IN THE SUPREME COURT OF FLORIDA

PAMELA PERERA, Appellant, v. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellee.	CASE NUMBER: SC08-1968

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

INITIAL BRIEF OF
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PRELIMINARY STATEMENT

Appellant, Pamela Perera, as personal representative of the Estate of Mitchell Kenneth Perera, refers to herself as "Perera." Perera refers to Estes Express Lines Corporation as "Estes."

Perera refers to Appellee, United States Fidelity and Guaranty Company, as "USF&G," and to its policy at issue as the "USF&G Policy;" to Federal Insurance Company, a member of the Chubb Group, as "Chubb," and to its policy at issue as the "Chubb Policy;" and to Cigna Property and Casualty Insurance Company as "Cigna," and to its policy at issue as the "Cigna Policy."

Perera designates references to the record on appeal by the prefix "DE" for docket entry, followed by the exhibit number (Ex.) and/or page number (p.) of the document. Trial exhibits which do not have a separate docket number are designated by the prefix "Pl. Ex." or "Def. Ex."

References to the Eleventh Circuit briefs will be designated as "USF&G 11th Cir. Br," or "Perera 11th Cir. Br.," followed by the page number of the reference.

STATEMENT OF THE CASE AND FACTS

I. Statement Of The Case.

Perera, as the assignee of Estes, filed a two-count complaint against USF&G in the Circuit Court for Hillsborough County, Florida (DE 2); USF&G removed the action to federal court (DE 3). Count I of Perera's complaint was for breach of contract and sought recovery of the $1 million policy limits of the USF&G Policy (DE 2, pp. 6-7). Count II of the complaint was for bad faith and sought recovery of the remaining $4 million balance due on a $10 million consent judgment in favor of Perera against Estes and certain of its employees (DE 2, pp. 7-10).

Both counts of the complaint were resolved in the trial court by summary judgment. Based on the magistrate's recommendation, the district court granted summary judgment to Perera on Count I, resolving the coverage issue in Perera's favor (DE 112, p. 2). USF&G did not appeal this judgment. However, the magistrate recommended that summary judgment be entered for USF&G on Count II of the complaint on the single ground that no excess judgment existed upon which to base a bad faith claim (DE 73, pp. 24-25). The district court adopted this recommendation and entered judgment in USF&G's favor on Count II (DE 112, pp. 1-2).

Perera appealed the adverse summary judgment. On February 27, 2007, the Eleventh Circuit issued an opinion indicating that it intended to certify the "no

excess judgment" issue to this Court for resolution. However, to insure that this represented the controlling legal issue in the case, the court first remanded the case to the district court for a factual determination as to whether USF&G had acted in bad faith. On January 22, 2008, following a one-week trial, a jury reached a verdict finding that USF&G's conduct constituted bad faith under Florida law (DE 288). USF&G filed post-trial motions for judgment notwithstanding the verdict and for a new trial (DE297, 298). These motions were denied by the district court (DE 320). The Eleventh Circuit then ordered additional briefing on the issues raised by USF&G's post-trial motions. On October 9, 2008, the Eleventh Circuit issued an opinion that affirmed the jury verdict and the district court's denial of USF&G's post-trial motions and certified two questions to this Court.

II. Statement Of The Facts.

Mitchell Kenneth Perera was working as a newly-hired employee of Estes, a large trucking company, when, on April 11, 1997, he was crushed to death when an unoccupied idling tractor, known as a "yard dog," spontaneously went into reverse while he was standing behind it. As a result of Mitchell Perera's death, Perera, as personal representative of her husband's estate, filed a damages suit in Florida circuit court against Estes and certain of its employees (DE 73, p. 2).

Perera subsequently filed an amended complaint in the state action to state a wrongful death claim for intentional acts designed to result in injury or death or conduct substantially certain to result in injury or death. Perera also filed a second amended complaint that added claims for punitive damages; the trial court made a judicial determination that there was a sufficient evidentiary basis for Perera to assert claims for punitive damages arising out of Mitchell Perera's death. *Id.*

The liability insurance potentially applicable to the Perera claim consisted of three policies. Estes had a workers compensation/employers' liability policy with USF&G that covered both workers compensations claims and claims asserted against Estes by its employees that fell outside the exclusive remedy provisions of the workers compensation law (DE 37, p. 2). The USF&G Policy covered only Estes; it did not provide coverage to the Estes employees who had also been sued by Perera, since only Estes was an insured under the policy. *Id.* The USF&G Policy had limits of $1 million for employer's liability coverage; these limits applied over a $350,000 self-insured retention (DE 37, p. 1).

Estes also had a commercial general liability policy issued by Cigna (DE 37, p. 1). The Cigna Policy provided coverage to Estes' employees, but not to Estes, because of an employer's liability exclusion (DE 51, pp. 48-49). The Cigna Policy had policy limits of $1 million, subject to a $500,000 deductible (DE 37, p. 1).

Estes' third policy was a commercial umbrella excess policy issued by Federal Insurance Company, a Chubb company. The Chubb Policy specifically provided that it was excess to the USF&G Policy and to the Cigna Policy (DE 75, p. 8; DE 43, p. 15). The Chubb Policy had limits of $25 million, but required that the limits of all applicable underlying policies be exhausted before its excess coverage attached to a claim (DE 49, p. 22 & Ex. 3, at p. 3).

Chubb's coverage "followed form" to USF&G's and Cigna's underlying policies (DE 73, p. 3). Estes' insurance program required Estes to provide its own defense for liability claims; however, Estes' defense costs served to reduce the $350,000 self insured retention in the USF&G Policy (DE 73, p. 3l; DE 43, p. 8).

USF&G's response to notification of Perera's lawsuit was to issue what USF&G called a "reservation of rights" letter with respect to Estes' coverage for the Perera claim. However, USF&G's letter effectively amounted to a denial of coverage since it stated that, to the extent that Perera established that Estes had engaged in conduct "substantially certain to result in injury or death . . . there would be no coverage available under the USF&G policy" (Pl. Ex. 10, p. 3) This was a "heads I win, tails you lose" coverage position because Estes would have no liability to Perera because of workers' compensation immunity if the "substantially certain" test were not met (DE 311, pp. 140-41). This coverage position, by

USF&G's own admission, remained unchanged throughout the lawsuit (DE 313, p. 58).

As the lawsuit progressed, Estes' interest in settling became more acute as the case against it and its employees went from bad to worse. For example, Estes' concern grew when its motion for summary judgment based upon workers' compensation immunity was denied (DE 306, p. 27). Another milestone of concern occurred later when Perera was allowed to amend her complaint to seek punitive damages against Estes and its employees (DE 306, p. 61).

A mediation in the case was held in March, 2001. At this mediation, CIGNA, the general liability carrier that provided primary coverage for Estes' employees, made the full limits of its policy available for settlement (DE 306, p. 52). Chubb also acknowledged responsibility to provide coverage under its excess policy for Perera's claim. USF&G, however, did not follow suit.

The evidence regarding USF&G's proposed settlement position was disputed. Some witnesses testified that USF&G offered to contribute nothing, or only a nominal amount, toward a settlement (DE 49, p. 53; DE 48, p. 116). USF&G claimed that, solely out respect for its business relationship with Estes, it would have been willing to pay between $100,000 and $200,000 as part of an overall resolution of the case (DE 44, p. 58; DE 43, p. 20). However, even under USF&G's version of the facts, there was at least an $800,000 coverage gap that

had to be filled before Chubb's excess policy would attach to the claim against Estes. Moreover, USF&G's claimed offer was conditioned on being "part of an overall resolution of the case" or, stated otherwise, that USF&G would be excused from paying the 80% to 90% of its policy limits that it was not contributing to the settlement. *Id.*

The mediation did not result in a settlement. In the months following mediation, counsel for Estes wrote to USF&G explaining why there was coverage under its policy and imploring it to reconsider and tender its policy limits (Pl. Ex. 15). Equally significantly, counsel for Chubb, the excess carrier with a "follow-form" policy, wrote two letters to USF&G explaining its reasoning as to why USF&G's policy provided coverage for the Perera claim (Pl. Exs. 16, 23). However, USF&G refused to change its position or to tender its policy limits.

Because of USF&G's refusal to participate meaningfully in settlement negotiations, and because Chubb was not prepared to advance USF&G's $1 million share of a settlement, Chubb and Estes explored settlement alternatives with Perera's counsel that did not include USF&G's participation (DE 48, pp. 168-169). These parties were ultimately able to reach a settlement that was memorialized in a Stipulation to Settle, a release from Perera to Chubb, and a subsequent assignment by Estes of its claims against USF&G to Perera (DE 36,

Ex. 11; DE 48, p. 121 & Ex. 18). This settlement was consummated in August, 2001 (DE 306, p. 15).

The Stipulation to Settle called for the case to be resolved by entry of a consent judgment in favor of Perera and against Estes and its employees in the amount of $10 million, subject to court approval (DE 36, Ex. 11). The Stipulation to Settle was subsequently approved by a Florida circuit court judge following an evidentiary hearing at which the court found there was a reasonable basis for imposing liability on the defendants, that the terms of the Stipulation to Settle were reasonable, and that the settlement sum of $10 million was reasonable (DE 36, Ex. 12). Significantly, USF&G also expressly stipulated in the district court that the $10 million settlement sum provided in the Stipulation to Settle was reasonable in amount (DE 306, p. 15).

The Stipulation to Settle called for $5 million of the settlement sum to be paid in cash. This payment was composed of $500,000 from Cigna (representing its $1 million policy limits less the policy's $500,000 deductible), $750,000 from Estes,[1] and $3.75 million from Chubb. Chubb's $3.75 million payment was made under both its excess employer's liability and general liability coverages (DE 48,

[1] In addition to its $750,000 cash contribution to the settlement, Estes also paid $509,317.78 in attorneys' fees and court costs; $100,000 in worker's compensation indemnity to Perera; $5,000 in medical payments; and $6,058.74 in expenses (DE 36, Ex. 14).

pp. 171-172). The remaining $5 million was to be paid out of the proceeds of a bad faith action against USF&G which Estes agreed either to bring itself or to assign to Perera (DE 36, Ex. 11).

As consideration to Chubb for waiving the attachment point of its policy and paying to resolve the claim against Estes even though USF&G had not paid its underlying limits, the settlement limited Chubb's total liability for the Perera claim to the $3.75 million Chubb was paying as part of the settlement. The settlement documents accomplished this by eliminating both possible sources of potential exposure to additional liability for Chubb -- Perera, the claimant, and Estes, the insured. Perera provided Chubb with a release for any claims arising out of Mitchell Perera's death (DE 48, p. 121). The potential of a further claim against Chubb by Estes, its insured, was precluded by including a provision in the Stipulation to Settle under which Plaintiff agreed to accept the proceeds of the lawsuit against USF&G as a complete satisfaction of her consent judgment, even if there were no proceeds (DE 36, Ex. 11, p. 6). By eliminating any possibility that Estes could have further personal liability to Perera, the parties to the settlement also eliminated the possibility that Estes would have any further claim against the Chubb policy arising out of the Perera claim.

Perera subsequently brought suit as Estes' assignee against USF&G in Florida state court (DE 2). USF&G removed the action to federal court (DE 3).

Count I of Perera's complaint asserted that USF&G had breached the terms of its policy to Estes by failing to provide coverage to Estes for Perera's claim, and sought USF&G's $1 million policy limits as damages (DE 2, pp. 6-7). The district court entered summary judgment for Perera on this count, which USF&G did not appeal (DE 112, p. 2). Count II of Perera's complaint alleged bad faith and sought recovery of the $4 million remaining due under Perera's consent judgment (DE 2, pp. 7-10). The magistrate recommended that summary judgment be entered for USF&G on this count on a single ground, namely that no excess judgment existed because Estes purportedly still had $21 million in coverage available from Chubb to satisfy the consent judgment (DE 73, p. 25). The district court adopted this recommendation and entered judgment in favor of USF&G solely on the basis of USF&G's affirmative defense of "no excess judgment" (DE 112, p. 1).

Perera appealed this judgment. The Eleventh Circuit initially ordered a remand to the district court to make a factual determination of whether USF&G had acted in bad faith; this remand resulted in a jury verdict finding that USF&G's conduct constituted bad faith under Florida law, which the Eleventh Circuit affirmed. The Eleventh Circuit has now certified the "no excess judgment" issue to this Court for resolution in the form of two certified questions.

SUMMARY OF ARGUMENT

This appeal is before this Court on two certified questions from the Eleventh Circuit Court of Appeals.

The first certified question is whether an excess judgment is required in order to maintain a bad faith claim under Florida law. The only "excess judgment" that is required is a judgment that exceeds the limits of the insurer accused of bad faith, which indisputably exists here. When an insured has excess coverage, a judgment that also exceeds the limits of that excess coverage is not required. To the contrary, when the judgment exceeds the limits of the defaulting insurer but is within the limits of an excess policy, the excess insurer "stands in the shoes of the insured" and may bring its own bad faith action.

What occurred here was that, rather than have the excess carrier pursue the bad faith action, Estes agreed to allow its excess carrier to "cash out" of the case by effectively reducing its coverage limits in exchange for paying most of the sum that USF&G should have paid under its primary coverage. The new excess coverage limits were less than the consent judgment against Estes. Estes then assigned its consequent coverage and bad faith action against USF&G to Perera, who agreed to accept them as her sole source of additional compensation for the wrongful death action.

The second certified question is whether a bad faith action may be maintained when the insured was not exposed to liability in excess of the limits of its insurance. The answer to this question is "yes." When an insurer has breached its good faith duty to settle, an insured is not obligated to expose itself to personal liability in any amount, but may settle the case by entering into a reasonable, good faith consent judgment that is collectible only from the insurer and releases the insured from personal liability. USF&G's argument that it is excused from liability for its bad faith because Chubb excess coverage remains available to pay the unsatisfied portion of Perera's consent judgment is also incorrect. The intent of the settling parties, as reflected in the settlement documents, was to limit Chubb's coverage for the Perera claim to the $3.75 million it paid toward the settlement. Under both Florida law and established Florida public policy, this intention must be respected.

ARGUMENT

STANDARD OF REVIEW

This case comes before the Court as the result of certified questions from the Eleventh Circuit Court of Appeal requesting this Court's analysis of issues of Florida insurance law. This case has proceeded somewhat unusually from a procedural perspective in that the Eleventh Circuit ordered that a bad faith trial be held prior to before submitting the "threshold legal issue" concerning bad faith actions to this Court (DE 129, p. 2). Because the issues presented by the Eleventh Circuit's questions are issues of law, a *de novo* standard of review applies. *See*, *e.g.*, *Bell v. Indian River Mem. Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Moreover, as is expressly acknowledged in the Eleventh Circuit's opinion, the questions submitted are not intended to limit this Court's "scope of inquiry." *Perera v. United States Fid. & Guar. Co.*, 544 F.3d 1271, 1279 (11th Cir. Fla. 2008) ("*Perera*"). "This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are given." *Id.* (citing *Washburn v. Rabun*, 755 F.2d 1404, 1406 (11th Cir. 1985)).

AS TO CERTIFIED QUESTION NO. 1

THE ONLY EXCESS JUDGMENT NEEDED TO SUPPORT A BAD FAITH CLAIM UNDER FLORIDA LAW INDISPUTABLY EXISTS IN THIS CASE; THE TYPE OF EXCESS JUDGMENT SUGGESTED BY THE FIRST CERTIFIED QUESTION IS NOT NECESSARY.

The first question that the Eleventh Circuit has certified to this Court is phrased as follows:

> CAN A CAUSE OF ACTION FOR BAD FAITH AGAINST THE INSURER BE MAINTAINED WHEN THERE IS NOT AN EXCESS JUDGMENT AGAINST THE INSURED?

Perera, at 1276.

The answer to this certified question depends on how the term "excess judgment" is defined. A limited type of "excess judgment," namely a judgment that exceeds the policy limits of the insurance carrier that is accused of bad faith, is normally required in order for a bad faith claim to accrue. There is no dispute that this type of excess judgment exists in this case; Perera's judgment against Estes was for $10 million, while USF&G's policy limits were $1 million.

However, it is apparent from the Eleventh Circuit's opinion that it has used the term "excess judgment" in its certified question to mean a judgment that exceeds the combined limits of all insurance coverage an insured has purchased, primary and excess, and not just the policy of the insurer claimed to have acted in bad faith. Indeed, the Eleventh Circuit began its discussion of this certified

question in its opinion with an express statement of what it was referring to as an "excess judgment":

> "In this case, as the magistrate judge held, there is no excess judgment against the insured, Estes. Viewed as of the time the settlement agreement was negotiated, Estes has $25 million in insurance coverage -- $1 million from the Cigna policy; $1 million from the USF&G policy; and $25 million from the Chubb policy, in excess of the other two policies. **To constitute an excess judgment, there would have to have been a judgment in excess of $25 million**.

Id., at 1275 - 76 (emphasis added). The second type of "excess judgment" that is referred to in the Eleventh Circuit's opinion is not a prerequisite to a cause of action for bad faith under Florida law.

In certifying its questions to this Court, the Eleventh Circuit has specified that its formulation of the questions is not intended to limit this Court's scope of inquiry. Its opinion specifically cites to *Washburn v. Rabun*, 755 F.2d 1404 (11th Cir. 1985), which holds that the phrasing used in certifying questions does not restrict the Florida Supreme Court's consideration of the issues in its analysis of the record and that this latitude extends to the restatement of the issue or issues and the manner in which the answers are given. Thus, this Court is free to distinguish between the different uses of the term "excess judgment" in responding to this certified question, and advise the Eleventh Circuit that, although a bad faith claim generally requires a judgment that exceeds the limits of the insurer accused of bad

faith, the type of "excess judgment" to which the Eleventh Circuit refers in its opinion is not required in order for a bad faith claim to exist under Florida law.

The Eleventh Circuit's concern about the necessity for an "excess judgment" appears to have arisen from its review of certain Florida decisions that indicated that an insured being "exposed to an excess judgment" is part of a bad faith claim. For example, the Eleventh Circuit quotes from this Court's opinion in *Rosen v. Fla. Ins. Guar. Ass'n.,* 802 So. 2d 291, 294 (Fla. 2001) ("*Rosen*"), to the effect that "the essence of a 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." Other cases cited in the opinion to the same effect include *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 662 (Fla. 2004); *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 180-82 (Fla. 1994) ("*Cunningham*"); and *State Farm Fir & Cas. Co. v. Zebrowski*, 706 So. 2d 275, 277 (Fla. 1997) ("*Zebrowski*"). What the Eleventh Circuit has failed to appreciate is that all of the cases it cites as "suggest[ing] that Florida law may not recognize a bad faith action without an excess judgment" involved situations in which the insured had purchased only a single, primary layer of insurance coverage. When an insured has only one layer of coverage, a judgment that exceeds the policy limits of the insurer accused of bad faith is necessarily also a judgment that exceeds the limits of all the insured's coverage since they are one and the same.

However, where an insured has purchased multiple layers of insurance coverage, a judgment that exceeds the policy limits of the carrier claimed to have acted in bad faith need not also exceed the limits of all the insured's coverage.

The reason an underlying judgment normally must exceed the policy limits of the insurer accused of bad faith is simple.[1] If it does not, a finding that the defaulting insurer provided coverage for the disputed claim would fully satisfy the damages caused by the insurer's breach of duty to the insured, thus rendering a claim for bad faith superfluous. For example, in this case, if Perera's judgment against Estes had been for $5.5 million rather than $10 million, the district court's unappealed finding that the USF&G Policy provided coverage to Estes for Perera's claim would have provided sufficient funds to pay the unsatisfied portion of Perera's consent judgment. Thus, there would have been no need or basis for a bad faith claim against USF&G under this scenario. However, when the judgment exceeds the limits of the defaulting insurer's coverage, as it actually did here, a bad faith action is available to recover the unsatisfied portion of the judgment that exceeds the policy limits.

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[1] Perera uses the term "normally" because "in most bad faith cases, the excess judgment constitutes the extent of provable damages." *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 759 (Fla. 1st DCA 1994). However, in some cases, direct consequential damages or punitive damages may also be recovered on account of an insurer's bad faith, and the excess judgment does not constitute the full measure of damages. *Id.*

An example of a case in which the absence of a judgment exceeding the policy limits of the insurer accused of bad faith precluded a bad faith claim is *Zebrowski*, *supra*. Zebrowski had been injured in an automobile accident with a State Farm insured and had brought a bad faith action under §624.155 (1)(b)1, Fla. Stat. (1995), asserting that State Farm had not attempted to settle its third-party liability claim in good faith; while this claim was pending, Zebrowski secured a judgment against the tortfeasor within the liability limits of the State Farm policy that State Farm satisfied. State Farm then obtained a summary judgment on the bad faith claim on the ground that Zebrowski did not have a cause of action for bad faith because the judgment he had obtained against the insured did not exceed State Farm's liability limits. When this summary judgment was reversed by the Fourth District Court of Appeals, this Court accepted review and reinstated the judgment in the insurer's favor, stating that: "In the absence of an excess judgment, a third-party plaintiff cannot demonstrate that the insurer breached a duty towards its insured." 706 So. 2d at 277.

Zebrowski also cites with approval to *Dunn v. National Sec. Fire & Cas. Co.*, 631 So. 2d 1103 (Fla. 5th DCA 1993) ("*Dunn*"). *Dunn* expressly clarifies that the "excess judgment" that is required to maintain a bad faith claim for wrongful refusal to settle is a judgment that exceeds the coverage provided by the policy issued by the insurer accused of bad faith. Specifically, *Dunn* held:

> "At common law in Florida, the essence of a bad faith cause of action against an insurance company (whether brought by the insured or the injured party), is that the insurer breached its fiduciary duty owed to its insured by wrongfully refusing to defend its insured in a liability context, or **by wrongfully refusing to settle the cause within the policy limits, and exposing its insured to a judgment which exceeds the coverage provided by the policy**."

631 So. 2d at 1106 (emphasis added).

When excess coverage exists, the excess carrier "stands in the shoes of the insured and assumes the rights of the insured." *United States Fire Ins. Co. v. Morrison, Assurance Co.*, 600 So. 2d 1147, 1151 (Fla. 1st DCA 1992) ("*Morrison*"). The seminal case on this point is *Ranger Ins. Co. v. Travelers Indemnity Co.*, 389 So. 2d 272 (Fla. 1st DCA 1980) ("*Ranger*"). After examining precedent from throughout the country, the First District concluded in *Ranger* that an excess carrier that alleged it had become obligated to pay more than it should have because of an underlying primary carrier's bad faith failure to settle was equitably subrogated to the duty of good faith owed to the insured by the primary carrier, and could maintain a bad faith claim against the primary carrier.

The *Ranger* holding was subsequently adopted by other Florida courts. For example, in *Morrison*, *supra*, the court noted "that the primary insurer should be held responsible to the excess insurer for improper failure to settle, since the position of the later is analogous to that of the insured when only one insurer is involved." *Morrison*, *supra*, at 1151. By the time of the decision in *RLI Ins. Co. v.*

Scottsdale Ins. Co., 691 So. 2d 1095 (Fla. 4th DCA 1997) ("*RLI*"), the court was able to characterize this principle as "well settled," stating:

> It is well settled that an excess insurer is entitled to maintain a common law bad faith action against a primary insurer. *Ranger Ins. Co. v. Travelers Indem. Co.*, 389 So.2d 272 (Fla. 1st DCA 1980); *General Acc. Fire & Life Assur. Corp. v. American Cas. Co. of Reading, Pa.*, 390 So.2d 761 (Fla. 3d DCA 1980), *rev. denied*, 399 So.2d 1142 (Fla. 1981); *Phoenix Ins. v. Florida Farm Bureau Mut. Ins. Co.*, 588 So.2d 1048 (Fla. 2d DCA 1990). In each of these cases, it was held that a primary insurer has the same duty to exercise good faith to an excess insurer as it does to an insured.

691 So. 2d at 1096.

In *Ranger*, *Morrison* and *RLI*, the settlement or judgment that formed the basis for the bad faith claim was equal to or less than the policy limits of the excess carrier that was suing the primary carrier for bad faith. Since an excess carrier has no greater rights than the insured, a judgment that exceeds the limits of all the insured's coverage combined is patently unnecessary.[2]

In summary, this Court should respond to the first certified question by advising the Eleventh Circuit that the only "excess judgment" potentially needed

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[2] Another case cited by the Eleventh Circuit, *North American Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325 (Fla. 4th DCA 1996) ("*North American*"), suggests that the excess judgment requirement may be further relaxed when the insurer accused of bad faith has issued a policy like the USF&G Policy that obligates the insured to assume the defense of the claim. *North American* holds that if such an insurer arbitrarily rejects a reasonable settlement, it has breached its policy obligations and the insured may settle and sue to seek reimbursement without having an excess judgment entered against it. Here, of course, an excess judgment was entered against Estes.

for a bad faith claim to exist under Florida law is a judgment that exceeds the policy limits of the insurer charged with bad faith. In this case, Perera's $10 million judgment against Estes unquestionably satisfied this requirement.

AS TO CERTIFIED QUESTION NO. 2

ESTES WAS NOT OBLIGATED TO EXPOSE ITSELF TO PERSONAL LIABILITY TO STATE A CLAIM FOR BAD FAITH AND THE FORM OF THE SETTLEMENT DOES NOT NEGATE A BAD FAITH CLAIM AGAINST USF&G.

The second question certified to this Court by the Eleventh Circuit is phrased as follows:

> EVEN IF AN EXCESS JUDGMENT IS NOT ALWAYS REQUIRED, CAN A CAUSE OF ACTION FOR BAD FAITH AGAINST AN INSURER 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 INSURED'S POLICIES?

Florida law does not require an insured to expose itself to personal liability to the tort claimant when its insurer has breached the duty to settle in good faith, and the Court's answer to this certified question should be "yes." The Court should also advise the Eleventh Circuit that the form of the settlement documents in this case does not preclude a bad faith action against USF&G.

In its discussion of this certified question, the Eleventh Circuit posits that Estes was never exposed to liability in excess of the limits of its several policies.[3]

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[3] The Eleventh Circuit does not explain why, if the case had not been settled, a jury verdict in Perera's favor could not possibly have exceeded Estes' coverage limits, particularly since it was stipulated that the case had a settlement value of at least $10 million. In an extensive footnote, the Eleventh Circuit also found that Perera had waived the argument that Estes was exposed to liability in excess of its policy limits because "USF&G's bad faith conduct delayed the settlement and

It also asserts that Estes' actual out-of-pocket liability would not have exceeded the limits of USF&G's policy, stating: "Even if Estes had to come up with the full $1 million limit, that would impose upon Estes only an exposure to the extent of $1 million, the amount of the USF&G Policy itself and not an amount in excess thereof." [4] *Perera*, 544 F.3d at 1277. The Eleventh Circuit opinion then cites to

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caused Estes to be exposed to punitive damages for which it would not have been liable in the absence of USF&G's bad faith conduct by not adequately raising this issue in its brief or at oral argument. *Perera*, at 1278, n. 4. While Perera discussed Estes' potential punitive damages liability on no less than four occasions in its initial Eleventh Circuit brief (*see* Perera 11th Cir. Br., pp. 5-6, 24-25, 28, 31), punitive damages represented an uninsured exposure, rather than an excess exposure as the Eleventh Circuit's footnote implies. Even if Perera had obtained a verdict well below Estes' policy limits, any portion of the verdict representing punitive damages would have to have been paid by Estes personally since its insurance policies excluded coverage for punitive damages. The significance of this exposure is that it should be taken into consideration by an insurer in determining whether "a reasonably prudent person, faced with the prospect of paying the total recovery" would settle. *Boston Old Colony v. Guitierrez*, 386 So. 2d 783, 785 (Fla. 1980). Since the compensatory portion of Perera's claim alone significantly exceeded USF&G's limits, USF&G had the obligation to make its limits available for settlement without regard to the punitive damages claim.

[4] The Eleventh Circuit's discussion of this point is curious. The opinion asserts that Perera argued that Estes was required to advance sums for which it would not otherwise have been liable in order to persuade Chubb to contribute to the settlement even though USF&G's $1 million limit had not been paid. Actually, Perera's main argument on this point was that, **but for** the settlement, Estes would have had to pay USF&G's $1 million limits out of its own pocket to settle the case. However, even with the settlement, Estes paid more than it would have paid if USF&G had not acted in bad faith. In a footnote, the Eleventh Circuit acknowledges that Estes had contributed $250,000 above the amount of the Cigna Policy deductible toward the settlement. *Perera*, at 1277, n. 3. While the footnote also indicates there was a dispute as to whether some of this payment should be

Fidelity and Cas. Co. of NY v. Cope, 462 So. 2d 459 (Fla. 1985) ("*Cope*"); *Kelly v. Williams*, 411 So. 2d 902 (Fla. 5th DCA), *rev. denied*, 419 So. 2d 1198 (Fla. 1982) ("*Kelly*"); and *Cunningham*, *supra*, each of which contain language suggesting that a bad faith claim requires "the insured being exposed to an excess judgment." *Cope*, *supra*, 462 So. 2d at 460. The Eleventh Circuit has certified the issue of the import of these decisions on Perera's bad faith claim to this Court.

This certified question is predicated on an argument advanced by USF&G in its Eleventh Circuit briefing. USF&G argued that, since Perera had agreed in the Stipulation to Settle "to issue Estes a full satisfaction of judgment regardless of the outcome of the bad faith lawsuit against USF&G," Estes, and hence Perera as Estes' assignee, had no bad faith claim because "the essence of a bad faith claim under Florida law is the existence of an **excess judgment against an insured that exposes the insured to personal liability.**" USF&G 11th Cir. Br., pp. 17, 23 (emphasis added). In other words, USF&G took the position that the only way an insured could maintain a bad faith claim against its insurer was by assuming personal liability for the unsatisfied excess portion of the judgment in the event the bad faith claim were unsuccessful. USF&G's primary authority for this position

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applied to USF&G's self-insured retention, most or all of this amount constituted an additional contribution by Estes to the settlement since prior to the settlement Estes had paid more than $500,000 in attorneys' fees that served to erode USF&G's $350,000 self-insured retention to defend against Perera's claim (DE, Ex. 14).

was the case law cited in the Eleventh Circuit's opinion, particularly the decision in *Cope*, *supra*.

USF&G's argument that an insured must expose itself to personal liability in order to maintain a bad faith claim is based on a clear mischaracterization of the holdings in these decisions. *Cope*, for example, is a narrow decision that merely deals with the order in which an assignment and a satisfaction of judgment must be executed when both are part of a settlement. In fact, this Court specifically held just that in *Rosen*, *supra*, stating:

> 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 breach of duty between an insurer and its insured."

Rosen, *supra*, 802 So. 2d., at 294.

In *Cope*, a plaintiff had obtained a judgment in excess of policy limits against two defendants. It then sought to collect the excess from the defendants' insurers through bad faith actions. However, as part of a settlement with the first insurer, the plaintiff released both defendants and satisfied the bad faith judgment. This Court held that, because the plaintiff had not obtained a prior assignment of the defendants' claims against the second insurer, the release and satisfaction extinguished the bad faith cause of action.

Cope plainly has no application to this case. Here, Perera has already received an assignment of Estes' rights against USF&G and has not yet satisfied the consent judgment, which the Stipulation to Settle provides will occur only upon the conclusion of the action against USF&G. Accordingly, the *Cope* limitation has already been satisfied, and could not possibly serve to bar Perera's claim.

Indeed, in *Rosen*, *supra*, this Court held that the district court had misapplied *Cope* and committed reversible error in relying on that decision to bar a claim involving material facts nearly identical to those in this case. In *Rosen*, a law firm had settled a lawsuit brought against it by a former client. Just as in this case, the settlement agreement provided for the entry of a consent judgment against the firm that would not be executed upon, and also provided that this judgment would be satisfied at the conclusion of the litigation against the law firm's insurer, FIGA. Relying on *Cope*, FIGA successfully argued below that, because the client had agreed to release the law firm from liability regardless of the outcome of the suit against the insurer, the settlement agreement also extinguished any liability of FIGA's. In reversing and reinstating the action against FIGA, this Court expressly found that the lower court had "misapplied our decision in *Cope* when it concluded that the settlement agreement between Rosen [the client] and AB Law Firm constituted a release" (802 So. 2d at 298).

Kelly, *supra*, is equally inapposite. That case involved a situation in which the insurer had participated in the settlement of the plaintiff's claim and paid its full policy limits, but the settlement documents purported to reserve a claim against the insurer for bad faith negotiation. Because the settlement also stipulated that both the insured's and the insurer's liability for the personal injury claim was limited to the policy amount, the court held no bad faith claim existed.[2] *Kelly* has no bearing on this case, in which USF&G did not participate in the settlement and the personal injury judgment significantly exceeded USF&G's policy limits. Rather, as discussed, this case involves circumstances similar to those this Court addressed in *Rosen*.

Cunningham involved the issue of whether a bad faith claim could be tried by stipulation prior to the underlying negligence claim. This Court held that it could, finding that the stipulation was the functional equivalent of an excess judgment and that this liability had not been released but preserved by the stipulation. While the facts of *Cunningham* are different, its rationale that stipulations to settle litigation should be enforced if entered into in good faith affirmatively supports the enforcement of the Stipulation to Settle in this case.

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[2] "Where the parties have stipulated, as they have in this case, that Williams' and Allstate's liability is limited to the fifty thousand dollars ($50,000) policy amount, then no cause of action for bad faith can exist." *Kelly*, 41 So. 2d at 904.

USF&G's argument that the insured must be personally liable on the judgment in order for an insurer to be in bad faith for failing to pay it is plainly wrong. Under Florida law, an insured is not required to put its personal assets on the line in order to settle a case in which its insurer has breached its duty to that insured by failing to settle in good faith. Instead, the insured may enter into a settlement that assigns to the plaintiff the insured's rights against the insurance company that has failed to honor its obligations in exchange for a release from personal liability.

One example of this type of settlement is traced to the holding in *Coblentz v. American Surety Co. of NY*, 416 F.2d 1059 (5th Cir. 1969) ("*Coblentz*"), and is sometimes referred to in reported Florida decisions as a "*Coblentz* agreement."[5] In *Coblentz* the insurer had initially defended its insured against a liability claim arising out of a scuffle, but subsequently withdrew from the defense. Subsequently, the insured entered into a stipulation with the plaintiff that settled the case in exchange for a consent judgment of $50,000 that was payable only out of the proceeds of the defendant's insurance policy. The defendant then instituted an action against the defendant's insurance company based on the assignment. Although a jury found the incident was within the insured's coverage, the district

[5] *See Capital Assurance Co., Inc. v. Margolis*, 726 So. 2d 376, 377, n. 1 (Fla. 3d DCA 1999) ("In a *Coblentz* agreement, an insured who is denied coverage may consent to an adverse judgment that is collectable against its insurer.").

court entered a judgment notwithstanding the verdict, setting aside the jury verdict on the grounds that the underlying settlement agreement had released the defendant from personal liability for the judgment. The *Coblentz* opinion described the district court's rationale as follows:

> The district judge, in setting aside the jury verdict, stated that the final judgments entered by the state court were not within the coverage of the insurance policy because they did not legally obligate the insured to pay any sum or sums of money. This conclusion was apparently based upon the final paragraph of the state court judgments, which provided in pertinent part that:
>
> ' * * * In accordance with stipulation of the parties, that this judgment may only be satisfied from public liability insurance policies in force at the time of the incident complained of and this judgment is not satisfiable from nor (may it) be a lien upon any other assets of the defendant, Vincent Carbone'.

416 F.2d at 1062.

Thus, the district court in *Coblentz* had accepted the same argument that USF&G made in this case, namely that an insurer cannot be liable on a judgment if the insured is not also liable. On appeal, however, the Fifth Circuit reversed and reinstated the jury verdict holding that when an insured is "left to his own resources" by an insurance company, it is perfectly permissible for the insured to enter into a consent judgment that can be satisfied only from the proceeds of an action against the insurer and not from the insured's own personal assets.

These types of agreements were first considered and approved by a Florida appellate court in *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So. 2d 589 (Fla. 2d DCA 1984) ("*Steil*"), which also imposed important limitations on the enforceability of such agreements in Florida. The *Steil* court noted that, because the insured will never be obligated to pay the judgment, the settlement may therefore not actually represent an arm's-length determination of the worth of the plaintiff's claim. Accordingly, *Steil* held that such a settlement may not be enforced against a carrier if it is either unreasonable in amount or tainted by bad faith.

These limitations are not issues in this case. USF&G stipulated in the district court that the $10 million judgment in favor of Perera was reasonable in amount, and any claim that the settlement was tainted by bad faith was resolved by the jury verdict in Perera's favor on the bad faith claim that the Eleventh Circuit has already affirmed.

Thus, an insured who has been the victim of an insurer's bad faith failure to settle a claim is not obligated to subject itself to personal liability to the tort claimant, but may settle the claim by agreeing to a reasonable, good faith consent judgment that is collectible only from the defaulting insurer, just as Estes did here. In such circumstances, the insured's "exposure" to excess liability is provided by the unsatisfied consent judgment, even though there is an agreement that the

judgment will not be enforced against the insured and will be satisfied when the action against the defaulting insurer has been concluded. *Rosen*, *supra*.

USF&G has also taken the position in this case that any obligation on its part to pay the unsatisfied portion of Perera's consent judgment was excused because Estes still had excess coverage from Chubb available to cover this liability. Specifically, USF&G argued in the district court that the $21 million in unpaid limits of the Chubb Policy remained available to pay the unsatisfied $4 million of Perera's consent judgment, and that there was therefore no excess judgment against Estes. USF&G's argument was predicated on the fact that the Stipulation to Settle contained no formal release of Chubb by Estes or its employees. For example, USF&G's counsel argued at the summary judgment hearing as follows:

> The other document is, there's a release in this case. And -- and the release is -- doesn't include CHUBB Insurance Company. CHUBB Insurance Company paid a portion of the settlement, and, quite frankly, the -- the – documentation in the record seem to indicate that CHUBB was basically beyond instrumental here in moving this case towards settlement and keeping USF&G out of the loop.
>
> But there is no release from CHUBB for -- from the plaintiff of Estes to CHUBB. As it stands now, CHUBB has twenty-one million dollars in available coverage.
>
> Technically, if this case is over tomorrow, there's nothing that would preclude Estes or the plaintiff on the assignment going back against CHUBB to get the balance of the unpaid judgment. Nothing whatsoever.
>
> It's -- it's perplexing to me how you can argue -- when you look at those five documents, the stipulation, the letter, the late assignment, the -- the judgment, and the lack of a release for CHUBB -- to sit there and say we have a bad faith claim against USF&G, and

> the reason we have a bad faith claim is we have this ten million dollar judgment, and there's excess exposure to Estes because USF&G constructively or effectively denied coverage.
>
> This -- this is unbelievable to me. They could go around tomorrow and go against CHUBB. CHUBB -- CHUBB said that they asked for release. There was a discussion about a release. There was testimony about that, but there was no -- everybody agrees that there's no release.
>
> There's no release.
>
> They have twenty-one million dollars' worth of coverage and they are attending our judgment.
>
> The -- the -- the -- one of the necessary requirements to have a bad faith claim is to have an excess judgment. Where is the excess judgment? There isn't one.
>
> Uh, there was a twenty-five million dollar policy, they paid 3.75, so there's over twenty-one million dollars left. There's no release or indication that Estes is precluded. There's no document anywhere that addresses this.
>
> So, its our position that -- it's fairly clear to us that there is no excess exposure to this insured for this judgment.

DE 75, pp. 33-35.

Without analysis or explanation, the magistrate judge accepted USF&G's superficial and legally incorrect analysis and ruled that "Estes still had $21 million in coverage from Chubb" (DE 73, p. 25). From this premise, the court then reasoned that no excess judgment existed and Perera could not maintain a bad faith claim. Summary judgment was entered against Perera on her bad faith claim on this sole ground. Perera appealed this summary judgment to the Eleventh Circuit, which has now certified the "no excess exposure" issue to this Court for resolution.

The federal district court's conclusion that Estes still had $21 million in coverage for the Perera claim following the settlement is directly contrary to both the undisputed facts and controlling Florida law. All parties to the Stipulation to Settle, and everyone with a legal interest in the Chubb Policy under Florida law, agreed that, as a condition of the settlement, the Chubb Policy would provide no coverage for the Perera claim beyond the $3.75 million Chubb was paying as part of the settlement. Perera provided Chubb with a written release, thereby expressly extinguishing her right to bring an action against Chubb in her capacity as a judgment or settlement creditor. Chubb's exposure to a potential claim by its insureds, Estes and its employees, was extinguished by including in the Stipulation to Settle an agreement that the sole source of recovery for the balance of Perera's judgment would be the proceeds of an action against USF&G -- even if there were no proceeds. Thus, the Stipulation to Settle eliminated any basis for a further claim against the Chubb Policy by Chubb's insureds by expressly limiting the future liability of Estes and its employees to those liabilities USF&G had been found obligated to indemnify. By failing to honor the parties' agreement to limit Chubb's coverage obligation for the Perera claim, the district court in effect conferred on USF&G the benefit of non-existent insurance coverage.

The fact that Estes, Chubb and Perera all agreed to reduce the coverage limits of the Chubb Policy from $25 million to $3.75 million for the Perera claim

should have ended the inquiry. First, it should have done so because, under Florida law, the only persons with any legal interest in a liability insurance policy are the insureds and a claimant who has obtained a verdict against, or entered into a settlement with, an insured.

Section 627.4136(1), Fla. Stat. (2005), makes the requirement that a plaintiff must be either an insured or a judgment or settlement creditor a condition precedent to the maintenance of an action against a liability insurer. This statute states that:

> It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

Subsection (2) of the same statute, §627.4136(2), Fla. Stat. (2005), further provides that no persons other than an insured or a judgment or settlement creditor is deemed to have an interest in the policy. This subsection states in pertinent part that:

> No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, prior to first obtaining a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

Since all parties with a legal interest in the Chubb Policy had joined in the agreement to reduce Chubb's policy limits for the Perera claim, USF&G had no standing to contest this limits reduction.

The district court's failure to honor the settling parties' intent that Chubb's available limits for the Perera claim would be only $3.75 million, not $25 million, also directly contravened established Florida precedent on this issue.[3] For example, in *Rosen*, *supra*, this Court specifically held that the interpretation of settlement documents is controlled by the intent of the settling parties. 802 So. 2d at 295. In rejecting a similar claim by a non-settling insurer that the settlement documents served to exonerate it from liability, this Court quoted with approval from its decision in *Stephen Bodzo Realty, Inc. v. Willits International Corp.*,428 So. 2d 225, 227 (Fla. 1983), that:

> To allow these respondents to escape this obligation by relying on a document executed by others who had no intention of releasing them is the epitome of manifest injustice.

Id., at 152.

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[3] Even if the district court had doubts as to the intentions of the settling parties, which is difficult to imagine, the appropriate action would have been to hold a trial on that issue, not to enter a summary judgment. *See Auto-Owners v. St. Paul Fire & Marine Ins. Co.*, 547 So. 2d 148, 150 (Fla. 2d DCA 1989) ("*Auto-Owners*").

Rosen also cited with approval to *Auto-Owners*, *supra*, a decision that parallels this case in multiple respects. In *Auto-Owners*, two insureds had sued their liability insurer and the attorneys that this insurer had selected to defend a claim against them for the negligent handling of that defense. The liability carrier and two of the three malpractice carriers for the attorneys settled the case by entering into settlement agreements with the plaintiffs; however, the third malpractice insurer, St. Paul, did not participate in the settlements. This closely resembles the present case, in which Cigna and Chubb participated in the settlement, but USF&G did not.

Again, as in this case, the settlement agreements in *Auto-Owners* provided that any judgment the plaintiffs obtained against the attorney would be enforced solely against the non-settling insurer, St. Paul. When the liability insurer later sought contribution from St. Paul, St. Paul moved for and obtained a summary judgment on the ground that, by agreeing not to enforce any judgment obtained against the attorney, the settlement agreements had also had the effect of exonerating St. Paul. In reversing this summary judgment, the *Auto-Owners* found that to allow a non-settling insurer to be exonerated by a settlement when the settling parties had no intention of releasing it would run counter to Florida public policy, stating:

> In sum, we find that there was no intention by Auto-Owners to give up its rights of indemnification against St. Paul. To allow St. Paul to be exonerated based on a document it never signed and agreed to by parties with no intention to releasing it would run counter to the prevailing public policies of this state.

547 So. 2d at 152.

The *Auto-Owners* court also noted that any other conclusion would have the negative implication of discouraging settlements, stating:

> The *Deblon* court also discussed the policy of encouraging settlements, even if they are merely partial ones, as executed in this case. To release a party which did not engage in settlement negotiations because of those settlement agreements would, we think, have negative implications. Such a ruling could potentially discourage future litigants from entering into compromise negotiations for fear that they might thereby limit their remedies against other parties, regardless of their intent not to do so.

Id., at 151.

This observation applies directly to this case. Just as in *Auto-Owners*, if Perera had known that her agreement to seek recovery of the balance of her judgment only from USF&G, the insurer that had not participated in the settlement, could become the basis for exonerating USF&G from liability for the very claim she was reserving, she would not have settled.

However, any doubt on this issue has been removed by this Court's recent decision in *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980 (Fla. 2008) ("*Toomey*"). In *Toomey*, this Court expressly reaffirmed the "deeply rooted

principle of Florida law" that the intent of the parties controls their releases, and that it is "the epitome of manifest injustice" to allow a party to escape an obligation by relying on a document executed by others who had no intention of releasing them. *Id.*, at 986.

While this case represents a slight "twist" on *Toomey* in the sense that USF&G is arguing that Chubb was **not** released by settlement documents that the parties intended would release Chubb from further liability for the Perera claim, the underlying legal principles are the same. Furthermore, the purpose behind USF&G's claim that the Stipulation to Settle did not release Chubb from further coverage obligations to Estes and its employees for the Perera claim was exactly the same as in *Toomey*, namely "to escape liability by relying on a document executed by others when those parties did not intend to release [USF&G] from liability." *Id.*, at 987.

The only way the conclusion that Chubb continued to have $21 million in coverage available for the Perera claim makes the slightest sense is if one were to assume that Estes owed USF&G a duty to maintain its excess coverage at full policy limits in order to minimize the consequences to USF&G of USF&G's own bad faith conduct. Of course, there is no such duty. Excess insurance is coverage that an insured purchases to substitute for its own liability. An underlying insurer has no voice in an insured's decision to obtain or not to obtain excess insurance, or

to maintain it, and, *vis-a-vis* an underlying carrier, the excess insurer is deemed to stand in the shoes of the insured. *RLI*; *North American*.

Requiring Estes to maintain the full limits of its excess coverage for USF&G's benefit also makes no sense as a matter of public policy. The principal benefit that Estes' was buying with the premium dollars it paid to USF&G was USF&G's obligation to pay the first $1 million (subject to a self-insured retention) of any covered claim asserted against Estes. If, when USF&G failed to honor this obligation, Estes was not entitled to enter into an agreement with its excess insurer that ameliorated the effect on Estes of USF&G's bad faith, Estes would have had no option other than to pay out of its own pocket the $1 million rightfully owed by USF&G in order to obtain access to the excess coverage that Estes had also bought and paid for. Such a conclusion would add insult to injury. For all of these reasons, the district court's legal conclusion that Chubb still had $21 million in excess coverage for the Perera claim was simply wrong.[6]

The foregoing discussion also serves to refute USF&G's argument that the Perera settlement was merely a "manufactured bad faith claim" bearing no relationship to any actual increased exposure to Estes. *Perera*, 544 F.3d at 1278.

[6] Although Perera believes such a finding is unnecessary, the recognition that Chubb's limits for the Perera claim were $3.75 million rather than $25 million also means that Perera's consent judgment exceeded the combined limits of Estes' insurance coverage for this claim, and thus that USF&G's bad faith exposed Estes to liability beyond the total limits of its policies.

What USF&G is really complaining about is that, rather than being sued by Chubb in a contribution action as USF&G had expected, Chubb decided to wash its hands of the case by "cashing out" its policy, thus exposing USF&G to the consequences of its own bad faith. However, USF&G has nobody other than itself to blame for this.

As previously noted, under the express terms of the Chubb excess policy, Chubb had no obligation to pay even one dime toward the settlement of Perera's claim against Estes until the full $1 million limits of the underlying USF&G Policy had been exhausted. Chubb had also made the decision that it was not willing simply to waive this policy right, advance USF&G's $1 million in coverage itself, and pursue USF&G for reimbursement later. Catherine Blackman, the Chubb supervisor who handled the settlement negotiations on behalf of Chubb, testified that Chubb had expressly considered and rejected this option, stating:

> Q. Okay. If Mr. Greco suggested to you, was the one that suggested settling without USF&G's participation, why didn't Chubb just pay what Mr. Greco wanted under its policy and then pursue USF&G directly?
> A. That was something we considered and decided not to do.
> Q. Why?
> A. I guess because Chubb doesn't like to sue other insurance companies.
> Q. Okay. Did anyone at Chubb ever tell you that?
> A. Never in my years with Chubb have I been involved in litigation where Chubb had gone that route. It was something that

> was discussed and it was something that I was told I would not have the support to pursue.

DE 48, p. 143. Estes' attorney also confirmed that Chubb had informed Estes of this decision (DE 306, p. 85).

Thus, as a direct consequence of USF&G's bad faith refusal to participate meaningfully in settlement negotiations, Estes' options were limited either to paying out of its own pocket the $1 million in underlying limits actually owed by USF&G to effect a settlement, or to allow a dangerous and deteriorating case to proceed to trial and judgment. Thus, when Chubb offered a settlement in which, in exchange for a reduction in its policy limits for the Perera claim, Chubb agreed to waive the attachment point of its policy and relieve Estes of the obligation to pay the $1 million in underlying coverage actually owed by USF&G, Estes was totally within its rights to accept. Estes was doing nothing more than using the asset of its excess coverage to minimize the consequences of USF&G's bad faith. By intentionally creating a $1 million "hole" in Estes' coverage, USF&G was the architect of the circumstances that allowed Chubb to cash out its limits and create an uninsured excess exposure to USF&G.

While the amount of this excess exposure was likely greater than it would have been had the settlement with Perera been for all cash, once again USF&G has no one but itself to blame. USF&G has stipulated that the $10 million consent

judgment represented a reasonable amount to settle Perera's claim. It is a matter of common sense and simple logic that a plaintiff will accept a greater discount from the full value of his or her claim for a cash payment than for a settlement that consists half of cash and half of a cause of action that may or may not result in any further recovery, and in any event will almost certainly take years to reach fruition. If Estes had not purchased excess coverage, it unquestionably would have had a bad faith claim against USF&G for the difference between the amount for which the case could have been settled if USF&G had contributed its policy limits, and the amount the case had to be settled for because those limits were not made available. Since an insured that purchases excess coverage merely substitutes the excess carrier for itself, the result must be the same where excess coverage has been purchased, such as in this case.

USF&G's complaint that Chubb was able to use USF&G's bad faith to Chubb's advantage is particularly ironic given the compelling evidence that USF&G was inappropriately attempting to use Chubb's excess coverage for its own advantage. In light of the seriousness of the Perera claim, and the prior course of settlement negotiations, USF&G knew that any settlement with Perera would necessarily exceed the combined limits of Cigna's and USF&G's underlying coverage and implicate Chubb's excess coverage. Thus, if USF&G were to participate in a settlement, its contribution would have to be at or very near its full

$1 million policy limits. Under these circumstances, absent a bad faith exposure, USF&G could do no worse by refusing to settle than by settling, and might do better by not settling if Estes happened to defend successfully against Perera's suit.

The disincentives to a primary insurer to settle a claim that is at or near its limits when excess insurance is present are well documented. As the court observed in *Northwestern Mut. Ins. Co. v. Farmers Ins. Group*, 143 Cal.Rptr. 415, 425 (Cal.App. 1978):

> Permitting an excess insurer to recover from the primary insurer for its unreasonable failure to settle within its policy limits, in no way reduces or diminishes the duty of the excess insurer to settle within the limits of its own policy. Neither does it in any way discourage settlements. However, denying recovery, that is, relieving a primary insurer of its duty to effect reasonable settlement where excess coverage exists, would tend to deter settlements. It would give the primary insurer a disincentive to settle, particularly when the proposed settlement was near, at or in excess of primary's policy limits. This may be illustrated by assuming a case in which the primary policy limit is $20,000, the excess policy limit is $50,000, the reasonable settlement offer is $18,000, liability is likely but not certain, and the damages are such that, if recovery is had, it will likely be in an amount well in excess of the primary policy limit. In such a situation, if the primary insurer is not faced with the possibility of liability for bad faith failure to effect settlement, it will have at risk only $2,000 if it refuses to settle for $18,000 and proceeds to trial on the possibility of a favorable judgment. If the reasonable settlement offer were $20,000, it would risk nothing at all by going to trial. (Internal citations omitted.)

A primary insurer's disincentives to settle are magnified when the settlement value of the claim significantly exceeds the primary carrier's policy limits as it did

here as it did here. Since a verdict was likely to fall somewhere within the limits of Chubb's excess policy, unlike USF&G, Chubb had a real prospect of reducing its exposure by settling with Perera. Furthermore, Chubb had much greater potential exposure if the case were not settled because its policy limits were $25 million as compared to USF&G's $1 million.

There is compelling record evidence that USF&G's real reason for refusing to participate meaningfully in settlement negotiations was because it believed that Chubb would still settle the case without USF&G's participation. In fact, USF&G's counsel admitted as much. Richard Byrne, the attorney retained by USF&G to advise it on coverage matters testified that, although USF&G took the position that it would not make a determination on coverage until after the trial on Perera's claim against Estes and its employees, he believed that Estes would never suffer an adverse jury verdict because Chubb would settle the case. Specifically, Mr. Byrne testified:

> Q. Okay. Well, let's take it one at a time. Was it your opinion at this point in time, and we're looking at about July of 2001, that USF&G should await the outcome of a trial before making a determination whether or not they would deny coverage to Estes?
>
> A. Yes.
>
> Q. Okay. And you realized at that time, did you not, that by waiting until the outcome of a trial Estes could be put in a position where they got hit for a huge verdict with no recourse at that point?
>
> MS. MILLER: Object to form.
>
> THE WITNESS: No.
>
> BY MR. DIECIDUE:

Q. No.

You didn't realize that there was a possibility Estes could have a substantial judgment -- verdict and judgment entered against them by going to trial?

A. As of this point in time, the parties were being informed by Chubb that they were going to settle the case.

DE 44, p. 49.

Of course, if Chubb had settled the case in the manner USF&G had anticipated, with Chubb advancing or Estes paying out of its own pocket the $1 million USF&G policy limit, this would represent a significant, unwarranted benefit to USF&G. USF&G's payment of its limits would be delayed by months or years, and might itself be "settled" for less than USF&G's full policy limits. This undeserved benefit to USF&G would have come at the expense of either Estes, its insured, or Chubb, the excess carrier that legally stood in Estes' shoes.

What USF&G did not anticipate was that Chubb would instead use the leverage USF&G had created by its bad faith conduct to "cash out" the limits of its excess policy for the Perera claim and expose USF&G to an uninsured excess judgment. If USF&G is not held accountable for its bad faith conduct in this case, it is unlikely that future carriers in USF&G's position will honor their obligations to their insureds because they have nothing to gain and much to lose by doing so. Indeed, if USF&G is correct that there can be no bad faith claim here, the insurer that acted imprudently was Cigna. Cigna had the same coverage defenses that

USF&G did, and the same incentives to sit on its hands that USFG did, but still honored its obligations to Estes' employees, its insureds, by making its limits available to settle Perera's claim against them. To reward USF&G's bad faith by exonerating it from liability, and in effect penalize the insurer that honored its obligations in a timely fashion, would represent extraordinarily bad public policy, and should not be authorized by this Court.

CONCLUSION

This Court should answer the first certified question by advising the Eleventh Circuit that the only type of excess judgment needed to assert a bad faith claim exists in this case. The second certified question should be answered in the affirmative, and the Eleventh Circuit should be advised that the form of the settlement did not preclude a bad faith claim against USF&G.

Respectfully submitted,

/ s / Charles P. Schropp

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of January, 2009, a true and correct copy of the foregoing Initial Brief of Appellant, Pamela Perera has been furnished via U.S. Mail to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief is printed in 14-point Times New Roman, Microsoft Word Format, in accordance with Rule 9.210, Fla.R.App.P.

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