IN THE SUPREME COURT OF FLORIDA

CASE NO: SC08-1968

PAMELA PERERA

Appellant,

v.

UNITED STATES FIDELITY
& GUARANTY COMPANY,

Appellee.
______________________________/

APPELLEE UNITED STATES FIDELITY & GUARANTY COMPANY'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Introduction

This Court's answers to the questions certified by the Eleventh Circuit Court of Appeal will have a profound and far-reaching impact upon not only Appellee, United States Fidelity & Guaranty Company ("USF&G"), but upon insurance carriers and insureds throughout Florida. This Court has continuously concluded that in the absence of an excess judgment, an insured, or in this case the assignee of an insured, cannot maintain a bad faith action against an insurance carrier. This conclusion is consistent with unwavering precedent, logic, general legal principles, and fundamental fairness.

Appellant, Pamela Perera, as assignee (the "Assignee") of Estes Express Lines, Inc. (the "Insured"), now seeks to change the entire scope of Florida law in a way that will improperly subject USF&G to bad faith liability and open the proverbial floodgates to an unprecedented wave of bad faith litigation. The answer to the certified questions is clear: in the absence of an excess judgment or the increased risk of exposure to liability in excess of available insurance, a bad faith cause of action against an insurance carrier by an insured does not exist.

Furthermore, while this Court has the inherent authority to examine the certified questions and restate them as the Court may deem appropriate, the Assignee is attempting to relitigate facts that have been established in prior rulings from the United States District Court and affirmed by the Eleventh Circuit Court of

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Appeal. Specifically, the Assignee requests the Court to completely ignore the Eleventh Circuit's factual findings that the Insured neither suffered an excess judgment nor faced even the risk of uninsured exposure due to any conduct by USF&G. The Court should reject the Assignee's attempt to circumvent the questions certified and should address the questions in light of the facts developed over several years of litigation, two jury trials, post-trial motions, two separate briefing efforts before the Eleventh Circuit and, most recently, the Assignee's Petition for Panel Rehearing, which the Eleventh Circuit denied without even requiring a response.

The Facts

This case began when the Assignee's husband tragically died during an on-the-job accident while working for the Insured. Because it was undisputed that the Insured enjoyed worker's compensation immunity, the Assignee sued the Insured predicated upon intentional acts designed to result in injury or death or substantially certain to result in injury or death (USF&G's Ex. 4 at par. 16).[1] The Assignee expressly cited authority for the proposition that a lawsuit predicated upon intentional conduct evades worker's compensation immunity from suit. *Id*. citing *Eller v. Shova*, 630 So. 2d 537 (Fla. 1993); *Myrick v. Luhrs Corporation, etc. et. al.*, 689 So. 2d 516 (Fla. 5th DCA 1997) and, in a subsequent complaint,

[1] Citations to exhibits are to the trial exhibits, filed collectively at R296.

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Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000) (USF&G Ex. 6 at par. 13). In *Turner*, this Court concluded that a complaint against an employer alleging either intentional misconduct or conduct substantially certain to result in injury or death is tantamount to an intentional tort, overcomes worker's compensation immunity, and allows an employee to sue for damages.

As the Assignee explained in her Initial Brief, the Insured held three separate insurance policies: a commercial general liability policy issued by Cigna, which insured the employees but not the Insured (the "Cigna Policy"); the Excess Worker's Compensation Policy issued by USF&G which only covered the Insured and not its employees (the "USF&G Policy"); and the excess policy issued by Federal Insurance Company, more commonly known as "Chubb" (the "Excess Policy") which provided coverage to both the employees and the Insured and provided $25,000,000 in excess coverage (I.B. at 4-5).

Although the Assignee refers to USF&G as a primary insurance carrier throughout her Brief, this is not accurate. The USF&G Policy was an excess worker's compensation policy, which stood as an excess over the Insured's self-insured retention of $350,000 and provided no duty to defend (R168:12-13 at pars. 9a, d). Similarly, the Cigna Policy provided no duty to defend and had a $500,000 deductible and only covered the Insured's employees – not the Insured (R168:12-13 at par. 9g). It is undisputed that the Insured defended itself using its own attorney throughout the litigation between the Assignee and the Insured.

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As is customary in insurance policies in Florida, the USF&G and Cigna Policies contained exclusions for intentional conduct resulting in injury or death (312:74, Jan. 17, 2008 PM), and the Excess Policy incorporated those provisions by reference (308:22, Jan. 15, 2008 PM). Therefore, when the Insured notified USF&G about the lawsuit predicated upon intentional acts, USF&G issued a Reservation of Rights letter and cited the intentional act exclusion (313:139-40, Jan. 18, 2008 AM; USF&G's Ex. 8). Similarly, both Cigna and Chubb issued reservation of rights letters on the same basis (311:57, 59, Jan. 17, 2008 AM; USF&G's Ex. 23, 36).[2]

Although USF&G issued the Reservation of Rights letter and had no duty to defend, it consistently stayed involved by requesting information and updates and advised the Insured early during the course of the litigation that USF&G wanted to attend any mediation (311:63-66, 107-08, Jan. 17, 2008 AM; USF&G's Ex. 17, 20, 22, 25, 28, 30, 35). However, the Insured remained resolute in its intention to vigorously defend the lawsuit and told USF&G that it intended to "fight [liability] like hell" (312:35, Jan. 17, 2008 PM; USF&G's Ex. 69 at 3). It is undisputed that for nearly three years, the Insured defended itself and even expressed a belief that it would prevail on summary judgment against the Assignee (USF&G's Ex. 25, 69, 70). The Insured did not request USF&G's participation – monetary or otherwise

[2] The USF&G policy was issued by Discover Re, its authorized representative and wholly-owned subsidiary (309:107-08, Jan. 16, 2008 AM). Thus, Discover Re addressed issues pertaining to this policy.

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– or telegraph any desire to settle the dispute with the Assignee (312:71-72, Jan. 17, 2008 PM).

Nonetheless, on the morning of the only mediation, which took place on March 28, 2001, nearly three years after the Assignee sued the Insured, the Insured's insurance broker, a self-appointed advocate for the Insured, discussed the possibility of some contribution by USF&G toward global resolution, despite the fact that the lawsuit remained predicated upon intentional misconduct (312:117-18, Jan. 17, 2008 PM).[3]

As the Assignee explains in her brief Cigna and Chubb, in accordance with its role as an umbrella carrier that provided coverage to both the Insured and its employees, announced that they would provide coverage and contribute toward a global settlement (I.B. at 6). Nonetheless, incensed by USF&G's desire to address outstanding coverage issues rather than simply tendering the full policy limits, and

[3] USF&G's representatives explained that in addition to the allegation of intentional misconduct, because the USF&G Policy only covered the Insured and not the employees, it was important to determine which measure of liability would be apportioned against the employees and under what circumstances coverage would be provided (312:52, Jan. 17, 2008 PM). This was significant because the Assignee sued the employees for gross negligence, a lower standard than the intentional misconduct alleged against the Insured, and it was undisputed that USF&G did not cover the employees (R168: at 12-13 par. 9f). As USF&G's attorney, Richard Byrne, would ultimately explain to a jury, the distinct standards of proof decreased the likelihood that the Insured would be found liable while at the same time increased the chances of liability against the individual employees because the Assignee faced a higher burden of proof in her lawsuit against the Insured (314:17, 21-22, Jan. 18, 2008 PM).

despite the fact that the Insured had never before asked USF&G to tender anything toward the lawsuit, various mediation participants, including the Insured's attorneys, demanded or acquiesced in the demand that USF&G leave the mediation (312:112, 124-29, Jan. 17, 2008 PM; USF&G's Ex. 60 at par. 4). USF&G left the mediation room and was never asked to return, but the case did not settle that day (312:127-29, Jan. 17, 2008 PM).

In the months that followed, and despite the lack of resolution at mediation, USF&G continued to make efforts to stay involved in communication toward possible resolution (314:36-44, Jan. 18, 2008 AM). However, the Assignee, the Insured, Cigna, and Chubb negotiated and reached a global settlement agreement that would completely resolve the controversy well within existing coverage limits and eliminate any threat of exposure to the Insured, but which was aimed at creating a bad faith claim against USF&G (USF&G's Ex. 60 at pars. I(1), I(4), I(11), II(3)). Notably, while the parties were negotiating the Stipulation to Settle, albeit without advising USF&G that a bad faith claim was being crafted against it, Chubb engaged in direct negotiations with USF&G in an attempt to settle the conflict (311:114-15, Jan. 17, 2008 AM; USF&G's Ex. 48). For example, on July 30, 2001, Chubb's agent, Catherine Blackman, sent correspondence directly to Richard Byrne, counsel for USF&G, thanking him for his participation and confirming that USF&G would be willing to participate up to $100,000, and expressly advising USF&G that Chubb would negotiate directly with counsel for

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the Assignee in order to resolve the lawsuit. *Id*.

In further communication between Chubb and USF&G, Chubb indicated that it would assume the lead in negotiating and resolving the controversy and warned USF&G that it may face a contribution action brought by Chubb (313:29-30, Jan. 18, 2008 AM; USF&G's Ex. 55).[4] USF&G's agent testified at trial that he knew that Chubb would settle the lawsuit against the Insured, thereby protecting the Insured from any exposure, and then Chubb and USF&G would resolve the insurance dispute directly (313:29-30, 111-12, Jan. 18, 2008 AM). As the Eleventh Circuit concluded, the record undisputedly established that Chubb had agreed that it would settle the lawsuit against the Insured without preconditions, thereby fully protecting the Insured from any uninsured exposure. *Perera v. USF&G*, 544 F.3d 1271, 1277 (11th Cir. 2008). Chubb never indicated that it would reduce policy limits or eliminate remaining coverage represented by the Excess Policy, or that the Insured would be required to tender $1,000,000 in order to "trigger" Excess Policy coverage.

On August 7, 2001, in accordance with Chubb's announced intent to settle, Chubb's agent emailed the Assignee's counsel and offered $4.25 Million as a

[4] In separate correspondence from Chubb's counsel dated August 2, 2001, Chubb indicated that USF&G's position could be deemed to be in bad faith. This letter, which Chubb – not the Insured – sent more than three years after the lawsuit and mere days before the case settled, is the first time that the term "bad faith" was used to describe USF&G's coverage position (314:50, Jan. 18, 2008 PM; Assignee's Ex. 23).

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global settlement sum (USF&G's Ex. 55). Chubb's agent sent a copy of that email to USF&G and specifically indicated therein that a dispute remained regarding USF&G's obligations. But three days later, the Assignee's counsel sent a letter to the Insured's counsel with a copy to Chubb's agent, but not to USF&G's agent, identifying terms of resolution that varied dramatically from those identified in the email to USF&G's agent three days earlier (USF&G's Ex. 57). Rather than the $4.25 Million settlement contemplated in the prior correspondence copied to USF&G, the Assignee and the Insured entered into a Stipulation to Settle, albeit without notifying USF&G, that contained very different terms and potentially dire consequences.

<u>The Stipulation to Settle</u>

The Stipulation to Settle ("Stipulation") created an unrecorded judgment in the amount of $10,000,000 in favor of the Assignee and against the Insured and its employees (USF&G's Ex. 62 at 4-5). It called for the immediate payments by Chubb and Cigna (along with the Insured's deductible obligations) totaling $5,000,000 and the assignment of any claims that the Insured would have had against USF&G. *Id*. at 4-7. The Assignee agreed that she would accept, in full satisfaction of her claims against the Insured and its employees, the $5,000,000 regardless of the outcome of any subsequent lawsuit against USF&G and would ultimately issue a satisfaction of judgment to the Insured and its employees. *Id*. at 6.

The Assignee further agreed to execute a full release to the Insured and its employees regardless of the outcome of the lawsuit against USF&G (USF&G's Ex. 62 at 6). The Assignee also released Chubb (USF&G's Ex. 66). On the other hand, the Insured did not release Chubb. *Perera,* 544 F.3d at 1274. In her Initial Brief, the Assignee posits that the settlement documents eliminated any possible exposure to Chubb from either the Assignee or the Insured (I.B. at 9). This is flatly incorrect and the Eleventh Circuit expressly rejected this assertion because it is undisputed that the Insured did not release Chubb from further coverage or execute any document reducing the remaining $21,000,000 in coverage benefits. *Perera*, 544 F.3d at 1274. As the Eleventh Circuit held, "The provision requiring [the Assignee] to accept the proceeds of the USF&G suit as full satisfaction of her judgment also served to protect [the Insured] and the employees from any additional liability to [the Assignee]. **However, neither [the Insured] nor its employees released Chubb from further liability**." *Perera,* 544 F.3d at 1274 (emphasis added). Thus, the Eleventh Circuit concluded, "**As a factual matter**, we agree with USF&G that **[the Insured] 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 Chubb coverage with limits of $25 million**." *Perera,* 544 F.3d at 1277 (emphasis added).

It is undisputed that neither Chubb's agent nor the Insured's counsel advised USF&G's agent that the parties executed the Stipulation, despite USF&G's

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continuous efforts to discuss resolution in the months that followed the unsuccessful mediation (313:31-36, Jan. 18, 2008 AM). Meanwhile, as contemplated by their Stipulation, the Insured and the Assignee attended a circuit court hearing where, without notice or opportunity to be heard by USF&G, the circuit court approved the Stipulation as drafted (Assignee's Ex. 8). USF&G did not learn about the existence of the Stipulation, the $10,000,000 judgment or the bad faith claim until the Assignee sued USF&G (313:40-41, Jan. 18, 2008 AM).[5]

The bad faith claim against USF&G

When the Assignee sued USF&G for breach of contract and for bad faith, USF&G defended itself on multiple grounds, including the intentional act exclusion as to the breach of contract action, and the absence of any excess judgment. USF&G also asserted that it did not act in bad faith when no Florida court imposed a coverage obligation on an insurer for intentional misconduct or conduct substantially certain to result in injury or death alleged in order to evade

[5] In her Initial Brief, the Assignee contends that USF&G stipulated to the $10,000,000 judgment as reasonable (I.B. at 8). This is not presented in the proper context. USF&G stipulated **at trial following remand by the Eleventh Circuit (in 2007-08)** that USF&G would not challenge the reasonableness of the settlement sum in order to avoid trial testimony from the Assignee (R223:25, 31-32; 306:15, Jan. 14, 2008 PM). It is undisputed that USF&G did not attend and had no notice of, the hearing where the circuit court approved the $10,000,000 sum (313:40-41, Jan. 18, 2008 AM). This trial stipulation has nothing to do with the issues on appeal.

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worker's compensation immunity when the subject policy contained an intentional act exclusion (USF&G's Answer Brief, Eleventh Circuit, July 17, 2006 at 39-42).

The August 22, 2003 Report and Recommendation

USF&G moved for summary judgment, asserting, among other things, the absence of an excess judgment (R37:8-9 at pars. 24-25; R63:10-11). When the Magistrate Judge first addressed the parties' summary judgment motions, she deferred ruling on the existence of coverage based upon the intentional act exclusion when juxtaposed with the Assignee's allegation that the Insured engaged in intentional conduct substantially certain to result in injury or death (R73:12). The Magistrate Judge observed that no Florida case addressed the coverage issue and coincidentally, a factually analogous situation was then pending before this Court based upon a question certified by the Eleventh Circuit in *Travelers Indemnity Co. v. PCR, Inc.,* 326 F.3d 1190 (11th Cir. 2003) (R73:9).

Rather than address the coverage question or intentional injury exclusion while the certified question remained pending, the Magistrate Judge indicated that "a ruling on this issue is premature and this court recommends that a decision be deferred pending the Florida Supreme Court's decision answering the certified questions in *Travelers*" (R73:9-10). The Magistrate Judge recognized the existence of decisions from other states cited by both sides regarding the coverage issue in light of the intentional injury exclusion and allegations of intentional conduct, but decided to wait until this Court addressed this dispositive and unresolved issue

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(R73:12).

But the Magistrate Judge did at that time decide the bad faith claim in USF&G's favor based upon the lack of an excess judgment against the Insured (R73-22, 24). Specifically, the Magistrate Judge concluded that the Assignee could not sue USF&G for bad faith when the Insured still had $21,000,000 in coverage available from Chubb and, as the Assignee and the Insured agreed in their Stipulation, the Insured would never face any uninsured exposure (R73:25). The District Judge adopted the Report and Recommendation and administratively closed the case file pending disposition of *Travelers* (R79).

On December 9, 2004, this Court answered the certified question in *Travelers Indem Co. v. PCR Inc.,* 889 So. 2d 779 (Fla. 2004) and held, in a divided opinion, that a worker's compensation policy containing an intentional injury exclusion nevertheless extended coverage to a claim brought under the substantially certain standard articulated in *Turner*. In that decision, Justice Bell, writing for the majority, concluded that the insurer's decision to question coverage under identical circumstances facing USF&G in this case was a reasonable one. *Id.* at 786. Justice Wells on the other hand, writing for the three dissenters, opined that a finding of coverage under a worker's compensation policy containing an intentional act exclusion when a plaintiff sued an employer for intentional misconduct or conduct substantially certain to result in injury or death was incompatible with common sense and logic. *Id.* at 797.

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In light of this Court's decision in *Travelers*, the District Court reopened the case for further consideration. The parties agreed that *Travelers* addressed and resolved the overriding coverage question relating to the intentional act exclusion (R103:8-9). The District Court entered judgment for the Assignee on the coverage issue, and USF&G paid its $1,000,000 policy limits to the Assignee, leaving only the bad faith issue open for consideration by the Eleventh Circuit. *Id*. at 9-11.[6]

On appeal, USF&G asserted that an insurer should not be found to have acted in bad faith when the threshold coverage question not only remained unresolved under Florida law, but actually resulted in a split decision on the precise coverage question (USF&G's Answer Brief, Eleventh Circuit, July 17, 2006 at 39-42). USF&G asserted that it could not be found to have acted in bad faith when it advanced the identical argument that resulted in this Court's decision in *Travelers*. *Id*. at 40. The Eleventh Circuit concluded, however, that this issue would be relegated to a jury as a factual finding and remanded the case for consideration (R129). After the first trial ended in a hung jury, a second jury found that USF&G acted in bad faith (R288). Despite USF&G's request, the Magistrate Judge would not allow the jury to hear testimony regarding this Court's dissent in *Travelers* where three Justices believed that a finding of coverage under identical circumstances as those facing USF&G defied logic and common sense (R219:3-4),

[6] The district court also concluded that the Assignee could recover despite collecting worker's compensation benefits (R103:11-17).

or testimony from the Insured's Vice-President of Safety or from the Insured's insurance broker, who both testified that they did not believe that USF&G acted in bad faith or treated the Insured unfairly (314:4-5, Jan. 18, 2008 PM).

Following expedited briefing relating to the jury proceedings, the Eleventh Circuit issued its Opinion affirming the Magistrate Judge's post-trial motions and the jury's verdict, *Perera*, 544 F.3d at 1274, n.1; certified the questions at hand, *Id*. at 1276, 1279; and expressly held that, as a factual matter, the Insured never faced an excess judgment or any increased risk of uninsured liability in excess of its various policies of insurance due to any conduct by USF&G. *Id*. at 1275, 1277.

Additionally, the Eleventh Circuit, in no uncertain terms, rejected the Assignee's claim that it faced a risk of exposure to punitive damages or that any so-called threat of punitive damages would even be considered in the context of the certified question. *Perera*, 544 F.3d at 1277, n.4. The Eleventh Circuit held that the Assignee waived this issue entirely, despite multiple opportunities to advance it. *Id*. But the Eleventh Circuit noted that notwithstanding the waiver, it would not change the outcome because, based upon a complete review of the appellate record and facts developed, USF&G did nothing to increase the risk of liability outside available coverage. *Id*. This is supported by Chubb's agent's testimony that Chubb was prepared to settle the case without regard for USF&G's participation, and the Insured's Vice-President of Safety who testified that the Insured had no concern that it would face personal liability or uninsured exposure

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(R46:118). The Assignee filed a Petition for Panel Rehearing which attempted to reargue the punitive damages issue, challenged the factual findings rendered by the Eleventh Circuit, and sought to rewrite the certified questions. *See* the Assignee's Petition for Rehearing, filed October 27, 2008. The Eleventh Circuit denied the Petition for Panel Rehearing without requiring USF&G to respond. *See* Order denying the Assignee's Petition for Rehearing, entered December 15, 2008.

SUMMARY OF ARGUMENT

The Court should answer the certified questions in the negative, and eliminate any doubt that an excess judgment remains the essence of a bad faith claim against an insurer or, alternatively, if an actual "judgment" against an insured is not required, a bad faith action will not lie if an insurer's conduct does not increase the risk of liability in excess of available insurance policy limits.

This Court has consistently concluded that the essence of a bad faith claim is an excess judgment, and this legal tenet is deeply-rooted in the well-established principle that an individual must suffer damages in order to state a cause of action. The Eleventh Circuit noted multiple decisions from this Court for this established conclusion. *Perera*, 544 F.3d at 1276 (citing *Berges v. Infinity Ins. Co.,* 896 So. 2d 665, 672 (Fla. 2004), *Rosen v. Fla. Ins. Guar. Ass'n,* 802 So. 2d 291, 294 (Fla. 2001) (citing *Fid. Ins. Co. v. Cope,* 462 So. 2d 459, 460 (Fla. 1985)); *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181-82 (Fla. 1994); *State Farm Fire & Cas. Co. v. Zebrowski,* 706 So. 2d 275, 277 (Fla. 1997).

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However, the Eleventh Circuit identified two district court decisions as raising confusion. *Perera*, 544 F.3d at 1276 (citing *N. Am. Van Lines v. Lexington Ins.,* 678 So. 2d 1325, 1333 (Fla. 4th DCA 1996); *Swamy v. Caduceus Self Ins. Fund, Inc.,* 648 So. 2d 758, 759 (Fla. 1st DCA 1994)). As explained herein, this Court's stance on this pivotal issue has never wavered, and a bad faith claim cannot be advanced by the insured in the absence of an excess judgment. To the extent decisions from the Fourth or First District Courts of Appeal have caused confusion, they are distinguishable and do not announce a shift in Florida's commitment to established precedent. But as USF&G will demonstrate herein, both decisions actually support USF&G's position by reiterating the threshold requirement that an insured suffer exposure to damages in excess of available insurance coverage as a prerequisite to a bad faith claim. Accordingly, the Court should utilize this case as an opportunity to eliminate any further confusion as to this significant issue.

Moreover, the facts of this case justify this Court's commitment to precedent and exemplify the danger that exists if a plaintiff and defendant can simply manufacture a bad faith claim by agreeing upon a settlement sum or judgment against an insured that is within available policy limits, yet still open the door to a bad faith lawsuit by the insured or the insured's assignee against the insurer. USF&G had no duty to defend but consistently sought updates and attempted to participate in settlement negotiations; however, the Assignee and the Insured,

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along with other carriers, crafted the Stipulation without USF&G's involvement and created a phantom judgment on paper. The judgment is within the Insured's available insurance coverage and, pursuant to the Stipulation, can never be enforced regardless of the outcome of the lawsuit against USF&G. Therefore, as the Eleventh Circuit concluded, the Insured will never face uninsured exposure. Allowing the Insured to nonetheless assign a bad faith claim under these circumstances is inconsistent with the purpose of bad faith litigation, which serves to compensate an insured that suffered uninsured exposure to damages. The Insured never faced exposure beyond policy limits, but nonetheless offered the Assignee a separate bad faith claim against USF&G as a bargaining chip. If insureds need not face excess exposure, or even the risk of liability beyond available coverage as a prerequisite to the ripening of a bad faith claim, Florida courts will be inundated with manufactured bad faith lawsuits against insurance carriers where a defendant-insured neither suffered nor faced uninsured exposure, but simply assigned a bad faith claim on paper as a matter of convenience and settlement leverage.

The Court should also reject the Assignee's blatant attempts to revisit established facts. The Eleventh Circuit held, as a factual matter, that the Insured never faced either an excess judgment or any increased risk of uninsured liability due to USF&G's conduct, and that Chubb, at all relevant times, indicated its intent to resolve the case without preconditions or risk to the Insured and in fact did so.

Perera, 544 F.3d at 1277. It is also established beyond dispute that the Insured did not release Chubb or otherwise eliminate remaining coverage of $21,000,000. *Id*. at 1274-77. The Assignee attempts to reargue these facts rather than addressing the legal questions presented. The Court should reject the Assignee's attempts to reargue facts under the guise of recasting the certified questions.

Finally, if the Court concludes that an excess judgment is not *per se* required against an insured in order to support a bad faith lawsuit by the insured against a carrier, the Court should answer the Eleventh Circuit's second question in the negative and conclude that, at the very least, the insurer's conduct must increase the risk of liability beyond an insured's various policy limits as a prerequisite to a bad faith claim. Neither logic nor law suggests that an insurer whose conduct did not increase the risk of an insured's liability to uninsured exposure should nonetheless be sued by the insured for bad faith. This case presents the paradigm for answering the Eleventh Circuit's second question in the negative. The Assignee's claim is pure artifice. It is a trumped-up judgment that, by its own terms, can never be enforced against the Insured and nonetheless falls within existing insurance coverage. The Assignee's argument seeks to pave the way to scores of bad faith lawsuits by insureds or their assignees that do not serve to compensate for any actual damage, but simply create bad faith claims as a matter of convenience. This Court should conclude that when an insurer does nothing

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that increases the risk of an uninsured liability to an insured, the insured cannot sue for bad faith.

ARGUMENT

USF&G will address each question independently, noting that this Court's resolution of either one in the "negative" will eliminate any bad faith liability against USF&G in light of the established fact that the Insured did not suffer an excess judgment and no action by USF&G increased the risk of liability in excess of the Insured's various policies of insurance.

I. AN EXCESS JUDGMENT REMAINS THE ESSENCE OF A BAD FAITH CLAIM UNDER FLORIDA LAW.

The first question the Eleventh Circuit posed to the Court is:

> Can a cause of action for bad faith against an insurer be maintained [by the insured or its assignee] when there is not an excess judgment against the insured?[7]

The answer is no. This Court has consistently concluded that an excess judgment is the essence of a bad faith claim against an insurer. *Macola v. Gov't Employees Ins. Co.,* 953 So. 2d 451 (Fla. 2007); *Berges,* 896 So. 2d at 672, *Rosen,* 802 So. 2d at 294 (citing *Cope,* 462 So. 2d at 460); *Cunningham*, 630 So. 2d at 181-82; *Zebrowski,* 706 So. 2d at 277. As this Court expressly held in *Camp v. St. Paul Fire,* 616 So. 2d 12, 14 (1993). "The insurer breaches its duty if it fails to act

[7] USF&G respectfully suggests that adding the bracketed terminology more accurately presents the thrust of the question certified by the Eleventh Circuit without changing its scope.

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in good faith **and the third party obtains a judgment against the insured for an amount in excess of the policy coverage**." (Emphasis added). It has long been established that if an insured does not suffer an excess judgment, a bad faith claim does not exist.

A. The Insured did not suffer an excess judgment.

The Assignee devotes the bulk of her brief to rearguing whether the Insured actually faced an excess judgment. According to the Assignee, the Court should conclude that if an insured faced a judgment that is larger than the limits offered by the insurer accused of bad faith but still within all available insurance coverage, this constitutes an excess judgment. Asking the Court to revisit this established fact is an unnecessary distraction and inappropriate. *See Auto Owners Ins. Co. v. Pozzi v Window Co.,* 984 So. 2d 1241 (Fla. 2008) (declining to address issues beyond a question certified by the Eleventh Circuit Court of Appeal when it was based upon factual issue to be resolved in the federal arena); *Hawkins,* 748 So. 2d 993, 997, n.5 (Fla. 1999) ("We decline to address the standing and treble damages issues raised by Ford and the *amici curiae* arguing in support of the position taken by Ford, as those issues are outside the scope of the certified question **and already have been squarely addressed by the Eleventh Circuit**.") (Emphasis added). As the Honorable Rosemary Barkett observed in a concurring opinion in *Tucker v. Dep't of Corrections,* 301 F.3d 1281, 1286 (11th Cir. 2002), the Florida Supreme Court's inherent authority to address issues beyond questions certified "certainly

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does not describe certified question proceedings as a forum for the relitigation of all claims." Although the Eleventh Circuit already dispensed with this factual question, USF&G will address it succinctly so that the Court may focus on the certified question without distraction.[8]

As a threshold matter, the Assignee's assertion is inconsistent with the very Stipulation that created the bad faith claim because the Insured and the Assignee expressly recognized that the Insured did not suffer an excess judgment and never will (USF&G's Ex. 62 at 6). This presents the Assignee with an insurmountable hurdle that completely supports the Eleventh Circuit's conclusion. Regardless, when it comes to ascertaining the definition of an "excess judgment" this Court is not writing on a blank slate. In cases apparently overlooked by the Assignee, this Court has defined "excess judgment" in a way that supports the Eleventh Circuit's conclusion and devastates the Assignee's position. As this Court explained, "**An excess judgment is defined** as the difference between **<u>all available insurance coverage</u>** and the amount of the verdict recovered by the injured party." *United Services Auto. Assoc. v. Jennings,* 731 So. 2d 1258, 1259, n.2 (Fla. 1999) (emphasis added). *See also Black's Law Dictionary* at 859 (Bryan A. Garner, 8th

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[8] *See also Major League Baseball v. Morsani*, 790 So. 2d 1071, 1080 n.26 (Fla. 2001) ("We decline to address the other claim ... because it is outside the scope of the certified question and was not the basis of our discretionary review. As a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution.").

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ed., West 2004) ("Excess Judgment – *Insurance*. A Judgment that exceeds **all** of the defendant's insurance coverage.") (Emphasis added).

The existing definition correctly focuses on injury to the insured, rather than the alleged transgression of a primary insurance carrier that does not expose an insured to liability. *Jennings*, 731 So. 2d at 1259 (citing *McLeod v. Continental Ins. Co.,* 591 So. 2d 621 (Fla. 1992) (emphasis added). In *McLeod,* which was superseded by statute on alternative grounds not relevant to the definition of "excess judgment", this Court noted that in both the first and third-party contexts, the insured must suffer damages in the form of an excess judgment to state a cause of action for bad faith. As this Court explained in *McLeod,* "[t]hird-party actions do not allow for the recovery of the excess judgment **in cases in which the insured is not damaged by the excess liability**." *Id.* at 624-25 (emphasis added).[9]

As explained in more detail below, the excess judgment requirement is consistent with the premise that without damages, a cause of action does not exist. Not surprisingly, no Florida court has ever suggested that an insured suffered an excess judgment and held the right to sue for bad faith when an excess carrier, rather than the insured itself, paid toward a claim due to a primary carrier's failure to settle within its own policy limits.

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[9] *See Time Ins. Co., Inc. v. Burger,* 712 So. 2d 389, 392 (Fla. 1998) (noting that *McLeod* has been overturned only to the extent that Section 627.727(10), Fla. Stat., authorized the recovery of the excess judgment in first party bad faith actions against uninsured motorist insurance carriers).

B. The Insured remains protected by excess insurance coverage that eliminates any risk of personal liability.

The Assignee next dispenses with the foregoing theory entirely and argues that even if the excess layer of coverage is considered when addressing whether an insured has suffered an excess judgment, the Insured in this case did suffer an excess judgment because Chubb "cash[ed] out" by settling the lawsuit against the Insured and eliminating existing coverage (I.B. at 11). The Assignee makes this assertion the lynchpin of its argument relating to both certified questions, but has neither factual nor legal support for this bold assertion. Indeed, the Eleventh Circuit expressly rejected this identical argument. *Perera*, 544 F.3d at 1274, 1277. Moreover, there is nothing in the factual record supporting the Assignee's argument that the parties intended for Chubb to eliminate any further available coverage for the Insured.

Indeed, it is clear and beyond dispute that the Insured **never released** Chubb (and never had any reason or obligation to do so). *Perera*, 544 F.3d at 1274. Moreover, nothing in the record supports the argument that Chubb (or any of the parties) intended to reduce Chubb's available policy limits. On the contrary, the Insured's counsel expressly testified that he did not believe that the Insured would be precluded from going back after Chubb if the Insured became liable for the remaining $5,000,000 identified in the Stipulation (R51:159). Also, Chubb's agent, who testified at trial, never suggested that Chubb eliminated remaining coverage to

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the Insured or that reducing policy limits constituted a condition of settling the lawsuit between the Assignee and the Insured. Furthermore, the Assignee completely ignores the fact that once Cigna tendered its policy, Chubb had an obligation to provide coverage because Chubb, as an umbrella carrier, insured over both USF&G and Cigna.[10]

The Assignee next contends that although the Insured did not execute a release in Chubb's favor, Chubb no longer has any liability because the Insured no longer has any liability. Specifically, the Assignee argues that "**[b]y eliminating any possibility that [the Insured] could have further personal liability to [the Assignee],** the parties to the settlement also eliminated the possibility that [the Insured] would have any further claim against Chubb arising out of [the Insured's] claim." (I.B. at 9) (emphasis added).

USF&G agrees that the Insured had no personal liability, and this concession by the Assignee not only eviscerates her argument, but reinforces USF&G's entire premise that an excess judgment or uninsured exposure is the *sine que non* of a bad faith claim.

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[10] Significantly, because the Cigna Policy provided coverage the employees who were sued for gross negligence, Cigna did not face the same coverage issue facing USF&G (USF&G's Ex. 6). The Assignee expressly sued the Insured for intentional misconduct, thereby potentially activating the intentional act exclusion. Therefore, coverage was a clearer question for Cigna than for USF&G, as this Court would ultimately establish in the *Travelers* decision.

The Stipulation makes very clear that the Assignee's "judgment" has been fully satisfied by payment of the $5,000,000 already received (USF&G's Ex. 62). The Assignee expressly guaranteed that regardless of the outcome of her lawsuit against USF&G, she will provide a satisfaction of judgment and forfeit any further recovery (USF&G's Ex. 62 at 6). Also, the Stipulation does not eliminate or undermine Chubb's continuing coverage obligation for an additional $21,000,000 in coverage, and whether any excess exists is obviously determined at the point when a "judgment" is entered. Stated simply, the Assignee cannot have it both ways. If, as the Assignee now concedes, the Insured was not subject to any personal liability, and insurance proceeds (minus the Insured's deductible in the Cigna Policy and self-insured retention in the USF&G Policy) completely satisfied the Assignee's claim and eliminated exposure to the Insured, then there is no excess judgment and no further claim for Chubb to insure against.[11] On the other hand, if the Insured did face additional responsibility for the remaining $5,000,000 announced on paper (which it undisputedly does not), then Chubb is equally liable

[11] In its Opinion, the Eleventh Circuit held that the full sum contributed by the Insured remained its obligation because of the deductible and the self-insured retention under the Cigna and USF&G policies. *Perera,* 544 F.3d at 1277, n.3. This is consistent with the testimony from the Insured's Vice-President of Safety, who stated that the Insured never faced personal exposure beyond the self-insured retention (314:13, Jan. 18, 2008 PM). Therefore, the record supports the Eleventh Circuit's factual conclusion that the Insured's faced no uninsured exposure.

for providing coverage because the Insured never released Chubb, and Chubb never eliminated the remaining $21,000,000 in coverage under the Excess Policy.

An insured's right to sue for bad faith arises when the insured suffers damage due to an excess judgment and, without damage, no cause of action exists. The Stipulation completely eliminates any liability against the Insured, and the Excess Policy protects the Insured from any exposure. This case exemplifies the basis for the rule because, as the Assignee concedes, the Insured never faced personal liability and never will.

C. *Cope* and its progeny remain good law for the proposition that an insured cannot sue for bad faith if an insured does not suffer an excess judgment or if an insurer does not increase the risk of liability beyond available insurance coverage.

Having established that the Insured did not suffer an excess judgment, the Court should reaffirm its commitment to established precedent and conclude that without an excess judgment no bad faith claim can be advanced by an insured. In *Cope*, this Court resolved a conflict between the Second and Fifth District Courts of Appeal and held that the "essence" of a bad faith lawsuit against an insurance carrier is that the insurer breached a duty which "results in the insured being exposed to an excess judgment." *Id.* at 460 (citing *Kelly v. Williams*, 411 So. 2d 902 (Fla. 5th DCA 1982), *rev. den.*, 419 So. 2d 1198 (Fla. 1982)).

In *Kelly*, like the case at hand, an insured settled with the plaintiff and purported to assign any potential bad faith claim to the plaintiff and against the

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insurer. *Id*. at 903. But the Fifth District noted that the parties stipulated to a sum that would never exceed the policy limits set forth in the insurance policy and, therefore, the insured did not face an excess judgment. *Id*. at 904. As the Fifth District observed, "[u]nder the arrangement stipulated to by the parties in this case, the insured could not be exposed to an excess judgment under any circumstances. If one was obtained, the insured was entitled to a 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*. The circumstances in *Kelly* are remarkably similar to the circumstances in this case, and by approving *Kelly* and resolving the conflict, this Court highlighted the excess judgment requirement as a fundamental prerequisite to a bad faith claim.

The Court reiterated this conclusion in *Shuster v. South Broward Hosp. Dist., etc*., 591 So. 2d 174 (Fla. 1992), when a physician sued his insurance carrier for bad faith for settling a claim within policy limits, rather than continuing to defend the claim, causing Shuster's claimed inability to maintain malpractice insurance, damage to his reputation, and inability to produce income. *Id*. at 176. But the Court concluded that despite pleading collateral damages, the insured could not sustain a bad faith claim because Shuster's insurer resolved the claims within policy limits. *Id*. at 177, n.3; 178.

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As recently as 2007, the Court reiterated this principle. In *Macola, supra,* a decision not mentioned by the Assignee, the Court concluded that the tender of policy limits after a civil remedy notice deadline expired did not vitiate a potential bad faith claim because it did not eliminate exposure to an excess judgment. As the Court observed, "[f]urther, 'the **essence** of a third-party bad faith cause of 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.'" *Id.* at 458 (citing *Cunningham,* 630 So. 2d at 181 and *Cope*, 462 So. 2d at 460) (emphasis added).

The Assignee asserts that this Court's well-settled proposition in *Cope* that an excess judgment is the essence of a bad faith claim has been narrowed by this Court in *Rosen*. This overstates the impact of *Rosen* and overlooks cases both before and after *Rosen* which reiterate the excess judgment requirement, such as *Berges, Cunningham, Zebrowski, and Macola, supra*. When examining *Rosen* in light of the foregoing, it is evident that this Court did not supersede or overrule *Cope* for the proposition at hand, but merely clarified it regarding the timing of an assignment of a potential bad faith claim. However, while *Rosen* clarified *Cope*, it did not retreat from the oft-cited principle that an excess judgment constitutes a prerequisite to a bad faith claim.

In *Rosen*, which is not even a "bad faith" case, the plaintiff and an insured settled a lawsuit for a small portion of a remaining dwindling policy, which

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deducted litigation costs from available coverage. *Id*. at 293. The Court considered whether the settlement agreement between the plaintiff and the Florida Insurance Guaranty Association, which stepped in when the insurer became insolvent, constituted a release of the insured and the insurer from all further liability. *Id*. at 295. The Court did not examine whether an excess judgment constituted a necessary element of a bad faith claim, but focused solely upon whether the documents exchanged constituted a release. Ultimately, the Court concluded that the settlement agreement was not a release, but merely a covenant not to sue, and thus that the parties intended the lawsuit against the Florida Insurance Guaranty Association to survive. According to *Rosen*, because the parties did not intend to release the insured, the insurer's responsibility continued. *Id*. at 295.

But contrary to the Assignee's argument, nowhere in *Rosen* did the Court dispense with the excess judgment prerequisite to a bad faith claim, which is the fundamental issue for which the District Court cited *Cope*, and it is well settled that "this Court does not intentionally overrule itself *sub silentio*." *State v. Ruiz*, 863 So. 2d 1205 (Fla. 2003). In describing *Cope*, this Court in *Rosen* stated, "Our holding in Cope was a narrow one – '**if an excess judgment has been satisfied**, absent an assignment of that cause of action prior to satisfaction, a third party cannot maintain action for a breach of duty between an insurer and its insured.'" *Id.* at 294 (citing *Cope*, 462 So. 2d at 461) (emphasis added). Contrary to the

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Assignee's analysis, this Court's conclusion necessarily presupposes the existence of an excess judgment. Otherwise, the timing issue regarding the assignment of the claim would never even arise.

Also enlightening is the *Rosen* Court's treatment of *Cunningham*, which the Eleventh Circuit aptly cited as supporting USF&G's position on the certified questions. *Perera*, 544 F.3d at 1276. In *Rosen*, the Court cited *Cunningham* and noted that therein, the parties agreed that the insured would not be exposed to an excess judgment. *Rosen*, 802 So. 2d at 297. The *Rosen* Court neither narrowed nor overruled *Cunningham*, but instead cited it approvingly, observing, "[a]s we clarified in *Cunningham*, the key with regard to whether *Cope* applies is whether the underlying claim continues to exist after the settlement agreement." *Rosen*, 802 So. 2d at 297. This supports USF&G's contention that *Rosen* did not overrule or supersede *Cope* on the critical issue now facing the Court.

Once again, by reading *Cope*, *Cunningham*, and *Rosen* together, it is apparent that the underlying tenet that remains constant is the need for an excess judgment. Moreover, this Court's more recent recitation of this rule in *Berges*, 896 So. 2d at 680, n.10 (noting that insurer has duty to advise insured of settlement proposals within policy limits to avoid the risk of an excess judgment and distinguishing cases where insureds settled within policy limits) and *Macola, supra,* lend further support to USF&G's contention that this Court has consistently

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followed *Cope* for the proposition that an excess judgment remains the *sine que non* of a bad faith claim.

The Assignee also attempts to distinguish *Cunningham* and *Zebrowski* by asserting that such cases involve situations where the insured only enjoyed coverage from a single, primary layer (I.B. at 16). This is yet another attempt to sidestep overwhelming Florida law and avoid the question certified by examining an excess situation vis-à-vis the primary layer of coverage rather than all available insurance coverage. Again, the Insured never faced an excess judgment, and the Eleventh Circuit expressly rendered this factual finding. *Perera*, 544 F.3d at 1275-76. But logically, and as explained in greater detail below, the foregoing Florida authorities have only examined bad faith claims advanced by an insured against a single insurer because when an excess insurance carrier insulates the insured and satisfies the excess exposure, it is the excess carrier – not the insured – that has standing to sue for bad faith. It is therefore not surprising that no Florida case supports the unique theory the Assignee advocates.

D. The cases referenced by the Eleventh Circuit as causing confusion are distinguishable and do not undermine this Court's precedent.

The Eleventh Circuit expressed confusion as to whether this Court would still require an excess judgment as a prerequisite to a bad faith claim based upon two district court decisions: *North American Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325 (Fla. 4th DCA 1996) and *Swamy v. Caduceus Self Ins. Fund, Inc.*,

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648 So. 2d 758, 759 (Fla. 1st DCA 1995). Upon detailed analysis, however, both cases clearly support USF&G's contention that an excess judgment or, at the very least, an increase in the risk of liability above policy limits due to conduct by the insurer, is a prerequisite to a bad faith claim by an insured.[12]

In *North American Van Lines*, the Fourth District reinstated a bad faith lawsuit that the trial court dismissed, tailoring its decision to the "facts of this case" which the court accepted as true for purposes of evaluating the order of dismissal. *Id*. at 1327. In its complaint, the insured alleged that, as a result of both its primary and excess carriers' refusal to settle a claim, it paid the balance of a settlement sum that should have been covered by insurance – $7,000,000 – and its excess carrier paid the rest. *Id*. at 1328. As part of its bad faith claim, the insured sought reimbursement of the funds it paid to resolve the claim out of its own pocket which, the insured alleged, it would not have been obligated to pay if the insurers settled. *Id*. In concluding that the insured could maintain the bad faith claim, the Fourth District held, "No excess judgment is required, because the

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[12] Despite certifying the question in this case, in *Federal Ins. Co. v. Nat'l Union Fire Ins. Co. of Pitt.,* 298 Fed. Appx. 845 (11th Cir. 2008), an unpublished opinion, the Eleventh Circuit affirmed a summary judgment in favor of a primary carrier and against an excess carrier on a bad faith claim because the settlement documents in that case, like the one at hand, eliminated the risk of an excess judgment against the insured. *See also May v. Illinois Nat. Ins. Co.,* 190 F.3d 1200, 1202 (11th Cir. 1999) (concluding that recovery of damages on a bad faith claim against an insurance company is barred unless a judgment against the insured exceeds policy limits) (citing *Swamy,* 648 So. 2d at 759 and *Cope,* 462 So. 2d at 461).

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insured has paid an obligation for which the insurers should have been liable, had they not breached the contract." *Id*. at 1333.

But despite the foregoing language, which caused the Eleventh Circuit's confusion, the Fourth District expressly recognized two critical points. First, an excess judgment signifies the point at which the insured suffers injury. *Id*. at 1333. As the Fourth District explained, "[m]oreover, the practical reason underlying the requirement of an excess judgment in standard liability insurance cases is that **until the insured is personally exposed to liability, the insured suffers no damages**." *Id* (emphasis added). Second, the court rationalized that even in the absence of an adverse judgment, uninsured exposure remains the lynchpin of a bad faith claim. As the Fourth District noted, "[a]lthough not argued by the parties, we think that . . . **this case presents an excess situation**. . . . [I]n a very real sense, the failure of the insurance company to pay a reasonable settlement exposed the insured to expenses of settlement and defense in **excess of the policy amounts**." *Id*. at 1333, n.4 (emphasis added). Clearly underlying the Fourth District's reasoning was actual excess exposure to the insured above policy limits, regardless of the actual entry of "judgment" against an insured.

North American Van Lines should be distinguished and limited or, alternatively, expressly denounced as an improper statement of Florida law. In essence, the Fourth District focused upon the concern that an actual "judgment" should not be required as a prerequisite to a bad faith claim when an insured was

required to pay millions of dollars to settle a case – a sum that went well beyond available coverage; however, the court recognized that a bad faith claim still requires the insured to suffer uninsured "exposure". This is clear by the Fourth District's rationalization that the case should really be characterized as an "excess situation". *North American Van Lines,* 678 so. 2d at 1333, n.5. In a dissenting opinion, Judge Polen foresaw the very confusion now expressed by the Eleventh Circuit when he cited *Cope* and its progeny and disagreed with general statements suggesting that the absence of an excess judgment was no longer required to sustain a bad faith claim. *North American Van Lines,* 678 So. 2d at 1334.

Additionally, *North American Van Lines* is completely distinguishable from the case at hand because the Eleventh Circuit concluded that nothing USF&G did resulted in any increased exposure against the Insured. *Perera*, 544 F.3d at 1277. The undisputed record demonstrated that the Insured had a duty to defend itself, did not request any contribution from USF&G for nearly three years, and had a self-insured retention of $350,000 (R168:12-13 at pars. 9a, d; 312:117-18, Jan. 17, 2008 PM). Similarly, the Cigna Policy had a $500,000 deductible (R168:12 at par. 9a). Therefore, as the Eleventh Circuit concluded, the Insured's contributions toward settlement were well within its obligation under the available policies of insurance. *Perera*, 544 F.3d at 1277, n.3. Thus, unlike *North American Van Lines,* this case presents neither an excess judgment nor an "excess situation".

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Moreover, the Fourth District clarified *North American Van Lines* in *RLI Ins. Co. v. Scottsdale Ins. Co*., 691 So. 2d 1095 (Fla. 4th DCA 1997). In *RLI,* the Fourth District explored the well-established proposition that an excess insurer can sue a primary insurance carrier for bad faith when the excess insurer is exposed to damages due to the primary insurer's conduct. But the *RLI* court noted, in *dicta* and relying upon *North American Van Lines,* that an actual "judgment" is not necessary in order for an excess carrier to sue a primary carrier.[13] But in *RLI,* the court cited *North American Van Lines* and strengthened the focus on the requirement that an insured (or an excess carrier) pay a sum – whether as a judgment or settlement – that is in excess of insurance coverage. *RLI,* 691 So. 2d at 1096 (citing *North American Van Lines* and observing that a "judgment" is not necessary for an excess carrier to sue a primary carrier when the parties settled for an amount that invaded the excess carrier's policy limits). *See also infra* at 40, n. 15.

The Fourth District's distinction between an excess judgment and excess exposure has no meaningful impact, however, because in either situation the Fourth District's analysis remains consistent with the premise that an insured must

[13] Additionally, the *RLI* court perceived the issue as novel, noting that "no Florida case has addressed this precise issue". *Id*. at 1096 (emphasis added). Of course, both the Fifth District in *Kelly* and this Court in *Cope* had already concluded that an insured could not sue an insurer in the absence of an excess judgment, so the Fourth District recognized the obvious distinction between an excess insurer and an insured for purposes of this analysis.

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suffer exposure to damages that are higher than available insurance coverage to sue for bad faith, even if not reduced to a "judgment". Regardless, the Fourth District's concern for requiring a "judgment" rather than focusing specifically on whether the insured faced exposure above available limits is ameliorated by a recent decision from the Fourth District which reiterates the excess judgment requirement. *Bland v. Cage,* 931 So. 2d 931 (Fla. 4th DCA 2006). In *Bland*, the Fourth District affirmed an order granting a motion to approve settlement and held that even if an insured is potentially subject to collateral injury, an insurer does not act in bad faith for settling a claim within coverage limits and avoiding an excess judgment. *Id*. at 933 (citing *Shuster,* 591 So. 2d at 175-76) Thus, like *Cope* and *Shuster*, the Fourth District in *Bland* confirms that in the absence of an excess judgment or exposure beyond available insurance coverage, an insured cannot state a bad faith claim.

Similarly, although the Eleventh Circuit cited *Swamy* as causing confusion regarding the excess judgment requirement, *Swamy* supports USF&G's position that an excess judgment remains a prerequisite to a bad faith claim, and the Court should expressly resolve any confusion on the impact of this case. In *Swamy* the First District affirmed summary judgment for an insurer against an insured who sued for lost profits and damage to reputation resulting from an excess judgment. *Id.* at 759. Specifically, the court considered whether an insured is limited to recover damages in an amount equal to excess exposure, which constitutes the

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measure of uninsured damages. *Id.* But in evaluating the measure of damages, the First District necessarily confirmed that unless and until an insured faces an excess judgment, there is no bad faith cause of action. Indeed, in the absence of an excess judgment, the issue confronting the First District – the measure of recoverable damages – would never even arise. As the court concluded:

> In the instant case, **once the excess judgment was satisfied**, Dr. Swamy's remaining damage claims consisted of alleged lost profits due to reduced referrals, and damage to his professional reputation. In essence, Dr. Swamy sought to recover for losses resulting from the **attendant negative publicity of the large excess judgment**. Such damages are, at best, an indirect consequence of Caduceus' failure to settle. More importantly, the loss of reputation and referral cannot be said to have been within the contemplation of the parties to the insurance contract. Presumably, Dr. Swamy procured insurance to protect himself from the serious risks involved in practicing medicine. Insured and insurer must have contemplated that the insurer's bad faith in failing to settle a claim could **jeopardize the insured's security by exposing him to an excess judgment. In such an event, the carrier could be liable for the amount of the excess judgment or damages resulting from execution.**
>
> *Swamy*, 648 So. 2d at 760-61 (emphasis added).

Significantly, the First District only evaluated the measure of recoverable damages once the insured suffered an excess judgment, and clarified that incidental damages are not relevant for purposes of discerning whether an insured suffered uninsured exposure. Thus, the two district court decisions that caused the Eleventh Circuit to certify this case do not suggest a departure from established precedent and actually support the principle that an excess judgment is the lynchpin of a bad faith claim. The Court should answer the first certified question in the negative and

return the case to the Eleventh Circuit Court of Appeals for affirmance of the judgment in USF&G's favor.

II. IF AN INSURER'S CONDUCT DOES NOT INCREASE THE POSSIBILITY OF AN INSURED'S EXPOSURE TO LIABILITY IN EXCESS OF THE INSURED'S AVAILABLE POLICY LIMITS, THEN NO BAD FAITH ACTION EXISTS.

A. The Insured has not suffered an excess judgment or any risk of uninsured liability due to USF&G's conduct.

The Eleventh Circuit's second certified question asks this Court to consider whether:

> Even if an excess judgment is not always required, can a cause of action for bad faith against an insurer [by an insured or its assignee] be maintained when the 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?[14]

Again, the answer is no. When an insured has not faced any increased risk of uninsured liability due to an insurer's purported bad faith, the insured suffers no damages and, therefore, a bad faith claim does not exist.

The Assignee not only avoids this question, but tacitly agrees with USF&G by devoting her entire brief to arguing that the Insured did face uninsured exposure and by championing Chubb's right to sue for bad faith as an excess carrier. The Assignee never argues that an insurance carrier, such as USF&G, that never

[14] USF&G respectfully suggests that adding the bracketed terminology more accurately presents the thrust of the question certified by the Eleventh Circuit without changing its scope.

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increases the risk of uninsured liability should nonetheless be liable for bad faith. Instead, she maintains that the Insured faced either an excess judgment or uninsured exposure. This simply disregards the Eleventh Circuit's findings and is incorrect. But more importantly, the Assignee's argument is enlightening because it completely supports USF&G's stance by exemplifying the very reason why an excess judgment remains the lynchpin of a bad faith claim and that an insurer that did nothing to increase the risks of uninsured liability cannot be sued for bad faith.

As noted above, it is axiomatic that a necessary element of any cause of action is damages. In *Hanna v. Martin*, 49 So. 2d 585 (Fla. 1950), this Court stated that the "fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation **commensurate with the loss sustained in consequence of the defendant's act** which [gave] rise to the action." *Id*. at 587 (emphasis added). *See also Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965) ("The primary basis for an award of damages is compensation [and] the objective is to make the injured party whole"). This premise of both contract and tort principles is equally applicable in the bad faith context, which follows principles of contract law. If the insured never faces the risk of increased exposure to uninsured liability it suffers no compensable damages and, accordingly, does not have the right to sue for compensation for a loss that did not occur. *See No Harm,*

No Foul: Why A Bad Faith Claim Should Fail When An Insurer Pays The Excess Verdict, 33 Tort & Ins. L.J. 1001 (Summer 1998).

Curiously, to support her argument, the Assignee focuses completely on the established principle that an excess carrier obtains the right to sue a primary carrier for bad faith when the primary carrier's conduct requires the excess carrier to pay toward a claim. Of course, it is crucial to note, as did the Eleventh Circuit in its Opinion, that Chubb has never sued USF&G for bad faith and did not assign a bad faith claim against USF&G. *Perera*, 544 F.3d at 1277, n.2. Therefore, the Assignee does not, and cannot, assert that she stands in the shoes of the excess carrier. On the contrary, the Assignee stands in the shoes of **the Insured – not of Chubb.** *Perera*, 544 F.3d at 1274.[15]

Although the Assignee holds no rights held by Chubb, in addressing both certified questions the Assignee argues that USF&G is complaining that the

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[15] The Assignee makes Chubb's rights a central theme throughout her brief. This case is not about an excess carrier's rights, but about an insured that never faced exposure because an excess carrier stepped in and eliminated any potential exposure. Furthermore, no evidence presented in this case has ever suggested that the lawsuit would settle for less than USF&G's policy limits or for less than the amount Chubb ultimately paid to settle the case. Indeed, Chubb's agent testified at trial that the value of the case was greater than USF&G's policy limit (309:39, 101, Jan. 16, 2008 AM). Therefore, whether Chubb could even sustain a bad faith claim is doubtful. *See Ranger Ins. Co. v. Travelers Indem. Co*., 389 So. 2d 272, 275 (Fla. 1st DCA 1980) (noting that an excess insurer can only prevail on a bad faith claim by establishing that case could have been settled within primary carrier's limits or for less than excess carrier paid). In light of *Ranger,* it is telling that Chubb never sued USF&G for bad faith.

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Assignee is simply pursuing a bad faith claim that Chubb could have pursued (I.B. at 40). The Assignee is mistaken because the excess carrier's right to sue a primary carrier for bad faith illustrates the principle that only the entity suffering actual injury has standing to pursue a bad faith claim, thereby solidifying USF&G's position and demonstrating why actual uninsured liability is a necessary prerequisite to a bad faith claim by an insured and that the Assignee, who stands in the shoes of the Insured, has no cause of action.

When an excess carrier pays toward a claim based upon a primary carrier's purported bad faith, it is the excess carrier that suffers exposure while the insured remains insulated. The Assignee reiterates, however, that the excess carrier's ability to sue a primary carrier for bad faith supports the assertion that Florida should define an excess judgment vis-à-vis each specific carrier's available limits rather than **all** available coverage, despite the definition articulated in *Jennings,* 731 So. 2d at 1259, n.2. The opposite is true. Under the doctrine of equitable subrogation, an excess insurer has the right to maintain a cause of action for damages resulting from the primary insurer's bad faith failure to settle the claim against their common insured because the excess carrier, and not the insured, suffered injury. *See Ranger*, 389 So. 2d at 275. *See also Phoenix Ins. Co. v. Florida Farm Bureau Mut. Ins. Co*., 558 So. 2d 1048, 1050 (Fla. 2d DCA 1990); *General Acc. Fire & Life Assur. Corp., Ltd. v. American Cas. Co. of Reading, Pa*., 390 So. 2d 761, 765 (Fla. 3d DCA 1980) ("Equitable subrogation principles permit

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the excess carrier to proceed against the primary carrier when the primary carrier's bad faith refusal to negotiate a settlement has caused the excess carrier to become liable for an excess judgment."). "Subrogation is the **substitution** of one person in the place of another with reference to a lawful claim or right." *Ranger*, 389 So. 2d at 274 (internal citations omitted, emphasis added). As the First District observed:

> When there is no excess insurer, the insured becomes his own excess insurer, and his single primary insurer owes him a duty of good faith in protecting him from an excess judgment and personal liability. If the insured purchases excess coverage, **he in effect substitutes an excess insurer for himself. It follows that the excess insurer should assume the rights as well as the obligations of the insured in that position.** *Id*. at 275 (emphasis added).

The excess insurer "stands in the shoes" of the insured and succeeds to the rights and responsibilities that the insured would normally have against the primary insurer. *See Phoenix Ins. Co.*, 558 So. 2d at 1050.

Once the excess carrier is subrogated to the rights of an insured, it assumes the rights and obligations thereof. Accordingly, when an excess carrier pays toward a claim that is greater than the primary carrier's policy limits, the excess carrier has standing to sue a primary carrier for bad faith. If, as the Assignee maintains, a judgment or settlement sum that is larger than primary insurance limits but within excess coverage allows an insured to sue for bad faith, primary carriers will inevitably and unfairly face two separate bad faith claims – one advanced by the insured, despite the absence of any damages, and a separate lawsuit from the

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excess carrier, which actually suffered exposure and stepped into the shoes of the insured under principles of equitable subrogation.

The Assignee cites *United States Fire Ins. Co. v. Morrison Assurance Co.,* 600 So. 2d 1147 (Fla. 1st DCA 1992) for the argument that bad faith must be examined solely by examining the limits of the insurer accused of bad faith, rather than all available coverage. But *Morrison* supports USF&G and rejects the Assignee's novel position by reinforcing the principle that the excess carrier has standing to sue and eliminates the insured's bad faith claim. As the *Morrison* court concluded, " . . . the primary insurer should be held responsible to the excess insurer for improper failure to settle, since the position of the latter **is analogous to that of the insured when only one insurer is involved."** *Id.* at 1151 (emphasis added). The *Morrison* Court astutely noted that "[w]hen **only one insurer** is involved", the insured retains the right to pursue a cause of action for bad faith because an excess judgment necessarily exposes it to liability. *Id*. There is no excess coverage to absorb damages above the primary layer of coverage and, therefore, no excess carrier to step into the shoes of the insured.

But the corollary of the pronouncement in *Morrison* is logically accurate and supports USF&G's position on the certified question. Just as an insured holds the right to sue for bad faith when it suffers an excess judgment because "only one insurer is involved", when **multiple** insurers are involved that provide extra layers of coverage, the insured is protected from personal exposure and, therefore, does

not suffer compensable damages. As the *Morrison* Court continued, relying upon *Continental Cas. Co. v. Reserve Ins. Co.,* 238 N.W. 2d 862 (Minn. 1976), "In the decision by the Minnesota court, upon which this court relied, the Minnesota court noted that if an insured purchases excess coverage, **he in effect substitutes an excess insurer for himself."** *Morrison,* 600 So. 2d at 1151 (emphasis added).

The Assignee contends that USF&G acted with the improper motive of forcing Chubb to settle the case without waiting for USF&G to tender its limits, suggesting that USF&G should not be rewarded for its behavior. However, the Assignee has not demonstrated how such "behavior" (which included issuing a Reservation of Rights letter based upon the intentional act exclusion, attending mediation but being asked to leave, and attempting to negotiate while the Insured and others worked out a bad faith settlement behind USF&G's back) did anything to increase the risk of exposure to the Insured. In fact, the Eleventh Circuit expressly rejected the Assignee's contention and concluded that USF&G's so-called bad faith did not increase the risk of uninsured exposure. Moreover, as the Eleventh Circuit noted, the Assignee is in no position to champion Chubb's rights, and whether the excess carrier held the right to sue USF&G is completely irrelevant to whether an insured or assignee of the insured can sue for bad faith. *Perera*, 544 F.3d at 1277, n.2.

Along these lines, the Assignee's contention that USF&G somehow "took advantage" of Chubb or forced it to settle is meritless. From a legal perspective

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Chubb and other excess carriers already enjoy protection because they can sue a primary carrier for bad faith or contribution if a primary carrier's conduct improperly implicates the excess policy. Therefore, existing Florida law alleviates any concern that a primary carrier will be shielded from responsibility if it acts improperly when its insured faces potential liability and an excess carrier contributes toward resolution.[16]

The Assignee again raises the specter of punitive damages, suggesting that the Insured did potentially face an uninsured damages judgment (I.B. at 22-23, n.3). However, the Eleventh Circuit held that the Assignee failed to advance an adequate argument relating to punitive damages in the briefs to the Eleventh Circuit, at oral argument, during trial on remand or through post-trial briefing. *Perera*, 544 F.3d at 1277, n.4. Having waived this issue before the Eleventh Circuit, the Assignee should not be allowed to inject it into this proceeding.

Nonetheless, punitive damages remain a red herring for two reasons. First, the Eleventh Circuit expressly concluded that, "**As a factual matter**, we agree with USF&G that **[the Insured] 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 Chubb coverage with limits of $25 million." *Perera*, 544 F.3d at

[16] Here, Chubb made a business judgment decision to resolve the case and elected not to sue USF&G for contribution or bad faith. Chubb does not now need the Assignee to advance an argument on its behalf, and the Assignee has no standing to do so.

1277 (emphasis added). USF&G's failure to tender its $1,000,000 policy limits at mediation – the first time the Insured ever sought any contribution from USF&G after three years of vigorously defending the lawsuit – did nothing to increase the risk of any exposure to the Insured. *Perera*, 544 F.3d at 1277. Therefore, the punitive damages issue has not only been waived, but is irrelevant.

Second, nothing in the record supports the Assignee's contention that Chubb demanded USF&G's $1,000,000 as a prerequisite to contributing toward resolution, despite the Assignee's consistent efforts to rewrite the facts of this case in a manner that disregards the Eleventh Circuit's conclusions.

The Assignee asserts that USF&G's stance on the Eleventh Circuit's certified question would require the Insured to suffer personal liability before a bad faith claim ripens and that an insured should not be required to "put its personal assets on the line in order to settle a case" (I.B. at 24, 28). Both of these comments reflect a fundamental misunderstanding of USF&G's argument and reveal the Assignee's goal of maximizing a litigant's opportunity to pursue bad faith claims without regard for the more appropriate objective of protecting insureds from uninsured exposure.

Indeed, the Assignee's suggestion that it should be easier for an insured to settle cases for a sum that is within policy coverage (thereby not putting "personal assets on the line"), but still retain the right to sue for bad faith, highlights the danger inherent within the Assignee's entire line of reasoning (I.B. at 28). If an

insured has the right to settle lawsuits with a plaintiff for a sum that is within coverage limits and satisfied by an insurer, allowing the insured or the insured's assignee to then sue for bad faith despite the absence of injury flies in the face of the requirement that a litigant suffer damages as a necessary element of any cause of action and will exponentially increase baseless litigation.[17]

The Assignee cites *Coblentz v. American Surety Co. of New York,* 416 F.2d 1059 (5th Cir. 1969) for the proposition that an insured retains the power to settle a lawsuit and assign a claim against an insurance carrier. But *Coblentz* and its progeny support USF&G and lend no support to the Assignee's contention. In *Coblentz,* a plaintiff sued a defendant-insured for negligence, and the insurer refused to tender a defense. Left to his own devices, the insured settled without involving the insurance carrier for a sum that fell within limits of available coverage. The Fifth Circuit concluded that because the insurer refused to defend,

[17] Regardless, the Assignee's concern is unfounded because Florida courts recognize that if an insurer has a duty to defend but fails to do so, an insured can agree to a judgment that is larger than policy limits and assign the bad faith claim in exchange for an agreement not to pursue the excess against the insured. For example, in *Shook v. Allstate Ins. Co.*, 498 So. 2d 498 (Fla. 4th DCA 1986) an insured whose carrier refused to tender a defense agreed to a judgment of $350,000 – well beyond the available $10,000 coverage under the policy. In exchange, the judgment holder agreed not to pursue the insured and to pursue the insurer in a bad faith claim. *Id.* at 498. But unlike this case and the Stipulation, the insured agreed to entry of a judgment well beyond all available coverage limits and did so without "putting its personal assets on the line" as the Assignee now portends (I.B. at 24, 28).

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the insured had the right to settle on terms and for an amount that would give rise to insurance coverage.

In *Coblentz* the insurer had a duty to defend and it is undisputed that no such obligation existed in this case. Therefore, unlike *Coblentz,* USF&G did not leave the Insured to its own devices. On the contrary, the Insured defended itself vigorously for nearly three years (USF&G's Ex. 15, 17, 18, 25, 69). Also, and unlike *Coblentz,* the Insured had multiple layers of coverage that insulated it from liability. But most importantly, *Coblentz* involved an action for existing insurance coverage based upon the settlement of a covered claim **within policy limits and gave rise to a claim for insurance benefits – not for bad faith.** As in *Coblentz,* the Assignee actually sued USF&G for breach of contract and, when the amorphous, unresolved insurance issue was resolved following this Court's conclusion in *Travelers,* USF&G paid the Assignee its $1,000,000 limits (313:48, Jan. 18, 2008 AM). But *Coblentz* does not authorize the Assignee's tactic in this case – settling for a sum that is within the Insured's coverage limits and obtaining the right to sue for both coverage **and** bad faith liability for millions more. This logic applies here and underscores the importance of answering the certified questions in the negative. The Assignee seeks a windfall for insureds by creating the paradoxical situation where the insured faces no exposure, but retains the right to sue for bad faith while, at the same time, the excess carrier that did absorb

liability and steps into the shoes of the insured, also possesses the right to sue the same carrier for the same alleged transgression.

Additionally, under the Assignee's construct, a defendant would have the ability to quickly settle with the plaintiff by assigning a "bad faith" claim without regard for actual damage or payment by the defendant. This is unsupportable from a legal or policy perspective, and this Court should reject it. Thus, if the Court ultimately decides that an excess judgment is not an absolute prerequisite to a bad faith claim in accordance with established precedent, it should answer the Eleventh Circuit's second certified question in the negative and conclude that if an insurer does nothing to increase the risk of liability beyond coverage limits, no bad faith action will lie.

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CONCLUSION

The Court should answer the certified questions in the negative and return the case to the Eleventh Circuit to affirm the judgment in favor of United States Fidelity & Guaranty Company.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

I certify that the foregoing Appellee's Answer Brief was prepared using Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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