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

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Plaintiff[1] and her amicus fail to address a number of the arguments of Auto-Owners and its amicus proving §624.155(1)(a)1 does not grant a cause of action for third-party claimants without an excess judgment. These include:

(1) the legislature is deemed to have adopted *Cardenas v. Miami-Dade Yellow Cab Company*, 538 So. 2d 491 (Fla. 3d DCA 1989), *review dismissed*, 549 So. 2d 1013 (Fla. 1989).

(2) a statute may not be construed by looking ahead to language not in effect at the statute's adoption.

(3) Auto-Owners' coverage position was at least "fairly debatable" which precludes a finding of bad faith.

(4) the new duty adopted in *Conquest* would create conflicts with the duties an insurer owes its insured.

Plaintiff ignores that §624.155(1) does not simply allow "any person" to sue under it, but only "any person" "when such person is damaged." A noninsured third party in Plaintiff's situation who has not recovered an excess judgment is not damaged so as to be able to maintain an action under §624.155. As Plaintiff's claims prove, permitting third parties without excess judgments to sue will invite countless second suits asserting insurers caused bad credit, stress disorders and the like.

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[1] Auto-Owners uses the same designations as in its initial brief, with the additions that references to its initial brief are designated by the prefix "IB," and references to the amici brief of State Farm, et. al. are designated by the prefix "Amici."

ARGUMENT

I. PLAINTIFF AND HER AMICUS FAILED TO ADDRESS ISSUES RAISED BY AUTO-OWNERS WHICH ARE DETERMINATIVE OF THIS APPEAL.

A. Plaintiff and her amicus did not address Auto-Owners' argument that the legislature is deemed to have adopted the *Cardenas* court's construction of §624.155.

Plaintiff and her amicus offer no response to the cases holding the Florida legislature is deemed to have adopted the *Cardenas* holding that §624.155 does not grant a cause of action for third parties (IB 16-18). This silence demonstrates their inability to refute the legislature's recognition that *Cardenas* correctly interpreted §624.155.

B. Plaintiff and her amicus did not address Auto-Owners' statutory construction arguments.

Plaintiff and amicus make much of the single reference in §624.155(2)(b)4 to a third-party claimant (who is not required to attach the policy if the insurer has not provided a copy) which was added to the statute in 1987. However, they fail to address two recent cases in which this Court has observed that it is incorrect to construe a statute by looking ahead to statutory language adopted at a later date (IB 20-22).

Plaintiff failed to refute that the 1987 reference proves nothing more than the legislature's intent to codify the common law right of a third party who obtains an excess judgment to sue for those damages in bad faith and to permit that third party to

recover attorney's fees for the bad faith action if successful (IB 20-21). They also failed to address the argument that there are a number of situations where an insured may not be a named insured and thus not have a copy of the policy (Amici 39-40).

C. Plaintiff and amicus did not address Auto-Owners' argument the Second District used an erroneous and inconsistent analysis to hold any damaged person encompassed non-insureds who have not obtained an excess judgment.

Plaintiff and amicus argue the Second District applied the plain meaning rule of statutory construction to determine "any person" in §624.155 literally meant any person. First, the statute actually provides a remedy for any person only "when such person is damaged."

Second, Plaintiff failed to address Auto-Owners' argument that the Second District did not actually use the plain meaning of the term "any person," since it added the term "appropriate" to the definition and effectively defined "any person" as "any appropriate person." Third, the Second District's definition actually created ambiguity; every subsection would have to be construed to determine the meaning of "any person ... damaged" for that particular subsection (IB 18-19).

Plaintiff failed to address Auto-Owners' argument that *Conquest* is inconsistent, because the Second District did not apply the same reasoning to §626.9541 that it applied to §624.155(1)(b)1.

The duties described in §626.9541(1)(i)3. a, c and d are breaches of duties which run only to the insured (IB 22-23).[2]

D. Plaintiff and amicus failed to address Auto-Owners' argument that §624.155(1) requires a person bringing an action to have been damaged.

Neither Plaintiff nor amicus addressed Auto-Owners' argument that Plaintiff's claim was "fairly debatable" (IB 29). Plaintiff never asserted she had made a demand equal to or less than the $130,800 she actually recovered, an amount of less than half the policy limits. Because Plaintiff cannot plead or prove that she made a demand equal to or less than the amount she ultimately recovered, she cannot prove any damage. In other words, she cannot show that she demanded or would have accepted $130,800 short of going to trial (IB 28-29).

Plaintiff does attempt to make much of the alleged statements of defense counsel in the underlying case that he viewed the case as very defensible. Plaintiff forgets that the $1,000 offer of judgment on behalf of the defendant was closer to the net verdict than the $300,000 limits Plaintiff consistently demanded. Under Plaintiff's logic, if Auto-Owners is guilty of bad faith, Plaintiff is guilty of greater bad faith.

Plaintiff claims elements of damages in her statement of the case which are unsubstantiated by the record (stress-related flare

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[2] Plaintiff's amicus disagreed with *Conquest* to the extent it limited bad faith actions under §624.155(1)(b)1 to insureds. For the reasons discussed herein, the Second District correctly limited §624.155(1)(b)1. Because Plaintiff did not seek review of that portion of the Second District's ruling, her amicus should not be heard to seek affirmative relief.

up of osteomyelitides spreading to jaw, oral surgery, trashing of credit history)(see page 4). These provide the Court with a flavor of the flood of imaginative damage claims which would result from permitting this type of bad faith claim (assuming, *arguendo*, these types of damages are even available in bad faith actions. *See Butchikas v. Travelers Indemnity Co.*, 343 So. 2d 816, 819 (Fla. 1976); *Swamy v. Caduceus Self Insurance Fund, Inc.*, 19 Fla. L. Weekly D2046 (Fla. 1st DCA 1994)).

E. Plaintiff and amicus did not address the conflicts *Conquest* presents with the insurer's duties to its insured.

The Second District would fashion a new duty owed directly by an insurer to injured third parties; this duty would conflict with the contractual duty an insurer owes its insured. For instance, in a lawsuit by a third-party claimant against insured, the insurer is in the same adversarial position as its insured and should not be subjected to exposure to a bad faith claim threatened by the third-party claimant. (Amici 8-12).

Auto-Owners' amici observed that the recognition of a duty owed to a third-party claimant interferes with the constitutionally guaranteed freedom to contract. Plaintiff argues that an insurance contract cannot provide the insurer is "free to engage in bad faith and/or to be unregulated by the Florida legislature." (page 21)

Plaintiff misses the point. The duty to act in good faith is a duty which arises out of the contractual relationship of the insurer and the insured. Imposing a duty to someone outside of that contractual relationship, who has not recovered an excess

judgment, interferes with the benefits the parties negotiated in the contract. The bad faith of an insurer will not go unchecked if *Conquest* is not affirmed as intimated by Plaintiff. Administrative penalties and permissible bad faith actions serve as deterrents and remedies.

II. THE SECOND DISTRICT IS ALONE IN FAILING TO RECOGNIZE THAT §624.155 EXTENDED BAD FAITH CLAIMS TO INCLUDE FIRST-PARTY CLAIMS BUT NOT THIRD-PARTY CLAIMS WITHOUT AN EXCESS JUDGMENT.

Plaintiff contends several courts, in addition to the Second District, have held the plain language of §624.155 permits a claim by a third party without an excess judgment; however, not one of these cases contains such a holding (most simply interpreted §624.155 as expanding bad faith claims to **first-party claims** but not to third parties without an excess judgment (IB 10-16)).

Plaintiff argued the legislature did not intend §624.155 to limit third-party suits to those arising from an excess judgment, because this Court already had recognized that remedy prior to the statute's enactment. The simple answer is that §624.155 provides for elements of damage which were not available at common law in such excess cases (IB 20-25). For instance, *United Guaranty Residential Insurance Company of Iowa v. Alliance Mortgage Company*, 644 F. Supp. 339, 341 (M.D. Fla. 1986), recognized the statute altered the common law by allowing for the recovery of attorney fees. *See also, McLeod v. Continental Insurance Company*, 591 So. 2d 621 (Fla. 1992).

Plaintiff has failed to analyze correctly the cases she claims interpret §624.155 to include third-party claims without an excess judgment. In *United Guaranty, supra,* a first party action, United Guaranty argued that because §624.155(1)(b)1 did not expressly include first-party actions, the statute must be construed only as codifying the "established law as to third party actions."

The court held §624.155(1)(b)1 created first-party claims and altered the common law third-party actions to provide for the recovery of attorney's fees. 644 F.Supp. at 341. As quoted by Plaintiff, *United Guaranty* did, indeed, hold "the plain and unambiguous language of 624.155(1)(b)1 ("not attempting in good faith to settle claims...") reaches *all* claims, not only third party claims." *Id.* Plaintiff omitted, however, *United Guaranty's* definition of a third-party action:

> A third party action is one brought by an insured against his insurer because of its failure to settle a third party tort claim for a reasonable sum. Where the insurer breaches his duty to settle with the third party where a reasonably prudent person would do so, **and the wrongful refusal to settle exposes the insured to liability in an amount in excess of the policy limits,** Florida courts have consistently recognized the **insured's** right of recovery.

Id. n. 2. (emphasis added).

Thus, *United Guaranty* did not interpret §624.155(1)(b)1 to include claims by a third party who has not received an excess judgment. The court held the statute extended bad faith claims to first parties and expanded the existing third-party bad faith claims -- which by definition required an excess judgment -- to include attorney's fees. As the court also stated:

> 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 insureds, not simply to restate or clarify the common law.**

644 F. Supp. at 341 (emphasis added). The court recognized the "overall purpose" of the statute was to grant **insureds** a first-party bad faith action.

Opperman v. Nationwide Mutual Fire Ins., 515 So. 2d 263 (Fla. 5th DCA 1987), *review denied*, 523 So. 2d 578 (Fla. 1988), another first party action, also interpreted §624.155(1)(b)1 as changing the existing common law to the extent it included first-party bad faith actions. *Id.*, p. 266.

Plaintiff's brief selectively quotes from *Opperman*, "There is nothing in the statute which indicates an intent to limit an existing common-law remedy", to support her argument that §624.155 expanded the common law to allow all third party claims, regardless of the size of judgment. The portion Plaintiff failed to quote demonstrates the court's actual meaning: the statute did not limit a common law bad faith action to a third party with an excess judgment, but expanded it to allow a first party to bring a cause of action. 515 So. 2d at 265-266 (and as discussed below, the Fifth District later rejected Plaintiff's position).

Hollar v. International Bankers Insurance Company, 572 So. 2d 937, 939 (Fla. 3d DCA 1990), *review dismissed*, 582 So. 2d 624 (Fla. 1991), contains clear language indicating the court's belief §624.155 did not change the common law requirement that a third party must base its bad faith claim on an excess judgment:

> Section 624.155 changes neither the case law obligation of good faith nor the measure of damages due an insured once bad faith is proven. Rather than changing the decisional law, section 624.155 simply expands the cause of action to first-party claims.

Industrial Fire & Casualty Insurance Company v. Romer, 432 So. 2d 66 (Fla. 4th DCA 1983), a pre-statutory first-party bad faith action, held an insured could not sue his insurer because no independent tort was alleged. The court footnoted that passage of §624.155(1)(b)1 would enable insureds to bring a bad faith action which previously had been available only to third parties.

Rowland v. Safeco Ins. Co. of America, 634 F. Supp. 613 (M.D. Fla. 1986), held an insured could bring a first-party bad faith action under §624.155. *Rowland* relied on *Romer* and found that case "recognized that the statute apparently does change the law regarding *first party refusal to settle cases.*" *Rowland*, 634 F. Supp. at 615 (emphasis added). Neither *Rowland* nor *Romer* indicated, explicitly or implicitly, that §624.155 allowed a cause of action for third party claimants without an excess judgment.

Both *Fortson v. St. Paul Fire and Marine Ins. Co.*, 751 F.2d 1157 (11th Cir. 1985), and *Lucente v. State Farm*, 591 So. 2d 1126 (Fla. 4th DCA 1992), *review denied*, 601 So. 2d 552 (Fla. 1992), held a third party could not bring an action under §624.155 without a determination of liability. Neither indicates that a third party may sue without an excess judgment.

The cases cited by Plaintiff, with the exception of *Lucente*, interpret only §624.155(1)(b)1. That subsection does not support Plaintiff's contention "any person" may bring an unfair claims

settlement practices claim under §§624.155(1)(a)1 and 626.9541, since §624.155(1)(b)1 is the very section the Second District held in *Conquest* contained duties running only to the insured, "By the very language of the statute, the insurer's duty runs to its insured and not to third parties." *Conquest v. Auto-Owners Ins. Co.*, 637 So. 2d 40 (Fla. 2d DCA 1994).

III. PLAINTIFF AND AMICUS FAILED TO REFUTE AUTO-OWNERS' ARGUMENT §624.155 MUST BE READ WITH REFERENCE TO ITS MANIFEST INTENT.

Plaintiff's amicus argues the phrase "any person...damaged" means "every person or all persons, without exception, who are damaged." (page 4; as discussed herein, even if Plaintiff could sue, she could prove no damage). However, the authority cited for this expansive interpretation of §624.155 does not apply. *Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc.*, 541 So. 2d 738 (Fla. 3d DCA 1989), *review denied*, 548 So. 2d 662 (Fla. 1989), construed a contract, and rather than "squarely holding" anything, it merely cited *Black's Law Dictionary* in a "see generally" reference. The case actually supports Auto-Owners' position. The court construed the contract, holding "Here, the reference in the termination clause to 'any term' clearly refers to the initial three-year term as well as the subsequent three-year terms." Thus, merely because a contract or statute uses the term "any" does not dictate a mindless result, but still requires the court inquire into the intent of the contract or statute.

Post-Newsweek Stations v. Doe, 612 So. 2d 549 (Fla. 1992), and *Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 8 Fla. L. Weekly Fed. C632 (11th Cir. Sept. 21, 1994)[3] discuss a rule and a different statute. This Court indicated in *Silva v. Southwest Florida Blood Bank*, 601 So. 2d 1184 (Fla. 1992), the same word can have a different meaning when used in different statutes.

More important, §624.155 does not simply permit "any person" to sue, but only any person who "is damaged" by the alleged violations (thus, it differs from the rule involved in *Doe*). As discussed above, the Plaintiff's failure to recover an excess judgment, and her failure to ever offer to settle for the amount she ultimately recovered, preclude such a finding. In *Mike Smith Pontiac* the dealer had a contract with the car manufacturer (unlike Plaintiff) and proved it suffered the requisite "pecuniary loss" required by the statute (which Plaintiff cannot prove).

Plaintiff argues *Cardenas'* interpretation of "any person" to mean "any insured" cannot be harmonized with the legislature's intended meaning, because §624.04 defines a number of different types of entities and individuals in various capacities as "person":

> "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.

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[3]Cited in the Notice of Supplemental Authority served by Plaintiff's amicus on October 4, 1994.

First, this again ignores that the person must be damaged. Second, not one of the individuals or entities listed is inconsistent with *Cardenas'* definition of "any person" as "any insured." Each could be an insured. Third, the definition is obviously intended to be broad in order to describe those who will be regulated by the Insurance Code (e.g., *see* §624.11). Fourth, if Plaintiff's argument that this definition should be strictly applied were correct, then "insureds" are not persons under §624.155, because they are not specifically listed in §624.04.

Plaintiff also claims the statute contains repeated references to the "rights of persons who could not be an insured at all because they are never issued policies." (p. 15). Each of the sections cited by Plaintiff contain duties which are contained within the insurance contract or, at least, involve direct contact between a potential insured and an insurer.

As noted, the statutory reference to a third-party claimant cannot be used to construe "any person ... damaged" because it was adopted later. In any event, it is consistent with the statute permitting a third party to sue for bad faith when that third party has obtained an excess judgment.[4]

An analysis of §624.155, and the case law preceding it and construing it, demonstrate the legislature did not intend the result *Conquest* reached.

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[4] Plaintiff's amicus at page 4 cites a phrase in a legislative staff report which merely states a §624.155 third-party suit may be filed by an amendment to the complaint. Of course, this is entirely consistent with a third-party excess claim.

IV. PLAINTIFF FAILED TO REFUTE THE ARGUMENT THAT OTHER STATES HAVE DECLINED TO EXPAND BAD FAITH STATUTES IN THE MANNER THE SECOND DISTRICT WOULD.

Plaintiff's assertion the numerous cases from other jurisdictions rejecting her contention can be "easily distinguished," is belied by her failure to make a real attempt to do so. Contrary to Plaintiff's assertion, as Auto-Owners discussed at IB 23, the Texas statute permitted suit by "any person who has been injured" by conduct violating its enumerated code sections.

The Texas Supreme Court refused to construe the statute to permit suits by third party claimants, absent explicit directive from the legislature (IB 24). Similarly, *Dunn v. National Security Fire and Casualty Company*, 631 So. 2d 1103 (Fla. 5th DCA 1993), indicated the extension of such a right must be granted by explicit statutory language. There is no express command in §624.155 which requires this Court to conclude the legislature intended to grant a third-party action in the absence of an excess judgment. (IB 24-25, Amici 37). The Amici brief demonstrates an overwhelming majority of other states refuse to extend a right of action under the Unfair Claims Practices Act to third party claimants.

Plaintiff erroneously argues that *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 758 P.2d 58 (Cal. 1988), relied on law review articles and not facts. The California Supreme Court referred to 25 cases which were on appeal at the time it considered *Moradi-Shalal*. 758 P. 2d at 67. Those 25 cases obviously represented only a portion of the matters being litigated at the

trial level. The law review articles merely highlighted what occurred in California in the wake of *Royal Globe Insurance Company v. Superior Court*, 592 P.2d 329 (Cal. 1979): a dramatic increase in the number of third party bad faith lawsuits.

Plaintiff claims Auto-Owners and amici have not substantiated their predictions of adverse consequences if §624.155(1)(a)1 sanctioned claims by a third party without an excess judgment. It is not necessary for insurance companies and the courts to actually face a California-like barrage of lawsuits to recognize, and to attempt to prevent, the inevitable result of permitting every third party, regardless of the judgment he or she receives, to sue an insurance company for bad faith: unwarranted lawsuits leading to unwarranted settlement demands, coercion of inflated settlements, and rising insurance costs.

Plaintiff and her amicus criticize Auto-Owners' reliance on *Moradi-Shalal* because the California Supreme Court allegedly did not sufficiently document the adverse consequences resulting from a statute granting a private right of action for unfair claims settlement practices. Yet, they offer an unsubstantiated depiction of plaintiffs as "broken" and "worn down" by the widespread "stonewalling" and "lowballing" settlement practices of the evil insurance industry.

If the insurance industry functions as depicted, why haven't plaintiffs and consumer groups pressured the Department of Insurance to discipline carriers. The answers are (1) it doesn't function that way, and (2) some plaintiffs prefer to perpetuate

this image of insurance companies in order to bring suits, like this one, extracting additional sums.

Plaintiff argues the courts will not be flooded with lawsuits unless unfair claims settlement practices run amuck in Florida; the illogic of this claim is obvious. The mere filing of a lawsuit does not mean the suit is justified. In other words, there is not an insurance company gone amuck behind every lawsuit filed. Plaintiff argues affirming the Second District would avoid protracted litigation. She offers no support for this conclusion, because there is none. On the contrary, allowing claims such as Plaintiff's under §624.155 will open the floodgates to suits based on alleged stress, bad credit, etc.

Plaintiff's position, if affirmed by this Court, would impose an absolute duty to settle every claim when the demand is within policy limits. Insurers could not dispute the amount of the claim because any delay at that point would be "bad faith" towards the claimant. If the insurer did not settle, plaintiffs could routinely bring such second suits even though the underlying tort judgment was well below any figure the plaintiff demanded. The insureds' premiums would inevitably go up, and insureds could be left without coverage in the face of other claims.

CONCLUSION

This Court should reverse the Second District's holding in *Conquest*.

Respectfully submitted,

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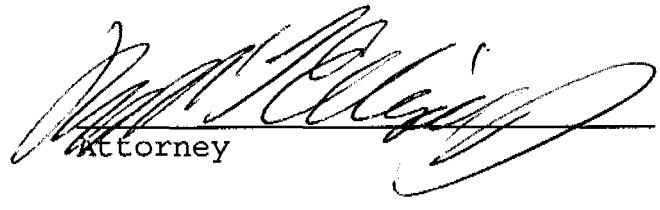
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: K. JACK BREIDEN, ESQ., 3101 Terrace Avenue, Naples, Florida 33942, COUNSEL FOR APPELLANT; and JOEL D. EATON, ESQ., Podhurst, Orseck, et al., 800 City National Bank, 25 West Flagler Street, Miami, Florida 33130-1720; PAUL B. BUTLER, JR., ESQ., Butler, Burnette & Pappas, Bayport Plaza - Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458 and PAUL E.B. GLAD, ESQ., Sonnenschein, Nath & Rosenthal, 685 Market Street, Tenth Floor, San Francisco, California 94105 this 11th day of October, 1994.



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