IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1968

PAMELA PERERA,

Petitioner,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE ASSOCIATION AND COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF RESPONDENT UNITED STATES FIDELITY & GUARANTY COMPANY

Proceedings to Review Questions Certified from the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF AMICI CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies.[1] CICLA focuses on educational efforts and legal issues of concern to insurers. Through *amicus curiae* efforts, CICLA seeks to assist courts in resolving insurance policy interpretation and coverage questions of importance.

The American Insurance Association ("AIA") is a leading national trade association representing major property and casualty insurers writing business in Florida, nationwide, and globally.[2] AIA's members, based in Florida and most other states, range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts.

[1] This brief is filed on behalf of the following CICLA members: AIU Holdings Inc.; Arrowpoint Capital Corp.; Chubb & Son – a Division of Federal Insurance Company; Liberty Mutual Insurance Co.; Selective Insurance Company of America; and TIG Insurance Co. Because an affiliate of CICLA Member The Travelers Indemnity Co. is a party to this case, the brief is not submitted on behalf of The Travelers Indemnity Co.

[2] Because an affiliate of AIA Member The Travelers Indemnity Co. is a party to this case, the brief is not submitted on behalf of The Travelers Indemnity Co.

CICLA and AIA members provide a substantial percentage of the liability coverage written in Florida. CICLA and AIA have participated in numerous cases throughout the country, including several cases before this Court.[3] Most recently, CICLA has been granted leave to appear in *Penzer Transportation Insurance Co.*, No. SC08-2068 (Fla.), which presents important questions concerning the scope of personal injury coverage in general liability policies. As trade associations with a broad outlook on the insurance and public policy considerations before the Court, CICLA and AIA are uniquely positioned to address the key issues concerning bad-faith claims that this Court will determine here.

CERTIFIED QUESTIONS

1. Can a cause of action for bad faith against an insurer be maintained when there is not an excess judgment against the insured?

2. Even if an excess judgment is not always required, can a cause of action for bad faith against an insurer be maintained when the

[3] *See, e.g., U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007) (CICLA); *Fla. Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815 (Fla. 2007) (AIA); *Macola v. Gov't Employees Ins. Co.*, 953 So. 2d 451 (Fla. 2006) (CICLA); *In Re: Amendments to the Rules Regulating the Fla. Bar*, 933 So. 2d 417 (Fla. 2006) (AIA); *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528 (Fla. 2005) (CICLA); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003) (both); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998) (CICLA); *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996) (AIA); *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700 (Fla. 1993) (CICLA); *Auto-Owners Ins. Co. v. Conquest*, 658 So. 2d 928 (Fla. 1995) (AIA); *Holmes County Sch. Bd. v. Duffell*, 651 So. 2d 1176 (Fla. 1995) (AIA); *Clair v. Glades County Bd. of Comm'rs*, 649 So. 2d 224 (Fla. 1995) (AIA).

> insurer's actions never resulted in increased exposure on the part of the insured to liability in excess of the policy limits of the insured's policies?

STATEMENT OF ARGUMENT

This Court has consistently held that a bad-faith cause of action against an insurer for failure to settle requires an excess judgment, as do the better-reasoned cases from other jurisdictions. Damages are an element of both statutory and common law bad-faith claims, but a policyholder does not incur damages in the absence of a judgment above the policy's limits. However, even if a bad-faith cause of action does not require an excess judgment, this Court has time and again held that an insured cannot maintain a claim for bad-faith without exposure to an excess judgment. If it is not exposed to an excess judgment, a policyholder suffers no injury. Because actual injury is a requirement of standing under well-settled Florida law, an insured who is not exposed to an excess judgment lacks standing to sue for bad faith.

Subjecting insurers to extra-contractual liability for bad faith where the insured is neither damaged nor injured in fact would adversely affect the insurance mechanism. When insurers are forced to pay damages that were not contemplated entering into the insurance agreement, they must necessarily account for such liabilities and that will inevitably impact

consumers of insurance. This Court should not permit bad-faith remedies to become windfalls for uninjured plaintiffs at the expense of other consumers.

For these reasons, CICLA and AIA respectfully urge this Court to answer the certified questions in the negative.

ARGUMENT

I. AN EXCESS JUDGMENT IS AN ESSENTIAL ELEMENT OF A BAD-FAITH CLAIM AGAINST AN INSURER.

This Court should reaffirm that a bad-faith cause of action requires an excess judgment, and should answer the first certified question in the negative. Florida law makes an excess judgment an essential element of an insured's bad-faith claim. Not even the Petitioner challenges this rule,[4] and this Court should not depart from it now.

This case arises out of the tragic death of the Petitioner's husband, Mitchell Kenneth Perera ("Perera"). Perera was an employee of Estes Express Lines Corporation ("Estes") when he was killed in an on-site accident on April 11, 1997. As a result, the Petitioner, as representative of

[4] The Petitioner does not challenge the established rule that a bad-faith action will not lie in the absence of an excess judgment. See Brief of Petitioner-Appellant at 14, *Perera v. U.S. Fid. & Guar. Co.*, No. SC08-1968 (Feb. 9, 2009) (stating that the answer to the certified question "depends on how the term 'excess judgment' is defined"); *id*. at 18 (citing with approval a case's description of the kind of excess judgment "*that is required to maintain a bad faith claim*" (emphasis added)). Rather, the Petitioner only asks that this Court clarify the type of excess judgment "potentially needed for a bad faith claim to exist under Florida law . . . ." *Id*. at 20.

her husband's estate, filed a damages suit against Estes and certain of its employees. Estes possessed $27 million in applicable insurance from three carriers, Cigna, the United States Fidelity and Guaranty Company ("USF&G"), and Chubb: $1 million from the Cigna policy; $1 million from the USF&G policy; and $25 million in excess insurance from the Chubb policy. After learning of the Petitioner's lawsuit, USF&G reserved its rights on an intentional acts exclusion in its policy, which it believed precluded coverage of the Petitioner's claim against Estes. When the three insurance companies met with the Petitioner and Estes to discuss settlement in 2001, Cigna tendered its policy limits in order to effect settlement, but USF&G demurred. The others asked USF&G to leave the mediation.

The Petitioner, Estes, Chubb, and Cigna ultimately settled without USF&G. The parties agreed to a settlement of $10 million -- $5 million from the settling parties and the remainder to be sought through a bad-faith claim against USF&G, which Estes agreed to assign to the Petitioner. After payment of the $5 million from the settling parties, the Petitioner agreed to accept the proceeds of her lawsuit against USF&G as a complete satisfaction of her judgment, even if her bad-faith suit was ultimately unsuccessful.

As the assignee of Estes, Perera brought and prevailed in a breach of contract claim against USF&G, which then paid its policy limits of $1

million, satisfying its obligations under the contract. USF&G did not appeal this decision. Because no excess judgment was entered against Estes, however, the court held that USF&G was not liable for bad faith under the established law of Florida. Perera then appealed the adverse ruling that there was no basis for a bad-faith claim to the Eleventh Circuit. In certifying the questions here, the Eleventh Circuit recognized that Estes was never subject to an excess judgment. As the court recognized, "[t]o constitute an excess judgment, there would have to have been a judgment in excess of $25 million. The judgment agreed upon in settlement—$10 million—is obviously far less than the extant coverage." *Perera v. U.S. Fid. & Guar. Co.*, 544 F. 3d 1271, 1275 (11th Cir. 2008). As the Eleventh Circuit explained, Estes therefore faced no liability above its existing policy.

Florida's relevant statute provides that "[a]ny person may bring a civil action against an insurer *when such person is damaged*" by enumerated acts of the insurer, including "not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so . . . ." § 624.155(1)(b)(1), Fla. Stat., (2005) (emphasis added). Damages are also an element of the common law cause of action for bad-faith failure to settle within policy limits. Here, the insured suffered no damages because the insurer, USF&G, satisfied its obligations under the policy, and no judgment

above limits issued against USF&G's insured, Estes. Accordingly, there is no basis for Estes to pursue a bad-faith claim. As Estes' assignee, Perera's rights are no greater than Estes' rights, so that Perera also lacks any basis for a bad-faith claim.

CICLA and AIA urge this Court not to create a claim for bad faith failure to settle where the policyholder was never called upon to pay more than its insurance policies provided. This Court should again hold that a party cannot maintain a cause of action for bad faith against an insurer absent an excess judgment against the insured.

A. When There Is No Excess Judgment, An Insured Can Not Show That It "Is Damaged," As The Bad-Faith Action Requires.

Damages are an element of any bad-faith claim. An excess judgment is a prerequisite of a bad-faith action for failure to settle because, absent an excess judgment, an insured suffers no damages. Both the bad-faith statute and the common law expressly require damages as a prerequisite for a bad-faith claim. *See* § 624.155(1) (providing that "[a]ny person may bring a civil action against an insurer when such person *is damaged*" by the insurer's bad-faith failure to settle); *Conquest v. Auto-Owners Ins. Co.*, 637 So. 2d 40, 43 (Fla. 2d DCA 1994) ("Damages [are] a necessary element explicitly required" by the statute); *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d

758, 760 n.3 (Fla. 1st DCA 1994) (damages available for a third-party bad-faith claim are the same whether claimants pursue the statutory or common law remedy).

An insured suffers no damages, however, when the judgment falls within the limits of its insurance policies. Estes contracted with USF&G for $1 million in worker's compensation insurance that USF&G paid on its behalf. Despite USF&G's conduct in contesting coverage, Estes was never called upon to pay more to the Petitioner than its policies provided and was never exposed to liability in excess of its insurance. Therefore, Estes has no basis to claim any actual damages. *See State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275, 277 (Fla. 1997) (at common law, claimant cannot demonstrate damage by insurer's bad-faith failure to settle without an excess judgment); *Fid. & Cas. Co. of N.Y. v. Cope*, 462 So. 2d 459, 461 (Fla. 1985); s*ee also Hollar v. Int'l Bankers Ins. Co.*, 572 So. 2d 937, 940 (Fla. 3d DCA 1990) ("[W]hen the legislature employed the term 'damages' in [the statute], it necessarily contemplated the same elements of damages that are viable and extant under the decisional law of the supreme court.").

Without a claim for actual damages, the company cannot seek punitive damages. *See Pozzi Window Co. v. Auto-Owners Ins. Co.*, 429 F. Supp. 2d 1311, 1322 (S.D. Fla. 2004), *affirmed in relevant part by* 446 F. 3d

1178 (11th Cir. 2006) (applying Florida law) ("Without compensatory damages, a claim for punitive damages cannot stand."). Nor are nominal damages available to Estes under the bad-faith statute. *Conquest v. Auto-Owners Ins. Co.*, 773 So. 2d 71, 75 (Fla. 2d DCA 1998). These limitations necessarily apply to the Petitioner because, as Estes' assignee, she "only has a derivative claim as the insured's stand-in." *Dunn v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103, 1107 (Fla. 5th DCA 1993).

This Court has long recognized that "[t]he basis for a [bad-faith] action [is] 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." *Cope*, 462 So. 2d at 461. This is because, according to the Louisiana Court of Appeals, "[i]t is the entry of the judgment on the principal demand in excess of the policy limits that harms the insured and gives rise to enforce the cause of action for damages." *Mathies v. Blanchard*, 959 So. 2d 986, 988-89 (La. Ct. App. 2007). A settlement within policy limits "is, as a practical matter, of no interest to the insured since the insured has paid his premium and is shielded to the extent of the policy limits." *A.W. Huss Co. v. Cont'l Cas. Co.*, 735 F.2d 246, 251 (7th Cir. 1984). Likewise, as the Southern District of Florida has explained,

> where . . . the settlement or the judgment is within the policy limits, the insured has suffered no independent damages other than the amount of coverage for which the insured contracted and the insurer has refused to pay. Therefore, the insured has no basis to claim any actual damages beyond the coverage provided by the policy since he is not being called upon to pay more to the person whom he injured than the policy provided.

Pozzi Window Co., 429 F. Supp. 2d at 1321 (applying Florida law).

Since Estes cannot collect on its own behalf, Petitioner has no better right to collect as Estes's assignee. This is consistent with a third-party's statutory right to bring a direct action against the insurer, which exists only where the third party has obtained an excess judgment against the policyholder. *Zebrowski*, 706 So. 2d at 277 (Fla. 1997) (the statute "authorizes a third party to file a bad-faith claim directly against the liability insurer without an assignment by the insured *upon obtaining a judgment in excess of the policy limits*" (emphasis added)); *Cope*, 462 So. 2d at 461 (discussing third-party actions under the common law). In the absence of an excess judgment, there are no damages and there is no basis to pursue a bad-faith action.

B. Settled Law In Florida Recognizes That There Is No Cause of Action For Bad Faith Against An Insurer Where There Is No Excess Judgment.

Because an insured does not suffer damages from an insurer's bad-faith failure to settle where there is no excess judgment, this Court has long

recognized that "[a]n excess judgment is an element of a bad-faith claim." *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994); *see also Cope*, 462 So. 2d at 461 (judgment for damages above insured's policy limits is the basis of the bad-faith action); *Kelly v. Williams*, 411 So. 2d 902, 904 (Fla. 5th DCA 1982) ("[A] cause of action for bad faith arises when the insured is legally obligated to pay a judgment that is in excess of his policy limits.").

In *Cope*, 462 So. 2d at 461, the Court addressed facts similar to those here. After a car collision that injured the claimant and killed his wife, the claimant demanded that Fidelity, the driver's insurer, pay the limits of the driver's policy in settlement. Fidelity refused, and the claimant sued Fidelity and the driver it insured, as well as the car's owner and the owner's insurer, for personal injuries and wrongful death. Following trial, a jury awarded the claimant damages in excess of the policy limits. The claimant eventually settled with the driver, as well as the car's owner and the owner's insurer, for part of the judgment, in return for which the claimant executed a release and a satisfaction of judgment in favor of the settling parties. To satisfy the remainder of the judgment, the claimant sued Fidelity, who was not named in the release, for bad-faith failure to settle within the policy limits. *Id*. at 459-60. This Court dismissed the claim. An 8-1 majority held that the

claimant had no cause of action because the "stipulation entered in the cause completely released the insured" who was no longer liable for the judgment above limits. Because the claimant stood in the insured's shoes, he could not bring a suit for which the insured himself would not have standing, or maintain a bad-faith claim in the absence of an excess judgment against the insured. *Id*. at 460-61.

The parallels between *Cope* and this case are striking: in both, a claimant sued an insured for wrongful death; in both, the claimant settled with all but one insurer; in both, the settlement released the insured from liability for any excess judgment; and, in both, the claimant then sought to pursue a bad-faith claim against the non-settling insurer. Neither in *Cope*, nor here, was the insured exposed to liability in excess of its insurance policies. As it did in *Cope*, therefore, this Court should now affirm the settled law that a bad-faith cause of action requires an excess judgment against the insured.

C. Other Courts Agree That There Should Be No Bad-Faith Cause of Action Where There Is No Excess Judgment

The better-reasoned cases agree that an excess judgment is a prerequisite for any bad-faith failure to settle a claim. Indeed, "courts in other jurisdictions squarely faced with [this question] . . . have repeatedly held that an excess judgment or settlement is a prerequisite to [a bad-faith]

action." *Amoco Oil Co. v. Reliance Ins. Co.*, No. 96-0011-CV-W-6, 1998 WL 187336, at *3-4 (W.D. Mo. April 14, 1998) (applying Missouri law); *see Mathies*, 959 So. 2d at 988-89 ("[N]umerous courts in other jurisdictions have squarely addressed the issue, and have repeatedly held that an excess judgment is a prerequisite to an action for bad faith failure to settle a claim against an insured within the policy limits."); *see also Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 611 (6th Cir. 1995) ("[U]nder Ohio law, implicit in bringing an action against an insurer for bad faith with respect to settling a claim within policy limits, is a requirement that there be an excess judgment against the insured."); *A.W. Huss Co.*, 735 F.2d at 253 ("It is irrefutable that under Wisconsin law plaintiff's bad faith claim lacks that element upon which Wisconsin bad faith claims involving third parties . . . are predicated—the insured's liability for an excess judgment."); *Catholic Relief Ins. Co. of Am. v. Liquor Liab. Joint Underwriting Ass'n of Mass.*, No. CIU. A. 93-0840, 1997 WL 781448, *23 (Mass. Super. Ct. Dec. 22, 1997) ("The existence of a judgment in excess of the policy limits [is] a prerequisite to [the insured's] claim" of bad faith failure to settle); *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 659 (Md. Ct. App. 1994) ("[A] cause of action against the insurer for a failure, in bad faith, to settle a claim will not accrue prior to the entry of a judgment against the insured in excess of policy

limits."); *Jarvis v. Farmers Ins. Exch.*, 948 P.2d 898, 901-02 (Wyo. 1997) ("[W]e decline to extend a cause of action for bad faith for failure of the insurer to initially settle a claim which is followed by a judgment or settlement within policy limits.").

Like this Court, these jurisdictions recognize that an excess judgment is an integral element of a bad-faith action because an insured suffers no damages in the absence of such judgment. *See, e.g., Wolkokwitz v. Redland Ins. Co.*, 112 Cal. App. 4th 154, 163 (2003) ("Until a judgment has been entered against the insured after a trial, there is no assurance that the insured will suffer any damage from the insurer's breach of its implied obligation to accept a reasonable settlement offer."); *Catholic Relief Ins. Co.*, 1997 WL 781448, at *23 (plaintiff cannot demonstrate that the insured suffered any damages "because no judgment entered in excess of the . . . policy limits"). The Petitioner offers no compelling reason for this Court to overrule long-established precedent or to permit insureds to recover in a setting where they can show no actual damages. Rather, this Court should hold, as it has many times before, that an excess judgment is an element of a bad-faith claim for failure to settle.

II. EVEN IF AN EXCESS JUDGMENT IS NOT NECESSARY TO STATE A CLAIM FOR BAD FAITH, THERE IS NO INJURY TO AN INSURED WHEN THERE WAS NEVER EXPOSURE TO AN EXCESS JUDGMENT.

Petitioner suggests that exposure to an excess judgment due to an insurer's bad-faith action is sufficient to maintain a cause of action for bad-faith failure to settle, even when there is ultimately no excess judgment for which the insured is liable.[5] For the reasons stated above, CICLA and AIA respectfully assert that exposure to an excess judgment alone is insufficient to state a cause of action in the absence of such a judgment, and urges this Court to hold that a judgment above limits is a prerequisite to a bad-faith action.

A. The Insured Did Not Suffer Actual Injury on the Facts of This Case

Whether or not it alone is *sufficient* to maintain a claim, exposure to an excess judgment is *necessary* to support a bad-faith claim. Even if an excess judgment is not an element of a bad-faith action, the Petitioner here cannot maintain her suit against USF&G because Estes was never exposed

[5] Although a claim for bad faith has not been maintained by this court in the absence of an excess judgment, some language in this Court's rulings might be read to suggest that exposure to an excess judgment is a necessary element of a bad-faith claim. For instance, this Court has stated that the "essence" of a bad-faith action is "to remedy a situation in which an insured *is exposed to an excess judgment* because of the insurer's failure to properly or promptly defend the claim." *Macola v. Gov't Employees Ins. Co*., 953 So. 2d 451, 458 (Fla. 2006) (emphasis added) (citing *Cunningham*, 630 So. 2d at 181); *see also Cope*, 462 So. 2d at 460 (the "essence" of a bad-faith insurance suit is the insurer's breach of duty "which results in the insured *being exposed to* an excess judgment" (emphasis added)) (citing *Kelly*, 411 So. 2d at 904).

to a judgment above its policy limits. This Court has recognized that, *at the least*, exposure to an excess judgment is required to state a cause of action for insurer bad faith.

In *Kelly*, 411 So. 2d at 902, the Fifth District Court of Appeal dismissed the plaintiff's bad-faith claim because the parties stipulated that "the insured could not be exposed to an excess judgment under any circumstances." The court emphasized that even "if [an excess judgment] was obtained, the insured was entitled to complete satisfaction of it, as soon as the judgment became final or enforceable. *The stipulation completely safeguarded the insured, and therefore it completely discharged the insurer's duty to its insured*." *Id*. at 904 (emphasis added). This Court in *Cope* later cited *Kelly's* holding with approval, stating, "[t]he Fifth District Court of Appeal properly analyzed the nature of [the bad-faith] action, and its result is correct." 462 So. 2d at 460-61 (summarizing Kelly's holding as "[b]ecause the insured could not be exposed to any loss or damage from the alleged bad faith of the insurer, no cause of action for bad faith remained for anyone").

Estes was similarly safeguarded. As the Eleventh Circuit held, "Estes was never exposed to liability in excess of the limits of its several policies,

because any exposure above USF&G's limits was covered by the [excess] coverage with limits of $25 million." 544 F. 3d at 1277.[6]

B. The insured must allege actual injury to bring an action in Florida courts.

Estes has no standing to assert a bad-faith claim. Florida courts recognize that "[t]o establish standing it must be shown that the party suffered injury in fact (economic or otherwise) for which relief is likely to be redressed." *Peregood v. Cosmides*, 663 So. 2d 665, 668 (Fla. 5th DCA 1995); *see Wexler v. Lepore*, 878 So. 2d 1276, 1280 (Fla. 4th DCA 2004) (To establish standing, "the party must allege that he has suffered or will suffer a special injury . . . . Thus, the court must determine whether the plaintiff has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation."); *Pandya v. Israel*, 761 So. 2d 454, 456 (Fla. 4th DCA 2000) ("A party has standing when he has a sufficient stake in a justiciable controversy. To establish standing a party must have an injury in fact for which relief is likely to redress.")

USF&G's alleged bad faith did not injure Estes. Even if Estes worried that USF&G's recalcitrance might expose it to a judgment above

[6] The court noted that even if Estes had needed to pay the $1 million limit of USF&G's policy itself to trigger the excess insurance, that $1 million would still have been well within Estes' $27 million aggregate limits. *Id.* The company could then have sued USF&G for breach of contract for its failure to provide the benefit for which Estes paid premiums, but not for bad faith. Because excess insurance shielded Estes from an excess judgment, it also "completely discharged the insurer's duty to its insured."

limits, injury in fact requires "an invasion of a legally protected interest which is . . . actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).[7] Since it was unexposed to an excess judgment, Estes at no time suffered the "concrete" harm, which could cloak it (and its assignee, Perera) with standing in this Court. *Id.*; *see Laird v. Tatum*, 408 U.S. 1, 10-14 (1972) (discussing "a specific present objective harm or a threat of specific future harm" as a requirement of injury in fact).

III. SUBJECTING INSURERS TO EXTRA-CONTRACTUAL LIABILITY FOR BAD FAITH WHERE THE INSURED IS NEITHER "DAMAGED" NOR INJURED IN FACT WOULD ADVERSELY AFFECT THE INSURANCE MECHANISM.

Because "the insurance industry is peculiarly affected with a public interest," the expansion of liability does not affect only insurers. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 53 (Tex. 1997). If insurers are forced to pay damages that were not contemplated entering in an insurance agreement, and thus are not reflected in the premium, they must necessarily account for such new liabilities and this will ultimately impact the consumers of insurance. These increased costs for insurance necessarily and

[7] Moreover, at all times, Estes possessed the peace of mind that it was still covered by $25 million in insurance if the judgment against it exceeded USF&G's $1 million limits. It suffered neither financial injury, nor emotional harm.

adversely affect the individual and small business consumers of insurance, and particularly those that lack the resources to self-insure.

In enacting § 624.155(1), the legislature determined that the benefits of an extra-contractual remedy outweigh these costs when an insured faces an excess judgment due to the insurer's bad faith. Expanding the insurer's liability as the Petitioner requests would tip the scales, however, because it serves no legitimate purpose: on the facts here, the policyholder never suffered an injury that would be a basis for a bad-faith claim. This Court should not permit bad-faith remedies to become windfalls for uninjured plaintiffs at the expense of other consumers, contrary to the legislature's intent. Insurers already have ample incentives not to act in bad faith toward policyholders, including avoidance of liability for excess judgments against their insureds and existing, ample regulation of their practices in Florida. An expansion of the bad-faith cause of action to uninjured plaintiffs would serve only to encourage unnecessary litigation, consuming judicial resources at taxpayer expense.

This case offers no compelling rationale for deviating from the settled law that a bad-faith action will not lie without entry of an excess judgment. Estes was never called upon to pay more to the Petitioner than its insurance policies provided. There is no reason to unjustly enrich Estes, or

derivatively, the Petitioner. As the California Supreme Court has recognized, any unwarranted expansion of insurers' obligations leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989); *see also Giles*, 950 S.W.2d at 53 (finding "obviously legitimate" the concern that bad faith torts "often have a windfall nature" and "may raise the cost of insurance for the vast numbers of insureds who are not mistreated").

Fundamental policy considerations therefore reinforce what Florida law requires – the entry of a judgment above limits before an insured or third-party may bring an action for bad faith failure to settle against an insurer. This Court should thus reaffirm that a bad-faith cause of action will not lie in the absence of an excess judgment, and should answer the first (or alternatively, the second) certified question in the negative.

CONCLUSION

For the reasons set forth herein, *amici curiae* American Insurance Association and Complex Insurance Litigation Claims Association respectfully request that this Court again hold that a party cannot maintain a cause of action for bad faith against an insurer absent an excess judgment against the insured.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Brief of *Amici Curiae* American Insurance Association and Complex Insurance Claims Litigation Association complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
William D. Horgan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished this 7th day April, 2009, to:

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