keys to the answer to this question. First, it makes it clear that first party uninsured motorist claims were uppermost in the Legislature's mind when it enacted Section 624.155:

> [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....

Staff Report, 1982 Insurance Code Sunset Revision (HB4F; as amended HB 10 G) (June 3, 1982), cited in Rowland v. Safeco Ins. Co., supra at 615. The fact that Section 624.155 was specifically addressing uninsured motorist claims is important because, if F & C's position is accepted, the statute is virtually meaningless in this context - a construction which must be avoided. See City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 219-220 (Fla. 1985).

F & C contends that in an uninsured motorist case Section 624.155 only authorizes the recovery of the extra costs occasioned by going to trial as opposed to the amount of the excess judgment. (R. 1-9-2). But compensation for these costs was already available from other sources. An insured who is successful on his uninsured motorist claim is entitled to recover his fees under Section 627.428, Florida Statutes, and court costs are always awarded to successful litigants. To contend that Section 624.155 was enacted to compensate the insured for the pittance of miscellaneous expenses not already covered by this existing law, for example the difference between actual and taxable costs, is absurd. The Legislature could not have dreamed that such a "sanction" would motivate carriers to negotiate first party claims in good faith.

Second, and not surprisingly given the above reality, Section 624.155's legislative history explicitly provides that the sanction for failing to negotiate in good faith is liability for excess judgments:

> [T]he sanction [for not dealing in good faith] is that a company is subject to a judgment in excess of policy limits.

Staff Report, 1982 Insurance Code Sunset Revision (HB4F; as amended HB 10 G) (June 3, 1982).

Third, the Florida Legislature attempted to put this controversy to rest in its most recent session. On June 1, 1990, it passed legislation amending Section 624.155 for the express purpose, inter alia, of:

> [C]larifying legislative intent... with respect to the issue of the definition of damages....

Ch. 90-119, Preamble, Laws of Fla. To this end the Legislature added a new subsection (7) to Section 624.155, which provides in relevant part that:

> 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.

§624.155(7), Fla. Stat. (Supp. 1990) (emphasis added).[8]

Thus, the only view consistent with the Legislature's intent in

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[8]This Court has held that an amendment such as this is to be considered in determining legislative intent under the prior statute:

> 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. This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute.

Lowry v. Parole & Probation Comm'n, 473 So.2d 1248, 1250 (Fla. 1985) (citations omitted).

enacting Section 624.155 is that an excess judgment may be recovered as an element of damages in a first party bad faith action arising out of an uninsured motorist claim. Several courts, both implicitly and explicitly, have so held. In Jones v. Continental Ins. Co., supra at 1460, the federal district court held:

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

In Fidelity and Cas. Ins. Co. v. Taylor, supra, the Third District permitted a Section 624.155 counterclaim for the amount of an arbitration award over and above the limits of an uninsured motorist policy to be entertained, and in Opperman v. Nationwide Mut. Fire Ins. Co., supra, the Fifth District reversed the dismissal of a Section 624.155 claim that was based upon an arbitration award that exceeded the limits of an uninsured motorist policy.

Courts that have reached, and parties (including F & C here) that urge the conclusion that excess judgments are not recoverable in first party bad faith actions under Section 624.155 ignore or summarily dismiss the question of legislative intent, relying instead upon a common law causation analysis. See Cocuzzi v. Allstate Ins. Co., supra; McLeod v. Continental Ins. Co., supra. The common law causation argument, however, is misplaced. First party bad faith actions were not recognized at common law, and the Florida Legislature expressly provided that Section 624.155 "shall not be construed to create a common law cause of action". §624.155(7), Fla. Stat. (Supp. 1990). The issue is thus what the Florida Legislature intended first party bad faith damages to be when an insurer refuses to negotiate in good faith, and the answer to that question is that "the sanction is that a company is subject to a judgment in excess of policy limits." Staff Report, 1982

Insurance Code Sunset Revision (HB4F, as amended HB 10 G) (June 3, 1982) (emphasis added).

Beyond being misplaced, the proximate cause argument cannot withstand analysis. The argument is that in first party bad faith cases, unlike third party bad faith cases, the damages making up the excess judgment are caused by the tortfeasor, not the insurer's bad faith, and since the first party bad faith plaintiff does not have to pay the excess award like the third party bad faith plaintiff does, the excess judgment cannot be considered proximately caused damages. The truth, however, is just the opposite. Excess judgments in both first and third party cases are proximately caused by the insurer's bad faith in precisely the same fashion, and the third party bad faith plaintiff's right to collect an excess judgment is in no way dependent upon it being the measure of his actual damages.

In both first and third party bad faith cases, the excess judgment is proximately caused by the insurer's bad faith. "But for" a bad faith refusal to settle within policy limits, the excess judgment would not exist in either situation. And in both first and third party bad faith cases the damages which form the basis for the excess judgment are caused by the tortfeasor in the underlying case -- be it the uninsured driver or the insured himself -- not by the carrier's bad faith. In short, this part of the common law causation argument simply confuses proximate cause with ultimate cause.

Similarly, the notion that the amount of the excess judgment defines the actual damages suffered by a third party bad faith plaintiff is specious. An insured who can afford to pay the excess judgment entered against him is the exception rather than the rule. The damages the insured suffers in this situation are the loss of credit and other financial constraints resulting

from the unsatisfied judgment, and perhaps mental anguish. Yet, even though the insured will never have or be able to pay the excess judgment, he can recover it as damages in a bad faith action. The reality, then, is that the proximate cause knife does not cut as finely as F & C would have it. Both first and third party bad faith produce unsatisfied excess judgments, and in both contexts the guilty insurer must satisfy them.

Finally, a return to the touchstone of legislative intent is appropriate. The social ill being addressed by the enactment of Section 624.155 was that insurers were routinely refusing to settle the first party (particularly uninsured motorist) claims of their insureds in good faith, safe in the knowledge that at worst they might have to pay policy limits. With the enactment of Section 624.155, the Florida Legislature served notice that policy limits no longer cap the downside risk of bad faith:

> [T]he sanction is that a company is subject to a judgment in excess of policy limits.

Staff Report, 1982 Insurance Code Sunset Revision (HB4F; as amended HB 10 G) (June 3, 1982). If the Court eliminates liability for excess judgments, leaving only increased costs and the potential of consequential damages as the penalty for bad faith, the principal sanction envisioned by the Florida Legislature will be gone and the social ill will remain.

CONCLUSION

For the above reasons and based upon the above authority, it is respectfully submitted that the certified question of the Eleventh Circuit should be answered in the affirmative and the assumptions made therein should be validated.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 1ST day of February, 1989 to: Love Phipps, Esquire, Attorney for Defendant, Corlett, Killian, Hardeman, McIntosh & Levi, P.A., 116 West Flagler Street, Miami, Florida 33130.

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