IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. SC04-1828

DADELAND STATION ASSOCIATES, LTD. and DADELAND DEPOT, INC.,

Appellants,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL.,

Appellees.

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

GRANTED BY LEAVE OF COURT

January 27, 2005

STEPHEN A. MARINO, JR., ESQ.
VER PLOEG & LUMPKIN, P.A
Amicus Curiae for Appellants
100 Southeast Second Street
Suite 2150
Miami, Florida 33131-2151
Tel: (305) 577-3996
Fax: (305) 577-3558

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IDENTITY OF AMICUS CURIAE

The Academy of Florida Trial Lawyers ("the Academy") is a voluntary state-wide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. Members of the Academy are pledged to foster the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law and the right of access to courts. The Academy has been involved as amicus curiae in hundreds of cases in this Court and the Florida District Courts. The Academy believes this case involves an issue of general application and significance, requiring its participation on behalf of Florida's citizens.

SUMMARY OF THE ARGUMENT

Introduction: The Academy, as Amicus Curiae for Appellants, appears here to address several significant legal issues raised by the District Court's decision on appeal. The Eleventh Circuit Court of Appeals certified five questions for determination by this Court. Amicus Curiae defers to Appellant as to the questions certified to the extent that they relate solely to the instant case. The following discussion examines the legal principles that form the predicate for the District Court's errors and is intended to provide this Court with a broader perspective on the law controlling the issues on appeal.

Significant Facts of the Case: The facts of the case are set forth in the Eleventh Circuit's opinion. (A2-7). Amicus Curiae highlights the significant facts for the purposes of its discussion, specifically: There was a surety contract to which Appellant was the obligee (R137-2); the principal of the surety contract and the surety were advised of construction deficiencies in the project on September 24, 1997 (R137-5); the principal failed to correct the problems and an arbitration action was instituted by the obligee against the principal and surety (R137-6); the obligee gave notice to the surety of the principal's default on December 14, 1998, triggering the surety's obligation to protect the obligee from further losses (R137-7); the surety declined to take any action to protect the obligee on January 18, 1999 (R137-8); a Civil Remedy Notice was served on the surety on February 17, 1999 (R137-8); an arbitration award was entered on May 15, 2000 in favor of the obligee and against the principal and surety in April in the amount of $1,417,842 (less a setoff for contract balances and extra work) (R137-10); and the surety's defenses to its obligation under the surety contract were considered and denied by the arbitration panel (R137-10).

Issues on Appeal: Given these facts, the issues on appeal resolve themselves into three interrelated discussions. First, an obligee has the right to sue a surety under Fla. Stat. §624.155 if the obligee files a notice pursuant to Fla. Stat. §624.155(3), alleges damages resulting from violations of the statute and alleges a

valid claim under the surety contract. Second, a claimant need not prove a general business practice to obtain compensatory damages for violations of §624.155, as the flush-left clause in Fla. Stat. §624.155(1) eliminates that requirement. Finally, claims under §624.155 are not barred by *res judicata* where the underlying arbitration or action did not include bad faith claims.

ARGUMENT

I. AN OBLIGEE HAS THE RIGHT TO SUE A SURETY UNDER FLA. STAT. §624.155

The threshold question for this Court is whether an obligee under a surety contract has a right of action against the surety under Fla. Stat. §624.155. Surety contracts are considered insurance under Florida law and therefore regulated by the Florida Insurance Code, of which Fla. Stat. §624.155 is an integral part. There being no express provision to the contrary, the surety is subject to suit under Fla. Stat. §624.155, provided that the conditions precedent for such action are met.

A. Surety Contracts Are Insurance Contracts Regulated by the Florida Insurance Code

Insurance is defined as "a contract whereby one undertakes to indemnify another or pay or allow a specified amount of a determinable benefit upon determination of contingencies." Fla. Stat. §624.02 (2004). An "insurer" is "every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity." Fla. Stat. §624.03 (2004); *see also Nichols v.*

Preferred Nat'l Ins. Co., 704 So.2d 1371, 1373 (Fla. 1997) (observing that a surety is included within the definition of "insurer" under the Florida Insurance Code). The Florida Insurance Code expressly describes "surety insurance" as "[a] contract bond … or a performance bond, which guarantees the execution of a contract." Fla. Stat. §624.606(1)(a) (2004). Accordingly, there can be no dispute that a surety contract is "insurance" under Florida law.

B. An Obligee to a Surety Contract Is an Insured

The purpose of a surety bond such as the one at issue in the case at bar is "to assure the prompt payment to a creditor of sums admittedly due and as to which the principal has no defenses." *United Bonding Ins. Co. v. General Cable Corp.*, 381 F.2d 753, 755 (5th Cir. (Fla.) 1967) (holding obligee of bond entitled to immediate payment upon default by principal). It is the obligee, not the principal, that enjoys the protections offered by the surety contract, as would a policyholder.

The District Court, under slightly different circumstances, acknowledged the fiduciary relationship between a surety and the obligee: "Because the obligee looks to the surety for protection from calamity, the surety owes a duty of good faith to the obligee." *Shannon R. Ginn Const. Co. v. Reliance Ins. Co.*, 51 F.Supp.2d 1347, 1352 (S.D. Fla. 1999) (Judge Hurley noting that "the surety's duty runs to the third party obligee") (citations omitted). Judge Hurley ultimately concluded that "if any party has a claim for bad faith failure to settle under section 624.155(1)(b)1,

Florida Statutes, it would be … the obligee under the performance bond." *Id*.[1]

While the Florida Insurance Code does not define the term "insured," *see Ginn* at 1350 n.5, the fiduciary relationship between a surety and an obligee bear all the indicia of an insurer-insured relationship.[2] For the purposes of Fla. Stat. §624.155, an obligee is an insured and can bring an action pursuant to Fla. Stat. §624.155 against a surety.[3]

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[1] Judge Hurley also observed that "both parties agree that only an *insured* can bring a bad faith action under section 624.155(1)(b)1. *Ginn* at 1351. This is an erroneous statement of the law. As this Court made clear in *Talat Enters., Inc. v. Aetna Cas. And Sur. Co., 753 So.2d* 1282 (Fla. 2000), "the statute provided a remedy for any person damaged by an insurer's commission of any of the following [acts enumerated under §624.155(1)(b)]."

[2] *See, e.g.*, Part XII of Chapter 627, "Surety Insurance Contracts," includes §627.756 (expressly stating project "[o]wners … shall be deemed to be insureds or beneficiaries for the purpose of this section").

[3] A cause of action under Fla. Stat. §624.155(1) is available to any party damaged by an insurer's wrongful acts. *Talat at* 1278, 1282 The issue of whether the obligee is an "insured" may therefore be irrelevant. Viewing the principal as the insured and the obligee as the equivalent of a third-party claimant leads to the same result: An obligee would be permitted under Florida law to bring a statutory bad faith action once judgment is entered against the principal. The analogy is imperfect in that Florida law requires a judgment in excess of the insurance policy limits in a third-party bad faith action. *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So.2d 275, 277 (Fla. 1997). The concept, however, is the same in that a third-party claimant can bring a direct action against the insurer once liability on the part of the insured has been established, pursuant to Fla. Stat. §627.4136. *See Blue Cross and Blue Shield of Mich. v. Halifax Ins. Plan, Inc.*, 961 F.Supp. 271, 273-74 (M.D. Fla. 1997). In the case *sub judice*, the underlying arbitration proceeding could be viewed as the third-party action against the insured, with the surety joined in the judgment as an insurer would be under Fla. Stat. §627.4136.

C. A Surety Is Subject to Bad Faith Claims Pursuant to Fla. Stat. §624.155

Florida Statute §624.155 is the "civil remedy statute of the Florida Insurance Code," which authorizes causes of action for bad faith against an insurer. *Talat*, 753 So.2d at 1281. Section 624.155 provides "the mechanism by which a person may bring a civil suit against an insurer who violates the Insurance Code" *Auto-Owners Ins. Co. v. Conquest*, 658 So.2d 928, 929 (Fla. 1995). Any person who is damaged by an insurer's violation of the statutes incorporated within subsection 624.155(1)(a) or the acts enumerated in subsection 624.155(1)(b) may bring a bad faith action.

Sureties are included within the definition of insurers and are therefore subject to suit under Fla. Stat. §624.155. Had the Florida Legislature intended to shield sureties from bad faith actions, it could have done so in the same way it exempted Worker's Compensation insurers[4] or the Insurer Guarantee Association.[5] In the absence of any language shielding surety contracts from liability under

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[4] *See* Fla. Stat. §440.11(4) ("Notwithstanding the provisions of s. 624.155, the liability of a carrier to an employee or anyone entitled to bring suit in the name of the employee shall be as provided in this chapter, which shall be exclusive and in place of all other liability").

[5] *See* Fla. Stat. §631.717(11) ("The association shall not be liable for any civil action under s. 624.155 arising from any acts alleged to have been committed by a member insurer prior to its liquidation").

§624.155, the civil remedies provided under the Florida Insurance Code are available against sureties.

D. An Arbitrator's Finding of Liability on Behalf of a Surety and Its Defaulted Principal, Together With a Perfected Civil Remedy Notice, Is a Sufficient Precedent to Sustain an Action Under Fla. Stat. §624.155

As it is beyond dispute that sureties are insurance contracts and subject to regulation under the Florida Insurance Code, the question remains as to what conditions precedent must be met to perfect a claim under Fla. Stat. §624.155. It is undisputed that notice must be given in accordance with Fla. Stat. §624.155(3).[6] The only other prerequisites to bringing an action under Fla. Stat. §624.155 are allegations of the existence of: (1) a claimant's damages and (2) liability on the part of the insurer to pay a valid claim. *See Hollar v. International Bankers Ins. Co.*, 572 So.2d 937, 939 (Fla. 3rd DCA 1991) (holding the enactment of Fla. Stat. §624.155 expands the common law bad faith remedies and "adds a procedural first step that requires insureds to notify the insurer of a bad-faith claim").

[6] There appears to be no dispute that Appellant properly served a Civil Remedy Notice on February 17, 1999, to which the surety responded on March 3, 1999. (R137-8). Accordingly, the discussion that follows presumes that this condition has been met and looks to the additional prerequisites for an action under Fla. Stat. §624.155.

1. A Claimant Must Have Damages

Prior to the passage of §624.155 in 1982, first-party insureds had no recourse against their insurers for bad faith claims handling. Florida courts had long recognized "third party" bad faith actions, commenced by an injured party against the tortfeasor's insurer, *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938), but the fiduciary duty rationale underlying the third party cause of action was never extended by Florida courts to suits by the insured against its own insurer. *See, e.g., Baxter v. Royal Indem. Co.*, 285 So.2d 652, 656 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d 725 (Fla. 1975). This changed with passage of §624.155, which provided first-party insureds with potential extra-contractual relief. *Talat* at 1281. The relationship between actions for breach of the insurance contract and the related bad faith claims, however, remained uncertain.

This Court addressed that issue in *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So.2d 1289 (Fla. 1991). Blanchard sued State Farm in federal court under §624.155 after recovering judgments against both the uninsured tortfeasor and State Farm (under his policy's uninsured motorist provisions) in a state court action. *Id*. at 1290. State Farm moved to dismiss, arguing that Blanchard had impermissibly split his cause of action by failing to file the bad faith suit in the original state court case. *Id.* On appeal after dismissal, the Eleventh Circuit Court of Appeals certified three questions to this Court:

1. Does an insured's claim against an uninsured motorist carrier under section 624.155(1)(b)1, Florida Statutes, for allegedly failing to settle the uninsured motorist claim in good faith, accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits?
2. If so, is joinder of the claim under section 624.155(1)(b)1 in the underlying litigation for contractual uninsured motorist benefits permissible?
3. If so, is joinder of the section 624.155(1)(b)1 claim with the contractual claim mandatory?

Id. at 1290.

In the face of an insurer's claim that completion of the contractual litigation without joinder of the bad faith action extinguished the claim under Fla. Stat. §624.155, the *Blanchard* Court held:

> It follows that an insured's claim against an uninsured motorist carrier for failing to settle the claim in good faith does not accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits. Absent a determination of the *existence of liability* on the part of the uninsured tortfeasor and the *extent of the plaintiff's damages*, a cause of action cannot exist for a bad faith failure to settle.

Id. (emphasis supplied).

Neither §624.155 nor *Blanchard* requires litigation prior to bringing a bad faith action. Indeed, this Court consistently adheres to the premise that "the law favors settlement of disputes and the avoidance of litigation." *Imhof v. Nationwide Mut. Ins. Co.*, 643 So.2d 617, 618-19 (Fla. 1994) (citing *DeWitt v. Miami Transit Co*., 95 So.2d 898, 901 (Fla. 1957). In keeping with these basic considerations, the *Imhof* Court held that the insured met the *Blanchard* test by obtaining an

arbitration award. *Id*. at 619.[7]

This Court made it clear in *Imhof* that while damages are a necessary predicate, no requirement exists, either in statute or case law, to allege any specific amount. *Imhof* at 618 ("[n]either *Blanchard* nor section 624.155(2)(b) requires the allegation of a *specific amount* of damages") (emphasis in original). Where, as in the case at bar, the obligee alleged that the arbitration award fixed an amount of damages and established the surety's liability for same, and also asserted that additional damages were incurred due to the surety's failure to protect the oblige (R137-10), the conditions precedent to bringing a cause of action under Fla. Stat. §624.155 were indisputably met.

2. A Claimant Must Have a Valid Claim

The existence of a valid claim is the final prerequisite to an action under Fla. Stat. §624.155. *Brookins v. Goodson*, 640 So.2d 110, 112 (Fla. 4th DCA 1994), *rev.*

[7] This Court has similarly deemed valid a stipulation between an injured party and the tortfeasor's insurer to try the bad faith action before the underlying negligence claim, stressing the favorability of methods that "simplify, shorten, or settle litigation and save costs to parties." *Cunningham v. Standard Guar. Ins. Co.*, 630 So.2d 179, 180-82 (Fla. 1994).

denied, 648 So.2d 724 (Fla. 1994).[8] The *Brookins* court found that settlement of litigation without trial upon the insurer's payment of UM policy limits did not eliminate the insured's bad faith cause of action. *Id.* In doing so, the court addressed the central issue in *Blanchard* and *Imhof* – the question of "liability and damages":

> The [*Imhof*] court did not, however, require that the damages be determined by litigation, that there be an allegation of a specific amount of damages or that the damages be in excess of the policy limits. … The amount or extent of damages was held [in *Imhof*] not to be determinative of whether an insured could bring a first party bad faith claim; *the purpose of the allegation concerning a determination of damages was to show that [the insured] had a valid claim*.

Id. at 112 (citation omitted) (emphasis supplied).

In the case at bar, the obligee obtained an arbitration award that confirmed liability on the part of the principal and surety in the amount of $1,417,842 on the part of the principal and the surety. (R137-10). The award serves as proof that the obligee had a valid claim, and underscores the error in the surety's determination

[8] This Court disapproved *Brookins* in *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995) "to the extent [it] can be read as approving the retroactive application" of a 1992 amendment to the UM law under which the case arose. *Laforet* at 62. *Brookins*' holdings on the remaining issues remain good law, as evidenced by this Court's approval of *Brookins* in *Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1273-74 (Fla. 2000).

that it had no further duty to the obligee.[9]

II. THE FLUSH-LEFT CLAUSE IN FLA. STAT. §624.155(1) ELIMINATES THE REQUIREMENT OF PROVING A GENERAL BUSINESS PRACTICE

A second, crucial error by the District Court was in its misreading of Fla. Stat. §624.155(1). The District Court required that "a plaintiff must provide evidence that the defendants committed certain violations [of Fla. Stat. §626.9541(1)(i)] to the extent that would constitute a 'general business practice.'" (R137-27). The District Court's interpretation of the section ignored the flush-left paragraph at the end of §624.155(1).

Florida Statute §624.155(1) includes subsections (1)(a) and (1)(b). Subsection (1)(a) incorporates by reference six statutory provisions of the Florida Insurance Code; subsection (1)(b) essentially codifies the fiduciary duties owed by

[9] The District Court emphasized the surety's decision that "the contractor had performed and completed all the work for which it was responsible," permitting the surety to "deny liability on whole or in part" pursuant to the bond agreement. (R137-25). Bad faith cases generally arise from an insurer's decision that it owes no further duty to act. The insurer's error is evidenced by the entry of a judgment against the insurer (in a breach of contract action) or its insured (in a third-party claim). The allegation of damages and a valid claim, predicated on such a judgment or arbitration award, serve as the predicates for a bad faith claim, and create – at a minimum – questions of material fact for trial.

an insurer and expands the remedy to allow a claimant to recover damages arising from the breach of those duties. At the end of subsection (1), flush with the left margin, the Florida Legislature set forth the following paragraph:

> Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

Fla. Stat. §624.155(1) (2004).[10]

Accepted statutory construction principles dictate that where a separate paragraph is positioned flush with the left margin of the entire section, the contents of the paragraph apply to the section as whole.[11] Because of its placement by the Florida Legislature, the flush-left paragraph must liberally construed as modifying §624.155(1) in its entirety and as obviating the need for a claimant to prove a business practice in order to secure damages for an insurer's failure to comply with the mandates of §626.9541(1). *See Golf Channel v. Jenkins*, 752 So.2d 561, 565-66

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[10] In certifying its questions, the Eleventh Circuit mistakenly refers to this paragraph as being part of §624.155(1)(b)(3). A plain reading of the section shows that the paragraph was inserted flush with the left margin, below subsection (b)(3).

[11] *See Missouri Dept. of Soc. Servs. v. Leland Health Care, Inc.*, 103 S.W.3d 273, 276 (Mo. App. 2003) (finding that a paragraph that follows a numbered subsection but is itself "unnumbered and is set out flush to the left side of the page" applies to the whole section); *Downey v. Motor Vehicle Acc. Indem. Corp.*, 43 A.D.2d 168, 175 (N.Y. 1973) (holding that the entire section is modified where a provision "is positioned flush with the left hand margin of the entire paragraph rather than being merely a continuation of the latter sub-paragraph").

(Fla. 2000) (holding "remedial statutes should be liberally construed in favor of granting access to the remedy provided by the Legislature") (citations omitted).

This plain reading of §624.155(1) is also the only logical one. The phrase "general business practice" does not appear anywhere in §624.155(1)(b); it appears only in §624.155(1)(a) to the extent that §626.9541(1)(i) is incorporated therein. *See* Fla. Stat. §624.155(1) (2004). The reference to "general business practice" would therefore be nonsensical if it were limited to §624.155(1)(b). The phrase appears again in §624.155(5) in the context of punitive damages (the only other reference to a "general business practice" in the statute), which is consistent with the Legislature's obvious intent that a claimant could pursue a claim under the provisions enumerated in §624.155(1)(a), but to substantiate a claim for punitive damages against an insurer, proof of a general business practice would be necessary.[12] *See Home Ins. Co. v. Owens*, 573 So.2d 343, 346 (Fla. 4th DCA 1990), *rev. denied*, 592 So.2d 680 (Fla.1991) (discussing the punitive damage standard in Fla. Stat. §624.155).

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[12] The Court should also note that there is no private right of action under Fla. Stat. §626.9541, the Unfair Trade Practices Act, except to the extent that certain of its subsections (i, o and x) are incorporated in §624.155(1)(a), and that several similar regulatory statutes intended to be enforced by the State of Florida include the phrase "general business practice." *See*, *e.g.*, Fla. Stat. §641.3903(5), "Unfair Claim Settlement Practices," and *Florida Phys. Union, Inc. v. United Healthcare of Florida, Inc.*, 837 So.2d 1133 (Fla. 5th DCA 2003) (interpreting same).

The District Court committed reversible error in finding that a claimant must prove an insurer's violations of §624.155(1) occur with such frequency as to indicate a general business practice in order to obtain compensatory damages resulting from violations of that section.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT APPELLANT'S CLAIMS UNDER FLA. STAT. §624.155 WERE BARRED BY *RES JUDICATA*

Under Florida law, four conditions must be met for a second suit to be barred by *res judicata*: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality in the person for or against whom the claim is made. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 84 F.3d 1388, 1394 (11th Cir. (Fla.) 1996) (*citing Albrecht v. State*, 444 So.2d 8 (Fla. 1984)). A plain reading of Florida law, applied to the facts of this case, clearly shows that neither of the first two elements necessary for *res judicata* preclusion was met.

A. The Identity of the Thing Being Sued For Is Different in a Bad Faith Case Than in a Breach of Contract Action

Florida law recognizes significant distinctions between an action for breach of an insurance policy and the relief sought under Fla. Stat. §624.155. For example, different choice of law rules apply to the two different causes of action. The *lex loci contractus* rule determines the rights and risks of parties to an insurance policy on the issue of coverage. *Teachers Ins. Co. v. Berry,* 901 F.Supp.

322, 324 (N.D. Fla. 1995) (*quoting Lumbermens Mut. Cas. Co. v. August*, 530 So.2d 293 (Fla. 1988) and *Sturiano v. Brooks*, 523 So.2d 1126 (Fla. 1988)). Matters concerning the performance of an insurance policy – such as bad faith claims – are determined by the law of the place of performance. *Berry*, 901 F.Supp. at 324 (*quoting Government Emp. Ins. Co. v. Grounds*, 332 So.2d 13 (Fla. 1976)). The basis for this distinction is obvious: The breach of contract action arises from a common law right to enforce an insurance policy; claims pursuant to Fla. Stat. §624.155 are bounded by specific statutory provisions that expressly contemplate damages beyond the policy's limits (*see* Fla. Stat. §624.155(8)) as a means of regulating the manner in which insurers conduct business in Florida.

The identity of the thing sued for in an action for breach of the insurance contract is thus substantially different from the thing sued for under Fla. Stat. §624.155. *See, e.g., Inter-Active Servs., Inc. v. Heathrow Master Ass'n., Inc.*, 809 So.2d 900, 902 (Fla. 5th DCA 2002) (finding no identity of thing sued for where first action sought injunction and second action was for money damages due to breach of contract). Accordingly, claims pursuant to Fla. Stat. §624.155 cannot be precluded under the doctrine of *res judicata* in a subsequent action.

B. The Identity of the Cause of Action Is Different in a Bad Faith Case Than in a Breach of Contract Action

The second necessary condition for preclusion under *res judicata* is identity of the cause of action. *Aquatherm* at 1394 (*citing Albrecht*). The determining

factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions. *Id.* Florida law recognizes a policyholder's right to bring independent suits to recover under separate coverages in the same insurance policy. *State Farm Mut. Auto. Ins. Co. v. Yenke*, 804 So.2d 429, 432 (Fla. 5th DCA 2002) (permitting different suits against insurer under "separate and distinct coverage provisions") (*citing Bryant v. Allstate Ins. Co.*, 584 So.2d 194 (Fla. 5th DCA 1991)). It is beyond argument that in the case *sub judice* the identity of the cause of action and the facts and evidence necessary to prove a breach of the construction contract (the existence of a contract and the failure to comply with its terms) are very different from those necessary to prove the elements of a claim under Fla. Stat. §624.155, specifically, that the surety unreasonably refused to adjust and pay a valid claim.

Florida law acknowledges the distinction between claims for breach of an insurance contract and statutory bad faith claims by allowing significantly different discovery in each case, recognizing the disparity in facts and evidence necessary to prove each claim. *See, e.g., Allstate Ins. Co. v. Baughman*, 741 So.2d 624, 625 (Fla. 2nd DCA 1999) (holding that if bad faith claim was allowed to be tried with contract action, plaintiff would be able to obtain discovery that she would not be entitled to if her bad faith claim had been abated or dismissed); *see also Kujawa v. Manhattan Nat'l Life Ins. Co.*, 541 So.2d 1168 (Fla. 1989) (discussing discovery

available in a first-party statutory bad faith action).

That the identity of the cause of action asserted (or that could be asserted) in an action on the insurance contract is distinct from that under Fla. Stat. §624.155 is further borne out by the fact that a surety's conduct in litigating the breach of contract action is discoverable in and relevant to the statutory bad faith claim. *See Owens* at 344 (holding that in a bad faith action in Florida, "the insurance company's litigation conduct was admissible, relevant evidence") (*citing T.D.S., Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520 (11th Cir. (Fla.) 1985), *reh'g denied*, 760 F.2d 1485 (11th Cir. (Fla.) 1985) and *Norman v. American Nat'l Fire Ins. Co.*, 555 N.E.2d 1087 (Ill. App. 1990)).

The District Court's determination that the claims under Fla. Stat. §624.155 could have been brought in the underlying arbitration, even though the surety's handling of the obligee's claim was not fully explored and the facts of the surety's litigation conduct were not perfected, simply cannot be reconciled with Florida law as explained in *Owens* and *T.D.S., Inc.*

CONCLUSION

This Court recently observed in *Berges v. Infinity Ins. Co.*, *slip op. avail. at* 2004 WL 2609255, *1 (Fla.) that its decision was a reiteration of "well-established and long-standing jurisprudence in this State." In the instant appeal, this Court can likewise rely on firmly-entrenched Florida law to conclude that the District Court

committed reversible errors requiring remand for resolution of questions of material fact *via* a trial of the matter on its merits. This Court should confirm that: An obligee has a right of action against a surety under Fla. Stat. §624.155, because a surety contract is "insurance" under Florida law and there is no statutory provision barring a bad faith suit against the surety; there is no requirement to prove a business practice in order to recover compensatory damages under 624.155; the necessary predicates for a statutory bad faith claim are the filing of a notice pursuant to Fla. Stat. §624.155(5), allegations of damages arising from one of the enumerated violations and a valid claim under the surety contract; that an arbitration award, which expressly included a determination of liability as to both the principal and surety and a denial of the surety's defenses, was sufficient predicate for a claim under §624.155; and that the District Court incorrectly applied the doctrine of *res judicata* to bar the obligee's bad faith claim as there was no identity of the thing sued for and no identity of the cause of action.

VER PLOEG & LUMPKIN, P.A.

Amicus Curiae for Appellants,
100 Southeast Second Street, Suite 2150
Miami, FL 33131
Tel: (305) 577-3996
Fax: (305) 577-3558

_____

STEPHEN A. MARINO, JR., ESQ.
Florida Bar No. 79179

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail, this 27th day of January 2005 to:

Philip M. Burlington, Esq.
Philip M. Burlington, P.A.
2001 Professional Building, Suite 205
2001 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409

Jeffery M. Liggio, Esq.
Richard Benrubi, Esq.
Liggio, Benrubi & Williams, P.A.
1615 Forum Place, Suite 3B
West Palm Beach, FL 33401

Lee Craig, Esq.
Veronica D. Vellines, Esq.
6200 Courtney Campbell Causeway
Suite 1100, Tampa, FL 33607-5946

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

STEPHEN A. MARINO, JR., ESQ.