SUPREME COURT OF FLORIDA

CASE NO. SC02-971

U.S.C.A. No. 01-11249-A

UNITED STATES OF AMERICA

vs.

PEPPER'S STEEL & ALLOYS, INC.

AMENDED
INITIAL BRIEF OF PEPPER'S STEEL AND ALLOYS, INC.
AND NORTON BLOOM
ON CERTIFIED QUESTION OF LAW FROM THE
ELEVENTH CIRCUIT COURT OF APPEALS

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INTRODUCTION

Pepper's Steel and Alloys, Inc. and Norton Bloom respectfully submit this brief in support of their position asserted in the United States Court of Appeals for the Eleventh Circuit that section 627.428, Fla. Stat., authorizes an award for attorney's fees incurred by an insured in obtaining a judgment against its insurer to enforce a settlement resolving a coverage dispute. The federal district court agreed with United States Fidelity and Guaranty Company that the statute did not authorize fees under these circumstances. (DE 1773).[1] The Eleventh Circuit was uncertain on this point, given the absence of a decision from this Court directly addressing the issue and the "conflicting language" contained in decisions from Florida's Third[2] and Fifth[3] District Courts of Appeal. (App.7).[4]

"Finding that this case turns on an important question of state law for which there is no clear controlling precedent" (App. 3), the Eleventh Circuit, pursuant to section 25.031, Fla. Stat. and Fla. R. App. P. 9.150, has asked this Court for a definitive answer.

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[1] "DE" refers to the docket entries which the clerk of the federal district court assigned to the documents comprising the record on appeal. The record was previously forwarded to this Court by the Eleventh Circuit in conjunction with this certification proceeding.

[2] *Travelers Indemnity Co. v. Morris,* 390 So. 2d 464 (Fla. 3d DCA 1980).

[3] *Bankers Security Ins. Co. v. Brady,* 765 So.2d 870 (Fla. 5th DCA 2000).

[4] "App." refers to the Eleventh Circuit's April 25, 2002 certification opinion. The opinion is reported at *United States v. Pepper's Steel & Alloys, Inc.,* 15 Fla. L. Weekly Fed. C498, 2002 WL 729039 (11th Cir. April 25, 2002).

The Eleventh Circuit's certified question and the text of the statute at issue here are set forth next.

THE CERTIFIED QUESTION

The Eleventh Circuit certified the following determinative question of law to this Court:

> UNDER SECTION 627.428 OF THE FLORIDA STATUTES, IS AN INSURED ENTITLED TO AN AWARD OF ATTORNEYS' FEES INCURRED IN ENFORCING A SETTLEMENT AGREEMENT AGAINST AN INSURER? (App. 7-8).

APPLICABLE STATUTE

Section 627.428, Fla. Stat. provides in pertinent part:

> (1) UPON THE RENDITION OF A JUDGMENT OR DECREE BY ANY OF THE COURTS OF THIS STATE AGAINST AN INSURER AND IN FAVOR OF ANY NAMED OR OMNIBUS INSURED OR THE NAMED BENEFICIARY UNDER A POLICY OR CONTRACT EXECUTED BY THE INSURER, THE TRIAL COURT OR, IN THE EVENT OF AN APPEAL IN WHICH THE INSURED OR BENEFICIARY PREVAILS, THE APPELLATE COURT SHALL ADJUDGE OR DECREE AGAINST THE INSURER AND IN FAVOR OF THE INSURED OR BENEFICIARY A REASONABLE SUM AS FEES OR COMPENSATION FOR THE INSURED'S OR BENEFICIARY'S ATTORNEY PROSECUTING THE SUIT IN WHICH THE RECOVERY IS HAD.

STATEMENT OF THE CASE AND FACTS

1. The lawsuit against Pepper's Steel and USF&G's denial of coverage.

In March of 1985, the United States of America brought an action in the federal

district court for the Southern District of Florida against several defendants, including Pepper's Steel and Alloys, Inc. and the company's President, Norton Bloom (collectively referred to as "Pepper's Steel"). The lawsuit sought recovery of remediation costs under section 107 of CERCLA[5] arising from an allegedly polluted scrap metal recovery site operated by Pepper's Steel. (DE 1552; *United States v. Pepper's Steel & Alloys, Inc.,* 823 F.Supp. 1574, 1577 (S.D. Fla. 1993)). Shortly thereafter, Pepper's Steel demanded coverage for the United States' claims under comprehensive general liability and excess indemnity insurance policies which USF&G had issued to Pepper's Steel over a several-year period. (App. 3; DE 89, pp. 20-26; *Pepper's Steel,* 823 F.Supp. at 1577-78).

USF&G denied coverage under its insurance policies. Among other things, the carrier took the position that it was not obligated to defend or indemnify Pepper's Steel in the lawsuit brought by the United States because the clean-up and response costs sought did not constitute otherwise covered "damages" within the meaning of the policies. *Pepper's Steel,* 823 F.Supp. at 1577. USF&G furthermore urged that any potential coverage under its policies was vitiated by policy exclusions. *Id.* at 1577 n. 9.

2. Pepper's Steel accepts USF&G's offer to settle the coverage case.

USF&G, on November 12, 1991, offered to settle the claims against it for $2,000,000. (DE 1552, pp. 3-4). No time limit for acceptance was placed on this

[5] Comprehensive Environmental Response and Compensation Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*

settlement offer. (DE 1552, p. 4).

On June 7, 1993, the district court ruled that the remediation expenses which the United States sought from Pepper's Steel "do constitute 'damages' under the subject insurance policies."[6] *Pepper's Steel,* 823 F.Supp. at 1583. Less than a month later, on July 1, 1993, this Court handed down its decision in *Dimmit Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.,* 636 So. 2d 700 (Fla. 1993), which interpreted favorably for insurers a "pollution exclusion clause" similar to clauses contained in some of the USF&G policies covering the Pepper's Steel scrap metal recovery site. (DE 1552, p. 5). Subsequently, on October 22, 1993, Pepper's Steel faxed a letter accepting USF&G's settlement offer which had never been withdrawn. (DE 1552, pp. 6-7). USF&G, however, responded that there was no outstanding offer for Pepper's Steel to accept and refused to make payment. (DE 1552, p. 7).

3. The district court and the Eleventh Circuit enforce the settlement and reject USF&G's attempts to renege on the deal.

Pepper's Steel was constrained to move in the district court for enforcement of the settlement agreement. The court, after a two-day evidentiary hearing, ruled in favor of Pepper's Steel and against USF&G and held that there was a binding settlement. (DE 1552, p. 7). The court found that USF&G never revoked its offer to settle and that the offer had been timely accepted by Pepper's Steel. (DE 1552, p. 7).

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[6] All emphasis has been supplied by counsel unless otherwise noted.

Pursuant to the district court's ruling which held USF&G to the bargain struck to resolve the coverage issues, Pepper's Steel requested entry of a final judgment enforcing the parties' agreement to settle. (DE 1552, p. 7). In this connection, Pepper's Steel also requested the court to retain jurisdiction for an award of attorney's fees. (DE 1552, p. 7).

The district court entered an amended final judgment on October 27, 1994 enforcing the settlement and requiring USF&G to pay the $2,000,000; however, the judgment provided that "each party [was] to bear its own costs and attorney's fees." (DE 1522, p. 2). The judgment further stated that Pepper's Steel (and others) "shall hold USF&G harmless with respect to any and all claims or causes of action that have been or may in the future be asserted against USF&G relating in any way to the Pepper's Steel site or to case numbers 85-0571-Civ-Paine and 86-1531-Civ-Paine." (DE 1522, p. 2).

USF&G appealed from the October 27, 1994 judgment enforcing the settlement agreement, assailing the district court's ruling on numerous grounds. (DE 1552, pp. 7-13). Pepper's Steel cross-appealed from the court's failure to reserve jurisdiction for an attorney's fee award. (DE 1552, p. 8).

The Eleventh Circuit, in a 19-page opinion,[7] rejected in all respects USF&G's multi-pronged attack on the judgment enforcing settlement. (DE 1552, pp. 7-13). The appellate court also agreed with Pepper's Steel that the district court reversibly erred in

[7] The Eleventh Circuit's opinion was not published. *See United States v. Pepper's Steel & Alloys, Inc.,* 87 F.3d 1329 (11th Cir. 1996)(table).

disallowing attorney's fees outright. The Eleventh Circuit said:

> [W]e conclude the district court should have retained jurisdiction to hear a motion for attorney's fees under Fla. Stat. § 627.428 . . . .
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> USF&G has been sued by its insureds [Pepper's Steel] for claims they allege were covered under their policies with USF&G.
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> Although USF&G settled this case, Florida courts have equated an insurance company's settlement of a coverage dispute with a confession of judgment. *See Wollard v. Lloyd's and Cos. of Lloyds,* 439 So. 2d 217, 218 (Fla. 1983). Hence, an insured may be entitled to collect a reasonable attorneys' fee from its insurer under § 627.428 despite the insurer settling and avoiding an adverse judgment or decree. *See id.* at 218-19 . . . .
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> [W]e have not been appraised [sic] of what fees the Movants [Pepper's Steel] are seeking to charge to USF&G. If the Movants are attempting to collect fees for the prosecution of their coverage action against USF&G *prior* to the parties' settlement on October 22, 1993, then the Movants' claim is foreclosed by the parties' settlement. In their agreement, the Movants dropped "all cla
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> Yet, if the Movants are seeking an award of fees incurred *after* October 22, 1993, in connection with their motion to enforce the agreement, then they may have a viable claim. Since these fees were incurred post-agreement, we cannot assume the parties compromised them in their settlement. (DE 1552, pp. 16-18) (italics by the Court).

The Eleventh Circuit accordingly vacated the judgment in part and remanded the case to the district court for further consideration of Pepper's Steel's claim for attorney's fees. (DE 1552, pp. 18-19).

4. The district court holds that section 627.428 does not apply to attorney's fees

incurred by an insured in enforcing a settlement agreement on an insurance policy.

On remand, the district court concluded as a matter of law that there was no contractual or statutory basis for an award of attorney's fees in favor of Pepper's Steel. (DE 1773, pp. 3-5). The court found that the settlement agreement which it upheld and later had been upheld by the Eleventh Circuit did not contain a provision for recovery of fees incurred in enforcing it. (DE 1773, p. 3).

Relying on *Travelers Indemnity Co. v. Morris,* 390 So. 2d 464, 465 (Fla. 3d DCA 1980), the district court also found that section 627.428 does not authorize a fee award when the insured successfully enforces a settlement on the policy against the insurer. (DE 1773, p. 4). The Third District in *Morris* held that fees "required to effect compliance with, collection of, or execution upon" a judgment previously entered against an insurer were not permitted under the statute.[8] The district court acknowledged, however, that because Florida law (i.e., section 627.428) does permit recovery of fees incurred by the insured before settling with the insurer, Pepper's Steel's fee claim had "considerable equitable appeal." (DE 1773, p. 4).

5. The Eleventh Circuit's certification order.

Pepper's Steel timely appealed from the district court's denial of its motion for

[8] For the reasons discussed below in the argument section of this brief at pages 20-22, Pepper's Steel submits that *Morris* is factually distinguishable and, in any event, should not be viewed as persuasive on this issue.

attorney's fees.[9] The Eleventh Circuit, after the matter had been fully briefed by the parties, framed the issue before it as: "whether section 627.428 provides for an award of attorney's fees when an insured successfully sues to enforce an agreement that purportedly settled a coverage issue." (App. 5). The Eleventh Circuit concluded that this "important question of Florida law . . . has not been directly addressed by" this Court, and that the "conflicting language" in *Travelers Indemnity Co. v. Morris,* 390 So. 2d 464 (Fla. 3d DCA 1980) and *Bankers Security Ins. Co. v. Brady,* 765 So. 2d 870 (Fla. 5th DCA 2000) was "difficult to reconcile." (App. 7). The Eleventh Circuit, as noted previously, thus certified to this Court the following question:

> UNDER SECTION 627.428 OF THE FLORIDA STATUTES, IS AN INSURED ENTITLED TO AN AWARD OF ATTORNEY'S FEES INCURRED IN ENFORCING A SETTLEMENT AGREEMENT AGAINST AN INSURER? (App. 7-8).

SUMMARY OF THE ARGUMENT

Section 627.428 requires an attorney's fees award where the insured obtains a judgment or decree against the insurer under a policy or contract executed by the insurer. The statute was enacted to discourage insurers from contesting valid claims, to make

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[9] USF&G also filed a cross-appeal, urging that the district court erred in rejecting USF&G's contention that Pepper's Steel's motion for attorney's fees was untimely under the federal local rules. The Eleventh Circuit obviously was unpersuaded by USF&G's argument on this point. First, the Eleventh Circuit did not even mention the point in the April 25, 2002 certification opinion. Second, the Eleventh Circuit's certified question regarding interpretation of section 627.428 was, by definition, deemed "determinative" of the case. Fla. R. App. P. 9.150(a).

their insureds whole, and to penalize insurers for forcing their insureds to litigate to obtain payment under insurance policies or contracts. Allowing recovery for attorney's fees an insured has involuntarily incurred in securing a judgment against its insurer to enforce a settlement agreement resolving a dispute over coverage will further the statute's purpose and avoid an absurd result, and also is consistent with this Court's prior decisions in this area. There simply is no principled legal or factual basis for drawing a distinction between enforcing the insurer's obligations under the insurance policy or contract and enforcing the insurer's settlement of its obligations under the policy or contract when determining the right to fees pursuant to the statute.

The federal district court erred in denying Pepper's Steel's motion for attorney's fees incurred after the settlement with USF&G in October, 1993. This Court should answer the Eleventh Circuit's certified question in the affirmative.

ARGUMENT

SECTION 627.428 ENTITLES PEPPER'S STEEL TO AN AWARD OF ATTORNEY'S FEES INCURRED IN ENFORCING THE SETTLEMENT AGREEMENT WITH USF&G. THE CERTIFIED QUESTION THEREFORE SHOULD BE ANSWERED IN THE AFFIRMATIVE.

Pepper's Steel submits, respectfully, that this Court should accept jurisdiction in this case and answer the question certified by the Eleventh Circuit in the affirmative. Holding that Pepper's Steel is entitled to fees incurred in enforcing the settlement agreement with USF&G would be in complete accord with the language of section

627.428, the legislature's intent in enacting the statute and the public policy furthered by it, and decisions from this Court and elsewhere interpreting this attorney's fees provision and others like it in circumstances applicable here by analogy.

1. SECTION 627.428 AND ITS PURPOSE.

Section 627.428 provides in pertinent part that a trial or appellate court "shall adjudge or decree against the insurer and in favor of the insured . . . a reasonable sum as fees . . . for the insured's . . . attorney prosecuting the suit . . ." where a judgment or decree is rendered against the insurer and in favor of the insured "under a policy or contract executed by the insurer." This Court and the district courts of appeal "have consistently held that the purpose of section 627.428 and its predecessor is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or to sue to enforce their insurance contracts." *Insurance Co. of North America v. Lexow,* 602 So. 2d 528, 531 (Fla. 1992); *see also Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.,* 753 So. 2d 55, 59 (Fla. 2000)(same); *Scottsdale Ins. Co. v. DeSalvo,* 748 So.2d 941, 943 (Fla. 1999)("the intent of section 627.428 is to encourage early and fair settlements of valid claims"); *Fewox v. McMerit Constr. Co.,* 556 So. 2d 419, 423 (Fla. 2d DCA 1989)(cited with approval in *Lexow*, 602 So. 2d at 531)("the legislative policy underlying section 627.428 is to protect insureds . . . from unwarranted proceedings by insurers contesting coverage"); *Leaf v. State Farm Mutual Automobile Ins. Co.,* 544 So. 2d 1049, 1050 (Fla.

4th DCA 1989)(cited with approval in *Lexow,* 602 So. 2d at 531)(the purpose of section 627.428 is "to penalize a carrier for wrongfully causing its insured to resort to litigation to resolve a conflict when it was reasonably within the carrier's power to do so."); *Bassette v. Standard Fire Ins. Co.,* 803 So. 2d 744, 746 (Fla. 2d DCA 2001)("If a dispute is within the scope of section 627.428 and an insured must enforce rights under a contract and a judgment is rendered against the insurer, the insurer is required to pay attorney's fees to the insured . . . . [T]he purpose of section 627.428 is to penalize an insurance company for wrongfully causing its insured to resort to litigation in order to resolve a conflict with its insurer . . . ."); *Aksomitas v. Maharaj,* 771 So.2d 541, 544 (Fla. 4th DCA 2000)(en banc)("The purpose of the statute is to make the insured whole, i.e., in the same position the insured would have been if the insurer had paid the claim without litigation.").

This Court furthermore has held that an insurer's good faith in bringing or defending an action against its insured is "irrelevant" to the question of recoverability of attorney's fees under section 627.428: "If the dispute is within the scope of section 627.428, and the insurer loses, the insurer is always obligated for attorney's fees." *Lexow,* 602 So. 2d at 531.

And as this Court aptly observed five decades ago in connection with section 625.08, which is substantively the same as section 627.428,

> the business of insurance is affected with a public interest as much as any other business conducted in the United States .

> . . It is an undue hardship upon beneficiaries of policies to be compelled to reduce the amount of their insurance by paying attorney's fees when suits are necessary in order to collect that to which they are entitled.
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> * * *
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> [Statutes awarding attorney's fees to insureds are] sustained under the doctrine that they may be imposed under the police power of the State as a penalty incurred in the conduct of a business affected with a public interest.

Feller v. Equitable Life Assur. Soc., 57 So. 2d 581, 584 586 (Fla. 1952).

2. *WOLLARD* AND ITS PROGENY TEACH THAT SECTION 627.428 WILL BE INTERPRETED CONSISTENT WITH ITS PURPOSE AND TO AVOID ABSURD RESULTS.

It was against this analytical backdrop that this Court, in *Wollard v. Lloyds & Companies,* 439 So. 2d 217 (Fla. 1983), resolved a conflict among the district courts and held that section 627.428 entitles an insured to an award of attorney's fees incurred in reaching a negotiated settlement with its insurer. The Court concluded:

> [w]here an insurer pays policy proceeds after suit has been filed but before judgment has been rendered, the payment of the claim constitutes the functional equivalent of a confession of judgment or verdict in favor of the insured, thereby entitling the insured to attorney's fees [under section 627.428].

Ivey v. Allstate Ins. Co., 774 So. 2d 679, 684 (Fla. 2000)(explaining the holding in *Wollard*).

Significantly, the Court in *Wollard* expressly rejected the insurer's narrow construction of section 627.428 that the statute was inapplicable because no judgment or decree had been entered in favor of the insured in light of the insurer's voluntary

payment pursuant to the settlement agreement. The Court reasoned:

> [I]t is neither reasonable nor just that an insurer can avoid liability for statutory attorney's fees by the simple expedient of paying the insurance proceeds to the insured . . . at some point after suit is filed but before final judgment is entered, thereby making unnecessary the entry of final judgment . . . . We think the statute must be construed to authorize the award of an attorney's fee to an insured . . . under a policy or contract of insurance . . . even though technically no judgment for the loss claimed is thereafter entered favorable to the insured . . . due to the insurer voluntarily paying the loss before such judgment can be rendered.

Id. at 218 (quoting *Cincinnati Ins. Co. v. Palmer,* 297 So. 2d 96, 99 (Fla. 4th DCA 1974)). Adopting the insurer's interpretation of section 627.428 additionally would "do violence to its purpose, which is to discourage litigation and encourage prompt disposition of valid insurance claims without litigation." *Wollard,* 439 So. 2d at 218 (quoting *Gibson v. Walker,* 380 So. 2d 531, 533 (Fla. 5th DCA 1980)).

The *Wollard* court also pointed out that it would make no sense at all and contravene section 627.428's purpose by denying fees to the insured who was forced to litigate the coverage issue on the ground that the settlement avoided triggering application of the statute since the insured failed to recover a judgment or decree against the insurer:

> Requiring the plaintiff to continue litigation in spite of an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system, fails to protect any interest -- the insured's, the insurer's or the public's -- and discourages any attempt at settlement. This literal

> requirement of the statute exalts form over substance to the detriment of public policy, and such a result is clearly absurd. It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result.

Id. at 218; *see also Palmer v. Fortune Ins. Co.,* 776 So. 2d 1019, 1021 (Fla. 5th DCA 2001)(Under *Wollard*, "the settlement between the insured and insurer provides the basis for an award of attorney fees to the insured"); *Ajmechet v. United Auto Ins. Co.,* 790 So. 2d 575, 576 (Fla. 3d DCA 2001) ("Because the payment [by the insurer] was obviously effected [sic] by the lawsuit, we hold the insured was entitled to fees under section 627.428 . . .," citing *Wollard* as authority).

Cases decided after *Wollard* have adhered to its rationale and have held that section 627.428 authorizes an attorney's fee award despite contentions by insurers that the literal requirements of the statute had not been met. For example, in *Fewox v. McMerit Constr. Co.,* 556 So. 2d 419 (Fla. 2d DCA 1990), *approved sub nom., Ins. Co. of North America v. Acousti Engineering Co.,* 579 So. 2d 77 (Fla. 1991), the Second District, sitting en banc, held that property owners were entitled to fees from a surety on a contractor's performance bond where the surety interplead funds to pay on the claim after an arbitrator entered an award in favor of the property owners and against the contractor. Echoing the analysis employed by this Court in *Wollard,* the Second District was not convinced by the insurer's assertion that fees were disallowed absent a judicial "'rendition of a judgment or decree,' or its equivalent, which is a prerequisite under section 627.428(1) to an award of fees." *Id.* at 421. The appellate court explained:

> The legislative policy underlying section 627.428 is served by requiring insurers to pay attorney's fees to a prevailing insured or beneficiary, regardless of whether the insurers contest coverage through arbitration or in the trial courts. To hold otherwise would be to allow insurers to avoid paying attorney's fees in contested coverage cases merely by choosing arbitration.
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> * * *
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> [A] voluntary payment of the arbitration award by the surety insurer is the equivalent of "the rendition of a judgment or a decree" under section 627.428(1).

Id. at 424.

In *Ins. Co. of North America v. Acousti Engineering Co.,* 579 So. 2d 77, 79-80 (Fla. 1991), this Court agreed with the Second District's construction of section 627.428, and "adopt[ed] the thorough and well-reasoned en banc opinion . . . in *Fewox* as [its] own."[10]

3. *LEXOW* REITERATES THAT ATTORNEY'S FEES WILL BE AWARDED UNDER SECTION 627.428 WHERE DOING SO IS CONSISTENT WITH THE BROAD PURPOSE OF THE STATUTE.

Nine years after *Wollard* was decided, this Court confirmed once more that fidelity to public policy concerns and the legislature's intent in enacting section 627.428 should guide the analysis under the statute. In *Ins. Co. of North America v. Lexow,* 602 So. 2d 528 (Fla. 1992), the Court responded to the following certified question from the Eleventh Circuit:

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[10] *Turnberry Assocs. v. Service Station Aid, Inc.,* 651 So. 2d 1173 (Fla. 1995), recedes from *Acousti* on a separate holding totally unrelated to the instant case.

> DOES THE PHRASE "UNDER A POLICY OR CONTRACT" IN FLORIDA STATUTES § 627.428(1) INCLUDE SUBSEQUENT LITIGATION TO DETERMINE WHETHER THE INSURED OR THE SUBROGATED INSURER IS ENTITLED TO FUNDS OBTAINED BY THE INSURED FROM A TORFEASOR AFTER THE INSURER HAS PAID THE INSURED ITS POLICY LIMITS, ALTHOUGH THESE FUNDS ARE INSUFFICIENT TO COMPENSATE THE INSURED'S LOSS, FOR THE PURPOSE OF AWARDING ATTORNEY'S FEES TO THE INSURED ACQUIRING A JUDGMENT AGAINST THE INSURER FOR THE FUNDS RECEIVED FROM THE TORTFEASOR?

This Court answered "yes" to the certified question, and stated as follows:

> Florida courts have consistently held that the purpose of section 627.428 and its predecessor is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts. [citations omitted]. We are persuaded that the lawsuit involved in this case falls within the scope of this rationale.
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> In the instant case, the resolution of the dispute over who was entitled to the fund paid by the third-party tortfeasor ultimately determines whether the claim was fully paid under the insurance contract . . . . It is important to note that INA's right to claim subrogation exists solely by virtue of having paid a claim under the policy. Thus, any dispute with Lexow concerning subrogation in this case arises under the policy.
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> There is little difference between paying an insurance claim and then suing for its return and refusing to pay the claim in the first place.

Id. at 531.

4. THE FIFTH DISTRICT CORRECTLY HOLDS IN *BRADY* THAT AN

INSURED WHO SUCCESSFULLY SUES ITS INSURER FOR BREACH OF AN ORAL SETTLEMENT AGREEMENT IS ENTITLED TO ATTORNEY'S FEES UNDER SECTION 627.428.

In keeping with *Wollard, Lexow* and the other authorities cited above, the Fifth District, in *Ins. Co. of North America v. Brady,* 765 So. 2d 870 (Fla. 5th DCA 2000), recently held that attorney's fees were properly awarded under section 627.428 in a case with similar facts. There, the insurer's adjuster agreed to pay the insured $65,000 after the insured's home was destroyed by fire. When the insurer replaced the adjuster and refused to pay as the adjuster had previously agreed, the insured sued for breach of the settlement agreement. The insurer disputed the validity of the agreement on the ground that the adjuster was without authority to bind it. The trial court ruled in favor of the insured and, pursuant to section 627.428, assessed attorney's fees against the insurer. On appeal, the Fifth District affirmed. The court reasoned in language directly applicable here:

> The purpose of section 627.428 is to discourage insurance companies from contesting valid claims and to reimburse insureds for their attorney's fees when they must enforce in court their contract with the insurance company. [citations omitted].
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> . . . Brady was forced to file suit against Bankers for breach of its agreement to pay for his loss. Had Brady filed a breach of contract action and prevailed, he would clearly be entitled to fees under section 627.428. It is unreasonable to deny fees to Brady for what is in essence the same action. Thus, attorney's fees were properly awarded pursuant to section 627.428.

Id. at 873.

5. PEPPER'S STEEL IS ENTITLED TO ATTORNEY'S FEES UNDER SECTION 627.428, AS PROPERLY INTERPRETED BY *WOLLARD, LEXOW,* AND *BRADY.*

As we have shown, the legislature enacted section 627.428 to discourage insurers from contesting valid claims, to make insureds whole, and to penalize insurers for forcing their insureds to litigate in court or other fora to obtain payment under insurance policies or contracts. This Court furthermore has made it crystal clear that the statute will be sensibly construed so as to effectuate the legislature's intent in enacting it and to avoid absurd results. With these principles in mind, this Court should hold that section 627.428 authorizes an award for attorney's fees incurred by Pepper's Steel in enforcing the settlement agreement with USF&G.

To be sure, Pepper's Steel is not requesting an award for attorney's fees incurred before October 22, 1993, when Pepper's Steel accepted USF&G's outstanding offer to settle the claims asserted against the carrier. Pepper's Steel's claim for those pre-settlement fees was compromised when it accepted that offer, as the Eleventh Circuit held in the prior appeal in this matter. (DE 1552, p. 18). Pepper's Steel instead seeks here only an award for fees incurred in connection with enforcement of the agreement which USF&G -- unilaterally and unsuccessfully -- attempted to disavow, and fees incurred in prosecuting the efforts to obtain fees. (App. 4 n. 2).

USF&G's opposition to attorney's fees under section 627.428 is a transparent

effort to avoid the carrier's statutory responsibility for fees by agreeing to settle a coverage dispute, reneging on that agreement, and then claiming that the judgment Pepper's Steel was forced to secure in the ensuing protracted litigation to obtain payment under the insurance policies actually enforced its obligations under a settlement agreement rather than "under a policy or contract" within the meaning of the statute. USF&G's position is completely untenable.

In the first place, the judgment enforcing the settlement against USF&G was, just like the settlements in *Wollard* and its progeny, the functional equivalent of an adjudication of Pepper's Steel's rights under the insurance policies issued by USF&G and must be treated as such when assessing the carrier's liability for attorney's fees under section 627.428.

In addition, Pepper's Steel's urged entitlement to attorney's fees arises exclusively from USF&G's breach of its promise to pay a claim under its insurance policies. Consequently, as in *Lexow,* resolving the dispute over whether there was a settlement ultimately determined whether the claim under the policies was paid. Analytically, there is no substantive difference between agreeing to pay an insurance claim and then refusing to honor the agreement, and refusing to pay on the claim in the first place.

And, as in *Brady*, USF&G should be held liable for fees under section 627.428 because it breached its agreement to pay the claim which plainly had arisen "under a policy or contract."

In sum, the result advocated by Pepper's Steel is wholly consistent with the language of section 627.428 and the purpose and public policy underlying it, which, as noted above, is "to place the insured or beneficiary in the place she would have been if the carrier had reasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees." *Clay v. The Prudential Ins. Co.,* 617 So. 2d 433, 436 (Fla. 4th DCA 1993); *see also Morrison v. Allstate Indemnity Co.,* 228 F.3d 1255, 1266 (11th Cir. 2000). This Court therefore should give effect to substance over form in evaluating the circumstances present in this case to assess whether they fall within the purview of the statute and the scope of the rationale behind the statute's enactment. *Lexow,* 602 So. 2d at 531. Because the substance of Pepper's Steel's motion to enforce settlement agreement was to require USF&G to meet its obligations under its insurance policies, and because Pepper's Steel succeeded in having judgment subsequently entered against USF&G, Pepper's Steel is entitled to an attorney's fee award under section 627.428. This Court should so hold.

6. THE THIRD DISTRICT'S *MORRIS* DECISION IS OFF POINT AND, IN ANY EVENT, IS NOT PERSUASIVE AUTHORITY FOR DISALLOWING ATTORNEY'S FEES UNDER SECTION 627.428.

The federal district court relied on *Travelers Indemnity Co. v. Morris,* 390 So. 2d 464 (Fla. 3d DCA 1980), in denying Pepper's Steel's motion for attorney's fees. (DE 1773, pp. 4-5). The Eleventh Circuit in turn was troubled that, in its view, language in the Third District's decision conflicted with language in *Brady.* (App. 5-7).

Respectfully, *Morris* does not support denial of fees in this case.

In *Morris*, after obtaining a judgment against an insurer on a PIP claim, the insured sought fees for attorney time spent securing payment of the PIP benefits required by the judgment. In a terse opinion, the Third District held that the request for fees should have been denied because section 627.428 "permit[s] fees only for services involved in obtaining a judgment against a carrier, and not for those required to effect compliance with, collection of, or execution upon that judgment." *Id.* at 465.

Morris is factually distinguishable and thus inapposite. The fees at issue there were incurred in connection with post-judgment collection services. In contrast to *Morris*, the fees which Pepper's Steel seeks here were incurred in connection with obtaining a judgment against its insurer and defending that very same judgment against the insurer's appellate attacks on it. Pepper's Steel had not yet recovered a judgment against USF&G on October 22, 1993, when USF&G's settlement offer was accepted, so the attorney time for which Pepper's Steel seeks to be reimbursed was not required to "effect compliance with, collection of, or execution upon that judgment." *Id.* at 465. *Morris* therefore is off point. To the extent this Court concludes otherwise, Pepper's Steel submits that *Morris* cannot be squared with the language and purpose of section 627.428, and is inconsistent with the decisions from this Court and the Fifth District

previously discussed.[11]

7. AN ATTORNEY'S FEE AWARD TO PEPPER'S STEEL IS SUPPORTED BY PRECEDENT FROM ACROSS THE COUNTRY.

USF&G presumably will argue here, as it has argued in the federal courts, that section 627.428 is in derogation of the common law of this state, which follows the American Rule that each party bears its own attorney's fees, and should therefore be strictly construed.[12] As we previously established, such "strict construction" must yield

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[11] *Morris* cites two decisions in support of its holding that the request for fees at issue there should have been denied under section 627.428, neither of which remotely resembles the instant case. *Bohlinger v. Higginbotham,* 70 So. 2d 911 (Fla. 1954), held only that section 625.08, section 627.428's predecessor, did not apply in an action "against the liquidator of the assets of a defunct insurance company and the Florida Insurance Commissioner to adjudicate rights in a statutory fund." *Id.* at 916. Of course, no such circumstances are present here. *Lee v. Government Employees Ins. Co.,* 388 So. 2d 346 (Fla. 1st DCA 1980), did not even involve section 627.428 or its predecessor. Like *Morris* itself, *Bohlinger* and *Lee* therefore do not support denial of Pepper's Steel's request for attorney's fees in the instant case.

[12] In fact, "the American Rule now is a minority position in the declaratory judgment context, with 26 of the states now allowing an insured to recover its attorneys' fees from its insurer in a declaratory judgment action, even where the insurer has acted in good faith." Floyd A. Wisner, *Insurer's Liability for Insured's Attorneys' Fees in Declaratory Judgment Actions,* 28 Fall Brief 58 (1998). Of these 26 states, 16 states (including Florida) have specific statutes providing for the award of attorneys' fees to an insured against its insurer in a declaratory judgment action. These states and their respective fee statutes are as follows: Alaska - Alaska R. Civ. Proc. 82; Arizona - Arizona Rev. Stat. Ann. § 12-341.01; Arkansas - Ark. Stat. § 66-3239; Florida - Fla. Stat. § 627.428; Georgia - Ga. Code Ann. § 33-7-15(b.1); Hawaii - Haw. Rev. Stat. § 431:10-242; Idaho - Idaho Code § 41-1839; Kansas - Kansas Stat. Ann. § 40-256; Nebraska - Neb. Rev. Stat. § 44-359; New Hampshire - N.H. Rev. Stat. Ann. 491:22-B; New Jersey - N.J. Rev. Stat. 4:42-9(A)(6); North Carolina - N.C. Gen. Stat. § 6-21.1; Oklahoma - 36 Okla. Stat. § 3629(B); Oregon - Or. Rev. Stat. 743.114; Texas - Tex. Civ. Prac. Rem. Code § 37.009; Wisconsin - Wis. Stat. Ann. 806.804(a). *Id.*; *see also* Andrew M. Reidy and Kathrin V. Smith, *Attorneys' Fees in*

to the dominant purpose of the statute and the rule against sanctioning absurd results. What's more, USF&G's argument collapses under the weight of national precedent on this issue.

Courts throughout the country have liberally construed statutes providing for attorney's fees in suits against insurers. For example, the Fifth Circuit, applying Florida law, broadly interpreted the Florida statute providing for fees where a "recovery is had" to award fees to the insured in a declaratory judgment suit, reasoning that the statute was not limited to suits for the recovery of money. *See Continental Cas. Co. v. Giller Concrete Co.,* 116 F.2d 431 (5th Cir. 1940). Likewise, the Nebraska Supreme Court broadly interpreted the Nebraska insurance statute to award fees in an action for declaratory judgment by the insured under a statute providing for such fees in actions "at law." *See Workman v. Great Plains Ins. Co.,* 200 N.W.2d 8 (Neb. 1972). Expanding on the *Workman* decision, the Nebraska Supreme Court also held that section 44-359 applied where the insurer brought the action and the insured prevailed, even though the statute read in pertinent part: "In all cases where the beneficiary, or other person entitled thereto, brings an action . . . ." *See State Farm Mut. Auto. Ins. Co. v. Selders,* 202 N.W.2d 625 (Neb. 1972). The *Selders* court reasoned, "We do not think the allowance

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Coverage Actions: Making Insurers Foot the Bill, 11 No. 44 Andrews Ins. Coverage Litigation Report 990 (Oct. 5, 2001). Mr. Reidy and Ms. Smith note in this article that courts have also awarded attorneys' fees to policyholders pursuant to the Federal Declaratory Judgment Act and state Declaratory Judgment Acts.

of the attorney's fee should depend upon who brings the action. The insured prevailed and the allowance of attorney's fee is under the circumstances within the purposes of the statute . . . ." *Id. at* 626; *accord, Hardware Mut. Cas. Co. v. Farmers Ins. Exchange,* 474 P.2d 316 (Or. 1970)(rejecting argument that ORS 743.114 does not apply because by its terms it authorizes the award of fees only to successful plaintiffs, whereas recovery was had by the defendants in their counterclaims).

Other states have also awarded fees in connection with suits against insurers to enforce settlement agreements. In *Betancourt v. Arizona Property & Cas. Ins. Fund,* 823 P.2d 1304 (Ariz. Ct. App. 1991), the Court of Appeals of Arizona held that the Arizona Property & Casualty Insurance Fund ("the Fund") was bound by a settlement agreement reached by an insolvent insurer and a third party before the insurer's insolvency. The court also affirmed the award of attorneys' fees against the Fund pursuant to A.R.S. section 12-341.01, which allowed an award of fees to the successful party in "any contested action arising out of a contract . . . ." The court concluded that the Fund should have to absorb the extra fees incurred in enforcing the settlement agreement. *Accord, Hays v. Fischer,* 777 P.2d 222 (Ariz. Ct. App. 1989)(holding that trial court properly awarded attorneys' fees to defendant as a consequence of a breach of a settlement agreement); *see also Flood Control District of Maricopa County v. Conlin,* 712 P.2d 979 (Ariz. Ct. App. 1985)(holding that complaint seeking relief from judgment essentially sought to invalidate prior settlement agreement and was thus a "contested action arising

out of contract" under Arizona fee statute); *Lamb v. Arizona Country Club,* 601 P.2d 1068, 1070 (Ariz. Ct. App. 1979)(granting request for fees for opposing a motion to set aside a stipulated judgment, reasoning, "Nothing in the language of the statute suggests that it will not apply when the agreement is negotiated in the course of litigation and incorporated into a judgment."); *see also Oregon Mut. Ins. Co. v. Barton,* 36 P.3d 1065, 1071-72 (Wash. Ct. App. 2001)(awarding fees to insured who counterclaimed to enforce settlement agreement, reasoning, "When the conduct of the insurer imposes upon the insured the burden of compelling the insurer to honor its commitment, the insured is entitled to fees.").

In *Weber v. Sentry Ins.,* 442 N.W.2d 164 (Minn. Ct. App. 1989), the Minnesota Court of Appeals held that an insured who sued the tortfeasor's insurer to enforce a settlement agreement was entitled to bad faith attorney's fees from that insurer and to attorney's fees from its own underinsurer based on the Uniform Declaratory Judgment Act. The *Weber* court reasoned: "Insurance contracts are intended to relieve the insured of the financial burden of litigation, and the costs of the declaratory judgment action are considered consequential damages flowing from the breach of the insurance contract." *Id.*

This Court should follow this national precedent and construe section 627.428 in accordance with its purpose -- to shift the financial burden of litigation to the insurance company in disputes with insureds. Again, USF&G's literal and strained interpretation

of the statute would frustrate its purpose and would improperly exalt form over substance to yield an absurd result.

CONCLUSION

Based on the facts and authorities discussed above, Pepper's Steel and Alloys, Inc. and Norton Bloom respectfully request that this Court accept jurisdiction in this case and answer the Eleventh Circuit's certified question in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **May 31st, 2002,** a true and correct copy of the foregoing was served by U.S. Mail on:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief has been prepared using Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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