OA 10-6-93
OY7

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,823
(Third DCA Case #90-1626, 90-2861, and 91-783)

JACQUES LUGASSY and DEBRA LUGASSY, his wife,

Petitioners,

vs.

INDEPENDENT FIRE INSURANCE COMPANY,

Respondent.

FILED
SID J. WHITE
AUG 2 1993
CLERK, SUPREME COURT
By Chief Deputy Clerk

PETITIONERS' REPLY BRIEF ON THE MERITS

FERRELL, CARDENAS, FERTEL & MORALES, P.A.
201 South Biscayne Boulevard
Miami, Florida 33131
(305) 371-8585

FRIEND & FLECK
5975 Sunset Drive, Suite 802
South Miami, FL 33143
(305) 667-5777

and

EVAN J. LANGBEIN, ESQ.
1125 Alfred I. duPont Bldg.
Miami, Florida 33131-1294
(305) 374-0544

Attorneys for Petitioners

TABLE OF CONTENTS

	Page No.
ARGUMENT	
POINT I. THE DISTRICT COURT INCORRECTLY DISREGARDED THE TRIAL COURT'S RECOGNITION OF THE ORAL CONTINGENCY FEE AGREEMENT AND IMPROPERLY RELIED UPON RESPONDENT'S APPLICATION AND INTERPRETATION OF A PRIOR AGREEMENT.	1
POINT II. THE CONTINGENCY FEE CONTRACT "CAP" OF ROWE SHOULD BE ABROGATED OR CLARIFIED.	8
POINT III. PETITIONERS ARE ENTITLED TO CONTINGENT RISK ENHANCEMENT FOR SERVICES RENDERED LITIGATING A CONTESTED RIGHT TO REASONABLE ATTORNEYS' FEES.	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Cases	Page No.
Askowitz v. Susan Feuer Interior Design, Inc., 563 So.2d 752 (Fla. 3d DCA 1990)	4
Brown v. Vermont Mut. Ins. Co., 614 So.2d 574 (Fla. 1st DCA 1993)	11
Clark v. City of Los Angeles, 803 F.2d 987 (9th Cir. 1986)	13
Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962)	2
Crittenden Orange Blossom Fruit v. Stone, 572 So.2d 351 (Fla. 1987)	14
Estate of Platt, 586 So.2d 328 (Fla. 1991)	14
Ganson v. Department of Administration, 554 So.2d 522 (Fla. 1st DCA 1989)	5
Goodpaster v. Evans, 570 So.2d 354 (Fla. 2d DCA 1990)	9,11
Harvard Farms, Inc. v. National Cas. Co., 617 So.2d 400 (Fla. 3d DCA 1993)	2,5
Inacio v. State Farm Fire and Cas. Co., 550 So.2d 92 (Fla. 1st DCA 1989)	2,9,13
Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979)	13
Kaufman v. McDonald, 557 So.2d 572 (Fla. 1990)	4
Mark J. Kaufman, P.A. v. Davis & Meadows, 600 So.2d 1208 (Fla. 1st DCA 1992)	5,11,12
Peacock Construction Co. v. Gould, 351 So.2d 394 (Fla. 2d DCA 1977)	4

Pendley v. Shands Teaching Hospital and Clinic, Inc., 577 So.2d 642 (Fla. 1st DCA 1991)	3,5
Quarture v. Allegheny County, 14 A.2d 575 (Pa. 1940)	3
Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982)	12
Sonara v. Star Mut. Ins. Co., 603 So.2d 661 (Fla. 3d DCA 1992)	13,14
Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990)	2,5,9
Stocks v. Sullivan, 717 F.Supp. 400 (E.D.N.C. 1989)	14
Stuart v. State, 360 So.2d 406 (Fla. 1978)	2
Ziontz v. Ocean Care Unit Owners Ass'n, Inc., 18 Fla.L.Wkly. D1146 (Fla. 4th DCA, May 5, 1993)	7

Other Authorities

42 U.S.C. Section 1988	13
Section 627.428	13,14
Section 627.428(1) Fla. Stats.	11,12
Section 627.428(3) Fla. Stats.	12

ARGUMENT[1]

POINT I

THE DISTRICT COURT INCORRECTLY DISREGARDED THE TRIAL COURT'S RECOGNITION OF THE ORAL CONTINGENCY FEE AGREEMENT AND IMPROPERLY RELIED UPON RESPONDENT'S APPLICATION AND INTERPRETATION OF A PRIOR AGREEMENT.

There is no dispute or contradiction that:

(1) When Mr. Ferrell was hired by Petitioners, the law firm of Friend & Fleck was not also retained (T 1675-1676).[2]

(2) When Mr. Ferrell's fee agreement was signed, Petitioners were asserting a claim for loss of their home, the lawsuit had not been filed, and no counterclaim existed.[3]

(3) Mr. Ferrell and Mr. Sams both testified the original contingency agreement was prepared before any decisions applying the Rowe "cap" relating to fee agreements, and they specifically discussed with the clients their understanding and contemplation of recovery of a court-awarded fee exceeding the percentage fee.[4]

---

[1]Petitioners will employ the abbreviations used in the initial brief. That brief will be referred to as "IB." Respondent's Brief will be referred to as "AB."

[2]At AB 3, Respondent alleges that Mr. Ferrell was retained "on or about July 25, 1986,..." referring to "R 567." R 567 does not concern the date Mr. Ferrell was "retained." The Authority to Represent recited no day or month (R 557-559). Mr. Ferrell did not recall the date (T 1685).

[3]Respondent misleads at AB 1 saying it paid the mortgagee "in 1986" "directly" without telling the court the payment was made December 19, 1986 (T 1240), over a year after the loss, and after Mr. Ferrell's retainer agreement, and suit. There is no record support that Petitioners contemplated the counterclaim (AB 14).

[4]Mr. Ferrell: "...We told them (Petitioners) we fully expected the fee to be far more than 40 percent and they (continued...)

(4) After the counterclaim was filed (December 4, 1986) plaintiffs and defendant obtained new counsel and Friend & Fleck appeared for Petitioners (T 1447-1458).

(5) Mr. Friend testified his law firm had an oral contingency fee agreement at the outset identical to Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990); see also, Harvard Farms, Inc. v. National Cas. Co., 617 So.2d 400 (Fla. 3d DCA 1993)] (T 1474-1475, 1483).

(6) Mr. Ferrell testified he later confirmed and ratified that oral agreement with the clients.[5]

(7) The trial court found this agreement, allowing the statutory fee, unlimited by a percentage fee, the applicable "uncontradicted" terms of representation.[6]

---

[4](...continued)
probably would get the full amount of the judgment because we believed that a reasonable fee would have to be more than that contingency amount" (T 1674).

[5]Mr. Ferrell at (T 1679):
THE WITNESS: May I see it? I know I had discussions with Debra and Jacques Lugassy about this letter. It was agreed that a letter would be prepared and they said, yes, **this was the agreement**. We all had those discussions before that.
Respondent makes the unworthy accusation that Petitioners' brief "...is replete with material inaccuracies and omissions" (AB 1). Respondent alone inaccurately infers from Mr. Ferrell's testimony so as to treat interchangeably the fact that there was no written retainer with its misleading claim there was no agreement whatsoever.

[6]Respondent contends the trial court recognized the oral agreement because it was contained in the November 22, 1989 letter and that alone led it to conclude that "[t]he agreement today is that the court is allowed to award a reasonable fee..." Respondent's claimed insight of the unspecified basis for the court's final ruling, even if correct arguendo, ignores the settled principle that when the record furnishes a basis upon which the trial court's conclusion may be affirmed, the appellate court shall do so. Stuart v. State, 360 So.2d 406, 408 (Fla. 1978); Cohen v. Mohawk, Inc., 137
(continued...)

(8) Respondent possessed no knowledge of the terms of Petitioners' representation before the fee litigation; was neither privy to those terms, nor did it rely upon those terms. Respondent simply occupied the position as a statutory obligor to pay Petitioners' counsel a reasonable fee under Section 627.428, based upon all exertions it required of those attorneys.[7]

(9) **Inacio v. State Farm Fire and Cas. Co.**, 550 So.2d 92 (Fla. 1st DCA 1989) endorses post-settlement written confirmation of a prior oral fee arrangement and the propriety of trial court approval in the context of a statutory fee recovery against one not privy to that contract, notwithstanding a different prior written agreement.

(10) **Pendley v. Shands Teaching Hospital and Clinic, Inc.**, 577 So.2d 642 (Fla. 1st DCA 1991) recognizes the freedom to contract of attorney and client permits them, during a fee

---

[6](...continued) So.2d 222 (Fla. 1962). Petitioners believe the trial court concluded that all the evidence showed the fee agreements contemplated recovery of the statutory fee "in lieu of" (rather than) or in any event, not limited to a percentage of the clients' recovery. The record also supports the award as the court's ruling that Respondent invited a determination of no valid contract so that, "we are left with a complete reasonable fee" (T 1443). In any event, the record contains abundant support for the court's allowance of a reasonable fee for a host of reasons.

[7]Respondent ignores cases cited at IB 23 holding that as a stranger to the contract, Respondent lacks both standing and capacity to invoke the parol evidence rule to prevent evidence of the full fee contract. Further, in **Quarture v. Allegheny County**, 14 A.2d 575 (Pa. 1940), cited by Respondent (AB 37) the court reiterates the principle that "it is always competent for the parties to a written contract to show by parol evidence a subsequent modification, change, waiver of a condition, or the substitution of a new contract..."

hearing, to reach agreement upon a **Kaufman v. McDonald** [557 So.2d 572 (Fla. 1990)]-type fee agreement in substitution for a percentage fee agreement, to secure entitlement to a statutory court awarded reasonable fee award.

(11) Legal consideration is manifestly present when a new law firm (Friend & Fleck) is retained, particularly when it undertakes to handle litigation which has materially changed.[8]

(12) The "complete reasonable fee" of the trial court adjudicated the reasonable compensation earned for the inseparable services prosecuting the coverage claim and defending the counterclaim and is supported by the record and the law.[9]

(13) The reasonable fee amount assessed by the trial court is indeed "astronomically" (AB 20) greater than the "capped" fee amount proffered by Respondent, because, as the

---

[8]Again, Respondent ignores authority cited at IB 18 that a stranger to a contract lacks standing to challenge the "consideration" therefor between others. Respondent simply seizes standing, citing cases from other jurisdictions concerning issues of consideration but as between the parties inter se.

[9]Respondent admits **Askowitz v. Susan Feuer Interior Design, Inc.**, 563 So.2d 752 (Fla. 3d DCA 1990) supports a "complete reasonable fee" award in excess of an inferred "cap" when defense of a counterclaim not embraced by the initial fee contract becomes required (AB 31-32). See also, **Peacock Construction Co. v. Gould**, 351 So.2d 394 (Fla. 2d DCA 1977).

The original agreement made no reference to a counterclaim. Respondent's later payment to the mortgagee greatly reduced Petitioners' potential recovery. Respondent ignores the enormous shift of the risk of loss presented by the counterclaim and the sensibility of a fee agreement then based on the retrospective allowance of reasonable compensation for all services rendered pursuant to Section 627.428. At that point, the obsolescence of any agreement linked to a percentage of the remaining rights of affirmative recovery is evident.

record and this disparity establishes, the amount awarded by the Court is reasonable and the fee offered by Respondent is manifestly not.

(14) Respondent is neither the client nor the Florida Bar, as the trial court knew when Respondent sought to inject a "red herring" challenging "ethics" of the fee agreement (T 1442-1445, 1622).[10],[11]

Respondent's renewed assault on ethics in this Court perpetuates and exemplifies its litigation strategy of selective character assassination prolonging a "go-to-the-mat" defense.

During the jury trial (that did not begin until almost four years after the fire), Respondent concocted a fictional

---

[10]Despite professed allegiance to stare decisis (AB 20), Respondent repudiates precedent such as Pendley, by averring the case was "wrongly decided" (AB 39) and Harvard Farms, supra, and Mark J. Kaufman, P.A. v. Davis & Meadows, 600 So.2d 1208 (Fla. 1st DCA 1992), which Respondent debunks as "erroneously" denying it standing to discipline "ethics" of a fee agreement of another (AB 23). Kaufman succinctly recognizes (600 So.2d at 1211) it is error to employ Rule 4-1.5 "as a basis to invalidate or render void a provision in a private contract between two parties..."

[11]In its footnote 2 (AB 4), Respondent claims Petitioners "conceded" Friend & Fleck was hired after January 1, 1987. The "concession" was that the firm did not appear until January. The record is silent as to the exact date Friend & Fleck was retained, which might arguably be relevant since oral contingent fee agreements not concerning tort claims were not addressed in the pre-1987 rules. In either event, the 1987 rule does not apply when the source of payment of the "contingent fee" is the opposing party under a fee shifting statute. See, Ganson v. Department of Administration, 554 So.2d 522, 528-529 (Fla. 1st DCA 1989) rev.d on other grounds, 556 So.2d 791 (Fla. 1990). Quanstrom noted the difference between a "contingency adjustment" when a fee-authorizing statute is involved, and a "contingency fee arrangement" arising from a percentage fee (555 So.2d 833). The former entails no fee subtracted from the client's recovery, and therefore the rule is not applicable.

"ongoing criminal investigation," insinuating "there will be criminal charges" against Petitioners, both false and inflammatory (T 7, 364, 604).[12]

During closing argument in the attorney's fee trial, Respondent maligned even the jury, attributing the verdict to a jury that it argued consisted of "...people who were of very low intelligence ... weren't that ultimately bright..." (T 1571T).

Next, Respondent attacked the trial judge. After the trial court ruled he would assess a "complete reasonable fee," Respondent sought to disqualify the judge to prevent him from completing the fee trial (R 411-415; 419). This motion came after two extensive evidentiary hearings in the fee litigation.

Given its no-holds-barred position before the trial court, it is no surprise that Respondent interjects ad hominem appellate invective against Petitioners' counsel in a forum less familiar with its accusatory tactics.[13]

The trial court properly recognized, even if these ethics arguments were anything more than makeweight contentions and

---

[12]These tactics cloaked a flawed arson theory. Respondent theorized the fire was caused by 48 or 49 cubic feet of natural gas escaping in 12 minutes (T 65; 1386). The evidence demonstrated the impossibility that a 12-minute supply of natural gas, all of which was accounted for after the firefighters were summoned, could have started the fire (T 852-856; 936-943; 1006-1007; 1454-1456).

The trial court considered the trial a "two-sided coin" (T 1571W), and that all of the expert testimony refuted Respondent's arson claim (T 1571FF).

[13]The trial court was obliged to admonish Respondent to employ just common courtesy (T 1635; see also, T 1495; T 1551; and T 1571I).

invalidated the oral fee agreement, then "...we are left with a complete reasonable fee" (T 1443), precisely the award the court made, and invited by Respondent.[14]

Respondent's brief avoids the evolution of the terms of representation. Instead, it substitutes false claims of misconduct. The November 22, 1989 letter demonstrates, on its face, that it was dictated after the verdict, and no attempt to suggest otherwise was made.

It is Respondent who now seeks to feature the letter as the agreement and ironically proffers it as a "modification" rather than acknowledge it as a confirmation of the applicable terms of representation. Again, a diversion from the issues.

What principle of law allows a stranger to a contract to preclude the parties to that contract from realizing their contractual understanding, based solely on its self-serving contention that they "goofed" (T 1612) in their initial written expression?

Likewise, what prohibition disallows a new law firm from entering a case on different terms of compensation from the original firm, particularly when the amount of potential

---

[14]Respondent's "lawyer-bashing" rises to group vilification. Respondent condemns "certain Bar members' proclivity to seek excessive fees" (AB 19) which juxtaposed with footnote 21 (AB 21) impugns the entire "...intrepid Plaintiffs' Bar..." handling insurance claims. It then cites **Ziontz v. Ocean Care Unit Owners Ass'n., Inc.**, 18 Fla.L.Wkly. D1146 (Fla. 4th DCA, May 5, 1993), contending the decision "reinforces" a cap to "brake" "runaway fees." **Ziontz** did not address fee "caps." The message of **Ziontz** is the need to administer "vaccines" for a "virus" of either "excessive" or "inadequate" fees wrought by an inflexible application of **Rowe's** guidelines. A trial court should be entrusted with discretion allowing it to apply the guidelines with flexibility and reason to assure that both inadequate and excessive fees are avoided.

recovery has been changed and a counterclaim, far exceeding the remaining claim, is first asserted?[15]

The trial court was correct in simply ruling that the fee agreement, then in effect for Petitioners' counsel, permitted an award of reasonable attorneys' fees. Likewise, the court properly assessed a total reasonable fee for all of the services rendered on inseparable claims. Respondent's challenge of that award ignores or trivializes the consideration in the evolution of the litigation and representation, and Respondent's legal incapacity to foreclose court ratification of the understanding of the parties inter se.

Lastly, the court awarded fee remains the only "reasonable" fee proffered by either party on appeal and supported by the evidence. Respondent seeks only to use **Rowe** as a means to substitute an undeniably unreasonable fee for the reasonable one, in disregard of the manifest justice of this cause and the principles underlying **Rowe**.

POINT II

THE CONTINGENCY FEE CONTRACT "CAP" OF ROWE SHOULD BE ABROGATED OR CLARIFIED.

Consistent with a selective veneration for "stare decisis," Respondent ignores precedent at IB 28, holding a contingent fee contract percentage does not represent the reasonable value of legal services in the context of a court award of fees against an opposing party.

---

[15]Respondent also substituted counsel after the counterclaim was filed. Petitioners properly lack standing to contest the exact terms of representation of Respondent's new attorneys.

A fee award "cap," or any criteria utilized in adjudicating a reasonable fee, should no more require an inadequate fee of $10 per hour than impose an excessive fee of $1,000 per hour. An objective standard of reasonableness must, pursuant to the mandatory terms of Section 627.428, govern.[16]

Respondent contends the "market supply" of attorneys to handle insurance claims is fostered best only by allowing a "prospectively bargained for" fee (AB 34-35). Respondent ignores that all prospective fee arrangements for insured's claims are enabled by the contemplation of the statutory guarantee of a reasonable fee allowance, allowing the retrospective assessment of the actual exertions required. As Palma, Quanstrom and Inacio epitomize, the "reasonableness" of such fee awards may only be accurately determined after the case.

The legislative promise of Section 627.428 is that an insured's attorney will receive a reasonable fee for all of his/her services, determined at the end of the litigation. This assurance is the only "guaranty" made by the insurer (see

[16]Respondent claims citation to Goodpaster v. Evans. 570 So.2d 354 (Fla. 2d DCA 1990) was "misleading" (AB 20). It contends that since the verdict was $60,000, the $10,000 fee award was less than a 45% fee cap. Respondent fails to inform the court that the insurer had a $10,000 policy limit. The court found that since there was "no foreseeable prospect" of recovery over the $10,000 (570 So.2d 355, fn. 1), the "recovery" was $10,000, not the higher verdict. Goodpaster and this court's decisions in Quanstrom and Palma support the "rule of reasonableness" in setting court-awarded fees. Indeed, Florida jurisprudence should support no other rule. Respondent claims the "rule of reasonableness" was not raised below, when the record shows it was the quintessence of Petitioners' position (R 369).

AB 38) and the only fee obligation the insurer has standing to litigate.

This hindsight determination enables counsel to undertake insurance cases without regard to the amount of recovery. There is no basis to conclude that any attorney or insured ever would "agree" to restrict, limit or diminish that entitlement against the insurer.

The coexistence of a percentage fee agreement between attorney and client, sets only a measure for a potential recovery of a fee from the insured's recovery and is neither inconsistent with nor a prospective limitation upon the allowance of the separate entitlement to the statutory retrospective reasonable fee recovery from the insurer.

The view that the retrospective statutory fee from the insurer may not exceed a prospective percentage fee from the client, without explicitly so providing, undermines the legislative objective to enable insureds to secure counsel by assuring reasonable compensation for the exertions actually required by the insurer.

Any presumptive disregard for the retrospective statutory fee entitlement is misplaced as above-mentioned and unfair as described hereafter. Such disregard is unfair because: the insurer is not bound by the private fee agreement; the fee contract of the insurer is the statutory obligation for reasonable fees for actual exertions it requires; and the insurer is ordinarily, as here, wholly ignorant of the terms of representation and neither acts nor forbears in reliance upon those terms. Insofar as the insurer is concerned, its

statutory obligation for a reasonable fee is, and should remain, essentially independent of the fee arrangement between the insured and its attorneys.

627.428(1) provides, in pertinent part, that the award of fees is "for the insured's ... attorney" and sub-part (3) of the statute provides for the "fee of the attorney..."

The statute evidences that the attorney is the party in interest insofar as the statutory fee entitlement. See, **Brown v. Vermont Mut. Ins. Co.**, 614 So.2d 574 (Fla. 1st DCA 1993). The enabling effect of the statute is the attorney's customary separate contemplation of his/her sole entitlement to the statutory fee.

Accordingly, to limit that separate entitlement solely because of the existence of a percentage fee applicable to the client's separate recovery incorrectly presumes the representation was secured by a percentage fee when the legislative determination in Section 627.428 is precisely otherwise.

The "parade of horribles" springing from this mistaken presumption which Petitioners' brief surveyed (AB 21, fn. 21) were: the loss to **Kaufman**-contract clients of the prior definitive cap to the client of a percentage fee; the inevitable fee litigation promoted by the need to ascertain the amount of the court's award to determine the "greater amount"; and, the potential for clients forfeiting their entire recovery to counsel when the "greater" fee exceeds the client's recovery. (See, **Goodpaster** or when the insurer becomes insolvent.) Respondent completely ignores these present day consequences flowing from fee contracts drafted to

avoid the cap to protect only counsel, and admits the proliferation of such agreements.

By admitting the usage of Kaufman fee contracts, Respondent in effect confesses that the "cap" has become illusory and fictional but at the ironic expense of clients' fee contract rights, repugnant to the rationale of Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982).

POINT III

PETITIONERS ARE ENTITLED TO CONTINGENT RISK ENHANCEMENT FOR SERVICES RENDERED LITIGATING A CONTESTED RIGHT TO REASONABLE ATTORNEYS' FEES.

Section 627.428(3) provides:

> "compensation or fees of the attorney shall be included in the judgment or decree rendered in the case."

Section 627.428(1) provides:

> (1) "Upon rendition of a judgment or decree... against an insurer, ...the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."

The statutory language evinces a clear assurance that the insured's attorney will be compensated reasonably for all services rendered, including those rendered in the fee litigation itself. This is so since the fee award (subsection 3) is expressly included in the judgment (or decree) and subsection 1 then triggered to allow recovery of a fee for that recovery. This statutory mechanism evidences the legislated public policy encouraging insurers to resolve claims without protracted litigation and enabling counsel to undertake

representation with the assurance of complete compensation. This only sensible operation counterbalances the otherwise enormous economic superiority of insurers in the judicial system. Sonara v. Star Mut. Ins. Co., 603 So.2d 661 (Fla. 3d DCA 1992).

Respondent's position would imprudently invigorate insurers to litigate their opponent's fee recovery because by doing so they will necessarily dilute and deprive opposing counsel of recovery of a full reasonable fee.[17]

Respondent offers no sensible rationale for denying attorney's fees for the exertions required to secure the statutory fee recovery.

Clark v. City of Los Angeles, 803 F.2d 987, 992 (9th Cir. 1986), cited by Respondent, holds contrary to its position. The case holds an argument similar to that here "frivolous" because federal courts uniformly "have held that the time spent in establishing entitlement under Section 1988 is compensable (citations omitted)."

Inacio, supra, held that fee awards under Section 627.428 resemble 42 U.S.C. Section 1988 fee awards.

Respondent's citation to fee awards under the Federal Social Security Act is misplaced. As the court said in Stocks

[17]Respondent makes the offensive assertion that allowing fees for litigating fees would "only lin[e] the pockets" of counsel seeking statutory fees (AB 46). On the contrary, Respondent's position fills only the pockets of defense counsel who by litigating fee issues would empty the pockets of counsel for prevailing insureds by imposing involuntary, uncompensated servitude for all of the professional services rendered in the ensuing fee litigation. See, Johnson v. Mississippi, 606 F.2d 635, 638 (5th Cir. 1979).

v. Sullivan, 717 F.Supp. 400, 401 (E.D.N.C. 1989) cited at AB 47, fees under the Act "...come out of the claimant's fund, as opposed to being assessed against an opposing party..." This fact "distinguishes social security fees from those under fees fixed in statutes or rules (citations omitted)."

As the Third District stated in Sonara v. Star Cas. Ins. Co., supra, 603 So.2d at 664:

> "...Different statutes with different policy considerations may very well dictate different results on this question [awarding attorney's fees for litigating fees] (citations omitted)."

Unlike a worker's compensation case, insurance litigation is not "simple, expeditious and inexpensive." Cf., Crittenden Orange Blossom Fruit v. Stone, 574 So.2d 351, 352 (Fla. 1987).

Unlike a probate proceeding, fees to Petitioners' counsel are not assured, and do not deplete an estate. Cf., Estate of Platt, 586 So.2d 328 (Fla. 1991).

The legislative policy promulgated by Section 627.428 is to allow attorneys for Florida's insureds full reasonable compensation for all exertions required by insurers and does not vanish when the statute is invoked.

CONCLUSION

For the reasons stated herein and in the initial brief, the District Court's decision should be quashed and remanded with instructions to affirm the trial court's judgment awarding attorney's fees and the fee awarded for the contested

right to a reasonable attorney's fee modified to apply the contingent risk enhancement to that award.

Respectfully submitted,

FERRELL, CARDENAS, FERTEL
& MORALES
201 South Biscayne Blvd.
Suite 1920, Miami Center
Miami, FL 33131-2305

FRIEND and FLECK
5975 Sunset Drive
Suite 802
South Miami, FL 33143
(305) 667-5777

and

EVAN J. LANGBEIN, ESQ.
~~1125 Alfred I. duPont~~ Bldg.
~~169 E. Flagler Street~~
~~Miami, FL 33131-1294~~
(~~305) 374-05~~44

see address change

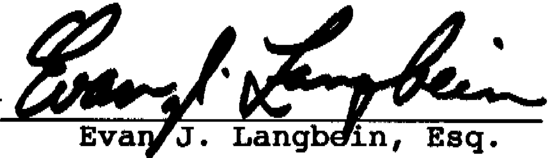
Attorneys for Petitioners

By______________________
Evan J. Langbein, Esq.

And By______________________
Richard A. Friend, Esq.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy hereof has been served by mail to **Alvin N. Weinstein, Esq.**, Weinstein, Bavly & Moon, 920 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; and to **Arthur J. Morburger, Esq.**; Penthouse I, 155 South Miami Avenue, Miami, Florida 33130, on this 29th day of July, 1993.



By______________________
Evan J. Langbein, Esq.

EJL\Lugassy\SupCourt\AB.2\mm