IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1021

MICHELLE MACOLA, and INGE QUIGLEY, as Personal Representative of the Estate of Francis E. Quigley, deceased,

Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Appellee.

ON TWO CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMENDED INITIAL CONSOLIDATED ANSWER BRIEF OF APPELLEE GOVERNMENT EMPLOYEES INSURANCE COMPANY

B. RICHARD YOUNG
Florida Bar No.: 442682
STEPHEN D. GILL
Florida Bar No.: 542091
Young, Bill, Fugett & Roumbos, P.A.
P.O. Drawer 1070
Pensacola, Florida 32591-1070
(850) 432-2222 telephone
Attorneys for Appellee GEICO

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QUESTIONS CERTIFIED

In its Order of January 7, 2004, granting the Consolidated Motion for Summary Judgment as to Both Plaintiffs or Defendant/Appellee Government Employees Insurance Company's ("GEICO"), the United States District Court for the Middle District of Florida ("district court") succinctly expressed its opinion as to the crux of the issue presented in these cases as follows:

> Both Plaintiffs emphatically insist their causes of action are based on the common law and not section 624.155 so that the notice and cure provisions of the statute cannot bar their common law claims. They point to section 624.155(7)[(1999)] which provides that the statutory civil remedy does not preempt a common law bad faith claim and that a person may obtain a judgment based on either the common law remedy or the statutory remedy but not both. Their arguments, however, miss the mark because ***this case is not about preemption but about*** election of remedies or, alternatively, ***satisfaction of a claim***.

R.180 at p.11. (Emphasis added).

On appeal, the United States Court of Appeals for the Eleventh Circuit, ("Eleventh Circuit") rejected roundly that part of the district court's opinion pertaining to Florida's election of remedies doctrine. Instead, the Eleventh Circuit focused its eye on the district court's alternative reasoning that GEICO's tender of policy limits in response to a Civil Remedy Notice ("CRN") served by its insured, Francis E. Quigley, deceased ("Quigley"), through counsel, constituted a full satisfaction of his bad faith claim. Specifically, the Eleventh Circuit held:

> [U]nder Barbe[v. Villeneuve, 505 So.2d 1331 (Fla. 1987)], the district court erred in holding that Quigley's CRN constituted an election of remedy that estopped her from pursuing a common law bad faith claim.
>
> . . .
>
> While we are confident that Quigley's decision to file a CRN did not estop her common law bad faith claim, we are less certain about the effect of GEICO's tender. As noted above, the statute provides that its remedy does not preempt a common law cause of action. Fla. Stat. [(2003)] § 624.155(8). However, that same statutory provision also provides that "[a]ny person may obtain a judgment under either a common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies." Id. This would seem to be consistent with general Florida law, which provides that "only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to other remedies." Barbe, 505 So.2d at 1333 (*quoting* Am. Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So.942, 944 (1908)); *see also* Sec. & Inv. Corp. v. Droege, 529 So.2d 799, 802 (Fla. 4th DCA 1988) ("[I]f the remedies are concurrent or cumulative, and logically can coexist on the same facts, the doctrine of election does not apply until the injured party has received full satisfaction for his injuries.").
>
> The district court held that GEICO's tender constituted a full satisfaction of Quigley's bad faith claim. If this holding is correct, then Quigley is estopped from pursuing a common law claim. Because Macola's bad faith claim is derivative of Quigley's, satisfaction of Quigley's claim would necessarily extinguish Macola's as well. *See* Fid. & Cas. Co. of New York v. Cope, 462 So.2d 459, 461 (Fla. 1985).
>
> Macola v. Gov't Employees Ins. Co., 410 F.3d 1359, 1364-1365 (11th Cir. 2005) (n.5 incorporated).

To answer the question about the effect of GEICO's tender, the Eleventh Circuit certified two questions to this Court as follows:

> (1) IN THE CONTEXT OF A THIRD PARTY BAD FAITH CLAIM WHERE THERE IS A POSSIBIILITY OF AN EXCESS JUDGMENT, DOES AN INSURER "CURE" ANY BAD FAITH UNDER § 624.155 WHEN, IN RESPONSE TO A CIVIL REMEDY NOTICE, IT TIMELY TENDERS THE POLICY LIMITS ***AFTER*** THE INTIATION OF A LAWSUIT AGAINST ITS INSURED BUT ***BEFORE*** THE ENTRY OF AN EXCESS JUDGMENT?
>
> (2) IF SO, DOES SUCH A CURE OF THE STATUTORY BAD FAITH CLAIM CONSTITUTE A FULL SATISFACTION OF THE ***JUDGMENT*** SUCH THAT THE INSURED AND DERIVATIVE INJURED THIRD PARTIES ARE BARRED FROM BRINGING A COMMON LAW BAD FAITH CLAIM TO RECOVER THE DIFFERENCE BETWEEN THE POLICY LIMITS AND THE EXCESS JUDGMENT?
>
> Macola, 410 F.3d at 1365 (emphasis added).

In so doing, however, the Eleventh Circuit invited this Court to exercise its authority to restate either or both of the certified questions in the interest of justice and for proper resolution of the issues presently under consideration. Specifically, the Eleventh Circuit commended to this Court:

> Our statement of the questions to be certified is not meant to limit the scope of inquiry by the Florida Supreme Court. "This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are given." Washburn v. Rabun, 755 F.2d 1404, 1406 (11th Cir. 1985). Similarly, an answer to one of the questions may render resolution of the other one unnecessary. In order to assist the court's consideration of this case, the entire record, along with the briefs of the parties, shall be transmitted to the court.
>
> Id.

Accordingly, because the Eleventh Circuit recognizes that the cases under consideration turn upon the district court's alternative rationale that GEICO's

tender constituted ***a full satisfaction of the bad faith claim*** of Plaintiff/Appellant Inge Quigley ("Quigley"), as Personal Representative of Francis E. Quigley's Estate (and from which, the derivative bad faith claim of Plaintiff/Appellant Michelle Macola ("Macola") otherwise would have come into being but for the full satisfaction of Quigley's bad faith claim by virtue of GEICO's tender), GEICO respectfully suggests that this Court adopt the most consistent and least obtrusive restatement of the second certified question along these lines as follows:

> (2) IF SO, DOES SUCH A CURE OF THE STATUTORY BAD FAITH CLAIM CONSTITUTE A FULL SATISFACTION OF ***[THE CLAIM FOR BAD FAITH]*** SUCH THAT THE INSURED AND DERIVATIVE INJURED THIRD PARTIES ARE BARRED FROM BRINGING A COMMON LAW BAD FAITH CLAIM TO RECOVER THE DIFFERENCE BETWEEN THE POLICY LIMITS AND THE EXCESS JUDGMENT?

As discussed more fully herein below, GEICO respectfully submits that this Court should answer both the first certified question and the second certified question, as restated above, in the affirmative.

STATEMENT OF THE CASE AND OF THE FACTS

A. Course of Proceedings and Dispositions in the Federal Court

The certified questions before this Court precipitate from the consolidated appeals of Quigley and Macola pending before the Eleventh Circuit. Macola and Quigley appealed from the district court's entry of final summary judgment on January 7, 2004, in favor of GEICO as to that aspect of GEICO's motion in which

GEICO argued that both Quigley and Macola are precluded from bringing any bad faith action because GEICO properly cured any and all alleged acts of bad faith within the sixty-day cure period afforded by section 624.155, following its receipt of service of Quigley's civil remedy notice dated July 11, 2000 ("CRN").[1] R.161; R.180, n.1. On January 15, 2004, a costs judgment totaling $1,196.75 was taxed against Quigley and Macola. R.183.

Following oral argument of these consolidated appeals, the Eleventh Circuit ordered a limited remand of the case back to the district court to determine and certify whether there is a genuine issue of material fact with respect to bad faith. R.200.

After additional limited review, the district court found that genuine issues of material fact exist with respect to bad faith and thus could not opine whether or not GEICO breached its single, implied duty of good faith that it owed Quigley

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[1] Before ruling on GEICO's consolidated motion for summary judgment, the district court denied GEICO's two separate motions for judgment on the pleadings as to Quigley and Macola and converted the same into motions for summary judgment and incorporated them into GEICO's consolidated motion for summary judgment. R.161; R.180, n.1. The district court later announced at a hearing held on December 30, 2003, that it would first consider the merits of GEICO's motion for summary judgment relating to section 624.155, before proceeding on the merits of other issues raised in the motion. R.180, n.1. Because the district court entered final summary judgment in favor of GEICO solely on the issue of notice and cure under section 624.155, the district court initially did not reach the merits of the other issues raised in GEICO's consolidated summary judgment motion, namely, that GEICO did not breach its single, implied duty of good faith that it owed Quigley under his insurance contract in the handling of Macola's claim against Quigley and later, against his estate. R.180, n.1.

under his insurance contract. R.215. Specifically, on March 3, 2005, the district court certified its determination to the Eleventh Circuit as follows:

> After reviewing the file and the supplemental memoranda of the parties, the Court finds that genuine issues of material fact exist with respect to bad faith and thus the Court cannot opine either that Defendant acted in bad faith or that Defendant did not act in bad faith. The material facts surrounding the depth and time spent in the investigation conducted by Ms. Junco in the first five months after the accident, the importance and significance of the comparatively minuscule amount of property damage as opposed to personal injury in the settlement process, and the discrepancies regarding communication among the parties, all militate against satisfactorily resolving the bad faith issue on summary judgment. Consequently, the Court certifies to the Eleventh Circuit Court of Appeals that genuine issues of material facts exist with respect to bad faith. Id.

On June 6, 2005, the Eleventh Circuit certified the above questions to this Court. *See* Macola, 410 F.3d at 1365.

B. Statement of Facts Relevant to the Certified Questions.

On May 18, 1999, Macola was involved in a serious automobile accident with Quigley, and at the time of the accident, GEICO insured Quigley under an automobile liability insurance policy providing bodily injury liability coverage in the sum of $300,000.00 per person/$300,000.00 per occurrence and a property damage limit of $100,000.00 per occurrence. R.137, ¶ 1; R.145, ¶ 1. Three days after the accident, on May 21, 1999, while Macola was still laying in her hospital bed, Attorney Michael A. Roe ("Roe") came to her bedside and had her execute a

representation agreement for the accident. R.154-155[2] (Roe dep. of 4/9/03, pp.13-14). On May 24, 1999, Ms. Dale Junco ("Junco"), GEICO's adjuster assigned to Macola's claim, received a call from personnel at Roe's office, who had telephoned GEICO to advise that Macola was represented by Roe, and to request an Affidavit of Coverage. R.146; R.147. A subsequent letter of representation was faxed to Junco that day. R.154-155 (Roe dep. of 4/9/03, Exh. 1&2). On June 7, 1999, Junco mailed an Affidavit of Coverage to Roe pursuant to the request of office personnel. R.146; R.147.

Thereafter, Roe embarked on what appears to have been an intentional campaign to obfuscate the extent of Macola's injuries from GEICO and equivocate about her property damages, including efforts to remain *incommunicado* during settlement dealings with GEICO on behalf of Macola, all as more fully set forth in GEICO's Statement of Supplemental Facts Supported by the Record in Support of Defendant's Consolidated Motion for Final Summary Judgment as to Both Plaintiffs, which GEICO incorporates herein by reference. R.146,¶¶ 17-55.

On Friday, October 21, 1999, GEICO received Macola's 21-day time-limit demand, dated October 19, 1999, from Roe. R.154-155 (Roe dep. of 4/9/03, p.7);

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[2] Roe's deposition took place on 4/9/03 and 9/24/03. The district court's docket lists the two Roe deposition transcripts as docket nos.154 and 155, but fails to differentiate between them. As such, when citing to Roe's deposition throughout this brief, GEICO will reference the same as, "R.154-155," and will add parenthetical references to the date and page for clarity.

R.146; R.147; R.152; R.153. Macola's 21-day demand letter sought payment of the $300,000.00 bodily injury limits and a small menagerie of property damages totaling $1,377.81. R. 154-155 (Roe dep. of 4/9/03, Exh.7); R.161,p.6. In response to and within 21 days of the time-limit demand, GEICO tendered the $300,000.00 Bodily Injury limits and requested further clarification and negotiation of the property damage claims. R.156, p.22; R.154-155, Exh.9. For the next 120 days, Roe failed to initiate any communications with GEICO and refused to respond to GEICO's numerous telephone calls, facsimiles, mailings, and personal appearances at Roe's office. [3] R.146, ¶¶ 32-55. Roe held GEICO's

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[3] Indeed, on November 9, 1999, (the day that the 21-day time limited demand was to expire), GEICO adjuster, Patrick Jeffares ("Jeffares"), went to Roe's office to meet with him and hand deliver GEICO's preprinted check for the $300,000.00 Bodily Injury limits under Quigley's policy, together with a release to settle Macola's personal injury claim, and to verify and negotiate settlement of Macola's property damage claim. R.156, pp.20-23, 34-37, 46 & 59. Jeffares brought a field checkbook with him in order to negotiate and settle Macola's property damage claim, and was prepared to accept Roe's release for the same. R.156, pp.23, 34-37. While Jeffares waited for 55 minutes in Roe's lobby, Roe remained in his private office and failed to present himself. R.156, pp.38, 49. After waiting an hour, Jeffares tendered the $300,000.00 check and personal injury release to Roe's assistant and left. R.156, p.22. Neither Roe nor anyone from his office communicated with Jeffares after he left Roe's office. R.156, p.22. Jeffares continued to attempt to reach Roe to settle Macola's property damage claim. R.156, pp.24, 44-45. Jeffares also contacted Roe's law partner in an attempt to resolve the discrepancies and ambiguities of Macola's small collection of property damage claims. R.156, pp. 24-26, 44-45. According to Jeffares, Roe's partner was told by Roe, "to mind his own business." R.156, p.45. Thereafter, from November 10, 1999 through February 16, 2000, Ms. Junco and Jeffares repeatedly wrote and called Roe, but because Roe refused to speak with them, they had to leave voicemail messages and messages via proxy with Roe's staff and law partners

$300,000.00 check for more than three months before returning it to GEICO with his letter dated February 15, 2000. R. 154-155 (Roe dep. of 4/9/03, pp. 22-24).

On February 15, 2000, after settlement negotiations between GEICO and Macola failed to come to fruition, Macola sued Quigley in a Florida state circuit court, asserting ***only*** a claim for personal injury damages and ***never*** amended her complaint in the underlying litigation to assert a claim for property damages ("underlying litigation"). R.180, pp. 2-3 (emphasis in original). GEICO assigned counsel to defend Quigley in the underlying litigation. Quigley, through counsel, filed his answer to Macola's complaint in the underlying litigation. R.137, ¶ 8; R.145, ¶ 8.

In and around the time between when Macola filed her complaint on February 15, 2000, and when Quigley filed his answer on March 17, 2000, Quigley, through counsel, offered to pay all of Macola's claimed property damages and tendered payment in the amount of $1,377.81. R.62, pp. 32-38; R.154-155 (Roe dep. of 4/9/03, pp.88); R.157, pp.50-51. Macola did not accept Quigley's $1,377.81 tender. R.62, p.32-38.

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regarding settlement of Macola's property damage claim. R.147 at Exh.E. Roe admitted receiving Jeffares and Ms. Junco's telephone messages, and further admitted that neither he nor anyone at his office ever returned any of their calls. R.154-155 (Roe dep. of 4/9/03, pp.90-92). Roe stated that he was "too busy" to return their calls and that he did not do so, but he conceded that he could have found five minutes to speak to either Ms. Junco or Jeffares during the time that they had been calling, writing and visiting his office. R.154-155 (Roe dep. of 4/9/03, pp.90-92).

While the underlying litigation was pending, Mr. Quigley died and his wife, Inge Quigley, as personal representative of his estate, was substituted as the defendant. R.137,¶ 12; R.145, ¶ 12; R.180, p.3. More than two years later, on July 9, 2002, the Thirteenth Judicial Circuit Court in and for Hillsborough County entered a final judgment in favor of Macola in the amount of $1,541,941.61, which sum exceeded the Bodily Injury coverage under Quigley's insurance contract issued by GEICO ("excess final judgment"). R.137, ¶ 14; R.145, ¶ 14; R.180,p.3. Not one cent of the excess final judgment includes an award for Macola's abandoned property damage claim.

Six months ***afte***r Macola filed her circuit court suit against Quigley, and two years ***before*** the excess final judgment entered, Quigley, through counsel, served his CRN dated July 11, 2000 (bearing Florida Division of Insurance acceptable date of July 13, 2000), on GEICO pursuant to section 624.155, alleging that GEICO committed acts of bad faith. Specifically, Quigley's CRN alleges that GEICO violated section 624.155(1)(b)1, Florida Statutes (1999)[4] and describes the circumstances giving rise to the purported violation as follows: "GEICO failed to settle with the injured party for policy limits when they had the opportunity to do

[4] Although Quigley's CRN also alleges that GEICO violated section 624.155(1)(b)3, Florida Statues (1999), this section cannot apply as a matter of law because Quigley's insurance contract is an automobile liability policy. *See* State Farm Fire & Cas. Co. v. Zebrowski, 706 So.2d 275, 277 (Fla. 1997) (construing § 624.155, Fla. Stat. (1995)) ("subsection (1)(b)3 excludes liability coverage altogether").

so." R.106, Exh.A; R.115, Exh.A; R.180,p.3. On August 25, 2000, GEICO responded to Quigley's CRN by sending his attorney a check for $300,000.00 representing the Bodily Injury limits of the subject policy, and Quigley's attorney acknowledged receipt of GEICO's delivery of the $300,000.00 check representing the bodily injury limits of Quigley's insurance policy. R.106. Exh. B&C; R.155, Exh. B&C; R.180, pp.3-4.

SUMMARY OF ARGUMENT

Quigley and Macola's causes of action for bad faith against GEICO under section 624.155 and the common law were extinguished by GEICO's tender of the $300,000.00 Bodily Injury policy limits within the 60-day cure period afforded under section 624.155, Florida Statutes (1999), in response to Quigley's CRN served through his counsel two years ***before*** Macola obtained entry of an excess final judgment against Quigley in the underlying litigation. GEICO's tender cured any and all breaches of its implied duty of good faith owed to Quigley under his automobile liability insurance contract as a matter of law.

In order to determine whether GEICO cured its breach, if any, of its duty of good faith owed to Quigley, it must be distinctly understood that GEICO's duty of good faith only extends so far as its ability to settle, if it could have and should have, the claim of the injured third-party, Macola, ***within the policy limits***. This is because the nature and extent of the insurer's duty of good faith toward its insured

is derived (rightly so) from the insurance contract itself, including the policy limits that the insured selected and contracted-for. *See* Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 858 (Fla. 1938) (emphasis added; citations omitted) ("Because the ***contrac***t takes away these rights [to settle or to contest claims] from the insured and transfers them to the insurer, the insurer owes the insured ***an implied duty*** [of good faith] to so exercise them…. It is the duty of the Court here to give effect to all the provisions of the ***policy*** sued upon. The provisions of the ***policy*** are a guide to control the conduct and action of all parties claiming interests under the same. It is not to be assumed that the parties, or either of them, have a right to act arbitrarily. The ***policy*** here gave the company the right to take charge of the defense of this claim.").

As such, the insurer's duty of good faith can never extend so far beyond the insurance contract as to require it to prevent the injured third-party (or her attorneys) from pursuing a judgment in excess of policy limits against the insured if the injured third-party (or her counsel) is determined to do so. On the contrary, the injured third-party always maintains her right to make herself whole by pursuing all damages suffered by her at the hands of the insured-tortfeasor regardless of how little or how much liability coverage the insured-torfeasor chose to carry or how much wealth he has.

To hold otherwise not only violates GEICO's constitutional right to due process of law, but also runs afoul of the legislative intent and purpose of the cure provisions of section 624.155, which is to curtail – not proliferate - bad faith litigation. Accordingly, GEICO respectfully submits that this Court should answer the first and second certified questions in the affirmative.

ARGUMENT

I. INTRODUCTION

In order to answer the first and restated second certified questions, several important principles must be established. First, an objective standard must be employed to determine the acts necessary for the insurer to cure the alleged violation. Second, the objective standard by which the insurer's "cure" is measured must be established by this Court or the legislature, not by the complaining party. To allow the complaining party *ipse dixit* to set the standard for the insurer's cure simply by serving a civil remedy notice ("CRN") under the statute would vest in the complainant the authority to unilaterally declare an insurer in bad faith by virtue of so stating in the CRN. Such a declaration not only would improperly empower a complainant to essentially void the insured's negotiated and contracted for choice of policy coverage limits in favor of any amount desired without paying a corresponding premium, but also, would circumvent the judicial process in violation of the insurer's constitutional right of

due process. Recognizing these principles, the only appropriate objective standard by which the insurer's "cure" should be measured is payment of the claimed damages up to an amount not exceeding the contractual policy limits for which the insurer is obligated. In the context of a case such as the one at hand, in which the party filing the CRN claims that the insurer failed to timely tender the policy limits in response to a policy limits settlement demand, the proper "cure" would be a tender by the insurer of the policy limits within the 60 day window of opportunity presented by section 624.155, thereby discharging the insurer's contractual obligation to the insured.

In understanding the foregoing analysis, it is important to first understand the nature of the relationship between the insurer and insured. The insurer contracts with the insured, through a policy of insurance, to investigate and defend liability claims against the insured for bodily injury and property damage, to make reasonable attempts to settle those claims where appropriate and to indemnify the insured up to the full policy limits against any judgments that might be entered against the insured.[5] *See* Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980).

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[5] Where the judgment entered is in excess of the policy limits, the insurer's obligation is to tender the full policy limits in partial satisfaction of the judgment.

By agreeing to issue a policy of insurance providing liability indemnity benefits to an insured, the insurer does not become a guarantor that the insured will never be subject to personal liability for his negligent acts that cause harm to another.[6] Circumstances may occur in which the insured causes injury to another party which far exceeds the limits of liability of his policy with the insurer. The decision whether to accept a tender of the insurer's policy limits in settlement of a claim that is worth far more than those limits rests solely with the injured party. Neither insurer nor insured, no matter how valiantly they strive, has the power to compel the injured party to accept a sum of money which is less than the full value of the claim. Consequently, situations can and do occur in which an injured third party chooses to reject a policy limits settlement offer, electing instead to pursue the insured for a monetary judgment for the full value of the damages sustained. The insurer's obligation, in that situation, is to defend the insured through the entry of the excess judgment and, upon conclusion of all necessary appeals or the election to forego such appeals, to tender its policy limits in partial satisfaction of

[6] *Cf.*, Transam. Ins. Co. v. Rutkin, 218 So.2d 509, 511-512 (Fla. 1969) (quoting Rigel v. Nat'l Cas. Co., 76 So.2d 285, 286 (Fla. 1954) ("based on the rule that a court 'should construe a contract of insurance to give effect to the intent of the parties[,]…' Transamerica is correct in maintaining that the [policy] may not reasonably by construed to make it the guarantor of payment of Rutkin's personal … obligations, even when those obligations are incurred as adjuncts to [covered events]."

the outstanding excess judgment. This basic understanding of insurance law is critical to a proper resolution of the case currently before this Court.

It is in recognition of this inability of either the insurer or the insured to compel settlement that the Third DCA declared in Powell v. Prudential Prop. & Cas. Ins. Co. that once liability has been determined to be clear and damages are certain, **an insurer's obligation to its insured is not to settle, but rather, to initiate settlement negotiations**. *See* Powell, 584 So.2d 12,14 (Fla. 3d DCA 1991). This distinction is crucial. A requirement that the insurer settle all claims within policy limits would be legally and practically impossible for the insurer to meet because the ultimate decision to settle the claim rests with the claimant. Accordingly, the insurer's obligation is to **attempt** to settle claims by initiating settlement negotiations, when appropriate. *See* id.

Correspondingly, when the insurer receives a demand for settlement the insurer's obligation is to give fair consideration to the demand and to act with due regard for the interests of its insured in determining how to respond to the demand. *See* Gutierrez, 386 So.2d at 785. This duty is imposed upon the insurer because liability insurance policies vest to the insurer all control over the investigation and settlement of claims, thereby removing that power from the insured. *See* Shaw, 184 So. 852 (Fla. 1938). This common law duty has come to be known as the

insurer's fiduciary duty of good faith toward its insured.[7] *See* Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So.2d 555, 558 (Fla. 4th DCA 2003), *cert. denied*, 871 So.2d 872 (Fla. 2004) (quoting State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So.2d 55, 58 (Fla. 1995); *see also*, Clauss v. Fortune Ins. Co., 523 So.2d 1177, 1178 (Fla. 5th DCA 1988).

In 1982, the Florida Legislature created a first party cause of action for bad faith claims handling by enacting section 624.155, Florida Statutes. This statute had the effect of creating for the insured a first party claim for bad faith claims handling if the insured believed that the insurer had improperly handled a claim brought by the insured himself for the first party benefits. Importantly, however, and critical to the instant discussion, the statute also codified the common law cause of action for bad faith. Section 624.155 (1)(b)1 is a verbatim recitation of the insurer's common law duty to its insured in the third party bad faith context. In fact, this Court recognized this fact in Zebrowski, and declared that Section 624.155 (1)(b)1 had the effect of codifying the direct third party common law bad faith cause of action established in Thompson v. Commercial Union Ins. Co. of

[7] No fiduciary duty of good faith exists, however, in first party claims brought by the insured against its own insurer. *See* Baxter v. Royal Indem. Co., 285 So.2d 652 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d 725 (Fla. 1975). In that context, the relationship of the insurer to the insured is adversarial, not fiduciary. *See* id. In recognizing this fact, Florida has adhered to the legal theory that no common law cause of action for first party bad faith can exist. *See* id.

New York. *See* Zebrowski, 706 So.2d at 277 (Fla. 1997) (construing Thompson, 250 So.2d 259 (Fla. 1971); § 624.155(1)(b)1, Fla. Stat.).

Because the language of section 624.155 (1)(b)1 is identical to the common law standard for bad faith and, in fact, tracks the jury instruction utilized in claims of common law bad faith, it is clear that the conduct of the insurer which is brought into question either by a claim brought pursuant to section 624.155 (1)(b)1 or a common law claim of third party bad faith, is the same. Thus, a cure under one necessarily must constitute a cure under the other.

II. WHEN AN INSURER TENDERS THE POLICY LIMITS IN RESPONSE TO A CIVIL REMEDY NOTICE OF INSURER VIOLATION UNDER SECTION 624.155 AFTER THE INITIATION OF A LAWSUIT AGAINST ITS INSURED BUT BEFORE THE ENTRY OF AN EXCESS JUDGMENT, THE INSURER "CURES" ANY CLAIM OF BAD FAITH

A. Section 624.155, Florida Statutes

Under Florida law, any person may bring a civil action against an insurer when the insurer has damaged such person by committing the following:

> Not attempting in good faith to settle claims when, under all circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests.
>
> § 624.155(1)(b)(1), Fla. Stat. (2005)

This statutory right is embodied in section 624.155(1)(b)1, Florida Statutes. Although the statute has undergone revisions since 1982, the basic content of the statute has remained the same. It creates a right allowing any person to bring a

civil action against an insurer when that person has been damaged by the insurer's violation of certain enumerated statutes or by the commission of certain acts by the insurer in the handling of claims. Because the remedy provided by section 624.155 did not exist at common law and the statute itself is in derogation of common law, the courts of Florida have held that this statute must be strictly construed. Time Ins. Co. Inc. v. Burger, 712 So.2d 389 (Fla. 1998).

The right of a person claiming to be damaged by violations of the statutory sections and conduct described in section 624.155 is not, however, absolute. The statutory scheme provides that certain steps must be taken before the right to bring a claim under the statute is perfected. Section 624.155(3)(a) provides: "As a condition precedent to bringing an action under this section, the Department [of Insurance] and the insurer must have been given 60 days' written notice of the violation." § 624.155 (3)(a), Fla. Stat. (2005). Section 624.155(3)(d) further provides:

> No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.
>
> § 624.155(3)(d), Fla. Stat. (2005).

The sixty (60) day notice provision of the statute is more than a mere procedural technicality that the plaintiff must perform. This sixty (60) day notice period is a "grace period" during which an insurer may take steps to cure the conduct which allegedly gives rise to the plaintiff's claim of bad faith. *See* Talat

Enter., Inc. v. Aetna Cas. & Sur. Co., 753 So.2d 1278, 1282 (Fla. 2000) (answering question certified in the affirmative). If the insurer corrects the circumstances giving rise to the alleged claim of bad faith, the plaintiff's claim is extinguished and no action may be maintained under section 624.155. *See* id.

B. There Must Be an Objective Standard Governing the Insurer's Right to Cure

Where the party serving a CRN contends that the insurer has failed to timely tender its policy limits in an effort to settle a liability claim, the insurer is provided with a 60 day window of opportunity within which to cure that allegation of bad faith. *See* § 624.155(3)(d). In order to provide the party choosing to file the CRN with guidance on whether to elect this course of action, and to provide the insurer with a clear understanding of the actions necessary to cure the alleged violations, it is critical that an objective standard be established. In determining the appropriate objective standard, it is equally important that constitutional principles of due process be recognized and afforded proper deference. This analysis leads to the inescapable conclusion that the objective cure must conform to the obligations of the policy and cannot engraft upon the contract of insurance obligations which were not part of the original bargain.

The determination of the objective standard for the cure of a section 624.155(1)(b)1 allegation cannot begin with the proposition that the mere filing of the notice establishes bad faith. To the contrary, the notice is merely an **allegation**

of bad faith, not a definitive statement that such conduct exists. This Court recognized this fact in Talat when it declared that the determination of the cure necessary to extinguish a potential claim for bad faith cannot be vested in the complaining party. *See* Talat, *passim*. Otherwise, a complainant always would demand sums or performance beyond the scope of the original contract.

In situations where an excess judgment has been entered and a CRN is filed subsequent to the entry of the excess judgment, the cure is clear. In order to cure such a claim for bad faith, the insurer must pay the excess judgment. *See* Hollar v. Int'l Bankers Ins. Co. and State Farm Ins. Co., 572 So.2d 937 (Fla. 3rd DCA 1990). On the other hand, when the CRN is filed before the entry of an excess judgment, the standard necessarily must be different. *See, e.g.,* Vest v. Travelers Ins. Co., 753 So.2d 1270, 1275 (Fla. 2000).

First, it is not known whether an excess judgment ever will be entered. Second, the amount of any such potential excess judgment is incapable of determination by anyone. Because the certainty of an excess judgment is not established and the amount thereof could never be established at the time the prejudgment CRN is served, the objective standard by which the insurer's cure is to be measured cannot be the amount of any future excess judgment. *See* Fortson v. St. Paul Fire & Marine Ins. Co., 751 F.2d 1157, 1160-1161 (11th Cir. 1985) (rejecting plaintiff's contention that a 624.155 bad faith claim should proceed

before the resolution of the underlying claim by stating, "the damages plaintiff seeks can only be determined after the liability of St. Paul's insured has been established", and further recognizing the absurd result that could follow by commenting, "allowing plaintiff to proceed first against the insurer under a section 624.155(1)(b)1 good faith failure to settle claim could lead to the insurer being held liable for bad faith failure to settle even though its insured might later be found not liable in the underlying tort action."). The standard must be the policy limit; it cannot be otherwise. To require the insurer to pay sums or to perform acts beyond the contemplation of the parties in the original contract based merely upon the allegation of a complaining party who stands to benefit from making the allegation would be tantamount to declaring the insurer in bad faith before any such determination had been made. This would violate the insurer's rights of due process and would unalterably impair the insurer's rights under the contract. Allowing the third party claimant or the insured to determine the "cure" is violative of due process because it raises a presumption that the insurer has acted in bad faith and that the cure cannot occur unless the insurer meets the demand of the third party claimant or insured, even if such demand calls for payment of damages beyond the policy contract. In Zeigler v. South and North Alabama Railroad Co., 58 Ala. 594, 599 (Ala. 1877), the Supreme Court of the sate of Alabama explained the principles of due process by stating the following:

> Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

In declaring a statute that created an arbitrary presumption violative of the principles of due process, the United States Supreme Court discussed the specific terms of the statute and declared:

> "[T]he facts so to be presumed are as uncertain and vague as the terms 'fraudulent' and 'fraud' contrasted with 'fairly,' 'legally,' 'honestly,' and 'in accordance with law,' when used to describe the management of a bank. [citation omitted] Nor is the generality of the presumption aided by the allegations of accusation. The indictment merely follows the general words of the statute without specifying facts to disclose the nature or circumstances of the charge." Manley v. State of Georgia, 279 U.S. 1, 6, 49 S.Ct. 215, 217, 73 L.Ed. 575, 578 (U.S. 1929).

In the case at hand, the language of the statute in question is "fairly" and "honestly." The civil remedy notice filed does nothing more than recite the language of the statute in an attempt to declare that GEICO failed to act "fairly and honestly" toward Quigley. To establish a standard for cure pursuant to 624.155(3)(d) that requires GEICO to pay whatever the injured third party claimant or insured demand, prejudgment, creates an unconstitutional presumption of bad faith and violates the due process clause of the United States Constitution. On the other hand, it is perfectly consistent with the rights of the contracting

parties and the principles of due process to declare that the insurer must, in response to a CRN, tender to the injured plaintiff or to the insured the sums claimed as damages up to an amount not exceeding the limits of liability of the policy.

Macola and Quigley contend that the only method by which an insurer may "cure" a claim of bad faith under section 624.155 within the statutory 60 day window of opportunity in the context of a third party bad faith claim when the CRN is served before the entry of an excess judgment is to roll back the hands of time and somehow settle the claim based on the third party plaintiff's original settlement demand. *See* Macola Principal Brief, p. 21; *see also* Quigley Principal Brief, p.22. Macola and Quigley's argument seeks to create a standard for prejudgment cure of a section 624.155 claim that is both arbitrary and at the whim of the complaining party.[8] Should this Court accept Macola and Quigley's argument, GEICO would have been required at the time the CRN was served on July 11, 2000, to settle Macola's claim against Quigley on the terms of Macola's original offer. This proposition defies reason and falls outside the realm of logical discourse. First, both Macola and her attorney, Roe, made clear that as of July 11,

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[8] GEICO respectfully submits that adopting Macola and Quigley's argument would result in no standard, with the cure being dictated case by case on the fanciful demands of the party filing the civil remedy notice. Such a declaration by this Court would render the "cure" provisions of section 624.155(3)(d) meaningless.

2000, they had no intention of settling this claim on the basis of their original demand (if they ever truly had any intention of settling the case on that basis, in the first place). GEICO had attempted to contact Roe on multiple occasions after the initial tender of the $300,000.00 policy limits in an effort to discuss his property damage demands and to resolve the claim. Roe failed to return a single telephone call, respond to a single letter or otherwise make any effort whatsoever to negotiate a settlement of Macola's claim. To the extent that Macola and Quigley contend that GEICO had an obligation to correct the circumstances of the alleged claim of bad faith by attempting to settle the claim on the basis of Roe's original demand, it is respectfully submitted that the record reveals abundant evidence that GEICO did exactly that. GEICO's inability to successfully resolve Macola's claim despite repeated telephone calls and letters to Roe underscores the folly in setting forth a standard that allows the cure provision of section 624.155 to be defeated at the whim of a third party plaintiff and her attorney, both of whom stand to benefit greatly by insuring that no cure is effectuated.[9,10]

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[9] Justice Alderman, in his concurring opinion in Gutierrez, also recognized the illogic of plaintiff's argument when he stated, "[i]n the 'Alice-in-Wonderland' world created by the Thompson rule, it is to the injured party's benefit if the insurer breaches its duty to its insured and to his detriment if there is no breach. This is so since, if the insurer settles, the Plaintiff will receive no more than the policy limits, but if it does not, the Plaintiff may end up with both the policy limits and an excess judgment." Gutierrez, 386 So.2d at 786.

Both Macola and Quigley appear to have conceded that payment of a potential future excess judgment cannot be the standard by which the insurer's "cure" is measured after a lawsuit has been filed but before any judgment has been entered. Not only is it unknown whether an excess judgment will enter, but the amount of the judgment is incapable of determination. *See* Macola Principal Brief, p.21; *see also* Quigley Principal Brief, p.22. Consequently, all parties agree that this Court should not adopt a cure standard that requires the carrier to pay some estimated figure for a potential excess judgment that has yet to be entered.

Correspondingly, this Court should not adopt a standard that requires the carrier to pay, prejudgment, whatever the third party claimant demands. This proposition was directly confronted and soundly rejected in Talat, in which United States Magistrate Judge Glazebrook stated:

> The Court rejects as unsupported Talat's contention that the insurer must not only pay the claim within the 60 day window, but must also pay all compensatory damages that flow from any delay in settling the claim. § 624.155 does not impose on an insurer the obligation to pay whatever the insured demands. The 60 day window is designed to be a cure period that will encourage payment of the underlying claim, and avoid unnecessary bad faith litigation. Surely, an insurer need not immediately pay 100% of the damages claimed to flow from bad faith conduct in order to avoid the chance that the insured will succeed on a bad faith cause of action. If the insurer may avoid a bad faith action only by paying in advance every penny of the

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[10] Both the Estate of Quigley and his surviving widow are judgment proof and without the ability to satisfy the large judgment obtained by Macola. Macola's only avenue for recovery of the excess judgment is a finding of bad faith against GEICO.

> damages that it faces if it loses at trial, the insurer would have no reason to pay. Furthermore, few insureds would restrict their demands to compensatory damages. There is no reason why insureds would not demand also the advance payment of punitive damages and attorney's fees. § 624.155(2)(d) would have no effect or purpose under such an interpretation. The law does not support such an expansive and illogical reading of Fla. Stat. Ann. [(1990),] § 624.155(2)(d).[11]

Talat, 753 So.2d at 1282 (quoting Judge Glazebrook's opinion in Talat, 952 F.Supp.773, 778 (M.D. Fla. 1996), aff'd, 217 F.3d 1318 (11th Cir.2000)).

It is clear from the foregoing analysis that the standard by which the insurer's "cure" under section 624.155 is measured cannot be compliance with the original settlement demand, or payment of some undetermined and unknown excess judgment, or payment of whatever the third party claimant or insured demands in the notice. The only logical and workable standard to apply is the policy limits. This Court recognized the logic of this reasoning in Talat when it stated:

> When one reads the civil remedy statute in context and with the understanding that it is in derogation of the common law, it is plain that the Legislature intended the notice to the Department to serve as a basis for the Department to assist in the settling of claims and to monitor the insurance industry. It also is plain that the 60 day period was a time in which the insurer could act to "cure" a violation of subdivision (1)(a) or (b) about which it had been served notice. It naturally follows that for there to be a "cure," what had to be "cured" is the non-payment of the contractual amount due the insured. In the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and

[11] Section 624.155(2)(d) has since been renumbered as (3)(d).

conditions of the policy after all of the conditions precedent of the insurance policy in respect to payment are fulfilled.

Talat, 753 So.2d at 1283.

In addition to this Court's analysis and interpretation of section 624.155 in the first party context in Talat, we also have the benefit of the Fifth DCA's analysis of section 624.155 in a third party case in Clauss in a **prejudgment** context and the Third DCA's analysis of section 624.155 in a third party case in the **postjudgment** context in Hollar.

In Clauss, the Court held that a prejudgment tender of the policy limits within 60 days of service of a civil remedy notice in a third party context cured any claim for statutory bad faith by the insured or third party claimant. The insured had a bodily injury/property damage liability policy with Fortune Insurance Company ("Fortune"). On June 22, 1985, the insured ("Forrester") and the plaintiff ("Clauss") were involved in an accident. Clauss' attorney sent a letter to Fortune's adjuster on July 15, 1985, demanding that Fortune tender policy limits within twenty (20) days. Upon receiving a second demand letter from Clauss' attorney, Fortune requested the plaintiff's medical records and indicated that it wanted to tender the policy limits after it verified the extent of Clauss' injuries. By August 16, 1985, Fortune sent a letter to the plaintiff's attorney and enclosed the

policy limits and a release form. Clauss' attorney refused to accept Fortune's tender because the plaintiff had already filed suit against the insured. [12]

Fortune filed a declaratory action seeking a declaration that it had acted in good faith and a determination of whether section 624.155, Florida Statutes, had preempted the common law bad faith action. Clauss, proceeding under an assignment of rights from Forrester, filed an answer and a counterclaim seeking damages for Fortune's alleged breach of its duty to act fairly and honestly toward its insured, Forrester, under common law and statutory claims for bad faith.

In addressing Clauss' allegation under section 624.155 that Fortune had acted in bad faith toward its insured Forrester by not settling Clauss' claim on the terms of Clauss' original demand, the Fifth DCA stated:

> The trial court properly determined that the tender of the policy limits satisfied the requirement in section 624.155(2). Clauss first sent Fortune a demand for the policy limits on July 15, 1985. On August 15, 1985, Clauss sent notice to Fortune and the Department of Insurance that he was bringing a suit for bad-faith failure to settle; on August 16, 1985, Fortune tendered the policy limits to Clauss. Fortune corrected "the circumstances giving rise to the violation" by timely tendering the policy limits. The timely tender of the policy limits corrected any possible allegations of bad faith; hence Fortune was not liable for the excess judgment under section 624.155.
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> Clauss, 523 So.2d at 1179.

[12] Clauss filed suit against Forrester on August 15, 1985. A final judgment was entered in favor of Clauss in the amount of $314,000.00 Thereafter, Forrester filed bankruptcy and assigned his rights to Clauss.

In fully understanding the Fifth DCA's holding in Clauss, it is critical to note that no excess judgment existed at the time Clauss made his initial policy limits demand on July 15, 1985. More importantly, no excess judgment existed on August 16, 1985, when Fortune tendered its policy limits to Clauss. Clauss' CRN had been served on August 15, 1985. Thus the CRN was served ***after*** the original demand allegedly had not been met, but ***before*** the excess judgment entered. By tendering the policy limits on August 16, 1985 – one day after the CRN was sent to Fortune – the Fifth DCA declared that Fortune had "corrected the circumstances giving rise to the violation by timely tendering the policy limits." *See* id. at 1179. Equally as important, the Fifth DCA determined that because Fortune had tendered the policy limits in response to the CRN within the 60-day window of opportunity to cure Clauss' allegations of bad faith, Fortune was not liable for the excess judgment entered against its insured, Forrester. The Fifth DCA's analysis and conclusion is eminently correct, accords with the principles of Talat, and comports with due process of law. As clearly indicated in Clauss, the objective standard for "cure" in a prejudgment context, whether the claim is a first party claim or a third party claim, is tender of the policy limits within the 60 day window of opportunity to cure.

In Hollar, the Third DCA was presented with a situation in which the insureds, the Hollars, filed a CRN against State Farm Insurance Company ("State

Farm") **after** an excess judgment had been entered against the Hollars. The Hollar opinion provides little information regarding the factual background of the action and the posture of the parties at the time the CRN was served. The initial brief that the Hollars filed with the Third DCA in Hollar, however, clarifies the position of the parties at the time the CRN was served and allegedly cured. The Hollars' initial brief states that the CRN pursuant to section 624.155 was served on State Farm on September 27, 1998. State Farm thereafter tendered its policy limits of $10,000.00 on November 17, 1988. The excess judgment for which the Hollars sought recovery was entered three (3) years earlier in March 1985. See the Hollars' Initial Brief, pp. 3-4; see also, State Farm's Answer Brief, p. 3.[13] In rejecting State Farm's reliance on Clauss, supra, the Third District pointed out that "in Clauss, unlike the instant case, no award in excess of policy limits was sought by the insured." Hollar, 572 So.2d at 939. Because the CRN was not served until **after** an excess judgment had been entered against Hollar for an amount several hundred thousand dollars in excess of the available policy limits, the Third District correctly determined that an attempt by State Farm to tender solely the policy limits could not satisfy Hollar's claim of bad faith and that a factual determination

[13] Pursuant to Federal Rules of Appellate Procedure 28(j), Eleventh Circuit Rule 28-4, and Eleventh Circuit Internal Operating Procedures 6, GEICO submitted and the Eleventh Circuit docketed copies of most of the briefs submitted in Hollar, 572 So.2d 937 (Fla. 3d DCA 1990) (collectively, "Hollar briefs"). Copies of the Hollar briefs are included in GEICO's Appendix submitted in support hereof.

must be made by the trier of fact to determine whether State Farm's claims handling conduct should require it to pay the full amount of the excess judgment. Importantly, at the time the 60 day window of opportunity to cure was opened for State Farm, an excess judgment already existed. In order to take advantage of its opportunity to cure, State Farm was required to pay the full amount of the excess judgment against its insured. This is not the situation that existed in Clauss and likewise is not the situation that exists in the instant cases.[14]

As the discussion above illustrates, Clauss and Hollar are not in conflict. Clauss clearly establishes that the objective standard by which an insurer may avail itself of the statutory opportunity to cure within the 60 day notice period is the policy limits if the CRN is served **before** an excess judgment is entered. Hollar, on the other hand, clearly establishes that once an excess judgment has entered, a CRN filed **after** the entry of an excess judgment may be cured only by the payment of the excess judgment.

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[14] This explains Judge Glazebrook's use of the word "sometimes," in his opinion in Talat, which this Court adopted, as follows:

> To cure an alleged violation and to avoid a civil action, an insurer must pay the claim (**sometimes** in excess of policy limits in the third-party context) before the sixty days expire. Aetna has done so, and Fla. Stat. Ann. § 624.155(2)(d) states that no action lies. Aetna is entitled to judgment as a matter of law.

Talat, 753 So.2d at 1283 (quoting Judge Glazebrook's opinion in Talat, 952 F.Supp. 773, 778 (M.D. Fla. 1996), aff'd 217 F.3d 1318 (11th Cir. 2000)). (Emphasis added).

C. GEICO Cured all Alleged Acts of Bad Faith Asserted in Quigley's CRN Within the Sixty-Day Cure Period Afforded by Section 624.155, Florida Statutes

Two years **before** the excess final judgment entered, Quigley filed a CRN alleging that GEICO violated section 624.155(1)(b)1, Florida Statutes, describing the facts and circumstances giving rise to the purported violation as follows: "GEICO failed to settle with the injured party for policy limits when they had the opportunity to do so." Within sixty days of service of Quigley's notice, GEICO responded on August 25, 2000, by sending his attorney a check for $300,000.00 representing the bodily injury liability limits of the subject policy. Quigley's attorney acknowledged receipt of GEICO's delivery of the $300,000.00 check representing the bodily injury limits of Quigley's insurance policy. The district court correctly determined that because the underlying lawsuit involved a claim for personal injury damages only and not property damages, GEICO was reasonably justified in concluding that the "policy limits" referred to in Quigley's CRN related to the $300,000.00 bodily injury limits.[15]

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[15] The Eleventh Circuit affirmed that Macola waived her property damage claims in her underlying tort suit against Quigley's estate as follows:

> In that suit, Macola asserted a claim for personal injuries, but no claim for property damages. Because Macola failed to assert a claim for property damages in the underlying action, the district court deemed this claim waived; we agree. Prior to filing an answer in that case, Quigley offered to pay all of Macola's claimed property damages and

III. A CURE OF THE STAUTUTORY BAD FAITH CLAIM CONSTITUTES A FULL SATISFACTION OF THE CLAIM FOR BAD FAITH SUCH THAT THE INSURED AND DERIVATIVE INJURED THIRD PARTIES ARE BARRED FROM BRINGING A COMMON LAW BAD FAITH CLAIM TO RECOVER THE DIFFERENCE BETWEEN THE POLICY LIMITS AND THE EXCESS JUDGMENT

GEICO respectfully submits that this Court should answer this restated second certified question in the affirmative because it is undisputed that six months ***after*** Macola filed her state court suit against Quigley, and two years ***before*** the excess final judgment entered, Quigley, through counsel who to date continues to represent his estate in this matter, invoked the notice and cure provisions of section 624.155 by serving his CRN alleging that GEICO breached its duty of good faith under ***section 624.155(1)(b)1***.[16] R.106, Exh.A; R.115, Exh.A; R.180, p.3. By

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tendered payment in the amount of $1,377.81. Macola rejected that tender and proceeded with the underlying litigation.

Macola, 410 F.3d at 1361 (n.2 incorporated).

Clearly, correcting "the circumstances giving rise to the violation" by going back and negotiating a settlement with Macola for her property damage claim was not possible. On the other hand, GEICO's tender of the $300,000.00 "policy limits" expressly sought by Quigley's CRN paid the "damages" and otherwise corrected the circumstances giving rise to the purported violation.

[16] Although Quigley's CRN also alleges that GEICO violated section 624.155(1)(b)3, Florida Statutes (1999), this section cannot apply as a matter of law because Quigley's insurance contract is an automobile liability policy. *See* Zebrowski, 706 So.2d at 277 (construing § 624.155, Fla. Stat. (1995)) ("subsection (1)(b) 2 excludes liability coverage altogether").

curing its alleged breach of its duty of good faith implied under Quigley's auto liability policy through its tender of the Bodily Injury policy limits in response to the CRN, GEICO not only effectuated a full satisfaction of Quigley's statutory bad faith claim, but also simultaneously brought about the full satisfaction of Quigley's common law claim for bad faith because GEICO's duty of good faith recognized by Florida common law and reflected in the statutory language of section 624.155(1)(b)1 are one and the same.[17] Accord, Shaw, 184 So. at 858; Gutierrez, 386 So.2d at 785; Zebrowski, 706 So.2d at 277; Farinas, 850 So.2d at 558, cert. denied, 871 So.2d 872; see also, Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So.2d 1103, 1107 (Fla. 5th DCA 1993).

By curing Quigley's common law and statutory claims, GEICO also brought about the full satisfaction of Macola's common law bad faith claim. This is because Macola's cause of action against GEICO is derivative of Quigley's and, having stepped into his shoes, Macola cannot disavow his earlier invocation of the remedial provisions of section 624.155 or GEICO's cure of any alleged breach of its duty of good faith recognized by the common law and codified under section

[17] This point may very well be reflected in the Notes on Use for Standard Civil Jury Instruction MI 3.1 by the Florida Supreme Court Committee on Standard Jury Instructions (Civil). *Cf.*, Standard Jury Instructions in Civil Cases (No. 03-01), 849 So.2d 1083, 1086 at comm..n.3. ("In cases brought under section 624.155, Florida Statutes, issues of notice and cure generally will be determined by the court. See Talat, 753 So.2d 1278. Therefore, no standard jury instruction is provided on those issues.").

624.155(1)(b)1. *See* Zebrowski, 706, So.2d at 277; Cope, 462 So.2d at 460-261; Thompson, 250 So.2d 259 (Fla. 1971).

A. The Insurer Owes Its ***Insured*** a Duty of Good Faith Implied under the Insurance Contract

"In Florida, when an insured brings an action against his carrier for failure to settle a third party's claim, the action sounds in ***contract***." Swamy v. Caduceus Self Ins. Fund, Inc., 648 So.2d 758, 760 (Fla. 1st DCA 1994) (*citing* Gov't Employees Ins. Co. v. Grounds, 332 So.2d 13 (Fla. 1976) (emphasis added)). "Florida is among the minority in this respect, as most states treat this as a tort claim or as a combination of tort and contract." Swamy, 648 So.2d at 760 (citing R. KEETON & A. WIDISS, INSURANCE LAW, § 7.8 (a), n.9 (1988)). Furthermore, "[u]nder Florida common law, it was recognized that the existence of the fiduciary relationship between the parties under the liability provisions of a ***policy*** imposed upon the insurer the obligation of exercising good faith in negotiating for and in effecting a settlement of the claim against an insured." Clauss, 523 So.2d at 1178 (emphasis added).

B. An Injured Third-Party's Bad Faith Claim is Merely Derivative of the Insured's Bad Faith Claim

Even though the duty of good faith exists only between the insurer and its insured, Florida law allows the injured third-party to bring an action directly against the insurer alleging breach of the insurer's implied duty of good faith that it

owes to its insured, but only after obtaining a judgment in excess of the policy limits against the insured tortfeasor. *See* Thompson, 250 So.2d at 264; *accord* Cunningham v. Standard Guar. Ins. Co., 630 So.2d 179, 181 (Fla. 1994) (*citing* Blanchard v. State Farm Mut. Auto. Ins., 575 So.2d 1289 (Fla. 1991) (announcing analogous rule to that of a first-party bad faith claim)). "The rationale behind this procedure is that the injured third party, as the beneficiary of any successful bad faith claim, is the real party in interest as a sort of judgment creditor." Farinas, 850 So.2d at 558, cert. denied, 871 So.2d 872, (*citing* Thompson, 250 So.2d at 264). In Cope, this Court took the opportunity to clarify Thompson and held:

> Nowhere in Thompson, however, did we change the basis or theory of recovery. We did not extend the duty of good faith by an insurer to its insured to a duty of an insurer to a third party. The basis for an action remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his policy limits. Thompson merely allowed the third party to bring such an action in his own name without an assignment. 462 So.2d at 460-461 (Fla. 1985).

The injured third party's common law bad faith cause of action, however, is derivative of the insureds, not separate and distinct from it. As succinctly stated by the Court in Cope, "[u]pon its (the judgment) being satisfied Brosnan no longer had a cause of action; if he did not, then Cope did not. Cope's action was not separate and distinct from, but was derivative of Brosnan's." Cope, at 461.

C. Section 624.155(1)(b)1, Florida Statutes, Codifies the Insurer's Duty of Good Faith Implied under the Insurance Contract

The Florida Legislature expanded section 624.155(1)(a)[18] and (1)(b)1,[19] to include a remedy for third-party claimants, the effect of which was explained in Farinas as follows:

> In 1982, the Florida legislature enacted section 624.155, which created a statutory bad faith claim and extended the claim to the first-party insureds. *See* §§ 624.155, Fla. Stat. (Supp.1982). A 1990 amendment noted that a person may obtain a judgment under either the common law remedy or the statutory remedy, but not both. See §§ 624.155, Fla. Stat. (supp. 1990). ***The third district has determined that this statutory obligation did not change the common law obligation of good faith or the measure of damages***. *See* Hollar v. Int'l Bankers Ins. Co., 572 So.2d 937, 939 (Fla. 3d DCA 1990).
>
> 850 So.2d at 558 (emphasis added).

As a condition precedent to bringing a statutory claim against an insurer for an alleged violation of section 624.155(1)(b)1, a third-party claimant must first

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[18] Subsection (1)(a) does not apply to the undisputed facts presented in these consolidated cases. Consequently, no further references to the same are addressed herein.

[19] This Court has expressed its belief within the context of third-party bad faith claims that the Legislature's expansion of section 624.155 to include a remedy for third-party claimants, specifically section 624.155(1)(b)1, had the effect of codifying Thompson and Cope. See Zebrowski, 706 So.2d at 277; Shaw, 184 So. at 858 (a fiduciary relationship between insurer and insured under liability policies gives rise to an implied duty of good faith under such insurance contracts). *See also*, Dunn, 631 So.2d at 1107 (only damages caused to the insured are recoverable under § 624.155 (1)(b)1, Fla. Stat. (1991) because "[t]he relationship between the insurance company and the injured party (not its insured) is as adverse and arms length as the relationship between the tortfeasor and the injured third party.")

invoke the civil remedy available to him under section 624.155 by giving notice under section 624.155(3)(a) to the Department of Financial Services and to the insurer by furnishing a CRN setting forth, *inter alia*, the circumstances giving rise to an alleged violation. *See* id. If the insurer pays the "damages… or the circumstances giving rise to the violation are corrected within 60 days after filing of the notice," then the insurer cures any and all breaches of its duty of good faith that it owes its insured under the insurance contract and "no action shall lie." § 624.155(3)(d), Fla. Stat.(2005).

As addressed *supra* in connection with the first certified question in the case *sub judice*, because Quigely, through counsel, served his CRN six months after Macola filed her state court suit against him, and two years before the excess final judgment entered, the proper measure of the "damages" that GEICO was required to pay under section 624.155 (3)(d) to cure its breach, if any, of its implied duty of good faith that it owed Quigley under his auto liability policy was the contractual amounts owed, *i.e.*, the $300,000.00 Bodily Injury policy limits. As such, GEICO's timely tender of the same within 60 days of service of the CRN cured any and all breaches of its duty of good faith toward Quigley.

In the third-party context under both Florida's common law and section 624.155(1)(b)1, the insurer's implied duty under the insurance contract to act "in good faith and with due regard for the interests of the insured," as explained in

detail in Gutierrez, are one and the same. *See* Farinas, *passim* (citing Gutierrez); *see also*, § 624.155(1)(b)1, Fla. Stat. (1999); accord Zebrowski. Specifically, in Farinas, the Fourth DCA essentially recognized that section 624.155(1)(b)1 codifies Florida common law pertaining to an insurer's implied duty of good faith that it owes to its insured under the insurance contract in the third-party context. *See* Farinas, 850 So.2d at 559, cert. denied, 871 So.2d 872. To be sure, the Fourth DCA held:

> The Florida Supreme Court announced the case law standard for insurer good faith in Boston Old Colony Ins. Co. v. Gutierrez, 286 So.2d 783 (Fla. 1980). The general standard of care that the insurer must exercise when handling claims against the insured is 'the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business.' Id. At 785 (citation omitted).
> . . .
> This standard of care is further reflected in the applicable Florida Statute, which states that an insured has a cause of action for bad faith, when the insurer did not attempt 'in good faith to settle claims when, under all circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for her or his interests.' §§ 624.155(1)(b)1, Fla. Stat. (2002).

850 So.2d at 558-559 (citations omitted in original).

As a general rule for determining whether a statute codifies or declares existing case law, Florida courts consider the intent of the legislature as manifested in the language of the section under review, together with the various subsections thereunder, as well as references to staff analyses of the Judiciary Committees of the Florida Senate and House of Representatives. *See, e.g.,* Zebrowski, 706 So.2d

at 277; Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp., __ So.2d __, 30 Fla.L.Weekly S516 (Fla. July 7, 2005); DeLoach v. DeLoach, 590 So.2d 956, 960-961 (Fla. 1st DCA 1992); IMC Phosphates Co. v. Prater, 895 So.2d 1263, 1272 (Fla. 1st DCA 2005); Florida Hospital v. Garabedian, 765 So.2d 987, 988 (Fla. 1st DCA 1000); Egan v. Florida Atlantic Univ., 610 So.2d 585 (Fla. 1st DCA 1993).

With regard to the Legislature's expansion of section 624.155(1)(b)1 to include a remedy for third-party claimants, it is clear that the intent of the legislature as manifested in the language of the statute itself that the purpose of expanding the civil remedy available thereunder to third-party claimants is to curtail – not proliferate – bad faith litigation. *See* id. As this Court observed in Talat, wherein it adopted whole cloth the reasoning of United States District Court Magistrate Judge Glazebrook:

> When one reads the civil remedy statute in context…, it is plain that the Legislature intended the notice… to serve as a basis for the Department to assist in the settling of claims and to monitor the insurance industry. It is also plain that the sixty-day period was a time in which the insurer could act to "cure" a violation of subdivision [(1)(b)1] about which it had been served notice.
> . . .
> We find that in creating this statutory remedy for bad faith actions, the Legislature provided this sixty-day window as a last opportunity for insurers to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.
>
> 753 So.2d 1278, 1282-1284 (Fla. 2000).

Most recently, the Fifth DCA echoed the Legislature's intent to curtail as opposed to proliferating bad faith litigation by way of this statute in Lane v. Westfield Ins. Co., in which it held, "[t]he purpose of the civil remedy notice is to give the insurer one last chance to settle a claim with its insured and avoid unnecessary bad faith litigation – not to give the insured a right of action to proceed against the insurer even after the insured's claim has been paid or resolved." Lane, 862 So.2d 774, 779 (Fla. 5th DCA 2003).

This is exactly what the district court attentively observed in the instant cases as follows:

> To accept [Quigley and Macola's] construction of the statute would render these notice and cure provisions meaningless within the context of a third party bad faith claim because an insurance company, having complied with these safe harbor provisions, would nonetheless continue to be exposed to a storm of bad faith litigation. This Court cannot conceive that the Florida legislature ever intended such an absurd result. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Universal Medical Ctr. of South Florida, 2003 WL 22715675 *2 (Fla. 3d DCA Nov. 19, 2003) (restating age-old principle that '[c]ourts must further construe statutes so as not to effect an absurd result that would defeat the intent of the legislature.').[20] That is, it makes no logical sense that the Florida legislature would, as stated in Zebrowski, codify a cause of action for third party bad faith against an insurance company based on Thompson and Cope, then promulgate a procedure by which an

[20] Pursuant to Federal Rules of Appellate Procedure 28(j), Eleventh Circuit Rule 29-4, and Eleventh Circuit Internal Operating Procedures 6, GEICO submitted and the Eleventh Circuit docketed supplemental authority addressing the Third DCA's withdrawal and substitution of its opinion, which does not change the underlying legal doctrine addressed by Judge Lazzara. A copy of the same is included in GEICO's appendix submitted in support hereof.

> insurance company could cure the underlying facts and circumstances giving rise to such a cause of action, but still allow the insurance company to be subjected to a civil action for damages under the common law based on the 'cured' underlying facts and circumstances.
> R. 180, p. 12-13.

As this Court asserted in Zebrowski, study and consideration of other subsections of 624.155 fortifies the Fourth DCA's implicit recognition in Farinas that section 624.155(1) (b) 1 does not preempt, but rather, codifies Florida's common law pertaining to an insurer's implied duty of good faith that it owes to its insured under the insurance contract in the third-party context. *See* § 624.155 (8), Fla. Stat. (2005).[21] Specifically, the express language of section 624.155 (8) shows that section 624.155(1)(b)1 does not preempt (as Macola and Quigley incorrectly argue), but rather, codifies Florida's common law pertaining to an insurer's duty of good faith implied under the insurance contract as follows:

> The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of an specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.

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[21] Quigley's CRN identifies the 1999 version of section 624.155, Florida Statutes. The language of section 624.155(7), Florida Statutes (1999), is identical to the current statutory iteration, but the same has been renumbered as 624.155(8).

§ 624.155(8), Fla. Stat. (2005).

Moreover, this Court already has expressed its belief within the context of third-party bad faith actions that the enactment of section 624.155(1)(b)1 had the effect of codifying Thompson and Cope, thus authorizing a third-party to "stand in the shoes" of the insured and file a bad faith action directly against a liability insurer upon obtaining a judgment in excess of the policy limits without an assignment from the insured. *See* Zebrowski, 706 So.2d at 277. Specifically, in Zebrowski this Court noted:

> [I]n subsection [(1)](b)[1], the cause of action is predicated on the failure of the insurer to act "fairly and honestly toward its insured and with due regard for his interests." The duty runs only to the insured.
> . . .
> Our interpretation of subsection (1)(b)1 is fortified by a study of the other subsections of (1)(b). Thus, subsection (1)(b)2 speaks only of payments to insureds or beneficiaries, and subsection (1)(b)3 excludes liability coverage altogether.

Id.

Because section 624.155(1)(b)1 codifies Thompson and Cope, it naturally follows that the insurer's good faith duty referred to in section 624.155(1)(b)1 is a codification of Florida common law pertaining to an insurer's implied duty of good faith that it owes to its insured under the insurance contact in the third-party context. Accordingly, in the third-party context, an insurer's duty of good faith implied under liability insurance contracts under Florida's common law and section 624.155(1)(b)1 are one and the same and consists of those obligations to

act in good faith and with due regard for the interests of the insured espoused in Shaw and articulated in Gutierrez and Powell. *See* Gutierrez, 386 So.2d at 785 and Powell, 584 So.2d at 14; *accord* Farinas; Zebrowski; and § 624.155(1)(b)1, Fla. Stat. (2005).

This revelation has emerged from various decisions of the Courts of Florida and statutory refinements by the Florida Legislature discussed above which have synthesized certain aspects of Florida's body of bad faith law. Many bright-line distinctions that once existed between the insurer's duty of good faith under the common law and section 624.155 have been harmonized.[22] For example, any person may invoke the notice and cure remedy under section 624.155 in both third and first-party cases. See Zebrowski; § 624.155, Fla. Stat. (2005). Also, the "totality of the circumstances" approach is the standard for evaluating both statutory and common law causes of action for third-party bad faith, as well as first-party causes of action. *See* Berges v. Infinity Ins. Co., 896 So.2d 665, 680 (Fla. 2004); LaForet, 658 So.2d at 61-62; cf., Talat, 952 F.Supp. 773 (M.D. Fla. 1996), aff'd 217 F.3d 1318 (11th Cir. 2000), *certified question answered in the affirmative*, 753 So.2d 1278 (Fla. 2000). Further discovery disclosure requirements have been unified. *See* Allstate Indem. Co. v. Ruiz, 899 So.2d 1121

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[22] Of course, significant and fundamental differences remain between an insurer's duty of good faith owed to its insured in first and third-party contexts because no fiduciary obligation arises between insurer and insured in first-party claims. *See* n.7, *supra*.

(Fla. 2005); *see also*, Liberty Mut. Fire Ins. Co. v. Bennett, __So.2d__, 29 Fla. L. Weekly S2190 (June 16, 2005).

D. Quigley and Macola Are Estopped from Pursuing a Common Law Bad Faith Claim

In the context of Quigley and Macola's third-party claims presented in the instant consolidated cases, because section 624.155(1)(b)1 codifies GEICO's implied duty of good faith recognized by Florida's common law under Quigley's liability policy, it naturally follows that if GEICO statutorily cured its alleged breach of this duty of good faith by paying the damages or correcting the circumstances giving rise to the violation within 60 days after Quigley, served his CRN, then as a matter of law no claims for breach of GEICO's duty of good faith can survive GEICO's cure under both section 624.155 and the common law. *See* Talat, 952 F.Supp. 773 (M.D. Fla. 1996), aff'd 217 F.3d 1318 (11th Cir. 2000), *certified question answered in the affirmative*, 753 So.2d 1278 (Fla. 2000) (insurer's tender of policy limits ***before*** entry of excess arbitration award in favor of the insured ***and*** within 60-day cure period afforded by insured's CRN under § 624.155, Fla. Stat., cured all potential bad faith claims of the ***insured***); Clauss, 523 So.2d at 1179 (insurer's tender of policy limits ***before*** entry of excess final judgment ***and*** within 60-day cure period afforded by injured third-party's civil remedy notice under § 624.155, Fla. Stat., cured all potential bad faith claims of ***injured third-party***); and Francois v. Illinois Nat'l Ins. Co., no. 01-8070-CV-KLR

(S.D. Fla. Mar. 28, 2002) (unpublished) (citing Clauss) (insurer's tender of policy limits ***before*** entry of excess final judgment ***and*** with 60-day cure period afforded by injured third-party's civil remedy notice under § 624.155, Fla. Stat., cured all potential bad faith claims ***of injured third-party and insured***), *aff'd*, case no. 02-12499 (11th Cir. Sept. 19, 2002) (unpublished) (affirming "on the basis of the opinion of the district court, with which we fully agree on both the facts and the law");[23] *cf.*, Hollar, 572 So.2d at 939 (insurer's tender of policy limits **after** entry of excess final judgment in favor of injured third-party and against insureds within 60-day cure period afforded by injured third-party's civil remedy notice under § 624.155, Fla. Sta., does not cure bad faith claims of insured or injured third-party).

It is undisputed that six months after Macola filed her state court suit against Quigley, and two years before the excess final judgment entered, Quigley, through counsel who to date continues to represent his estate in this matter, invoked the notice and cure provisions of section 624.155 by serving his CRN alleging that GEICO breached its duty of good faith under section 624.155(1)(b)1.

Accordingly, by curing its alleged breach of its duty of good faith implied under Quigley's auto liability policy by tendering the Bodily Injury policy limits in response to the CRN, GEICO not only effectuated a full satisfaction of Quigley's statutory bad faith claim, but also simultaneously brought about the full

[23] See copies of Francois opinions appended to GEICO's Appendix, Dkt.# 210 at Exh.C.

satisfaction of Quigley's bad faith claim under Florida common law because GEICO's good faith duty under section 624.155(1)(b)1 and the common law are one and the same. As the Eleventh Circuit astutely noted in certifying these issues to this Court:

> This would seem to be consistent with general Florida law, which provides that "only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to other remedies."
>
> Macola, 420 F.3d at 1365 (*quoting* Barbe, 505 So.2d at 1333).

In light of the undisputed facts and Florida's synthesized body of bad faith law discussed above as well as in the district court's orders, the district court correctly determined that Quigley consciously and deliberately chose, to invoke the statutory provisions of section 624.155 prior to entry of the excess judgment in favor of Macola in the underlying litigation in an attempt to have GEICO cure its alleged breach of its duty of good faith for not settling with Macola for the "policy limits." Given that section 624.155(1)(b)1 codifies Florida's common law pertaining to GEICO's implied duty of good faith that it owed to Quigley under the insurance contract, Quigley is estopped from pursuing a common law bad faith claim against GEICO.

Consequently, Macola too is estopped from pursuing a common law bad faith claim against GEICO because her cause of action is derivative of Quigley's ,

and having stepped into his shoes, Macola cannot disavow Quigley's earlier invocation of the remedial provisions of section 624.155.

Accordingly, GEICO respectfully submits that this Court should answer the restated second certified question in the affirmative.

CONCLUSION

GEICO cured all claims for bad faith pursuant to Section 624.155 by timely tendering the bodily injury liability policy limits within 60 days of service of Quigley's CRN and, correspondingly, satisfied both Quigley and Macola's common law claims for bad faith. Wherefore, GEICO respectfully requests this Court to answer the first and second certified questions in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned has, on this ____ day of September, 2005, delivered for filing by Federal Express to the Clerk of the Supreme Court of the State of Florida one(1) original and seven(7) copies of Appellee GEICO's Amended Answer Brief and that copies of same have been served by U.S. Mail upon Shea T. Moxon, Esq., 1234 E. 5th Ave., Tampa, FL 33605, Paul T. Cardillo, Esq., 209 W. Verne St., Tampa, FL 33606, Lefferts L. Mabie, III, Esq., 601 N. Ashley St., Ste. 1100, Tampa, FL 33601, Roy D. Wasson, Esq., Ste 450, 1320 S. Dixie Hwy, Miami, FL 33146, Raymond A. Haas, Esq., P.O. Box 1700, Tampa, FL 33601-1700, Philip M. Burlington, P.A., Ste 205, 2001

Palm Beach Lakes Blvd, West Palm Beach, FL 33409, Janis Keyser, Esq., Ste 301, 888 S.E. 3rd Ave., Ft. Lauderdale, FL 33316 and Alyssa M. Campbell, 20 N. Wacker Dr., Ste 2100, Chicago, IL 60606.

CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Rule 9.210(2) of the Florida Rules of Appellate Procedure, in that, it uses Times New Roman 14-point font.

____

B. RICHARD YOUNG
Florida Bar No.: 442682
STEPHEN D. GILL
Florida Bar No.: 542091
Young, Bill, Fugett & Roumbos, P.A.
Post Office Drawer 1070
Pensacola, Florida 32591-1070
Telephone: (850) 432-2222
Facsimile: (850) 432-1444
Attorneys for Appellee GEICO