IN THE SUPREME COURT OF FLORIDA

CASE NO, 79,712

ANNA RUE CAMP and JOHN E. VENN,

Appellants,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Appellee.

FILED
SID J. WHITE
JUL 31 1992
CLERK, SUPREME COURT.
By
Chief Deputy Clerk

ON QUESTIONS CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In Appellants' Preliminary Statement it is asserted that the Federal District Court acknowledged the existence of "many genuine issues of material fact concerning the underlying bad faith claim", but "nevertheless" granted Summary Judgment to St. Paul on the ground that the bankruptcy of St. Paul's insured absolutely immunized St. Paul from a bad faith action, This opening comment of Appellants' Preliminary Statement is a mischaracterization of what the Federal District Court did. The Federal District Court ruled that in Florida an insurer's duty of good faith runs to the insured alone, 127 B.R. 879,883 (N.D.Fla. 1991). That trial court stated:

> "Under Cope [Fidelity & Casualty Company of New York v. Cope, 462 So.2d 459 (Fla. 1985)], a satisfaction or release of the insured destroys the third party's derivative cause of action for bad faith, 555.145 (Florida Statutes) provides that an Order of Cancellation and Discharge shall 'have the same effect as a satisfaction of the judgment'. This is the status of the Camp judgment."

Thus, the Federal District Court did not rule as a matter of law as implied by Appellant, that the bankruptcy of any insured would absolutely immunize an insurer from a bad faith action in all factual settings. The federal trial court carefully analyzed the factual circumstances of the insured and the insurer in the Camp case and pointedly grounded its Opinion upon the judicial concepts developed in this Court's Opinion in Fidelitv & Casualty Company of New York v. Cose, 462 So.2d 459 (Fla. 1985).

The second question "certified" by the U.S. Court of Appeals for the Eleventh Circuit to this court, to wit:

> "II. Whether, as a matter of law, the language of a bankruptcy clause in a particular insurance policy, such as the language at issue in this case, can authorize an injured party's or bankruptcy trustee's bad faith action against an insurance company, notwithstanding the fact that the named insured was never personally liable for any amount of an excess judgment due to the named insured's bankruptcy."

is really not an issue **in the present case as framed by** the Eleventh Circuit. This is because the Appellee has not argued the legal issue of whether or not policy language can expand an insurance company's liability. The real legal issue in this case is whether or not the St. Paul insurance policy language did extend the insurance company's duties to its insured beyond: (1) to defend its insured **from** liability claims arising out of allegations of professional malpractice, (2) to pay for any such liability to the extent of its policy limits, and (3) to in good faith negotiate and attempt to settle such claims against its insured to the extent of its policy limits, if failure to settle could result in harm to its insured.

STATEMENT OF THE CASE

(i) Course of Proceedings

Appellee suggests that most of the "course of proceedings" section of Appellants' Statement of the Case consists of argumentative material inappropriate to the introduction of the status of this case to the court. Appellee particularly takes issue with the second paragraph of said Statement of the Case in which Appellants misstate that on January 11, 1989, after the Complaint

was filed, Dr. Kirnbell was relieved of personal liability for the excess Judgment, pursuant to Florida Statutes, §55.145 by a **Florida** court. By its own terms, Florida Statutes, §55.145 has **only** the effect "the same as a Satisfaction of Judgment . . . If it appears upon the hearing that the bankrupt or debtor has been discharged . . . etc.". (emphasis supplied) Thus, the Florida Statute, itself, recognizes that the federal bankruptcy law, not the state statute, triggered Dr. Kimbell's immunity from ever having personal liability on **the** Judgment long before it was ever entered. Thus, Dr. Kimbell was relieved from any potential liability on the subject Judgment by discharge in the bankruptcy court November 24, 1986, long before the Judgment was entered in the case of Camp v. Kimbell, June 25, 1987.

A succinct statement of the current proceedings in this case is as follows:

Judge Roger Vinson, of the U.S. District Court for the Northern District of Florida, entered a 22 page Order granting Summary Judgment in favor of St. Paul in this case on all counts, R:V:186, and a **Final** Judgment in favor of St. Paul was entered on February 27, 1991, R:V:186.

Appellants filed a Notice of Appeal March 5, 1991 to the United States Court of Appeals, Eleventh Circuit, R:V:188.

On April 16, 1992 the United States Court of Appeals, Eleventh Circuit, certified this action to the Supreme Court of Florida pursuantto Article V, Section 3(b)(6) of the Florida Constitution, stating two certified issues, 958 F.2d 340, 344:

"(I) Whether, as a matter of law, a named insured's bankruptcy and discharge from liability prior to exposure to an **excess** Judgment, such that the named insured was never personally liable for any amount of the Judgment, precludes an injured party's or bankruptcy trustee's subsequent bad faith cause of action against an insurance company.

(2) Whether, as a matter of law, the language of a **bankruptcy** clause in **a** particular insurance policy, such as the language at issue in this **case**, can authorize an injured party's or **bankruptcy** trustee's **bad** faith action against an insurance company, notwithstanding the fact that the named insured was **never** personally liable for any amount of excess Judgment due to the named insured's bankruptcy.

As noted in Appellee's Preliminary Statement, the Appellee suggests that the **second** enumerated issue is really not an issue in this case because Appellee has not argued the legal issue of whether an insurer's policy language "can authorize" extended responsibilities for an insurance company in certain circumstances. The issue in this case has always been whether, as a matter of law, St. Paul's policy did extend the customary and usual liabilities of a liability insurer,

(ii) STATEMENT OF THE FACTS

Appellee submits that only the following facts are relevant to the issues on **appeal:**

(1) On July 13, 1984 Dr. Farris D. Kimbell, Jr. notified St. Paul that Ms. Camp's lawyers had presented a claim to Dr. Kimbell, claiming that Dr. Kimbell had injured Ms. Camp by medical malpractice, R:II:111

(2) On December 10, 1984 Anna Rue Camp sued Dr. Kimbell for malpractice in a state court in Pensacola, Florida. R:I:1.

(3) Prior to Ms. Camp's claim having been presented to St. Paul, Dr. Kimbell had had numerous prior financial problems. R:V:173:34.

(4) On January 17, 1985 the main hospital upon which Dr. Kimbell depended as a place to practice his surgery decided to cancel his privileges to perform surgery in that hospital, R:IV:141, Exhibit 32 at 4, and he suffered a concomitant loss of his practice and major source of income. R:V:173:43-44.

(5) Dr. Kimbell's loss of privileges at Baptist Hospital were not the result of Ms. Camp's claim against him nor of the manner in which St. Paul handled the claim. R:V:182:4.

(6) On July 11, 1986 Dr. Kimbell filed a Chapter 7 bankruptcy case in the U.S. Bankruptcy Court for the Northern District of Florida. The filing of the bankruptcy stayed Ms. Camp's state court suit pursuant to 11 U.S.C. Section 362. R:V:173:80-81. A discharge order was entered in that court on November 24, 1986 discharging him from any liability for any claims which were pending against him as of July 11, 1986. R:IV:141, Exhibit 57,

(7) From June 3, 1985 until at least May 14, 1987, Ms. Camp's attorneys offered to settle her claim for the amount of the St. Paul policy limits, $250,000, and St. Paul never agreed to pay that amount. R:II:111.

(8) On April 13, 1987, the Bankruptcy Court authorized Ms. Camp to proceed with her suit for the purpose of liquidating her

claim in the bankruptcy case, but ordered that no judgment obtained in her case could be enforceable against Dr. Kimbell. R:I:3.

(9) On June 25, 1987 trial of the case was completed in a Florida state court, and a Judgment was entered in favor of Ms. Camp in the amount of $3,052,.499.13. R:IV:141, Exhibit 76.

(10) **On December** 30, 1988 Ms. Camp and Dr. Kimbell's bankruptcy trustee, John Venn, filed a bad faith action against Appellee, St. Paul Fire & Marine Insurance Company, in state court, which was removed to the U.S. District Court in Pensacola on February 3, 1989. R:I:2.

SUMMARY OF ARGUMENT

Appellee, St. Paul, has never advanced the proposition that an insurer is "absolutely immunized" from exposure to a potential bad faith action as **a** result of its insured's bankruptcy. Appellee's position is that in this particular case St. Paul's insurance policy by its own language neither extended nor decreased its liability to its insured in the event of bankruptcy, and that since its insured went bankrupt over seven months prior to St. Paul's alleged bad faith refusal to settle and the Camp Judgment was obtained against St. Paul's insured then there was no harm to **the** insured, and therefore, no bad faith liability.

The St. Paul policy bankruptcy clause **reads** as follows:

> "If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy."

This clause simply states that St. Paul's responsibilities and obligations will remain the Same in the event of the insured's

bankruptcy, neither enlarging nor diminishing St. Paul's responsibilities under the policy. Thus, the insured's bankruptcy does not affect St. Paul's responsibilities under the contract and Florida common law one way or the other, but leaves it the same.

There was no genuine issue in this case as to the fact that St. Paul's conduct did not harm Dr. Kimbell or his bankruptcy estate. Clearly, St. Paul's handling of the Camp malpractice claim did not cause Dr. Kimbell's bankruptcy but other factors, including in particular the loss of his privileges to practice at a certain hospital caused his bankruptcy. An uncontroverted Affidavit from the hospital administrator showed that Dr, Kimbell would have lost his privileges at said hospital regardless of St. Paul's activity in regard to the Camp claim. Dr. Kimbell testified in deposition that loss of those hospital privileges led to his financial downfall.

Ms. Camp was not an insured of St. Paul, and therefore, does not have a direct right of action against St. Paul under Florida Statutes, §624.155 as decided in Cardenas V, Miami-Dade Yellow Cab Company, 538 So.2d 491 (Fla. 3d DCA), rev.dismissed, 549 So.2d 1013 (Fla. 1989) and Lucente V. State Farm Mutual Automobile Insurance Company, 591 So.2d 1120 (Fla. 4th DCA 1992).

ARGUMENT

Contrary to the implication framed in Appellants' argument, Appellee has never advanced the proposition that an insurer is "absolutely immunized" from exposure to a potential bad faith action as a result of its insured's bankruptcy, Appellee's position

is that in this particular case St. Paul's insurance policy by its own language neither extended nor decreased its liability to its insured in the event of bankruptcy, and that since its insured went bankrupt over seven months prior to St. Paul's alleged bad faith refusal to settle and the Camq Judgment was obtained against St. Paul's insured then there was no harm to the insured, and therefore, no bad faith liability.

I, THE INSOLVENCY CLAUSE CONTAINED IN THE ST. PAUL LIABILITY INSURANCE POLICY DOES NOT EXTEND ST. PAUL'S LIABILITY BEYOND ITS STATED POLICY LIMITS.

Initially, Appellee wishes to briefly address Appellants' discussion of the "history and meaning" of the bankruptcy clause which is contained in Dr. Kimbell's insurance policy. Appellee contends that this discussion is irrelevant to the issues before this Court and should therefore be disregarded. In support of its position, Appellee makes the following observations.

First, the statutory and common law involved in Appellants' discussion is, obviously, that of Minnesota, not Florida. Thus, because Dr. Kimbell's insurance policy was issued in Florida, this discussion carries little weight.

Second, the statute referenced in Appellants's discussion requires insurance policies issued in Minnesota to provide for a specific cause of action. This provision was not contracted far in Dr. Kimbell's policy and is not required by Florida statutory law to appear in insurance policies issued in Florida. This fact is significant for, as explained, infra, under Florida case law the particular terms set forth in Dr. Kimbell's insolvency policy

govern the question of whether or not he and Appellee "contemplated" the creation of the bad faith action argued for by Appellants.[1]

Third, the true genesis *of* the bankruptcy or insolvency clause contained in Dr. Kimbell's insurance policy predates the Minnesota statute referenced at page 10 of Appellants's brief. As reflected in that statute's wording, this type of clause is not specifically concerned with preserving a bad faith action against an insured's insurer. Rather, it restates a fundamental doctrine of the bankruptcy laws of this country, namely, that an individual's bankruptcy is personal to him and will not affect the liability of third parties. This doctrine dates back to the U.S. Supreme Court's decision in Eldrige v. Pewey, 103 U.S. 301, 26 L.Ed. 394 (1881) and was codified in Section 16 of the Bankruptcy Act of 1898, 11 U.S.C. § 34 (repealed effective October 1, 1979) which provided:

> The liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.[2]

This Court recognized this doctrine in its decision *of* Bass v. Geiger, 73 Fla. 312, 73 So. 796, 797 (1917). See 1A Collier On Bankruptcy, ¶ 16.02 at p. 1523 (14th Ed. 1978). It is settled that this doctrine, as codified, applies to liability insurers.

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[1] See Argument I A, *infra*.

[2] This section was rewritten and reenacted in the Bankruptcy Reform Act of 1978 as 11 U.S.C. § 524(e). See *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595, n. 1 (7th Cir. 1982).

Wilkinson v. Viuilant Ins. Co., 236 **Ga.** 456, 224 S.E.2d 167, 168 (1976):

> **It** was **held** in Miller v. Collins, 328 Mo. 313, 40 S.W.2d 1062, that section 16 of the Bankruptcy Act (11 U.S.C.A. § 34), applies to liability insurance carriers.
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> * * * * *
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> In **Miller,** supra, **it was held** (p. 319, 40 S.W.2d p. 1065): "It is unnecessary to determine specifically that the insurer is a co-debtor, or a **guarantor, or in** any manner **a** surety for the assured, but it is clear that the insurer falls within one of these classifications....Consequently the liability of the [insurer] is not altered by the discharge of the bankrupt."[3]

Public policy concerns have been the impetus for the inclusion of such clauses in insurance policies. ***See*** generally 8 Appleman, Insurance Law & Practice § 4834 (1990). Some states, however, have enacted statutes which do more than merely require the restatement of bankruptcy doctrine. The Minnesota statute referenced in Appellants's brief for instance, not only restates bankruptcy doctrine, but also requires that insurance policies issued in Minnesota include a bankruptcy or insolvency clause which creates a specific cause of action for **third** parties. This particular statute is very similar to the one reviewed by this Court in Auto Mutual Indemnity Company v. Shaw, 134 Fla. 815, **184** So. 853 (1938).

Finally, any consideration of the "notice" that Appellants contend Appellee "was on" with regard to the way Minnesota courts have interpreted bankruptcy clauses contained in insurance policies issued in that state (although bearing no direct relevance to this

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[3] ***See*** *Owaski* v. *Jet Florida Systems, Inc.* ***(In re*** *Jet Florida* ***Systems,*** *Inc.)*, **883** F.2d **970, 973 (11th** Cir. **1989) (liability of insurer** under 11 U.S.C. § 524(e)).

Court's deliberations) should, in all fairness, be viewed in light of Minnesota statutory law and the facts in the cases of **Riske v.** , 541 F.2d 768 (8th Cir. 1968) and Lange v. Fidelity & Casualty Co. of New York, 290 Minn. 61, 185 N.W.2d 881 (1971). In sum, explicit statutory language requiring insurers to provide for the inclusion of a specific cause of action in insurance policies issued in Minnesota together with case law based on facts distinguishable from the case at bar, have coupled to produce a result in Minnesota which should not affect this Court's decision under Florida law,[4]

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[4] The facts in *Riske*, and in the Minnesota Supreme Court decision of *Lange* v. *Fidelity & Casualty Co. of New York*, 290 Minn. 61, 185 N.W.2d 881 (1971) upon which *Riske* relied, are clearly distinguishable from those in the case at bar and had a significant impact in those decisions. In Riske, the Eighth Circuit rejected the argument of an insurer who aseerted that its insured had suffered no harm from the entry of an excess judgment against him and, therefore, could not recover against the insurer. The insurer reasoned that since the insured had entered into an agreement with his plaintiff which provided that he would prosecute his bad faith action in exchange for a complete discharge and satisfaction of his debt, he could not prove the element of damage. *Riske*, 490 F.2d at 1087-88. Interestingly, instead of dismissing this point, the court addressed it and found that under the agreement the insured *was* liable for the debt at the time the verdict was entered and remained liable until the conclusion of his bad faith action against the insurer. *Riske*, 490 F.2d at 1088. Hence, the facts in *Riske* are quite different: than those in the instant case in which Appellee's insured could never have been harmed by an adverae judgment by virtue of, among other things, the terms of the order entered by the bankruptcy judge on April 13, 1987 which modified the automatic stay to permit the liquidation of the claim held by Mrs. Camp on the specific condition that "such judgment shall not be enforceable against the Debtor as a personal liability of the Debtor." *Camp v. St. Paul Fire and Marine Ins. Co.*, 127 B.R. 879, 883 (N.D. Fla. 1991). Additionally, the facts in Riske are distinguishable from those addreesed by the Eleventh Circuit Court of Appeal in *Clement v. Prudential Property & Casualty*, 790 F.2d 1545 (11th Cir. 1986), in which the insured also agreed to prosecute a bad faith action against an insurer in exchange for a release from liability. In *Clement*, the Eleventh Circuit correctly held that since the third-party plaintiff had not received a valid assignment of the insured's bad faith action prior to granting the insured a release from liability, the bad faith action, which under Florida law is personal to the insured, was thus extinguished.

Accordingly, Appellee contends that the brief "history and meaning" discussion contained in Appellants's initial argument is of no substantive value to this Court in its deliberation of the issues before it which turn on principles and operation of Florida law, and should therefore be disregarded.

A. The Terms Of Dr. Kimbell's Insolvency Clause Do Not Indicate That Appellee And Dr. Kimbell Contemplated A Bad Faith Action As Argued By Appellants

Contrary to Appellants's assertion in their brief at page 12 that Appellee has avoided a discussion of contract principles in the course of this litigation, Appellee welcomes it.

Citing this Court's decision in Auto Mutual Indemnity Company v. Shaw, 134 Fla. 815, 184 So. 853 (1938), Appellants state that under Florida law, language in an insurance policy can give rise to a bad faith action even if such an action would be barred under common law principles.

Assuming, arguendo, that parties to an insurance contract can create by the terms of their agreement a bad faith action against

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In *Lange*, an insurer was sued for bad faith for refusing to settle a suit against its insured. The insurer contended that its refusal was justified because the insured was insolvent. *Lange*, 185 N.W.2d at *885*. The *Lange* court held that a judgment-proof insured suffered injury from an excess judgment entered against him because such a judgment could "impair his credit, place a cloud on the title to his exempt estate, impair his ability to successfully apply for loans, and may eventually require him to through bankruptcy." Id. The facrs in *Lange* involved an insolvent insured who was not in bankruptcy and could be harmed as a result *of* hie insurer's actions, perhaps even driven into bankruptcy as noted by the court. Contrastly, Dr. Kimbell was not harmed at all by the judgment obtained by Mrs. Camp. Furthermore, as the district court found, Appellee's actions were not a cause of Dr. Kimbell's bankruptcy filing.

the insurer which survives the operation of Florida common[5] and statutory[6] law at work in this case, basic principles of contract law, and the holdings of this Court in Shaw and Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971), require that such intent be clearly expressed by the terms of the contract.

In Shaw, this Court found such intent clearly expressed in the terms of an insurance contract. The pertinent policy language in Shaw was:

> The insolvency or bankruptcy of Assured shall not release the Company from any payment otherwise due hereunder, and if, because of such insolvency or bankruptcy, an execution on a judgment against Assured is returned unsatisfied, the judgment creditor shall have a right of action against the Company to recover the amount of said judgment to the same extent that Assured would have had if he had paid the judgment.

Shaw, 184 So. at 855

Understandably, the Shaw Court found that the language of the insurance policy had extended the limits of coverage under the policy in the event the insured became insolvent and an execution on a judgment against the insured was returned unsatisfied, because the policy could be read to mean that upon the happening of those events, the company was liable to the judgment creditor to the same extent that the insured would have been, As the Shaw Court explained:

> "It seems that the creditor under the terms of the policy has a right of action against the insurance company to

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[5] *Fidelity & Casualty Company of New York v. Cope*, 462 So.2d 459 (Fla. 1985).

[6] Fla. Stat. § 55.145 (1985). *See* note 8, *infra*.

> recover the amount of the judgment against the assured. The things contemplated by the terms of the policy have transpired which authorizes a right of action," (Emphasis added)

Shaw, 184 So. at 856.

Thus, the import of the Shaw decision, as this Court explained in Thompson, was that the liability of the insurer for an excess judgment was within the contemplation of the parties as expressed by the "particular wording of the insurance policy." Thompson, 250 So.2d at 261,

By the same token, it is clear that the bad faith action which Appellants argue for in this case was not within the contemplation of the parties in Dr. Kimbell's policy. The pertinent language in Dr. Kimbell's policy states:

> "If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy."

Even under a construction of Dr. Kimbell's insolvency clause most favorable to Appellants, it simply does not reveal any support for the argument that Dr. Kimbell and Appellee contemplated that it would create a new type of direct bad faith action against Appellee or constitute a "waiver" of any rights which may devolve upon Appellee by virtue of the operation of Florida common law or, for that matter, statutory law.

Rather, as recognized by Judge Vinson in the district court decision giving rise to Appellants' appeal to the Eleventh Circuit Court of Appeal, the language used in Dr. Kimbell's policy merely contemplated that Appellee would bear the duty to defend and pay

off a claim up to the policy limits. Camp v. St. Paul Fire and Marine Ins. Co., 127 B.R. 879, 885 (N.D. Fla. 1991).

Appellee agrees with one statement in Appellants' argument on the issue regarding the meaning of the insolvency clause contained in Dr. Kimbell's insurance policy. At the top of page 18 of Appellants' Brief the statement is made: " . . . the bankruptcy clause specifies that St. Paul's obligations will not be lessened or affected by Dr. Kimbell's bankruptcy." It is clear that Appellants recognize that the language of the policy is intended simply to state that St. Paul's obligations to Dr. Kimbell will not be "affected" one way or another in the event of his bankruptcy.

B. Florida Law Does Not Support Appellants' Interpretation of the St. Paul Policy

Recognizing that Florida law does not support their interpretation of Dr. Kimbell's insolvency clause, Appellants turn to three cases from different jurisdictions as support for their argument. Of these cases, Appellants chiefly rely upon the decision of Maguire v. Allstate Insurance Company, 341 F.Supp. 866 (D.Del. 1972). Appellants also cite Torrez v. State Farm Mutual Automobile Ins. Co., 705 F.2d 1192 (10th Cir. 1982) and Ganawav v. Shelter Mutual Ins. Co., 795 S.W.2d 554 (Mo.App. 1990), together with Maguire as "the only three cases addressing the precise issue here." Appellants' Brief at 29.

These three cases do not deal with the "precise issue here."[7] Moreover, none of the three deal with Florida law. Maguire arises in Delaware, Torrez in New Mexico and Ganawav in Missouri. Both Torrez and Ganawav cite Maguire for the generalized proposition that the bankruptcy or insolvency of an insured or an insured's estate would not relieve an insurer of its obligations 'under a policy.

None of these cases deal with the real issue before this Court in the present case, and that is whether or not under Florida law St. Paul should be found to have acted in bad faith toward its insured, Dr. Kimbell, in not settling the Camp claim for *$250,000* prior to trial, when its insured, Dr. Kimbell, would suffer no harm from such failure to settle. Only a resort to controlling **Florida** law can answer that question.

Neither Maguire, Torrez nor Ganawav are useful in this regard, particularly since the Maguire court whose opinion is quoted in Ganawav elected to skirt the central issue altogether, by deciding that it was unnecessary to divine state law on the central issue of whether or not insolvency affected the existence or nonexistence of a right to a bad faith claim. Maguire, 341 F.Supp. at 869. With all due respect, Appellee suggests that the court's reasoning in the Maguire opinion is seriously flawed by the expression beginning at the first full paragraph on page *869* thereof and ending at

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[7] **Judge Vinson noted that the facts in *Maguire* and *Torrez* were distinguishable from those in the case at bar. R:V:186:12-13; *Camp*, 127 B.R. at 883.**

headnote 2. In this section of the opinion the court abandons any consideration of the central issue and simply states that Allstate was not relieved of any obligations as a result of the language of the policy, The real issue to be dealt with in that case was: What were Allstate's obligations? Similarly, the Torrez opinion is flawed by its outright reliance upon what that court felt was a fully reasoned decision in the Maguire case. Torrez, 705 F.2d at 1197,

Interestingly, the opinion in Ganawav states that: "It is clear that a 'bad faith' action for refusal to settle sounds in tort, not in contract . . .," in light of the fact that Appellant has cited Ganawav in support of Appellants' position that a bad faith action should be maintained pursuant to the terms of Dr. Kimbell's contact with St. Paul.

This sort of argument really begs the question, since it is undisputed that St. Paul was not relieved of its obligations under the insurance policy by virtue of Dr. Kimbell's bankruptcy, The real issue under Florida law is whether or not the insured was exposed to harm and/or suffered harm as a result of the insurance company's refusal to settle for policy limits.

The opinions in Maguire, Torrez and Ganaway all note that there have been two lines of cases on whether or not bankruptcy or insolvency of an insured precludes the existence of a "subsequent bad faith" claim. See e.g. Maguire, 341 F.Supp. at 869. Illustrative of the two lines of cases are Harris v. Standard Accident & Ins. Co., 297 F.2d 627 (2d Cir. 1961) (under New York

law), cert. denied, 369 U.S. 843, 82 S.Ct. 875, 7 L.Ed.2d 847 (1962), Bourget v. Government Employees Ins. Co , 456 F.2d 282 (2d Cir. 1972) (under Connecticut law), and Shapiro v. Allstate m n , 92 Cal.Rptr. 244 (Ct.App. 1971) (under California law) favoring Appellee's position, and a number of others, including Lee v. Nationwide Mutua1 Ins. Co,, 286 F.2d 295 (4th Cir. 1961) (under Maryland law) and others cited in Maguire favoring Appellants' position. However, a review of these apparently diverse lines of cases reveals many instances where the real issue was whether or not the insurance company acted in such a way as to harm the insured by placing the insurance company's own interests above the insured's interests. Many of these cases also turned upon the peculiarity of individual state's laws or state statutes. For example, in Lee:

> "We disagree only because, in the absence of a ruling by the Maryland Court of Appeals, we believe the opposing position offers a sound resolution of the issue in law and is demanded under Maryland statutes on the administration of decedents' estates."

Lee, 286 F.2d at 295

In the issue presently before this Court, it is appropriate to refer to Florida law and determine whether or not Florida requires an apparent harm or potential for harm to the insured for the existence of a "bad faith" claim,

There is no mystery regarding this issue under Florida law, This Court addressed this issue in the case of Fidelity & Casua1ty Company of New York v. Cope, 462 So.2d 459 (Fla. 1985). In that case, which will be discussed in detail later in this brief, it is

clear that a "bad faith" cause of action in Florida is based upon harm to the insured. As the Cope Court explained:

> "An essential ingredient to any cause of action is damages."

Cope, 462 So.2d at 461

11, THE DISTRICT COURT CORRECTLY RULED THAT UNDER FLORIDA COMMON LAW APPELLANTS HAVE NO BAD FAITH ACTION AGAINST THE INSURANCE COMPANY UNLESS THE COMPANY CAUSED HARM TO ITS INSURED.

The District Court found that neither Dr. Kimbell nor his bankruptcy estate were harmed under Florida law by St. Paul's failure to settle the malpractice case for the policy limits, and that, therefore, under Florida law Dr. Kimbell had no right to a bad faith claim against St. Paul. The Court further found that Appellants' rights, if any, were derivative of Dr. Kimbell's and that if he has no right of action, they have none.

The Appellants argue that despite Dr. Kimbell's bankruptcy discharge from any possible liability on the Camp claim months prior to the state court malpractice trial, he or his estate possesses a bad faith claim against St. Paul. For the reasons stated below, Appellee submits that the law and the uncontroverted facts do not support such an argument.

A. Under Florida Law No Bad Faith Claim Exists Unless St. Paul's Actions Caused Harm To Its Insured.

The District Court did not rule that under Florida common law Dr. Kimbell's bankruptcy, vel non, immunized St. Paul from a bad faith claim. The District Court's ruling was that under Cope and Clement v. Prudential Property & Casualty Ins. Co., 790 F.2d 1545

(11th Cir. 1986) no bad faith claim exists under Florida common law unless the insured, in this case Dr. Kimbell, was harmed by some action of the insurer. R:V:186:8-14; Camp, 127 B.R. at 885.

There can be no doubt that the recovery by Ms. Camp of the excess judgment resulted in absolutely no liability to Dr. Kimbell. As the District Court explained in its opinion, (1) Dr. Kimbell's bankruptcy discharge released him from liability well before trial;[8] (2) his bankruptcy discharge constituted a release and satisfaction of any claim arising out the state court malpractice case under Florida law;[9] (3) the bankruptcy judge relieved Dr. Kimbell of any liability for the excess judgment months prior to trial;[10] and (4) the judgment was canceled as a matter of Florida law shortly after its entry.[11] The effect of the discharge,

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8 Dr. Kimbell filed his Chapter 7 case on July 11, 1986. He received his discharge in due course on November 24, 1986.

9 Under Fla. Stat. § 55.145, the judgment had the same effect as a cancellation and satisfaction of judgment. Section 55.145 provides in pertinent part:

> If it appears...that the bankrupt or debtor has been discharged...the Court shall enter an order canceling and discharging said judgment. The order of cancellation and discharge shall have the same effect as a satisfaction of judgment...

Fla. Stat. § 55.145 (1985).

10 A salient point raised by the District Court regarding Dr. Kimbell's obligations stemming from the underlying judgment was that the bankruptcy judge's order permitting rhe state court action to proceed against Dr. Kimbell was conditioned on the understanding that he would not be exposed to any personal liability resulting from any judgment entered in that action. This order entered by the bankruptcy judge preceded the entry of the excess judgment.

11 See Fla. Stat. § 55.145 (1985).

coupled with the wording of the bankruptcy judge's order permitting the underlying litigation to continue, was far reaching, as the District Court recognized. It correctly concluded that under Cope and Clement the discharge in bankruptcy eliminated any possible bad faith claim against St. Paul. R:V:186:14-16; Camp, 127 B.R. at 885.

In Cope, the issue was whether an injured third party who had obtained an excess judgment against an insured could maintain a bad faith action against the insured's insurer after having executed a release and satisfaction to the insured, Resolving a conflict which had developed between the Second and Fifth District Courts of Appeal, this Court held that the bad faith action which the insured possessed was extinguished when the injured third party executed a release and satisfaction to the insured without first obtaining a valid assignment of his action. Cope, 462 So.2d at 459, In reversing the Second District Court of Appeals, this Court ruled that the common-law bad faith action it had authorized under Thompson v. Commercial Union Ins, Co., 250 So.2d 259 (Fla. 1971) was not a separate and distinct cause of action, but was derivative of the insured's action. Accordingly, once the insured was released from any liability for the excess judgment, his bad faith action against his insurer was extinguished and this, in turn, eliminated the injured third-party's direct action as well. Cope, 462 So.2d at 461. The Cope Court explained:

> Nowhere in Thompson, however, did we change the basis or theory of recovery, We did not extend the duty of good faith by an insurer to its insured to a duty of an insurer to a third party. The basis

> for an action remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his policy limits. Thompson merely allowed the third party to bring such an action in his own name without an assignment.

Cope, 462 So.2d **at** 461.

In Clement, an injured third party and an insured entered into a settlement agreement which provided, among other things, that the insured would not be liable to the third party for any amount over his policy limits. Also included in the agreement was a provision requiring that the insured prosecute a bad faith action against his insurer and assign all of the benefits to the third party. The Eleventh Circuit Court of Appeal held that in accordance with the Florida Supreme Court's holding in Cope, the insured's bad faith action was extinguished because the terms of the settlement agreement did not effect a valid assignment of the insured's bad faith action to the third party. Clement, 790 F.2d at 1548.

> It is clear as a matter of Florida law that, in the absence of a prior assignment of the bad faith claim, no such claim remains after the insured is released from liability for any damages he otherwise might have suffered as a result of the insurer's bad faith. That is precisely what happened here,

Clement, 790 F.2d at 1548,

As the District Court explained, the essence of the Florida Supreme Court's decision in Cope was that the "insurer's good faith runs to the insured alone," not to an injured third party. R:V:186:10; Camp, 127 B.R. at **883.**

> "As the Supreme Court of Florida indicated, the bankruptcy estate's cause of action is entirely derivative of the insured's, and is

> extinguished once the insured is released from obligations stemming from the underlying judgment."

R:V:186:10-11; Came, 127 B.R. at 883.

The obvious point of both the Cope case and the Clement case is that there is no cause of action for bad faith if the insured is not harmed nor exposed to harm, Neither Appellee nor anyone else has ever suggested that the Cope case stands for a proposition that an insured's bankruptcy automatically immunizes his insurer from the possibility of any bad faith claim. This is simply a non-issue. The issue, again, is whether or not there was any harm or potential harm to the insured.

Appellants urge this Court to find special significance in the fact that this case involves an insured who went bankrupt.[12] They assert that "in the bankruptcy context a mechanical application of Cope makes no sense." Appellants' Brief at 21. In support of this declaration, the Appellants announce that Cope and Clement expressly state that if a cause of action for bad faith is assigned or instituted prior to the insured's release, the action can be maintained. Appellants' Brief at 21. Yet, neither case says that the institution of a bad faith action prior to release or satisfaction will save the action from being barred. While it is

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[12] Appellants have suggested that the Florida Fifth District Court of Appeals' opinion in Clauss v. Fortune *Insurance Company,* 523 So.2d 1177 (Fla. 5th DCA 1988) stands for the proposition that the *Cope* case should not be interpreted to mean that an insured's bankruptcy bars a bad faith claim. This issue is not even raised in the Clauss opinion. Therefore, it is extremely hard to understand how the Appellants can rely upon the Clauss opinion concerning an issue raised by no party and not mentioned by the court.

true that the **Cope** case involved **a** bad faith action that was commenced prior to judgment being entered, it is quite another thing **to** declare, as **the Appellants** do here, **that** this constitutes an essential element in the holding of the case. Indeed, this was not included in the holding of the Cope case.[13] Furthermore, based upon the facts in the Cope case, the Appellants' statement is **a** non sequitur and turns this Court's decision upside down, This is so because the bad faith action against one of the two insurers in Cope was instituted before the subject release and satisfaction was executed, yet despite this, the Cope court proceeded to bar the action against the second insurer because of the release and satisfaction executed in the initial action to the first insurer and its insured. Cope, 462 So.2d at 461. Accordingly, Appellants' argument is unpersuasive.

Clearly, at page 22 of Appellants' Brief, Appellants confuse the doctrine of "bad faith" by suggesting that St. Paul "believed it had carte blanche to act in bad faith and could drive down the terms of **a** settlement because its maximum exposure was the policy limits." In reading this paragraph of Appellants' Brief, the question obviously arises: Bad faith to whom? Appellants obviously

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[13] **The Florida Supreme Court left no doubt as to the substance of its holding in *Cope:***

> **"We hold that if an excess judgment has been satisfied, absent an assignment of the cause of action prior *to* satisfaction, a third party cannot maintain action for a breach of duty between an insurer and its insured."**

***Cope*, 462 So.2d at 461.**

here are assuming that there is some right of action in Florida for "bad faith" exhibited by an insurance company to a third party claimant.

Furthermore, it is abundantly clear that the issue of whether or not "bad faith" exists is an issue concerning a fiduciary relationship between an insured and his insurer, There is no cause of action for any form of imagined "bad faith" shown to the claimant.

Again in II(A) of Appellants' Argument, Appellants raise the notion that Dr. Kimbell was not relieved of liability to Ms. Camp until the state court order canceling and discharging the judgment against Dr. Kimbell January 11, 1989, Appellants' Brief at 21 n. 10. The record shows that this is simply irrelevant to anything in the issues presented here. Dr. Kimbell was never even potentially liable on the Camp judgment,

Dr. Kimbell was, in fact, relieved of any potential personal liability at the time of his discharge in bankruptcy November 24, 1986. The Florida statutory section (F.S. 555.145) which Appellants continue to assert relieved Dr. Kimbell of liability effective January 11, 1989, by its own terms recognizes that the federal bankruptcy law, not the state statute, triggered Dr. Kimbell's immunity from having personal liability on the Judgment, The bankruptcy discharge occurred long before the Judgment was ever entered. That statute provides that it shall have only the effect: "The same as a Satisfaction of Judgment . . . If it appears upon

the hearing that the bankrupt or debtor has been discharged . . . etc.". (emphasis added).

Appellants also argue that a "mechanical" application of Cope in this case would send the wrong message to insurers, and that this Court should not announce a ruling which will only provide a "windfall" to insurers from the bankruptcy of their insureds. Appellants Brief at p. 21-22. The siren call trumpeted by the Appellants has been heard before, As explained in detail hereinbelow, the Harris court found such a fear to be unjustified. It observed that insurers "receive premiums only upon the face amount of the policy, and this much [they] must pay regardless of the insured's financial condition," Harris, 297 F.2d at 633. Moreover, as Appellants point out in Section III of their brief, where the conduct of an insurer causes the bankruptcy or insolvency of its insured, a cause of action for bad faith may be maintained against the insurer.[14] Accordingly, such an exception is unnecessary and would only swallow the rule pronounced in Cope.

The parallel between this case and the Cope case is compelling. In Cope, the Judgment was satisfied before the action was filed; therefore, the insured had no action and the third party had none. Similarly, in the present case, Kimbell's potential liability was extinguished long before the Camp claim was tried. Upon its being extinguished, Kimbell could no longer have a cause

[14] By the same reasoning, Appellants assertion in Section II(B) of their brief, namely, that a holding that an insured's bankruptcy precludes a bad faith action would be bad public policy and would encourage reckless behavior by insurers is meritless because of this principle.

of action; if he could not, then Camp could not. Camp's action was not separate and distinct from, but was derivative of Kimbell's.

The Second Circuit Court of Appeal has analyzed a similar circumstance. In Harris v. Standard Accident and Insurance Company, 297 F.2d 627 (2d Cir.1961), a trustee in bankruptcy brought an action against an automobile liability insurer for failure to settle a personal injury claim against a bankrupt within the policy limits. The court of appeals held that the insured, who was insolvent before an excess judgment was rendered, who paid no part of it, and who was discharged in bankruptcy from any future obligation to pay it, was not damaged by the insurer's failure to settle the personal injury claim within policy limits, and that, therefore, the insured's bankruptcy trustee could not recover from the insurer. This case is in harmony with the present case and with the Florida cases of Cope, Clement, and Kelly v. Williams, 411 So.2d 902 (Fla. 5th DCA 1982). These cases make it clear that, absent economic damages to Dr. Kimbell, there is no "bad faith" claim cognizable in Florida,[15] Moreover, it has been specifically

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15 In Kelly V. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), an action was broughr to recover for injuries suffered in an automobile accident by Kelly against Williams. Williams was insured by Allstare. Kelly accepted a $50,000 payment and agreed not to execute on any judgment he might obtain against Williams for any amounts above $50,000. In addition, the parties etipulated that in the event a bad faith action were filed against Allstate, Kelly would execute a Satisfaction of Judgment with regard to any and all judgments which were entered against Williams and would deliver such Satisfaction of Judgment to Williams' attorney within ten days of conclusion of the action. Florida's Fifth District Court of Appeal held that a cause of action for bad faith arises only when the insured is legally obligated to pay a judgment that is in excess of his policy limite, citing *Farmers' Insurance Exchange v. Henderson, 82* Az. 335, 313 P.2d *404* (1957) and 7c *Appleman* Insurance *Law and Practice*, Section 4712, and stated:

held in Florida that the insured's mental anguish, resulting from the experience of the entry of a judgment in excess of his policy limits is not a legitimate element of recovery in a "bad faith" or "excess judgment" suit by an insured against his insurer. See **Travelers** Indemnity v. Butchikas, 313 So.2d 101 (Fla. **1st DCA), aff'd,** 343 So.2d 816 (Fla. 1975)

Thus, given the facts in the case at bar, the District Court's findings constitute a straight-forward, logical application of the holdings in Cope and Clement.

B. Dr. Kimbell's Bankruptcy **Estate Does** Not Possess **Any** Cognizable Claim Against St. Paul **Independent** Of **The Claim** That Dr. **Kimbell Was** Harmed By St. **Paul's** Conduct,

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> The essence of a "bad faith" insurance **suit** (whether it is brought by the insured or by the injured party standing in his place), is that the insurer breached its duty to its insured by failing to properly or promptly defend the claim (which may encompass its failure **to** make a **good** faith offer **of** settlement within the policy limits) - all of which results in the insured being **exposed** to an excess judgment.

Kelly, 411 So.2d at 904 (Citing ***Thompson v.*** Commercial *Union* ***Insurance Company of N.Y.,*** 250 So.2d **259** (Fla. 1971)).

In *Travelers Indemnity V, Butchikas,* 313 **So.2d** 101 (Fla. 1st DCA), *aff'd,* ***343*** So.2d 816 (Fla. 1975), an insured brought an action against his automobile insurer seeking compensation far an amount that a previous judgment against him from an automobile accident exceeded his policy limits and for mental anguish, together with punitive damages. In that action Florida's First District Court of Appeals held that mental anguish arising out **of** a judgment against an insured in excess of his policy is not a legitimate element of damages because mental anguish is not reaaonably within the contemplation of the parties (the insured and insurer) when they enter into the insurance contract, The insured in that case did recover the amount of the difference between his policy and the judgment entered against him, but the case was remanded with directions concerning an excess amount for mental anguieh.

It is thus clear that the District Court was correct in holding that Florida law requires harm to the insured as **a** prerequisite to maintaining a bad faith excess judgment case,

Appellants advance the argument that it is Dr. Kimbell's bankruptcy estate which now possesses the excess judgment claim against St. Paul,[16] They further argue that even if St. Paul's conduct did not harm Dr. Kimbell or proximately **cause** his bankruptcy, the bankruptcy estate has still been harmed because the ***excess*** **judgment** resulted in an increase in the claims **asserted** against the bankruptcy estate. This "harm," according to Appellants, gives rise to a cause of action against St. Paul.

For the reasons stated below, Appellees submit that either the subject Excess Judgment Claim never became part of the bankruptcy estate **and** therefore could not be asserted by the Trustee in Bankruptcy," or if it did become part of the bankruptcy estate, (i) the claim was subject to all of the defenses discussed above respecting harm to Dr. Kimbell; and, in any event, (ii) St. Paul is not liable to the bankruptcy estate for any increase in claims.

1. The **Excess** Judgment **Claim Against St. Paul Arose After The Filing Of Dr. Kimbell's** Bankruptcy **And** Therefore Did Not **Become** Property **Of His** Bankruptcy **Estate.**

Appellee submits that Dr. Kimbell's bankruptcy estate never succeeded to a claim against **St.** Paul because no **cause** of action for bad faith existed at **the** commencement of **Dr.** Kimbell's bankruptcy case which could pass to Dr. Kimbell's Bankruptcy **Estate. This is** necessarily **the** case because the cause of action,

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[16] **Appellants also argue that Mrs. Camp has an independent claim and should not** have **been dismissed as a party Plaintiff. This issue is discussed later in this** brief.

[17] **Appellants** do **not argue that Mrs. Camp's claim against St. Paul has anything to do with** "harm" **to Dr. Kimbell's bankruptcy estate. Thus, the issue of "harm" to the estate is relevant only to the Trustee's claim.**

if any, arose months after Dr. Kimbell filed his bankruptcy petition, to wit, at the time judgment was rendered in the state court.

Only causes of action existing at the time of the filing of the Bankruptcy pass by operation of law to the Bankruptcy Estate.[18] It is uncontroverted that the alleged breach of contract by St. Paul occurred at the time of St. Paul's rejection of Ms. Camp's last policy limits settlement offer. The last offer, according to Appellants took place on May 14, 1987. Appellants' Answer Brief in the Eleventh Circuit at 20.

2. Dr. Kimbell's Trustee Effectively Abandoned The Estate's Rights, If Any, To The Policy Contract,

Appellants submit that St. Paul's only duty was to its insured, Dr. Kimbell. It owed no duty to his bankruptcy estate, and none was expected by the Trustee.

It must first be noted that the Trustee, Mr. John Venn, did not participate as a party in the underlying malpractice case against Dr. Kimbell and did not participate in any of the settlement negotiations.[19] In fact although Venn at one time

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[18] See *Jones v. Harrell*, 858 F.2d 667, 669 (11th Cir. 1988): ("A trustee in bankruptcy succeeds to all causes of action held by the debtor *at the time the bankruptcy petition is filed.*" Emphasis supplied. See also 11 U.S.C. §541(a)(1) providing that property of the estate includes "...all legal or equitable interests of the debtor in property *as of the commencement of the case*". Emphasis supplied.

[19] In his deposition of September 6, 1989, Mr. Venn testified:

Q And you never appeared as a party in that lawsuit, right?

A No, I never did. I appeared at some of the hearings but not as a party. I appeared in my role as trustee and attorney for the trustee.

contended that **he** had an **interest** in the *$250,000.00* insurance proceeds in Ms. Camp's suit, he changed his mind and abandoned his interest therein.[20] Assuming arguendo that St. Paul had some **duty** to the bankruptcy estate initially, it is difficult to see how such duty could continue when the estate's trustee had voluntarily abandoned the estate's interest in the policy and lawsuit, did not participate in the lawsuit and sought no benefits therefrom for the creditors of the **estate.**

Q Do you have any knowledge hat Mr. Estes and his **pa** tners, specifically Mr. Kerrigan, made various settlement proposals **to** Dr. Kimbell in that state court action?
A Other than their representations to me, I have no independent knowledge of it.

Q But they did tell you that?
A Yes.

Q And did they ever receive any authorization from you to make those settlement offers?
A No.

R:II:110:61-62.

[20] In his deposition of September *6*, 1989, Venn testified:

Q Do **you** ever contend that any recovery that the Plaintiff in these personal injury cases would make would be property of the estate?
A I did for **a** very short period of time until fudge Killian told me I was **wrong,** and I think you told me I was wrong in Atlanta.

* * *

Q You subsequently **abandoned** your contention that any recovery made by Mra. Camp in the state court lawsuit would be property of the estate?
A **Any** recovery of the $250,000.00 policy limits would be, that's correct.

R:II:110:**58-59.**

Moreover, case law shows, as suggested by Venn in his deposition,[21] that there is a sound basis for abandoning the Estate's **interest in** a suit like the underlying malpractice case. While theoretically the Bankruptcy Estate may have become the owner of Dr. Kimbell's insurance policy at the time of the filing of his Bankruptcy Petition, the Courts have had no difficulty in distinguishing (1) those cases where the Estate has a claim or interest in an insurance policy which the Trustee should assert and recover for the benefit of a certain class of creditors from (2) those cases where the estate clearly does not have such **a** claim or interest and should not assert a claim. In the former **cases**, the Courts have kept control of insurance carriers **and** the proceeds of insurance policies. In the latter **cases**, the Courts have allowed **Trustees to** abandon their interests in insurance policies and have lifted the automatic stay and allowed third parties to pursue their rights against insurance carriers.

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[21] In his deposition of September 6, 1989, Venn testified:

> **THE WITNESS:**
>
> ...and I what [sic] typically tell the plaintiff's attorney is that the Bankruptcy Court, on **a** motion for relief from the stay, will typically allow the personal injury or the tort action to **proceed** for the purposes of collecting judgment but that no action **may** be **taken** against the debtor except for collection of insurance proceeds; and **also**, that the proceeding will serve to liquidate their claim in bankruptcy if they intend to file one.

R:IT: 110: **57-58**

In many of the so-called IUD and asbestos litigation cases,[22] the ***Courts*** **have** allowed Trustees in Bankruptcy or Debtors-in-Possession to marshall insurance proceeds for the benefit of **a** class **of creditors who** were protected by certain of a Debtor's insurance policies. **An** examination of these cases reveals that they almost always involved multiple victims **and** multiple insurance carriers. For example, ***see*** A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 **(4th Cir.** 1986).

In these cases the total insurance proceeds from all insurance carriers were insufficient to cover the claims of multiple Plaintiffs with similar claims. Thus, by gathering all of the insurance proceeds into a "fund," a pro-rata payment could be made ***to the*** **injured** class **of creditors** under **a** Chapter 11 Plan of Reorganization, The rights of all injured creditors in the class are thereby protected.

No such "equities" exist in the garden variety insurance case such as the underlying malpractice case at bar where there is usually one claimant and one policy and generally no reorganization.

The Eighth Circuit in In re: Titan Energy, Inc., 837 F.2d 325 (8th Cir. 1988) recently distinguished multiple claimant cases as described above from ordinary cases:

> In the above cases, numerous creditors claimed entitlement to a debtor's insurance policy, the proceeds of which were inadequate

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22 See *A.H. Robins Co., Inc., infra;* see *also, In re Johns Manville Corp.,* 33 B.R. *254* (S.D.N.Y. 1983).

> to satisfy a large or growing list of claimants. Further, the debtor in those cases intended to resume business after concluding its Chapter 11 reorganization proceedings. Allowing one claimant to collect the policy proceeds in a state court judgment would, in those cases, deplete the insurance pool to the detriment of all remaining creditors. Further, disbursing the policy proceeds in such a haphazard manner could slow the debtor's reorganization effort. Recognizing these hazards, the courts above shared two common goals - to insure equitable division of a limited insurance fund, and to facilitate the debtor's swift and efficient reorganization.

Titan Enersv, 837 F.2d at 330 (emphasis supplied).[23]

In the case at bar, there is no reason to treat Dr. Kimbell's insurance policy as property of the bankruptcy estate. There are no multiple claimants and no chapter 11 reorganization.[24]

A result consistent with the above logic has been ordered by the lower Court's Bankruptcy Division in an unpublished opinion of Judge Lewis M. Killian in In re Ronald E. Wadkins, May 19, 1988, Case No. 86-04064-A, United States District Court for the Northern District of Florida, Bankruptcy Division. In that case, Mr. Venn as Trustee of the Debtor sought to prevent the automatic stay from

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[23] The Bankruptcy Court in *In re* ***Forty-Eight Insulations, Inc.***, 54 B.R. 905 (Bkcy N.D. Ill,), also distinguishes "garden variety" insurance cases from the more involved ones: "Both cases involved individual personal injury claimants where there was adequate insurance so that allowing the cases to proceed would not prejudice or diminish the debtor's estate, 54 B.R. at 908-909.

[24] Under Chapter 11, a Plan of Reorganization may classify general unsecured creditors in separate classes. Thus, a Plan could treat a class of asbestos claimants differently from a class of general trade creditors. 11 U.S.C. §1122. See, ***e.g., In re U.S. Trucking Company, Inc., 800*** F.2d 581 (6th Cir. 1986). There is, however, no basis under Chapter 7 of rhe Bankruptcy Code to treat any unsecured, non-priority creditor differently from other such creditors. See 11 U.S.C. §726.

being modified so as to allow personal injury victims to continue litigation against Debtor. The Bankruptcy Court modified the **stay** holding that the **case** at bar was unlike the IUD and Asbestos cases.[25]

St. Paul submits that while an argument can be made that the subject insurance policy is nominally property of the bankruptcy estate, the Trustee's abandonment before trial of his right in the policy and the fact that the case at bar is **not** the kind of case warranting intrusion by the bankruptcy trustee into what is essentially a dispute between third parties make it clear that the District Court was correct in finding that any claim for bad faith belonged to the insured, Dr. Kimbell and not to his bankruptcy estate.

3. **Any** Claim The **Bankruptcy Estate Possesses Against St. Paul Is Derivative Of Dr. Kimbell's Rights And** Could **Be No Greater** Than **Dr. Kimbell's Rights.**

St. Paul submits that the bankruptcy estate's rights regarding this matter are derivative of Dr. Kimbell's rights pursuant to 11

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[25] The Bankruptcy Court on **page 3** of its opinion **states:**

> "The Trustee has cited several cases dealing with multiple claimants where the insurance **coverage** is insufficient to pay **all** claims in full. **In** these instances, continuance of the stay is appropriate in order to provide a fair **pro** rata distribution **to** all beneficiaries in accordance with the disrribution scheme of the Bankruptcy **Code.** The Court thus concurs with the Movants herein that these **cases** are distinguishable. There are no competing claims in the case **sub judice,** thus there can be no adverse impact on the estate from allowing the requested **stay** relief."

See *also Matter of Holtkamp,* 669 F.2d ***505*** (7th Cir. **1982)** holding that there was no harm to the Estate in allowing the state court action to continue.

U.S.C. §541. That section of the Bankruptcy Code, as aforesaid, gives the bankruptcy estate all of a bankruptcy Debtor's legal and equitable interests in property, Appellants argue that this interest would include any claim which Dr. Kimbell had against St. Paul arising under the subject malpractice insurance policy. Thus, if Dr. Kimbell had no claim against St. Paul, neither would the bankruptcy estate.[26]

As discussed in detail, supra, Florida law protects an insured from damages suffered by the insured arising from the failure of an insurance company to settle a liability case covered by a policy of insurance, See Cope, supra. However, in the case at bar, Dr. Kimbell was not damaged by St. Paul's conduct. The conduct of failing to settle the subject lawsuit took place months after Dr. Kimbell received his discharge in Bankruptcy. On two different occasions---one before verdict and one afterwards---the Bankruptcy Judge entered Orders protecting Dr. Kimbell from enforcement of any Judgment obtained by the Camps against him.[27]

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[26] As pointed *out* by *4 Collier on Bankruptcy 7541.01* at p.541-6:

> "Although the broad provision of section 541(a)(1) includes choses in action and claims by the debtor against others, it *is not intended to expand the debtor's rights against others beyond what rights existed at the Commencement of the case.* For example, if a debtor's claim is barred by the statute of limitations at the commencement of the case, the trustee too will be barred and cannot, therefore, pursue the claim. *The trustee can take no greater rights than the debtor himself had on the date the case was commenced."* Emphasis supplied.

[27] See paragraphs 10 and 18 of Plaintiffs' Amended Complaint. R:I:23:3, 8.

Finally, the state court judge, as aforesaid,[28] ordered the judgment canceled and discharged. In sum, Dr. Kimbell has never been damaged, nor could he have been damaged by the failure of St. Paul to settle.

There being no damage to Dr. Kimbell, he could not have a cause of action against St. Paul. Since Dr. Kimbell could have no cause of action, it necessarily follows that neither would Venn as Trustee of Dr. Kimbell's bankruptcy estate.

4. The Increase In Claims Against Dr. Kimbell's Bankruptcy Estate Does Not Constitute Damage To The Bankruptcy Estate For Which Relief May Be Granted.

Appellants advance the novel argument that Mrs. Camp's recovery of an *excess* judgment "damaged" Dr. Kimbell's bankruptcy estate. The only support for this proposition offered by Appellants is *the* holdings in two cases in which the debtor's bankruptcy was directly caused by the insurer

In Young v. American Casualty Company, 416 F.2d 906 (2d Cir.1969), cert. dismissed sub nom., Myles v. Procunier, 396 U.S. 997, 90 S.Ct. 580, 74 L.Ed.2d 490 (1970) cited by Appellants, owners of a laundromat were sued in a personal injury action by a customer who fell and injured herself at a laundromat owned by the insureds. When the insurer failed to settle the action, an *excess* judgment was entered against the insureds. Prior to the entry of the judgment, the insureds were solvent; however, the excess judgment forced the insureds to file for bankruptcy when a liquidation of their holdings failed to satisfy the excess amount

[28] R:11:106: Exhibit "A."

of the judgment. Young, 416 F.2d at 908. The Court in Young provided a means wherein the Debtor would be placed "in a position where his net assets are as great after as before payment of the excess judgment..." Young, 416 F.2d at 911. The Young holding has nothing whatsoever to do with recognizing a right of action for "damage" to a bankruptcy estate.

The other case cited by Appellants is Purdy v. Pacific Automobile Insurance Company, 157 Cal.App.3d 59, 203 Cal.Rptr. 524 (2d Dist. 1984). In Purdy, a California appellate court held that a trustee assumed his insolvent debtor's bad faith action against his insurer where the insures's action had "brought about" the debtor's bankruptcy filing. Purdy, 203 Cal.Rptr. at 531. In Purdy, the damage which the court recognized was not damage to the bankrupt's estate, but rather, to the bankrupt debtor. Purdy, 203 Cal.Rptr. at 531, Again, this case has nothing to do with recognizing a right of action for damages to Dr. Kimbell's bankruptcy estate.

Moreover, it is inconceivable that a bankruptcy estate can suffer actual damage through the filing of an unsecured creditor's claim.[29] The existence of a claim, such as the excess judgment in

[29] The argument can be made that: the entry of the excess judgment did not in fact "increase" the claims filed in Dr. Kimbell's bankruptcy case. On March 12, 1987, *several months prior to trial* of the underlying malpractice case, Mr. and Mrs. Camp filed a proof of claim in Dr. Kimbell's bankruptcy case asserting a claim for "unliquidated damages". R:V:11:Exhibit 12. Accordingly, on that date, the total claims filed by all of Dr. Kimbell's creditors in his bankruptcy included a claim by the Camps for whatever judgment amount would ultimately be recovered by the Camps in the state court action. Appellants submit that no "increase" in claims thus occurred following the entry of judgment since a claim covering any such amount had already been filed.

the instant case, does not reduce the amount of assets which will be collected. Whatever assets there are will still be collected and distributed to creditors.[30]

As the Second Circuit Court of **Appeals** recognized in Harris, the party which is truly harmed when an insurer's bad faith causes an excess judgment to be entered against its insured-bankrupt is the creditor of the insured-bankrupt who will receive less assets from the estate. The Harris court questioned whether, under New York law, any duty was even owed by the insurer to creditors in such a case. **Harris**, 297 F.2d at 636. In Florida, this question has been answered by the Florida Supreme Court in Cope, viz., there is no duty owed to third parties. Under Cope, as the **District** Court recognized, the duty runs to the insured alone. Cope, 462 So.2d at 461. Moreover, as the Harris court reasoned when considering the possibility of such a right being created in New York, there is no provision under federal bankruptcy law "that empowers a trustee to sue on a cause of action that belongs to his bankrupt's creditors." Harris, 297 F.2d at *636.*

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[30] As discussed above, the Bankruptcy Judge lifted the automatic stay of 11 U.S.C. § 362 and allowed the underlying malpractice case to proceed to judgment. He stated in his order "...that any Judgment entered in such action shall be for the full amount of the claim of Harvey and Anna Rue Camp and shall thereby liquidate such claim for purposes of this Chapter 7 case." Appellants' Amended Complaint at paragraph 10. R:I:3. The Bankruptcy Judge in allowing the liquidation of the Camps' claim, provided a means wherein the Camps could share in any dividends from the bankruptcy estate in the event they recovered a judgment in excess of the policy limits. Thus, the possibility that the Camps would **have a** surviving claim was foreseen at least from the time the Bankruptcy Judge's Order **was** entered---or even sooner, if the Camps' proof of claim is considered. Id,

III. AFFIRMING THE DISTRICT COURT'S ACTION IN THIS CASE IS GOOD PUBLIC POLICY AND WOULD NOT ENCOURAGE ANY RECKLESS BEHAVIOR BY INSUREDS,

Appellant erroneously asserts that the Federal District Judge in this case "followed" the Second Circuit decision in Harris v. Standard Accident & Insurance Company, 297 F.2d 627 (2d Cir. 1961), cert.den. 369 U.S. 843 (1962). Though Judge Vinson in this case mentioned the Harris citation, 127 B.R. 879, 886 (N.D.Fla. 1991), the Court noted (at 884): "The facts of Harris are, of course, somewhat different from those of this case." Clearly, what Judge Vinson "followed" in this case was the reasoning of this court in the case of Fidelity & Casualty Company v. Cope, 462 So.2d 459 (Fla. 1985). Judge Vinson quoted the Cope opinion extensively in this case, see Camp v. St. Paul Fire & Marine Insurance Company, 127 B.R. 879, 882, noting that if the insurance company's actions did not cause the insured's bankruptcy, then there was no harm to the insured and that absent harm, there is no action for bad faith. Judge Vinson stated:

> "The answer to this argument, I believe, is that the insurer's duty of good faith runs to the insured, alone, as the Cope opinion makes very clear. As the Supreme Court of Florida indicated, the bankruptcy estate's cause of action is entirely derivative of the insured's, and is extinguished once the insured is released from obligations stemming from the underlying judgment. The underlying judgment could not be more clear: Kimbell was never personally liable for the excess judgment. Under the law of Florida, his discharge in bankruptcy had the effect of 'satisfying' that judgment with respect to him. Further, the discharge was well before trial and long before judgment was entered . . . Therefore, Kimbell was, before trial, 'released from liability for any damages he might have suffered as a result of the insurer's bad faith' . . . As a result, *Cose* and Clement control and St. Paul cannot be liable for any alleged bad faith in defending Dr. Kimbell." 127 B.R. 879, 884.

After misstating the law upon which Judge Vinson's Judgment was grounded in order to launch an attack on the Harris case and upon any concept "that payment of an excess judgment by the insured (or indication of ability to pay) is a condition precedent to filing a bad faith action", Appellants then proceed to make a public policy argument that is similarly a strawman argument. This case does not "demonstrate in stark terms" what can and will happen regarding insurer's duty to insureds in cases where an insurer cannot be sued for bad faith as asserted by the Appellants, St. Paul's activities recited by the Appellants evidenced concern for whether or not St. Paul's actions would or would not harm its insured, Dr. Kimbell.

The district court's ruling in the present case would open no doors: for reckless misbehavior by insurers. Clearly, Judge Vinson was aware that his ruling would have been different had St. Paul instigated its insured's bankruptcy. The suggestion by the Appellants that according to the District Court's rationale, St. Paul could have completely abandoned Dr. Kimbell takes the argument to its natural ridiculous extreme. Obviously, St. Paul continued to have the duty to defend Dr. Kimbell and to pay any liability asserted up to its policy limits which are separate and distinct duties in Florida law relating to insurance policies. West American Insurance Company v. Silverman, 378 So.2d 28 (4th DCA 1979), cert.den.(Fla.) 389 So.2d 1117 and Aetna Insurance Company v. Waco Scaffoldins & Shoring Company, 370 So.2d 1149 (4th DCA 1978), cert.den.(Fla.) 368 So.2d 1375, The only public policy effect the

present case might have if affirmed will be to reaffirm that in Florida one does not collect money damages in legal actions where there has been no breach of duty which resulted in harm to the party to whom the duty was owed.

What Appellants really are attempting to do is to engraft some form of duty of good faith to a third party liability claimant which does not exist in the State of Florida. As stated by this Court in Fidelity & Casualty Company of New York v. Cope, supra, an insurance company in Florida owes no "good faith" duty directly to an injured third party and the third party's action, if any, is derivative of the insured's, In that opinion, Judge MacDonald stated:

> " . . . An essential ingredient to any cause of action is damages, Before this action was filed, however, the judgment was satisfied. Upon being satisfied, Brosenan (the insured) no longer had a cause of action; if he did not, then Cope did not. Cope's action was not separate and distinct from, but was derivative of Brosenan."

As the cases of Cope, Clement v. Prudential Property & Casualty Ins. Co. and Travelers Indemnity v. Butchikas, 313 So.2d 101 (Fla. 1st DCA), aff'd, 343 So.2d 816 (Fla. 1975) 790 F.2d 1545 (11th Cir. 1986) make clear, absent damages to Dr. Kimbell, there is no "bad faith" claim cognizable in Florida.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT ST. PAUL'S FAILURE TO SETTLE WAS NOT A FACTUAL CAUSE OF DR. KIMBELL'S BANKRUPTCY FILING,

The District Court found precedent for the proposition that if an insured filed bankruptcy because of the entry of an excess judgment, the insurer could be responsible to the insured for damages sustained. R:V:186:16-17; Camp, 127 B.R. at 885-86.

However, after a review of the affidavits, record and other evidence before him, the District Court concluded that St. Paul's conduct was not the cause of Dr. Kimbell's bankruptcy. R:V:186:17; Camp, 127 B.R. at 886. As set forth below, there is no genuine issue as to any material fact regarding this finding,

A. The District Court Applied The Correct Causation Standard,

Appellants urge this Court to reverse the District Court's finding on the basis that it applied an "incorrect formulation of the causation standard," Appellants' Brief at 28. Specifically, the Appellants claim that the District Court erred because it applied a "sole cause" standard instead of the "substantial factor" test which Florida courts have adopted. Appellants' Brief at 28. Appellee submits that the District Court applied the correct causation standard.

In Tieder v. Little, 502 So.2d 923 (Fla. App. 3d DCA 1987), a case cited by the Appellants for the proposition that the District Court applied the wrong causation standard, the court observed that Florida courts have adopted "a 'substantial factor' exception to the 'but for' test where two causes concur to bring about an event in fact, either one of which would have been sufficient to cause the identical result." Tieder, 502 So.2d at 925-926 (emphasis added), Applying this rule to the facts in the instant case, it follows that unless St. Paul's alleged bad faith constituted a "concurring cause" of Dr. Kimbell's bankruptcy, the "substantial

factor" exception would be inapplicable.[31] ***See*** Stahl v. Metropolitan **Dade** County, 438 So.2d 14, 22 (Fla. 3d DCA 1983). As revealed in the detailed findings set forth in his Order, the District Court methodically and painstakingly examined the numerous uncontroverted facts in this case before arriving at his conclusion that the alleged bad faith on St. Paul's part did not amount to "a factual, let alone, proximate cause of Kimbell's bankruptcy," R:V:186:21-22; Camp, 127 B.R. at 887, Thus, the "substantial factor" exception to the sole cause or "but for" test was not applicable to the facts in the instant case.

Regarding Appellants' assertion that the District Court's allusion to "proximate cause" necessitates the submission of this case to a jury, this contention is likewise unfounded, While it is true that proximate cause questions are usually reserved for juries, it is well settled that in situations where reasonable

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[31] In the Statement of the Facts contained in Appellants' **Brief** in the Eleventh Circuit, the Appellants note that in **a** letter to St. Paul's attorney, Dr. Kimbell's attorney (Mr. Westmoreland) stated that Dr. Kimbell's potential exposure beyond his policy limits was a "factor in our decision on filing some type of bankruptcy proceedings." Appellants' Brief in the Eleventh Circuit at 9. Appellants also note that the Trustee stated that but-for the Camp case, the bankruptcy would nor have occurred. Id., at 45. Neither Mr. Wesrmoreland's letter nor Mr. Venn's opinion constitute credible evidence of whether St. Paul's alleged failure to settle was **a** substantial factor leading to Dr. Kimbell's bankruptcy. The reason for this is that Dr. Kimbell's bad faith action did not arise -- if ever -- until ***months after*** Dr. Kimbell's bankruptcy filing on July 11, 1986. ***Id.***, at **15** and 17. St. Paul's alleged breach of duty was its failure to settle for policy limits prior to the May 1987 trial **and** the **alleged** harm **waa** the entry of the June 1987 excess verdict. Both of these events occurred long after the petition for bankruptcy. St. Paul could therefore have settled the case **as** late as May *14,* 1987. See ***Id.,*** at 20. Therefore, the decision to file €or bankruptcy must have been based upon substantial factors other than the Camp claim which was still open.

factfinders could not differ, the issue is one of law for the court. Tieder, 502 So.2d at 926.

Appellants urge this Court to find that the District Court overlooked direct evidence which raised a genuine issue of material fact. However, the District Court was thorough in its deliberations. Upon a careful analysis of the chronology of events, the District Court found that:

> "Kimbell would have gone bankrupt, independent of any bad faith on the part of St. Paul. The record reflects that his liabilities well exceeded his assets, without any consideration of the Camp suit. The practice difficulties lading to Kimbell's drastic decrease in income apparently started before Camp filed suit. This independent income reduction, by itself, rendered Kimbell unable to meet his obligations and forced him to start liquidating whatever he could sell before he finally filed [bankruptcy] in July 1986."

R:V:186:21; Camp, 127 B.R. at 887.

Dr. Kimbell's own affidavit fails to assert that St. Paul's conduct caused his bankruptcy. Rather, the affidavit simply says (i) that Dr. Kimbell's income was dependent on referrals from other physicians and (ii) that most of his income was lost after his privileges were suspended by Baptist Hospital.[32] R:V:145 paragraphs 9 and 10. The affidavit of Lyn Shepherd of Baptist Hospital, which was also before the District Court, confirms that Dr. Kimbell would have filed for bankruptcy independent of Appellee's conduct. Ms.

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[32] "The suspension of both my hospital privileges and operating room privileges at Baptist Hospital adversely affected my patient referrals at Sacred Heart Hospital, as the same physicians were also on the Sacred Heart Hospital staff that were on the Baptist Hospital staff, thereby causing a substantial decrease in my income earning ability." R:V:145 at paragraph 9. "After my privileges were suspended and I lost most of my income stream, I had *to* consider bankruptcy." R:V:145 at paragraph 10.

Shepherd asserts that "[T]he peer review process began due to the Risk Management Committee's concern regarding Dr. Kimbell's handling of a number of cases." R:V:182 at paragraph 5, page 3. Her affidavit further asserts that "Once the peer review process had been commenced, no action by St. Paul Insurance Company could have affected the continuation or ultimate result of the peer review process," R:V:182 at paragraph 7. Finally, Shepherd states that "The existence and/or outcome of a lawsuit by Anna Rue Camp against Dr. Kimbell and Baptist Hospital in no way affected the result of Dr. Kimbell's peer review process." R:V:182 at paragraph 8.

Moreover, on page 20 of their answer brief before the Eleventh Circuit Court of Appeal, Appellants assert that a policy limits settlement offer was open as late as approximately one month prior to the trial of the underlying malpractice case. It follows that if St. Paul had accepted Appellants' settlement proposal at that time, such acceptance would not have prevented Dr. Kimbell's financial difficulties or his bankruptcy.

Thus, it was not St. Paul's failure to settle which was a cause of Dr. Kimbell's bankruptcy, but his suspension of privileges.[33] Accordingly, the District Court did not err in finding that "no reasonable factfinder could find that any alleged

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[33] Of course, as found by the District Court, there were a number of other causes, including Dr. Kimbell's lack of savings, and large debts. Moreover, Judge Vinson's finding that Dr. Kimbell's financial difficulties "must have started as early as August of 1984, five months before the Camp lawsuit was filed . . ." is uncontroverted. R:V:186:20.

bad faith by St. Paul was a **factual, let** alone **proximate,** cause of Kimbell's **bankruptcy."** R:V:186:21-2; Camp, **127** B.R. **at 887.**

V. MS. CAMP DOES NOT HAVE A RIGHT OF ACTION AGAINST ST. PAUL UNDER FLORIDA STATUTE, §624.155.

Appellants identify as an issue in this appeal the question of whether or not Ms. Camp can maintain an action against St. Paul under Florida Statute, §624.155. They also point out that Ms. Camp's action is based on that section and **not** on Florida common **law.**[34]

Appellee relies upon the **case** of Cardenas v. Miami-Dade Yellow Cab Company, 538 So.2d 491 (Fla. **3d** DCA), rev.dismissed, 549 So.2d 1013 (Fla. 1989) as the most appropriate interpretation of Florida **Statutes,** §624.**155 on** this point. In **that** case **Florida's** Third District Court of Appeal in reference to Florida Statutes, 5624.155 **noted**:

> " . . . However, no court has **read** the statute **to** extend a direct cause of action to **a** third party. ***See*** Fidelity & Casualty Company of New York v. Cope, 462 So.2d 459 (Fla. 1985)."
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> * * *
>
> "By the language used, **the** legislature clearly intended to impose a duty of good faith and fair dealing . . . **However, the duty is** one the parties to **the** contract **owe to** each **other,** not to a third party who is not in privity of contract. In other words, an insurer owes no duty directly to a third party **claimant.** The insured may assign his cause of action **for breach of duty to settle** to the injured third party, but that party has no **independent** cause of action against the insurer." Cardenas, 538 So.2d at 496,

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[34] **R:V:I:23 at paragraph 14-16.**

In Cardenas the court directly ruled on this issue because the Plaintiff, Cardenas, had attempted a direct action against Miami-Dade Yellow Cab Company's insurer, joining in Liberty Mutual Insurance Company. Therefore, the court in the Cardenas opinion was ruling upon the issue and not stating mere obiter dictum. There the appellate court defined the term "any person" as used in §624.155 as any insured party who is harmed by his insurer's bad faith refusal to settle. Recognizing the effect of its holding, the appellate court certified this particular issue to the Supreme Court of Florida as being on of great public importance, Cardenas, 538 So.2d at 496 and 497. Subsequently, this Court simply dismissed the review of this issue. Cardenas v. Miami-Dade Yellow Cab Company, 549 So.2d 1013 (Fla. 1989).[35]

Appellants have stated at page 31 of their brief that Clauss v. Fortune Insurance Company, 523 So.2d 1177 (Fla. 5th DCA 1988) is a Florida case "permitting bad faith action by third party under 5624.155, but holding that insurer did not act in bad faith."

This is clearly a misreading of that opinion. Nowhere in the opinion does one *see* any words suggesting that Florida Statute, 5624.155 "permits" such an action, As a matter of fact, the court's opinion specifically notes that the court has not reached the issue

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[35] Since the briefs were filed in this case in the United States Court of Appeals, Eleventh Circuit, another Florida appellate court has considered the issue of whether or not F.S. 5624.155 affords a direct right of action to a noninsured third party, In Lucente v. State Farm Mutual Automobile Insurance Company, 591 So.2d 1120 (Fla. 4th DCA 1992) the Court decided that this section of the Florida Statutes does not provide an uninsured third party the right to bring a direct action against an alleged tortfeasor's insurer for alleged unfair claim settlement practices.

of whether 5624.155 has preempted the common law bad faith cause of action. Clauss, 523 So.2d at 1179. Likewise, the court in Clauss clearly did not deal with the issue raised here by the Appellants. This issue was never raised in the Clauss case.

Since the record is devoid of any mention of any assignment from Dr. Kimbell to Ms. Camp of any cause of action prior to Dr. Kimbell's discharge from any possible liability, and, moreover, since Ms. Camp's argument on the point squarely states that she urges no common law right of direct action, but is relying upon a perceived statutory right or direct action not recognized by the Florida courts, it is apparent that Ms. Camp has no right of direct action in this matter.

Furthermore, the District Court properly dismissed Ms. Camp as a party Plaintiff since she has waived any right to recover any sums from St. Paul in favor of Mr. Venn as Trustee. F:V:II:110:18.

CONCLUSION

It is uncontroverted that Dr. Farris D. Kimbell, Jr. suffered no economic harm from the refusal of St. Paul Fire & Marine Insurance Company to settle the underlying malpractice litigation for the policy limit set forth in Dr. Kimbell's malpractice insurance policy. It is further uncontroverted that Dr. Kimbell was forced to file bankruptcy due to a combination of a reduction in income from his medical practice and other factors also unrelated to St. Paul's conduct.

Under Florida law, proof of harm to the insured is a prerequisite to the maintenance of a bad faith suit following recovery of an *excess* judgment. In the case at bar, there was no harm suffered by the insured, Dr. Kimbell. It necessarily follows that the District Judge was correct in awarding St. Paul Summary Judgment.

DATED this 30th day of July, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing has been furnished by mail this 30th day of July, 1992 to Talbot D'Alemberte and Adalberto Jordan, Steele, Hector & Davis, 4000 Southeast Financial Center, Miami, FL 33131-2398, and to George W. Estess, Kerrigan, Estess & Rankin, 400 East Government Street, P.O. Box 12009, Pensacola, FL 32589.

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