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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
STATE FARM FIRE & CASUALTY COMPANY,
UNITED SERVICES AUTOMOBILE ASSOCIATION,
FIREMAN'S FUND INSURANCE COMPANY,
HARTFORD FIRE INSURANCE COMPANY,
ROYAL INSURANCE COMPANY OF AMERICA,
AMERICAN INSURANCE ASSOCIATION,
ALLIANCE OF AMERICAN INSURERS and
THE DEFENSE RESEARCH INSTITUTE

IN SUPPORT OF BRIEF OF PETITIONER AUTO-OWNERS INSURANCE COMPANY

ON CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Amici Curiae State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, United Services Automobile Association, Fireman's Fund Insurance Company, Hartford Fire Insurance Company, Royal Insurance Company of America, American Insurance Association, Alliance of American Insurers and The Defense Research Institute (collectively "Amici") submit this brief in support of Petitioner Auto-Owners Insurance Company ("Auto-Owners") in its appeal of the decision of the Second District Court of Appeal. Amici are insurance companies and national associations of insurers. The American Insurance Association is comprised of over 250 member companies most of which are large insurance carriers doing business in the State of Florida. The Alliance of American Insurers represents the interest of another approximately 220 insurance carriers. The State Farm Mutual Automobile Insurance Company and the State Farm Fire and Casualty Company are the largest writers of automobile and homeowners insurance policies in the State of Florida. USAA, Fireman's Fund and the Hartford are major insurance carriers insuring many consumers in Florida and throughout the country. Royal writes a substantial amount of both commercial and personal insurance coverages in Florida and elsewhere. The Defense Research Institute is an association of approximately 20,000 members representing the concerns of self insureds, insurers and state and local defense bar associations. As such, the Amici are directly affected by this Court's decision determining whether a direct cause of action by an injured third party lies against an insurance company for violation of Florida's Unfair Claims Practices Act as incorporated by §624.155, Fla. Stat. (1990).

SUMMARY OF ARGUMENT

In its decision in *Conquest v. Auto-Owners Ins. Co.*, 637 So. 2d 40 (Fla. 2d DCA 1994), the Second District Court of Appeal took the unprecedented step of creating a direct duty owed by an insurance company to Plaintiffs who bring an action against their insured. The Second District reached its decision without any regard for the consequences of imposing such a duty. Amici respectfully request this Court to overrule the Second District and refuse to embark on such a radical departure from existing Florida law.

This Court has long recognized that an insurer owes a good faith duty to its insured to act in its best interests when the insurer undertakes the defense of its insured pursuant to a liability policy. In every instance, if for no other reason than to protect his or her claim history and keep his or her premiums as low as possible, the insured wants its insurer to achieve the best possible settlement which will fully protect the insured's interests. The coincident imposition of a duty running directly from an insurer to a third party claimant (the plaintiff) places the insurer in the conflicting position of choosing between honoring its contractual and good faith duties owed its insured and satisfying the duty owed a third party claimant.

The recognition of a duty to a third party claimant raises constitutional questions as well, because it impermissibly interferes with the way the parties to the insurance contract carry out their agreement. The insured expects the insurer's consideration of the insured's interests. To the extent an insurer is forced to honor an independent obligation to the third party claimant, whose interests are absolutely adverse to those of the insured, the original bargain between insurer and insured is altered after the fact, in violation of both Art. I, §2, Fla. Const. (1968) and U. S. CONST., art. I, § 10, cl. 1.

The economic consequences that will result from the recognition of a duty between an insurer and a third party claimant also militate against any imposition of this duty. Each tort claim in which the tortfeasor happens to have liability insurance will now give rise to two lawsuits -- one against the insured to determine liability for the claimant's injuries and one to determine if the tortfeasor's insurer properly responded to the third party's settlement demands. This "settle and sue" invitation must be avoided. A whole range of procedural issues governing the liability of an insurer for breach of this newly imposed duty will need to be resolved by the courts. Settlement costs will increase because the settlement of the alleged bad faith handling of the third party's claim by the tortfeasor's insurer will become an element in every settlement, unless the insurer chooses to expose itself to the second lawsuit and its associated expenses. The litigation of the third-party claimant's suit against the insurer will likely prove more costly than the typical underlying action because of the nature and extent of the discovery necessary to prove the allegations of a company-wide practice upon which an award of punitive damages could be based. All of these factors will undoubtedly contribute to an increase in premiums and a decrease in the overall availability of liability coverage, both of which adversely impact Florida consumers.

The overwhelming majority of jurisdictions which have considered this issue have concluded that there is no duty owed directly to a third party claimant. This Court need not look far to see that the results identified above are not mere hypotheses or doomsday predictions, but are the real and likely consequences of a decision to uphold the Second District's imposition of a duty owed directly by an insurer to a third party claimant. California experienced these consequences for nine years before concluding that the insurer's duty to act in good faith should

extend only to its insured. The turmoil and travail during those nine years was significant. Rather than revisit California's experience, this Court should look to the Texas Supreme Court's recent (1994) analysis of a similarly worded statutory bad faith scheme and should decline to extend the statutory bad faith cause of action beyond the insured.

Moreover, under applicable Florida law, the Second District erred in concluding that a third party claimant had an independent basis to sue an insurer for bad faith claims handling. First, the Second District misconstrued out of context the meaning of the phrase "any person" in §624.155 and erroneously concluded that the Florida Legislature intended that third party claimants directly pursue insurers for purported unfair claims practices targeted at the claimant. Such a construction is not borne out by an examination of the legislative history of §624.155 or relevant Florida case law.

Section 624.155 and those portions of the Florida Insurance Code incorporated therein, particularly the Unfair Claims Practices Act (§626.9541(1)(i), Fla. Stat. 1990), are replete with specific references to the duties owed by an insurer only to its insured. Section 624.155 was enacted to afford an insured the right to sue its insurer for bad faith claims handling practices. There is nothing in the legislative history that indicates that §624.155 was intended to expand this right to third party claimants who are not insureds under an insurance policy. The Third District Court of Appeal in *Cardenas v. Miami-Dade Yellow Cab Co.*, 538 So. 2d 491 (Fla. 3rd DCA 1989), reached this conclusion, holding that "any person" means "any insured person". Since the *Cardenas* decision, the Legislature has twice considered amendments to §624.155 and in neither instance passed language that alters the interpretation given to §624.155 by the Third District in *Cardenas*. The absurdity the Second District's construction of the phrase "any

person" is highlighted by considering the scope of persons who conceivably might allegedly be injured by a delay in the settlement of a third party claim and who might file actions--the claimant's attorney, doctors, service providers, or creditors, all of whom may claim they were forced to wait for their cut. "Any person" cannot be as broad as the Second District concluded.

The solitary reference in §624.155 to a "third party claimant" is not enough to support a construction that the Legislature intended to give plaintiffs/claimants the ability to directly sue an insurer for violation of Florida's Unfair Claims Practices Act. The reference to a "third party claimant" was added by a 1987 amendment, intended only to clarify the elements required in the 60-day pre-suit notice sent to an insurance company. The amendment states a third party claimant need not quote policy language if they do not have a copy of the insurance policy. The later inclusion of this language cannot be used to retrospectively manufacture legislative intent to create a third party cause of action. The logical interpretation of this amendment is that it applies to a third party claimant who is a "definitional insured" but not a "named insured" under an insurance policy, e.g. a pedestrian making claim under the motorist's PIP coverage, a permissive driver of another's automobile, an injured visitor claiming Medical Payments coverage under someone else's homeowner's policy. None of these would be expected to have a copy of an insurance policy. All would be "third party claimants," but all would at the same time be "insureds" owed a duty by an insurer. This is the logical construction. Moreover, this is the construction supported by the legislative history.

The Second District's reading of §624.155 is further flawed in that it fails to recognize that §624.155 is triggered only when a person is damaged by a violation of the duties identified in §624.155 or those statutes incorporated therein. The proscribed acts upon which Conquest

premised her case against Auto-Owners did not damage her. Section 624.155(b)(1)(failure to attempt in good faith to settle a claim when possible) and §626.9541(1)(i)3.a.(failure to adopt claims investigation standards), c.(failure to acknowledge communications) and d.(denial of claim without reasonable investigation) detail ways in which an insurer violates a duty owed exclusively to its insured. Assuming, arguendo, that these breaches gave rise to damages to a claimant as a result of a delayed settlement, the types of damages identified in Conquest's amended complaint are not recoverable under Florida law, i.e. payment of attorney's fees in the underlying action or damages for the pain and suffering of the Plaintiff who was required to file suit.

Finally, there are adequate remedies in place which already address the concerns about fair dealing with third party claimants. In those instances where an insurer's claims handling conduct adversely impacts its insured, the insured can assign its cause of action to the claimant for enforcement. If an excess judgment occurs, the claimant can proceed directly against an insurer even without an assignment. The claimant can also bargain for and receive a full assignment of the insured's claim against its insurer. Within the context of litigated matters, Florida's Offer of Judgment and Chapter 57 statutes operate as additional checks which compel insurers to act appropriately toward opposing litigants.

ARGUMENT

I. Substantial Policy Considerations Should Cause this Court to Reject the Recognition of Any Independent Duty Owed a Third Party Claimant by an Insurer.

A. The *Conquest* Decision Ignores the Policy Ramifications of Judicially Imposing an Independent Duty Owed by an Insurer to a Third Party Claimant.

The conflicting results reached by the Third District in *Cardenas* and the Second District in *Conquest* place this court at the crossroads in determining the development of insurance bad faith liability in Florida. The *Conquest* decision introduces a new strain of bad faith liability to the already existing bad faith remedies recognized under Florida common law and by statute. The disastrous results that will flow from this court affirming the Second District's construction of §624.155, Fla. Stat. (1990), and recognizing the existence of a duty owed directly by an insurance company to a third party claimant are manifest. This new found duty directly conflicts with the good faith duty owed by an insurer to its insured to act in the insured's best interest. Constitutional issues may also arise with respect to the right to contract free of legislative interference. There are also economic consequences in the form of expanding litigation costs and resulting insurance premium increases which mandate that this Court overrule the Second District's *Conquest* decision.

1. *The Duty Judicially Created and Imposed by the* Conquest *Decision Directly Conflicts with the Pre-Existing Good Faith Duty Requiring an Insurer to Act in Its Insured's Best Interests.*

In *Conquest*, the Second District recognized a new duty owed directly by an insurance company to third party claimants injured by its insured. The existence of this new duty places an insurer in a position of conflict. Florida law recognizes that an insurer defending an insured pursuant to a liability policy owes its insured a good faith duty requiring the insurer to act in the best interests of its insured and "use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980). This contractual duty owed an insured by its insurer conflicts with the wholly independent duty the Second District found running from an insurer to a third party claimant. The insurer is left in a position of choosing between honoring its contractual and good faith obligations to its premium-paying insured, and complying with a newly established duty owed the injured claimant. Florida has long exalted the duty owed by the insurer to its insured, and in fact, until the Second District's holding in this case, had never recognized the existence of a third party bad faith claim based on anything except a breach of the obligation running between insurer and insured. This Court should not make the mistake of establishing a new cause of action so adverse to long standing law.

The conflict issue will arise in a variety of contexts. Occasionally, professional insurance policies such as malpractice policies, are written such that the consent of the insured is required before an insurer can settle any claim. Assume an insurer, upon receipt of a claim against its insured physician, concludes liability may be proved at trial and determines that the claimant has

made a reasonable settlement demand. If the insured refuses to consent to the settlement, if contractually it is his or her right under the provisions of the policy, the insurer is faced with the choice of honoring its contract with the insured thereby potentially exposing itself to bad faith liability to the claimant for failing to settle,[1] or, alternatively breaching its contract with the insured by paying the third party claimant's reasonable settlement demand, thereby subjecting itself to contractual and extra-contractual liability to its own insured.

Another context in which the insurer is placed in an irreconcilable conflict position is one in which a third party claimant requests a detailed explanation of the factual and legal basis for the denial of his claim (including statements of the insured and witnesses, and legal citations to the statutes and cases relied upon by the insurer). If *Conquest* is upheld, the insurer has a legal obligation to respond to the letter. In doing so the insurer has the impossible task of deciding how much information to provide to the third party. Obviously, in many instances complete and full disclosure would be detrimental to the defense of the pending claim and would result in increased exposure of the insured (including exposure to an excess judgment). Hence, complete and full disclosure to the third party claimant exposes the insurer to a bad faith claim by its insured. On the other hand, a partial or incomplete disclosure of information exposes the insurer to a claim from the third party. A third party claimant, who has been unsuccessful recovering a judgment against the insured, could claim that had he earlier been provided with more detailed

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[1]A violation of the Unfair Claims Practices Act (§626.9541) results in damage to a third party only if the violation delayed resolution of the claim. Although the Second District in *Conquest* correctly recognized a third party claimant cannot assert a claim pursuant to §624.155(1)(b)1. (not attempting in good faith to settle claims) it is expected that the basis of claims made pursuant to the Unfair Claims Practices Act will be the insurer's failure to timely resolve claims by virtue of whatever statutory violations allegedly occurred (i.e., the failure to investigate the claim delayed settlement.)

information regarding the insurer's position he or she would not have pursued the litigation or would have accepted the insurer's settlement offer. By so doing he would have avoided the expense of the lawsuit.

There also may be instances where it is not in the insured's best interest to effect early settlements of all claims presented under an insured's policy. For instance, consider an insured who has an annual aggregate policy limit which caps the total dollars an insurer will pay on the insured's behalf for claims arising within a given year. Assume further there are certain claims pending where liability is probable but defenses exist; yet, the insured and insurer are also aware certain other catastrophic claims are about to be made where liability is certain and would involve dollars subject to the same aggregate limit. Should the insurer proceed to investigate and then settle the "probable liability" claims, and thereby exhaust the aggregate limit, relieving itself of any duty to defend any suit, under the rationale that it is discharging its "obligation" under *Conquest*? Or, does the insurer have an obligation to its insured to put the insured's interests first so that the "catastrophic claims" are considered and the insurer utilizes all available dollars for indemnity and defense in a way that affords the insured the greatest protection?

Similarly, consider the corporation that often opts for a large deductible in the range of $250,000 to $500,000. The *Conquest* decision does not impose a duty on the corporation to investigate a claim, promptly communicate with a third party claimant, or to exhaust its deductible by entering into a settlement with a third party claimant. Should a different result obtain because there is an insurer who believes liability might be found and a jury might award damages? Does *Conquest* require an insurer to settle a claim for $275,000 where there is a $250,000 deductible? Moreover, does *Conquest* "allow" an insurer to settle with the third party

claimant for $275,000, where $250,000 is the insured's money, thereby relieving the insurer of any bad faith exposure to the third party claimant and relieving the insurer from incurring continued defense dollars?

If *Conquest* is ratified, disputes would be created between primary and excess insurers. Excess carriers would often contend primary carriers were offering their policy limits to a third party claimant in order to protect themselves from a third party claimant bad faith claim, without regard for the interests of the excess carrier who would then be exposed to the payment of settlement dollars beyond the primary layer. Lawsuits would no doubt result from excess carriers contending the primary acted to protect its own interests at the excess' expense.

Worse still is the situation where there is no excess insurance. An insurer who, following a claim, quickly offers the third party claimant its policy limits will be accused by a wealthy insured of having acted to protect the insurer's own interests with the consequence of having diluted the opportunity to effect a lower settlement using a more protracted settlement negotiation process. Under *Conquest*, however, a failure to investigate and immediately communicate to the third party claimant and arguably, offer its limits will subject the insurer to extra-contractual liability.

What all of these scenarios highlight is that, first and foremost, it is the contractual relationship between insurer and insured which is at the center of any obligation to settle in good faith. In the face of a lawsuit by a third party claimant against its insured, an insurer is in exactly the same adversarial position as its insured and should not be subjected to exposure to any bad faith claim threatened by the third party claimant. To find otherwise fractures long established principles and casts serious doubt on the ability of any insurer to make the correct

choice between the obligation to its insured and its duty to a third party claimant. There is, in fact, only one consideration and that is that the insurer act in the best interests of its insured at all times. An insurer should remain free to make this choice without fear of liability to its insured's adversary.

2. *The Recognition of a Duty Owed a Third Party Claimant Interferes with the Constitutionally Guaranteed Freedom to Contract.*

Beyond disrupting contractual and good faith duties running from insurer to insured, the imposition of a duty running from an insurer to a third party claimant impermissibly interferes with the right to contract as guaranteed by both the Florida and United States Constitutions. As is particularly highlighted in the scenario where the insured's consent to a settlement is required, the imposition of an independent duty running from an insurance company to a third party claimant directly impacts the insured's prime motivation for entering into an insurance contract containing a consent provision -- namely, the ability to control litigation of matters which impact the insured, not only economically, but in terms of the insured's professional stature. "[S]ubsequent legislation which diminishes the value of a contract is repugnant to the [Florida] Constitution. *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1080 (Fla. 1978). If the Second District's reading of §624.155(1)(a) is correct, and the Florida Legislature intended to create an independent duty running from an insurer to a third party claimant, §624.155 is void as an unconstitutional restraint on the ability of parties to contract as they see fit. The constitutional problems raised by the Second District's reading of §624.155 can be avoided by

finding that the Legislature did not intend insurers be liable to third party claimants for breach of a duty separate and apart from the ones arising from the contract with its insured.

3. *Substantial Economic Consequences Will Result If a Bad Faith Cause of Action Is Created in Favor of a Third Party Claimant.*

The substantial economic consequences which would result from the Second District's *Conquest* ruling militate against recognizing the existence of an independent duty owed to a third party claimant. The imposition of such a duty opens the floodgates of litigation by inviting a second lawsuit by the third party claimant directly against the insurer anytime the claimant is dissatisfied with the progress of settlement discussions. A "settle and sue" mentality is encouraged. A monetary settlement in the underlying litigation will act as a lottery ticket for an everything-to-win claimant hoping for a jackpot and with relatively little to lose. Within those secondary lawsuits, a myriad of issues relating to the procedural aspects of the prosecution of a statutory third party bad faith claim will arise and require resolution by the courts. The courts will reach widely disparate results, fostering more litigation and adding uncertainty to the entire process of handling claims. Moreover, the litigation itself is likely to be more expensive than traditional litigation to the extent that punitive damages would be sought requiring extensive discovery missions looking for proof of a pattern of bad faith claims settlement practices.

The most obvious result of recognizing the existence of a duty running directly from an insurer to a third party claimant is the virtual sanctioning of the filing of a second action by the third party claimant against the insurer if the claimant is dissatisfied with the settlement offered in the underlying lawsuit. The facts presented in Conquest's Amended Complaint epitomize the

type of second generation lawsuit that will be brought. The jury award received by Conquest, while substantially in excess of the amount offered by the insurer, was approximately $169,000 less than the policy limit demand made by Conquest's attorneys (Conquest Amended Complaint, paragraph 11). Dissatisfied that she was forced to prove her case at trial and, in all likelihood, dissatisfied with the result she received at trial, Conquest now complains that her case should have been settled sooner, without any indication that she was willing to accept anything less than a policy limits payment.

A recognition of the duty running to the third-party claimant from the insurer would act as an invitation to file the second lawsuit. Such a problem was immediately recognized by the dissent in *Royal Globe Insurance Co. v. Superior Court*, 592 P.2d 329, 341 (Cal. 1979), when California first recognized a duty running directly between an insurer and a third party claimant. In that dissent Justice Richardson prophesied:

> It seems predictable that in almost every case in which an insurer hereafter declines a settlement offer the injured Third-party Claimant will be tempted to file an independent action against the carrier despite the clear admonition in our recent unanimous *Murphy [v. Allstate Ins. Co.*, 553 P.2d 584 (Cal. 1976)] decision that the insurer's duty to settle runs to the insured and not to the injured party.

After nine years, the California Supreme Court reversed itself and found that the California version of the Unfair Claims Practices Act did not authorize a third party claimant's lawsuit directly against an insurance company. *See Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58, 69 (Cal. 1988).

Commentators evaluating the impact of the California Supreme Court's decision in *Royal Globe* concurred in concluding that a duty running directly to a third party claimant gives rise

to double litigation: an initial suit against the insured, followed by the second suit against the insurer for bad faith refusal to settle.[2]

The recognition of the existence of a third party claimant's cause of action directly against an insurer also breeds litigation regarding the nature and the extent of the duty owed to the third party claimant. Some of the more obvious questions which would require resolution include:

1) what triggers the accrual of a cause of action against an insurer[3];

2) what is the nature of recoverable damages[4];

3) what triggers the duty owed a claimant under the Unfair Claims Practices Act;[5] and

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[2]Price, *Royal Globe Insurance Company v. Superior Court: Right to Direct Suit Against an Insurer by a Third Party Claimant*, 31 Hastings L.J. 1161, 1186-1187; Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 Pacific L.J. 833, 851 (1982).

[3]In California, for example, possible liability for violation of *Insurance Code* §790.03 (California's Unfair Practices Act) was not limited to insurance companies. The Unfair Practices Act applies to "persons engaged in the business of insurance" and was construed to provide a cause of action against independent insurance agents (*Eddy v. Sharp*, 245 Cal. Rptr. 211, 214-215 (Cal. Ct. App. 1988)), independent insurance adjusters (*Bodenhamer v. Superior Court*, 223 Cal. Rptr. 486, 489 (Cal. Ct. App. 1986); *Davis v. Continental Ins. Co.*, 224 Cal. Rptr. 66, 68-69 (Cal. Ct. App. 1986)), and individual employees of an insurance company (*Reasoner v. Life Ins. Co.*, 600 F. Supp. 278, 279 (S.D. Cal. 1984)). Even attorneys hired by insurers to represent their insureds were subject to possible liability under *Insurance Code* §790.03 if they were found to have conspired with the insurance company to commit violations of *Insurance Code* §790.03 against third party claimants. (*Wolfrich Corp. v. United Services Automobile Ass'n*, 197 Cal. Rptr. 446, 449 (Cal. Ct. App. 1983)).

[4]*See Schlauch v. Hartford Acc. Indem. Co.*, 194 Cal. Rptr. 658, 661 (Cal. Ct. App. 1983), allowing for recovery of emotional distress and punitive damages in appropriate circumstances by a third party claimant for the insurer's violation of its duty to the claimant under the Unfair Practices Act.

[5]In California, this issue arose in the context of whether settlement of the underlying litigation against the insured was a sufficient conclusion to allow a third party to bring a §790.03 claim against an insurer. *See Rodriguez v. Fireman's Fund Ins. Cos.*, 190 Cal. Rptr

4) what are the methods of proving whether an alleged unfair claim practice is a sufficiently "regular business practice" to a warrant an award of punitive damages.[6]

Litigating the third party claim against the insurer will be more expensive than the typical lawsuit. The extensive discovery required to establish a pattern of unfair claims practices in support of a punitive damage claim is expensive and burdensome, potentially impacting dozens or even hundreds of persons over a lengthy period of years. Settlement costs are increased, even within the litigation of the underlying tort claim between the claimant and the insured, because settlement of the potential follow-up statutory bad faith suit becomes a factor in every case. *Moradi-Shalal*, 758 P.2d at 66; Note, *Extending the Liability of Insurers for Bad Faith Acts: Royal Globe Insurance Company v. Superior Court*, 7 Pepperdine L. Rev. 777, 790-791 (1980); Price, *supra* note 2 at 1186-1187; Allen, *supra* note 2 at 851.

Springing from the increased claims handling costs associated with the imposition of a duty on an insured running to third party claimants, are the increased insurance premiums, which inevitably must result, as well as the likelihood of a decrease in the number of carriers

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705, 709 (Cal. Ct. App. 1983), holding that settlement of the third party's claim against the insured was a sufficient conclusion to allow the third party to proceed against the insurer for statutory violations; *but see Nationwide Ins. Co. v. Superior Court*, 180 Cal. Rptr. 464, 466 (Cal. Ct. App. 1982), holding that adjudication of the insured's liability to the third party claimant was a necessary pre-requisite to maintenance of a §790.03 action. The resolution of this conflict, in fact, was the basis upon which the California Supreme Court accepted review in *Moradi-Shalal, supra.*

[6]*See Colonial Life & Acc. Ins. Co. v. Superior Court*, 647 P.2d 86, 90 (Cal. 1982), approving the trial court's discovery order requiring an insurer to identify all claimants with whom a particular adjuster had attempted settlements so that claimant's counsel could obtain authorizations from other claimants regarding their claims files for purposes of establishing a pattern of unfair practices.

willing to provide insurance coverage or both.[7] The reduced availability of affordable liability insurance has a ripple effect economically in that the increase in uninsured risks also increases the costs society as a whole must pay to compensate those who are injured and have no other source of recompense.

The negative impact of a recognition of a duty owed by an insurance company directly to a third party claimant cannot be overdramatized. This new duty directly conflicts with the duty owed by an insurer to its insured. Considering the many conflict problems, the economic consequences, the constitutional implications and the floodgate of litigation which will result from a new found duty, this Court has ample basis, on public policy grounds alone, to overrule the Second District's conclusion in the *Conquest* case.

B. Florida Should Follow the Lead of the Overwhelming Majority of Other Jurisdictions Which Have Held a Third Party Claimant Lacks Standing to Sue an Insurer for a Violation of the Unfair Claims Practices Act.

1. *Virtually All Jurisdictions Considering the Issue Have Determined an Insurer Owes No Independent Statutory or Common Law Duty to a Third Party Claimant.*

Florida is far from the first jurisdiction to consider whether a third party claimant has a direct cause of action against an insurer. The overwhelming majority, if not almost unanimous number, of courts which have considered the issue have determined that a third party claimant has no standing to bring an action based upon an alleged violation of the Unfair Claim Practices

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[7]White, *Liability Insurers and Third Party Claimants: The Limits of Duty*, 48 Univ. Chi. L. Rev. 125, 139-140 (1981).

Act as enacted in that particular jurisdiction.[8] Presently only one jurisdiction continues to recognize that a third party claimant may bring a private right of action under its Unfair Claim Practices Act. This Court should align itself with the majority rule and similarly find that Conquest has no standing to sue Auto-Owners for an alleged violation of Florida's Unfair Claim Practices Statute.

To date, 28 jurisdictions have already considered the issue of third party standing to sue an insurer under their state's Unfair Claims Practices Act.[9] Only three states -- California, West

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[8]A significant number of the courts reaching that conclusion have also concluded that first parties may not bring an action pursuant to the Unfair Claims Practices Act.

[9]Other jurisdictions have resolved this issue using varying bases. The following jurisdictions have concluded that the Unfair Claims Practices Act does not create a private cause of action: *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014, 1020-1021 (Idaho 1986); *Scroggins v. Allstate Ins. Co.*, 393 N.E.2d 718, 723-724 (Ill. App. Ct. 1979); *Herrig v. Herrig*, 844 P. 2d 487, 494 (Wyo. 1992); *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 40-43 (Iowa 1982); *Earth Scientists v. United States Fidelity & Guar.*, 619 F. Supp. 1465, 1470-1471 (D. Kan. 1985); *Tweet v. Webster*, 610 F.Supp. 104, 105 (D.Nev. 1985) *reconsideration denied*, 614 F.Supp. 1190; *Patterson v. Globe American Cas. Co.*, 685 P.2d 396, 397-398 (N.M. App. Ct. 1984); *A&E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 673-675 (4th Cir. 1986) (Applying Virginia law); *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 269 (Wis. 1981); *Young v. Michigan Mut. Ins. Co.*, 362 N.W.2d 844, 846-847 (Mich. App. Ct. 1984); *Morris v. American Family Mut. Co.*, 386 N.W.2d 233, 238 (Minn. 1986); *Lawton v. Great Southwest Fire Ins. Co.*, 392 A.2d 576, 581 (N.H. 1978); *Farris v. United States Fidelity & Guar. Co.*, 587 P.2d 1015, 1018-1023 (Or. 1978); *D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 431 A.2d 966, 969-970 (Pa. 1981); *Swinton v. Chubb & Son, Inc.*, 320 S.E.2d 495, 496-497 (S.C. App. Ct. 1984); *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981); *Strack v. Westfield Cos.*, 515 N.E.2d 1005, 1007-1008 (Ohio Ct. App. 1986); *Farmers Group, Inc. v. Trimble*, 658 P.2d 1370, 1377-1378 (Colo. Ct. App. 1982). Other courts have concluded that only an insured has standing to bring suit pursuant to the Unfair Practices Act. *Vail, infra*; *O. K. Lumber Co., Inc. v. Providence Washington Ins. Co.*, 759 P.2d 523, 527 (Alaska 1988)(third party claimant has no private right of action under unfair claims practices act); *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1156-1157 (Alaska 1989)(insured may maintain action against insurer for violation of unfair claims practices act); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1130, 1140 (Wash. 1984)(no right of action in third party claimant); *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 792 P.2d 520, 530 (Wash 1990)(insured may sue insurer for violation of unfair claims practices act pursuant

Virginia[10] and Montana[11] -- have ever recognized a direct cause of action by a third party claimant pursuant to the Unfair Claims Practices Act. California's Supreme Court has since reversed itself. *Moradi-Shalal*, 758 P.2d at 69. The Montana Legislature amended the Montana version of the Unfair Claims Practices Act to specifically recognize a third party claimant's standing to sue for violations of the Act. *O'Fallen v. Farmers Insurance Exchange*, 859 P.2d 1008, 1013 (Montana 1993).[12] West Virginia now stands alone in its construction of unmodified Act as providing a third party claimant a direct action against an insurer.

The conclusion reached by all of the other courts rejecting such a right of action has rested on one overriding principle -- the duty of an insurer to its insured is at the root of any

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to state consumer protection act). Arizona has thus far only permitted an insured to proceed under the Act. *Sparks v. Republic Nat'l Life Ins. Co.*, 647 P.2d 1127, 1138-1139 (Ariz. 1982). The Eastern District of Louisiana has permitted an alleged violation of the Act to serve as the basis for a negligent misrepresentation cause of action by an insured. *French Market Plaza Corp. v. Sequoia Ins. Co.*, 480 F. Supp. 821, 826 (E. D. La. 1979). The legislatures in New Mexico and Pennsylvania modified their versions of the Unfair Claims Practices Act to specifically confer an action under the statute to an insured only. *See, Russell v. Protective Ins. Co.*, 751 P.2d 693, 695 (N. M. 1988); *American Franklin Life Ins. Co. v. Galati*, 776 F.Supp. 1054, 1062 (E.D. Pa. 1991). Although presented the opportunity to expressly decide whether a private right of action exists under its version of the Unfair Practices Act, the North Dakota Supreme Court has expressly declined to do so but has refused to allow claimants to go forward under the statute because of a failure to allege sufficient facts to show that the alleged unfair ractices occurred with a frequency indicating a general business practice. *Dvorak v. American Family Mut. Ins. Co.*, 508 N.W.2d 329, 332-333 (N.D. 1993). The Connecticut Supreme Court has similarly limited the ability of a third party claimant to bring suit under Connecticut's Unfair Practices Act to situations where the plaintiff can plead and prove a pattern of unfair practices. *Mead v. Jay William Burns, Commissioner of Transportation,* 509 A.2d 11, 16 (Conn. 1986).

[10]*Jenkins v. J.C. Penny Cas. Inc. Co.*, 280 S.E.2d 252 (W. Va. 1981).

[11]*Klaudt v. Flink,* 658 P.2d 1065 (Mont. 1983) *overruled on other grounds, Fode v. Farmers Ins. Exchange*, 719 P.2d 414 (Mont. 1986).

[12]Section 33-18-242 of Montana Code Ann. provides "[a]n insured or a third party claimant has an independent cause of action against an insurer..."

claim, first or third party, for bad faith. *See, e.g., Scroggins*, 393 N.E.2d at 721. The courts, recognizing the conflict that arises from the imposition of an independent duty to a third party claimant, have steadfastly refused to find such a duty exists.

2. *The Specific Examples Provided by the Considered Opinions of the California and Texas Supreme Courts Demonstrate Why This Court Should Find That a Third Party Claimant Has No Standing to Sue an Insurer for Violation of the Unfair Claims Practices Act.*

In 1979, the California Supreme Court opened what turned out to be Pandora's box by finding that an injured third party had a statutory cause of action directly against a tortfeasor's insurer for violation of the California version of the Unfair Claims Practices Act. In *Royal Globe, infra*, the court held an injured third party was owed a duty by the tortfeasor's insurer pursuant to the California version of the Unfair Claims Practices Act. *Id.* at 335. The Court further held a private right of action against an insurer could be founded upon a single knowing violation of the provisions of the Act. *Id.* at 336.

In *Royal Globe* the injured third party slipped and fell in the insured's market. In her action against the market the third party joined Royal Globe, the market's liability insurer, claiming Royal Globe violated the Unfair Claims Practices Act when it failed to settle her claim when liability became reasonably clear (*Insurance Code* §790.03(h)(5)) and when Royal Globe's adjuster advised her not to retain an attorney (*Insurance Code* §790.03(h)(14)).

The court held that "a third party claimant may sue an insurer for violating subdivisions (h)(5) and (h)(14), but that the third party's suit may not be brought until the action between the injured party and the insured is concluded." *Id.* at 332. The primary rationale relied upon by

the court was the conclusion that the Legislature intended to confer a cause of action on third party claimants, with particular emphasis on the fact that claimants were specifically identified in certain portions of *Insurance Code* §790.03(h). *Id.* at 334-335.

The *Royal Globe* dissent and the commentators noted the majority opinion was a marked retreat from the unanimous decision reached by the California Supreme Court three years earlier in *Murphy, supra.*[13] In *Murphy,* the Court held that absent an assignment of an insured's claim against its insurer for breach of the implied covenant of good faith and fair dealing, a third party did not have a claim against an insurance company for bad faith. *Id.* at 588-589. The court emphasized the good faith duty arose out of the contractual relationship between insurer and insured. *Id.* at 588

In the aftermath of *Royal Globe,* litigation initiated by third party claimants against insurers for alleged violations of *Insurance Code* §790.03 blossomed. True to the predictions of the *Royal Globe* dissent, the double litigation of tort cases--once to determine liability of the insured and once to determine whether the insurer acted in bad faith in its efforts to settle with the third party claimant--abounded. The lack of specifics regarding the procedural prerequisites to prosecuting a claim pursuant to *Insurance Code* §790.03 contributed to the proliferating litigation. Commentators vilified the *Royal Globe* holding, pointing to both the strained statutory construction used by the majority to reach its conclusion and the undesirable social and economic

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[13]White *supra* note 7 at 149, N. 95; Price *supra* note 2 at 1175-1176; Casey, *Bad Faith: Defining Applicable Standards in the Aftermath of Royal Globe v. Superior Court,* 23 Santa Clara L. Rev. 917, 926 (1993); Meskin, *Rodriguez v. Fireman's Fund Insurance Companies, Inc.: An Illustration of the Problems Inherent in the Royal Globe Doctrine,* 15 SW. U.L. Rev. 371, 382 (1985).

impacts likely to result from the recognition of a duty to third party claimants.[14] In the meantime, nineteen (19) other jurisdictions considered the same issue as in *Royal Globe* and seventeen (17) of them concluded no private right of action existed under the Unfair Claims Practices Act.

Acknowledging the influence of all of these factors, in 1988 the California Supreme Court reversed *Royal Globe* in *Moradi-Shalal, supra*. The most important factor influencing the Court's re-evaluation and determination that a third party claimant did not have standing to sue an insurer pursuant to *Insurance Code* §790.03 was the recognition of the conflict arising from the existence of a duty running from an insurance company to its insured and a duty running from an insurer to a third party claimant:

> Most authors have noted another unfortunate consequence of our holding in Royal Globe that insurers owe a direct duty to third-party claimants. It tends to create a serious conflict of interest for the insurer, who must not only protect the interest of its insured, but also must safeguard its own interest from the adverse claims of the third-party claimant. This conflict disrupts the settlement process and may disadvantage the insured.

Id. at 67.

This court is in the unique position of being able to examine in detail the likely consequences of making a radical departure from Florida's current bad faith law. The court should take this opportunity to avoid the problems that will flow from recognizing that a third party claimant is owed a duty by an insurance company and should decline to re-live California's experience.

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[14]Price *supra* note 13 at 1177-1179 (statutory construction) and 1186 (economic and social impact); White *supra* note 13 at 148-151 (statutory construction) 131-134 and 139-140 (economic and social impact); Meskin, *supra* note 13 at 389-395 (economic and social impact); Allen, *supra* note 2 at 850-854 (economic and social impact).

Given the similarity of Texas bad faith law to the current law of Florida, this Court should also look to the Texas Supreme Court's 1994 decision in *Allstate Insurance Co. v. Watson*, 876 S.W.2d 145 (Tex. 1994), for guidance on how to rule. In *Watson,* the Texas Supreme Court considered the existence of a third party claim in the context of a statutory scheme remarkably similar to the one in existence in Florida. Watson, who had not even filed an action against the insured, filed suit against Allstate on the basis that it had unreasonably delayed the settlement of her claim. The Texas legislature had enacted Texas Ins. Code. Ann. Art. 21.21, §16(a) clearly providing that an insured could sue an insurer which violated Texas's Unfair Claims Practices Act, Texas Ins. Code Art. 21.21-2. *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988). The court concluded, however, that a third party claimant could not file a similar suit. *Watson,* 876 S.W.2d at 150.

The language of the Texas statute is instructive. As will be noted it, like Florida's §624.155, contains the phrase "Any person." Art. 21.21, §16(a) of the Texas Code provides in relevant part:

> Any person who has sustained actual damages as a result of another's engaging in an act or practice declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code as amended, as an unlawful deceptive trade practice, may maintain an action against the person or persons engaging in such acts or practices.

The court in *Watson* found that the reasoning it employed in *Vail* to find that an insured could sue an insurer for violations of Art. 21, 21-2 (Unfair Claims Practice Act) did not create a similar right in a third party claimant. The Court emphasized that a statutory cause of action

brought by an insured was entirely consistent with pre-existing common law bad faith principles. *Id.* at 149. The Court distinguished the situation arising from a claim by an insured from a cause of action brought by a third party claimant:

> To be sure, Art. 21.21, section 16 is worded as providing a cause of action to "any person."...
>
> . . .
>
> The obligations imposed by art. 21.21 of the Insurance Code and *Vail* are engrafted onto the contract between the insurer and the insured and are extra-contractual in nature. A third party claimant has no contract with the insurer or the insured, has not paid any premiums, has no legal relationship to the insurer or special relationship of trust with the insurer, and in short, has no basis upon which to expect or demand the benefit of the extra-contractual obligations imposed on insurers under art. 21.21 with regard to their insureds. Nothing in *Vail* suggests that the extra-contractual obligations, rights, and remedies of art. 21.21, section 16 extend to third party claimants.
>
> More to the point, in construing art. 21.21, section 16 as Watson would have us construe it to give her standing in this case, we would undermine the duties insurers owe to their insureds under *Vail* and *Arnold*. In construing art. 21.21 in *Vail*, we were not faced with potentially conflicting duties. There is nothing inconsistent between the common law duty of good faith and fair dealing owed by an insurer to its insured and a duty imposed under *Vail* and art. 21.21, section 16 on an insurer as to its insured prohibiting unfair claims settlement practices. Were we to extend to third party claimants the same duties insurers owe their insureds, insurers would be faced with owing coextensive and conflicting duties. An insurer owes to its insured a duty to defend the insured against the claims asserted by a third party. Recognizing concomitant and coextensive duties under art. 21.21 to third party claimants, parties adverse to the insured, necessarily compromises the duties the insurer owes to its insured. In fact, the logical result of permitting a separate and direct cause of action in favor of third party claimants allows third parties to sue for unfair claims settlement practices even though the insured has no claim for an unfair claims settlement practice. As troublesome, it is conceivable in attempting to settle claims pursuant to the

> demands of a third party claimant, insurers may be liable to the insured for settling too quickly. [citation and explanation thereof omitted]. In refusing to provide a direct cause of action for third party claimants, the legislature may well have been aware of this potential for conflicting duties. We will not construe art. 21.21 or *Vail,* absent explicit directive from the legislature, so as to compromise the insurer's loyalties and obligations owed to the insured.

Id. at 149-150.

As the Texas Supreme Court found, it is inappropriate to create a third party cause of action where to do so is contrary to all existing common law bad faith rights. Such rights are derivative of the duty owed by the insurer to its insured. This is a common theme in each of the jurisdictions which has determined there is no independent third party cause of action against an insurer pursuant to the Unfair Claims Practices Act. This Court should reaffirm that it is the duty owed to the insured that is the sole basis upon which a claim of bad faith can be premised and should refuse to extend the scope of bad faith liability beyond the insurer-insured duty.

II. Substantial Legal Reasons Exist Which Demonstrate Why Third Party Claimants Lack Standing to Sue Insurers Directly for Any Violation of Florida's Unfair Claims Practices Act.

The Second District in *Conquest* found that an injured third party had standing to sue an insurer pursuant to §624.155(1)(a)1 for violations of §626.9541(1)(i)3.a (failing to adopt standards for proper investigation of claims), c. (failing to acknowledge an act promptly upon communications with respect to claims), and d. (denying claims without conducting reasonable investigation based upon available information). In reaching that conclusion, the Second District

found that "the words 'any person' constitute clear, unambiguous, all-inclusive language that requires no interpretation of legislative intent." *Id.* at 42. In so holding, the court acknowledged the conflict with the Third District Court of Appeals' reading of the same language in *Cardenas,* which held that "any person" meant "any insured person." *Cardenas,* 538 So. 2d at 496.

There are multiple flaws in the reasoning used by the Second District to conclude that §624.155 authorizes a third party claimant to directly sue an insurer for alleged violations of Florida's Unfair Claims Practices Act (§626.9541(1)(a)3.). First, "any person" as used in §624.155 only means any insured person as was held by the Third District in *Cardenas.* The Second District narrowly focused on the term "any person" without consideration of the entirety of either §624.155 or §626.9541(1)(i)3. As will be seen from the discussion which follows such a reading ignores both the background out of which the Unfair Claims Practices Act arose and the legislative history of §624.155.

The problem with the interpretation employed by the Second District is also highlighted by taking the term "any person" and reading it literally. If it is read to include all persons who might be impacted by the circumstances surrounding the settlement of a third party claim it will lead to absurd results. However, considering the phrase "any person" in the context of the statute as a whole, and more importantly in the context of the statute's application, leads to the inescapable conclusion that "any person" means only those persons to whom a duty is owed pursuant to an insurance contact -- namely, the insured.

The second error in the Second District's analysis is its misplaced reliance on the single reference to a "third party claimant" which appears in §624.155 as authorization for a direct suit by a claimant against an insurer. The phrase "third party claimant" appears at §624.155(2)(b)4

as part of the description of the prerequisite to initiating a civil action directly against an insurance company. The words "third party claimant" were not part of the statute as originally adopted, were added by an 1987 amendment, and the express purpose of the amendment was to simply prescribe the requirements of the obligatory 60-day notice to an insurer of any violation giving rise to a civil action pursuant to §624.155. The 1987 amendment is in no way indicative of the legislative intent at the time of its initial passage of §624.155 and cannot be used to bootstrap in a third party claim that was never intended by the Legislature.

In fact, as will be discussed, since *Cardenas* the Legislature has revisited §624.155 and each time has declined to define the phrase "third party claimant" to mean "any person." The phrase "third party claimant," logically read, refers to an "additional insured," a position supported by the legislative history.

A third defect in the Second District's analysis of §624.155 is its failure to consider that Conquest has no recoverable damages caused by the alleged violations of §626.9541(1)(i) 3.a. (failure to adopt claims investigation standards),c. (failure to acknowledge communications) and d. (denying claim without reasonable investigation). Assuming the violations occurred as alleged, it is inconceivable that these breaches caused damage to Conquest. The only instance which arguably gives rise to damage to a third party claimant is when the settlement of the third party's claim is delayed. Even if such breaches are presumed to cause damage to a claimant because of a delay in payment of the third party's claim, such damages are not recoverable under applicable Florida law.

Finally, lest this court be concerned that there are unredressed wrongs being committed by insurers, there are already remedies under Florida law which operate as a check on any

unfair claims practices. There are, of course, damages available for the breach of the duty owed by an insurer to its insured. In addition, third party judgment creditors have a means of suing insurers directly for an excess judgment and can bargain for and receive assignments from insureds of their causes of action against an insurer. Over and above compensatory damages such as the amount of any excess judgment, the third party claimant, standing in the shoes of the insured, can recover consequential and punitive damages. As will be discussed, the demand for judgment pursuant to §768.79, Fla. Stat. (1993), and sanctions available for the assertion of a bad faith defense pursuant to §57.105, Fla. Stat. (1993), act as a check on unreasonable litigation practices designed to delay resolution of legitimate third party claims.

A. Considering the Statute as a Whole, the Phrase "Any Person" in §624.155 Can Only Logically Refer to "Any Insured Person."

1. The Second District's Interpretation of "Any Person" Is Misplaced.

As is exemplified by the decisions of the Third District in *Cardenas* and the Fifth District in *Dunn v. National Sec. Fire and Cas. Co.*, 631 So. 2d 1103, 1107-1108 (Fla. 5th DCA 1993), both of which refused to recognize the independent standing of a third party claimant to sue an insurer for alleged statutory bad faith, as well as the Texas Supreme Court's decision in *Watson,* concluding that "any person" as used in the Texas Civil Remedy Statute means only "any insured person", it is not so clear that the words "any person" used in §624.155 have the meaning ascribed to them by the Second District. The proper interpretation of the phrase "any person" requires consideration of the totality of both §624.155 and §626.9541(1)(i)3 (the Unfair Claims

Practices Act) which is incorporated by reference, and cannot be achieved by reading "any person" in isolation. *Cardenas,* 538 So. 2d at 496; *Florida Jai-Other, Inc. v. Lake Howell Water & Reclamation Dist.*, 274 So. 2d 522, 524-525 (Fla. 1973). In other words, the Unfair Claims Practices Act cannot be read in isolation, nor can portions of §624.155. Instead, the intent of the components must be gleaned from the whole.

Section 624.155 provides in relevant part:[15]

> 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)[16], (o)[17] or (x)[18];
>
> . . .
>
> (b) By the commission of any of the following acts by the insurer:
>
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it

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[15]The entirety of §624.155 is set forth at Exhibit 1 to the Appendix filed herewith. The portions of §624.155 relevant to each discussion herein will be restated in full in the Amici Brief.

[16]This is the only incorporated statute at issue in this case. The relevant portions of §626.9541(1)(i) are set forth hereinafter. Brief descriptions of the substance of the other referenced statutes appear as footnotes hereafter.

[17]Illegal charges made in connection with premiums.

[18]Discriminatory refusal to insure.

acted fairly and honestly toward its insured and with due regard for his interests;

2. Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverage, 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.

(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:

. . .

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.

The relevant portions of §626.9541(1)(i) Fla. Stat. (1993) are as follows:

626.9541. Unfair methods of competition and unfair or deceptive acts or practices defined

(1) Unfair methods of competition and unfair or deceptive acts. The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

...

(i) *Unfair claim settlement practices.*

...

3. Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Failing to adopt and implement standards for the proper investigation of claims;

b. Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;

c. Failing to acknowledge and act promptly upon communications with respect to claims;

d. Denying claims without conducting reasonable investigations based upon available information;

e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;

f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;

g. Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or

h. Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

The literal interpretation of the term "any person" applied by the *Conquest* court is overly broad in light of the multitude of references throughout §624.155 (civil remedy) and §626.9541 (Unfair Claims Practices Act) to the duties owed by an insurer to its insured. *Cardenas,* 538 So. 2d at 496. Section 624.155 is replete with specific references to the duty owed an insured by the insurer. As was recognized by the Second District in its *Conquest* decision, §624.155(1)(b)1. defines a bad faith failure to settle a claim in violation of the statute in terms of whether the insurer acted "fairly and honestly towards its **insured** and with due regard for **his** interests," (emphasis supplied) and thus only affords a remedy to the insured. *Id.* at 42. Subsections (b)2. and (b)3. are also specifically directed to the duty owed by the insurer to its insured and are specific to first-party coverage situations.

With the notable exception of the three subsections of §626.9541 upon which Conquest based her claims, all of the statutes incorporated by reference into §624.155(1)(a)1.-6. are specifically only applicable to dealings between the insurer and its insured. Simply because subsections enumerated in *Conquest* do not limit themselves *definitionally* to the insurer/insured relationship does not mean there was an intent to expand their application to third party claimants. The failure of an insurer to adopt and implement guidelines for the investigation of claims, the failure to respond to communications about pending claims, or the denial of a claim without a reasonable investigation are all violations of the insurer's fiduciary duty owed to its insured to attempt to settle, in good faith, claims made against its insured. These are simply iterations of the obligations an insurer owes its insured. By virtue of §624.155 a breach of these duties owed its insured can vest a cause of action in the insured but not in a third party claimant. Such a reading is not warranted and is out of context.

2. *The Legislative History of §624.155, the Common Law, and a Common Sense Analysis, Do Not Support the Second District's Reading of the Term "Any Person."*

To find that §624.155 was intended to extend a duty and an independent cause of action to a third party claimant would be to disregard Florida's existing law respecting the ability of a third party claimant to recover bad faith damages. Prior to the passage of §624.155, an insured basically had no claim against its insurance company for an insurer's bad faith in refusing to settle the insured's claim, absent allegations sufficient to support the occurrence of an independent tort of fraud or the intentional infliction of emotional distress. *Opperman v. Nationwide Mut. Fire Ins.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987); *Industrial Fire & Cas. Ins. Co. v. Romer,* 432 So. 2d 66, 69 (Fla. 4th DCA 1983). At common law a bad faith claim arose when an insurer, in the face of an opportunity to settle a liability claim within the policy limits, refused to do so in bad faith. *American Fire and Cas. Co. v. Davis,* 146 So. 2d 615, 619 (Fla. 3d DCA 1962). In this instance the insured, upon proof of a bad faith refusal to settle, was entitled to recover the amount of the excess judgment and attorneys' fees. *Id.* The third party claimant could prosecute the same action, based on the insurer's conduct towards its own insured, even without a specific assignment of rights from the insured. *Thompson v. Commercial Union Ins. Co. of New York,* 250 So. 2d 259, 264 (Fla. 1971).

Section 626.9541(1)(i)3, Florida's Unfair Claims Settlement Practice Act, was adopted by the Legislature in 1976. It was derived from the National Association of Insurance

Commissioners' 1972 Model Unfair Claims Practices Act.[19] The model act was promulgated with the intent of providing a regulatory enforcement scheme for use by insurance commissioners. It was never intended to provide a means for any individual to directly sue an insurer. *See, e.g. Moradi-Shalal*, 758 P.2d at 65. The perceived lack of use of §626.9541 by the Florida Insurance Commissioner led, in part, to the enactment of the civil remedy statute, §624.155.[20]

With the adoption of §624.155, the Legislature created a civil cause of action pursuant to which a insured could sue its insurer for its bad faith handling of the insured's claim. *Opperman,* 515 So. 2d at 266. A review of the legislative history of §624.155 supports the conclusion that "any person" was intended to refer only to an insured. Section 624.155 was adopted in 1982 as part of the Sunset Revision of the Insurance Code. The Legislature's purpose in adopting §624.155 was described as follows:

> The approach taken by the Insurance Committee Bill is to provide a civil remedy which may be pursued by any **policyholder** when he has been damaged by the actions of an insurance company which violate the Insurance Code. An **insured** who successfully sues an insurance company under this provision can recover the amount of damages he has suffered, together with his court costs and attorney's fees.

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[19]The portions of the model Unfair Claims Practices Act that were adopted by the Florida Legislature are verbatim from the model act but the Legislature did not adopt each of the provisions of the model act. Most notably, the model act provides that "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" is an unfair claims settlement practice. The Florida Legislature, however, did not include this as part of §626.9541(1)(i)3. This particular prohibition, however, was included as part of §624.155(1)(b). *See* Appendix, Exhibit 2.

[20]*See* Appendix, Exhibit 3.

(Emphasis supplied.) Preliminary draft bill analysis, Bill Number PCB 4, November 30, 1981, Appendix A.[21] The subsequent revisions of §624.155 did not expand the availability of the civil remedy to anyone but an insured. The 1987 revision, which added the sole reference to a third party claimant that appears in the statute, was a technical amendment, the stated purpose of which was to "...[provide] greater detail of what must be included in a civil remedy notice."[22]

The Legislature also amended §624.155 twice following the Third District's decision in *Cardenas* and neither time did the Legislature amend the statute to overrule *Cardenas*. Each time the Legislature addressed the statute, they had the opportunity to specifically include an action by a third party claimant within §624.155 but declined to do so. The failure to do so is compelling evidence that *Cardenas* was correctly decided, and the *Conquest* rationale is misplaced. *See* discussion in the Brief of Petitioner citing *Gulfstream Park Racing Ass'n, Inc. v. Department of Business Regulations*, 441 So. 2d 627, 628 (Fla. 1983), and *Peninsular Supply Co. v. C.B. Day Realty of Florida,* 423 So. 2d 500, 502 (Fla. 3d DCA 1982).

The absurdity of a construction of §624.155 to confer a direct cause of action against an insurance company on "any person" is highlighted by considering the following. If intended to be read so broadly, can the phrase "any person" be limited to a third party claimant who is a plaintiff in the underlying action? If "any person" truly means any person, may any service provider retained by a claimant bring suit against an insurer? Can the lawyer representing the third party claimant in the suit against the insured sue for the extra time expended prosecuting

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[21]*See* Appendix, Exhibit 3.

[22]*See* Appendix, Exhibit 4.

the claim when her or his contingency fee is fixed? Can a physician rendering care to a third party claimant sue for the time value of his or her money if payment of their bill was delayed until a settlement was forthcoming? Can the relative of a plaintiff file suit because the plaintiff's case was not settled as quickly or as profitably as that individual contends it should have been, giving rise to alleged economic harm as a result of enduring the claim/litigation process? It is not at all inconceivable to think that such damages would be sought by a third party claimant if a duty running directly from an insurer to any person is found to exist. This Court should prevent such unintended results.

B. Section 624.155 Was Not Intended to Change Pre-existing Bad Faith Law with Respect to the Recovery of Bad Faith Damages by a Third Party Claimant.

The common law has never recognized a duty running from an insurer to a non-insured Plaintiff/Claimant. Nothing in §624.155 was intended to create such a duty. This long recognized distinction between the duty owed the insured and no duty owed a non-insured must consistently be observed. As was recently held by the Fifth District in *Dunn v. National Security Fire and Casualty Co.*, 631 So. 2d 1103 (Fla. 5th DCA 1993), in evaluating a third party suit brought pursuant to §624.155, a third party claim for bad faith damages is solely derivative of the breach of the duty running from the insurer to the insured:

> The insurer has no insurance contract with the injured third party, and thus breaches no fiduciary duty with regard to that person, when it wrongfully refuses to settle a suit for its insured. The injured third party only has a derivative claim as the insured's stand-in. [footnote omitted] Most courts in other jurisdictions have refused to recognize a separate independent fiduciary cause of

> action for an injured party against a tortfeasor's liability carrier. [footnote omitted].
>
> Section 624.155 does not appear to change this concept for third party suits. [footnote omitted]. The gravamen for the statutory cause of action is similar to the common law cause of action: an insurer's not attempting in good faith to settle claims when, under the circumstances, it could and should have done so, had it *acted fairly and honestly toward its insured and with due respect for his interests*. (emphasis supplied). §624.155(1)(b)1.,Fla.Stat.(1991). The duty breached is owed to the insured, and only damages for pain and suffering *caused to the insured* should be recoverable in an appropriate case. The 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, 631 So. 2d at 1107.

The Fifth District went on to say that absent explicit statutory language to support such a construction, it was loathe to find a duty extended from an insurer directly to a third party:

> Our supreme court has not recognized the existence of a fiduciary duty owed by an insurer to a third party injured by its insured to settle the suit within the policy limits. [citation omitted]. If it did, then recovery of attorney's fees expended by the injured third party after the time a court decides settlement should have been made, would be recoverable. But, recognizing such a duty under §624.155 would greatly expand the theory and extent of liability of insurance carriers beyond that established by common law, for third party bad faith cases. Although the legislature can expand by statute the common law concept of third party suits and recoverable damages, we are reluctant to interpret the statute as having made such a drastic change without clear and more express language in the statute indicating that intent. [footnote omitted].

Id. at 1108.

The Fifth District recognizes the duty has not--and should not--be expanded. This court should follow the lead in *Dunn, Cardenas* and the prior holdings of this Court recognizing a duty owed only to an insured by an insurer.

C. The Single Reference to "Third Party Claimant" in §624.155(2)(b)4 Does Not Give Rise to a Cause of Action for an Alleged Breach of a Duty Owed by an Insurer to a Third Party Claimant.

The *Conquest* court's reliance on the solitary reference to a "third-party claimant" which appears in §624.155(2)(b)4. is not sufficient to support the conclusion that a duty is imposed by Florida's Unfair Claims Practices Act (§626.9541(1)(i)3.) with respect to an injured third party. As originally enacted, there was no mention of third party claimants in §624.155. Certainly in adopting the 1987 amendment clarifying the contents of a civil remedy notice, had the Legislature wanted to provide that a third party claimant had the right to sue an insurance company for a breach of a duty owed exclusively to the claimant, it could have specifically done so. Once *Cardenas* was decided, the Legislature knew that §624.155 had been construed by a court as not creating a right to a third party claimant. In two subsequent revisions of the statute the Legislature did nothing to alter the *Cardenas* holding. Its failure to act is itself compelling evidence that the Legislature never intended that an insurer would be directly liable to a third party claimant.

In 1987 the Act was amended to better define what was required in order to perfect a claim under §624.155 which required the aggrieved part to file a civil remedy notice. That notice, on a form prescribed by the Department of Insurance, requires a reference to specific policy language relevant to the alleged violation. The 1987 amendment provided that a "third

party claimant" 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. The *Conquest* court erroneously construed this reference in the statute to mean the Legislature intended to confer a cause of action to those beyond an insured. Such an interpretation is improper, is illogical within the context of the statute as a whole, and is not supported by the legislative history.

The testimony offered by former Representative Gustafson, Chair of the House Insurance Committee responsible for drafting §624.155, clarifies that §624.155 was intended to provide a cause of action for an insured only:

> Rep. Simon: [W]hat type of complaint would a third party claimant have alleging a violation of unfair trade practices?
>
> Mr. Gustafson: ...Any time they try to hold up one settlement on one section in order to get a settlement in another. In other words, they say we won't pay your PIP policies until you settle your liability. That's a violation.
>
> . . .
>
> Mr. Gustafson: ...The fact is that it implies that--it currently applies to both [first and third party claims] and if you can define yourself as an insured who has been injured and you have got to still do that and that is still in the statute. You've got to be an insured who is injured by an insurance company. Unless you have those three elements you haven't got a case whether it is third or first party.[23]

Clearly, there are situations where there can be a "third party claimant" that is an insured but may or may not also be a plaintiff/claimant as the Second District construed the phrase.

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[23]*See* Appendix, Exhibit 5. (Insurance committee meeting 4/7/87 - partial transcription.)

Florida law provides that pedestrians in certain cases can claim PIP benefits under the insurance policy issued to a motorist by whom they were struck. The above quotation contemplates a situation where an injured party is denied PIP benefits as an **insured**; the violation arises when an insurer refuses to pay if the same person refuses to release any liability claim they may have. The gravamen of the action is their status as a party entitled to collect PIP benefits as an insured. Policies of insurance also contain provisions extending the definition of an "insured" to persons other than the "named insured" to whom the policy was issued. Examples include drivers using an insured vehicle with the owner's permission and a resident relative in the household of a named insured homeowner. Furthermore, a visitor to a home or an occupant of a vehicle may have a right to certain "Medical Payments" benefits under the policy issued to another.

All of the above examples present situations involving a "third party claimant" who like the PIP claimant in the legislative history discussion, is also a person insured by an insurer under a policy of insurance. Because these persons are definitional or additional insureds they would not be expected to be in possession of a copy of the insurance policy which must be referenced--unless excused--in the notice of insurer violation as a condition precedent to bringing an action under §624.155. It was this category of person which the 1987 amendment was meant to include. This intent can clearly be gleaned from the legislative history referenced above. Unfortunately, the Second District improperly characterized, and expanded the reference. This Count should now correct the misapplication.[24]

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[24]Additionally, the reference to "third party claimant" might be read to include one who stands in the shoes of an insured via assignment or by application of the *Thompson* holding, which permits a post judgment suit by a third party claimant/plaintiff directly against an insurer.

D. There Can Be No Recoverable Damages to a Third Party Claimant that Result from an Insurer's Violation of the Unfair Claims Practices Act.

This Court has long acknowledged that "[a]n essential ingredient to any cause of action is damages." *Fidelity and Casualty Co. of New York v. Cope*, 462 So. 2d 459, 461 (Fla. 1985). This Court has also limited an insurer's liability under §624.155 to "those amounts which are the natural, proximate, probably or direct consequence of the insurer's bad faith actions." *McLeod v. Continental Ins. Co.*, 591 So. 2d 621, 626 (Fla. 1992). Thus, unless the damages which are sought have resulted from an insurer's violation of §624.155 or the portions of the Unfair Claims Practice Act incorporated therein, no recovery is afforded. Id.

Despite these principles, the Second District allowed Conquest's direct claim against Auto-Owners stand, even though the court acknowledged that there was a question as to what, if any, damages were recoverable:

> We also recognize that damages will be a necessary element explicitly required by the language of §624.155: Any person may bring a civil action against the insurer *when such person is damaged*. §624.155(1).... But we are compelled by the clear language of the statute to conclude that the first count of Conquest's complaint alleged a cause of action.

Id. at 43 (emphasis in the original). It is inconceivable that the alleged violations of §626.9541(1) (i) 3.a., c., or d. have in any way directly damaged Conquest.

Violations of Florida statute 626.9541(1)(i)3.a. (failure to adopt and implement claims investigation standards), c. (failure to acknowledge and act promptly upon communications regarding claims) and d. (denial of claims without reasonable investigation) in and of themselves

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Persons in this position would be excused from the obligation of citing specific policy language as a prerequisite to perfecting the third-party claimant's right to proceed against an insurer.

do not result in damage to a third party claimant. Violations of the foregoing provisions damage a third party only if the violations delayed the resolution and/or settlement of the claim. *More simply, a third party claimant is not damaged by an insurer's failure to adopt claims investigation standards, failure to act promptly upon communications, or failure to conduct a reasonable investigation unless the violations delayed the settlement or resolution of the claim.*

The Second District Court of Appeal correctly concluded that a third party cannot pursue a claim pursuant to §624.155(1)(b)1. (failure to settle in good faith). *Conquest,* 637 So. 2d at 42. In other words, the third party claimant cannot recover damages arising out of an insurer's failure to settle. As such, there are no recoverable damages flowing from a violation of §626.9541(1)(i)3.a., c., and d. Conquest should not be permitted to pursue damages indirectly which could not be pursued directly.

Assuming that Ms. Conquest could solve the damage causation problem identified above, she cannot, as a matter of law, recover the damages she claims in her amended complaint. Conquest alleges she suffered two kinds of damages as a result of Auto-Owners' purported handling of her claim: 1) emotional distress resulting from the delay in the payment of her claim; and 2) monetary damages resulting from delayed payment -- namely, her attorney's fees incurred in prosecuting the underlying action against the insured, plus interest. One must first ask whether it is even possible to segregate an "emotional distress" claim where it is a part of the damages recovered in the underlying lawsuit from any emotional distress claim in a subsequent bad faith action. Assuming it is possible to segregate the two, Florida law does not "permit financial recovery for all of the emotional and mental strains which modern society inflicts on an individual by reason of its inevitable clashes." *Butchikas v. Travelers Indem. Co.,*

343 So. 2d 816, 819 (Fla. 1976). To find otherwise in a situation such as presented in the Conquest complaint would be to ignore the adversarial relationship that exists between an insurer and a person making a claim--its insured. To find damages recoverable in this instance would impose a burden on an insurer which is not borne by other litigants -- liability for emotional distress damages for choosing to exercise the right to have a court decide a dispute

Ms. Conquest's claim of an entitlement to attorney's fees, unreimbursed court costs and loss of interest that would have been earned had Auto-Owners promptly paid her claim are similarly barred. A third party claimant is not entitled, as part of bad faith damages, to recover the attorney's fees expended in prosecuting the underlying action against the insured. *Roberts v. Carter,* 350 So. 2d 78, 79 (Fla. 1977); *Dunn v. Nat'l Security Fire and Cas. Co.,* 631 So. 2d at 1108. Conquest is entitled to recover court costs (§57.041, Fla. Stat. (1993)) and interest on any advance payments made on amounts she was awarded pursuant to her judgment against Auto-Owners' insured. *See Alvarado v. Rice,* 614 So. 2d 498, 499-500 (Fla. 1993). Such amounts, however, have already been paid as part of Auto-Owners' satisfaction of the judgment rendered against its insured.

Based on the above-cited case law, no damages are recoverable by Conquest even if the Second District's cause of action is recognized.

E. The Existing Florida Law and the Remedies Afforded Thereby Serve as an Adequate Check on Any Unfair Claims Activity Directed at a Third Party Claimant.

There are undoubtedly those who will raise the specter that should this Court fail to recognize a duty owed directly to a third party claimant by an insurer pursuant to §624.155, insurers will rabidly commit unfair claims practices against third party claimants. Such a claim would have no foundation. Moreover, there already exist remedies under Florida law which act as a check on improper behavior by an insurer in the context of a third party claim.

Where a plaintiff/claimant has obtained a judgment in excess of policy limits, a bad faith claim based on the principles of *Thompson* may be pursued directly against the insurer, or they can receive an assignment of any claim the insured may have against its insurer and prosecute a bad faith action against an insurance company. This type of suit provides a vehicle by which compensatory damages are recoverable and raises the possibility of recovering: 1) attorney's fees based upon what the insured has expended because of the insurer's wrongful conduct; and 2) punitive damages, upon submission of proper proof.

Over and above the claimant's ability to prosecute a bad faith claim following an excess judgment, current Florida law provides at least two procedural remedies that inhibit an insurer from engaging in gamesmanship respecting settlement of third party claims. A third party claimant who makes a demand for judgment not accepted by a defendant and who ultimately recovers a judgment of at least 25 percent in excess of the demand can recover reasonable costs and attorney's fees from the date of filing the demand for judgment. §768.79(1). To the extent the insurer defends a case without reliance upon a justiciable issue of either fact or law, the insurer, obligated to pay for both the defense of its insured and any judgment rendered against

it, would be liable for the third party claimant's reasonable attorney's fees if the third party claimant prevailed in a Chapter 57 action against the insured. §57.105.

It is anticipated the Amicus supporting Conquest's position in this case will contend, as they did before the Second District, that substantial abuses directed at third party claimants by insurers are occurring which can only be remedied by this Court ratifying the existence of a new cause of action premised on a duty owed directly to a third party claimant by an insurer. Other than the bald assertion that an insurer, through delay tactics, can compel injured persons to accept settlements below the value of the case, Conquest's Amicus has not, and cannot, point to any evidence which would substantiate this contention. The thought that any competent personal injury lawyer in the State of Florida would allow his clients to be intimidated by the mere passage of time into accepting a less than fair settlement is preposterous. Beyond overlooking the potential exposure to a bad faith claim from its own insured that would result if an insurer engaged in gamesmanship, and incorrectly concluded that a case was worth less than policy limits, Conquest's Amicus completely ignores the fact that insurance companies, like all businesses, are motivated by saving money. In continuing to defend its insured, the insurance company incurs legal fees and costs. The avoidance of these costs provides a substantial motivation for an insurer to settle claims as quickly as possible. In our system of justice, an insurance carrier should be allowed to proceed as any other litigant. Where there is no pre-existing contractual or good faith duty, an insurance carrier should not face an imposition of liability which is at variance with the same civil justice system in which it is compelled to participate.

There is no need to adopt the decision in *Conquest* to provide a check on improper insurer conduct. To adopt the *Conquest* decision would not only be unnecessary, it would invite the myriad of other problems discussed above.

CONCLUSION

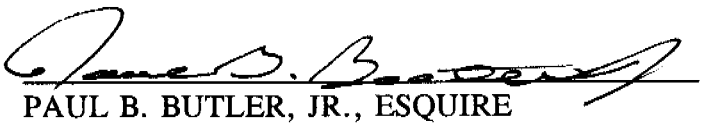
This Court should overrule the Second District's holding in *Conquest* and adopt the reasoning employed by the Third District in *Cardenas* to conclude that only an insured may sue an insurer for violation of §624.155 and the portions of the Florida Insurance Code incorporated therein. The difficulties that will necessarily arise from the recognition of an independent duty owed directly by an insurer to a third party claimant far outweigh any benefits to be gained by allowing a new bad faith cause of action. The overwhelming majority of courts considering the issue have concluded that the extension of a duty directly to a claimant is not mandated, either by the unfair claims practices act or common law. The most recent decisions of the California and Texas Supreme Courts provide worthwhile guidance in this regard.

Most significantly, Florida law simply does not support the conclusion reached by the Second District. The Florida Legislature did not intend to create a third party cause of action for bad faith based upon the breach of an independent duty owed directly by an insurer to a third party claimant. This Court should not hold otherwise.

There is no policy reason to adopt the *Conquest* reasoning. The policy reasons all militate against it. An appropriate legal analysis supports the position of the Third District in *Cardenas*. The Legislative history does not support the rationale in *Conquest*. The Legislative

history does support the reasoning in *Cardenas*. This Court is respectfully urged to reverse the holding of the Second District Court of Appeal.

BUTLER, BURNETTE & PAPPAS



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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, 401 East Jackson Street, Tampa, Florida 33602-5226; PAUL E.B. GLAD, Esquire, Sonnenschein, Nath & Rosenthal, 685 Market Street, Tenth Floor, San Francisco, California 94105; and WILLIAM T. BARKER, Esquire, Sonnenschein, Nath & Rosenthal, 8000 Sears Towers, Chicago, Illinois 60606 by U.S. Mail this 15th day of August, 1994.

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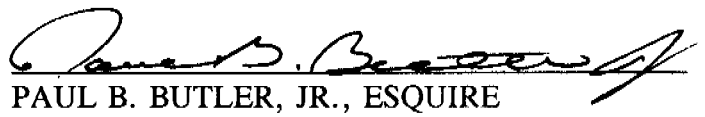

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