IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,712

ANNA RUE CAMP and JOHN E. VENN,

Appellants,

v.

ST. PAUL FIRE AND MARINE INS. CO.,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

Talbot D'Alemberte
Adalberto Jordan
Jonathan Sjostrom
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131
(305) 577-2800

Counsel for Appellants

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
(i) Course of Proceedings	2
(ii) Statement of the Facts	5
SUMMARY OF THE ARGUMENT	7
ARGUMENT	9
I. BY INSERTING THE BANKRUPTCY CLAUSE IN DR. KIMBELL'S POLICY, ST. PAUL HAS WAIVED *ANY* CONTENTION THAT DR. KIMBELL'S BANKRUPTCY PROVIDES ABSOLUTE IMMUNITY FROM BAD FAITH LIABILITY	9
A. Under Florida Law a Bad Faith Action Sounds in Contract	11
B. The Bankruptcy Clause of Dr. Kimbell's Policy Permits a Bad Faith Action Because One of St. Paul's Obligations Under the Policy is to Settle Claims in Good Faith	13
11. UNDER FLORIDA COMMON LAW, ST. PAUL IS NOT CLOAKED WITH ABSOLUTE IMMUNITY FROM A BAD FAITH CLAIM AS A RESULT OF DR. KIMBELL'S FORTUITOUS BANKRUPTCY	18
A. A Bad Faith Action Can be Maintained Under Cope Because Ds. Kimbell's Bankruptcy Estate Remains Liable for the Excess Judgment	18
B. A Holding That an Insured's Bankruptcy Precludes a Bad Faith Action Would be Bad Public Policy and Would Encourage Reckless Behavior by Insurers	22

TABLE OF CONTENTS (Cont'd)

Page

III. THE INSURED'S BANKRUPTCY SHOULD NOT BAR A BAD FAITH ACTION IF THE INSURER'S ACTIONS HAVE BEEN A SUBSTANTIAL FACTOR IN THE BANKRUPTCY 27

IV. MRS. CAMP CAN MAINTAIN THIS BAD FAITH ACTION UNDER FLA. STAT. § 624.155 IRRESPECTIVE OF DR. KIMBELL'S BANKRUPTCY 31

CONCLUSION 32

CERTIFICATE OF SERVICE 34

TABLE OF CITATIONS

Cases **Page(s)**

Aaron v. Allstate Ins. Co.,
559 So.2d 275 (Fla. 4th DCA) rev. denied,
569 So.2d 1218 (Fla. 1990) 12

American Fire & Casualty v. Davis,
146 So.2d 615 (Fla. 1st DCA 1962) 23

Anderson v. St. Paul Mercury Indemnity Co.,
340 F.2d 406 (7th Cir. 1965) 19,27

Auto Mutual Indemnity Co. v. Shaw,
134 Fla. 815,184 So. 852 (Fla.1938) 11,17

Barnes v. Gulf Power Co.,
517 So.2d 717 (Fla.1st DCA 1987) 29

Bellaire Sscurities Corp. v. Brown,
124 Fla. 47,168 So. 625 (1936) 13

Boston Old Colony Ins. Co. v. Gutierrez,
386 So.2d 783 (Fla. 1980) 14

Bourget v. GEICO,
456 F.2d 282 (2d Cir. 1972) 23

Brown v. City of Pinellas Park,
557 So.2d 161 (Fla. 2d DCA 1990) 29

Camp v. St. Paul Fire & Marine Ins. Co.,
i27 B.R. 879 (N.D. Fla. 1991), questions
certified,958 F.2d 340 (11thCir. 1992) .... passim

Carter v. Pioneer Mutual Casualty Co.,
67 Ohio St.2d, 423 146 N.E.2d 188 (1981) 24

Clauss v. Fortune Ins. Co.,
523 So.2d 1177 (Fla. 5th DCA 1988) 21,31-32

Clement v. Prudential Property & Casualty Co.,
790 F.2d 1546 (11thCir. 1986) 4, 18-19

Fidelitv and Casualtv Co. of New York v. Cope,
462 So.2d 459 (Fla. 1985) .... passim

TABLE OF CITATIONS (Cont'd)

Cases	Page(s)
Fortson v. St. Paul Fire & Marine Ins. Co., 757 F.2d 1157 (11th Cir. 1985)	32
Ganaway v. Shelter Mutual Ins. Co., 795 S.W.2d 554 (Mo. App. 1990)	7, 16
Gray v. Grain Dealer's Mutual Ins. Co., 871 F.2d 1128 (D.C. Cir. 1989)	16, 23
Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172 (11th Cir. 1985)	17
Harris v. Standard Accident & Ins. Co., 191 F. Supp. 538 (S.D.N.Y.), rev'd, 297 F.2d 627 (2d Cir.), cert. denied, 369 U.S. 843 (1962)	22-27
Holiday Inns, Inc. v. Shelburne, 576 So.2d 322 (Fla. 4th DCA 1991)	29
Home Ins. Co. v. Advance Machine Co., 500 So.2d 664 (Fla. 1st DCA 1986)	23
In re Louisiana World Exposition, 832 F.2d 1391 (5th Cir. 1987)	19
In re Wilson, 694 F.2d 236 (11th Cir. 1982)	19
Ivey v. Chicago Ins. Co., 410 So.2d 494 (Fla. 1982)	32
Jones v. Utica Mutual Ins. Co., 463 So.2d 1153 (Fla. 1985)	13, 28
Larraburu Bros., Inc. v. Royal Indemnity Co., 604 F.2d 1208 (9th Cir. 1979)	27
Lee v. Nationwide Mutual Ins. Co., 286 F.2d 295 (4th Cir. 1961)	21
Levantino v. Ins. Co. of North America, 102 Misc.2d 77, 472 N.Y.S.2d 995 (Sup. Ct. 1979)	27
Levine v. A. Madley Corp., 516 So.2d 1101 (Fla. 1st DCA 1957)	13
Maguire v. Allstate Ins. Co., 341 F. Supp. 866 (D Del. 1972)	4, 7, 14-16

TABLE OF CITATIONS (Cont'd)

Cases	Page(s)
McLeod v. Continental Ins. Co., 591 So.2d 621 (Fla. 1992)	9, 19, 32
Monrose, Inc v. Baldridge, 423 So.2d 467, 468 (Fla. 2d DCA 1982)	13
Moore v. USF&G Ins. Co., 325 F.2d 972 (10th Cir. 1963)	19
Nat'l Mutual Ins. Co. v. Dotschay, 134 So.2d 248 (Fla. 3d DCA 1961)	23
Nationwide Mutual Ins. Co. v. McNulty, 229 So.2d 585 (Fla. 1969)	11, 17
Nixon v. U.S. Fidelity & Guaranty Co., 290 So.2d 26 (Fla. 1973)	17
North American Van Lines v. Roper, 479 So.2d 750 (Fla. 1st DCA 1982)	13
O'Connell v. Walt Disney World, 413 So.2d 444 (Fla. 5th DCA 1982)	13
Palmer v. Travelers Ins. Co., 319 F.2d 296 (5th Cir. 1963)	9, 19, 27-28
Purdy v. Pacific Automobile Ins. Co., 157 Cal. App. 3d 42, 203 Cal. Rptr. 524 (2d Dist. 1984)	19-20
Raimondi v. I.T. Chips, Inc., 480 So.2d 240 (Fla. 4th DCA 1985)	13
Riske v. Truck Ins. Exchange, 641 F.2d 768 (8thCir. 1976)	10, 16
Shuster v. South Broward Hospital District, 570 So.2d 1362 (Fla. 4th DCA 1990), aff'd, 591 So.2d 174 (Fla. 1992)	11, 13, 17-18
Smoot v. State Farm Mutual Automobile Ins. Co., 299 F.2d 525 (6th Cir. 1962)	27
Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971)	12, 23
Tieder v. Little, 502 So.2d 923 (Fla. 3d DCA.), rev. denied, 511 So.2d 298 (Fla. 1987)	28

TABLE OF CITATIONS (Cont'd)

Cases **Page(s)**

Torrez v. State Farm Mutual Automobile Ins. Co., 706 F.2d 1192 (10th Cir. 1982) 4, 7, 16-16

United Guaranty Residential Ins. Co. v. Alliance Mortgage Co., 644 F.Supp. 339 (M.D.Fla. 1986) 9, 31

Wooten v. Central Mutual Ins. Co., 182 So.2d 146 (La. App. 1966) 19, 23

Young v. American Casualty Co., 416 F.2d 906 (2d Cir.), cert. dismissed sub nom, Myles v. Procunier, 396 U.S. 997 (1970) 20, 26-27

Constitutional Provisions, Statutes, and Rules

Fla. Coast. Art. V, § 3(b)(6) 1

11 U.S.C. § 541 19

Minn. Stat. Ann. § 60A-08(6) 10

Fla. Stat. § 55.145 .... passim

Fla. Stat. § 624.155 .... passim

Chapter 90-119, Laws of Florida 32

Other Authorities

Note, 41 Tex. L. Rev. 696 (1963) 23

7C Appleman, Insurance Law & Practice § 4711 (1979 and 1990 Supp.) 14, 23-24

8 Appleman, Insurance Law & Practice § 4834 (Supp. 1990) 19

Annotation, Insured's Payment of Excess Judgment, or a Portion Thereof, as Prerequisite of Recovery Against Liability Insurer for Wrongful Failure to Settle laim Against Insured, 63 A.L.R.3d 627 (1975) 23

<u>PRELIMINARY STATEMENT</u>

This case involves a bad faith action against St. Paul & Marine Insurance Company ("St. Paul"). The federal district court acknowledged that "there are many genuine issues of material fact concerning the underlying bad faith claim." 127 B.R. 879, 881 (N.D. Fla. 1991). Nevertheless, the district court granted summary judgment to St. Paul on the ground that, as a matter of law, the bankruptcy of St. Paul's insured (Dr. Farris Kimbell) absolutely immunized St. Paul from a bad faith action. <u>Id</u>. at 883-86.

The case is before the Court on the following questions, which were certified by the United States Court of Appeals for the Eleventh Circuit as questions of first impression under Florida law:

> 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.
>
> 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.

958 F.2d 340, 344 (11th Cir. 1992).

The Eleventh Circuit also stated in its opinion that

> the Florida Supreme Court may wish to consider whether or not different answers would be appropriate if the evidence demonstrated that the conduct of the insurance company either caused or contributed to the named insured's bankruptcy. In addition, the proper resolution of the certified questions may require an interpretation of Fla. Stat. § 624.155 (1991).

Id. This Court has jurisdiction pursuant to Article V of the Florida Constitution. <u>See</u> Fla. Const. Art. V, § 3(b)(6).

STATEMENT OF THE CASE

(i) Course of Proceedings

On December 30,1988, Anna Rue Camp and John E. Venn, as trustee of the bankruptcy estate of Dr. Fariss Kimbell (sometimes referred to as "appellants"), filed a two-count complaint in Florida circuit court against St. Paul. R. 1:2 (attachments). The complaint alleged that St. Paul had acted in bad faith in refusing to settle a medical malpractice claim by Mrs. Camp against its insured, Dr. Kimbell, and that as a result of St. Paul's actions Mrs. Camp obtained a judgment of $3.1 million against Dr. Kimbell, a judgment in excess of Dr. Kimbell's $250,000 policy limits.[1/] Mrs. Camp and Mr. Venn sought to recover damages, attorney's fees, costs, and interest, and requested a jury trial.

On January 11,1989, after the complaint was filed, Dr. Kimbell was relieved of personal liability for the excess judgment pursuant to Fla. Stat. § 55.145 by a Florida court, R. II:106, Exhibit A.[2/]

1/ In the remainder of this brief, a judgment against an insured which exceeds the policy limits will be referred to as an "excess judgment."

2/ The statute provides as follows:

> At any time after one (1) year has elapsed since a bankrupt or debtor was discharged from his debts, pursuant to the Act of Congress relating to Bankruptcy, the bankrupt or debtor, his receiver or trustee, or any interested party may petition the Court in which the judgment was rendered against such bankrupt or debtor for an order to cancel and discharge such judgment. The petition shall he accompanied by a certified copy of the discharge of said bankrupt or by a certified copy of the order of confirmation of the arrangement filed by said debtor. The petition, accompanied by copies of the papers upon which it is made, shall be served upon the judgment creditor in the manner prescribed for service of process in a civil action. If it appears upon the hearing that the bankrupt or debtor has been discharged from the payment of that judgment or of the debt upon which it was recovered, the Court shall enter an order cancelling and discharging said judgment. The order of cancellation and discharge shall have the same effect as a satisfaction of judgment and a certified copy thereof may be recorded in the same manner as a satisfaction of judgment. This section shall apply only to liens under judgments or obligations duly scheduled in the bankruptcy proceedings.

Fla. Stat. §55.145.

St. Paul removed the bad faith action to federal district court on February 6, 1989. R. 1:2. St. Paul then moved for judgment on the pleadings. R. 1:15. In part, St. Paul argued that a bad faith action could not be maintained because Dr. Kimbell had not been damaged by the excess judgment, In support of its argument St. Paul cited this Court's decision in Fidelity and Casualty Co. of New York v. Cope, 462 So.2d 459 (Fla. 1985). R. I:16 at 10-12. St. Paul also argued that Mrs. Camp was not a proper plaintiff and that neither Mrs. Camp nor Mrs. Venn had stated a claim for bad faith. Id. at 5-9, 13-17. In March of 1989, appellants filed an amended complaint and St. Paul filed an answer to the amended complaint, R. I:23; I:25. The district court denied St. Paul's motion for judgment on the pleadings on April 20, 1989, holding that St. Paul's arguments had "no basis." R. I:29 at 2.

Appellants moved for summary judgment on September 22,1989. R. II:90; II:91. In October of 1989, St. Paul moved for summary judgment. R. II:105; II:106. Appellants responded to St. Paul's motion for summary judgment on November 7,1989, and submitted additional evidence in support of their own motion for summary judgment. R. III:137; IV:141.

On February 12, 1991, the district court (with a different district judge presiding) entered a 22-page order granting summary judgment in favor of St. Paul on all counts. R. V:186. See 127 B.R. 879 (N.D. Fla. 1991). A final judgment in favor of St. Paul was entered on February 27,1991. R. V:187.

The first part of the district court's order addressed whether St. Paul acted in bad faith in refusing to settle Mrs. Camp's claim against Dr. Kimbell. The district court concluded that "there are many genuine issues of material fact concerning the underlying bad faith claim, thereby precluding summary judgment for either plaintiffs or defendant." 127 B.R. at 881. Thus, the district court found that a jury should determine whether St. Paul acted in bad faith.

Before reaching the merits, the district court dismissed Mrs. Camp as a plaintiff. It reasoned that Mrs. Camp "did not have independent standing to sue St. Paul"

because she and Mr. Venn had agreed that any money recovered in this action would be initially paid to Dr. Kimbell's bankruptcy estate. Id. at 882. The district court did not cite any authority in support of this ruling, and did not address whether Mrs. Camp could maintain a bad faith action under Fla. Stat. § 624.155, as pled in the complaint.

The district court than turned to St. Paul's argument that this Court's decision in Cope and the Eleventh Circuit's decision in Clement v. Prudential Property & Casualty Co., 790 F.2d 1645 (11th Cir. 1986), eliminated Mr. Venn's bad faith action. The district court interpreted Cope as holding that "a satisfaction or release of the insured destroys" a bad faith claim. 127 B.R. at 885. Because the bankruptcy court had entered an order stating that any judgment obtained by Mrs. Camp in the underlying malpractice action would "not be enforceable" against Dr. Kimbell, and because the judgment obtained by Mrs. Camp had been cancelled with respect to Dr. Kimbell pursuant to Fla. Stat. § 55.145, the district court concluded that Mr. Venn did not have a bad faith claim:

> [Dr.] 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. ... As a result, Cope and Clement control, and St. Paul cannot be held liable for any alleged bad faith in defending Dr. Kimbell.

127 B.R. at 883-84. The district court rejected appellants' argument that a bad faith action could be maintained because Dr. Kimbell's bankruptcy estate remained liable for the excess judgment: "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." Id. at 883.

Appellants asserted that St. Paul could nevertheless be sued for bad faith because a clause in Dr. Kimbell's policy states that St. Paul will "still be obligated under [the] policy" if Dr. Kimbell "goes bankrupt." The district court acknowledged that two cases directly on point, Torrez v. State Farm Mutual Automobile Ins. Co., 705 F.2d 1192 (10th Cir. 1982), and Maguire v. Allstate Ins. Co., 341 F. Supp. 866 (D. Del. 1972), supported appellants' argument, but found it unnecessary to construe the language of Dr. Kimbell's policy because "the clause does not affect the application of the law of Florida

and the particular way the judgment was entered in accordance with that law." 127 B.R. at 885. According to the district court, St. Paul's duty of good faith towards Dr. Kimbell "was extinguished upon. . . the discharge in bankruptcy." Id.

The district court acknowledged and agreed with various cases holding that if the bankruptcy of the insured is caused by the insurer's bad faith, the insurer can be sued for bad faith regardless of whether the bankruptcy would normally preclude a bad faith action. Id. at 885. It held, however, that appellants were not entitled to a trial on whether St. Paul's actions caused Dr. Kimbell's bankruptcy: "there is no genuine issue of fact on this question, and St. Paul's alleged bad faith was not the cause of [Dr.] Kimbell's bankruptcy." Id. at 886. The standard of causation that the district court used in making this determination was whether St. Paul's actions were the sole cause of Dr. Kimbell's bankruptcy. Id. at 886, 887.

Appellants sought review of the district court's order in the Eleventh Circuit. After oral argument, the Eleventh Circuit certified various questions of first impression to this Court. See 958 F.2d 340 (11th Cir. 1992).[3/]

(ii) Statement of the Facts

The facts are comprehensively set out in pages 6-21 of appellant's initial brief to the Eleventh Circuit. They are also summarized as follows in the Eleventh Circuit's opinion:

> The insurance policy issued by St. Paul in favor of Dr. Kimbell covered the doctor for medical malpractice up to a limit of $250,000 per person injured. The policy also contained the language:
>
> > Once liability has been determined by judgement 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

---

3/ Consistent with their statue as appellants in the Eleventh Circuit, Mrs. Camp and Mr. Venn have filed the initial brief in this Court.

protected person or his or her estate goes hankrupt or becomes insolvent, we'll still be obligated under this policy.

While this policy was in force, Dr. Kimbell performed the procedures which resulted in Camp's injuries. Camp's lawyers threatened to sue Dr. Kimbell for medical malpractice. In July 1984, Dr. Kimbell notified St. Paul about Camp's claim.

St. Paul began the defense of Dr. Kimbell shortly thereafter. On December 10,1984, Camp Rued Dr. Kimbell for medical malpractice in Florida state court. Between the time that Camp's malpractice suit was filed at the end of 1984 and July of 1986, there were two important developments relevant to the present case. First, Dr. Kimbell's financial condition began deteriorating. He had large debts prior to Camp's lawsuit. In addition, the Camp lawsuit, as well as another medical malpractice suit, started to affect the doctor's ability to earn money. Specifically, an investigation of Dr. Kimbell, prompted by the two lawsuits, eventually led to the suspension of Dr. Kimbell's privileges at one of the hospitals where he practiced neurosurgery. That suspension led to fewer referrals, less income, and the concomitant financial instability.

Second, Camp twice offered to settle with St. Paul for Dr. Kimbell'a policy limits of $250,000. The settlement requests were made on June 3 and November 5 of 1985. St. Paul rejected both settlement offers. At the time the second offer was rejected, St. Paul was at least aware of Dr. Kimbell's financial difficulties.

In July of 1986, Dr. Kimbell filed a Chapter 7 bankruptcy case in the United States Bankruptcy Court for the Northern District of Florida. Pursuant to the automatic stay of 11 U.S.C. § 362 (1988), Camp's state lawsuit was halted. While Dr. Kimbell's bankruptcy case was proceeding, Camp offered to settle with St. Paul for the policy limits for the third time. On September 19, 1986, St. Paul again rejected settlement. One month later, on November 24, 1986, Dr. Kimbell was granted a discharge order in bankruptcy court, shielding him from any personal liability for claims pending against him as of the date of his bankruptcy filing. During all of this time, St. Paul was researching the question of whether or not Dr. Kimbell's bankruptcy would impact the company's exposure to a potential bad faith suit by Mrs. Camp.

On April 13,1987, the bankruptcy court modified the stay in Dr. Kimbell's case so as to allow Camp to liquidate her claim against the doctor. However, the bankruptcy court specifically ruled that any judgment obtained by Camp in her state court lawsuit would not be enforceable against Dr. Kirnbell personally. In May 1987, St. Paul rejected a fourth offer by Camp to settle for the $250,000 policy limits. Although after this fourth rejection St. Paul offered to settle for amounts lowered than the policy limits, the parties could not aPee and Camp's case proceeded to trial. Mrs. Camp won a verdict oPmore than three million dollars on June 26, 1987. This judgment was affirmed on appeal. See Kimbell v. Camp, 632 So.2d 1061 (Fla. Dist. Ct. App. 1988) (table).

Subsequent to the verdict, the bankruptcy court in December of 1988 entered an order allowing the excess of the judgment as a general, non-priority unsecured claim against Dr. Kimbell's bankruptcy estate. Once again, the bankruptcy court stated that Camp's judgment could not be enforced against Dr. Kimbell personally. In the Florida state trial court, Dr. Kimhell moved for an order cancelling and discharging the three million dollar judgment pursuant to Fla.Stat. ch. 55.145 (1991). On January 11,1989, the lower state court discharged the judgment against Dr. Kimbell in accordance with this provision of Florida law.

958 F.2d at 341-42.

SUMMARY OF THE ARGUMENT

Much of the district court's 22-page order was devoted to the question of whether, under Florida law, an insured's discharge in bankruptcy bars a common law bad faith claim against the insurer. This Court, however, need not make any broad pronouncements about Florida common law on bad faith or federal bankruptcy law. As explained in Point I, there is a narrow ground upon which this Court can permit this bad faith claim to go forward.

I. In Florida, a bad faith action sounds in contract, and an insurer's fiduciary duty is determined by the scope of the contractual undertaking. The policy issued by St. Paul to Dr. Kimbell provides that St. Paul will "still be obligated under [the] policy" if Dr. Kimbell goes bankrupt or becomes insolvent. Under Florida law, one of the obligations that St. Paul had under the policy was to settle in good faith, so the bankruptcy does not preclude a bad faith claim. Moreover, the three courts to have addressed the question have concluded that language similar to that in Dr. Kimbell's policy refers to more than payment of the policy limits and permits a bad faith action against the insurer even if the insured has filed for bankruptcy or become insolvent. In effect, the bankruptcy clause constitutes a waiver by the insurer of the argument that the insured's bankruptcy provides absolute immunity from a bad faith claim. See Ganaway v. Shelter Mutual Ins. Co., 795 S.W.2d 554, 564 (Mo. App. 1990); Torrez v. State Farm Mutual Automobile Ins. Co., 705 F.2d 1192, 1197-98 (10th Cir. 1982); Maguire v. Allstate Ins. Co., 341 F.Supp.

866, 869 (D. Del. 1972). The bankruptcy clause in Dr. Kimbell's policy therefore permits a bad faith action against St. Paul. To the extent that the language in Dr. Kimbell's policy is considered ambiguous, it must be construed strictly against St. Paul to permit a had faith action.

11. Dr. Kimbell's fortuitous bankruptcy does not immunize St. Paul from a common law bad faith claim. Fidelity and Casualty Co. of New York **v.** Cope, **462 So.2d 459** (Fla. 1985), holds only that a bad faith action cannot be maintained where all adverse Consequences resulting from-the excess judgment have been eliminated. Here, adverse consequences remain because Dr. Kimbell's bankruptcy estate, which owns the liability policy and any cause of action arising from it, stands in the shoes of Dr. Kimbell and remains liable for the multi-million dollar excess judgment. Moreover, Cope cannot be imported wholesale into the bankruptcy context. Cope involved a release given to the insured after rendition of the excess judgment. In the Cope paradygm, the insurer acts without knowledge that a release will be given in the future, or that it may be immune from a bad faith action. In the bankruptcy or insolvency context, the opposite is true. The insurer usually knows about its insured's financial condition before the third-party suit is resolved, and can use that knowledge in determining how to handle the claim. Here, St. Paul actually used the bankruptcy of Dr. Kimbell as a guide for its conduct and its persistent refusal to settle. St. Paul waited until Dr. Kimbell went bankrupt and then researched the issue **of** how the bankruptcy affected its own bad faith exposure. **If** Cope is applied mechanically in the bankruptcy context, insurers will be given license to use the insured's financial condition as the basis for their conduct with the incredible result that those who most need the loyalty and commitment of insurers are most likely not to receive it.

III. Even if Cope generally applies in the bankruptcy context, appellants can maintain their action for bad faith. Those jurisdictions which hold that an insured's bankruptcy generally bars a bad faith claim recognize that a bad faith action nevertheless can be maintained if the insurer's bad faith **was a** cause of the bankruptcy. The reason

for this exception is simple: if the exception were not recognized, an insures could "default, drive its assured to the wall of bankruptcy, and then blithely advise the estate, the trustee, the assured and all of the creditors that while its duty was breached, there is nothing to be done about it." Palmer v. Travelers Ins. Co., 319 F.2d 296,300 (5th Cir. 1963)(Brown, J.,concurring). In this case, there is an issue of fact as to whether St. Paul's actions were a substantial factor leading to Dr. Kimbell's bankruptcy, and this Court should hold that an insurer cannot escape liability for bad faith if it has contributed to the bankruptcy of its insured.

IV. Under Florida law, Mrs. Camp, who is a judgment creditor of Dr. Kirnbell's estate, can bring a direct action against St. Paul for bad faith under Florida common law or under Florida's bad faith statute, Fla. Stat. § 624.155. See McLeod v. Continental Ins. Co., 591 So.2d 621, 623 (Fla. 1992); United Guaranty Residential Ins. Co. v. Alliance Mortgage Co., 644 F. Supp. 339,341 (M.D. Fla. 1986). Mrs. Camp can maintain her bad faith action under § 624.155 irrespective of Dr. Kimbell's discharge in bankruptcy because her claim under the statute is not derivative of the insured's claim.

ARGUMENT

As the district court found, the evidence in the record created a genuine issue of fact as to whether St. Paul acted in bad faith. 127 B.R. at 881. For the reasons set forth below, appellants should be allowed to present their claims to a jury. The law and public policy of Florida should not provide absolute immunity to an insurer from liability for bad faith simply because the insured has become bankrupt, especially where the insurer has provided in the policy that its obligations will not be affected by the insured's bankruptcy or insolvency.

I. BY INSERTING THE BANKRUPTCY CLAUSE IN DR. KIMBELL'S POLICY, ST. PAUL HAS WAIVED *ANY* CONTENTION THAT DR. KIMBELL'S BANKRUPTCY PROVIDES ABSOLUTE IMMUNITY FROM BAD FAITH LIABILITY

A clause in Dr. Kirnbell's policy provides that St. Paul will remain obligated

under the policy even if Dr. Kirnbell becomes bankrupt or insolvent:

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

R. IV:141, Exhibit 28 at 8. This clause has its origins in the insurance code of Minnesota, where St. Paul is based. R. 1:2 at 1¶ 2. At the time that St. Paul issued the policy to Dr. Kimbell (1983), a Minnesota statute provided as follows:

> **Bankruptcy or insolvency** clause. Every bond or policy of insurance issued in this state . . . shall, notwithstanding anything in the policy to the contrary, be deemed to contain the following condition:
>
> "The bankruptcy or insolvency of the insured shall not relieve the insurer of any of its obligations under this policy, and in case an execution against the insured on a final judgment is returned unsatisfied, then such judgment creditor shall have a right of action on this policy against the company to the same extent that the **insured** would have, had the insured paid the final judgment."

Minn. Stat, Ann. § 60A.08(6).

In 1976, the Eighth Circuit had held that this Minnesota statute was consistent with the Minnesota rule permitting a bad faith action against the insurer notwithstanding the bankruptcy or insolvency of the insured. See Riske v. Truck Ins. Exchange, 541 F.2d 768, 770 n.3 (8th Cir. 1968)("'The Minnesota Court [in Lange] adopted this rule because it feared that an insurance company would disregard the insured's interests if it knew that because of the insured's financial condition, the insured would not have to satisfy an excess judgment.' . . . The Lange case interpreting Minnesota law controls and is in accord with Minn. Stat. Ann. § 60A.08(6)[.]").

Thus, in 1983, when St. Paul issued the policy to Dr. Kimbell, it was on notice that the bankruptcy clause which was required for policies issued in Minnesota had been interpreted to permit a bad faith action even if the insured was bankrupt or insolvent. Despite this knowledge, St. Paul did not alter the clause in the policy issued to Dr. Kimbell in Florida so as to prevent a post-bankruptcy bad faith claim. The history and meaning of the bankruptcy clause is important because, as the following section explains, under Florida law a bad faith action sounds in contract.

A. Under Florida Law a Bad Faith Action Sounds in Contract

Under Florida law, a bad faith action sounds in contract. Nationwide Mutual Ins. Co. v. McNulty, 229 So.2d 585, 586 (Fla. 1971). As the Fourth District has explained, the "fiduciary duty aspect of the insurer/insured relationship is determined by the scope of the contractual undertaking." Shuster v. South Broward Hospital District, 570 So.2d 1362,1368 (Fla. 4th DCA 1990), aff'd, 591 So.2d 174 (Fla. 1992).

In Shuster, a physician sued his insurer for "bad faith settlement," i.e., for settling a malpractice claim that was allegedly unfounded. The physician argued that as a result of the settlement he could no longer maintain malpractice insurance. He also sought recovery for loss to his professional reputation and for mental and emotional distress. 591 So.2d at 176. This Court did not find it necessary to determine whether the physician could, as a general matter, maintain such an action under Florida common law. Instead, the Court looked to the insurance policy at issue to determine the scope of the insurer's duties. Id. at 176.

After examining the language of the physician's insurance policy, the Court held that no bad faith action could be maintained. The policy allowed the insurer to settle claims "as it deems expedient," and the Court interpreted the "provision as granting the insurer the discretion to settle cases for amounts within the policy limits, regardless of whether the claim is frivolous or not." Id. at 177. In closing, the Court emphasized the preeminence of contractual language in bad faith analysis:

> The parties have expressly contracted with respect to the subject matter and this Court declines to rewrite the policy when the insurer merely exercises its rights under the agreement.

Id. Shuster clearly teaches that the language of an insurance policy supersedes the common law of bad faith.

The contractual analysis used in Shuster is not novel. Over 50 years ago, this Court held that language in an insurance policy can give rise to a bad faith action even if such an action would not be permitted under the common law. In Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 853 (Fla. 1938), the Court, without deciding whether a

judgment creditor of an insured had a common law right to bring a direct bad faith action against the insurer, ruled that language in the policy at issue permitted the judgment creditor to sue the insurance company for the judgment:

> It is shown here that a judgment was obtained against the assured and an execution remains unsatisfied. It seems that the creditor under the terms of the policy has a right of action against the insurance company to recover the amount of the judgment[.] The things Contemplated by the terms of the policy have transpired which authorize a cause of action.

184 So. at 856.[4]

This Court has recognized that Shaw stands for the proposition that the terms of an insurance policy can create rights not recognized at common law with respect to bad faith actions. See Thompson, 250 So.2d at 261 ("we . . . said [in Shaw] that under the particular wording of the **insurance policy**, the judgment creditor had a right of action against the insurer for the full amount of his judgment") (emphasis added). This understanding of the preeminence of contractual language is reflected in the recent decisions of Florida appellate courts. See, e.g., Aaron v. Allstate Ins. Co., 659 So.2d 275, 277 (Fla. 4th DCA) (although Florida common law does not recognize a bad faith action for "inadequate defense," the "language of a contract can give rise to a duty not only to defend, but to adequately defend"), rev. denied, 569 So.2d 1218 (Fla. 1990). Thus, regardless of whether Florida common law would permit a bad faith action when the insured has become bankrupt, the language in Dr. Kimbell's policy can give rise to a bad faith action.

St. Paul has attempted throughout this litigation to avoid discussion of contract principles, and has instead focused its attention on whether Dr. Kimbell's bankruptcy would preclude a bad faith action under the common law. St. Paul, however, cannot ignore the language that it itself inserted in Dr. Kimbell'a policy. "Generally, the rule is

---

4/ It was not until Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971), that this Court held that a third party had a common law right to sue the insurer directly to recover an excess judgment obtained against the insured.

that when parties contract to a specific matter, the terms of the contract control." Monrose, Inc. v. Baldridge, 423 So.2d 467,468 (Fla. 2d DCA 1982). Parties are free to alter and modify common law rules through contract as long as the contract is not against public policy. See generally Bellaire Securities Corp. v. Brown, 124 Fla. 47, 168 So. 625, 633 (1936)("A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution."). For example, parties may through a contract assume the risk of injury, O'Connell v. Walt Disney World, 413 So.2d 444,447 (Fla. 5th DCA 1982), provide for the recovery of attorney's fees in derogation of the common law, North American Van Lines v. Roper, 429 So.2d 750, 762 (Fla. 1st DCA 1983), or absolve themselves of liability for negligent conduct, Levine v. A. Madley Corp., 516 So.2d 1101, 1103 (Fla. 1st DCA 1987). See also Raimondi v. I.T. Chips, Inc., 480 So.2d 240, 242 (Fla. 4th DCA 1985)("We find that the parties contractually modified the common law rules of waiver and estoppel, and their modification does not conflict with any public policy. . . . It is apparent from a review of the record that the trial court simply applied the general rule and ignored the fact that the parties had contracted otherwise."). St. Paul cannot ask this Court to ignore or rewrite the policy language that it drafted. See Shuster, 691 So.2d at 177.

B. The Bankruptcy Clause of Dr. Kimbell's Policy Permits a Bad Faith Action Because *One* of St. Paul's Obligations Under the Policy is to Settle Claims in Good Faith

The "construction of an insurance policy is a question of law for the court." Jones v. Utica Mutual Ins. Co., 463 So.2d 1153,1156 (Fla. 1985). For the reasons set forth below, the bankruptcy clause in Dr. Kimbell's policy permits a bad faith action against St. Paul.

The bankruptcy clause, which provides that St. Paul will remain "obligated" in the event of Dr. Kimbell's bankruptcy, is contained in a section of Dr. Kimbell's policy entitled "Lawsuits Against Us" and subtitled "If your policy contains liability insurance." R. IV:141, Exhibit 28 at 8. One of the obligations that St. Paul had under the policy was

to settle claims in good faith because Florida law imposes this duty on insurers. See generally Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980) ("The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."). Thus, there can be no argument that the bankruptcy clause only refers to payment of the policy limits. Indeed, St. Paul has agreed that the "bankruptcy clause in the policy refers to more than payment of the policy limits," and that "it is undisputed that St. Paul was not relieved of its obligations under the insurance policy by virtue of Dr. Kirnbell's bankruptcy." St. Paul's Answer Brief in the Eleventh Circuit at 10, 12.5/

By including the bankruptcy clause in Dr. Kimbell's policy, St. Paul expressly recognized that it can be sued for bad faith notwithstanding the bankruptcy of its insured and waived any argument that Dr. Kimbell's bankruptcy immunizes it from a bad faith claim. This reading of the bankruptcy clause is not only consistent with the law of Minnesota, where St. Paul is based, it is also confirmed by three bad faith cases interpreting similar language in liability policies.

Maguire v. Allstate Ins. Co., 341 F. Supp. 866 (D. Del. 1972) (applying Delaware law), involved facts almost identical to those presented here. A third party sustained injuries as a result of an accident while riding in the insured's automobile, and sued the insured's estate. At the time of the suit, the estate did not have any "personal property or real estate having any value." Id. at 868. The insurer refused to settle, and the third party obtained an excess judgment against the insured's estate. The administrator of the estate then sued the insurer for bad faith.

The insurer argued, as does St. Paul here, that no bad faith action could lie

---

5/ See also Maguire v. Allstate Ins. Co., 341 F. Supp. 866, 870 (D. Del. 1972) (applying Delaware law) ("[The insolvency clause] does not prohibit the insolvency defense only against claims for the face amount of the policy; it is more comprehensive and bars insolvency against 'any obligations' of Allstate."); 7 C Appleman, Insurance Law & Practice § 4711, at 419 (1979 and 1990 Supp.) (insolvency and bankruptcy clauses are "not limited to the maximum amount of coverage").

because the insured's estate was insolvent prior to the institution of the personal injury action and "sustained no damage" as a result of any bad faith. Id. The district court in Maguire easily rejected the insurer's argument because a clause in the insurance policy provided that the "[b]ankruptcy or insolvency of the insured shall not relieve [the insurer] of any obligations." The district court held that the clause "constitute[d] a waiver by [the insurer] of the insolvency defense to the [bad faith] claim" because one of the obligations under the policy was to settle in good faith. Id. at 869.

The decision in Maguire was followed by the Tenth Circuit in Torrez v. State Farm Mutual Automobile Ins. Co., 706 F.2d 1192 (10th Cir. 1982) (applying New Mexico law). In Torrez, the estate of a deceased third party (the third party) brought a personal injury action against the estate of the insured (the estate). Both the third party and the insured had died in the automobile accident leading to the personal injury action. The third party offered to settle with the insurer for the policy limits, but the insurer refused. The third party subsequently obtained an excess judgment against the estate, and was assigned the estate's actions against the insurer.

The third party brought a bad faith action against the insurer for wrongful failure to settle, and obtained a judgment for the amount of the earlier excess judgment. On appeal, the insurer "alleged as a defense that there can be no bad faith when there is no proof that there were assets of the insured besides the liability policy which would be subjected to risk by [the insurer's] failure to settle." Id. at 1196. In addressing this contention, the Tenth Circuit said that the insurer's argument "was subject to question at the outset" by a provision of the insurance policy stating that "[b]ankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of its obligations hereunder." Id. The Tenth Circuit then cited Maguire approvingly, stating that the policy before it and the policy in Maguire were virtually indistinguishable. Id. at 1197-98.

After surveying the many bad faith cases dealing with bankrupt or insolvent insureds, the Tenth Circuit rejected the insurer's argument. It concluded that the financial condition of the insured should not be determinative of whether an insurer can

be held liable for bad faith. "[T]he underlying policy of the judgment rule is to enforce the obligations of the insurer to act prudently regardless of whether the insured was insolvent," Id. at 1199-1200.[6/]

Maguire and Torrez are not the last word on the effect of a bankruptcy clause similar to the one in Dr. Kimbell's policy. The same issue was addressed recently in Ganaway v. Shelter Mutual Ins. Co., 795 S.W.2d 554 (Mo. App. 1990). There, the insured filed for bankruptcy after an excess judgment was entered against him, and the insured's bankruptcy trustee assigned the bad faith claim to the judgment creditor (the original plaintiff). Id. at 560. When the judgment creditor brought a bad faith action against the insurer to recover the excess judgment, the insurer argued that "it was entitled to judgment as a matter of law because . . . its insured ha[d] been declared bankrupt, ha[d] no legal liability on the judgment and therefore ha[d] not been damaged." Id. at 563. A clause in the insured's policy, however, stated that "bankruptcy or insolvency of the insured or of the insured's estate shall not relieve [the insurer] of any of its obligations hereunder." Id. Based on this language, the Missouri Court of Appeals rejected the insurer's argument. Citing this Court's 1938 decision in Shaw, which held that a bad faith action can arise from language in a policy, see supra at 12, the Missouri Court of Appeals held that even "if the duty [of good] faith cannot be found in the four corners of the policy, it is one which flows from or arises out of the contractual relationship, and is included in the 'obligations' referred to in . . . the policy." 795 S.W.2d at 564. The Missouri Court of Appeals closed by citing Maguire with approval: "We believe the Maguire case correctly states the law on this point." Id.

Thus, the only three cases addressing the precise issue here -- Maguire, Torrez, and Ganaway -- have agreed that an insurer cannot use its insured's bankruptcy as a

---

6/ Maguire and Torrez find suppart in Riske, 541 F.2d at 770 n.3, and Gray v. Grain Dealers Mutual Ins. Co., 871 F.2d 1128, 1131-32 (D.C. Cir. 1989)(holding that policy language defeated insurer's argument that it was not liable for bad faith because excess judgment was not shown to be payable).

shield to fend off a bad faith action if the policy provides that the insured's bankruptcy or insolvency will not relieve the insurer of its obligations under the policy. Under Florida law, an insurer's obligations **and** duties (and the ensuing bad faith liability for failure to fulfill them) can be, and are, created by the terms of the liability policy. See supra at 11-12 (discussing cases). Accordingly, even if an insured's discharge in bankruptcy would bar a bad faith action under general principles of Florida common law, the parties here (Dr. Kimbell and St. Paul) could, and did, alter their common law rights and duties through language in the policy. See, e.g., Shaw 184 So. at 859 ("[t]he provisions of the policy are a guide to control the conduct and action of all parties claiming interests under same").

It would make no sense to say that a bad faith claim in Florida sounds in contract, e.g., McNulty, 229 So.2d at 886, and then hold that a contractual provision is of no effect in determining whether a **bad** faith action can be maintained. St. Paul's argument that Florida common law trumps the bankruptcy clause in Dr. Kimbell's policy essentially rends the clause out of the policy and rewrites the insurance contract. This Court's recent decision in Shuster, 591 So.2d at 177-78, makes it clear that the language in the policy must be given effect.

To the extent that the bankruptcy clause can be characterized as ambiguous, it must be read to permit a bad faith action against St. Paul. See Maguire, 341 F. Supp. at 871. The well-settled rule in Florida (as elsewhere) is that ambiguous provisions in liability insurance contracts are construed strictly against the insurer and liberally in favor of the insured. Nixon v. U.S. Fidelity & Guaranty Co., 290 So.2d 26, 29 (Fla. 1973); Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172, 1174 (11th Cir. 1985) (applying Florida law). This rule is especially applicable here because St. Paul was aware at the time it issued the policy to Dr. Kimbell that similar bankruptcy clauses had been interpreted to permit a bad faith action after the insured's bankruptcy.

In sum, the bankruptcy clause permits a bad faith action against St. Paul. Florida law recognizes that "the fiduciary duty aspect of the insurer/insured relationship

is determined by the scope of the contractual undertaking," Shuster, 570 So.2d at 1368, and the bankruptcy clause specifies that St. Paul's obligations will not be lessened or affected by Dr. Kimbell's bankruptcy. If St. Paul acted in bad faith, it can and should be held accountable.

II. UNDER FLORIDA COMMON LAW, ST. PAUL IS NOT CLOAKED WITH ABSOLUTE IMMUNITY FROM A BAD FAITH CLAIM AS A RESULT OF DR. KIMBELL'S FORTUITOUS BANKRUPTCY

St. Paul has argued that appellants cannot maintain a bad faith claim under general principles of Florida common law. According to St. Paul, Dr. Kimbell, due to his bankruptcy discharge, was not personally "harmed" by St. Paul's refusal to settle and the excess judgment that Mrs. Camp obtained. This argument is based on a misapplication of Fidelity and Casualty Co. of New York v. Cope, 462 So.2d 459 (Fla. 1985), and Clement v. Prudential Property & Casualty Co., 790 F.2d 1645 (11th Cir. 1986).

Cope does not bar the bad faith action here for two reasons, First, although Dr. Kimbell may not be personally "harmed" by the excess judgment, his bankruptcy estate remains fully liable for the judgment. Because the estate owns the liability policy and stands in Dr. Kimbell's shoes, there is harm to be compensated. Second, application of Cope in the bankruptcy context to bar a bad faith claim would encourage insurers to use the insured's financial condition as the standard for handling of claims. The actions of St. Paul in this case illustrate in stark terms how an insurer will ignore its insured's best interests and the validity of a claim if it believes that it cannot be liable for bad faith in the future.

A A Bad Faith Action Can be Maintained Under Cope Because Dr. Kimbell's Bankruptcy Estate Remains Liable for Excess Judgment

In Cope, this Court held 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

underlyingjudgment, no [bad faith] action may be maintained." 462 So.2d at 459 (emphasis added). The teaching of Cope is that "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." McLeod v. Continental Ins. Co., 591 So.2d 621, 624-25 (Fla. 1992) (citing Cope).7/ When properly analyzed, the principle set forth in Cope permits appellants to bring a bad faith action because Dr. Kimbell's liability policy is the property of the bankruptcy estate, and the estate has been harmed by the excess judgment.

Under federal bankruptcy law, the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). It is well-settled that "liability policies that provide coverage for the bankrupt's liability belong to the bankrupt's estate." In re Louisiana World Exposition, 832 F.2d 1391, 1399 (5th Cir. 1987) (collecting cases). See also 8 Appleman, Insurance Law & Practice § 4834, at 23 (Supp. 1990) (same). Indeed, "whatever claims - including potential and contingent claims - that the bankrupt owns at the time of his petition, [become] a part of his estate, with the title thereto vested in the trustee." Palmer v. Travelers Ins. Co., 319 F.2d 296, 299-300 (5th Cir. 1963). See also In re Wilson, 694 F.2d 236, 238 (11th Cir. 1982) (under 11 U.S.C. § 541(a)(7) (the bankruptcy estate includes every interest of the debtor acquired after the filing of the petition).

This plethora of federal bankruptcy law demonstrates that when Dr. Kimbell filed for bankruptcy in July of 1986, his St. Paul liability policy, as well as any potential or "contingent" bad faith claim arising from the policy, became property of his bankruptcy estate.8/ As a result, the estate stood in the shoes of Dr. Kimbell and in effect became

---

7/ See also Clement v. Prudential Property & Casualty, 790 F.2d 1545 (11th Cir. 1986) (applying Cope to agreement not to execute).

8/ There are numerous cases holding that the debtor's bad faith action becomes property of the estate. See Anderson v. St. Paul Mercury Indemnity Co., 340 F.2d 406, 409 (7th Cir. 1965); Palmer, 319 F.2d at 299; Purdy v. Pacific Automobile Ins. Co., 157 Cal. App. 2d 42, 203 Cal. Rptr. 524, 531 (App. 1984); Wooten v. Central Mutual Ins. Co., 182 So. 2d 146, 148 (La. App. 1966). Cf. Moore v. USF&G Ins. Co., 325 F.2d 972, 975 (10th Cir. 1963) (dicta).

the insured. Dr. Kimbell's bankruptcy estate stood to lose from an excess judgment, and St. Paul therefore owed a duty of good faith to the estate and Mr. Venn, the estate's trustee.

In Cope, no person or entity remained liable for the excess judgment after the insured was given a release. Unlike the situation in Cope, where the release eliminated all harm resulting from the excess judgment, the bankruptcy of Dr. Kimbell has not obliterated the adverse effect of Mrs. Camp's excess judgment. Although Dr. Kimbell was personally discharged from the excess judgment, his bankruptcy estate remains fully liable for the judgment. See R. 1:2 (attachments) (bankruptcy court order dated December 15, 1988, stating that Mrs. Camp's claim is "allowed as a general, non-priority unsecured claim" against the bankruptcy estate); 127 B.R. at 883 ("the bankruptcy judge entered an order which acknowledged the state court judgment and allowed that judgment as a general, non-priority unsecured claim").

As the Second Circuit has explained, the discharges of bankrupts "are personal to them, affording a defense to subsequent prosecution against them as individuals of [the excess judgment.] The estates in bankruptcy are not affected by the discharge." Young v. American Casualty Co., 416 F.2d 906, 912 (2d Cir.), cert. dismissed sub nom., Myles v. Procunier, 396 U.S. 997 (1969). The excess judgment here harmed Dr. Kimbell's estate by increasing the debt of the estate to the detriment of creditors and forcing the estate to incur extra expenses. See R. II:110 at 65, 68-70 (Venn deposition) (explaining harm to estate from excess judgment). This type of harm has been recognized as sufficient to permit bad faith actions by the trustee: "[The insurer] argues that due to the bankruptcy adjudication, [the insured] suffered no economic damage, an argument which ignores . . . the potential recovery by [the injured third party] and other creditors." Purdy v. Pacific Automobile Ins. Co., 157 Cal. App. 3d 42, 203 Cal. Rptr. 524, 432 (2d Dist. 1984). In the words of the Fourth District:

> The damage done to the estate is the creation of its liability for the judgments. Their holders are creditors equally with persons with whom debts may have been incurred though not paid, such as

medical expenses. . . . [The judgments] are nonetheless damages though they represent no contribution to the insured or his estate.

Lee v. Nationwide Mutual Ins. Co., 286 F.2d 295,296 (4th Cir. 1961). Mr. Venn, as the trustee of Dr. Kimbell's bankruptcy estate, has every incentive to prosecute a bad faith action in order to recoup the excess judgment for which the estate remains liable and pay off the estate's creditors.[9/]

Furthermore, in the bankruptcy context a mechanical application of Cope makes no sense. Cope expressly states that if the cause of action for bad faith is assigned or instituted prior to the insured's release, the action can be maintained. 462 So.2d at 459, 461. If Cope applied wholesale to a case in which the insured received a discharge in bankruptcy, the timing of the discharge should determine whether a bad faith action could be brought. But the effect of a post-judgment discharge is the same as that of a pre-judgment discharge -- both eliminate the debtor's personal liability. In sum, the rule of Coae was created for cases involving voluntary releases, and cannot be blindly imported into the bankruptcy context.[10/]

There is yet another reason why Cope should not be interpreted to bar appellants' bad faith action. In Cope, the release and satisfaction were executed well after the excess judgment was entered. The insurer's actions therefore were not driven or

---

9/ That Cope does not bar a bad faith claim when the insured has become bankrupt is illustrated by the Fifth District's decision in Clauss v. Fortune Ins. Co., 523 So.2d 1177 (Fla. 5th DCA 1988), a bad faith case involving a bankrupt insured. In Clauss, the insured, just like Dr. Kimbell, filed for bankruptcy and received a discharge from liability prior to the entry of an excess judgment against him. Id. at 1178 & n.3. The third party who had obtained the judgment then sued the insurer for bad faith, relying in part on Fla.Stat. § 624.155. On appeal, the Fifth District addressed the merits of the bad faith claim without so much as hinting that the insured's discharge in bankruptcy had any effect on the claim or that Cope barred the claim. See id. at 1178-79.

10/ As discussed earlier, Cope and Clement state that a bad faith action, if assigned or instituted prior to the insured's release or satisfaction of the judgment, is not barred. See 462 So.2d at 459,461. This bad faith action was filed by appellants on December 30, 1988. R. 1:2(attachments). The state court order canceling and discharging the judgment against Dr. Kimbell was rendered 12 days later, on January 11,1989. R. 2:106, Exhibit A. Because: any satisfaction of the judgment occurred after the institution of the bad faith action. the action is not barred by Cope.

influenced by its belief that it could not be held liable for bad faith. Here, St. Paul believed it had carte blanche to act in bad faith and could drive down the terms of a settlement because it thought its maximum exposure was the policy limits. See 958 F.2d at 341 ("During all of this time, St. Paul was researching the question of whether or not Dr. Kimbell's bankruptcy would "impact the company's exposure to a potential bad faith suit by Mrs. Camp."). If Cope is applied mechanically here, it will send a wrong message to insurers -- the message that once an insured goes bankrupt (or is on the brink of bankruptcy or insolvency), the insurer can gamble, go to trial (no matter how valid the claim against its insured is or what is in the best interest of its insured), and rest at ease knowing that it can never be held accountable for its actions. This Court should not announce a rule that will not only provide a windfall to insurers from the bankruptcy of their insureds, but will also be the catalyst for outrageous behavior which cannot be sanctioned.

B. A Holding That an Insured's Bankruptcy Precludes a Bad Faith Action Would be Bad Public Policy and Would Encourage Reckless Behavior by Insurers

The federal district court in this case followed the Second Circuit's decision in Harris v. Standard Accident & Ins. Co., 297 F.2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962). In Harris, a divided panel of the Second Circuit, applying New York law, held that the trustee of insureds who had become bankrupt prior to the rendition of an excess judgment against them could not bring a bad faith action against the insurer. The majority concluded that the insureds had not been damaged by the alleged bad faith because the excess judgment could not be collected from them:

> [S]ince the [insureds] were insolvent before the excess judgment was rendered, have not paid any part of it, and have been discharged from any future obligation to pay it, their trustee has not shown any right to recover as the existence of the [excess judgment] has not constituted any actual damage to them.

297 F.2d at 636.

Harris has been criticized by commentators and courts alike. See, e.g., 7 C Appleman, Insurance Law & Practice, § **4711,** at **417-3.8 (1979);** Note, **41** Tex. L. Rev. 696, 587-98 (1963); Bourget v. CEICO, **456** F.2d 282, 287-89 (2d Cir. 1972) (Oakes, J., dissenting); Wooten 182 **So.2d** at **149-50. For** various reasons, this Court should not adopt Harriq as the law of Florida.

First, Florida Courts have long rejected the basis of the ruling in Harris -- that payment of an excess judgment by the insured (or indication of ability to pay) is **a** condition precedent to the filing of a bad faith action. See American Fire & Casualty v. Davis, **146** So.2d **614,** 615 (Fla. 1st DCA 1962) (in era of credit, entry of judgment against insured is sufficient harm to permit bad faith action); Nat'l Mutual Ins. Co. v. Dotschay, 134 **So.2d 248, 251-52** (Fla. **3d DCA 1961)** (same) (dictum). Davis was cited with approval by this Court in **Thompson,** 250 So.2d at 260-61, and the "judgment rule" that it adopted -- that the entry of a judgment against the insured constitutes harm -- is followed by the majority of jurisdictions. See Annotation, Insured's Payment of Excess Judgment, or a Portion Thereof, as Prerequisite of Recovery Against Liability Insurer for Wrongful Failure to Settle Claim Against Insured, 63 A.L.R.3d 627, **634** (1975) (collecting cases). In a recent bad faith case, the District of Columbia Circuit listed Florida as one of the states that apply "the judgment rule where the insured (or his estate) was insolvent or even bankrupt." **Gray, 871 F.2d** at **1131** n.3.

Second, Harris is wrongly decided. Not only does Harris ignore the harm to the bankruptcy estate, see supra at 18-21, it also conflicts with the "public policy of Florida to encourage settlement as an alternative to protracted litigation," Home Ins. Co. v. Advance Machine Co., 500 So.2d **664, 667** (Fla. 1st **DCA** 1986), and to discourage bad faith by insurers. If an insured goes bankrupt (or looks like a candidate for bankruptcy) prior to trial or prior to the consummation of a settlement, under Harris the insurer, which knows that the most it will be required to pay is the policy limits, has every incentive to not settle and to roll the dice at trial. Harris encourages an insurer to drive down the amount of a possible settlement by eliminating the risk of a subsequent large award against the

insurer for bad faith. See Harris, 297 F.2d at 638 (Smith, J., dissenting) (rule in Harris "opens the distinct possibility that the shaky financial condition of the insured will be used as an improper device for driving down settlements . . . below policy limits on threats of prolonged litigation at no risk to the insurer"); 7C Appleman, Insurance Law & Practice § 4711, at 418 (1979 & 1990 Supp.) (rule set forth in cases like Harris "opens a new avenue for driving down the amount of a proposed settlement without additional risk to the insurer").

Third, the undesirable consequences of a ruling in favor of St. Paul cannot be overstated. In adopting St. Paul's position, the district court held that "any . . . duty [of good faith] was extinguished upon the insured's discharge in bankruptcy." 127 B.R. at 885 (emphasis added). This holding can only be described as remarkable. What the district court in effect said is that St. Paul could have done anything it wanted to subsequent to Dr. Kimbell's discharge without fear of being required at a later time to justify its actions or account for the harm it caused. According to the district court's rationale, St. Paul could have completely abandoned Dr. Kimbell, permitted a default judgment to be entered against him, and rested comfortably knowing it could not be sued, Surely Florida's public policy should not favor a rule which would permit such conduct to go unsanctioned. The "fullness or emptiness of an insured's purse" is "'an irrelevant and poor measure of liability and performance of duty by the insurer under his contract.'" Caster v. Pioneer Mutual Casualty Co., 67 Ohio St.2d 146, 423 N.E.2d 188, 191 (1981).

St. Paul's behavior in this case proves that the scenario described above is very real, After finding out that Dr. Kimbell was considering filing for bankruptcy, and after having already rejected various offers to settle for the policy limits, St. Paul began thinking about how the bankruptcy would affect its own exposure, and began ignoring its duty to act in good faith. See 958 F.2d at 341. A St. Paul memo dated February 24, 1986, reads in full:

> Instruct Bozeman [defense counsel] to research and report to us how ins[ured]'s bankruptcy affects our case. When we have that we can decide on future tactics!

R. IV:141, Exhibit 49. After Dr. Kimbell filed for bankruptcy, St. Paul's Mr. Barnhardt

[the adjuster in the Camp matter] told Mr. Bozeman to "go ahead and research [the] bankruptcy problem." Id. at Exhibit 57. When Mr. Bozeman told St. Paul that Florida law **was** unsettled as to whether an insured's bankruptcy precluded a bad faith claim, see id. at Exhibit 59, St. Paul continued its efforts to find out if it could get off the bad faith hook due to the bankruptcy of Dr. Kimbell.

On March 24,1987, St. Paul asked another law firm (Parker, Johnson) to look into whether Dr. Kimbell's bankruptcy immunized it from bad faith liability in the event of an excess judgment. In part, the letter from St. Paul to Parker, Johnson states:

> [O]ur insured has declared bankruptcy and is now bankrupt . . . . [T]he question has arisen whether or not St. Paul **can be held for bad** faith if our insured is bankrupt and if the claimants in the case have no better position than any other creditor of the insured . . . . You will note that all along the demand has been for **our** policy limits but that we have not made any offer. What is **our exposure** now that **our** insured is in bankruptcy?

Id. at Exhibit **64** (emphasis added). St. Paul sought the second opinion because it wanted someone to protect **its** interests, as opposed to those of Dr. Kimbell. See R.II: 111 at **112** (Barnhardt deposition); R. II:108 at 79 (Tice deposition). At the time that St. Paul sent the letter to Parker, Johnson, Mr. Bozeman had (1) recommended to St. Paul a settlement for the policy limits, **(2)** told St. Paul that its chances of prevailing at trial were only 30-40%, and (3) estimated that the possible verdict range was between $500,000 and $1 million. See R. **IV:141,** Exhibit 63 (second suit report).

In April of 1987, Mr. Kerrigan, Mrs. Camp's attorney, again offered (now for the fourth time) to settle for the policy limits. Id. at Exhibit 65 at 3. St. Paul purposefully decided not to act on the fourth offer until it had an answer on its bad faith exposure. Mr. Barnhardt, St. Paul's adjuster, wrote a memo to Ms. Voelkel, his supervisor, which stated as follows:

> In my opinion we don't want, to make any deals until we hear from Clay [Parker] and I don't like the . . . deal anyway. I suggest we stay at status quo until we hear from Clay.

Id. at Exhibit ***66.*** Ms. Voelkel concurred: "I agree, Norm -- let's do nothing until **we** hear from Clay." Id. After Parker, Johnson advised St. Paul that it had no bad faith exposure,

see id. at Exhibits 68 & 69, St. Paul rejected Mr. Kerrigan's fourth offer of settlement. Id. at Exhibit 72.

St. Paul's behavior was not consistent with its duty of good faith:

> It is not the function of the insurer, when undertaking the defense of the action, to ascertain the financial condition of the insured and to consider that factor in making a determination to defend. The decision whether to defend or settle should be made on the basis of an objective appraisal of the possibility of success; other extraneous considerations should be disregarded.

Harris v. Standard Accident & Ins. Co., 191 F.Supp. 538,544 (S.D.N.Y.) (Kaufman, J.), rev'd on other grounds, 297 F.2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962). This case demonstrates in stark terms what can and will happen if an insurer knows that it cannot be sued for bad faith, and this Court should not create a rule that will encourage conduct like St. Paul's.

Fourth, the payment rule adopted in Harris is hypertechnical and lacks a principled basis. Harris held that the pre-judgment bankruptcy of the insured foreclosed a bad faith action, but was not clear that the same rule would apply to an insured who was solvent but whose net worth was less than the excess judgment. Harris, 297 F.2d at 637 (Smith, J., dissenting). Eight years after Harris, the Second Circuit held that an insured who became bankrupt after an excess judgment was rendered could, through his trustee in bankruptcy, bring a bad faith action against the insurer. See Young v. American Casualty Co., 416 F.2d 906 (2d Cir. 1969) (applying New York law), cert. dismissed, 396 U.S. 997 (1970). The Second Circuit has not explained why the timing of the bankruptcy should determine whether a bad faith action can be brought. Indeed, the Tenth Circuit has concluded that Young "seriously undermined" Harris. See Torrez, 705 F.2d at 1198 n.2. As explained earlier, a discharge in bankruptcy has the same effect regardless of when it is obtained, so it is difficult to reconcile Harris with Young. See supra at 21.

Finally, the principle of Harris cannot be limited to bankrupt insureds. The principle will also apply to insureds who are insolvent, and may lead to the adoption of a rule that an insured must pay the excess judgment before instituting a bad faith action

(the "payment rule"). The illogical net effect of Harris and Young is that an insured whose assets are $100 more than his liabilities prior to the excess judgment can bring an excess judgment but an insured whose assets are $100 less than his liabilities cannot. As a result of Harris, the rule in New York today is that the insured is entitled to recover the full amount of the excess judgment if he was able to pay a part of the excess judgment, but cannot recover if he was insolvent and obtained a discharge in bankruptcy either before or after the judgment. See Levantino v. Ins. Co. of North America, 102 Misc.2d 77, 472 N.Y.S.2d 995, 1002 (Sup. Ct. 1979). To make matters more confusing, if the insured was insolvent or nearly insolvent at the time of the excess judgment, the jury must consider "his past, his prospects, and other economic factors and assess his damages." Id. This scenario, for which there can be no satisfactory rationale, is the result of slavish adherence to a technical definition of "damage," and should not be perpetuated in Florida.

III. THE INSURED'S BANKRUPTCY SHOULD NOT BAR A BAD FAITH ACTION IF THE INSURER'S ACTIONS HAVE BEEN A SUBSTANTIAL FACTOR IN THE BANKRUPTCY

Those jurisdictions which hold that the bankruptcy of the insured bars a bad faith action against the insurer recognize a necessary exception to the rule. If the bad faith of the insurer caused the insured's bankruptcy, the insured (or the bankruptcy trustee) can bring a bad faith action. See Young, 416 F.2d at 912; Anderson, 340 F.2d at 409; Harris, 297 F.2d at 632. See also Smoot v. State Farm Mutual Automobile Ins. Co., 299 F.2d 525, 530 & n.11 (5th Cir. 1962) (applying Georgia law) (suggesting that, if caused by insurer, "bankruptcy is itself a damage"). Cf. Larraburu Bros., Inc. v. Royal Indemnity Co., 604 F.2d 1208, 1215 (9th Cir. 1979) (applying California law) (insurer which pays excess judgment is still liable for bad faith if its actions led to insured's bankruptcy). The exception is recognized because

> [a]ny other result would he to allow an insurer to default, drive its assured to the wall of bankruptcy, and then blithely advise the estate, the trustee, the assured and all of the creditors that while its duty was breached, there is nothing to be done about it.

Palmer, 319 F.2d at 300 (Brown, J., concurring).

Should this Court reject appellants' arguments concerning the bankruptcy clause and the effect of Cope, it should recognize the exception set forth above. If the exception is not recognized, then insurers will have an incentive to drag out claims and lawsuits whenever the insured is in a prrcarious financial condition. Insurers will have nothing to lose and everything to gain by forcing the insured into bankruptcy.

In adopting this exception, this Court should correct the federal district court's incorrect formulation of the causation standard. The district court labored under the assumption that in order for the exception described above to apply, St. Paul's actions had to be the only cause of Dr. Kimbell's bankruptcy. See 127 B.R. at 886 (Dr. Kimbell's deposition "makes it apparent that several major factors were at work") (emphasis in original), at 887 (Dr. Kimbell "would have become bankrupt, independent of any bad faith on the part of St. Paul"). This "sole cause" standard is not applicable because Florida courts apply the "substantial factor" test in cases of multiple causes:

> There is, , , . 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. In that narrow circumstance it is settled that a "[d]efendant's conduct in an action for personal injuries is considered a cause [in fact] of the event if it was a material and substantial factor in bringing it about."

Tieder v. Little, 502 So.2d 923, 925-26 (Fla. 3d DCA 1987) (citations omitted). See also Jones v. Utica Mutual Ins. Co., 463 So.2d 1153, 1156 (Fla. 1985) ("The defendant is liable when his act . . . combines with some other concurring or intervening cause in the sense that, 'but for' the other cause as well, injury would not have occurred.").

The district court alluded to "proximate cause" in its opinion and suggested that there was no such causation in this case. R. V:186 at 22. To the extent that proximate cause is relevant here (none of the bad faith cases cited above speak in terms of proximate cause), summary judgment on the issue was inappropriate. "Proximate cause depends upon foreseeability," Brown v. City of Pinellas Park, 557 So.2d 161, 176 (Fla. 2d DCA 1990), and there is evidence in the record that 11 months before Dr. Kimbell filed for bankruptcy, his bankruptcy attorney told St. Paul that "the potential exposure beyond

insurance is a factor in our decision on filing some type of bankruptcy proceedings." R. IV: 141, Exhibit 18. St. Paul therefore was on notice that its actions could cause Dr. Kimbell to file for bankruptcy. This evidence is enough to create a jury question on proximate cause. See Holiday Inns, Inc. v. Shelburne, 576 So.2d 322, 327 (Fla. 4th DCA 1991) (evidence of numerous criminal activities on premises of bar in 18 months prior to shooting incident established foreseeability and owner's negligence in providing inadequate security could be considered a proximate cause of injuries suffered in shooting).

Under Florida law, "causation is a jury question" unless "reasonable people could not differ." Barnes v. Gulf Power Co., 517 So.2d 717, 718 (Fla. 1st DCA 1987). There is substantial direct evidence in the record which creates an issue of fact as to whether St. Paul's actions were a "substantial factor" in bringing about Dr. Kimbell's bankruptcy, including the following:

1. Mr. Venn, the trustee of Dr. Kimbell's bankruptcy estate, testified at a deposition that in his opinion St. Paul's bad faith caused Dr. Kimbell's bankruptcy:

> Q: So you're contending then, or at least in this discussion your position is that had the insurance company settled, there would not have been a bankruptcy?
>
> A: That's correct.

R. II:110 at 68 (Venn deposition).[11/]

2. Dr. Kimbell's bankruptcy attorney, in a letter dated June 10, 1985 (6 months after the Camp suit was filed) told Mr. Bozeman that "[o]bviously, the potential exposure beyond insurance is a factor in our decision on filing some type of bankruptcy proceedings." R. IV: 141, Exhibit 18. This letter indicates that Dr. Kimbell's bankruptcy attorney believed that settlement of the medical malpractice case -- which would of course have eliminated the possibility of an excess verdict -- would affect whether Dr. Kimbell

---

[11/] Mr. Venn has been on the panel of trustees for the Northern District of Florida since 1979, and has practiced bankruptcy law for 15 years. R. II:110 at 5-6 (Venn deposition).

filed for bankruptcy.

3. Dr. Kimbell's affidavit states as follows:

> 8. I was very secure and unchallenged in my neurosurgical practice at the Baptist Hospital before the Anna Camp lawsuit was filed against me. The Camp lawsuit precipitated the summary suspension of my privileges and the subsequent Ad Hoc Committee investigation.
>
> 9. As a neurosurgeon, my income was dependent on referrals from other physicians. At the time of the filing of the Anna Camp lawsuit against me, my neurosurgical practice was conducted at both the Baptist Hospital and the Sacred Heart Hospital. The suspension of both my hospital privileges at Baptist Hospital adversely affected my patient referrals at the 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. The filing of the lawsuit was, therefore, a substantial contributing cause in the events which led to my bankruptcy.

R. V:**144** at ¶¶ **8-9** (emphasis added).

4. The statements in Dr. Kimbell's affidavit that the Camp lawsuit led to his suspension and subsequent loss of income are corroborated by a letter from Dr. Mark McCaughan, Chairman of the Risk Management Committee at Baptist Hospital, to Dr. T.M. Tippett, Baptist Hospital's Chief of Neurosurgery and Dr. Kimbell's supervisor. The letter, written only 16 days after the Camp lawsuit was filed, states in its entirety:

> A review of pending litigation at a Risk Management Committee Meeting on January 14, 1985, included a suit filed by Anna Rue Camp and her husband. Mrs. Camp was admitted to Baptist Hospital and treated by Fariss D. Kimbell, Jr., M.D.
>
> It has come to our attention that there are at least two other instances involving patients of Dr. Kimbell which seem to indicate a trend and exhibit a lack of surgical judgment. Those patients were John Melvin Dyal and Janice C. Singleton.
>
> The Risk Management Committee has requested that you, as Service Chief, investigate this matter further and take whatever follow-up action you feel is indicated.

R. IV:**141, Exhibit 32** at 3 (emphasis added). Two days after this letter was sent to Dr. Tippett, Dr. Kimbell's privileges at Baptist Hospital were summarily suspended. Id. at **4.** There can be no doubt that the Camp lawsuit, filed because of St. Paul's refusal to settle, led to Dr. Kimbell's summary suspension.

A reasonable jury could infer from these facts that St. Paul's refusal to settle was a substantial factor which caused Dr. Kimbell to file for bankruptcy. To the extent it rejects appellants' first and second arguments, this Court should hold that an insurer can be liable for bad faith if its actions have been a substantial factor leading to the bankruptcy of its insured.

IV. MRS. CAMP CAN MAINTAIN THIS BAD FAITH ACTION UNDER FLA. STAT. § 624.155 IRRESPECTIVE OF DR. KIMBELL'S BANKRUPTCY

Mrs. Camp's action against St. Paul is not based on Florida common law. Rather, as the amended complaint states, R. I:23 at ¶ 14-16, the action arises under Florida's bad faith statute, Fla. Stat. § 624.155. In pertinent part, that statute provides:

> (1) Any person may bring a civil action against an insurer when such person is damaged:
>
> * * * *
>
> (b) By the commission of any of tho following acts by the insurer:
>
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests.

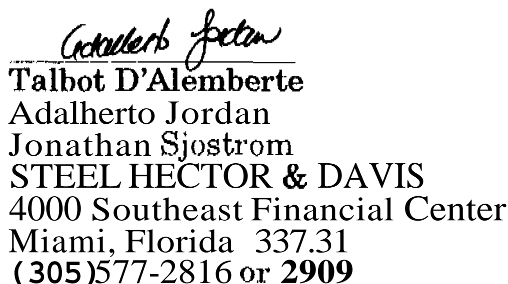
The plain language of § 624.155(1)(b)(1) ("any person") permits a third party judgment creditor like Mrs. Camp to bring a statutory bad faith action for failure to settle in good faith. See United Guaranty Residential Ins. Co. v. Alliance Mortgage Co., 644 F. Supp. 339, 341 (M.D. Fla. 1986) ("an interpretation of subsection (1)(b)(1) as covering both first party and third party bad faith actions is consistent with the general scheme of [§] 624.155"). Cf. Clauss, 523 So.2d at 1178-79 (permitting, without discussion, bad faith action by third party under § 624.155 despite insured's bankruptcy but holding that insurer did not act in bad faith); Fortson v. St. Paul Fire & Marine Ins. Co., 751 F.2d 1157, 1160-61 (11th Cir. 1985) (dismissing without prejudice third party's bad faith action under § 624.155 on the ground that action was filed prematurely). Indeed, this Court has recently held that the statute "does not differentiate between first- and third-party

actions and calls for the recovery of damages in both instances." McLeod, 591 So.2d at 623, Dr. Kimbell's bankruptcy does not cut off Mrs. Camp's statutory action because the statutory action is not derivative of the insured's common law action. See Fla. Stat. § 624.155(7) ("The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state.")[12/] Because Mrs. Camp's action against St. Paul arises under § 624.155, Dr. Kimbell's bankruptcy does not affect her claim in any way. Mrs. Camp can pursue a bad faith action against St. Paul.

CONCLUSION

For the reasons set forth above, this Court should answer the first certified question "no" and the second certified question "yes." If this Court disagrees with appellants on both of these questions, it should rule that an insurer can be sued for bad faith if its actions have been a substantial factor leading to the insured's bankruptcy. It should also rule that Mrs. Camp's action against St. Paul under Florida's bad faith statute is unaffected by Dr. Kimbell's bankruptcy.

Respectfully submitted,



Talbot D'Alemberte
Adalherto Jordan
Jonathan Sjostrom
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 337.31
(305)577-2816 or 2909

Counsel for Appellants

12/ Subsection (7) of § 624.165 was added by Chapter 90-119, Laws of Florida. Chapter 90-119 "applies to policies or contracts issued or renewed on or after [October 1, 1990]." Although Dr. Kimbell's policy was issued in 1983, this Court can consider subsection (7) in addressing Mrs. Camp's statutory claim. Subsection (7) was created specifically for the purpose of "clarifying legislative intent with respect to civil remedies." If an amendment to a statute is meant to clarify legislative intent the amendment should be considered in interpreting the statute notwithstanding the amendment's effective date. See generally Ivey v. Chicago Inc. Co., 410 So.2d 494,497 (Fla. 1982).

CERTIFICATE OF SERVICE

I hereby certify that copies of appellants' initial brief was mailed this 10th day of June, 1992 to Elmo Hoffman, Esq., 1300 Barnett Plaza, 201 S. Orange Avenue, P.O. Box 2867, Orlando, Florida 32802; Gus Small, Jr., Esq. and Mark Marani, Esq., Suite 400, 2970 Peachtree Road, N.W., P.O Box 63483, Atlanta, Georgia 30355; and J. Dixon Bridgera, III, Esq., Carlton, Fields, P.A., 26 W. Cedar Street, 4th Floor, P.O. Box 12426, Pensacola, Florida 32501-2582.

Adalberto Jordan

AJ/932