IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,827

AUTO-OWNERS INSURANCE CO.,

Petitioner,

vs.

BONITA CONQUEST,

Respondent.

_____/

ON CERTIFIED CONFLICT FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF POSITION OF RESPONDENT

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I.
ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S ACTION ON THE GROUND THAT THE CIVIL REMEDY PROVIDED BY §624.155, FLA. STAT., IS AVAILABLE ONLY TO "FIRST-PARTY CLAIMANTS," AND NOT TO "THIRD-PARTY CLAIMANTS" DAMAGED BY AN INSURER'S "BAD FAITH."

The issue presented here is a straightforward legal question: is the civil remedy provided by §624.155, Fla. Stat., available only to "first-party claimants," as the Third District held in *Cardenas v. Miami-Dade Yellow Cab Co.*, 538 So.2d 491 (Fla. 3d DCA), *review dismissed*, 549 So.2d 1013 (Fla. 1989), or does it extend to "third-party claimants" damaged by the "bad faith" of an insurer as well, as the district court held in the decision under review? We hope to persuade the Court that *Cardenas* was wrongly decided, and that the remedy provided by the statute *is* available to third-party claimants like the plaintiff in this case. We also hope to persuade the Court that, although the district court was correct in disagreeing with *Cardenas*, the limitation which it placed upon the availability of third-party "bad faith" actions was unjustified in light of the language of the statute. Our argument will therefore be in two sections. We will address the error of *Cardenas* first.[1/]

A. *Cardenas* was wrongly decided.

Unfortunately, the facts in this case represent only one small portion of the much

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[1/] The Fifth District has recently weighed in with an even different construction of the statute, holding that §624.155 provides a remedy to third-party claimants for some of their consequential damages, but not for others. *See Dunn v. National Security Fire & Casualty Co.*, 631 So.2d 1103 (Fla. 5th DCA 1993). To the extent that this decision rejects *Cardenas*' blanket elimination of *all* third-party claims, we agree with it. To the extent that it sides with *Cardenas* in eliminating some third-party damage claims from the reach of the statute, however, we disagree with it. Because our disagreement with *Dunn* will be sufficiently addressed by our disagreement with *Cardenas*, we will not separately address it in the text.

broader problem which we believe §624.155 was designed to cure, so they do not fully illuminate the problem. A brief introductory discussion of the more general problem may therefore be helpful to the Court in focusing upon the issue presented here. When the settlement value of a plaintiff's case is below or near the defendant's policy limits, there is very little motivation for the defendant's liability insurer to act in good faith toward anyone.[2/] In that circumstance, the insurer may simply stonewall the plaintiff for however long it takes to make preparation of the case so expensive that it might be abandoned (which occasionally happens), or it can make a low-ball offer as the long-delayed day of reckoning approaches, in the hope that the plaintiff, who is now broke, worn down, and concerned that the defendant intends to fight to the bitter end, will capitulate in favor of a certain recovery of at least something (which happens more frequently); and if that ploy is unsuccessful, it may simply tender a reasonable settlement offer as jury selection begins, in the knowledge that few plaintiffs in this situation can reasonably refuse such an offer. It may even roll the dice by forcing the plaintiff to trial, with the knowledge that the verdict will not likely exceed the reasonable settlement offer which it should have made earlier, as the defendant-insurer did in the instant case.

An insurer rarely loses anything by this tactic (and will frequently gain by holding on to its money as long as possible). The costs to the system are enormous, however. Settlements and recoveries are delayed. Victims are deprived of their recoveries for substantial periods of time. They lose the use of the money they should have had years

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[2/] By this qualification, we mean to exclude those cases in which the defendant is potentially exposed to a judgment considerably in excess of the policy limits. In that situation, the potential for recovery of the excess judgment from the insurer in a common law "bad faith" action brought by the plaintiff is generally enough (at least in theory) to motivate the insurer to act in good faith. The instant case involves the far more common occurrence where the settlement value of the plaintiff's claim does not exceed the defendant's policy limits, and the discussion which follows will be limited to those types of cases.

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earlier, and their credit standing may even be destroyed in the process. They incur enormous expenses in preparing for trial, which reduce their recoveries further. The limited assets of the judiciary are regularly squandered by the extensive pre-trial maneuvering characteristic of such cases -- maneuvering which ultimately contributes next to nothing to their ultimate resolution when they are settled on the eve of trial. And, of course, the limited assets of the judiciary are fully squandered when an insurer chooses to roll the dice instead of making a reasonable settlement offer, and the verdict ultimately approximates what the insurer should have offered years earlier.

In its relentless pursuit of so-called "tort reform," the insurance industry is fond of blaming all of these unfortunate aspects of "the system" on the plaintiffs' bar. As the facts of the general problem outlined above readily demonstrate, however, a great deal of the blame lies squarely at the self-interested feet of liability insurers -- and putting some teeth into the settled legal obligation to act in good faith in settling legitimate claims, whether large or small, would go a long way toward ridding the system of many of its present evils.

It was to that end, we believe, that the legislature enacted §624.155, which reads in pertinent part as follows:

> **624.155 Civil remedy.--**
>
> (1) *Any person* may bring a civil action against an insurer when such person is damaged:
> (a) By a violation of any of the following provisions by the insurer:
> 1. Section 626.9541(1)(i), (o), or (x);
> 2. Section 626.9551;
> 3. Section 626.9705;
> 4. Section 626.9706;
> 5. Section 626.9707; or
> 6. Section 627.7283.
> (b) By the commission of any of the following acts by the insurer;
> 1. Not attempting in good faith to settle claims when, under

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> 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;
>
> 2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
>
> 3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
>
> Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice. . . .

Section 624.155, Fla. Stat. (1993) (emphasis supplied).

In our judgment, the phrase "any person" cannot legitimately be read to mean "some persons (like first-party claimants), but not others (like third-party claimants)." As the Third District squarely held in *Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc.*, 541 So.2d 738, 739 (Fla. 3rd DCA), *review denied*, 548 So.2d 662 (Fla. 1989), the word "any" is *unambiguous* -- and it means "'either,' 'every,' or 'all'," and "'[o]ne or another without restriction or exception'."[3/] If that is what the word "any" means, then the unambiguous phrase "any person . . . damaged" simply must mean "every person or all persons, without exception, who are damaged" -- and §624.155 therefore simply must create a civil remedy for *any* person damaged by a liability insurer's failure to attempt in good faith to settle a claim, whether first-party, third-party, or other, including the plaintiff in the instant case.

[3/] In addition, *see Post-Newsweek Stations, Florida, Inc. v. Doe*, 612 So.2d 549 (Fla. 1992), in which the phrase "any person" in Rule 3.220(m), Fla. R. Crim. P., is given the same expansive meaning. *See also Opperman v. Nationwide Mutual Fire Insurance Co.*, 515 So.2d 263 (Fla. 5th DCA 1987), *review denied*, 523 So.2d 578 (Fla. 1988).

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Nevertheless, the Third District held in *Cardenas v. Miami-Dade Yellow Cab Co.*, 538 So.2d 491 (Fla. 3rd DCA), *review dismissed*, 549 So.2d 1013 (Fla. 1989), that §624.155 creates a civil remedy *only* for first-party claimants, and *not* for third-party claimants.[4/] This decision may be distinguishable from the instant case, since it only denied a third-party claimant the right to sue a defendant's liability insurance carrier *during the pendency of the underlying lawsuit*, and "[did] not address the issue of whether an injured third party can bring suit against an insurer under the statute after having reached a settlement with the insured defendants" (which is essentially the situation presented in the instant case, except that the plaintiff was required to proceed to judgment against the defendant's insured). 538 So.2d at 496 n. 5. The language which the Court used to dispose of the principal question in the text leaves little doubt as to how the question reserved in the footnote would be resolved, however, so we can take little comfort from the fact that the issue presented here was technically left open in *Cardenas*. Instead, we perceive that our task here is to convince the Court that *Cardenas* was wrongly decided.

First, we note that the Court went to great lengths in *Cardenas* to "interpret" and "construe" §624.155 to determine the legislative "intent" behind the phrase "any person." That would have been appropriate, of course, if the word "any" were ambiguous; according to the *first* rule of statutory construction, however, that was inappropriate if the word was *unambiguous*:

> Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. The plain and obvious provisions must control. Rules of statutory construction should be used only in case of doubt and should never be used

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[4/] The decision was certified to this Court as presenting a question of great public importance. Unfortunately, the case was settled by the parties before the question was answered, so it was dismissed rather than decided.

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> to create doubt, only to remove it.
>
> If the language of the statute is clear and admits of only one meaning, the legislature should be held to have intended what it has plainly expressed. There is no room for construction, and no necessity for interpretation. The only proper function of the court is to effectuate the legislative intent.
>
> When the language of a statute is both clear and reasonable and logical in its operation, the court should not search for excuses to give a different meaning to words used in the statute, nor should the court speculate as to what the legislature intended. Thus, the court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications.

49 Fla. Jur.2d, *Statutes*, §111 (and numerous decisions cited therein). As we noted at the outset of our argument, the Third District has elsewhere held -- in *Acceleration National Service Corp., supra* -- that the word "any" is *unambiguous*, and that it means "all, without exception." Most respectfully, the two decisions cannot be reconciled with each other, and one of them simply has to be wrong.

More importantly, we do not believe the Third District read far enough in §624.155 before concluding that the phrase "any person" was meant to exclude third-party claimants. The very statute which the Court purported to construe in *Cardenas* -- the 1987 version, which was only partially quoted in the Court's opinion -- contained the following provision:

> (2)(a) As a condition precedent to bringing an action under this section, the department and the insurer must have been given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period shall not begin until a proper notice is filed.
>
> (b) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:
>
> . . . .

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> 4. Reference to specific policy language that is relevant to the violation, if any. *If the person bringing the civil action is a third-party claimant*, he shall not be required to reference the specific policy language if the insurer has not provided a copy of the policy to the *third party claimant* pursuant to written request.

(Emphasis supplied).[5/]

Most respectfully, in our judgment at least, this provision makes it crystal clear that the legislature intended the phrase "any person" to include third-party claimants, because there would have been no reason whatsoever to include it if the phrase "any person" meant only first-party claimants. We also note that the "Legislative Staff Report issued with Section 624.155 stated that '[t]his section could be activated after the filing of a third-party suit by an amendment to the complaint'" -- which is an *express* legislative recognition that third-party claims were contemplated by the legislature. *Fortson v. St. Paul Fire & Marine Ins. Co.*, 751 F.2d 1157, 1160 (11th Cir. 1985).

We also take issue with the Court's insistence in *Cardenas* that an insurer's duty to exercise good faith is owed only to its insured. When "bad faith" actions were first recognized in the jurisprudence of this nation, that was certainly the prevailing sentiment (or at least the rationale upon which recognition of the concept was bottomed), and an assignment of the insured's cause of action for "bad faith" was therefore necessary for the third-party to sue the insurer directly for its handling of the claim. Later, however, the courts recognized that this "conveyance" was an unnecessary formalism; that the plaintiff in the lawsuit was actually a "third-party beneficiary" of the liability insurance contract; that the insurer therefore owed a duty of good faith to both its insured and the plaintiff; and that

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[5/] This provision was added to the statute by Ch. 87-278, §1, Laws of Florida, and it remains in the statute today. Prior to that amendment, the statute contained no reference to "third-party claimants." Perhaps the Third District was inadvertently working off a copy of the unamended 1985 version of the statute when it decided *Cardenas* in 1989.

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a third-party action for "bad faith" could therefore be brought directly against the insurer by the plaintiff, without the need of an assignment. *See, e. g., Thompson v. Commercial Union Insurance Co. of New York*, 250 So.2d 259 (Fla. 1971).

In fact, the existence of a "duty" running directly from the insurer to the plaintiff is explicit in *Thompson's* quotation from *Auto Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938):

> "Upon the principle of law well established and long recognized, where a person engages another, for a valuable consideration, to do some act for a benefit of a third, the latter who would enjoy the benefit of the act may maintain an action for the breach of such engagement, the law operates upon the acts of the parties, creates a duty, establishes a privity and implies the promise and obligation. We therefore hold that the plaintiff to this suit is within the benefits of the policy sued upon and has a right to maintain this suit."

Thompson, supra at 261. And because such a third-party lawsuit can only be based on the breach of a duty owing directly to the third-party, we must respectfully disagree with *Cardenas'* conclusion that an insurer's duty of good faith is owed *only* to its insured.

We also think that there is a conceptual problem which has plagued discussion of this question through the ages, and which continues to infect the discussion today. "Bad faith" actions were initially conceived by the judiciary as a means to prevent insurers from gambling with their insureds' assets when defending lawsuits against them -- by rolling the dice in large cases on the off chance that they might escape liability altogether, with knowledge that they had nothing to lose beyond their coverage limits in any event and only their insureds would suffer the loss of an "excess judgment." The duty to prevent an "excess judgment" of this sort can *only* be owed to the insured, of course, and because this was the rationale for initial invention of "bad faith" suits, it continues to be the principal rationale for such suits today.

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But the fact that the duty to exercise good faith toward an insured to prevent an "excess judgment" in a third-party lawsuit may be owed only to the insured does not mean that there can be no broader duty of good faith owed to other claimants caught up in a controversy with an insurer, like the insured himself or a third-party claimant. Although the common law never recognized such duties, perfectly valid arguments (like the ones we are making here) can be made for the recognition of such duties -- to prevent insurers from acting in "bad faith" towards their own first-party claimants, and to prevent insurers from stonewalling third-party claimants in "bad faith" in cases where no real threat of an "excess judgment" exists.

In any event, however the common law may have circumscribed the duty of good faith, the fact remains that the legislature could permissibly extend the duty to third parties if it wished, so any limitations on the concept which might have been lurking in the common law were simply not valid reasons for construing the phrase "any person" to mean something considerably less than it plainly states. After all, the common law was persistent in its refusal to recognize first-party "bad faith" actions[6/] until the legislature rectified the problem with §624.155, so it should take no great leap of faith to conclude that the legislature also meant to overturn any limitations upon the concept of "duty" which might have been lurking in the decisional law with respect to third parties, with the very same statute.

More importantly still, as the facts in the instant case readily demonstrate, whether the defendant-insurer owed a "duty" of good faith directly to the plaintiff or not, the fact remains that the "bad faith" which it exercised toward its insured during the five-year period in which it refused to negotiate in good faith (and in which it required its insured to stand trial rather than negotiate a reasonable settlement of the claim against its insured) *damaged*

[6/] *See Baxter v. Royal Indemnity Co.*, 285 So.2d 652 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d 725 (Fla. 1975).

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the plaintiff, not its insured. In our judgment, the legislature could have permissibly concluded that the remedy should belong to the person damaged by the "bad faith," irrespective of where the duty was owed. In addition, it is also a fact that, if the plaintiff had recovered a judgment of $300,001.00 against the defendant's insured, she could then have maintained a "bad faith" action against the defendant to recover not only the $1.00 "excess judgment," but the other damages she is claiming in this lawsuit. *See Dunn v. National Security Fire & Casualty Co.*, 631 So.2d 1103 (Fla. 5th DCA 1993).

In our judgment, the legislature could have permissibly concluded that forcing a plaintiff to recover a judgment in excess of policy limits in order to obtain full compensation for all the additional damages caused by the insurer's "bad faith" had little to commend it, in logic or policy -- and that the more appropriate solution would be to allow a plaintiff damaged by the "bad faith" of an insurer to settle the underlying claim with the defendant (or try it to verdict) within the coverage limit, and then recover the additional damages caused by the "bad faith" in a subsequent, direct action against the insurer. According to *Cardenas*, however, the legislature meant that persons situated like the plaintiff must either refuse a pre-trial tender of a reasonable settlement offer and go to trial to protect their right to full compensation, or accept the tender and simply swallow the additional damages caused by the insurer's "bad faith." That is, of course, a Hobson's Choice of the worst kind, which the legislature may very well have intended to eliminate by creating a straightforward civil remedy for "any person . . . damaged" by the "bad faith" of an insurer -- and nothing which the Court said in *Cardenas* about where the "duty" is owed convinces us otherwise.

We also take issue with the "policy" reasons which the *Cardenas* Court purported to muster to support its narrow "construction" of §624.155:

> Finally, assuming, arguendo, that the words "any person" are read in isolation from the rest of section 624.155, interpreting those words to include an injured third party would achieve an

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> unreasonable result in that permitting a third party such a cause of action against the insurer any time the insurer allegedly failed to settle in good faith could result in "undesirable social and economic effects . . . (i. e., multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other 'transaction' costs)." . . .

Cardenas, supra at 496.[7/]

Most respectfully, however weighty these "social and economic effects" may be, the fact remains that all of them are *equally* implicated by the recognition of *any* type of "bad faith" action -- whether (1) by a first-party claimant under §624.155, or (2) by a third-party claimant seeking recovery of an "excess judgment" under the common law, or (3) by the type of third-party claim in issue here -- so they provide no valid reasons for *distinguishing* one type of "bad faith" action from another, recognizing some, and refusing to extend recognition to another. Moreover, since two of these three types of "bad faith" actions are clearly available under Florida law, it would appear that these potential "social and economic effects" have long been discounted by Florida courts as far less weighty than the compelling need to motivate liability insurers to act in good faith; and the *Cardenas* Court's resort to them to withhold recognition of the third type of "bad faith" action in issue here was therefore contrary to what appears to be the settled "public policy" of this state where all other types of "bad faith" actions are concerned -- which brings us to our final quibble with the decision.

We have searched the *Cardenas* decision in vain for any discussion of the "undesirable social and economic effects" which would result from *refusing* to recognize a

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[7/] This observation was borrowed from a California decision (which was the obvious motivation for the conclusion reached in *Cardenas* and many of the other decisions relied on by the defendant here). The Court should note that the California court was being asked to "imply" a remedy from a statute which created no remedy; it was not being asked to enforce an express statutory remedy provided to "any person . . . damaged" by the "bad faith" of an insurer, as §624.155 explicitly provides.

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remedy for the type of "bad faith" claim in issue here. The Court did not state that there would be no such effects; it simply failed to acknowledge them. The undesirable effects of "no remedy" cannot fairly be overlooked, however, because, as the facts in the instant case readily demonstrate, the settled legal obligation to attempt settlement of legitimate claims in good faith can amount to no obligation at all in many cases, if it cannot be enforced by the person actually damaged by its breach. It is therefore entirely possible -- indeed, we think it is highly probable -- that, in enacting §624.155, the legislature weighed the various "undesirable social and economic effects" which would attend recognition of the type of "bad faith" action in issue here, and found the compelling need to put some teeth into the obligation to act in good faith far more weighty, and that a civil remedy for "bad faith" should therefore be extended to "any person . . . damaged" by the "bad faith" of an insurer. Policy judgments like that are, after all, the legislature's very function. Most respectfully, for all of the foregoing reasons, we do not believe that *Cardenas* was correctly decided.

We should also note that, in addition to the decision under review here, there have been some other subsequent developments which call *Cardenas* into considerable doubt. The most notable of these developments is this Court's recent decision in *McLeod v. Continental Insurance Co.*, 591 So.2d 621 (Fla. 1992). Although the issue in that case was the measure of damages in a first-party "bad faith" action brought under §624.155, this Court also addressed the point in issue here. First, the Court explained the difference between first-party and third-party "bad faith" actions as follows:

> A first-party action is one in which the insured is also the injured party who is to receive the benefits under the policy. In contrast, a third-party action is one in which a third-party injured, not the insured, is entitled to the benefits under the policy as the result of the insured's tortious conduct.

591 So.2d at 623 n. 3.

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This Court then went on to announce, in effect, that *Cardenas* was wrongly decided: "Section 624.155 does not differentiate between first- and third-party actions and calls for the recovery of damages in both instances." 591 So.2d at 623. *See Brookins v. Goodson*, 19 Fla. L. Weekly D1535, D1536 (Fla. 4th DCA July 20, 1994) (" . . . Section 624.155 does not distinguish betewen first party and third party bad faith [claims] . . ."; citing *McLeod*). As a technical matter, of course, this announcement is a dictum (which is why we resisted the temptation to quote it in italics for the emphasis it deserved here). It is the unambiguous and authoritative dictum of *this* Court, however, and we take it that it was not lightly penned. Most respectfully, if this Court meant what it plainly said in *McLeod*, dictum or not, *Cardenas* was wrongly decided.

Another recent development deserves to be noted here -- the Fourth District's decision in *Lucente v. State Farm Mutual Automobile Insurance Co.*, 591 So.2d 1126 (Fla. 4th DCA), *review denied*, 601 So.2d 552 (Fla. 1992). In that case, because a potential tort defendant's liability insurer failed to provide the potential tort plaintiff with pre-suit verification of its insured's coverage, the potential tort plaintiff filed suit against the insurer seeking damages for its "unfair claim settlement practices." The suit was dismissed. On appeal, the district court held (citing *Cardenas*) that, to the extent that the suit was bottomed upon §624.155, it was premature -- that the potential tort plaintiff could not maintain a "bad faith" action against the insurer until such time as he sued the insured on the underlying tort and that litigation was concluded. Implicit in this holding, of course, is its necessary corollary -- that a third-party "bad faith" action *will* lie against an insurer after the underlying lawsuit is concluded.[8/] Most respectfully, because the plaintiff in this case did sue the defendant's

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[8/] The United States Court of Appeals for the Eleventh Circuit has reached essentially the same conclusion reached in *Lucente*, in *Fortson v. St Paul Fire & Marine Ins. Co.*, 751 F.2d 1157 (11th Cir. 1985).

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insured, and that litigation was concluded before the instant action was filed, *Lucente* fully supports the plaintiff's position here, and it is in direct conflict with the essential thrust of *Cardenas*.

Although *Lucente* supports the plaintiff's position here, our function as an amicus curiae requires us to alert the Court to our disagreement with the *rationale* upon which the decision was based, so that this Court does not make the same mistake. In reaching the conclusion that a third-party "bad faith" action will lie only after the underlying lawsuit is concluded, the *Lucente* Court imported the non-joinder statute -- §627.7262, Fla. Stat. -- as a limitation upon third-party actions brought under §624.155. We believe this was an error, and that the non-joinder statute has no relevance whatsoever to the issue presented here.

The non-joinder statute prevents a direct action by a plaintiff against a defendant's liability insurer *to enforce the insurance policy and recover the benefits due under the policy*, until judgment is first obtained against the defendant on a cause of action *covered* by the policy. That limitation upon the reach of the non-joinder statute is explicit in the statute itself:

> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a judgment against a person who is an insured under the terms of such policy *for a cause of action which is covered by such policy*.

Section 627.7262(1), Fla. Stat. (emphasis supplied). As a result of this statute, to recover from the defendant-insurer the $130,800.00 in damages caused by the defendant's insured, the plaintiff had to sue the defendant's insured first, and could not join the defendant-insurer in that suit.

However (and this is an important however), the "bad faith" action which is in issue here is *not* a "cause of action covered by [the] policy" which the defendant issued to

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indemnify its insured against the consequences of the insured's tortious conduct; it is an action to redress the separate conduct of the insurer which caused damage which is *uninsured* (i. e., not covered) by the policy, and it is therefore an entirely separate and distinct cause of action than the one governed by the non-joinder statute. As a result, the non-joinder statute and §624.155 deal with entirely separate and distinct causes of action, and there is no justification whatsoever for reading the non-joinder statute into §624.155 as a limitation upon the type of third-party action which will lie for the separate and distinct "bad faith" cause of action created on behalf of third-party claimants by the latter statute.

In short, although *Lucente* fully supports the plaintiff's position in this case, since the plaintiff did obtain a judgment against the defendant's insured, it erroneously denies the remedy provided by §624.155 to all third-party claimants who have suffered damages as a result of an insurer's "bad faith," but who have settled their separate "covered" claim short of a trial to judgment. We respectfully submit that such a limitation should not appear in the Court's opinion in the instant case -- that, if the Court should determine (as *McLeod* states) that the phrase "any person" in §624.155 includes third-party claimants, it should hold that the phrase includes *all* third-party claimants, and that the limitation imposed by the non-joinder statute applies *only* to a cause of action "covered" by an insurer's policy and not to a "bad faith" action brought directly against the insurer for its own misconduct under §624.155. Most respectfully, for all of these reasons, *Cardenas* was wrongly decided.

B. The limitation imposed by the district court's decision is unjustified.

To the extent that the district court's decision disagrees with the limiting "construction" placed upon §624.155's phrase "any person" by the *Cardenas* Court, the decision should be approved. The district court's decision contains its own limiting "construction," however, which we believe to be unjustified. According to the district court, no third-party

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"bad faith" action will lie under §624.155 to the extent that it is bottomed upon §624.155(1)-(b)1., because the duty of good faith expressed in that subsection of the statute runs only to the insured. We have previously expressed our disagreement with that reading of the statute, so we will not belabor it. We point out simply once again that the duty of good faith runs to the third-party as well, else there could be no such thing as a third-party action to recover both an excess judgment *and other consequential damages* -- and such an action plainly exists. *See Dunn v. National Security Fire & Casualty Co.*, 631 So.2d 1103 (Fla. 5th DCA 1993). In addition, the civil remedy created by the statute inures to the benefit of "any person . . . damaged" by the "bad faith" of an insurer, so a breach of an insurer's duty of good faith which *damages* a third party ought to be actionable, even if the duty is technically owed only to the insured.

In any event, even if the district court correctly limited third-party "bad faith" actions brought under the statute to an insurer's violations of the specific statutes listed in §624.155-(1)(a), we believe that the district court actually validated third-party "bad faith" actions bottomed upon §624.155(1)(b)1. in a roundabout way, without realizing it. We reach this conclusion because the first statute listed in §624.155(1)(a) is §626.9541(1)(i), which is a "laundry list" of "unfair claim settlement practices" -- a list which includes a number of acts which, if committed, would meet the classic definition of "bad faith." The district court apparently concluded that allowing a third-party "bad faith" action under §624.155(1)(a) for committing any of the acts enumerated in §626.9541(1)(i) would be *different* and much more *limited* than recognizing a third-party "bad faith" action bottomed upon §624.155(1)(b)1., because proof of a violation of §626.9541(1)(i) requires proof not merely of an act of "bad faith," but additional proof that the act is "committ[ed] or perform[ed] with such frequency as to indicate a general business practice . . . ." Section 626.9541(1)(i)3. In our judgment, however, this limitation is unjustified by the language of §624.155.

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Most respectfully, the district court did not read far enough in the statute. The pertinent portion of §624.155 is quoted verbatim at pages 3-4, *supra*, in exactly the form in which it appears in the Florida Statutes. As the Court will observe, the concluding paragraph of subsection (1) reads as follows:

> Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

Because this paragraph is unnumbered and purposefully set apart by spacing from what goes before, it is clear that it modifies the entire subsection (1) of the statute, and not merely subsection (1)(b) of the statute. And if that were not clear enough as a matter of form, it is clear as a matter of substance, for two reasons. First, the paragraph expressly refers to "a person pursuing a remedy *under this section*," which is a reference to the entire statute, not merely one of its subsections. Second, because there are *no* "provisions of the above to the contrary" in subsection (1)(b) of the statute and because the *only* "provisions of the above to the contrary" are the "general business practice" provisions of §626.9541-(1)(i) -- which are incorporated into, and the violation of which is made actionable by, subsection (1)(a) of the statute -- this paragraph simply must modify subsection (1)(a) of the statute, else it modifies nothing at all.

In other words, when §624.155(1) is read all the way to its end, it is clear that a third-party "bad faith" action brought under §624.155(1)(a) for an insurer's act of "bad faith" in violation of the "unfair claim settlement practices" in §626.9541(1)(i) is a third-party "bad faith" action requiring proof *only* of "bad faith," *without* the need to provide additional proof of "regular business practice." This, however, is precisely the type of "bad faith" action which the district court declined to find authority for in §624.155(1)(b)1., when it concluded that the duty of good faith recognized in that subsection of the statute was owed only to the

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insured. Most respectfully, once it is recognized that a third-party "bad faith" action brought under §624.155(1)(a) for violation of §626.9541(1)(i) is not conditioned upon additional proof of "regular business practice," then the third-party "bad faith" action allowed by the district court under subsection (1)(a) amounts to essentially the same action it disallowed under subsection (1)(b) -- a reading of the statute which simply makes no sense. The more sensible reading of the statute, we submit, is the one we have proposed here, which is the one given to it by this Court in *McLeod* -- that an action can be brought under §624.155 by "any person . . . damaged" by the "bad faith" of an insurer, including third-party claimants like the plaintiff in the instant case. We respectfully urge that reading of the statute upon the Court.

II.
CONCLUSION

It is respectfully submitted that, to the extent that it disagrees with the limiting "construction" placed upon §624.155 by the *Cardenas* Court, the district court's decision should be approved. To the extent that it declines to recognize a third-party "bad faith" action under §624.155(1)(b)1. and conditions proof of a third-party "bad faith" action under §624.155(1)(a) upon proof of "regular business practice," the district court's decision should be disapproved. This Court should hold, as it previously announced in *McLeod*, that §624.155 creates a civil remedy for "any person . . . damaged" by the "bad faith" of an insurer, including third-party claimants.

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III.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 16th day of September, 1993, to: Raymond T. Elligett, Jr., Esq., Schropp, Buell & Elligett, P.A., Landmark Center, Suite 2600, 401 E. Jackson Street, Tampa, Fla. 33602-5226; L. Floyd Price, Esq., Price, Price, Prouty & Whitaker, P.O. Box 1519, Bradenton, Florida 34206; Paul B. Butler, Jr., Esq., Butler, Burnette & Pappas, Bayport Plaza - Suite 110, 6200 Courtney Campbell Causeway, Tampa, Fla. 33607-1458; Paul E. B. Glad, Esq., Sonnenschein Nath & Rogenthal, 685 Market Street, 10th Floor, San Francisco, Cal. 94105; and to K. Jack Breiden, Esq., Breiden & Associates, 3101 Terrace Avenue, Naples, Florida 33942.

By: Joel D. Eaton
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