IN THE SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY,

Petitioner,

vs.

BONITA CONQUEST,

Respondent.

Case No.: 83,827
District Court of Appeal:
2nd District - No. 93-01567

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS and ALLSTATE INSURANCE COMPANY IN SUPPORT OF PETITIONER AUTO-OWNERS INSURANCE COMPANY

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

SONNENSCHEIN NATH & ROSENTHAL
PAUL E. B. GLAD, ESQ.
JOHN LELAND WILLIAMS, ESQ.
685 Market Street, Tenth Floor
San Francisco, California 94105
(415) 882-5000

SONNENSCHEIN NATH & ROSENTHAL
WILLIAM T. BARKER, ESQ.
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Attorneys for Amici Curiae
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND ALLSTATE INSURANCE COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - cont'd.

PAGE

CASES:

TABLE OF AUTHORITIES - cont'd.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae the National Association of Independent Insurers ("NAII") and Allstate Insurance Company ("Allstate") respectfully present this brief in support of the position of Auto-Owners Insurance Company ("Auto-Owners") to assist the Court in this matter of great public importance.

NAII is a non-profit trade group representing the interests of more than 570 property-casualty insurance companies throughout the United States. NAII's membership represents a cross-section of the insurance industry and is composed mainly of mid-sized and small insurers. NAII works to promote competitiveness, innovation and independent action in the insurance industry that fosters the public interest in making insurance easily available at reasonable rates. NAII's members insure a significant percentage of Florida's residents and thus its members have a substantial interest in the outcome of this case.

Allstate is one the largest single property and casualty insurers in the nation and writes a substantial percentage of the insurance purchased by the citizens of Florida. As such, Allstate has a substantial interest in the outcome of this case. Allstate and its counsel herein are uniquely familiar with the issues before the Court, having recently addressed these same issues before the Texas Supreme Court in Allstate Ins. Co. v. Watson, 876 S.W.2d 145 (1994).

SUMMARY OF ARGUMENT

The issue in this case is not, as Conquest argues, simply a matter of statutory construction. What is at stake is an insured's right to receive the full and faithful protection of her insurer. What is at stake is an insurer's ability to discharge the duties it owes to its insured. What is at stake is the public's interest in obtaining insurance at a reasonable cost. What is at stake is Florida's interest in preserving judicial resources to address claims of merit.

Stripped to its essentials, the Second District held that an insurer who fully defends its insured and promptly pays a judgment that is both well-within policy limits and substantially less than ever demanded by the insured's adversary is nevertheless subject to liability to a third party stranger to the insurance contract because it honored its duties to the insured. Unless the Second District's decision is reversed, insurers will now find themselves, like Odysseus of Greek myth, floundering a between Scylla and Charybdis of impossibly conflicting duties. An insurer, like Auto-Owners in this case, who defends and indemnifies its insured as it contracted to do, will now have to fend off a second suit by the third-party who grew weary of the adversarial process she initiated. An insurer who, instead, performs this newly-created duty owed to the third-party by settling a claim regardless of its merits, will now face an

action by the insured whose right to and expectation of the loyalty of her insurer are necessarily compromised.

Quite simply, the odyssey that Conquest would have Florida undertake is unsound as a matter of public policy. It would subject insurers to conflicting obligations, drive-up the costs of insurance for the consuming public and open the floodgates to meritless litigation. It is for these reasons that the overwhelming majority of courts nationwide have refused to extend the duties an insurer owes to its insured to the insured's adversary. These same reasons compelled the California Supreme Court to conclude in Moradi-Shalal v. Fireman's Fund Ins. Co., 250 Cal. Rptr. 116 (1988), that it had made a mistake nine years earlier in holding that a third party could directly sue a insurer for violation of the Unfair Claims Practices Act. Florida should not repeat that mistake.

The Second District's decision is also wrong as a matter of law. This Court recently made it clear that it has always been the law of Florida that the only rights a third-party has against an insurer are derivative of the rights of the insured. McLeod v. Continental Ins. Co., 591 So. 2d 621, 625 (1992). The Second District's decision, creating a new cause of action for a third party when the insured has not been damaged, cannot be reconciled with this established principle. Nor does the Second District's decision withstand scrutiny as a matter of statutory construction. Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491, 496 (Fla. 3rd DCA 1989).

Allstate and NAII respectfully urge the Court to reverse the decision of the Second District.

ARGUMENT

I. THE THIRD PARTY RIGHTS ESTABLISHED BY THE SECOND DISTRICT'S DECISION WILL HAVE DELETERIOUS EFFECTS ON THE PUBLIC, THE COURTS AND INSURERS

The court below correctly held that Auto-Owners had no common law duty to Conquest to settle her claim against its insured. Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40 (Fla. 2nd DCA 1994). The court also correctly held that the statute which expressly addresses an insurer's duty to settle -- section 624.155(1)(b)1 -- likewise confers no right of action on a third party. Id. Inexplicably, however, the court held that Conquest could bring an action against Auto-Owners for the alleged "general business practices" of failing to (1) implement standards for the investigation of claims; (2) act promptly upon communications with respect to claims; and (3) denying "claims" without conducting a reasonable investigation. Id.; Fla. Stat. §§ 624.155(1)(a)1; 626.9541(1)(i)3.a, c, d.

Contrary to sound public policy and the intent of the legislature, the court of appeal's ruling forces an insurer, prior to any determination of the liability of its insured and regardless of how unreasonable the third party's settlement demands may be, to settle with that third party irrespective of the duties it owes to its insured. Otherwise, the insurer will be exposed to separate liability for a putative failure

to reasonably investigate or communicate. As recognized by courts nationwide, this ruling is untenable.

The California experience provides an instructive lesson. At one time, the California Supreme Court construed a statute similar to the one at issue here to impose on insurers the same duties to third parties created by the court below in this case.[1] Royal Globe Ins. Co. v. Superior Court, 153 Cal. Rptr. 842 (1979). The pernicious effects of Royal Globe on California's consumers and judicial resources proved so damaging that it was later overruled in Moradi-Shalal v. Fireman's Fund Ins. Co., 250 Cal. Rptr. 116 (1988). In Moradi-Shalal, the California Supreme Court found that the benefit of stare decisis was heavily outweighed by the need to correct the dire mistake of Royal Globe.

What California learned by experience, and other states recognized by foresight, is that a third-party cause of action such as the one created by the Second District, has a variety of damaging effects. The most significant of these harmful effects are the: (1) creation of conflicts of interests; (2) inhibition on an insurer's right to test the merits of a demand; (3) encouragement of multiple litigation and drain on

---

[1] The California statute made it an unfair claims practice to, among other things, fail "to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies" and "to adopt and implement reasonable standards for the prompt investigation and processing of claims under insurance policies." Cf. Cal. Ins. Code § 790.03(h)(2) and (3) with Fla. Stat. § 626.9541(1)(i)3.a, c.

judicial resources; and (4) escalation of the cost of insurance. These effects are discussed below.

A. Conflict of Interest

As noted by the court in Moradi-Shalal, third-party causes of action such the one recognized by the court below

> create a conflict of interest for the insurer, who must not only protect the interests of the insured, but also must safeguard its own interests from the adverse claims of the third party claimant. This conflict disrupts the settlement process and may disadvantage the insured.

250 Cal. Rptr. at 125.

The need to protect insureds and insurers from such conflicts was recently echoed by the Texas Supreme Court in Watson v. Allstate Insurance Co., 876 S.W.2d 145 (Tex. 1994). In that case, the court rejected the view that the Texas unfair claims practices statutes imposed upon insurers any duties to third party claimants. The court reasoned that to hold otherwise "would undermine the duties insurers owe to their insureds." Id. at 150. The court explained:

> Were we to extend to third party claimants the same duties insurers owe to their insureds, insurers would be faced with owing coextensive and conflicting duties. An insurer owes its insured a duty to defend the insured against the claims asserted by a third party. Recognizing concomitant and coextensive duties ... to third party claimants, parties adverse to the insured, necessarily compromises the duties the insurer owes to its insured. . . .

Id. (citation omitted).

Thus, for example, an insurer could be found to have acted in "bad faith" to its insured by exhausting its policy

limit in settlement with some of multiple claimants and leaving the insured personally exposed for the claims of the remaining claimants.

The Second District's ruling in this case creates the very conflict that the both California Supreme Court and the Texas Supreme Court concluded is deleterious to the interests of the insured. The decision forces insurers -- charged with zealously defending their insureds -- to risk exposure to the third party for declining to settle, no matter how unrealistic the settlement demand of the third party. Indeed, that is precisely what happened here. Under the Second District's ruling, Auto-Owners is potentially liable because it fully defended its insured and declined to accept a policy limit settlement demand of $300,000; a sum that is more than twice the $130,800 judgment ultimately obtained by Conquest.

B. Insurer's Right To Test The Merits Of A Claim

The Second District's decision also ignores that an insurer has the same right as its insured to test the merits of a suit as to both the insured's liability and the extent of the third party's damages. As noted in Moradi-Shalal, "[w]hile liability may be reasonably clear, damages may not be, and an insurer is not necessarily required to accept whatever settlement demand is made by the third-party." Moradi-Shalal, 250 Cal. Rptr. at 129. This is because an insurer who is properly defending its insured is necessarily the adversary of the third party claimant. As explained by

the Maine Supreme Court in Linscott v. State Farm Mit. Auto. Ins. Co., 368 A.2d 1161 (Me. 1977):

> The pre-trial negotiations which may be conducted between a tort claimant and a defending insurance company are adversary in nature and, hence, will not give rise to a duty to bargain in good faith .... A "duty of good faith and fair dealing" in the handling of claims runs only to an insurance company's insured; it derives from a covenant implicit in the provisions of the insurance contract establishing the insurer as the authorized representative of the insured and is, therefore, without application for the benefit of the adversary third party tort claimant. Indeed, that the insurer is the representative of the insured logically imports that the third party tort claimant's status as the adversary of the insured renders him, ipso facto, the adversary of the insured's agent. Thus, prior to the establishment of legal liability, as the tort claimant has no legal right to require the tortfeasor to negotiate or settle, it likewise lacks right to require such action by his representative.

Id. at 1163-64.[2]

The Linscott analysis, in fact, is in perfect harmony with Florida law. As the court explained in Residential Ins. Co. v. Alliance Mortgage Co., 644 F. Supp. 339 (M.D. Fla. 1986), "the insurer has the right to completely control the

---

[2] See also Murray v. Mossman, 355 P.2d 985, 987 (Wash. 1960) ("[t]he duty of an insurance company to protect its insured in the settlement of claims cannot consistently be extended to one who is prosecuting a claim against the insured"); Hostetter v. Hartford Ins. Co., 1992 Del. Super. LEXIS 284, at *19 (July 13, 1992); Long v. McAllister, 319 N.W.2d 256, 262 (Iowa 1982); Kranzush v. Badger State Mut. Cas. Co., 307 N.W.2d 256, 263 (Wis. 1981); Herrig v. Herrig, 844 P.2d 487, 491 (Wyo. 1992); O.K. Lumber Co., Inc. v. Providence Washington Ins. Co., 759 P.2d 523 (Alaska 1988); Murphy v. Allstate Ins. Co., 132 Cal. Rptr. 424, 426-27 (Cal. 1976); Scroggins v. Allstate Ins. Co., 393 N.E.2d 718 (Ill. App. 1979); and Auclair v. Nationwide Ins. Co., 505 A.2d 431 (Rhode Island 1986).

defense and acts as the attorney-in-fact on behalf of the insured." Id. at 341 n. 3; see also Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491, 495 n. 2. (Fla. 3rd DCA 1989). In this circumstance, "[t]he relationship between the insurance company and the injured party (not its insured) is as adverse and arms length as the relationship between the tortfeasor and the injured third party." Dunn v. National Security Fire and Cas. Co., 631 So. 2d 1103, 1107 (Fla. 5th DCA 1993).

The ruling of the court below cannot be reconciled with the adversarial relationship that the Florida courts acknowledge exists between an insurer and a third party claimant. While the vast majority of claims are settled without dispute, disagreements about the merits and value of any given claim will necessarily arise between the insurer and the claimant. Indeed, if the third party's evaluation of the claim were beyond dispute, then the third party would be in a position to establish her rights by a motion for summary judgment.[3] In this case, the fact that Conquest failed to obtain a summary judgment shows the validity of the issues in dispute.

---

[3] It is a rare case, indeed, in which a plaintiff's recoverable damages for personal injury are indisputable. In this particular case, Conquest claimed that her damages were at least $300,000 (the limit of the Auto-Owners policy). After consideration of all the facts, however, a jury determined that Conquest's recoverable damages were $130,800.

The adversarial process protects both the insured's interests and the general public interest. Insurance spreads the cost of compensating victims of tortious injuries widely across the insurance-buying public. But for this very reason, the public has an interest in preventing payment of unjustified or excessive claims. The adversarial process accomplishes this goal. The legislature has established a strong public policy to protect the functioning of that process in cases where insurance is involved, in order to prevent inflation of claims and consequent increases in premiums. In particular, it has done this through its enactment of legislation forbidding injured parties to sue the insurers of the alleged tortfeasors in advance of the establishment of the insured's liability. Fla. Stat. § 627.4136.

The adversarial process thus protects the public at large from the costs of inflated judgments and settlements and the increased costs of insurance that would necessarily result. This requires the insurer be free to test the merits of a third party's demands. The insurer should not be hampered in its role as the insured's attorney-in-fact by the fear of "Monday morning quarterbacking" of the third party's attorneys. That, however, is precisely what will occur if the Second District's ruling is allowed to stand. Saddling the insurer with a duty to the claimant would effectively make the insurer both judge and jury of the insured's liability and

simultaneously subject the insurer to additional liability if it is wrong. If the insurer immediately settles a case for the amount demanded by the third party, it may deprive its insured of the benefits of the adversarial process; if it does not settle immediately, it may expose itself to another lawsuit for such refusal.[4]

C. Multiple Litigation And Drain On Judicial Resources

In Moradi-Shalal, 250 Cal. Rptr. 116, the court acknowledged that the existence of a third-party right of action against an insurer "promotes multiple litigation, ... indeed encourages, two lawsuits by the injured claimant: an initial suit against the insured, followed by a second suit against the insurer for bad faith refusal to settle." Id. at 124 (quoting Price, "Right To Direct Suit Against An Insurer By A Third Party Claimant" 31 Hastings Law Journal 1161).

Indeed, that is precisely what has happened here. Conquest took her case against the insured through trial and was compensated for her damages as determined by a jury. Now

---

[4] In essence, the court of appeal has created a new tort for "malicious defense." Courts nationwide have consistently refused to recognize such a tort for self-evident reasons. Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 729 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980) (Illinois law); Walasauage v. Nationwide Ins. Co., 633 F. Supp. 378 (E.D. Pa. 1986), aff'd, 806 F.2d 465 (3d Cir. 1986); Coleman v. Gulf Ins. Group, 226 Cal. Rptr. 90, 96 n.9 (Cal. 1986); Ritter v. Ritter, 46 N.E.2d 41, 44 (Ill. 1943); Wetmore v. Mellinger, 18 N.W. 870, 871 (Iowa 1884); Baxter v. Brown, 111 P.430, 431 (Kan. 1910); Smith v. Barrett, 788 P.2d 324, 326 (Mont. 1990); Johnson v. Walker-Smith Co., 142 P.2d 546, 548 (N.M. 1943); Wolf v. Wolf, 26 A.D.2d 529, 271 N.Y.S.2d 155 (N.Y. App. 1966); Terry v. Zachry, 272 S.W.2d 157, 159 (Tex. Civ. App. 1954); Abbott v. Thorne, 76 P. 302, 303-04 (Wash. App. 1904).

she's knocking on the courthouse door, asking for more. If the Second District's ruling is allowed to stand, Conquest will not be the last to do so. As one court astutely observed in refusing to recognize a third-party cause of action for failure to settle:

> [I]f she were allowed to maintain this suit, she would be setting the stage for a direct action by virtually any tort plaintiff against the defendant's insurer, for failure to settle a claim. This, the law of Maryland, or of any other state, will not tolerate, for reasons so obvious as to need no belaboring here.

King v. Government Employees Ins. Co., 843 F. Supp. 56 (D. Md 1994 (applying Maryland law).

There can be no doubt that "the public ultimately will be affected by the additional drain on judicial resources" that would inevitably flow should the Court endorse the new third party cause of action created by the court below. Moradi-Shalal, 250 Cal. Rptr. at 124. Every rejection of a settlement demand or perceived "delay" in settlement would potentially generate a secondary suit by the third-party claimant. As California experienced, the courts at all levels will become quickly entangled in defining the parameters of this newly-created third party cause of action.

At a time of unprecedented demands on our judicial system, Florida can ill-afford for its courts to become mired in the multiple, interminable litigation sanctioned by the court below.

D. Cost of Insurance

Another overriding concern in Moradi-Shalal was the fear that a third party cause of action for unfair claims practices would "tend to encourage unwarranted settlement demands by claimants, and to coerce inflated settlements by insurers seeking to avoid the cost of a second lawsuit and exposure to a bad faith action." Id. As a result, "the public will indeed suffer from escalating costs of insurance coverage, a certain result of inflated settlements and costly litigation." Moradi-Shalal, 250 Cal.Rptr. at 124.[5]

The concern expressed in Moradi-Shalal is not imaginary. Insurers bargain for and receive a premium calculated on an assessment of the risk and cost of defending and indemnifying insureds for covered claims. Insurers will now be forced to factor in the cost of a second action and the potential liability they will now face despite properly defending their insureds. Policyholders will pay more, but receive no benefit for the additional cost of their insurance.

In sum, there is nothing to be gained and much to be lost by permitting a third party to bring an action against an insurer who properly and faithfully defends its insured. The Court should reverse.

---

[5] This same concern lead the North Carolina Supreme Court to state "[w]e are slow to impose upon an insurer liabilities beyond those called for in the insurance contract. To create exposure to such risks except for the most extreme circumstances would, we are certain, be detrimental to the consuming public whose insurance premiums would surely be increased to cover them." Newton v. The Standard Fire Ins. Co., 229 S.E.2d 297 (N.C. 1976)

II. THE SECOND DISTRICT'S RULING CANNOT BE RECONCILED WITH FLORIDA COMMON LAW UNDER WHICH AN INSURER OWES NO SPECIAL DUTIES TO A THIRD PARTY CLAIMANT

Florida's law, in fact, is in accord with that of the rest nation. It is an established principle in Florida that an insurer's obligation to promptly, fairly and reasonably investigate, evaluate and settle claims runs solely to the insured. As the court explained in Dunn:

> At common law in Florida, the essence of a bad faith cause of action against an insurance company (whether brought by the insured or the injured party) is that the insurer breached its fiduciary duty owed to its insured by wrongfully refusing to defend its insured in the liability context, or by wrongfully refusing to settle the case within the policy limits, and exposing its insured to a judgment which exceeds the coverage provided by the policy.

Dunn, 631 So. 2d at 1106 (emphasis added). The corollary of this rule is that because the "insurer has no insurance contract with the injured third party [it] breaches no fiduciary duty with regard to that person, when it wrongfully refuses to settle a suit for its insured." Id. Rather "[t]he injured third party only has a derivative claim as the insured's stand-in." Id. (emphasis added).

Any doubt that Florida law does not devolve upon a third party any independent rights against an insurer dissipates in the face of this Court's decisions. To be sure, Florida is unique in holding that a claimant who recovers an excess judgment after an insurer improperly refused to settle within policy limits may sue the insurer directly to recover the

excess amount. Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971). Thompson, however, does no more than permit the claimant to recover the full judgment against the insured from the insurer, thereby relieving the insured of the obligation to satisfy the judgment. Stated simply, the claimant's rights rise no higher than and derive solely from those of the insured. Thus, if the insured has suffered no damage, as in this case, neither the insured nor the claimant/judgment creditor has any right to sue the insurer.

More importantly, Florida permits a direct action by a judgment creditor for the benefit of insureds who have been damaged by an insurer's breach of its duties, not for the benefit of third parties. As this Court recently observed, Thompson "did not extend the duty of good faith by the insurer to its insured to a duty of an insurer to a third party." McLeod v. Continental Ins. Co., 591 So. 2d 621, 625 (Fla. 1992). To the contrary, the Court explained that:

> Thompson did not remove the requirement that recoverable damages be sustained by the insured as a result of the bad faith conduct of the insurer. It merely allowed the judgment creditor to step into the shoes of the insured and bring an action without an assignment by the insured. The purpose of the suit is to remove the burden of the excess judgment from the shoulders of the insured, not to compensate the injured party for damages arising from the underlying occurrence. Had the insured not sustained any damage as the result of the insurer's bad faith, the judgment creditor would not have had a bad faith cause of action against the insurer.

Id. at 625 n. 6. (emphasis added).

Thus, there is no real question that Florida, like the rest of the nation, recognizes that the third party claimant, who is a stranger to the insurance contract, has no basis upon which to expect or demand any special rights or duties from an insurer. More importantly, it is indisputable that under Florida law an insurer owes a fiduciary duty to its insured.

Undoubtedly, common law and statutory law need not be co-extensive. The legislature can create new duties and liabilities not recognized in the common law. Nevertheless, statutory obligations and common law duties must be in harmony. An insurer's duty of good faith owed to its insured, cannot be reconciled with the Second District's view that an insurer also has statutory duties to the insured's adversary. An insurer cannot honor one without breaching the other.

In this circumstance, the Second District's ruling that section 624.155 establishes a third-party cause of action cannot survive scrutiny.

III. THE LEGISLATURE CONFIRMED THE COMMON-LAW RULE THAT AN INSURER HAS NO DUTY INDEPENDENT DUTY TO A THIRD-PARTY CLAIMANT

Contrary to the conclusion of the Second District, the legislature did not create a new third-party cause of action when it enacted section 624.155. Rather, with respect to liability insurance, the legislature merely codified the common law duties an insurer already owed to its insured and provided for an election of either the common law or statutory

remedy. Fla. Stat. § 624.155(7) (requiring election of remedy).

The legislature's intent is plainly evidenced by section 627.4136(2) which provides that "[n]o person who is not an insured under a liability insurance policy shall have any interest in such policy, either as third-party beneficiary or otherwise, prior to first obtaining a settlement or verdict against a person who is an insured." This statute reflects the Florida common-law principle that a third party has no relationship to another's insurer other than as adversary and no rights against that insurer other than those that derive solely from the insurer's obligation to settle claims and pay judgments on the insured's behalf. When this statute is read in conjunction with section 624.155, it becomes all the more apparent that the Second District erred.

Section 624.155(1) provides that "[a]ny person may bring a civil action against an insurer when such person is damaged" by conduct described in subdivisions (a) or (b). Subdivision (b) proscribes, in pertinent part, the following conduct by an 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 in good faith toward its insured and with due regard to his interests; . . .

Subdivision 1 does two things: it codifies an insurer's common law duty to act in good faith to protect its insured from excess liability on third party claims and it extends the

duty of good faith to the handling of the insured's own claims where the common law had imposed no such duty. See, e.g., Hollar, 572 So. 2d at 939. This is plainly the meaning of this Court's statement in McLeod that "Section 624.155 does not differentiate between first-party and third-party actions and calls for recovery of damages in both instances."[6] McLeod, 591 So. 2d at 623.

The Second District acknowledged that this subdivision is intended solely to protect the interests of the insured and creates no duty to a third-party claimant. Conquest, 637 So. 2d 40; see, also, Dunn, 631 So. 2d at 1107. Nevertheless, the court held that Conquest could make a claim under § 624.155(1)(a). That subdivision makes certain unfair claim practices actionable. The specific provisions which the Second District concluded supported Conquest's suit are the following provisions of subdivision 3 of § 626.9541(1)(i):

> a. Failing to adopt and implement standards for proper investigation of claims;
>
> c. Failing to acknowledge and act promptly on communications with respect to claims;
>
> d. Denying claims without conducting reasonable investigations based upon available information;

---

[6] Contrary to the views of the court below and the contentions of Conquest, this statement offers no support for creation of a third-party cause of action. See, McLeod, 591 So. 2d at 625 n. 6 (third party has no claim against insurer absent damage to the insured).

Viewed against the legislature's express statement that a third party has no interest of any kind in an insurance contract prior to obtaining a settlement or judgment against the insured and its adoption of the rule that an insurer's duty to settle runs only to the insured, these provisions cannot be properly read to create any right of action in a third party. Fla. Stat. §§ 627.4136(2), 624.155(1)b1.

The provision upon which the court below rested its ruling plainly address an insurer's conduct in the handling of pending claims. To hold, as did the Second District, that an insurer's obligations under these provisions run to a third party has one of two effects, neither of which is legally sustainable. First, because an insurer's obligation to investigate and handle claims in good faith ultimately derive from the insurance contract, the Second District's analysis effectively gives a third party an interest in the policy before a settlement or judgment against the insured has been obtained. Cf. Watson, 876 S.W.2d 145 (obligations imposed by unfair claims practices act are engrafted onto the contract between insurer and insured). This is directly contrary to section 627.4136(2).

Alternatively, under the Second District's ruling, the claims handling provisions of the unfair claims practices statutes effectively operate as ex post facto laws. The Second District's decision subjects an insurer to liability to a third party who has obtained a judgment against the insured

(fully satisfied by the insurer) for conduct that occurred before the third party acquired any interest in the policy. That is precisely what Conquest is attempting to do here.

Conquest's claim also cannot succeed because she does not allege that any failure to investigate[7] or to respond to communications damaged her in any way except insofar as it resulted in a failure to settle. As noted above, however, section 624.155(1)(b) expressly governs an insurer's duty to settle and specifically provides that this duty runs only to the insured. The generalities of section 626.9541(i)3 cannot be permitted to erode the specific legislative decision to preserve an insurer's common-law right to treat third parties as adversaries. Absent some allegation of damage resulting from something other than a failure to settle, there can be no viable third party action based on section 626.9541.

IV. THE SECOND DISTRICT'S RELIANCE ON THE "ANY PERSON" TERM DISREGARDS THE PURPOSE OF THE UNFAIR CLAIMS PRACTICES ACT

The Second District decision rests entirely on the following syllogism: (1) section 624.155(1) provides that "[a]ny person may bring a civil action against an insurer when such person is damaged;" (2) Conquest is a person; and, therefore, (3) Conquest has standing to sue under the unfair claims practices act. This analysis is fundamentally flawed.

---

[7] Conquest treats investigation inconsistently, arguing both that Auto-Owners failed to investigate and that it was unreasonable in failing to settle despite full knowledge of the strength of her claim.

The Second District clearly failed to give due weight to two fundamental principles of statutory construction: (1) "Statutes should be construed to harmonize with existing law;" and (2) "Statutes intending to alter established case law must show that intention in unequivocal terms." Hollár v. International Bankers Ins. Co., 572 So. 2d 937, 939 (Fla. 3d DCA 1990) (finding section 624.155 codified, rather than limited, the rights of insureds to recover for an insurer's failure to protect them from an excess judgment). As discussed above, imposing upon insurers any duty for the benefits of the insured's adversary cannot be harmonized with Florida's established common law. Nor is there anything in the statutes at issue which evince any unequivocal intention to subject insurers to an entirely new liability to third parties.

The Third District understood that legislative intent must be determined from consideration of the statute as a whole. Cardenas, 538 So. 2d at 495 (citing Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So. 2d 522 (Fla. 1973)). The Cardenas court recognized that when the entire unfair practices act is analyzed in this manner, the term "any person" cannot be properly read to mean a third party such as Conquest who is a stranger to the insurance contract. Indeed, the court found that to hold otherwise "would achieve an unreasonable result" and cause "'undesirable

social and economic effects." Id. at 496 (quoting Moradi-Shalal, 250 Cal. Rptr. at 123.)

The Texas Supreme Court confronted the same issue in Watson, 876 S.W.2d 145. The Texas unfair claims practices act, like Florida's, is worded as providing a cause of action to "any person." Id. The Texas Supreme Court, like the court in Cardenas, declined to construe the statute as creating a third party cause of action, "absent an explicit directive from the legislature." Id. In the court's analysis, a third party cause of action did not and could logically follow from a statutory scheme which had its origin in the "special relationship" between the insurer and the insured. To sanction such a cause of action would "compromise the insurer's loyalties and obligations owed to the insured." Id.

The Cardenas and Watson analyses are compelling. To adopt the view of the Second District, this Court would have to assume that the legislature, with full knowledge of an insurer's fiduciary obligations to its insured and its adversarial relationship to the third party, nevertheless intended to subject insurers to liability for honoring their duties to their insureds. The Court would likewise have to presume that by its use of two words --"any person" -- the legislature chose to disregard the public interest. The Court should not do so.

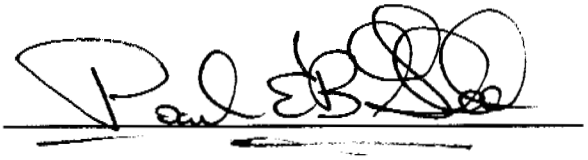
V. CONCLUSION

For each of the foregoing reasons NAII and Allstate respectfully urge the Court to reverse the decision of the Second District Court of Appeal and hold that a third party has no right of action pursuant to section 624.155(1).

Dated: August 15, 1994

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL
Paul E. B. Glad, Esq.
William T. Barker, Esq.
John Leland Williams, Esq.

By: 

Paul E. B. Glad

Attorneys for amici curiae
NATIONAL ASSOCIATION OF
INDEPENDENT INSURERS and
ALLSTATE INSURANCE COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: K. JACK BREIDEN, Esquire, 3101 Terrace Avenue, Naples, Florida 33942; JOEL D. EATON, Esquire, Podhurst, Orsck, et al., 800 City National Bank, 25 W. Flagler Street, Miami, Florida 33130-1720; RAYMOND T. ELLIGETT, JR., Esquire, Schropp, Buell & Elligett, P.A., Landmark Centre, Suite 2600; and LISA A. OONK, Esquire, Butler, Burnette & Pappas, Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458 by U.S. Mail this 15th day of August, 1994.

John Leland Williams