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IN THE SUPREME COURT OF FLORIDA

CASE NO. **79,712**

ANNA RUE CAMP and JOHN E. VENN, as Trustee of the Estate of Fariss D. Kimbell, Jr., M.D.,

Appellants,

vs.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Appellee.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE APPELLANTS' POSITION

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I
STATEMENT OF THE CASE AND FACTS

The relevant facts are accurately stated in the federal court's certifying opinion, ***Camp v. St. Paul Fire and Marine Ins. Co.,*** **958** F.2d **340** (11th Cir. **1992).** Plaintiff Anna **Camp** filed a medical-malpractice suit against Dr. Fariss Kimbell in Florida state court in **1984.** Dr. Kimbell's insurer--appellee St. Paul Fire and Marine Ins. Co.--undertook the defense, and rejected two **offers** of settlement for the policy limits of **$250,000.00.** In the interim, in part because of the pending action, "Dr. Kimbell's financial condition began deteriorating," and he filed for bankruptcy in July of **1986.** 958 F.2d at **341.** St. Paul then rejected a third offer to settle for the policy limits, after which the bankruptcy court discharged Dr. Kimbell from all personal liability, and lifted the bankruptcy stay to permit the state action to continue--but solely for the purpose of liquidating Mrs. Camp's claim against Dr. Kimbell, so that she could levy against the insurance or against the bankruptcy estate for any excess. St. Paul then rejected a fourth offer *to* settle for the policy limits, **and** Mrs. **Camp** rejected St. Paul's offer to settle below the policy limits. **Mrs.** Camp then won a **$3** million verdict in the state court, which **was** affirmed on appeal. ***Kimbell v. Camp,*** **532** So.2d 1061 (Fla. 1st **DCA** 1988).[1] The bankruptcy court then ruled that the excess state judgment (above the amount of coverage) was an unsecured claim against the bankruptcy estate; and in accordance with **§** 55.145, **Fla.** Stat. (1991), the state trial court discharged the judgment against Dr. Kimbell personally.

Mrs. Camp **and** the bankruptcy trustee then **filed** their bad-faith action against St. Paul in Florida state court. It was removed to the federal district court, which granted St. Paul's motion for summary judgment, on the ground that Dr. Kimbell's discharge in

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[1] The undersigned counsel represented Mrs. Camp in that appellate proceeding, but **was** not counsel **of** record in the instant action by Mrs. Camp **and** the bankruptcy trustee against St. Paul.

bankruptcy had extinguished Mrs. Camp's derivative bad-faith claim against St. Paul, and with it the estate's potential exposure. On appeal, the U.S. Court of Appeals for the Eleventh Circuit certified that question, and several subsidiary questions, to this Court.

II
ISSUES ON CERTIFICATION

WHETHER THE FEDERAL DISTRICT COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR ST. PAUL, ON THE GROUND THAT DR. KIMBELL'S DISCHARGE IN BANKRUPTCY CUT OFF STATE FARM'S EXPOSURE FOR BAD FAITH, NOTWITHSTANDING THE LANGUAGE OF THE INSURANCE POLICY.

III
SUMMARY OF THE ARGUMENT

The substantive question which was certified by the Court of Appeals for the Eleventh Circuit is whether an insured's discharge in bankruptcy, which relieves the insured of any personal liability far an excess judgment above the amount of his policy's limits, necessarily extinguishes the insured's first-party rights against the insurer, and therefore necessarily extinguishes the injured third party's derivative right to recover the excess from the insurer in a bad-faith action. That is a question, however, which is not squarely presented in this case, because any common-law rule resolving that question has been superseded by the language of the insurance policy at issue. The policy says that "[i]f the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy." That means that notwithstanding any common-law rule to the contrary, St. Paul has contractually assumed an obligation of good faith to the insured's successor-in-interest–the bankruptcy trustee--by acknowledging in the contract that St. Paul's good-faith obligation does not terminate with Dr. Kimbell's discharge in bankruptcy. And

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of course, because St. Paul's first-party obligation survived the bankruptcy, so does Mrs. Camp's derivative third-party action against St. Paul.

Moreover, even if the insurance policy were silent on this question, Dr. Kimbell's discharge from personal liability did not extinguish the insured's rights under the policy, but merely transferred those rights to Dr. Kimbell's successor-in-interest–the bankruptcy trustee. Under well-established principles of bankruptcy law, the insurance policy became an asset of the bankruptcy estate; the trustee in bankruptcy stepped into Dr. Kimbell's shoes as insured; and the trustee became the beneficiary of all of St. Paul's obligations under the policy--including its obligation of good faith. Thus, to the extent that St. Paul's alleged bad faith threatens any injury to the bankruptcy estate, that estate has a viable statutory claim for bad faith under § 624.155, Fla. Stat. (1991). That claim was not extinguished by Dr. Kimbell's discharge from personal liability; as the bankruptcy court ruled in this **very** case, the amount of any excess judgment remains a general unsecured claim against the bankruptcy estate.

This is not a case, therefore, like *Fidelity **and*** Casualty ***Co. v. Cope,*** **462** So.2d **459** (Fla. **1985**), in which the insured's potential exposure to a bad-faith action was extinguished in its entirety by the third-party plaintiffs execution of a release of all claims against the name insured, before any assignment of those claims to the injured third-party plaintiff. To the contrary, in this case the insured's potential liability (which now rests in his successor-in-interest–the bankruptcy trustee) remains unaffected, and with it the third-party plaintiffs derivative rights to go after the insurer for the excess. As this Court explained in *McLeod* ***v. Continental Ins. Co.,*** **591** So.2d **621, 625** n.6 (Fla. **1992): "In** a third-party action, damages **. . .** would include the amount of a judgment in excess of policy limits because the insured is exposed to additional liability for the excess amount." In the instant case, the trustee in bankruptcy is now "the insured," and without question "the insured is exposed to additional

liability for the excess judgment." For that reason, Mrs. Camp's derivative third-party rights are preserved.

Any other outcome would turn the law of bad faith on its head. The whole purpose of the bad-faith doctrine is to deter the insured from wrongfuly refusing to settle a case within the policy limits, in confidence that the amount of any excess judgment will be born entirely by the insured. Yet that is precisely the outcome which St. Paul is advocating in this case--and in all cases in which the insurer knows that his insured's financial status is shaky, and may result in a bankruptcy. In all such cases, if St. Paul's position were the law, the insurer would be immunized from any consequences for its bad faith, because the insurer would have no potential exposure to liability for an excess judgment. St. Paul's position would give all insurers, in all cases in which the insured's bankruptcy seems likely, the license to act in bad faith at will. That cannot be the law--and not surprisingly, it is not the law. To the contrary, because of the language of the very policy at issue here, and because of the bankruptcy estate's exposure to liability for the excess judgment, Mrs. Camp's derivative third-party rights have not been extinguished by Dr. Kimbell's discharge from personal liability in bankruptcy. That is what the insurance policy says; that is what the law of Florida says; and that is what this Court should re-affirm.

IV
ARGUMENT

THE FEDERAL DISTRICT COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR ST. PAUL, ON THE GROUND THAT DR. KIMBELL'S DISCHARGE IN BANKRUPTCY CUT OFF STATE FARM'S EXPOSURE FOR BAD FAITH, NOTWITHSTANDING THE LANGUAGE OF THE INSURANCE POLICY.

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A. Any Common-Law Rights of St. Paul were Superseded by Its Own Contract. As the federal appellate court pointed out, 958 F.2d at 341, St. Paul's policy contains the following language:

> Once liability has been determined by judgment or by written agreement, the party making the claim may be able to recover under this policy, up to the limits of your coverage. But that party can't sue us directly or join us in a suit against the protected person until liability has been so determined. If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy.

As this Court has ruled, Mrs. Camp is a third-party beneficiary of that contractual provision, and of all other provisions of the insurance policy. ***Thompson v. Commercial Union Ins. Co.,*** 250 So.2d 259 (Fla. 1971). Moreover, when Dr. Kimbell filed for bankruptcy, the insurance policy became the property of the bankruptcy estate, and the trustee in bankruptcy--plaintiff/appellant John Venn--succeeded to all of Dr. Kimbell's rights under the policy, whether they accrued before or after the bankruptcy.[2]

That policy states unequivocally that St. Paul's obligations are unaffected by the intervening bankruptcy of the insured. The policy language does not say that only *some* of the insurer's obligations survive a bankruptcy; it says that "we'll still be obligated under this policy." Even if that language were ambiguous, it must be construed against St. Paul.[3] Thus, in the only three extant cases which have addressed this precise issue, all three courts

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[2] 11 U.S.C. § 541(a)(1). *See In Re Louisiana World Exposition, Inc.,* 832 F.2d 1391, 1399 (5th Cir. 1987); *Matter of Wilson,* 694 F.2d 236, 238 (11th Cir. 1982); Anderson ***v. St. Paul*** Mercury ***Indemnity Co.,*** 340 F.2d 406, 409 (7th Cir. 1965); ***Palmer v. Travelers Ins. Co.,*** 319 F.2d 296, 299-300 (5th Cir. 1963). ***See generally*** 8 Appleman, ***Insurance*** Law ***& Practice*** § 4834, at 23 (Supp. 1990).

[3] *See Travelers Ins. Co. v. Bartoszewicz,* 404 So.2d 1053 (Fla. 1981); ***Nixon v. U.S. Fidelity & Guaranty Co.,*** 290 So.2d 26, 29 (Fla. 1973); ***Poland v.*** Dash, 441 So.2d 174 (Fla. 3d DCA 1983). ***See Gulf Tampa Dtydock Co. v. Great Atlantic Ins. Co.,*** 757 F.2d 1172, 1174 (11th Cir. 1985).

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have held that notwithstanding the bankruptcy, the insurer's policy language preserved the injured third party's bad-faith action, notwithstanding any statutory or common-law rule to the contrary. ***See Torrez v. State Farm Mutual Automobile Ins. Co.,*** 705 F.2d 1192 (10th Cir. 1982); ***Maguire v. Allstate Ins. Co.,*** 341 F. Supp. *866* (D. Del. 1972); ***Ganaway v. Shelter Mutual Ins. Co.,*** 795 S.W.2d 554 (Mo. Ct. App. 1990).

The outcome is no different under Florida law. Even constitutional rights can be waived by contract under Florida law.[4] As this Court has put it: "A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution." ***Bellaire Securities Corp. v. Brown,*** 124 Fla. 47, 168 So. 625, *633* **(1936).** ***See generally Raimondi v. I.T. Chip, Inc.,*** 480 So.2d 240, 241 (Fla. 4th DCA 1985). Thus in ***Auto Mutual Indemnity*** Co. ***v. Shaw,*** 134 Fla. *815,* **184** So. **852** (1938), this Court held that the insurance policy itself created a third-party right of action, whether or not the common law would have recognized such a right of action on the facts alleged.

An insurer's good-faith obligations are prescribed both by statute ***(see*** § 624.155, Fla. Stat. (1991)), and by pre-existing common-law rules which survive the statute.[5] Even assuming ***arguendo*** that such common-law or statutory obligations might otherwise be discharged or modified by the intervening bankruptcy of the insured, St. Paul has explicitly

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[4] ***See Manrique v. Fabbri,*** 493 So.2d 437 (Fla. 1986) (contractual forum clause waives constitutional right to insist on minimum due-process contacts); ***Pacific Mills v. Hillman Garment,*** *87* So.2d 599 (Ha. 1956) (contractual agreement to binding arbitration waives constitutional right to trial by jury). ***See generally M/S Bremen v. Zapata Off-Shore Co.,*** 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) (forum clause).

[5] ***See McLeod v. Continental Ins. Co.,*** 591 So.2d 621 (Fla. 1992); ***Hollar v. International Bankers Ins. Co.,*** **572** So.2d 937, 939 (Fla. 3d DCA 1990), ***review dismissed,*** *582* So.2d 624 (Fla. 1991); ***Cardenas v. Miami-Dade Yellow*** Cab ***Co.,*** **538** So.2d 491,494-96 (Fla. 3d DCA), ***review dismissed,*** **549 So.2d** 1013 (Fla. 1989); ***Opperman v. Nationwide Mutual Fire Ins. Co.,*** 515 So.2d 263 (Fla. 5th DCA 1987), review denied **523** So.2d 578 (Fla. 1988).

contracted away such pre-existing rights. That observation ends the inquiry, and obviates the need to address any of the other issues in this case.

B. Dr. Kimbell's Bankruptcy Did Not Extinguish the Common-Law and/or Statutory Rights of Either Mrs. Camp or of Dr. Kirnbell's Successor-in-Interest, the Bankruptcy Trustee; and St. Paul is Estopped by the Policy to Claim Otherwise. Dr. Kirnbell's bankruptcy did not extinguish his own first-party rights in the policy, but merely transferred those rights to his successor-in-interest--the bankruptcy trustee. As we have established, *supra* p. 5, the insurance policy is an asset of the bankruptcy estate, and the trustee has succeeded to all of Dr. Kimbell's interests in that asset. That of course includes Dr. Kirnbell's statutory right of action under **§ 624.155,** for any damages caused to the insured by St. Paul's bad faith.

As the bankruptcy court has ruled in this case *(see* **958** F.2d at **342),** any amount of Mrs. Camp's judgment not paid by St. Paul will represent "a general, non-priority unsecured claim against Dr, Kimbell's bankruptcy estate."[6] Thus, to the extent that the excess judgment is the product of St. Paul's bad-faith refusal to settle within the policy limits, the insured's successor-in-interest has a first-party statutory right of action, under **§ 624.155,** for the full amount of the excess judgment, plus any incidental damages."

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[6] *See Young v. American Casualty Co.,* **416 F.2d 906,912** (2d Cir.), *cert. dismissed* sub *nom. Myler v. Procunier,* **396 U.S. 997, 90 S.** Ct. 580, **74** L. Ed. **2d 490 (1969);** *Purdy v. Pacific Automobile Ins. Co.,* 157 Cal. App. 3d **42, 203** Cal. Rptr. **524,** 532 (1984).

[7] In *McLeod v. Continental Ins. Co.,* 591 So.2d 621 (Fla. 1992), this Court held that the insured's damages in a first-party action include the amount of the policy, plus "ajudgment in excess of policy limits if the actual damages resulting from the insurer's bad faith are found to exceed the policy limits." **591 So.2d** at **626.** When the insured himself is the injured party (in *McLeod,* the insured sued his UM carrier), those damages are limited to the amount of the policy, plus any incidental damages like "interest, court costs, and reasonable attorney's fees incurred by the [insured]," including "any fees incurred in the original underlying action as a result of the insurer's bad faith actions." **591** So.2d at **626.** Such damages do not include the amount of any excess judgment secured by the insured against the third-party tortfeasor--"[e]ven though the insurer's bad faith in refusing to settle

Because the intervening bankruptcy did not extinguish St. Paul's first-party obligations under the policy, it necessarily failed to extinguish any derivative third-party rights. Those derivative rights exist in any case in which the insured has been damaged by the insurer's bad faith. As this Court put it in *McLeod v. Continental Ins. Co.,* 591 So.2d **621, 624-25** (Fla. **1992):** 'Third-party actions do not allow for the recovery of the excess judgment in cases in which the insured is not damaged by the excess liability." **As** the Court explained in *McLeod*, 591 So.2d at **625** n.6, because "[t]he purpose of the [third-party] suit is to remove the burden of the excess judgment from the shoulders of the insured, not to compensate the injured party for the damages arising from the underlying occurrence," if the insured has "not sustained any damage as a result of the insurer's bad faith, the judgment creditor would not have . . . a bad faith cause of action against the insurer." Thus in ***Fidelity** and **Casualty Co.** of New York v. Cope,* **462** So.2d **459** (Fla. 1985), the named insured was not responsible for the excess judgment, because the injured third party had executed a release of all claims against the named insured. There was no third-party action against the insurer, And in ***Clement v. Prudential Property & Casualty Ins. Co.,*** **790** F.2d **1545** (11th Cir. **3.986**)(Fla. law), the injured third party had agreed not to execute on any assets of the named insured. ***But*** see *infra* pp. 8-9. The viability of the third-party action depends upon a single question: whether "the named insured has sustained any damage as a result of the insurer's bad faith . . . ." McLeod, **591** So.2d at **625 n.6.**

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a first party action leads to an excess judgment in favor of the insured and against the third party"--because the amount of the excess judgment was caused by the third-party tortfeasor, not the insurer. **591** So.2d at **624.** Thus, "in the uninsured motorist case, the excess judgment does not qualify as damages resulting from a violation of the statute." **591** So.2d at **624.** In a case like this one, however, in which the insured is the defendant in the underlying action, the insurer's refusal to settle for the policy limits is a direct, proximate cause of the insured's (or his successor's) exposure for the excess. The insured thus has a clearcut first-party claim for the excess. See Jones *v. Continental Ins. Co.,* 920 F.2d **847,849** n.5 (11th Cir. **1991)** (Fla. law).

That question has been the subject of substantial debate in cases in which the insured's liability has not been formally extinguished by his settlement with the third-party plaintiff, but the plaintiff has given up his right to levy against the insured for the excess. ***See, e.g., Aaron v. Allstate Ins. Co.,*** 559 So.2d 275, 277 (Ha. 4th DCA), ***review denied,*** 569 So.2d 1218 **(Fla.** 1990) (covenant not to execute will not extinguish the third party's claim); Shook ***v. Allstate Ins. Co.,*** **498** So.2d 498, 499-500 **(Fla.** 4th DCA **1986),** ***review denied,*** 508 So.2d 13 (Ha. 1987) (same). The rationale of these decisions is that notwithstanding the covenant not to execute, the insured still has been harmed by the insurer's bad-faith refusal to settle within the policy limits, which exposed the insured to the possibility of personal liability for any excess judgment; forced the insured to negotiate with the plaintiff to avoid that outcome; and exposed the insured to an extant judgment which may adversely affect the insured even if it is never collected.[8] Because the insurer's bad faith has harmed the insured notwithstanding the third-party plaintiffs promise not to execute, the third-party plaintiffs derivative action against the insurer survives.

We could debate the extent to which these decisions are consistent with Cope--that is, the extent to which the insured is still "harmed" by the existence of an outstanding judgment even if he will never have to satisfy that judgment, and thus whether the settlement

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[8] ***An*** analogous principle has been applied in the context of ***Coblentz*** agreements, ***see*** Coblenk ***v. American Surety Co. of*** New *York,* 416 F.2d 1059 (5th Cir. 1969), made between the insured and the third-party plaintiff in cases in which the insurer has wrongfully refused to defend, in which the insured stipulates to the entry of judgment in exchange for the third-party plaintiffs promise not to execute, but to seek redress from the insurer. See ***Quintana*** *v. Barad, **528*** So.2d 1300, 1301 n.1 (Fla. 3d DCA 1988); ***Florida Ins. Guaranty Ass'm v. Giordano,*** 485 So.2d 453, 456-57 (Ha. 3d DCA **1986);** ***Florida Physicians Ins. Reciprocal v. Avila,*** 473 So.2d ***756*** (Fla. 4th DCA **1985),** ***review denied,*** 484 **So.2d** 7 (Fla. 1986); ***Steil v. Florida Physicians' Ins. Reciprocal,*** **448 So.2d *589*** (Fla. 2d DCA 1984).

has extinguished any derivative third-party rights.[9] But that debate would be entirely academic in this case, because in this case the insured's successor-in-interest remains fully liable (to the extent of the available assets, which is true in every case) for the entire amount of the excess judgment. Indeed, the bankruptcy court itself has ruled that the excess judgment does represent a claim against the estate, and that is the law of this case. **See** *supra* note *6.*

In this context, the fact that Dr. Kimbell has escaped personal liability is entirely irrelevant, because he has done so only by transferring that liability to his successor-in-interest–the bankruptcy estate. And that estate has succeeded to all of Dr. Kimbell's prior interests in the insurance policy, which states explicitly that the intervening bankruptcy will not affect those interests. The insurance policy remains viable notwithstanding the bankruptcy; the bankruptcy estate has succeeded to all interests under that policy; and the bankruptcy estate remains liable for the excess judgment, if it is not satisfied by the insurer. As this Court has stated explicitly, the "purpose of the [third party's] suit is to remove the burden of the excess judgment from the shoulders of the insured . . . ." *McLeod v. Continental Ins. Co.,* 591 So.2d at 625 n.6. Thus, "[i]n a third-party action, damages . . . would include the amount of a judgment in excess of policy limits because the insured is exposed to additional liability for the excess amount." *Id.* at 624. At this stage of the

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[9] Even Cope says only that the third-party action is extinguished if the insured has received a release from all liability *before* he assigns his bad-faith cause of action, suggesting that the derivative cause of action survives if an assignment is made before the release is executed: "We hold that, absent a prior assignment of the cause of action, once an injured party has released the tortfeasor from all liability, or has satisfied the underlying judgment, no such action may be maintained." *Fidelity and Casualty Co. of New York v. Cope,* 462 So.2d 459 (Fla. 1985). *See Shook v. Allstate Ins. Co.,* 498 So.2d at 499-500; *Florida Ins. Guaranty Ass'n v. Giordano,* 485 So.2d 453, 456-57 (Fla. 3d DCA 1986). In the instant case, the bad-faith action was filed on December 30, 1988; Dr. Kimbell's personal liability was extinguished by the state court twelve days later, on January 11, 1989.

litigation, the bankruptcy estate *is* "the insured," and "the insured is exposed to additional liability for the excess amount." There can simply be no question that Dr. Kimbell's discharge in bankruptcy did not extinguish Mrs. Camp's derivative third-party rights.

Moreover, we think that St. Paul is estopped to claim otherwise, because St. Paul has agreed in its policy that "[i]f the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy." At the least, that clause of the policy represents an admission, which St. Paul is estopped to retract, that its contractual obligations do extend not only to protecting the insured from personal liability, but to protecting his bankruptcy estate as well, Indeed, unless the clause in question were considered to be pure surplusage, supported by no consideration, it necessarily constitutes St. Paul's concession that the insured's exposure is not terminated by any personal discharge in bankruptcy, but survives such a discharge. That, indeed, was one basis for the decision in *Torrez v. State Farm Mutual Automobile* Ins. Ca., 705 F.2d 1192, 1196 (10th Cir. 1982), in which the court held that the insurer's position–that there were no "assets of the insured besides the liability policy which would be subjected to risk by [the insurer's] failure to settle"--was "subject to question at the outset," because of the policy's declaration that "[b]ankruptcy or insolvency of the insured or the insured's estate shall not relieve the company of its obligations hereunder." That contractual provision, the court suggested, essentially estopped the insurer to argue that the only "assets of the insured" at stake after the bankruptcy were the proceeds of the policy itself. To the contrary, the insurer itself had acknowledged that the assets of the bankruptcy estate also constituted "assets of the insured." The same is true here.

C. St. Paul's Position is* Bad *Policy. The implications of St. Paul's position are significant. In the ordinary case, the potential availability of a bad-faith action helps to make sure that the insurer's actions in managing the litigation are consistent with the insured's

interests. The insurer cannot withhold a defense, or reject a reasonable settlement offer within the policy limits, and roll the dice at the trial, confident that any excess judgment will burden only the insured.

St. Paul's position would change all of that. In any case in which the insured's financial stability is suspect--perhaps because of the pendency of the very lawsuit in question, perhaps even because of the insurer's intransigence in failing to settle--St. Paul would give the insurer a free ride. Under St. Paul's theory, if the insurer has reason to believe that the insured will seek a discharge of personal liability in bankruptcy, the insurer has the freedom to act in bad faith. He no longer has any obligation to settle the case, or otherwise to act in his insured's best interests, because the consequences of his bad faith will be born by the bankruptcy estate. That, in fact, is exactly what St. Paul did in this case, or so a reasonable jury could find (see Appellants' Brief on Certification). If sanctioned by this Court, St. Paul's position "would allow the insurance companies to play fast and loose with claims against their less affluent policy holders." *Liberty* Mutual *Ins. **Co. v. Davis,*** **412** F.2d **475, 485** (5th Cir. **1969).** In this particular kind of case, St. Paul would grant all insurers an unqualified license to act in bad faith. That is bad policy, and it would make bad law.

V
CONCLUSION

It is respectfully submitted that the first question certified to this Court should be answered **"no,"** and the second certified question "yes."

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th **day** of June, **1992,** to: TALBOTT **D'ALEMBERTE,** ESQ. and **ADALBERTO** JORDAN, **ESQ.,** Steel, Hector & Davis, **4000** Southeast Financial Center Miami, Florida

33131-2398; ELMO HOFFMAN, ESQ., Brownlee, Hoffman, P.O. Box 991, 255 S. Orange Avenue, Suite 1390, Orlando, Florida 32802-0991; GUS SMALL, JR., ESQ. and MARK MARANI, ESQ., Suite 400, 2970 Peachtree Road, N.W., P.O. Box 53483, Atlanta, Georgia 30355; J. DIXON BRIDGERS, 111, ESQ., Carlton Fields, P.A., 25 W. Cedar Street, 4th Floor, P.O. Box 12426, Pensacola, Florida 32501-2582; and to GEORGE ESTESS, ESQ., Kerrigan, Estess & Rankin, P.A., 400 East Government Street, Pensacola, Florida 32589.

Respectfully submitted,

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