IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

vs.

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

Respondents.

Case No.: 88,338
District Court of Appeal
4th District - No. 94-02626

REPLY BRIEF OF PETITIONER STATE FARM FIRE & CASUALTY COMPANY

ON CERTIFIED CONFLICT FROM THE FOURTH DISTRICT COURT OF APPEAL.

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PRELIMINARY STATEMENT

Petitioner, STATE FARM FIRE & CASUALTY COMPANY, is referred to as “State Farm”.

Respondents, WAYNE ZEBROWSKI and CAROL ZEBROWSKI, are referred to as “Plaintiffs”. References to Respondents’ Brief will be identified by the letters "PB."

Amicus Curiae, THE FLORIDA TRIAL LAWYERS ASSOCIATION, is referred to as “Amicus”. References to the Amicus Brief will be identified by the letters "AB."

INTRODUCTION

The decision in ***Zebrowski v. State Farm Fire & Casualty Co., 673 So.*** 2d 562 (Fla. 4th DCA 1996) dramatically expands liability under §624.155(1)(b)1, establishing a ***duty to settle*** an insurance claim owed directly to a third-party claimant injured by an insured tortfeasor. This Court cannot overlook the substantial consequences which arise if the district court's decision is allowed to stand. An inexorable conflict will arise between the obligations an insurer owes its insured by virtue of the insurance policy and the existing law, and the newly-imposed obligation ***to settle*** owed directly to a claimant. The existence of this new duty invites litigation of every claim, and re-litigation of every case where a judgment is for less than policy limits based on the claimant's contention that the insurer should have settled the claim rather than defended it.

I. SECTION 624.155 DOES NOT CREATE A DUTY TO SETTLE OWED DIRECTLY TO A THIRD-PARTY CLAIMANT BY A TORTFEASOR'S INSURER.

The plaintiffs and their amicus engage in sleight of hand, attempting to recast this appeal as a revisitation of the issues addressed by this Court in ***Auto-Owners Ins. Co. v. Conquest,*** 658 So. 2d 928 (Fla. 1995). This appeal is not about whether a third-party claimant such as the Plaintiffs has standing to bring a claim under 9624.155, Fla. Stat. The Fourth District's decision in ***Zebrowski*** marks the first time a Florida court has interpreted §624.155(1)(b)1 as creating a ***duty to settle*** owed to a claimant that is not "subordinate to, and derivative of, the insured's cause of action." *Id.* at 565. The Fourth District also departed from existing law in finding that

an excess judgment against the insured was not an essential ingredient to a third-party bad faith claim under the statute. *Id.* It was these findings upon which the Fourth District certified conflict with the Second and Third Districts. To frame the issue on this appeal as one of standing -- whether a third-party claimant can sue at all for violation of §624.155(1)(b) 1 -- is at best disingenuous and at worst represents a deliberate effort by plaintiffs and their amicus to mislead this Court about the significant departure from existing law that the *Zebrowski* decision represents,

Try as they might to bring their case within the confines of ***Conquest,*** Plaintiffs fail to provide this Court with a factual or legal basis to do so. Plaintiffs proceed to restate "the facts," neatly glossing over the fact that in the proceedings below they never raised a claim for violation of §624.155(1)(a), the only portion of the statute construed by this Court in ***Conquest.*** Plaintiffs' civil remedy notice cites only to §624.155(1)(b) 1, as does their amended complaint. For that reason, the trial court never addressed §624.155(1)(a), although Plaintiffs tell this Court that it did. (PB. 3.) Because §624.155(1)(a) was not an issue in this case at any point, this Court's decision in ***Conquest*** regarding §624.155(1)(a) is neither controlling nor dispositive of this case.

Existing Florida case law and the language of §624.155(1)(b) dispel the notion that §624.155(1)(b) 1 was intended to achieve anything more than to incorporate the already-existing third-party bad faith claim into Florida's civil remedy scheme. Contrary to Plaintiffs' assertion, ***Conquest*** does not hold that a third-party non-insured is authorized to bring suit under §624.155(1)(b)1. This Court quite carefully limited

its holding in ***Conquest*** to a claimant's ability to assert a violation of §624.155(1)(a). Plaintiffs and their amicus would have this Court think that that careful distinction was drawn without purpose.

Although limiting itself to an express consideration of a claimant's standing to pursue a claim for violation of §624.155(1)(a)1, this Court approved and adopted the entirety of the Second District's opinion in ***Conquest v. Auto Owners Ins. Co., 637 So.*** 2d 40 (Fla. 2d DCA 1994). The Second District found that the duties set forth in §624.155(1)(b)I were owed exclusively to the insured. *Id.* at 42.

Likewise in ***Conquest,*** this Court did not overrule ***Cardenas v. Miami-Dade*** *Yellow* ***Cab*** Co., 538 So. 2d 491 (Fla. 3d DCA 1989), in its entirety, even though the decision in that case conflicted directly with the Second District's ruling on the availability of a cause of action under §624.155(1)(a)1 to a third-party claimant. Rather, this Court again only disapproved those portions of ***Cardenas*** which expressly conflicted with its decision. The conclusion in ***Cardenas*** that a third-party claimant has no cause of action under §624.155(1)(b) and that the duty under that section runs only to the insured does not conflict with this Court's decision in ***Conquest*** and was, therefore, not overruled.

This Court's decision in ***State Farm Mutual Automobile ins. Co. v. Laforet, 658*** So. 2d 55 (Fla. 1995) also supports the position that the only cognizable claim arising from a ***duty to settle*** in a third-party action is based on the duty owed to an insured and not a duty owed to a third party. This Court considered, ***inter*** *alia,* what standard applies to evaluate whether an insurer has acted in bad faith, regardless of whether

a third-party bad faith claim was based on the Statute or common law or arose in a first-party context. This Court explained:

> [I]t is clear that a third-party action can now be brought under either §624.155 or the common law. . . . For consistency, however, we find that the standard set forth in this opinion should apply equally to third-party actions brought at common law.
>
> *Id.* at 63.

By extending the standards promulgated in *Laforet* to common law third-party bad faith claims, this Court acknowledged that the type of conduct redressed by this claim was identical under either a common law or statutory theory. The only third-party cause of action for bad faith which exists at common law is premised exclusively upon a breach of the duty to settle owed by an insurer to its insured. ***Fidelity and Casualty*** Co. *of New York v. Cope, 462* So. 2d 459, 460-461 (Fla. 1985). An excess judgment against the insured is a procedural prerequisite to any third-party bad faith claim. *Id.* By allowing "any person" to bring the suit, no assignment of the insured's §624.155(1)(b) 1 claim is necessary, consistent with existing law respecting common law bad faith actions. ***See, Thompson v. Commercial Union Ins. Co. of New York,*** 250 So. 2d 259 (Fla. 1971).

If this Court believed there were two distinct third-party bad faith claims under §624.155(1)(b)l -- one which could be brought based on violation of a duty to settle owed to the insured, evidenced by an excess judgment, and one which arose out of breach of a duty to settle, owed to a claimant, with or without any excess judgment against the insured -- then why adopt a single standard to apply to <u>all</u> third-party bad

claims? ***Laforet*** provides guidance as to the standards applicable to both first and third-party bad faith claims. First-party claims arise solely out of the contractual relationship between insurer and insured for breach of the duty to settle. There is no reference in ***Laforet*** to a claim premised upon breach of a duty to settle owed to a claimant because such a claim does not exist. Third-party bad faith, arises solely out of a breach of a duty to settle owed by an insurer to its policyholder.

Section 624.155(1)(b) reads substantially differently from §624.155(1)(a). Each sub-section under (b) specifically identifies the parties to whom the protections of that sub-section extend. Section 624.155(1)(b)1 requires an insurer to attempt in good faith to settle claims acting fairly and honestly toward its insured and with due regard for the insured's interests (emphasis supplied). Section 624.155(1)(b)2 requires an insurer to send an insured or beneficiary a statement identifying the coverages under which payments are being made by the insurer (emphasis supplied). Section 624.155(1)(b)3 prohibits an insurer from using claims owed under one coverage to force settlements under a different coverage afforded by the same insurance policy. Section 624.155(1)(b)3 specifically exempts liability coverages from its purview and thus, can only apply to varied first party coverages under which an insured might make claim, for example, when an insured sustains a storm loss and makes claim under both its property and business interruption coverages. In no way do any of these Sections under sub-paragraph (1)(b) remotely address an obligation owed a third-party claimant. Such is, of course, not the case under sub-paragraph (1)(a) which was the subject of the ***Conquest*** decision.

Had the legislature wanted to create a duty to settle running from an insurer to a third-party claimant, it could have done so by using clear and unambiguous language in §624.155(1)(b)1 to so indicate. The legislature uses the word "claimant" in other portions of the statute, see §624.155(2)(b)4, and could have done so here if it intended to create a duty to settle owed to a claimant. (Emphasis supplied). Referencing whether a violation has occurred in terms of whether settlement should have been made in the best interests of the insured clearly and unequivocally demonstrates that the legislature did not intend to create a duty to settle owed to a stranger to the insurance contract.

The case law supports this interpretation. As recognized by both the Second District in ***Conquest*** and the Fifth District in ***Dunn v. National Security Fire*** and ***Casualty Co.,*** 631 So. 2d 1103 (Fla. 5th DCA 1993), it is the language employed in §624.155(l)(b) that dictates that the duty created by that section of the statute is a duty owed solely to the insured. In finding no cause of action exists, the Second District expressly contrasted the language employed in §624.155(1)(b)1 with the unfair insurance trade practices identified at §626.9541(1)(i)3.a., c. and d., which are incorporated by reference into §624.155(1)(a) 1. (Emphasis supplied). The Second District found that there was nothing in 9626.9541 that would restrict claims to insureds only, but specifically held there was no duty under (b) 1. *Id.* at 43. The court in ***Dunn*** likewise concluded that the language employed in §624.155(1)(b)1 creates a duty owed to the insured only and did not change the basic premise and obligations underlying third-party bad faith claims. *Id.* at 1107.

II. PUBLIC POLICY MANDATES THAT THIS COURT REFUSE TO RECOGNIZE A DIRECT DUTY TO SETTLE OWED BY AN INSURANCE COMPANY TO AN INSURER.

Plaintiffs boldly assert that "no rational reason exists for not extending the duty [to settle] to third-parties." (PB.14.) Public policy concerns dictate to the contrary. The recognition of this new-found duty to settle owed to a claimant directly conflicts with the already recognized good faith duties owed by an insurer to its insured. The impact on Florida's existing litigation system cannot be overstated. (Already State Farm has been confronted with numerous motions seeking leave to add it as a defendant in ongoing cases pending against its insureds on the theory that State Farm has violated the duty to settle owed to the allegedly injured claimants.)

A. A Duty Owed By An Insurer To A Claimant Conflicts With An Insurer's Good Faith Obliqations To Its Insured.

Plaintiffs and their Amicus vainly strive to analogize the position of third-party claimants to the position of first-party insureds for whose benefit §624.155(1)(b)1 was enacted. This analogy is flawed because unlike an insured, who is directly damaged by the conduct of its insurer when the contract it purchased to protect itself or its property is not honored, a claimant is injured by the insured tortfeasor. It is a mere fortuity that the tortfeasor's decision to finance its potential liabilities was made by the purchase of an insurance policy.

To adopt the reasoning employed by plaintiffs and their Amicus, this court would have to find, in effect, that it was always in the insured's best interest to effect some type of settlement within policy limits. lnsureds should not be relegated to the position of a disinterested bystander who must watch their insurance carrier

affirmatively seek a settlement demand with its adversary of a non-meritorious claim because failure to do so would subject the insurer to its own potential liability. Moreover, insurers have duties to all of their insureds to negotiate disputed claims and thereby protect the assets available to pay claims and reduce the premium costs passed along to insureds.

To see a real-life example of the conflict that will exist if *Zebrowski* is allowed to stand, this Court need look no further than the case of ***Boston Old Colony Ins. Co. v. Gutierrez,*** 386 So. 2d 783 (Fla. 1980), which highlights one-set of circumstances where a conflict undoubtedly arises. In that case, Boston Old Colony's insured was involved in a head on collision with Mr. Gutierrez. The expert retained by the insurer corroborated its insured's account of how the accident occurred, supporting the position that Gutierrez, the Plaintiff, was on the wrong side of the road at the point of impact. Nevertheless, the insurance company knew there was still a question of liability and consulted with its insured about settling for policy limits. The insured had counter-claimed against Gutierrez for his own injuries and did not want to make the admission of fault implied by an offer to settle.

Before trial, Gutierrez offered to settle for policy limits and the insurer refused. Shortly thereafter, the insured settled with Gutierrez and his insurance company. Once its insured's claim was settled, Boston Old Colony offered Gutierrez policy limits which he rejected. Gutierrez obtained a $1.4 million dollar judgment against Boston Old Colony's insured. Gutierrez thereafter sued Boston Old Colony for a bad faith failure to settle for policy limits when it had the opportunity and prevailed on this issue

at trial and at the district court. The Supreme Court reversed, finding that there was not sufficient evidence under these facts from which a reasonable jury could have concluded there was bad faith on the part of the insurer, despite the excess judgment entered against the insured. ***Id.*** at 785,

If the insurer in ***Gutierrez*** had a concurrent duty to the claimant to settle which is urged by Plaintiffs and their Amicus, the insurance company would have confronted the dilemma choosing between honoring the obligations owed to its policyholder and its new-found obligation to the claimant. Although no Florida court has expressly held that damaging an insured's counter-claim or cross-claim rights is an act of bad faith, the framework for recognizing such actions as an act of bad faith has been laid by this court's decision in ***Shuster v. South Broward Hospital District Ph ysicians' Professional Liability Ins. Trust.,*** 591 So. 2d 174, 177 (Fla. 1992).

B. Litigation Will Exponentially Expand If The *Zebrowski* Decision Is Allowed To Stand.

Both plaintiffs and their Amicus scoff at the notion that the expansion of §624.155(1)(b) 1 liability recognized by the Zebrowskidecision will negatively impact the litigation system in Florida. At the same time, both briefs reveal exactly how far reaching and expansive counsel for claimants will contend this new claim should be. For example, the Amicus alleges that protections are needed for claimants in pre-suit negotiation, intimating that it would be appropriate to bring a §624.155(1)(b)1 claim based on something less than a fully litigated result. (AB. 19.) Current Florida law requires a judgment against the insured before a bad faith suit premised on a failure to settle can proceed. ***See, Blanchard v. State Farm Mutual Automobile Ins. Co,, 575***

So. 2d ***1289*** (Fla. 1991); ***Imhof v. Nationwide Mutual Ins. Co., 643 So.*** 2d 617 **(Fla. *1994); Lucente v. State Farm Mutual Auto. Ins. Co.,*** 591 So. 2d 1126 (Fla. 4th DCA ***1992).*** But ***see, Rubio v. State Farm Fire & Casualty Co,, 662 So.*** 2d 956 (Fla. 3d DCA 1995), ***rev, denied, 669*** So. 2d 252 (Fla. 1996), allowing such a suit to proceed under §624.155(1)(a)1.

If a duty to settle is now owed to a claimant, claimants will have no incentive to settle, except at a premium which would now be required to obtain a release of both insured and insurer. The stakes are now more than the damages caused by the tortfeasor. A successful defense from a policyholder's perspective guarantees a second lawsuit alleging bad faith. Moreover, it invites a claimant to initiate litigation where it might otherwise not be cost effective, in hopes of a misstep in the settlement negotiation.

Indeed, there are several instances where the expansion of liability for violation of §624.155(1)(b)1 based on a duty to settle owed to a claimant would create an impediment to settling a case short of trial. Suppose a claimant demands a $50,000.00 settlement, The insurer declines the offer and responds with a counter-offer of $15,000.00. One year later the claimant offers to settle the case as to the insured for $25,000.00 reserving its right to pursue a claim against the insurer for violation of §624.155(1)(b)1. Does the insurer, who believes the case is worth $15,000.00, have any choice but to proceed to trial to prove the legitimacy of its prior offer? If settling the case for $25,000.00 was in the best interests of the insured, would such a settlement constitute an admission of bad faith by the carrier? How can

the carrier protect itself? Claimants could routinely "set up" the carrier who, by agreeing to settle the claimant's case against the insured for more than was initially offered, would automatically face another lawsuit for bad faith. Litigation would double and premiums would increase as a result of paying too much. If no settlement was reached, the case would have to be litigated at trial a result of the "set up".

Plaintiffs and their Amicus ask this Court to ignore what occurred in California in the aftermath of ***Royal Globe** Ins. Co. v. Superior Court,* 23 Cal.3d 880 (Cal. 1979). *Royal Globe* dramatically departed from existing law in the same fashion as *Zebrowski,* establishing that the insurer owed the claimant a duty to settle. The result of *Royal Globe* was precisely the same as the result will be if *Zebrowski* is allowed to stand. The distinction drawn by Amicus to suggest that the experience in California arose out of a different statutory framework does not negate the fact that the result will be precisely the same. The adverse consequences identified by the California Supreme Court included the double litigation of claims, increased costs to the general public because of increased settlement expenses, the conflict created by the direct duty owed to the claimant and the volume of litigation necessary to settle the issues of what will constitute bad faith based on breach of the duty owed to the claimant. *Moradi-Shalal v. Fireman's Fund Ins.* Cos. 46 Cal.3d 287, 301-302 (Cal. 1988).

Beyond overruling the *Royal Globe* decision, the California Supreme Court in *Moradi-Shalal* concluded that a court adjudication of the insured's liability was a necessary prerequisite to maintaining a third-party bad faith claim by a claimant under Cal. *Ins. Code* §790.03. While current Florida law supports the same result, both the

Plaintiffs and their Amicus advocate expanding §624.155(1)(b) 1 claims to encompass claims which are not litigated to judgment with the insured (PB. 19-20, AB. 19) and ***presumably to claims which are settled without litigation at all.*** Allowing ***Zebrowski*** to stand will undoubtedly open a floodgate of litigation heretofore limited to the California court system.

III. ADEQUATE INCENTIVES EXIST TO ENCOURAGE INSURERS TO SETTLE CASES WITHOUT RECOGNIZING A DUTY TO SETTLE OWED DIRECTLY TO CLAIMANTS.

Plaintiffs and their Amicus cavalierly contend that absent this Court recognizing an ndependent duty to settle owed to a claimant, insurance companies have no incentives to settle cases with claimants. This broad statement is completely at odds with the realities of the current system and the compulsions which already exist on insurers to settle claims as expeditiously as possible. Plaintiffs and their Amicus would have this Court think that the threat of liability for exposure in excess of policy limits is a non-factor when an insurance company addresses a case where damages appear to be within policy limits. There are a substantial number of cases where the potential verdict range is wide enough that the threat of an excess verdict, even if remote, acts as a compulsion on the insurer to settle a case.

Almost as critically, insurance companies, which are a business after all, are interested in conserving and allocating resources. The resource at issue in these cases are administrative and defense costs -- attorney's fees and costs associated with defending insureds. The quicker an insurance company can resolve a claim pending against its insured, the less out-of-pocket expense it incurs. The intense desire to

avoid litigation is a strong motivating factor and is an element considered in every settlement proposal an insurer considers or makes.

The sanctions available under the offer of judgment remedy provided by §768.79 and under 957.105, Fla. Stat., discussed in detail in State Farm's initial brief, are also available to claimants who feel that a meritorious cases has been frivolously defended or reasonable settlement demands rejected. The concern raised that these remedies are available only to claimants who litigate should not be an issue because only claimants who litigate would ever have an opportunity to pursue a §624.155(1)(b) 1 claim under existing Florida law. *Blanchard; Imhof;* ***Lucente.***

The Amicus comments that there are "other damages" sustained by claimants, without any suggestion as to what those other damages might be. The ***Zebrowski*** court suggests that a claimant's damages are the additional attorney's fees incurred by a claimant in prosecuting its case against the insured and interest lost during the time period following when a settlement should have been paid and when the claimant ultimately obtains a judgment against the insured. A detailed examination of both the supposed elements of damage which claimants could sustain supports that neither is an element of damage which could be recovered by a claimant pursuing a §624.155(1)(b)1 claim.

The interest claim is, in essence, a claim for pre-judgment interest on an amount which has not yet been fixed or expended by the claimant. Florida law does not allow recovery of pre-judgment interest on amounts which are not fixed. ***Alvarado v. Rice,*** 614 So. 2d 498, 499 (Fla. 1993). Where, as in the instant case, **the** insurance

company takes an appeal, the claimant, if successful, will receive interest on the judgment entered against the insured, running from the date of the judgment. Until a judgment of liability against the insured has been rendered, there is no fixed amount upon which any court could base an award of pre-judgment interest. Thereafter, claimants are protected by the post-judgment interest allowed by Florida law,

As for additional attorney's fees, this argument ignores the fact that the overwhelming majority, if not all, tort cases on the plaintiffs' side are litigated on a contingency fee basis. Thus, the real "victim" of the insurance company's alleged failure to settle with the claimant is the claimant's attorney who is forced to invest more of her or his time to obtain a positive result for his client. Allowing a claim for attorney's fees to stand in this context would be to afford tort plaintiff's attorneys standing to sue under §624.155(1)(b) 1.

Although the legislature employed the words "any person" in the statute, it defies logic to assume that the statute is intended to give attorneys a claim against an insurer based upon additional time spent procuring settlements or judgments for their clients in cases of disputed liability. That is a risk the attorney assumes when he or she takes a matter on a contingent fee basis. This risk should not be affected by whether or not the entity against whom the plaintiff's lawyer pursues a client's case has a liability insurance policy or not.

CONCLUSION

The ***Dunn*** court succinctly analyzed the impact of §624.155(1)(b)1 on the existing common law bad faith cause of action as follow:

> "Our Supreme Court has not recognized the existence of a fiduciary duty owed by an insurer to a third-party injured by its insured to settle the suit within policy limits. . . . [R]ecognizing such a duty under 5624.155 would greatly expand the theory and extent of liability of insurance carriers beyond that established by common law, for third-party bad faith cases. Although the legislature can expand by statute the common law concept of third-party suits and recoverable damages, we are reluctant to interpret the statute as having made such a drastic change without clear and more express language in the statute indicating that intent." *Id.* at 1 108.

This Court's past rulings, as summarized in ***Dunn,*** are correct in concluding that no duty to settle is owed a claimant by the tortfeasor's insurance company. This Court should affirm its prior rulings in this regard and overturn the *Zebrowski* decision by the Fourth District

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Reply Brief of Petitioner State Farm Fire & Casualty Company has been furnished via regular mail to the following individuals this 4th day of December, 1996.

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