No. SC06-1110

IN THE SUPREME COURT OF FLORIDA

WACHOVIA INSURANCE SERVICES, INC., ET AL.,
Appellants/Cross-Appellees,

v.

RICHARD L. TOOMEY, ET AL.,
Appellees/Cross-Appellants.

On Questions Certified from the
United States Court of Appeals
for the Eleventh Circuit

AMENDED ANSWER BRIEF OF APPELLEES/CROSS-APPELLANTS

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STATEMENT OF THE CASE

Appellees/Cross-Appellants Brian Holman and Richard Toomey were employees and officers of IMC Mortgage Company ("IMC"), once a thriving mortgage business based in Tampa, Florida. Appellants/Cross-Appellees Joel Williams, Davis Baldwin, Inc., and Wachovia Insurance Services, Inc., as successor in interest to Davis Baldwin, (collectively, "Wachovia") served as insurance brokers to IMC, Holman, and Toomey, and recommended and sold to them, among other things, an Employment Practices Liability Insurance Policy (the "EPLI Policy" or "Policy"). This policy covered breach of written employment contract claims, and thus secured the benefits of Holman's and Toomey's employment contracts with IMC.

Under Florida law, the brokerage relationship between Wachovia and IMC created a fiduciary relationship, which imposed a variety of fiduciary duties on Wachovia. As the jury found in this case, Wachovia breached one or more of those duties to IMC by authorizing an endorsement to the EPLI Policy that retroactively eliminated the insurance coverage securing Holman and Toomey's employment contracts (the "Endorsement"). As a result, IMC lost the insurance coverage that would have covered a $1.8 million judgment for breaching Holman's and Toomey's employment contracts.

At issue in this appeal is a settlement agreement (the "Settlement Agreement" (attached as Appx. 1)[1]), which Holman, Toomey, and IMC executed in April 2001 after they discovered IMC's coverage for the employment claims had been eliminated by the Endorsement. The Settlement Agreement explicitly preserved Wachovia's liability for exposing IMC to the $1.8 million judgment, and assigned all of IMC's claims to Holman and Toomey to collect the judgment amount and related litigation expenses from Wachovia.

Wachovia's appeal disregards the express terms of the Settlement Agreement and well-established principles of Florida law to construe the agreement as granting broad and complete immunity for Wachovia's breaches of fiduciary duty to IMC. Holman and Toomey oppose such a construction in favor of upholding the clear intent of the parties as expressed in the language of the Settlement Agreement.

Statement of the Facts

The factual background of this case dates back almost a decade. In 1997, Holman and Toomey each had a five-year employment contract with IMC that guaranteed them an annual salary of $300,000 for the life of the contract unless they

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[1] The copy of the Settlement Agreement attached as Appendix 1 has been redacted to maintain the confidentiality of certain provisions. An unredacted copy appears in the record as docket number 55 of the case filed in the U.S. District Court for the Middle District of Florida.

were terminated for cause. (R45 – Ex. 23 at THW0612, Ex. 24 at THW0623.)[2] Also in 1997, Joel Williams recommended and sold to IMC the EPLI Policy, which covered losses and defense costs for breach of employment contract claims. (R138 – pp. 116:18-119:5.) By 1999, a crisis in the international financial markets forced IMC to begin closing down its business. (R138 – pp. 193:20-194:10; R139 – pp. 17:9-19:3.)

In June 1999, Holman and Toomey filed a lawsuit against IMC, initially alleging various securities claims, and later adding claims for breach of their employment contracts when IMC fired them in August 1999 (the "Maryland Litigation") (R45 – Ex. 63). During the pendency of that lawsuit, IMC obtained a series of short extensions of the Policy, which had originally been due to expire on June 30, 1999. (R45 - Ex. 17, Ex. 37 at DB0243; R62 - Ex. 56 at DB0016.) In late September 1999, the insurance carrier for the EPLI Policy told Wachovia that it wished to add the Endorsement to the Policy to remove coverage for breach of written employment contract claims retroactive to July 1, 1999. (R138 – pp. 205:9-12, 210:25-212:22.) At the time, Wachovia knew that IMC was vulnerable to breach of employment contract claims, that IMC had employment contracts with some of

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[2] Citations to the record refer to docket entries in the U.S. District Court for the Middle District of Florida. Thus, the citation here refers to the page Bates stamped THW 0612 in exhibit 23 of docket entry 45 and to the page Bates stamped THW 0623 in exhibit 24 of the same docket entry.

its officers, and that IMC already faced many employment-related claims by former employees. (R45 - Ex. 12 at DB0070, Ex. 47; R138 – p. 64:17-21.) Wachovia also knew of the Maryland Litigation involving Holman and Toomey. (R45 - Ex. 25; R138 – pp. 120:8-18, 121:20-122:2.)

Wachovia, however, never told IMC about the proposed Endorsement, did not advise IMC that the proposed Endorsement would strip coverage retroactively, and failed to ask IMC if it faced or expected any employment contract claims. (R138 – pp. 70:15-20, 71:1-5, 133:3-18, 134:8-13, 140:12-15.) Wachovia did not contact Holman and Toomey—the only remaining IMC officers who could have enforced their contractual severance provisions in September 1999—to alert them to the proposed Endorsement, even though Wachovia had dealt with them personally in the past and had served as their broker, too. (R137 – pp. 93:10-13, 122:19-24, 136:20-137:2, 181:25-182:13, 183:23-25; R138 – p. 71:20-23.) Wachovia also did nothing to avoid the effects of the Endorsement, such as negotiating with Chubb to keep the breach of contract coverage in place or seeking replacement coverage elsewhere. (R138 – pp. 69:5-8, 71:24-72:11, 136:8-14, 215:14-216:10.) Instead, Wachovia was more concerned about other new business ventures than they were about helping what was once their largest client. (R138 – pp. 75:16-76:11, 123:2-12.) Williams testified: “We knew the company was either going bankrupt or was being sold to CitiGroup. At that point, I was not involved in

understanding or caring what was going to happen at that point." (R138 – pp. 122:18-25.) Kerry O'Hallaron, the other key Wachovia employee dealing with IMC, shared Williams' attitude toward the failing company: "[A]t that point, I had little interest in IMC's runoff." (R138 – pp. 75:16-76:11.)

On or about September 22, 1999, Wachovia authorized the Endorsement to the Policy, eliminating IMC's insurance coverage for breach of written employment contract claims, retroactive to July 1, 1999, and leaving coverage only for defense costs related to such claims. (R62 - Ex. 56 at DB0019; R137 – pp. 205:9-12, 210:25-212:22.)

In January 2001, the federal court in the Maryland Litigation granted summary judgment to Holman and Toomey on their employment claims, awarding them $1.8 million for the balance of their contractual salaries. (R45 - Ex. 69 (attached as Appx. 2).) Unable to pay the judgment, IMC initiated settlement negotiations, during which IMC discovered for the first time that, due to the Endorsement, IMC had lost the EPLI Policy's coverage for breach of employment contract claims. (R139 – pp. 91:20-02:14, 97:8-15.) As a result, in April 2001, IMC and Appellees entered into the Settlement Agreement, releasing IMC for the securities claims and expressly reserving Wachovia's liability to satisfy the

outstanding $1.8 million judgment on the employment claims. (Appx. 1 at 3-4.) The carve out for the employment claims read:

> [*P*]*rovided however,* that nothing contained herein shall operate to release or waive any claims the Releasors might have or herein acquire against the insurance companies specified in Sections 3(d) and (e) below [related to the employment claims], Wachovia Davis Baldwin, or any partner, shareholder, associate, employee, servant, agent or broker of Federal/Chubb Insurance Company or Wachovia Davis Baldwin for claims which arise out of the claims referenced in Sections 3(d)-(e) below, including, but not limited to, any claims which may be made directly or indirectly to satisfy the $1.8 million judgment awarded by the Court in the Litigation, and further provided that nothing contained herein shall operate to release any obligations of the parties to this Agreement arising under this Agreement.

(Appx. 1 at 3-4.) Further, the covenant not to enforce as to the employment claims is made explicit in the following provision: "Plaintiffs… covenant that they will not seek to enforce against … IMC the $1.8 million judgment entered by the Court in the [Maryland] Litigation." (Appx. 1 at 8.)

Undisputed testimony at trial from IMC's attorney in the Maryland Litigation confirmed that Holman, Toomey, and IMC intended to hold Wachovia responsible for the unpaid judgment resulting from the deletion of insurance coverage. (R139 – pp. 55:12-56:3, 88:1-21, 104:3-105:19.) To achieve that end, IMC agreed to assign to Holman and Toomey "all its rights, including its choses in action, which rights IMC may have under or because of the existence of [the EPLI Policy] … to secure indemnification sufficient to satisfy" the $1.8 million judgment. (Appx. 1 at 8.) The

separate assignment executed in August 2001 assigned to them all of IMC's rights "under or because of [the EPLI Policy]." (R45 – Ex. N (Trial Ex. 118) (attached as Appx. 3).) After the parties executed the Settlement Agreement, the court in the Maryland Litigation entered final judgment on the employment claims, ordering IMC to pay Holman and Toomey $1.8 million. (R45 – Ex. O (Trial Ex. 116) (attached as Appx. 4).) That judgment remains unpaid and outstanding today.

Nature of the Case

This case involves the liability of an insurance broker, Wachovia, for breaching its fiduciary duty to its former client, IMC. That breach involved the gratuitous deletion of insurance coverage, which left IMC exposed to a $1.8 million judgment. To recover the judgment amount, Holman and Toomey sued Wachovia in federal court in Florida pursuant to an assignment of rights from IMC. A Florida jury found Wachovia liable for breaching its fiduciary duty to IMC, and awarded Holman and Toomey $1,069,200. In this appeal, Wachovia seeks to escape that liability by reading only parts of the Settlement Agreement, even though the document as a whole expressly preserved Wachovia's liability. Wachovia also argues that all fiduciary duty claims cannot be assigned, despite precedent from this Court to the contrary. Neither of Wachovia's contentions has any merit.

Course of Proceedings

Holman and Toomey filed this lawsuit against Wachovia in the U.S. District Court for the Middle District of Florida in August 2003. Wachovia moved to dismiss, arguing that Florida law prohibited the assignment of claims for breach of fiduciary duty. (R7.) The district court rejected that argument and denied the motion in its entirety. (R10.) Then, after discovery, the parties cross-moved for summary judgment, in which Wachovia argued that the Settlement Agreement effectively released Wachovia from all liability to IMC. (R44-45.) The district court rejected Wachovia's argument, and denied both parties' summary judgment motions. (R70 – pp. 1-3.) The case proceeded towards trial. Just before trial, in an extension of its order denying summary judgment, the district court entered a trial order, reiterating that most of Wachovia's legal arguments were irrelevant, and precluding Wachovia from presenting evidence at trial relating to, *inter alia,* whether Holman and Toomey's settlement with IMC discharged their judgment against IMC, thereby releasing Wachovia from liability. (R102 – p. 2.)

The parties tried this case to a jury, beginning on April 4, 2005, and lasting five days. (R103-05, 110-11.) After the presentation of Holman and Toomey's case, the district court dismissed as a matter of law their claims for punitive damages, tortious interference, breach of fiduciary duty owed to Holman and Toomey (*i.e.*, in their individual capacities), and negligence, leaving the jury to

consider only the assigned claim for breach of fiduciary duty owed to IMC. (R110 – p. 1; R140 – pp. 15:24-19:13.) The jury then rendered a verdict against Wachovia on that claim for $1,069,200. (R113 – p. 3 (attached as Appx. 5).)

Wachovia appealed to the U.S. Court of Appeals for the Eleventh Circuit, arguing that the district court erred, as relevant here, because (1) Holman and Toomey supposedly released IMC, thereby also releasing Wachovia of all liability; and (2) claims for breach of fiduciary duty cannot be assigned. Holman and Toomey opposed these arguments and cross-appealed. The arguments in the cross-appeal are not material to resolving the certified questions.

Disposition of the Eleventh Circuit

In a per curiam opinion, the Eleventh Circuit certified two questions for this Court's review. The first question is: "What is the effect of a settlement agreement between two parties that explicitly contains both an assignment of causes of action against a third party insurer and an immediate release of the insured on the same causes of action?" (Slip Op. at 13 (attached as Appx. 6).) The second question is: "Can a claim for breach of fiduciary duty against an insurance broker be assigned?" (*Id.* at 13.)

The Eleventh Circuit noted that, "[t]he phrasing of these two questions is not intended to limit the Florida Suprme Court's consideration of the issues involved or the manner in which it gives its answers." (*Id.*) "This latitude extends to the

Supreme Court's restatement of the issue or issues." (*Id.* (internal quotation marks omitted) (citing *Washburn v. Rabun*, 755 F.2d 1404, 1406 (11th Cir. 1985)).) Indeed, it is important to note at the outset that, in this case, Wachovia is not a third party *insurer*, as the Eleventh Circuit's first certified question suggests, but rather an insurance *broker*, as discussed further *infra* Part I.B.

SUMMARY OF THE ARGUMENT

The answer to the Eleventh Circuit's first certified question is that, under Florida law, the Settlement Agreement did not extinguish (a) the liability of Wachovia with respect to IMC's claims against it or (b) Holman and Toomey's ability to pursue those claims as IMC's assignees. Read fully and in the proper context, the language of the Settlement Agreement does not release IMC from all liability and, in fact, expressly prohibits the construction Wachovia now advocates in order to circumvent the jury's finding that it was liable for that claim. The conclusion that the Settlement Agreement did not extinguish Holman and Toomey's assigned claims is also required because Wachovia is an independent tortfeasor whose liability does not depend on IMC's liability to Holman and Toomey. Indeed, to allow Wachovia to escape liability based on a document executed by others who had no intention of releasing Wachovia—and who, in fact, had the opposite intention—would, in the words of this Court, be "the epitome of manifest injustice."

The answer to the Eleventh Circuit's second certified question is that Florida law permits the assignment of a claim for breach of fiduciary duty against an insurance broker. Almost a decade ago, this Court held that an insurance broker's relationship with its client is not so personal or confidential so as to preclude the client's assignment of a claim against the broker. That case involved many of the same facts present in this case, *e.g.*, an insurance brokerage relationship, a tort claim arising from that relationship, and the assignment of that claim to a third party. Based on this Court's precedent, including a recent case that expanded the types of assignable claims to incorporate even some legal malpractice claims, claims against an insurance broker for breach of a fiduciary duty may be assigned under Florida law. Holman and Toomey thus succeeded on a properly assigned claim for breach of fiduciary duty against Wachovia.

ARGUMENT

The questions before this Court involve matters of Florida law. While the federal court in Florida resolved these questions in Holman and Toomey's favor, this Court reviews them pursuant to section 25.031 of the Florida Statutes and Rule 9.150(a) of the Florida Rules of Appellate Procedure. *See generally Tyne v. Time Warner Entertainment Corp.*, 901 So. 2d 802 (Fla. 2005).

I. THE SETTLEMENT AGREEMENT DOES NOT INVALIDATE THE CLAIM FOR BREACH OF FIDUCIARY DUTY ON WHICH THE JURY IN THIS CASE FOUND WACHOVIA LIABLE

The Settlement Agreement explicitly preserved the claims that IMC had against Wachovia and other parties responsible for the non-payment of the $1.8 million judgment on Holman and Toomey's employment claims. Read as a whole and considering the clear intent of the parties, the Settlement Agreement did not effect a complete release of Holman and Toomey's claims against IMC, but rather released the securities-related claims, created a covenant not enforce the employment claims against Wachovia, and assigned all of IMC's claims against Wachovia to Holman and Toomey. Despite these provisions, Wachovia argues that "[t]he very Settlement Agreement by which Holman and Toomey acquired [the breach of fiduciary duty claim] also extinguished it, by releasing IMC from liability." (Initial Br. at 13.) Thus, according to Wachovia, IMC "suffered no damage" and "had no valuable rights left to assign to Holman and Toomey." (Initial Br. at 11.) The Court should reject this argument because it ignores key language of the Settlement Agreement and misconstrues the impact of that agreement under Florida law.

A. The Settlement Agreement expressly preserved IMC's claims against Wachovia for Holman and Toomey to pursue in subsequent litigation.

The terms of the Settlement Agreement, read as a whole, reflect the parties' intent to preserve and to assign IMC's claims against Wachovia to Holman and Toomey. It is a well-established, "deeply rooted principle of Florida law that the intent of the parties controls interpretations of their releases." *Rosen v. Florida Ins. Guar. Ass'n*, 802 So. 2d 291, 295 (Fla. 2001); *see also Atlantic Coast Line R.R. v. Boone*, 85 So. 2d 834, 842 (Fla. 1956). The best evidence of the parties' intent lies in the express language of the Settlement Agreement. *See Rosen*, 802 So. 2d at 297-98. When interpreting a contract, such as the Settlement Agreement, courts should give effect to all of its provisions. *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000); *see also Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract #242/99*, --- So. 2d ---, No. 4D04-4425, 2006 WL 1234962, at *2 (Fla. 4th DCA May 10, 2006). Rewriting the agreement or ignoring words or portions thereof is improper. *See Whitley v. Royal Trails Property Owners' Ass'n, Inc.*, 910 So. 2d 381, 385 (Fla. 5th DCA 2005); *BMW of North Am. v. Krathen*, 471 So. 2d 585, 587 (Fla. 4th DCA 1985).

Wachovia's reading of the Settlement Agreement is irreconcilable with two of its key provisions. The first is a clearly defined exception to the release of IMC, which specifically excluded claims Holman and Toomey "might have or herein

acquire against . . . Wachovia Davis Baldwin, or any partner, shareholder, associate, employee, servant, agent or broker of . . . Wachovia Davis Baldwin for claims which arise out of the claims referenced in Sections 3(d)-(e) below [related to the employment claims], including, but not limited to, any claims which may be made directly or indirectly to satisfy the $1.8 million judgment awarded by the Court in the [Maryland] Litigation." (Appx. 1 at 8.) The second is IMC's assignment to Holman and Toomey of "all its rights, including its choses in action, which rights IMC may have under or because of the existence of [the EPLI Policy]." (Appx. 1 at 8.) These provisions demonstrate that the parties to the Settlement Agreement intended for the employment claims to survive so that Holman and Toomey could recover the corresponding $1.8 million judgment from the tortfeasors who left it unpaid.[3]

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[3] The language creating a limited release of IMC and preserving Wachovia's liability for the unpaid judgment appears in the Settlement Agreement as follows:

> The Releasors [Holman and Toomey]… do hereby release, acquit and forever discharge the Releasees [IMC] from and against any and all claims… ; *provided however*, that nothing contained herein shall operate to release or waive any claims [Holman and Toomey] might have or herein acquire against the insurance companies specified in Sections 3(d) and (e) below, Wachovia Davis Baldwin, or any partner, shareholder, associate, employee, servant, agent or broker of Federal/Chubb Insurance Company or Wachovia Davis Baldwin for claims which arise out of the claims referenced in Sections 3(d)-(e) below, including, but not limited to, any claims which may be made directly or indirectly to satisfy the $1.8 million judgment awarded by

Further, the Settlement Agreement expressly prohibits any construction of its terms that would "operate to release or waive" the assigned claims, specifically against Wachovia. (Appx. 1 at 3.) Yet, despite the clear intent expressed in these undisputed and unambiguous terms, Wachovia still urges this Court to adopt a construction of the Settlement Agreement that releases it from all liability in this case. (Initial Br. at 10-17.) Such a construction would fly in the face of the express terms of the Settlement Agreement.

The basic flaw in Wachovia's reading of the Settlement Agreement is its reading of the release language in isolation. A well established rule of contract interpretation is that terms of a contract must be construed as a whole. *See*, *e.g.*, *Beach Street Bikes, Inc. v. Bourgett's Bike Works, Inc.*, 900 So. 2d 697, 700 (Fla. 5th DCA 2005); *Philip Morris, Inc. v. French*, 897 So. 2d 480, 488 (Fla. 3d DCA 2004). Despite this rule, Wachovia's only discussion of the release's exception is to claim that the Eleventh Circuit's phrasing of the certified questions requires this Court to disregard that exception. (Initial Br. at 13.) The Eleventh Circuit, however, expressly declined to offer any interpretation of the Settlement Agreement or to place any limits on this Court's consideration of the certified questions,

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the Court in the Litigation, and further provided that nothing contained herein shall operate to release any obligations of the parties to this Agreement arising under this Agreement.

stating: "The *phrasing* of these two questions *is not intended to limit* the Florida Supreme Court's consideration of the issues involved or the manner in which it gives its answers." (Slip. Op. at 13 (emphasis added).) Wachovia cannot limit this Court's ability to give full effect to the key provisions of the Settlement Agreement, which preserve Wachovia's liability to Holman and Toomey as assignees of IMC.

When read in its entirety and in proper context, both the release language and the exception for claims against Wachovia should be read as effectuating only a limited release (*i.e.*, of the securities claims), a covenant not to sue IMC on the employment claims, and an assignment of IMC's claims against Wachovia to Holman and Toomey. Together, these provisions operate to preserve Wachovia's liability to Holman and Toomey as assignees of IMC. The decision of this Court in *Rosen* bolsters that conclusion and undercuts Wachovia's argument for its release.[4]

(Appx. 1 at 3-4 (italicized emphasis in original and underscored emphasis added).)

[4] The cases relied on by Wachovia to support their reading of the Settlement Agreement (Initial Br. at 11-12) are inapposite because none of them contains both a limited release and an assignment in the same settlement agreement and because they do not involve the separate liability of an insurance broker (*see infra* Part I.B). *See, e.g.*, *Fidelity & Cas. Co. of New York v. Cope*, 462 So. 2d 459 (Fla. 1985); *Lageman v. Frank H. Furman, Inc.*, 697 So. 2d 981 (Fla. 4th DCA 1997); *Shook v. Allstate Ins. Co.*, 498 So. 2d 498 (Fla. 4th DCA 1986); *Fla. Physicians Ins. Reciprocal v. Avila,* 473 So. 2d 756 (Fla. 4th DCA 1985); *Kelly v. Williams*, 411 So. 2d 902 (Fla. 5th DCA 1982); *Clement v. Prudential Prop. & Cas. Ins. Co.*, 790 F.2d 1545 (11th Cir. 1986).

In *Rosen*, the plaintiff Bonnie Rosen sued a law firm that had represented her for malpractice and other claims. The Florida Insurance Guaranty Association ("FIGA") defended the firm, and argued that its liability was limited by statute to $300,000, including defense costs and indemnity amounts. Rosen and the firm ultimately entered into a settlement agreement upon learning that FIGA had calculated $39,000 remained available for indemnity after defense costs. Under the agreement, the firm consented to a judgment of $261,000 against it and paid Rosen, through FIGA, $39,000. In return, Rosen agreed not to record or execute the judgment against the firm, and to seek collection of the judgment amount against FIGA in a separate action, after which she would release the firm or file a notice of satisfaction of the judgment. In conformance with this agreement, FIGA paid $39,000 to Rosen without obtaining a release or filing a notice of satisfaction, and Rosen filed a declaratory judgment action against FIGA to have it declared liable for the judgment. On cross-motions for summary judgment, the trial court ruled that the settlement agreement had released the tortfeasor—*i.e.*, the law firm—thereby extinguishing any liability that FIGA had as an insurer. The appellate court affirmed.

Reversing, this Court held: "[T]he settlement agreement clearly demonstrates the intent of the parties not to release FIGA from liability and the underlying claim against the insured was not released." *Rosen*, 802 So. 2d at 297-98. It further held

that the settlement agreement constituted a covenant not to sue, not a release, because it "contained an *express reservation of the claim against FIGA* and the underlying claim was not eliminated with the execution of the settlement agreement." *Id*. at 298 (emphasis added). "The agreement did not provide a legal impediment to the litigation with FIGA to resolve the coverage dispute, which litigation was clearly within the contemplation of the parties." *Id.*

The Settlement Agreement here is equivalent to the agreement in *Rosen*. Most notably, the Settlement Agreement expressly reserved the rights of Holman and Toomey, as IMC's assignees, to assert "any claims" that IMC might have against Wachovia, "including, but not limited to" claims necessary to collect the unpaid judgment against IMC on the employment claims. (Appx. 1 at 3-4 (emphasis added).) It also expressly prohibited any construction that would operate to release or waive the assigned claims against Wachovia. (Appx. 1 at 3.) These express reservations of rights and limitations on construing the Settlement Agreement clearly demonstrate the parties' intent to keep the underlying employment claims alive for future litigation and not to release Wachovia from liability.

The Settlement Agreement also qualifies as a covenant not to sue regarding the employment claims, not a release. As held in *Rosen*:

> A release is an outright cancellation or discharge of the entire obligation as to one or all of the alleged joint wrongdoers. A covenant not to sue recognizes that the obligation or liability continues but the injured party agrees not to assert any rights grounded thereon against a particular covenantee.

Id. at 295 (internal quotation marks omitted). Thus, where the language of a settlement agreement reserves the plaintiff's claim against one party, but releases another party, such language creates a covenant not to sue, and the plaintiff may recover against the party which has not been released. *Id.* at 295-97.

Here, Wachovia concedes that the Settlement Agreement "includes a covenant not to sue" and "contemplates that Holman and Toomey would file lawsuits against Wachovia." (Initial Br. at 15-16.) Indeed, the Settlement Agreement provides: "Plaintiffs… covenant that they will not seek to enforce against … IMC the $1.8 million judgment entered by the Court in the [Maryland] Litigation." (Appx. 1 at 8.) Moreover, the evidence presented at trial reinforces construing the Settlement Agreement as a covenant not to sue. Steven Werber, IMC's attorney in the Maryland Litigation, testified that the parties to that litigation intended to preserve and assign any claims that IMC might have against Wachovia so that Holman and Toomey could assert them in subsequent litigation. (R139 – pp. 55:12-56:3, 88:1-21, 104:3-105:19.) Thus, under *Rosen*, the Settlement Agreement should be read not as a release of Holman and Toomey's employment

claims or as extinguishing those claims, but merely as a covenant not to sue or to enforce those claims against IMC.

The parties' conduct after executing the Settlement Agreement also reflects their understanding that Holman and Toomey's employment claims survived the April 2001 settlement. In August 2001, the federal court in Maryland entered final judgment on the employment claims, ordering IMC to pay Holman and Toomey $1.8 million in damages. (Appx. 4 at 1.) No satisfaction of judgment or other document discharging the judgment has been filed, and it remains outstanding on that court's docket. Had the parties released all claims—both employment and securities related—the district court would have had no basis on which to enter a final judgment and instead would have dismissed the action. Moreover, if the parties had understood that they were settling the employment claims, the parties would have filed a release or satisfaction of the judgment.[5]

Both the law and all of the evidence – the Settlement Agreement itself, the testimony at trial, and the conduct of the parties in the Maryland Litigation – support reading the Settlement Agreement as effecting a release solely of the securities claims, a covenant not to sue or to enforce the judgment on their

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[5] Wachovia concedes that the Settlement Agreement explicitly provides that IMC understood it was paying money to settle only the securities claims. (Initial Br. at 5; *see also* Appx. 1 at 7.)

employment claims, and a broad assignment, none of which extinguished the underlying employment claims. Rather, the combined impact of these provisions is that the Settlement Agreement preserved Holman and Toomey's right to sue Wachovia for breaching its fiduciary duty to IMC. Accordingly, the Court should reject Wachovia's release argument as an impermissible construction of the Settlement Agreement.

B. Wachovia is an independent tortfeasor, whose liability to Holman and Toomey, as assignees of IMC, cannot be extinguished by the Settlement Agreement.

Further, whether Holman and Toomey released IMC on the employment claims is wholly irrelevant to whether Wachovia is liable for breaching its fiduciary duty as an insurance broker to IMC. Wachovia's appeal manipulates the language of the Settlement Agreement to argue that a release of IMC is equivalent to a release of Wachovia. In addition to failing as a matter of basic contract construction, *supra* Part I.A, this argument fails because it relies on the erroneous notion that Wachovia's liability is entirely derived from IMC's liability to Holman and Toomey. Wachovia's liability to IMC is separate.

Wachovia is an insurance broker, not an insurance company.[6] As an insurance broker, Wachovia owes its clients fiduciary duties, which exist beyond the terms of a particular insurance policy or the settlement of a particular lawsuit. *See Southtrust Bank v. Exp. Ins. Serv., Inc.*, 190 F. Supp. 2d 1304, 1308-09 (M.D. Fla. 2002) (citing *Moss v. Appel*, 718 So. 2d 199, 201 (Fla. 4th DCA 1998); *Beardmore v. Abbott*, 218 So. 2d 807, 808-809 (Fla. 3d DCA 1969)); *see also Sewall v. State of Florida*, 783 So. 2d 1171, 1178 (Fla. 5th DCA 2001); *Randolph v. Mitchell*, 677 So. 2d 976, 978 (Fla. 5th DCA 1996); Fla. Jur. 2d. Insurance § 617 (2004). Wachovia's liability here arises strictly out of its own acts and omissions as an insurance *broker* and does not depend on the liability of its client, IMC. Its liability, therefore, is that of an independent tortfeasor. *Cf. Martha A. Gottfried, Inc. v. Amster*, 511 So. 2d 595, 598 (Fla. 4th DCA 1987) (distinguishing liability of broker from liability of broker's clients); *cf. also Mitchell v. Realty Source Inc.*, 740 So. 2d 39, 40 (Fla. 1st DCA 1999) (declining to extend release of condominium association to "separate and distinct claims" against real estate broker).

The possible ways in which Wachovia could have breached—and did, in fact, breach—its fiduciary duty to IMC show that Wachovia's liability in this case

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[6] As discussed *supra*, the Eleventh Circuit's first certified question mistakenly identifies Wachovia as a third-party insurer. Wachovia, however, is an insurance broker.

was not premised on IMC's liability to Holman and Toomey for breaching their employment contracts, but on Wachovia's failure to perform the duties that it owed its client, IMC. The verdict form asked the jury to determine whether Wachovia breached its fiduciary duty to IMC by at least one of the following acts or omissions:

> (a) failing to adequately explain to IMC that the [EPLI Policy] covered claims alleging the breach of a written employment contract as well as defense costs for such claims; or (b) failing to obtain proper approval from IMC to add [the Endorsement] to the Policy; or (c) failing to advise IMC about the impact of the proposed Endorsement on IMC's risk exposure and existing employment relationships; or (d) failing to ask IMC about the existence of any written employment contracts between IMC and any of its employees; or (e) failing to ask IMC about existing or pending claims or litigation alleging the breach of a written employment contract; or (f) failing to seek or offer replacement coverage or other alternatives by which IMC could preserve coverage for breach of written employment contract claims, such as by paying an additional premium to Chubb…; or (g) failing to explain that the proposed Endorsement would preserve defense costs for breach of written employment contract claims; or (h) failing to protect IMC from reasonably anticipated liability; or (i) engaging in a conspiracy to eliminate IMC's insurance coverage for breach of written employment contract claims.

(Appx. 5 at 1-2.) Whether any of these acts or omissions constituted a breach of Wachovia's fiduciary duty does not depend on, and is wholly separate from, IMC's liability to Holman and Toomey. Viewed in this light, Wachovia's release argument is irrelevant and merely a red herring.

Wachovia's brief overlooks this distinction, citing a string of cases where the release of a tortfeasor also releases a third-party *insurer*. (*See*, *e.g.*, Initial Br. at 11-12, 14-15 (citing *Fidelity & Cas. Co. of N.Y.*, 462 So. 2d 459; *Fla. Physicians Ins. Reciprocal*, 473 So. 2d 756; *Kelly*, 411 So. 2d 902; *Camp v. St. Paul Fire & Marine Ins. Co.*, 958 F.2d 340 (11th Cir. 1992); *Clement*, 790 F.2d 1545; *Romano v. Am. Cas. Co. of Reading, Pa.*, 834 F.2d 968 (11th Cir. 1987)).) These cases all involve the liability of an insurer, whose liability for bad faith or excess coverage under Florida insurance law is entirely derivative of the insured's/tortfeasor's liability. Plaintiffs cite no case involving the conduct of an independent tortfeasor, whose liability is premised on its own actions or omissions, rather than the liability of a third party. Thus, Wachovia's reliance on the above cases in its quest for immunity is wholly misplaced.

Indeed, the only link that Wachovia can draw between IMC's liability to Holman and Toomey and Wachovia's liability to IMC lies in an argument that, if IMC suffered no damages from Holman and Toomey's claims, then IMC cannot satisfy the damages element of its breach of fiduciary duty claim. (Initial Br. at 10-11.) This contention, too, is baseless.

IMC undeniably suffered damages that were precisely quantified in the form of a judgment issued by the federal court in Maryland on August 6, 2001. (Appx. 4

at 1.) Damages take their quintessential form in a judgment.[7] *See generally Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1413 (D.C. Cir. 1995) (award of money properly qualified as "damages"); *Delancy v. St. Paul Fire & Marine Ins. Co.*, 947 F.2d 1536, 1547 (11th Cir. 1991) (insured was damaged by a judgment against it); *Roden v. Empire Printing Co.*, 135 F. Supp. 665, 667 (D. Alaska 1955) (construing term "damages" to include compensatory and punitive damages). The indisputable fact that this judgment remains unsatisfied and outstanding on the docket of the federal court in Maryland belies Wachovia's assertion that IMC suffered no damages.[8] (Initial Br. at 11.)

As IMC's assignees, Holman and Toomey satisfied every element necessary to recover on a claim for breach of fiduciary duty. As discussed here and *supra* Part I.A, Wachovia's attempted use of the Settlement Agreement to escape these duties cannot extinguish its liability to IMC, and by extension, to Holman and Toomey as its assignees. Accordingly, the Court should also reject Wachovia's

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[7] Even under Wachovia's theory of *insurer* liability, the fact that IMC did not pay the judgment is immaterial to the conclusion that it suffered damages, as IMC's inability to pay stemmed directly from Wachovia's breach of fiduciary duty. *See Aks v. Southgate Trust Co.*, 844 F. Supp. 650, 656-57 (D. Kan. 1994) (even though insured was released from its obligation to pay a judgment, judgment still qualified as a covered "loss" under insurance policy).

[8] Indeed, the jury found Wachovia's breach of fiduciary duty proximately caused Holman and Toomey, as assignees of IMC, damages in the amount of $1,069,200. (Appx. 5 at 3.) Wachovia has not challenged this finding of causation on appeal.

release argument because the Settlement Agreement between Holman and Toomey on the one hand and Wachovia on the other preserved Wachovia's liability to IMC and to its assignees Holman and Toomey.

C. A manifest injustice would result if Wachovia escaped liability based on the Settlement Agreement.

The plain language of the Settlement Agreement and the principles of *Rosen* mandate reading the agreement to preserve IMC's claims against Wachovia and to assign those claims to Holman and Toomey. Further, as discussed above, the viability of IMC's breach of fiduciary duty claims against Wachovia does not depend on IMC's liability to Holman and Toomey. Finally, public policy demands a construction of the Settlement Agreement that serves the interests of justice, *i.e.*, enforcing the Settlement Agreement as the parties intended, by preserving Wachovia's liability to Holman and Toomey as assignees of IMC.

In *Rosen*, this Court held that to allow a party to escape liability "by relying on a document executed by others who had no intention of releasing them" would be "the epitome of manifest injustice."[9] *Rosen*, 802 So. 2d at 295. Such injustice would result here if the Court were to allow Wachovia to escape liability based on

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[9] Finding that the Settlement Agreement preserves the claims against Wachovia also serves the public policies identified in *Rosen*, including the "importance of enforcing the parties' intention" and the "encouragement of settlements, even if they are partial ones." *Rosen*, 802 So. 2d at 296.

an improper and constrained reading of the Settlement Agreement—a document that, by its own terms, was intended to hold Wachovia liable for its own role as an independent tortfeasor in the non-payment of the judgment against IMC. (Appx. at 3-4.) Indeed, if Wachovia had simply fulfilled its fiduciary duties, IMC would have had the insurance coverage to pay Holman and Toomey's $1.8 million judgment and they would not still be here pursuing payment of that judgment five years later.

Even Wachovia shares the view that the Settlement Agreement was not intended to release Wachovia from its potential liability. Wachovia concedes: "To be sure, the Settlement Agreement in this case also includes a covenant not to sue in addition to the release, *and contemplates that Holman and Toomey would file lawsuits against Wachovia* and others...." (Initial Br. at 15-16 (emphasis added).) Piling on, Wachovia then contends that "[t]he very Settlement Agreement by which Holman and Toomey acquired this claim also extinguished it" (Initial Br. at 13), and condescendingly laments the supposedly "bad bargain" struck by Holman and Toomey in agreeing to the Settlement Agreement (Initial Br. at 16).

Despite recognizing these inequities, Wachovia seeks to take full advantage of them in arguing for a complete release of itself. Such a result would be particularly unjust because Wachovia does not dispute or appeal the jury's factual finding that it breached its fiduciary duty to IMC. (Appx. 5 at 1-3.) To make matters worse, under Wachovia's theory of a complete release, Holman and

Toomey simply forfeited their right to collect a $1.8 million judgment for absolutely no consideration. (Initial Br. at 7, 10-11.) To be sure, Holman and Toomey did no such thing, particularly in view of the fact that they won final judgment on those claims on the merits (by summary judgment) and they carefully and expressly reserved the right to recover those monies from Wachovia and other responsible parties. (Appx. 1 at 3-4; Appx. 2 at 9-13, 16; Appx. 3 at 1-2; Appx. 4 at 1.) As such, to adopt Wachovia's position on the Settlement Agreement, indeed, would be the epitome of manifest injustice.

It would be inherently unfair and contrary to public policy to reward Wachovia with a release in this case, when everything – the law, the language of the Settlement Agreement, the intent of the parties to that agreement, all of the surrounding circumstances, and even Wachovia's concession regarding the intent of the agreement – favors adopting the position advocated by Holman and Toomey. Therefore, this Court should hold that the Settlement Agreement does not extinguish Wachovia's liability to Holman and Toomey as assignees of IMC.

II. FLORIDA LAW PERMITS THE ASSIGNMENT OF CLAIMS FOR BREACH OF FIDUCIARY DUTY AGAINST AN INSURANCE BROKER

Wachovia's brief gives short shrift to its argument that Florida law prohibits the assignment of claims for breach of a fiduciary duty. (Initial Br. at 18-20.) Importantly, Wachovia seeks to establish a brightline rule that all claims for breach

of fiduciary duty cannot be assigned, not just those against an insurance broker. (Initial Br. at 18-20.) According to Wachovia, the personal and confidential nature of a fiduciary relationship precludes the assignment of claims based on breach of fiduciary duty.[10] (Initial Br. at 19-20 ("Because a fiduciary relationship is a personal one, depending upon a confidential relationship between the parties, proper application of the distinctions in *Cowan* dictates that a breach of fiduciary duty claim may not be assigned.").) This Court's precedent belies Wachovia's argument.

In *Forgione v. Dennis Pirtle Agency*, this Court held that relationships between an insured and an insurance agent are not so personal so as to preclude the assignment of a tort claim against an insurance agent. 701 So. 2d 557, 558-59 (Fla. 1997). *Forgione* thus undermines the very premise for Wachovia's argument that fiduciary duty claims cannot be assigned. In fact, the key elements present in *Forgione* also exist here—*i.e.*, an insured (IMC), an insurance agent (Wachovia), a tort claim (breach of fiduciary duty), and an assignment to a third party (Holman

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[10] Although Wachovia's brief states that the relevant inquiry is "not the identification of the parties as an insurance broker and a client," but rather "the identification of the tort, and the type of duty allegedly breached," it is devoid of any authority for that proposed legal standard. (Initial Br. at 18.) Moreover, Wachovia's own analysis fails to adhere to such a standard, as its entire argument for why fiduciary duty claims are non-assignable focuses on the supposedly "personal" and highly "confidential relationship" between the parties here – *i.e.*, an insurance broker and its client. (Initial Br. at 19-20.)

and Toomey); thus, the result here should be the same as in *Forgione.* Based on *Forgione* alone, then, the Court should reject Wachovia's argument that claims for breach of fiduciary duty are too personal to be assigned.

This Court's recent decision in *Cowan Liebowitz & Latman, P.C. v. Kaplan*, further reinforces the concept that Florida law permits the assignment of breach of fiduciary duty claims. 902 So. 2d 755 (Fla. 2005). Although Wachovia relies on this decision as though it somehow bolsters its argument, *Cowan* actually expands the range of tort claims that may be assigned to encompass even some legal malpractice claims, which were previously not assignable. *Id.* at 756-57. *Cowan* also makes clear that this Court's only remaining restriction on the assignment of claims relates to those involving highly personal relationships between an attorney and her client. *See Cowan*, 902 So. 2d at 758 (distinguishing relationship between attorney and client, which is "confidential and personal and thus cannot be assigned," from relationship between insured and insurance agent); *Forgione*, 701 So. 2d at 559 (same); *see also KPMG Peat Marwick v. Nat'l Union Fire Ins. Co.*, 765 So. 2d 36, 38-39 (Fla. 2000). Wachovia cites nothing to support its contention that the relationship between an insurance broker and its client is "confidential and personal" like the attorney-client relationship. Indeed, the holding in *Forgione* precludes Wachovia from doing so.

Fiduciary duty claims against an insurance broker simply cannot be equated with legal malpractice claims against an attorney. Given the combined force of the Florida Supreme Court's rulings in *Cowan* and *Forgione*, Wachovia has no valid basis to argue that Florida law prohibits the assignment of fiduciary duty claims against an insurance broker. Accordingly, this Court should reject Wachovia's argument, and hold that claims for an insurance broker's breach of fiduciary duty may be assigned under Florida law.

CONCLUSION

WHEREFORE, Appellees/Cross-Appellants Holman and Toomey respectfully request this Court to answer the certified questions as follows: (1) the Settlement Agreement does not extinguish Wachovia's liability to Holman and Toomey as assignees of IMC; and (2) claims for the breach of a fiduciary duty against an insurance broker are assignable under Florida law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that this brief complies with the typeface requirement set forth in Rule 9.210(a) of the Florida Rules of Appellate Procedure. This brief is computer generated, and uses 14 point Times New Roman font.

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