SUPREME COURT OF FLORIDA

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

vs. CASE NO. 88,338

WAYNE ZEBROWSKI and CAROL ZEBROWSKI, his wife, a/k/a CAROL LORD,

Respondents.

ON CERTIFIED CONFLICT FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS' POSITION

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STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers (Academy), amicus curiae, files this brief in support of respondents Wayne Zebrowski and Carol Zebrowski and accepts respondents' statement of the case and facts.

ISSUES PRESENTED FOR REVIEW

I.

(as restated by respondent)

WHETHER SECTION 624.155(1)(b)1., FLORIDA STATUTES, PERMITS AN INJURED PARTY TO BRING A DIRECT ACTION AGAINST THE TORTFEASOR'S INSURER FOR BAD FAITH FAILURE TO SETTLE.

II.

(as framed by petitioner)

WHETHER, AS A MATTER OF PUBLIC POLICY, FLORIDA SHOULD REFUSE TO RECOGNIZE AN INDEPENDENT DUTY ON TEE PART OF AN INSURER TO SETTLE THE CLAIM OF AN INJURED THIRD-PARTY.

SUMMARY OF ARGUMENT

I.

Section 624.155 clearly and unequivocally authorizes 'any person" to bring a civil action under both section 624.155(1)(a) for violation of insurer unfair claims settlement practices and section 624.155(1)(b) for bad faith failure to settle. This court in Auto-Owners Insurance Co. v. Conquest, 658 So. 2d 928 (Fla. 1995), held that the term "any person" included both insureds and third-party claimants and, therefore, a third-party claimant may bring an action under section 624.155(1) (a). Because the term "any person" also applies to section 624.155(1)(b), Conquest controls and fully supports the district court's holding that a third-party claimant may maintain an action against the tortfeasor's insurer under section 624.155(1) (b)1. for bad faith failure to settle.

II.

State Farm's 'parade of horribles" does not raise any legitimate or verifiable public policy concerns that would prevent this court from applying the plain and unambiguous language of the statute. First, contrary to State Farm's contention, authorizing a third-party claimant to maintain an action under section 624.155(1)(b)1. will not create an adversarial relationship between insurer and insured, nor will it require the insurer to make the interests of the insured subservient to the interests of the claimant. Settling claims in

good faith by acting fairly and honestly toward the insured with due regard for his interests invariably will be consistent with the claimant's interests in receiving a fair and prompt settlement of his claim.

Further, applying section 624.155 to this case will not unconstitutionally impair the insurance contract between State Farm and its insured because section 624.155 was enacted many years before State Farm issued or renewed the subject policy.

Next, because the California and Florida bad faith statutes differ substantially, the California bad faith litigation experience does not invite meaningful comparison to Florida law, and State Farm has not advanced any valid concern that approving the district court's decision will open the litigation floodgates in Florida or result in systemic problems which commentators and academicians have observed in California.

Finally, common law bad faith remedies do not afford third-party claimants adequate protection against abusive insurance company settlement practices because third-party claimants cannot maintain a common law action for bad faith failure to settle without an excess judgment. Also, unlike common law actions, a claim under section 624.155(1)(b)1. allows a third party-claimant to recover attorney's fees and provides the insurance company with an opportunity to expeditiously resolve the bad faith claim during the pre-suit administrative process.

ARGUMENT

I.

SECTION 624.155(1)(b)1., FLORIDA STATUTES, PERMITS AN INJURED PARTY TO BRING A DIRECT ACTION AGAINST THE TORTPEASOR'S INSURER FOR BAD FAITH FAILURE TO SETTLE.

As respondents ably argue in their brief, and as the court below recognized, by creating a cause of action under both section 624.155(1)(a) and section 624,155(1)(b) in favor of "any person," the legislature voiced its clear and unequivocal intention to authorize a third-party claimant to bring an action against the tortfeasor's insurer for violations of section 624.155(1)(b)1. As this court has expressed on numerous occasions, extrinsic evidence of legislative intent should not be considered when the statute subject to interpretation is clear and unambiguous:

> The plain meaning of statutory language is the first consideration of statutory construction. St. Petersburg Bank & Trust Co. v. Hamm 414 so. 2d 1071 (Fla. 1982). Only when a' statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. Florida State Racing Comm'n v. McLaughlin, 102 So. 2d 574 (Fla. 1958). Courts may look to legislative history only to resolve ambiguity in a statute. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc. 434 so. 2d 879 (Fla. 1983). As we said in Heredia v. Allstate Insurance Co., 358 So. 2d 1353, 1354-55 (Fla. 1978):
>
> > " In matters requiring statutory construction, courts always seek to effectuate legislative intent. Where

> the words selected by the Legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent. Folev v. State ex rel. Gordon, 50 so. 2d 179, 184 (Fla. 1951); Platt v. Lanier, 127 So. 2d 912, 913 (Fla. 2d DCA 1961). It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning."

Shelbv Mutual Insurance Co. of Shelbv, Ohio v. Smith, 556 So. 2d 393, 395 (Fla. 1990).

In Auto-Owners Insurance Co. v. Conquest, 658 So. 2d 928, 929 (Fla. 1995), this court found that the term "any person" was 'precise" and 'unequivocal" and evinced the legislature's intent to allow a third-party claimant to bring a civil action against the tortfeasor's insurer pursuant to section 624.155(1)(a) for committing unfair claims settlement practices. The same precise and unequivocal terminology applies to civil actions brought under section 624.155(1)(b)1. and fully supports the district court's conclusion that an injured third-party claimant may bring an action against the tortfeasor's insurer under that statute for bad faith failure to settle.

II.

FLORIDA'S PUBLIC POLICY SUPPORTS THE DISTRICT COURT'S HOLDING THAT A THIRD-PARTY CLAIMANT MAY BRING AN ACTION FOR BAD FAITH FAILURE TO SETTLE PURSUANT TO SECTION 624.155(1)(b)1.

Based on the following argument, the Academy strongly disagrees with State Farm's contention that the district court's interpretation of section 624.155(1)(b)1. creates public policy concerns and asserts that Florida public policy supports, rather than contradicts, the conclusion reached by the court below.

A. Recognizing a statutory duty owed to third-party claimants to settle claims in good faith will not create an adversarial relationship between insurer and insured.

State Farm's initial concern that the district court's interpretation of section 624.155(1)(b)1. will create and adversarial relationship between insured and insurer is illusory and unfounded. The antagonistic relationship between insurer and insured envisioned by State Farm simply is not indicative of the manner in which claims typically are processed The insured's concern in having the claim settled fairly and honestly with due regard for his interests rarely collides with the claimant's similar interests. Prompt, fair settlements benefit both insureds and claimants, conserve judicial resources and effectively reduce costs system-wide.

In rare cases, the insured may obstinately maintain his non-liability which may place an insurer who wishes to settle with

the claimant in a more precarious position. The insurance policy, however, invariably grants exclusive control over settlement to the insurance company and gives the insurer authority to settle notwithstanding the insured's protestations. In cases where the insured professes his innocence and requests his insurer to resist settlement with the claimant, the insurer, if armed with information confirming its insured's liability, owes a good faith obligation to disbelieve its recalcitrant insured and settle the claim over his objection. Bowers v. Camden Fire Insurance Ass'n, 51 N.J. 62, 237 A.2d 857 (1968). If the insurer's settlement of the claim realistically impairs the insured's counterclaim against the claimant and the insured instructs the insurer not to settle, the insurer would not be guilty of bad faith by following the insured's directions. See Boston Old Colony Insurance Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), cert. denied, 450 U.S. 922, 101 S.Ct. 1372, 67 L.Ed.2d 350 (1981).

State Farm's reliance on the Texas case, Allstate Insurance Co. v. Watson, 876 S.W.2d 145 (Tex. 1994), ignores fundamental differences between Texas and Florida law. Directly contrary to this court's decision in Conuuest, the Texas Supreme Court in Watson construed the term "any person" differently from this court and held, notwithstanding that clear and unambiguous language, that a third-party claimant lacks standing under the Texas statute to bring an action against an insurer for unfair

claims settlement practices, including an insurer's failure to settle a third-party claim in good faith. Because the Texas decision reached the opposite conclusion reached by this court in Conquest, the rationale of the Texas court should be ignored.

Interestingly, the dissenters in Watson followed the same reasoning employed by this court in Conquest and would have held that the term 'any person" guaranteed both insureds and injured third-parties the right under the Texas statute to bring an action against the tortfeasor's insurer. Allstate Insurance Co. v. Watson, 876 S.W.2d at 153 (Doggett, J., dissenting). Further, the Watson dissent adamantly rejected the majority's claim, quoted in State Farm's brief at pages 31-32, that authorizing third-party claimants to maintain statutory claims for bad faith failure to settle would somehow undermine the insurer-insured relationship:

> In what is only a rationalization for a decision that lacks any basis in law, the majority concludes that any third party cause of action under art. 21.21 would "undermine the insurer's duty to its insured imposed in Vail and Arnold." 876 S.W.2d at 150. This contention is based upon the erroneous assumption that recognizing such a cause of action constitutes acknowledgment of inherently conflicting "concomitant and coextensive duties" to insureds and third parties. Id. at 150. The majority even goes so far as to speculate that such "potential for conflicting duties" may have provided a reason for the legislature's "refus[al] to provide a direct cause of action for third party claimants." 876 S.W.2d at 150. But art. 21.21 reflects no such "refusal"; its use of the phrase "any person" is not only a clear directive, but certainly thwarts any

> suggestion that the legislature recognized the majority's imagined conflict. How disingenuous to divine legislative intent from such judicial guesswork rather than to give effect to the plain wording of a legislative enactment.
>
> Concluding that art. 21.21 requires an insurer to refrain from unfair settlement practices does not in any way preclude its serving the interests of the insured. Indeed, engaging in fair claims settlement practices would appear very much in the interest of the insured as well as the third party. While an insurer acting in good faith will be forced to consider carefully its actions from the perspectives of both the insured and the claimant, no duties need to be compromised. An insurer simply may not act in bad faith toward a claimant in fulfilling its duty to defend its insured.
>
> An insurer may defend against third party claims yet still fulfill the duty to act in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear. Article 21.21 only demands conduct which we have long rightfully expected from insurance companies.

Id. at 154. The Academy respectfully urges this court to follow Justice Doggett's well-reasoned observations.

B. The district court's **interpretation of section 624.155(1)(b)1. will not unconstitutionally interfere with the insurer's** freedom **of contract.**

In response to State Farm's claim that the district court's interpretation of section 624.155(1)(b)1. will interfere with its constitutional freedom to contract, the Academy initially observes that State Farm waived its constitutional argument by failing to raise that issue in the trial court.. See Sanford v.

Rubin, 237 So. 2d 134 (Fla. 1970)(to preserve issue for appellate review, constitutionality of a statute must be raised in the trial court and cannot be raised for the first time on appeal).

On the merits of State Farm's impairment of contract argument, the insurer's reliance on Dewberry v. Auto-Owners Insurance Co., 363 So. 2d 1077 (Fla. 1978), is completely misplaced. In that case, this court held that a newly-enacted statute that prevented stacking of uninsured motorist coverage could not be applied to an existing insurance policy without impairing the insured's right to contract protected by Article I, Section 10, Florida Constitution. The court further held that the anti-stacking statute could be applied constitutionally only to those insurance policies issued or renewed after the statute's effective date.

'In order for a statute to offend the constitutional prohibition against enactment of laws impairing the obligation of contracts, the statute must have the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts." Manning v. Travelers Insurance Co., 250 So. 2d 871, 874 (Fla. 1971). courts follow that rule because the parties are presumed to have entered into their contracts in contemplation of existing statutory and case law, and that law becomes part of their bargain. Cenvill Investors, Inc. v. Condominium Owners Organization of Centurv Village East, Inc., 556 So. 2d 1197, 1200 (Fla. 4th DCA), rev.

denied, 570 So. 2d 1303 (Fla. 1990), cert. denied, 499 U.S. 919, 111 S.Ct. 1308, 113 L.Ed.2d 242 (1991).

The policy issued in this case by State Farm to Haisfield Enterprises was issued or renewed many years after the legislation under scrutiny was enacted by Ch. 82-243, § 9, Laws of Fla., and, accordingly, the statute could not have detracted from State Farm's contract or infringed upon its value in any respect.

C. Recognizing a statutory duty owed to third-party claimants to settle claims in good faith will not create a "no fault" tort liability system.

D. Recognizing a statutory duty owed to third-party claimants to settle claims in good faith will not cause adverse economic consequences.

State Farm's third and fourth public policy arguments predict that approval of the district court decision will open the proverbial litigation floodgates to duplicitous and duplicative lawsuits and cause Florida courts to succumb to the same systematic abuses purportedly experienced by California courts that lead to the Moradi-Shalal decision which imposed limitations on California bad faith actions. Not surprisingly, State Farm does not support its exaggerated rhetoric with verifiable evidence to sustain its concerns, nor has it otherwise advanced any legitimate public policy justification for this

court to refuse to apply the legislature's clear and unambiguous intent.

Technical distinctions between the California and Florida bad faith statutes should allay any apprehension that Florida will suffer the same bad faith litigation explosion observed in California by some commentators and academicians. In Roval Globe Insurance Co. v. Superior Court, 23 Cal.3d 880, 153 Cal. Rptr. 842, 592 P.2d 329 (1979), the California Supreme court interpreted certain provisions of the California Insurance Code to authorize a "private cause of action" by injured third-party claimants against insurers that committed violations of the California Unfair Practices Act, California Insurance Code § 790,03(h), a provision similar to Florida's Unfair Claims Settlement Practices Act, section 626.9541(1)(i), Florida Statutes. Nine years later, in Moradi-Shalal v. Fireman's Fund Insurance Companies, 46 Cal.3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988), the California Supreme Court overruled Roval Globe. As grounds for its decision, the court cited rejection of Roval Globe by other state courts, scholarly criticism, a 1980 report by the National Association of Insurance Commissioners, additional legislative history, adverse social and economic consequences and analytical difficulties defining the scope of the Royal Globe cause of action.

Several important factors differentiate the California experience from Florida law. First, the right of a Florida

third-party claimant to bring a statutory bad faith action against the tortfeasor's insurer rests upon more solid footing than Royal Globe. The Royal Globe court relied on California Insurance Code § 790.09 to create a cause of action in favor of third-party claimants:

> § 790.09. Administrative action against license or certificate; civil liability; criminal penalty
>
> No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal penalty under the **laws** of this State arising out of the methods, acts or practices found unfair or deceptive.

See Roval Globe, 592 P.2d at 332.

In overruling Royal Globe, the Moradi-Shalal court cited subsequent California legislative history which confirmed that section 790.09 contemplated administrative enforcement of the Unfair Practices Act by the Insurance Commissioner rather than creation of a private civil remedy. The language of section 790.09 certainly supports Moradi-Shalal's conclusion, and, at the very least, indicates that the legislative mandate to create a third-party cause of action under California's Unfair Practices Act was less than clear.

In sharp contrast to the California statute, Florida's statutory scheme clearly evinces the legislature's intent to authorize actions by third-party claimants for violations of the

Unfair Claims Settlement Practices Act and for bad faith failure to settle claims under section 624.155(1)(b)1. The Conquest court observed that section 624.155 contains dispositive language applying the provisions of the law to 'any person" which undeniably includes third-parties as well as insureds. Conquest, 658 So. 2d at 929. Additionally, section 624.155(2)(a)4. states that "[i]f 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." Thus, unlike the vague California statute, Florida's clear and unambiguous statutory language eliminates any doubt that the Florida legislature intended section 624,155 to apply to third-party claimants.

The Florida statute is further differentiated from California law by section 624.155(2), Florida Statutes, which requires all claimants to submit written notice to the Department of Insurance at least sixty days before filing suit, furnishing the Department and the insurance company specific notice of the alleged insurer misconduct. Full compliance with this notice requirement is a mandatory prerequisite to filing suit under section 624.155 for bad faith failure to settle or for violation of the Unfair Claims Settlement Practices Act. Rubio v. State Farm Fire & Casualty Co., 662 So. 2d 956, 957 n.1 (Fla. 3d DCA 1995), rev. denied, 669 So. 2d 252 (Fla. 1996). Under this

compulsory notice provision, no action may be filed by the claimant if the insurance company corrects the violation or pays the claimed damages during the sixty-day notice period. § 624.155(2)(d), Fla. Stat. (1993). Thus, unlike the California statute which does not provide a similar notice provision, claims in Florida alleging bad faith failure to settle or violations of the Unfair Claims Settlement Practices Act may be expeditiously and economically resolved at the administrative level. See Imhof v. Nationwide Mutual Insurance Co., 643 So. 2d 617, 619 (Fla. 1994) ('Section 624.155 follows longstanding public policy. and promotes quick resolution of insurance claims.").

State Farm claims at page 42 of its brief that the California experience furnishes "proof positive that the double litigation of every claim will occur" if third-party claimants are allowed to bring statutory actions for bad faith failure to settle. As recognized in Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d 491, 496 (Fla. 3d DCA), rev. dismissed, 549 So. 2d 1013 (Fla. 1989), the Moradi-Shalal court did express concern about the "undesirable social and economic effects" of the Royal Globe decision, including "multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards, and escalating insurance, legal and other 'transaction' costs." Moradi-Shalal, 758 P.2d at 64. While commentators and academicians wrote extensively about these "undesirable social and economic effects," not surprisingly, the California Supreme

Court conceded it was "not in a position to verify the accuracy of each of their observations." Moradi-Shalal, 758 P.2d at 66. The Moradi-Shalal court's inability to verify the accuracy and reliability of allegations that Roval Globe had created duplicative litigation and unwarranted bad faith claims in California hardly gives State Farm the "proof positive" that it claims.

E. Existing Florida common law remedies are inadequate to protect third-party claimants from insurer bad faith failure to settle.

Contrary to State Farm's contention, existing common law remedies are inadequate to protect third-party claimants from unscrupulous insurance companies and guarantee that their claims will be handled fairly and expeditiously. Although a third-party claimant has the option of bringing a common law action for bad faith failure to settle against the insurer under Thompson v. Commercial Union Insurance Company of New York, 250 So. 2d 259 (Fla. 1977), the statutory action for bad faith failure to settle under section 624.155(1)(b)1. offers safeguards and remedies unavailable at common law.

As noted by State Farm, a third-party claimant who brings a cause of action for bad faith failure to settle under common law principles may recover as damages the excess judgment and, in appropriate cases, consequential and punitive damages. Swamy v. Caduceus Self Insurance Fund, Inc., 648 So. 2d 758 (Fla. 1st DCA

1994). A third-party claimant, however, must first obtain a judgment against the insured in excess of policy limits before a cause of action for common law bad faith accrues. Cunningham v. Standard Guaranty Insurance Co., 630 So. 2d 179, 181 (Fla. 1994). Under section 624.155(1)(b)1., on the other hand, damages caused by the insurer's failure to settle in good faith can be recovered without first obtaining a judgment in excess of policy limits. See Imhof, 643 So. 2d at 618 ("[T]here is no need to allege an award exceeding the policy limits to bring an action for insurer bad faith" under section 624.155(1)(b)1.).

The district court below recognized that the statutory cause of action created by section 624.155(1)(b)1. offers other important advantages to third-party claimants not available at common law:

> One person who may potentially be damaged by the insurer's failure to settle an insurance claim in good faith is the injured third-party, who stands to benefit from an expeditious resolution of his damages demand if for no other reasons than the time-value of money and the costs associated with protracted litigation.

Zebrowski v. State Farm Fire & Casualty Co., 673 So. 2d 562, 564 (Fla. 4th DCA 1996).

Recovery of attorney's fees is another important benefit available to third-party claimants under section 624.155(1)(b)1. which is not available at common law. An injured third-party claimant who brings a common law bad faith action under Thompson without an assignment from the insured cannot recover attorney's

fees under section 627.428(1), Florida Statutes, because the third-party claimant is not an insured under the tortfeasor's policy. See Roberts v. Carter, 350 so. 2d 78 (Fla. 1977) (attorney's fees under section 627.428(1) available only to contracting insureds, the insured's estate, specifically named policy beneficiaries, and third parties who claim policy coverage by assignment from the insured). Under section 624.155(3), however, a third-party claimant can recover attorney's fees for the successful prosecution of a bad faith action brought under section 624.155(1)(b)1., affording an additional incentive for the insurer to properly handle the underlying claim in the first instance.

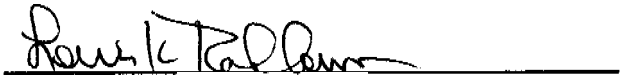
State Farm's suggestion that sections 768.79 and 57.105, Florida Statutes, offer sufficient protection to third-party claimants from insurer abuses is feeble at best. Those attorney's fees provisions do not apply unless suit is filed. Third-party claimants need protection from heavy-handed insurance companies during the entire claims process, both before and after suit, especially during pre-suit negotiations when the vulnerable claimant may not be represented by counsel. Further, sections 768.79 and 57.105 are limited to attorney's fees and costs and cannot compensate third-party claimants for other damages sustained when the insurance company fails to handle their claims honestly and fairly as required by section 624.155(1)(b)1.

CONCLUSION

In the ultimate analysis, fair and expeditious handling of claims, with due regard for the insured's interests, remains the best protection available to Florida insurers from bad faith actions, whether brought by insureds or by third-party claimants. Maintaining that basic standard will rarely, if ever, create any meaningful tension between insurer and insured and will effectively eliminate insurance bad faith litigation. The insured will be fully protected; the claimant will be satisfied; and judicial and litigant resources will be conserved.

The decision of the district court should be approved.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jesse S. Faerber, Esquire, Fenster and Faerber, P.A., 8751 West Broward Building, Plantation, Florida 33318, Jane Kreusler-Walsh, Esquire, Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401, Jay B. Green, Esquire, Green, Haverman & Ackerman, 315 S.E. 7th Street, Suite 200, Fort Lauderdale, Florida 33301, Paul B. Butler, Jr., Esquire, Paula B. Tarr, Esquire, and Lisa A. Oonk, Esquire, Butler, Burnette & Pappas, Bayport Plaza -- Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-5946, Michael Rossi, Esquire, and Bruce D. Austin, Esquire, Austin, Lay, Rowe, Patsko & Swain, P.O. Box 21750, St. Petersburg, Florida 33742 by mail this 31st day of October, 1996.

LOUIS K. ROSENBLOUM