10-11

IN THE SUPREME COURT OF FLORIDA

AUTO-OWNERS INSURANCE COMPANY,

Petitioner,

vs.

BONITA CONQUEST,

Respondent.

CASE NO: 83, 827

ON CERTIFIED CONFLICT FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF

K. JACK BREIDEN, ESQ.
Fla. Bar No: 0279374
BREIDEN & ASSOCIATES
3101 Terrace Avenue
Naples, Florida 33942
(813) 793-1200
COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Because this case arose from a dismissal of a complaint, the record before the Court is necessarily sparse. For convenience of the Court's reference, the Respondent has included an appendix that contains the Amended Complaint, attachments to the Complaint (the notice to the insurance department of a violation of the Unfair Insurance Trade Practices Act) and a copy of the transcript of the trial court's hearing which resulted in the dismissal of the Amended Complaint with prejudice. References to the appendix will be made by the prefix "App", followed by appropriate page citation. In that allegations of the complaint are admitted for purposes of a Motion to Dismiss, the following Restatement of the Facts and Case is taken almost entirely from Mrs. Conquest's Amended Complaint and attachment thereto.

RESTATEMENT OF THE FACTS AND CASE

In November 1986, Bonita Conquest received serious injuries as a result of being thrown from a horse (App.1-2). The injuries were caused by the negligent maintenance of premises owned by an insured of Auto-Owners (App.1). Auto-Owners was timely notified of Mrs. Conquest's injuries and claim for damages. A modicum of proper investigation should have readily reflected available information supporting indemnification under Auto-Owners' liability policy (App.14). Notwithstanding the fact that Auto-Owners knew or should have known that its insurer's negligence was the cause of Mrs. Conquest's injuries, the adjuster assigned to the claim steadfastly failed and/or refused to negotiate settlement of the claim (App.2). As a result, Mrs. Conquest was required to file suit against Auto-Owners insured in April of 1987 (App.2).

Throughout the discovery proceedings, evidence was gathered which further supported negligence on behalf of Auto-Owners insured (App.11-12). The evidence even included statements under oath by Auto-Owners' insured (App.11-12). Nevertheless, Auto-Owners rejected several offers to mediate the case and refused to offer settlement (App.3;12).

Within two years of filing suit, Mrs. Conquest had incurred over $68,000.00 in unreimbursed medical expenses and $50,000.00 in lost wages (App.11). She became permanently disfigured and lost the use of her left arm (App.11). She was diagnosed as suffering from osteomyelitis of the bone in her arm and wrist. Osteomyelitis is a condition that causes the affected bones and/or joints to deteriorate. Treatment can result in remission of the condition, but further trauma to the area and/or extreme stress can cause the condition to flair up and spread. To further complicate the condition, Mrs. Conquest was diagnosed as suffering from reflex sympathetic dystrophy -- a condition that is by definition accentuation of pain resulting from the trama. In December of 1989, after it became

apparent that Mrs. Conquest's injuries could exceed the $300,000.00 of available coverage provided to Auto-Owners' insured, demand was made to Auto-Owners for the tender of the policy limits (App.2). The response from Auto-Owners was sarcastic denunciation of Mrs. Conquest's claim and threats that a verdict in her favor in any amount would be appealed (App 13).

Throughout the course of the litigation, Auto-Owners objected repeatedly to Mrs. Conquest request for mediation (App.12). Ten months prior to trial, Auto-Owners filed an Offer of Judgment for $1,000.00. In the following months, the attorney representing Auto-Owners boasted that he would have the jury laughing out of their seats by the end of his opening statement, and that following a defense verdict the Conquests would be forced into bankruptcy from the judgment for attorney fees and costs (App.12).

On September 21, 1990, following a three day trial, a Lee County jury found that there was negligence on the part of Auto-Owners insured which was the legal cause of Mrs. Conquest's injuries. The total awarded was $327,000.00, reduced to $130,800.00 for comparative negligence. On October 2, 1990, Auto-Owners was advised that Mrs. Conquest would accept $130,800.00 plus reasonable costs in order to resolve the matter without the need for further proceedings (App.13). Auto-Owners ignored the offer, choosing to commence spurious post-trial efforts claiming a right to set-off (App.13). On November 30, 1990, the trial judge entered final judgment in the total amount of $134,518.62 (App.14). Prior to entering final judgment, the trial judge acknowledged on the record that the verdict was within "a few thousand dollars" of what he thought the matter could have been settled for (App.14).

On December 13, 1990, Auto-Owners' attorney advised he would be "willing to recommend $50,000.00 in complete settlement of this claim" (App.14). Two weeks later Auto-Owners filed a

Notice of Appeal.

On January 3, 1991, Mrs. Conquest filed a Notice of Insurer Violation under section 624.155 (2)(b) with the Department of Insurance (App.9). Said notice set forth with particularity violations of the Unfair Insurance Trade Practice Act, section 626.9541 Florida Statutes (1991), relating to failures by Auto-Owners to implement standards for the proper investigation of claims, failures to act promptly with regard to communications on claims and denying claims without conducting reasonable investigations based upon available information (App.9-7). Auto-Owners failed to pay the damages or correct the circumstances.

Following an unsuccessful appeal, Auto-Owners satisfied Mrs. Conquest's judgment in January 1992, by tendering a total of $153,050.99.(App.3) But the five years that it took to recover compensatory damages relating to the insured's negligence had taken its toll on Mrs. Conquest. The length and stress of the protracted litigation had aggravated her post traumatic depression. A stress related flare up of her osteomyelitides subsequent to trial resulted in the condition spreading to her jaw. Oral surgery was required. Her credit had been trashed as a result of the thousands of dollars in medical expenses that were years past due.

In October of 1992 the instant action was filed pursuant to the Florida Civil Remedy Act, section 624.155, seeking to recover interest on the money that should have been paid by Auto-Owners had it made a reasonable attempt to settle Mrs. Conquest's claim, payment of additional attorneys' fees as required by her contract with her attorney in the underlying case, unreimbursed costs incurred from the previous litigation and other damages that were the natural, proximate, probable or direct consequence of Auto-Owners bad faith actions (App.1-17). Auto-Owners submitted a Motion to Dismiss, averring that a third party does not have an independent statutory

cause of action against liability insurers who fail to act in good faith, pursuant to the holding in Cardenas vs. Miami-Dade Yellow Cab Company 538 So.2nd. 491 (Fla.3d.DCA 1989).

Auto-Owners' Motion to Dismiss came on to be heard before the Honorable James R. Thompson on January 6, 1993 (App.18-33). Judge Thompson acknowledged that he had read the Cardenas decision prior to the hearing, and that in the absence of a Second District opinion on point, he would be bound to follow the Cardenas ruling. More specifically, Judge Thompson announced:

> "THE COURT: In other words, to get me from having to follow Cardenas, you are going to have to get the Second District to say I'm not supposed to."(App.29)

Judge Thompson granted the Motion to Dismiss without prejudice, but stated:

> "THE COURT: I have looked at this thing, and I don't believe that you are stating causes of action here. In fact, I don't believe you can state causes of action. Let me not prolong this. I don't know if you want an opportunity to further try and amend. I suspect that it can't be amended, but, um, I think since you are only at the first level, unless you want to go ahead and take it up now, that I ought to dismiss it without prejudice. But if you are satisfied this is the most you can allege, you know, it is up to you at this point. I will dismiss it without prejudice and let you try again, but I don't think you are going to be able to state a cause of action to this thing."(App.31-32)

The complaint was amended, but maintained allegations relating to the statutory duties established under 624.155 and 626.9541 Florida Statutes (1991). Auto-Owners again moved to dismiss the Complaint based upon the Cardenas holding. On April 8, 1993, Judge Thompson granted Auto-Owners' Motion to Dismiss with prejudice. A timely appeal to the Second district followed.

On May 11, 1994, the Second District Court of Appeals rendered an opinion reversing the Order Dismissing the Complaint as to the allegations relating to section 624.155 (b), but affirming

as to the dismissal of the other counts of the complaint. Conquest v. Auto-Owners Ins. Co., 637 So2d 40 (Fla. 2DCA 1994). The Second District acknowledged express conflict in the holding of Cardenas v. Miami-Dade Yellow Cab Company. Thereafter, Auto-Owners perfected the instant appeal.

ISSUE ON APPEAL

THE SECOND DISTRICT DID NOT ERROR IN HOLDING THAT THE FLORIDA CIVIL REMEDIES ACT CREATES A CAUSE OF ACTION FOR THIRD PARTIES DAMAGED BY AN INSURER'S VIOLATION OF ONE OF SIX ENUMERATED SECTIONS OF THE UNFAIR INSURANCE TRADE PRACTICES ACT.

SUMMARY OF ARGUMENT

Section 624.155 specifically provides that "any person" is entitled to bring an action against an insurance carrier for violations of the statute and/or enumerated sections of the Unfair Insurance Trade Practices Act, 626.9541 Fla. Stat. (1991). The primary question on appeal is whether the plain meaning rule of statutory construction should be applied to the expression "any person", so as to allow third party actions against insurance carriers that violate the enumerated sections of the Unfair Insurance Trace Practices Act with such frequency as to indicate a business policy.

The Second District held that the words "any person" constitute clear, unambiguous, all-inclusive language that requires no interpretation of legislative intent. The Second District was imminently correct.

Assuming arguendo that there is a need to look at the legislative intent, that intent can be determined by a consideration of the statute as a whole. Such an interpretation supports the Second District conclusion, in that the statute contains numerous references to the rights of parties that could not be interpreted as being "an insured".

The arguments presented by the Petitioner and its Amici attempt to hide the forest from the trees. They claim that a third party cannot bring an action under 624.155 without an excess judgment. This court has held contrary. They claim that other states have refused to recognize a third party remedy for violation of the Unfair Insurance Claim Practices Acts. What other courts have done is irrelevant. Only the Supreme Court is tasked with interpreting the intent of the Florida Legislatures. They claim that disastrous results will occasion if the court does not overrule the Second District. This position is unsupported by fact. Moreover, affirming the Second District will avoid obvious pretrial impediments to settlement, and protracted litigation. Contrary to the position

of the Petitioner and its Amici, affirming the Second District opinion will promote settlement and avoid protracted litigation.

I.

THE SECOND DISTRICT DID NOT ERROR IN HOLDING THAT THE FLORIDA CIVIL REMEDIES ACT CREATES A CAUSE OF ACTION FOR THIRD PARTIES DAMAGED BY AN INSURER'S VIOLATION OF ONE OF SIX ENUMBERATED SECTIONS OF THE UNFAIR INSURANCE TRADE PRACTICES ACT.

The issue presented to the Second District in the case at bar was a straight forward question: Is the civil remedy provided by section 624.155 Fla. Stat. available only to "first-party" claimants, as the Third District held in Cardenas v. Miami Dade Yellow Cab Co., 538 So.2d 491 (Fla. 3rd DCA 1989) review dismissed 549 So.2d 1013 (Fla. 1989), or does it extend to "third-party" claimants damaged by the bad faith of an insurer as well? Concisely stated, the statute allows that "Any person may bring a civil action against an insurer when such person is damaged" by an insurer which violates one of six enumerated statutes or commits one of three prohibited acts. Conquest vs. Auto-Owners, 637 So.2d 40, 42 (Fla. 2nd DCA 1994). In concluding that the clear language of the statute creates a cause of action for third parties (non-insureds), the Second District held:

> "...that the words 'any person' constitute clear, unambiguous, all-inclusive language that requires no interpretation of legislative intent. Holly vs. Auld, 450 So.2d 217 (Fla. 1984); Opperman vs. Nationwide Mut. Fire Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987), review denied 523 So.2d 578 (Fla. 1988)." at Page 42

It has long been held that the legislature is conclusively presumed to have a working knowledge of the English language, and when a statute has been drafted in such a manner as to clearly convey a specific meaning, the only proper function of the Court is to effectuate this legislative intent.

Larrabee vs. Capelitti Bros. Inc., 158 So.2d 540 (Fla. 3rd DCA 1963). Where words used in an act, when considered in their ordinary and grammatical sense, clearly express the legislative intent, other rules of construction and interpretation are unnecessary and unwarranted. A court that fails to apply the plain and ordinary meaning and common usage of the language of an act in determining intent misapplies the established decisional rules of statutory construction. Rinker Materials Corporation vs. North Miami, 286 So.2d 552 (Fla. 1973) conformed to 288 So.2d 536 (Fla. 3rd DCA) In Holly vs. Auld, 450 So.2d 217 (Fla. 1984), this Honorable Court confirmed that the Courts of this state are:

> "...without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. **To do so would be an abrogation of legislative power.**" at Page 219(emphasis ours)

To be certain, the Second District opinion herein under review was not the first to apply the plain meaning rule of statutory construction in order to determine the scope of section 624.155. In 1986, District Judge Susan H. Black rendered an opinion involving the issue of the applicability of the statute to first party actions in United Guaranty Residential Ins. v. Alliance Mortg. Co., 644 F.Supp.339 (MD Fla. 1986). Therein, the injured party contended that the enactment of section 624.155 altered the common law on the subject by removing the requirement of an independent tort. The carrier in United Guaranty argued that section 624.155 only codified the established Florida law as to third party actions. Judge Black rejected this argument, holding that ". . . the plain and unambiguous language of (1) (b) 1 "not attempting in good faith to settle claims . . ." reaches **all** claims, not only third party claims."(emphasis ours) More specifically, Judge Black stated:

"An interpretation of Section (1) (b) 1 as covering both first party and third party bad faith actions is consistent with the general scheme of Section 624.155. The language of Section 624.155 indicates that the overall purpose of the legislature was to impose civil liability on insurers who act inequitably vis-a-vis their insured, not simply to restate or clarify the common law. For example, Subsection (1) (a), which incorporates certain enumerated provisions of Chapter 626, Part VIII, of the Florida Statutes ("Unfair Insurance Trade Practices"), is clearly intended to create civil liability where none had attached before." At Page 341.

In 1987, Florida's Fifth District Court of Appeal rendered another opinion regarding the applicability of section 624.155. In Opperman v. Nationwide Mut. Fire Ins., 515 So.2d 263 (Fla. 5 DCA 1987), a defendant insurance carrier urged the appellate court to interpret the language of the statute so as to exclude first party actions for bad faith. The plaintiff argued that by applying the plain meaning rule of statutory construction to the expression "any person", the clear and unambiguous language of section 624.155 extends a cause of action to first party insureds against insurers for bad faith refusal to settle. In rendering its opinion, the Fifth District relied specifically on the "well-reasoned opinion" of Judge Black in United Guaranty, wherein she concluded that resort to rules of statutory construction was unnecessary because the plain language of Section 624.155 (1) (b) ". . . clearly expressed the legislative intent to extend a cause of action for bad faith to first and third parties alike." The Fifth District stated with particularity that:

"The language of section 624.155 is clear and unambiguous and conveys a clear and definite meaning. It provides a civil cause of action to "any person" who is injured as a result of an insurer's bad faith dealing. Thus, there is no occasion to resort to rules of statutory construction; the statute must be given its plain and obvious meaning. Holly vs. Auld, 450 So.2d 217 (Fla. 1984). The legislature is presumed to know the existing law at the time it enacts a statute. Ford vs. Wayinwright 455 So.2d 471, 475 (Fla. 1984); Adler-Built Industries, Inc. vs. Metropolitan Dade County, 231 So.2d

197, 199 (Fla. 1970). There is nothing in the statute which indicates an intent to limit an existing common law remedy. Cf., Bankstrom vs. Brennan, 507 So.2d. 1385 (Fla. 1987). On the contrary, the statute clearly indicates the intent to expand that remedy." At page 266.(emphasis ours)

Thus, the Second District Conquest ruling became the third reported Florida decision to expressly apply the plain meaning rule of statutory construction to the words"any person" in order to determine the scope of section 624.155.[1] In point of fact, the only reported decision regarding section 624.155 wherein a Florida Court employed incidental rules of construction and/or speculation as to what the legislature intended or should have intended is Cardenas.

In Cardenas, the Third District held that "any person" in section 624.155 meant "any insured party", and concluded that the section did not authorize any third-party suits against insurance companies. Cardenas, at 496. Curiously, nowhere in Cardenas does the Third District address the plain meaning rule of statutory construction. However, Legislative intent controls the construction of statutes, and that intent is determined primarily from the language of the statutes. The plain meaning of the statutory language is the first consideration. When the language is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction -- the statute must be given its plain and obvious meaning. Holly v. Auld,

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[1]In addition, other prior decisions impliedly recognized that the plain language in section 624.155 conveys a clear and definite meaning which imposes an implied covenant of good faith and fair dealing which would permit tort recovery in first and third-party insurance claims. See Industrial Fire and Casualty Inc. Co. vs. Romer, 432 So 2d 66, 69 Note 5 (Fla. 4th DCA 1983); Fortsom vs. St. Paul Fire and Marine Ins. Co., 751 F. 2d 1127 (11th Circuit 1985) (dismissing without prejudice third-party action for bad faith failure to settle solely upon the carrier's argument that the cause was premature because it was submitted prior to a determination of primary liability claim); Rowland vs. Safeco Insurance Company, 634 F.Supp. 613 (M.D. Fla. 1986); Lucente vs. State Farm Mutual Automobile Insurance Company, 591 So 2d 1126 (Fla. 4th DCA 1992) (third-party action brought pursuant to section 624.155 dismissed until primary liability claim is determined.

450 So.2d 217 (Fla.1984).

By not applying the "plain meaning" rule, the Third District allowed itself to search for legislative intent, determined by a consideration of the statute as a whole. The Court noted:

> "Moreover, we have undertaken a careful reading of the instant statute and those other statutory sections referred to within section 624.155. There is repeated reference, not to the rights of third persons, but to the rights of the insured in his dealings with his insurance company." at Page 496 (emphasis the Court)

The respondent firmly maintains that the Third District erred by not applying the "plain meaning" rule of statutory construction in its Cardenas holding. However, in an abundance of caution, it is respectfully submitted that the legislative intent determined from a consideration of the statute as a whole does not support an interpretation that the phrase "any person" should be limited to "any insured party".

Is Schorb v. Schorb, 547 So2d 985 (Fla. 2d DCA 1989), the Second District addressed the relevant concerns when attempting to define terms from a consideration of a statute as a whole. Therein, it was held that:

> 1. Statutes arising out of the same act should be read in pari material;
> 2. Statutes which relate to the same subject matter typically receive comparable interpretations;
> 3. When statutes employ basically the same words or phrases, the legislature is assumed to intend the same meaning;
> 4. There is a presumption that the same words used in different parts of the statute have the same meaning and when a definition of a word appears in one portion of the statute, then there is no valid reason to employ a different definition.

It is respectfully submitted that the principles of statutory construction contained in Schorb supports a holding that the Respondent's complaint states a cause of action herein. Schorb is also in

direct and obvious conflict with the Third District holding in Cardenas that the phrase "any person" should be read to mean only an insured party. This Honorable Court's attention would be respectfully directed to section 624.04 wherein the legislature defined the word "person" as being:

> "Person" includes an individual, insurer, company, association, organization, Lloyds, society, reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation, agent, general agent, broker, solicitor, service representative, adjuster and every legal entity."

In Cardenas, the Third District interpreted the words "any person" so as to mean only an "insured party" and to exclude all others. Such an interpretation simply cannot be harmonized with the legislature's definition of the word person.

Morover, section 624.155 stems from the same act and must be read along with section 626.9541 (in fact, this point was conceded by Petitioner in the District Court, Appellee's Answer Brief, page 9). What the Third District also seems to have overlooked is the fact that the statutes contain repeated references to the rights of persons who could not be an insured at all because they are never issued policies. The following is a summary of the statutory sections referred to in 624.155:

> 1. Section 626.9541(1)(o) -- this section specifically prohibits collecting any sum for premiums when a policy is not in fact provided. If someone pays for a policy that is not issued, clearly that person is not an insured.
>
> 2. Section 626.9541(1)(x) -- here the legislators found that the refusal to issue a policy based upon race, color, creed, marital status, or natural origin was an unfair or deceptive act or practice. It is axiomatic that any person bringing an action under the Civil Remedy Statute for such a refusal would not be an insured.
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> 3. Section 626.9551 -- this section, titled "Favored agent or insurer; coercion of debtors-", states that "no person" may require as a condition precedent or subsequent to the lending of money or

extension of credit the acquisition of an insurance policy. If someone refuses to acquire an insurance policy as a condition precedent to borrowing money...how could that person bring a civil remedy action as an insured? And certainly, the "person" prohibited from making the condition precedent or subsequent would never be an insured.

4. Section 626.9705 -- this section specifically applies to "an applicant or a prospective policy holder" as a person to whom renewal cannot be refused based upon a severe disability. If a person is denied a renewal policy, surely that person does not become an insured dealing with his insurance company.

5. Section 626.9706 -- this section specifically applies to a refusal to issue and deliver a policy solely based upon sickle-cell trait. The sickle-cell trait person who was never issued a policy certainly could not bring an action under the civil remedy statute as an insured.

6. Section 626.9707 -- this is another section that deals with the refusal to issue or deliver a policy to a person with the sickle-cell trait.

7. Section 627.7283 -- this section requires an insurance company to return the unearned portion of any premium paid within 30 days of the cancellation of a policy of motor vehicle insurance. By definition, an insured is not a person whose policy has been canceled.

Additionally, as pointed out by the Second District, section 624.155(2)(b)(4) recognizes third-parties by excusing third-party claimants from a requirement of attaching policy language if it has not been provided by the insurer. Conquest, page 42. Thus, "a careful reading of 624.155 and the statutes therein" readily reflects repeated references to the rights of persons that would be excluded by the Third District's holding that "any person" must be read to mean only an insured.

In a final effort to support an interpretation that "any person" in 624.155 means "any insured party", the Third District stated:

"...interpreting those words to include an injured third-party would achieve an

> undesirable result in that permitting a third party such a cause of action against the insurer anytime the insurer allegedly failed to settle in good faith could result in 'undesirable social and economic effects'...(ie, multiple litigation, unwarranted badfaith claims, cohersive settlements, excessive jury awards, and escalating insurance, legal and other 'transitional costs')". at page 496. [2]

Clearly, these "social and economic effects" are equally implicated by the recognition of any type of "bad faith" cause of action. Accepting this argument would be tanamount to adopting a public policy interpretation of 624.155 so as to allow that "no person" may bring a civil action against an insurer when such person is damaged by an insurer which violates one of the six enumerated statutes, contrary to Holly v. Auld, Id. see page 219.

It is well settled that in ascertaining the legislative intent, the courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. If the language of the statute is clear and unequivocal, the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think the legislature intended or should have intended. Tropical Coach Line, Inc. V. Carter, 121 So.2d 779 (Fla. 1960). Moreover, courts have no power to modify the plain purpose and intent of the legislature as expressed by the language employed in the statute, even if such change is designed to bring about what may be conceived in the minds of the judges or the administrators to be a more practical or proper result. Vocelle v. Knight Bros. Paper

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[2]The sole reference proporting to support the aforementioned "undesirable social and economic affects" is to an "informative discussion of the issue" found in the California case of Moradi-Shalal v. Firemans Fund Insurance Companies, 758 P.2d 58 (Cal. 1988). Therein, the California Supreme Court did not reference documented examples of the "undesirable social and economic effects" of permitting third-party causes of actions for bad faith against insurers. Rather, the Court relied upon opinions/predictions contained in a half a dozen law review articles published from 1980 to 1985

Co. 118 So 2d 664 (Fla. 1st DCA 1960). Further, if the language of the statute is clear and not entirely unreasonable or illogical in its operation, the court has no power to go outside the statute in search of excuses to give a different meaning to words used in the statute Vocelle, Supra.

It is most respectfully submitted that to this point the Respondent has presented three succinct compelling reasons why the Second District opinion should be affirmed, to wit: 1) the plain meaning rule is controlling, therefore requiring no necessity for construction or interpretation of the statute 2) alternatively, reading the statute in pari material supports the Second District holding, 3) well established decisional law prohibits Florida Courts from abrogating legislative power by modifying express legislative intent in order to uphold policy that may be favored by a Court. It follows that the Second District Conquest opinion should be affirmed without the need for further discussion. However, Auto-Owners and its Amici raise several collateral issues in the briefs that the Respondent will hereafter address.

First, throughout the briefs Auto-Owners and its Amici maintain that the legislature intended to limit a third-party's rights under the civil remedy statute to those circumstances where an insurance company's bad faith led to an excess verdict. However, the Florida Supreme Court recognized that remedy prior to the enactment of the Civil Remedy Statute. See Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971), Boston Old Colony Ins. Co. v. Gutierrez 386 So.2d 783 (Fla. 1980). In Opperman, Infra., the Fifth District observed that there is nothing in section 624.155 which indicates an intent to limit a remedy existing under the decisions of the Supreme Court. On the contrary, the statute clearly indicates the legislature's intent to expand that remedy. Id, at page 266; in accord Hollar v. International Bankers Ins. Co., 572 So.2d 937 (Fla. 3rd DCA 1990), at page 939.

Auto-Owners states it did no more than exercise its right of evaluating claims and securing a jury verdict and judgment for less than the demanded policy limits. The gravamen of the complaint in the case at bar is that Auto-Owners failed to adopt and implement standards for the proper investigation of claims and defiantly denied Mrs. Conquest's claim without conducting reasonable investigations based upon available information. These practices are declared to be unfair or deceptive acts under 626.9541 (1)(i), without reference to the amount of verdicts, judgments or policy limits. According to Auto-Owners, a failure to adopt and implement standards for proper investigation of claims is unimportant, if the net verdict is less than an insurance company's policy limits. According to Auto-Owners, denying claims without conducting reasonable investigations based upon available information is unimportant, if the net verdict is less than the insurance company's policy limits. According to Auto-Owners, insurance companies can engage in unnecessary protracted litigation and thereby aggravate a person's condition, if the net verdict is less than the insurance companies policy limits.

In Imhof v. Nationwide Mutual Insurance Company, 19 Fla. L. Weekly S257 (Fla. May 12, 1994, revised opinion), this Honorable Court recently made it clear that there is no need to allege an award exceeding the policy limits to bring an action for insurer bad faith. Although Imhof involved a first party action pursuant to section 624.155, the reasoning of the opinion supports a conclusion that there is no reason to require an allegation of an award exceeding the policy limits in order to bring a third party action when violations of the Unfair Insurance Trade Practices Act have been properly plead.

In the instant case, the amount of the jury verdict shows that Mrs. Conquest had a valid claim. Mrs. Conquest thus had a legitimate interest in a speedy resolution of her claim. She notified

Auto-Owners of her claim against their insured and tried to settle as early as March 1987. In her Complaint herein, she alleges that Auto-Owners failed and/or refused to negotiate settlement of her claim prior to suit. She further alleges that throughout the balance of the pretrial litigation, Auto-Owners failed/refused to offer settlement and repeatedly refused mediation of the claim. Although Mrs. Conquest's unreimbursed medical expenses were known to Auto-Owners to exceed $68,000.00, her settlement advances were responded to by a denuncation of her claim and threats that a verdict in any amount would be appealed. Even after the trial when Mrs. Conquest offered to accept the $138,800.00 awarded by the jury, Auto-Owners' attorney rejected the offer and advised that he would be "willing to recommend $50,000.00 in complete settlement of the claim." On January 3, 1991, Mrs. Conquest filed a Notice of Insurer Violation under section 624.155 (2)(a). Because Auto-Owners failed to pay the damages or correct the circumstances giving rise to the voilation in a timely manner following the Notice of insurer violation, the instant action was filed. The amended complaint alleges, inter alia, that as a result of Auto-Owners' failure to properly investigate Mrs. Conquest's claim and/or failure to acknowldege and act promptly upon communications with respect to Mrs. Conquest's claim and/or the denying of Mrs. Conquest's claim without conducting a reasonable investigation based upon available information, Mrs. Conquest was required to incur additional attorney fees, unreimbursed court cost, and loss of interest that should have been earned had benifits under the policy issued by Auto-Owners been promptly paid. In Imholf, this court found that a complaint need not allege a specific amount of damages incurred as a result of an insurer's bad faith actions, and reconfirmed that the damages allowable under section 624.155 are those set forth in McLeod v. Continental Insurance Company, 591 So.2d 621, 626 (Fla. 1992), which include, but are not limited

to, interest, court costs, and reasonable attorney fees.[3] Clearly, Mrs. Conquest has set forth a claim under the Florida Civil Remedies Act for violations of the Unfair Insurance Trade Practices Act.

The second collateral issue set forth within the context of the initial briefs suggest that the recognition of a duty owed to a third party claimant intefers with the constitutionally guaranteed freedom to contract. Although Auto-Owners does not raise the aforementioned argument, the Amici does (see page 12 of Amici brief). The Amici suggest that "If the Second District's reading of section 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, section 624.155 is void as an unconstitutional restraint on the ability of parties to contract as they see fit." But where is it written that a term of an insurance policy is in agreement that the carrier is free to engage in bad faith and/or to be unregulated by the Florida Legislature? If such were the case, the entire insurance code would be void and unenforceable.

The third collateral issue urged by Auto-Owners and its Amici suggest that other states have declined to expand bad faith statutes in the manner set forth in the Second District Conquest opinion, and that this Court should overrule the Second District on that basis. The flagship case relied upon by Auto-Owners and its Amici for support of the above referenced concept is the California Supreme Court opinion in Moradi-Shalal v. Fire's Fund Insurance Company, 758 P.3d 58 (Cal. 1988). It is most respectfully submitted that the simplest way to dismiss this argument is by coining a phrase from Justice Mosk's dissenting opinion therein, to wit: This is wholly irrelevant. The Florida courts alone have the responsibility of interpreting the laws adopted by the Florida Legislature, and they cannot

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[3] In addition to the attorney fees sought as a result of having to file the instant action, Mrs. Conquest's complaint alleges a recovery for payment of additional attorney fees as required by her contract with her attorney in the underlying action.

be deterred from that duty by what other states have done or failed to do under laws enacted by their legislative bodies. Moradi-Shalal, at page 320

Auto-Owners' and their Amici's reference to what other states have done conveniently over looks the fact that each of the 28 jurisdictions referenced can be easily distinguished from the case at bar. Looking to their flagship case, the California Supreme Court held in Moradi that

> "finally, nothing we hold herein would prevent the Legislature from creating additional civil or administrative remedies, including, of course, creation of a private cause of action for violation of (the Unfair Insurance Trade Practices Act)." at page 69.

Without doubt, the Florida Legislature has done what the California Supreme Court allowed without qualification would over rule its opinion, to wit: enact a statute that creates an independent cause of action for violation of the Unfair Insurance Trade Practices Act. Similarly, the 1994 Texas Supreme Court decision featured in Auto-Owners' and its amicus' briefs expressly points out that the Texas legislature has not enacted a statute that provides a civil remedy for violations of insurer unfair trade practices. Allstate Insurance Comapny v. Watson, 876 S.W.2d 145, 149 (Tex. 1994). The balance of the other jurisdictional decisions cited by Auto-Owners and their Amici are easily distinguishable. Most involved a denunciation of first party bad faith claims, contrary to well established Florida decisional law.

The final collateral issue raised by Auto-Owners and its Amici that the respondent will address is the one that covers more collective pages in the briefs than any other argument. In simple terms, Auto-Owners and the Amici warn the Court that it cannot affirm the Second District Conquest holding without expecting disastrous consequences. Allowing all third parties to sue an insurer for unfair claims practices would have "deleterious" effects (Auto-Owners' brief page 7, 26). Webster's

New Universal Unabridged Dictionary defines "deleterious" as "a destroyer, from deletisthai, to injure, to destroy." The industry predicts that the coming of this destroyer will shake settlement practices to its foundations. "The floodgates of litigation" will open, a "settle and sue" mentality will be encouraged, confusion and conflict will rain and monetary settlements will act as a "lottery ticket" for claimants hoping for a "jackpot" (Amici brief pages 8-11; 13). This "legion of adverse consequences" will inevitably result in increase insurance premiums, and an exodus of carriers willing to do business in Florida (Auto-Owners brief pages 26; Amici brief page 16-17).

The aforementioned predictions of doom beg a question, to wit: How are all these law suits going to arise unless unfair and deceptive third party settlement dealings are run amuck in Florida as a general business practice? Doesn't it follow instead that in the more than 20 years since Florida insurance companies have had an opportunity to comply with the provisions of the Unfair Insurance Trade Practices Act that prohibitive unfair and deceptive practices should be rare? It is worth noting that if the allegations contained in the complaint in the instant case are admitted (and they must be deemed admitted for purposes of a Motion to Dismiss), then Mrs. Conquest has clearly suffered as a result of Auto-Owners' failure to implement standards for the proper investigation of claims, failure to acknowledge and act promptly upon communications with their respect to claims and flagrantly denying Mrs. Conquest's claim without conducting reasonable investigations based upon available information. Yet not one single insurance carrier has come forward to criticize Auto-Owners for its conduct. Rather, the insurance industry is trying to importune this court to favor a policy that would condone such conduct.

The approach taken by the insurance industry herein is the same that was used not that many years ago in an effort to exclude first party actions under the Civil Remedies Act, and years before

in an effort to exclude the recovery of excess judgments from carriers at common law. Whereas a few carriers have been penalized for first party bad faith conduct under the Civil Remedies Act and for unwarranted excess verdicts, this court has not been asked to take notice of a "flood" of law suits as a result of such actions. Rather, Auto-Owners and its Amici rely solely on their flagship case of Moradi-Shalal, Infra. A careful reading of that opinion reveals that the majority of the court did not offer specific factual examples of "undesirable social and economic effects" that sprang from prohibiting unfair and deceptive practices by insurers in their dealings with third party claimants. Rather, the California Supreme Court showed profound reverence to the opinions of commentators found in a half a dozen law review articles published between 1980 to 1985. Further, a review of those particular law review articles readily reflects that the commentators opinions are also unsupported by fact -- they are no more than predictions and forecasts of the authors. Without belaboring the point, the Respondent would represent that the undersigned has searched the available Florida decisional law data bases, and was unable to uncover a single opinion wherein this Honorable Court reversed clear legislative intent out of fear of law review criticism. Further, the Respondent verrily believes no such decision exists.

Common sense and logic mandates that the wailing of the insurance industry in the instant case is self serving. The insurance industry does not want to comply with the Unfair Insurance Trade Practices Act because the industry favors "unofficial" settlement techniques that are perceived as inexpensive short cuts. When an adjuster can deny claims without conducting reasonable investigations based upon available information, the adjuster is encouraged to develop the habit of

stonewalling and lowballing.[4] This is true because without a proper investigation, an adjuster simply does not have the tools to make a fair evaluation of a claim and must resort to other methods of dealing with the claimant or the claimant's attorney. A competent claimant's attorney is not going to accept this approach . . . he/she is going to file a law suit. Further, alllowing an insurance carrier to fail to adopt and implement standards for the proper investigation of claims means that any proper investigation is going to take place only through the discovery process. If there are no standards implemented for the proper investigation of claims during the discovery process, resolution of the matter will be protracted all the way through to the courthouse steps before trial (and if not then, the jury will perform the investigation chore). More is this the case if a carrier is allowed to fail to acknowledge and act promptly upon communications with respect to claims. Each of these failures is by legislative definition an unfair or deceptive act. When these acts are committed or performed with such frequency as to indicate a general business policy, as alleged herein, the offending carrier should be made to pay damages that result. Such an offending carrier needs a wake up call. It needs to realize that unfair and deceptive practices snarl the system.[5] It needs to embrace this court's observation in Imhof:

> "The law favors settlement of disputes and the avoidance of litigation. See e.g. Dewitt v. Miami Transit Company, 95 So.2d 889, 901 (Fla. 1957). The pre-trial settlement of a law suit is generally favored because it saves scarce judicial resources. In re Smith 926 F.2nd 1027, 1029 (11th Cir. 1991) Section 624.155 follows long standing public policy and promotes quick resolution of insurance claims."

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[4]For an informative discussion of these "unofficial" settlement techniques, see How Insurance Companies Settle Cases, Clinton E. Miller, James Publishing Group, Chapter 8 (App. 46-58)

[5]"Oh, what a tangled web we weave when first we practice to deceive!", Sir Walter Scott, Marmion, verse VI (1806).

CONCLUSION

The burden of this Honorable Court is to determine whether the complaint filed by Mrs. Conquest alleges sufficient facts which under any theory of law would entitle her to the money judgment she seeks. This court should affirm the Second District under the plain meaning rule. Alternatively, this court should affirm the Second District by reviewing the language of the statute as a whole. Auto-Owner's and the insurance industry's argument is without merit and without support. Accordingly, the Second District opinion should be affirmed so as to secure the just, speedy, and inexpensive determination of Respondent's cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: RAYMOND T. ELLIGETT, JR., Esq., Schropp, Buell & Elligett, P.A., Landmark Centre, Suite 2600, 401 East Jackson Street, Tampa, Florida 33602-5226; JOEL D. EATON, Esq., Podhurst, Orsck, et al., 800 City National Bank, 25 W. Flagler Street, Miami, Florida 33130-1720; and PAUL B. BUTLER, JR.,, Esq., Butler, Burnette & Pappas, Bayport Plaza, Suite 110, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458 by U.S. Mail this 16th Day of September, 1994.

K. Jack Breiden, Esq.