IN THE SUPREME COURT OF FLORIDA

PAMELA PERERA,

Appellant,

v.

Supreme Court Case No. SC08-1968
Lower Tribunal Case No. 06-10925

UNITED STATES FIDELITY
& GUARANTY COMPANY,

Appellee.

BRIEF OF *AMICI CURIAE* FLORIDA JUSTICE REFORM INSTITUTE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE UNITED STATES FIDELITY & GUARANTY COMPANY

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Florida Justice Reform Institute is a not-for-profit organization dedicated to reform of the state's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in civil justice.

The Chamber of Commerce of the United States of America[1] is the world's largest federation of business companies and associations, representing an underlying membership of more than three million business and professional organizations of every size and in every sector and region of the country.

This case presents an issue of paramount importance to Florida's citizens and businesses. Appellant asks the Court to extend the cause of action for bad faith to insureds with no excess liability. This new and boundless field of extra-contractual insurance litigation would impose unprecedented and unpredictable costs upon insurers and inevitably increase insurance premiums for all purchasers.

Appellant's proposed expansion of bad faith litigation undermines the objectives to which these *amici* are dedicated. Most importantly, by subverting predictability, imposing liability beyond contractually determined amounts, and subjecting insurers to heavy costs in the total absence of cognizable loss to the insured, Appellant's position threatens to destabilize the liability insurance market.

[1] The Chamber has filed a Motion for Leave to Appear as *Amicus Curiae* and joins this brief conditionally pending disposition of its Motion.

SUMMARY OF ARGUMENT

It is settled law throughout the United States that a cause of action for bad faith does not accrue absent a judgment for which the insured is partially liable. Contrary to the weight of nearly universal authority, Appellant urges this Court to embrace a dramatic expansion of common law and to extend the cause of action for bad faith to insureds who suffer *no* actual damages through an excess verdict.

The change proposed by Appellant is revolutionary—and fraught with policy implications of the highest importance. By breaking down the prevailing and well-reasoned limits on bad faith litigation, it threatens to increase the costs and burdens of insurance litigation, to increase the price of liability insurance, to reduce the coverage that Florida's citizens and businesses can afford to purchase, to render this state a less attractive market for insurance in comparison with other states, to impair Florida's efforts to retain and attract business and the work it creates, and to weaken an already fragile statewide economy. It would, moreover, place Florida law in conflict with the public policy of most other states and create an economic environment uniquely hostile to providers of liability insurance.

Needless to say, the affordability and availability of liability insurance is of crucial importance to Florida's citizens and businesses alike. Florida citizens who own automobiles purchase liability insurance to comply with the requirements of state law. Florida businesses—large and small—purchase liability insurance to

minimize risk and facilitate new enterprise. And Florida citizens who suffer genuine injuries rely on the adequacy of coverage for compensation.

The Legislature is best equipped to study and evaluate the serious and sweeping ramifications for all Floridians of the expansion of law which Appellant seeks. As it has done before, the Court should defer to the Legislature and decline an extension of common law that would dramatically affect public policy.

ARGUMENT

I. THE COURT SHOULD NOT EXTEND THE CAUSE OF ACTION FOR BAD FAITH TO INSUREDS WITH NO EXCESS LIABILITY.

A. Appellant Seeks a Broad Expansion of Common Law Fraught With Sweeping Public Policy Implications.

Insurers have long been subject to an obligation of good faith and fair dealing. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005). As early as 1938, this Court recognized a common law right of action for bad faith in the third-party context. *Id.*; *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938). This judicially created remedy afforded protection from the practice of rejecting claims "without sufficient investigation or consideration . . . , *thereby exposing the insured individual to judgments exceeding the coverage limits of the policy*." *Ruiz*, 899 So. 2d at 1125 (emphasis added). In Florida, therefore, as elsewhere, *see* Section II, *infra*, the "essence of a third-party bad faith cause of action" has been "to remedy a situation in which an insured is exposed to an excess judgment," *Malcola v. Gov't Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2006) (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

The extension of bad-faith litigation to situations in which the insured is *not* subject to excess liability would fundamentally alter the public policy of this state. Most significantly, the elimination of an essential predicate to a bad faith claim—liability against the insured for amounts in excess of the policy limits—

threatens vastly to enlarge the scope of insurance litigation in Florida, for the sole benefit of parties who have suffered *no* cognizable damages.

Of course, heavy litigation costs factor into the price charged to purchasers of insurance. "Every judgment against an insurer potentially increases the amounts that other citizens must pay for their insurance premiums." *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 71 Cal. Rptr. 2d 882, 891 (Cal. Ct. App. 1998) (quoting *J.G. Aguerre, Inc. v. Am. Guar. & Liab. Ins. Co.*, 68 Cal. Rptr. 2d 837, 844 (Cal. Ct. App. 1997)). Courts have been "slow to impose upon an insurer liabilities beyond those called for in the insurance contract. To create exposure to such risks except [in] the most extreme circumstances would . . . be detrimental to the consuming public whose insurance premiums would surely be increased to cover them." *Newton v. Standard Fire Ins. Co.*, 229 S.E.2d 297, 303 (N.C. 1976).

Berges v. Infinity Insurance Company, 896 So. 2d 665 (Fla. 2004), offers insights into the public policy implications of bad faith litigation. In *Berges*, an insurer accepted an offer of settlement within the time period prescribed by the insured, but the insured revoked the offer prior to court approval of the settlement and payment by the insurer. *Id*. at 680-82. The Court concluded that these facts supported a jury finding of bad faith. *Id*. In dissent, Justice Wells recognized the harmful consequences to insureds of increasingly burdensome bad faith litigation:

> Just as it is an obvious truth that "there is no free lunch," likewise, there is no free liability insurance. It is an undeniable fact which

> follows logic and common sense that bad faith judgments against insurers drive up the premium costs for all insureds, particularly for insureds who purchase low-limits liability insurance policies.

Id. at 686. He elaborated on the nature of liability insurance:

> Liability insurance is a pool of money. The pool is filled by premiums and drained by claims. When an insured purchases and pays premiums on $20,000 of insurance but the insurer pays $2.5 million in claims, someone has to fill up the pool. Initially, this amount may come out of an insurer's profits, but eventually the someones are the other insureds, whose premiums are increased.

Id. Noting that "many Floridians are dependent upon the availability of low-limits insurance policies" for their automobiles, *see* § 324.021, Fla. Stat. (2008), Justice Wells cautioned that the Court's decision would "have a future adverse impact on Florida citizens who need to have this insurance at affordable rates," *Berges*, 896 So. 2d at 686. It was the responsibility of the Court "to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts." *Id*.

It is equally the responsibility of the Court to reserve bad faith claims to circumstances in which the insured suffers that injury against which the common law was intended to guard: excess liability. The extension of bad faith litigation to any and all assertable injuries—real or pretended—regardless of the liability of the insured for an excess judgment, would expose insurers to a new and ever-present threat of expensive litigation; multiply the number of adverse judgments, as well as

settlements, based upon expediency, of meritless bad faith claims; and impair the affordability of needed insurance for Florida's citizens and businesses alike.

B. The Court Should Decline to Extend Common Law in Light of the Sweeping Public Policy Implications of an Extension.

"The common law may be altered when the reason for the rule ceases to exist, or when change is demanded by public necessity or required to vindicate fundamental rights." *United States v. Dempsey*, 635 So. 2d 961, 964 (Fla. 1994). Plainly, no public necessity or fundamental rights demand that this Court confer a cause of action for bad faith upon insureds who are not subject to excess liability. On the contrary, weighty and conflicting considerations of public policy argue strongly for judicial deference to the legislative branch.

This Court has repeatedly declined to modify the common law where the proposed modification involved public policy considerations better assessed by the Legislature. In *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985), the Court declined to create a cause of action for loss of the consortium of an injured parent. The Court noted the "need to properly circumscribe the cause of action so as to guard against the numerous considerations weighing against recognizing such actions" and held that, "if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause." *Id*. at 307.

Similarly, in *Shands Teaching Hospital and Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986), this Court refused to extend against wives the common law

cause of action that holds derelict husbands liable to third parties who provide "necessaries" such as food and shelter to a neglected spouse. The Court found two considerations controlling. First, it concluded that "the issue is one with broad social implications, the resolution of which requires input from husbands, wives, and the public in general." *Id*. at 646. Second, the Court recognized that, "of the three branches of government, the judiciary is least capable of receiving public input and resolving broad public policy questions based on a societal consensus." *Id*. The judiciary was not "the proper institution to resolve this issue." *Id*.

Shortly thereafter, in *Barr v. State*, 507 So. 2d 175 (Fla. 3d DCA 1987), the Court declined to extend the defense of recantation from criminal perjury, where it aided the "search for truth," to a charge of official misconduct founded upon the filing of false police reports. The Court reasoned that extension of the defense of recantation is a "question of public policy" and recognized that the Legislature "is entrusted with, and better equipped to handle, decisions concerning public policy matters." *Id*. at 176. Citing *Zorzos*, the Court held that "the decision to extend the common law defense of recantation to the offense of official misconduct is a public policy matter which should be left to the legislature." *Id*.

In *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987), this Court refused to create a common law cause of action against social hosts who serve alcoholic beverages to minors. While the imposition of civil liability on social hosts might

be "socially desirable," it was replete with "broad ramifications." *Id*. at 1387. As in *Smith*, the Court recognized that "the legislature is best equipped to resolve the competing considerations implicated by such a cause of action." *Id*. The Court also noted the enactment of a statute imposing liability upon *vendors* who sell to minors, holding that, "when the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch." *Id*.

In *Walt Disney World, Co. v. Wood*, 515 So. 2d 198 (Fla. 1987), a jury allocated one percent of the fault for an injury at its grand prix attraction to Walt Disney World, but the Court entered judgment against Disney for 86 percent of the damages. Disney asked the Court to abolish the doctrine of joint and several liability, but the Court deferred to the Legislature: "In view of the public policy considerations bearing on the issue, this Court believes that the viability of the doctrine is a matter which should best be decided by the legislature." *Id*. at 202. The Legislature acted promptly to require the entry of judgment on the basis of each party's percentage of fault. *See* § 768.81(3), Fla. Stat. (2008).

Finally, in *Horne v. Vic Potamkin Chevrolet, Inc*., 533 So. 2d 261 (Fla. 1988), the Court declined to adopt a provision of the Second Restatement of the Law of Torts that purported to impose liability upon the sellers of motor vehicles under a theory of negligent entrustment. Because the proposed change was imbued

with "broad implications" that required "input from the various interests involved and a societal consensus," the Court found it "highly desirable that this new policy be developed by the legislature rather than the courts." *Id*. at 262. The Court held that the Legislature was most capable of evaluating the relevant and conflicting considerations that weighed for and against the imposition of liability.

The same principles apply here. Long ago, this Court recognized a cause of action for bad faith in the third-party context, but it has never countenanced the sweeping imposition of liability against insurers absent liability against the insured. Nor should it do so now. The superior ability of the Legislature to consider and balance disparate views and competing interests in a matter of widespread social and economic concern recommends judicial restraint. The judicial branch is ill-equipped—especially in the present, non-evidentiary proceeding—to evaluate comprehensively all possible and probable ramifications of its decision for:

- the cost and volume of actual and threatened insurance litigation, including judgments and settlements;
- the price which Floridians of all economic conditions will be obliged to pay for mandatory insurance;
- the limits of coverage which Florida citizens and businesses will maintain if the price of insurance increases;
- the basic attractiveness and competitiveness of Florida's insurance market as compared to those of others states;
- the ability of this state to attract and retain business enterprise if it creates an environment singularly hostile to liability insurers; and

- of particular present relevance, the already fragile statewide economy.

In addition, as this Court recognized in rejecting the suggestion that the scope of coverage be interpreted in accordance with the reasonable expectations of the insured, a departure from contractual language "can only lead to uncertainty and unnecessary litigation." *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998). For the same reason, every addition or extension of extra-contractual obligations undermines the reliance interests of contracting parties, creates uncertainties and ambiguities that encourage posturing and gamesmanship, and paves new avenues of costly litigation. The Legislature is best suited to measure the benefits and burdens of the proposed change in law.

As in *Bankston*, the Legislature has actively entered the field of insurance bad faith. In 1982, it enacted Section 624.155, Florida Statutes, which adopted and implemented a model act promulgated by the National Association of Insurance Commissioners relating to improper insurance practices. *Ruiz*, 899 So. 2d at 1126. In doing so, the Legislature "created a statutory first-party bad faith cause of action for first-party insureds," eliminating the historic distinction in bad faith litigation between the first- and third-party contexts. *Id*. While the statute does not preempt the common law action, *see* § 624.155(8), Fla. Stat. (2008), it demonstrates the Legislature's capacity and willingness to address the policy questions here.

Finally, as in *Zorzos*, it would be impossible to "circumscribe" the cause of action which the Court is asked to create. Appellant concedes that an excess judgment is an essential predicate to an insured's bad faith claim, but argues that a judgment against the *excess insurer* satisfies this predicate. But there is no reason in logic or common sense to extend the cause of action to an insured who is *not* subject to liability, solely because the judgment was absorbed by two insurers and not one. According to Appellant, if two juries returned two $1.5 million verdicts against different insureds, one of whom purchased two policies from two different insurers of $1 million each, and the other of whom purchased a single policy of $2 million, the former should be permitted to recover damages such as attorney's fees and emotional distress, while the latter should not. This result makes no sense. The consequence of adopting Appellant's position would be to open the door to bad faith litigation in every case, whether or not liability reached the insured. This broad extension of bad faith litigation should be left to the Legislature.

II. THE LIABILITY OF THE INSURED IS A MINIMUM PREDICATE TO THE MAINTENANCE OF AN ACTION FOR BAD FAITH.

In virtually every jurisdiction of the United States, the liability of the insured for an amount exceeding the policy limits is an essential element of a bad faith cause of action. The uniformity of the law across jurisdictions supports the position that Florida likewise requires liability on the part of the insured. But it also illustrates an important public policy consideration: that Appellant's position

would place the public policy of Florida in contrast to the policy of other states, threatening Florida's ability to compete in the national marketplace for insurance.

In *A.W. Huss Company v. Continental Casualty Company*, 560 F. Supp. 513 (E.D. Wis. 1983), an insurer failed to settle a claim within the limits of two policies it had issued, and, after litigation commenced, settled for the full limits. *Id*. at 514. The insured sued, alleging that the insurer's bad faith forced it to retain litigation counsel, inflicted business damage, and prompted it to seek bankruptcy protection. *Id*. The Court concluded that the insured suffered "no legally cognizable damage" because the alleged damages "were not the kind of damages contemplated in connection with a bad faith insurance claim." *Id*. at 515. "The insurer must be allowed room to maneuver. If its maneuverings cross the line into bad faith, the insured will have a claim if it is harmed by an excess judgment." *Id*. The Seventh Circuit affirmed. *See A.W. Huss Co. v. Cont'l Cas. Co.*, 735 F.2d 246 (7th Cir. 1984). Noting that "all litigation . . . results in some detriment," the Court held that the "bad faith claim lacks that element upon which Wisconsin bad faith claims . . . are predicated—the insured's liability for an excess judgment." *Id*. at 253, 256.

In *Finkelstein v. 20th Century Insurance Company*, 14 Cal. Rptr. 2d 305 (Cal. Ct. App. 1992), the insured believed that an excess judgment was inevitable and therefore settled a suit within the policy limits, voluntarily contributing $6,700 to the settlement. *Id*. at 305-06. The Court, however, affirmed the entry of

summary judgment against the insured in subsequent bad faith litigation, holding that, because "there was no judgment in excess of the policy limits, [the insured's] cause of action never matured." *Id*. at 930. The mere possibility that the insurer's bad faith would result in damage to the insured was not actionable. *Id*.

In a frequently cited decision, an insurer settled for the policy limits, but only after it allegedly refused a reasonable settlement and failed adequately to represent the interests of the insured, requiring the insured to retain independent counsel. *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 653-54 (Md. 1994). The insured sued to recover attorney's fees and expenses, arguing that "it is inequitable to make an excess verdict a prerequisite" to a bad faith action. *Id*. at 654, 656. The Court rejected this argument: "It is generally held that if a liability insurer acts improperly in defending the insured it may become liable to the insured for the amount of judgment obtained against the insured which is in excess of the policy limits." *Id*. at 658. Thus, the "damage to the insured generally will be any excess judgment." *Id*. The Court expressly declined to "extend" the cause of action to cases in which the insured is not subject to liability, finding it "unreasonable to allow an insured, dissatisfied with the progress of settlement negotiations, to retain counsel . . . and then to require the insurer to reimburse the insured for the cost of that counsel." *Id*. at 659. It held that the cause of action does not accrue "prior to the entry of a judgment against the insured in excess of policy limits." *Id*.

In *Jarvis v. Farmers Insurance Exchange*, 948 P.2d 898 (Wyo. 1997), the insured sued for bad faith, claiming as damages attorney's fees incurred and other monetary and emotional damages sustained prior to the settlement of claims within the policy limits. *Id*. at 899. Thus, the "sole issue" was "whether an insured must plead the existence of a judgment in excess of policy limits as a prerequisite to a claim of third-party bad faith against an insurer." *Id*. at 900. The Court answered affirmatively. Rejecting the view that a judgment against the insured is "merely one type of damage which can be recovered in a third-party bad faith action," *id*. at 900-01, the Court, citing *Campbell*, refused to "build a new road to insurer liability," *id*. at 901. It held, on the contrary, that a cause of action for bad faith "will not accrue prior to the entry of a judgment against the insured." *Id*. at 902.

Recently, in *Mathies v. Blanchard*, 959 So. 2d 986 (La. Ct. App. 2007), an insured claimed that the insurer arbitrarily failed to settle claims within the policy limits, and sued for bad faith before an excess judgment had been entered. *Id*. at 987. The Court held that her suit was premature. In reliance on a "consistent line of reasoning" in other states, the Court held that a bad faith cause of action "does not arise until the entry of a judgment against the insured in excess of the policy limits. It is the entry of the judgment . . . in excess of the policy limits that harms

the insured." *Id*. at 988-89.[2] Similarly, in *State ex rel. American Home Insurance Co. v. Seay*, 355 So. 2d 822, 824 (Fla. 4th DCA 1978), the Court concluded that a bad faith claim was not ripe until the excess judgment was affirmed on appeal.

> Until such time as the . . . judgment becomes final, vis-a-vis appellate review, the [insured] has not been injured because its cause of action has not ripened and the [insured] should not be allowed to litigate its bad faith claim. Should the judgment be reversed and a new trial granted, resulting in judgment within the policy limits, the [insured] would have no cause of action for bad faith.

As *Seay* demonstrates, even the entry of a judgment against the insured in excess of the policy limits does not give rise to a cause of action unless the liability of the insured is real and final. *Accord Evans v. Mut. Assurance, Inc*., 727 So. 2d 66, 67-68 (Ala. 1999) (holding that no cause of action for bad faith arises where insurer voluntarily satisfies the excess liability, notwithstanding insured's allegations of "emotional distress, humiliation, damage to his reputation, and loss of business").

[2] The imperative of liability on the part of the insured is illustrated by a line of cases holding that the statutory limitations period for a bad faith cause of action does not begin to run until entry of an excess judgment, *see, e.g., John Beaudette, Inc. v. Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77, 108 (D. Mass. 1999) ("Logically, an insured does not experience appreciable harm until there is a judgment in excess of the policy limits." (citation omitted)), or until that judgment is affirmed on appeal, *see, e.g., Hartford Accident & Indem. Co. v. Cosby*, 173 So. 2d 585, 590 (Ala. 1965). This is so even where the insured purportedly suffered damages, such as the payment of a bond on appeal, prior to affirmance of the excess judgment. *See Am. Mut. Ins. Liab. Co. of Boston, Mass. v. Cooper*, 661 F.2d 446, 448 (5th Cir. 1932).

Likewise, in *Kricar, Inc. v. General Accident Fire and Life Assurance Corp., Ltd.*, 542 F.2d 1135 (9th Cir. 1976), the injured party secured a judgment against the insured in an amount three times the policy limit. While the insured's bad faith action was pending, the insurer satisfied the judgment and obtained a release in the insured's favor. The Court affirmed the entry of summary judgment against the insured, holding that the insurer's satisfaction of the judgment "negates any finding of bad faith" and that, since the insured's "action for compensatory damages fails, the request for consequential and punitive damages must also fail." *Id*. at 1136.

Federal Insurance Company v. Travelers Casualty and Surety Company, 843 So. 2d 140 (Ala. 2002), not only supports the same principle, but is especially relevant to this case, where the insured, though subject to no excess liability, seeks to assert bad faith on the ground that the excess insurer was liable. There, after entry of a $4.5 million verdict, the parties agreed to a settlement under which the primary insurer paid $1 million and the excess insurer paid the remainder. *Id*. at 142. The excess insurer argued that the insured was entitled to assert a bad faith claim against the primary insurer, and that the excess insurer might be subrogated to that claim. *Id*. at 141-42. The Court disagreed, finding that a bad faith cause of action "does not exist where the insured is subject to no personal loss." *Id*. at 144. Because the insured is without a claim "against an insurer where the insured is never subject to a final judgment ordering the payment of money that the insured

personally—and not his insurer—would have to pay, equitable subrogation is not available to an excess insurer whose insured is subject to no such final judgment." *Id*. at 145 (marks omitted). By analogy, here, an insured that is not subject to liability is without a cause of action despite the liability of the excess insurer.

Additional precedents make clear that, to support a bad faith claim, the insured must personally be subject to a valid obligation to pay. In *Romstadt v. Allstate Insurance Company*, 59 F.3d 608 (6th Cir. 1995), the insured settled for $125,000—five times the policy limit—but secured a release in her favor and assigned her bad faith claim to the injured party. The trial court concluded that, although the settlement amount exceeded the policy limits, the release insulated the insured from liability. *Id*. at 611. As a result, she had no bad faith claim to assign. *Id*. The appellate court agreed. The "whole point of [the insured's] entry into the agreement was to insulate herself from any personal financial liability." *Id*. at 614. The Court held that "an injured third party cannot sue the insurer directly, or via assignment, for bad faith refusal to settle in the absence of an *adjudicated* excess judgment against the insured." *Id*. at 615 (emphasis in original).

Other courts have held that a bad faith action is unavailable to an insured who, though exposed to an excess judgment, secures a covenant not to execute. In *Willcox v. American Home Assurance Co.*, 900 F. Supp. 850 (S.D. Tex. 1995), the insured agreed to a $10 million settlement—far in excess of the limits of both the

primary and excess policies—and secured a covenant from the injured party not to enforce against the assets of the insured. *Id*. at 854. The injured party, as assignee of the insured, sued for bad faith, but the Court rejected the claim. The covenant not to enforce secured the insured from actual liability and negated the right of the assignee to recover in excess of policy limits. *Id*. at 859; *accord Childress v. State Farm Mut. Auto. Ins. Co.*, 239 N.E.2d 492, 496 (Ill. App. Ct. 1968) (holding that assignee had no cause of action where the insureds were "fully and effectively insulated" from liability by a covenant not to execute). There was no assertion in *Willcox*, moreover, that the exposure of the *excess insurer* to liability beyond the limits of the primary policy established the *insured's* right to sue for bad faith.

An insured's liability for an excess judgment is an insufficient basis for a bad faith claim if that liability is discharged in bankruptcy. *See Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627 (2d Cir. 1961) (holding that an excess judgment of which the insured was subsequently discharged in bankruptcy was not an actual injury to the insured and did not give rise to a cause of action for bad faith).

One court has gone still farther, holding that, even where an insured is exposed to an excess judgment, no bad faith claim arises to the extent the excess judgment is uncollectible. In *Frankenmuth Mutual Insurance Co. v. Keeley*, 461 N.W.2d 666 (Mich. 1990), the Court on rehearing adopted the dissenting opinion in *Frankenmuth Mutual Insurance Co. v. Keeley*, 447 N.W.2d 691, 699 (Mich.

1990), which concluded that, while an insured need not satisfy its liability before it may sue for bad faith, the "insurer should not be required to pay more than the insured is *able* to pay on the judgment." *Id*. at 703 (emphasis added). An increase in the insured's liabilities, if those liabilities will never be satisfied, is insufficient to establish the actual harm that underlies an action for bad faith. *Id*. at 704.

These cases demonstrate that, to be entitled to sue for bad faith, an insured must personally be subject to actual—not nominal—liability. In other words, the insured must be subject to a binding obligation to pay which is final and which has not previously been satisfied by another, released, negated by a covenant not to enforce, discharged in bankruptcy, or defeated by the insured's inability to pay. The reason is obvious: the cause of action for bad faith was intended to remedy real and tangible injuries to insureds in the shape of damaging excess liability. To extend that cause of action beyond those limits would leave Florida virtually alone in authorizing bad faith claims in each and every case, without exception.

CONCLUSION

The Court should decline Appellant's invitation to revolutionize the public policy of this state by judicial decree. The extension of the cause of action for bad faith to insureds with no liability is out of line with prevailing law and threatens adverse consequences to Florida's citizens and businesses. Appellant's request for a dramatic extension of existing law should be addressed to the Legislature.

AMENDED CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States Mail on March 19, 2009, to the following:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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