

IN THE SUPREME COURT OF FLORIDA

Case No.: **SC03-1417**

**FLORIDA FARM BUREAU GENERAL INSURANCE COMPANY,**

Petitioner,

vs.

**MARIBEL FARINAS, MARGARITA FARINAS, SUSAN WALKER,  
individually, and as representatiave of the ESTATE OF MARGAUX  
SCHEHR; ROCHELLE SLOSBERG, individually; IRVING SLOSBERG,  
individually, and as representative of the ESTATE OF DORI SLOSBERG;  
EMILY SLOSBERG, individually; and LIGIA GALLEGO, individually, and  
as representative of the ESTATE OF CAROLINA GIL,**

Respondents.

A Certified Question of Great Public Importance,  
by the District Court of Appeal, Fourth District

**ANSWER BRIEF ON THE MERITS OF RESPONDENTS  
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EMILY SLOSBERG, and LIGIA GALLEGO**

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liability, multiple claims, and inadequate policy limits, does insurance good faith law require that an insurer reasonably investigate all claims prior to payment of any claim, keep the insured informed of the claims resolution process, and attempt to minimize the magnitude of possible excess judgments against the insured?

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## PREFACE

This is a question of great public importance certified to this court by the Fourth District. The Fourth District reversed a final summary judgment entered in favor of Florida Farm Bureau in an insurance bad faith case. The order was entered by the Honorable John D. Wessel, Fifteenth Judicial Circuit.

The respondents, Susan Walker, individually, and as representative of the Estate of Margaux Schehr; Rochelle Slosberg, individually; Irving Slosberg, individually, and as representative of the Estate of Dori Slosberg; Emily Slosberg, individually; Ligia Gallego, individually, and as representative of the Estate of Carolina Gil; Maribel Farinas, and Margarita Farinas were the intervenors/plaintiffs before the trial court and the appellants before the Fourth District. The petitioner, Florida Farm Bureau, was the plaintiff on the main claim, the defendant on the complaint for intervention and bad faith, and the appellee before the Fourth District.

Nicholas Frank Copertino and Nicholas T. Copertino were defendants/counter-plaintiffs before the trial court and were nominal appellees before the Fourth District. In this brief the parties will be referred to by name.

The following symbols will be used in this brief:

( R .

p . \_\_\_\_\_)

consolidated record on appeal;

( 1 S R .  
P .  
)

first supplemental record on appeal;

( R 0 2 - 9 6 p .  
  
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record on appeal case # 4D02-96;

( 2 S R .  
  
P .  
)

second supplemental record on appeal;

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third supplemental record on appeal;

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appendix accompanying this brief.

### **STATEMENT OF THE CASE AND FACTS**

Florida Farm Bureau (hereinafter “FFB”) ignores the principle that on review of a summary judgment an appellate court must view the facts in a light most favorable to the non-movant. It presents this court with a sanitized fact statement that bears little resemblance to the record. The record demonstrates that the Fourth District correctly concluded that this case should be decided by a jury, rather than by the trial court as a matter of law.

This lawsuit arises out of a tragic motor vehicle accident that occurred on

Palmetto Park Road in Boca Raton, Florida, on the night of February 23, 1996. A vehicle driven by Nicholas Frank Copertino at an excessive speed collided with a vehicle operated by Lisa Boccia. Five young teenagers were killed in the accident and seven others were critically injured. At the time of the accident, Nicholas Frank Copertino was insured under an automobile liability insurance policy issued by FFB. The policy provided coverage of \$100,000/\$300,000. This action was brought by the estates of three of the decedents and two of the parties injured in the accident against FFB for bad faith claims handling pursuant to common law and §624.155, Florida Statutes.<sup>1</sup>

**A. The Accident**

At the time of the accident, Nicholas Frank Copertino was 19 years old. On the evening of the accident, at approximately 7:30 p.m., he and his seventeen year old friend, David Grossman, went to Don Carter Bowling Lanes in Boca Raton to see friends. (1SR.1 p.3953-3954)

That same night, Maribel Farinas (age 14), Carolina Gil (age 14), and Crystal Cordes (age 14), had dinner at Emily and Dori Slosberg's residence. The Slosberg

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<sup>1</sup>

Farinas only sought recovery for a common law bad faith claim.

twin girls were 14 years old. Following dinner, Irving Slosberg drove his twin daughters and their three friends to the Town Center Mall just off of Glades Road in Boca Raton. On the way to the mall, Mr. Slosberg dropped Crystal Cordes off so that she could walk to the home of her friend, Margaux Schehr (age 13). Mr. Slosberg then dropped the three other girls off at the mall at approximately 7:30 p.m. Crystal Cordes and Margaux Schehr went to the mall where they met Emily, Dori, Maribel, and Carolina. (1SR.1 p.3954-3955)

After spending time at the mall, the six girls went to Don Carter Lanes in Boca Raton. Outside the bowling alley, Emily Slosberg and Maribel Farinas struck up a conversation with Nicholas Copertino and David Grossman. Emily and Maribel then went into the bowling alley, where they saw Ryan Rashidian (age 15). Ryan mentioned that he needed a ride home. The girls told him that they knew two guys who had a car and could give him a ride. (1SR.1 p.3955)

Copertino agreed to give Ryan Rashidian a ride home. (1SR.1 p.3955) The Slosberg twins, Carolina Gil, Maribel Farinas, Crystal Cordes and Margaux Schehr decided to go along for the ride. They sat in the rear seat of Copertino's Honda Civic. Seven passengers rode in the rear of that car. David Grossman rode in the front

passenger seat. (1SR.1 p.3955)

Nicholas Frank Copertino drove southbound on Military Trail en route to Palmetto Park Road. At Palmetto Park Road, Copertino proceeded westbound at approximately 90 miles per hour in a 55 mile per hour speed zone. Copertino changed lanes, lost control of his vehicle, and collided with Lisa Boccia's vehicle. Petra Rettig and Tamara Mikolajczac were passengers in Lisa Boccia's car. (1SR.1 p.3955-3956)

The high-impact collision resulted in the deaths of Ryan Rashidian, Dori Slosberg, Crystal Cordes, Carolina Gil, and Margaux Schehr. Nicholas Frank Copertino, Emily Slosberg, Petra Rettig, Lisa Boccia, and Tamara Mikolajczac suffered incapacitating injuries as a result of the accident. (1SR.1 p.3955-3957) Maribel Farinas was rendered a quadriplegic as a result of injuries sustained in the accident. David Grossman sustained non-incapacitating injuries in the collision. (1SR.1 p.3948)

## **B. Criminal Charges**

Nicholas Frank Copertino was charged with and convicted of five counts of manslaughter by culpable negligence and six counts of culpable negligence. His conviction was affirmed in *Copertino v. State*, 726 So. 2d 330 (Fla. 4<sup>th</sup> DCA 1999), *review denied*, 735 So. 2d 1284 (Fla. 1999). A federal judge subsequently granted a

petition for writ of habeas and ordered a new trial. *Copertino v. Secretary—Department of Corrections*, case number 00-08233-CV-KLR (S.D. Fla. 2000). The Eleventh Circuit reversed that order granting a new trial. *Copertino v. Secretary—Department of Corrections*, 281 F. 3d 1284 (11<sup>th</sup> Cir. 2001), *certiorari denied by Copertino v. Moore*, 537 U.S. 824, 123 S.Ct. 111, 154 L.Ed.2d 35 (2002). Copertino is presently serving a fifteen year prison sentence.

**C. FFB’s Insurance Claims Handling Process**

FFB issued an automobile liability insurance policy to Nicholas Frank Copertino’s father, Nicholas T. Copertino, that provided liability insurance for Nicholas Frank Copertino and his Honda Civic that was involved in the accident. That policy provided liability coverage of \$100,000 for any one person injured in an accident, and a total of \$300,000 limits for multiple injuries or deaths in one accident.

On February 26, 1996, three days after this tragedy, FFB received notification of the accident. John Potter was the local claims representative assigned by FFB to handle the claims arising out of this accident. (R.20 p.3531; 3552) Cliff Willis, FFB’s District Claims Manager, immediately retained John Bulfin, a West Palm Beach attorney, to handle the claims against its insureds, the Copertinos. (R.20 p.3529, 3531)

Bulfin was a highly experienced trial lawyer who, since 1983, had handled several cases for FFB. (R.12 p.1984-1985)

On February 26, 1996, Willis wrote a claims memo to adjuster John Potter advising in part as follows:

As you can see from the attached letter to John Bulfin, we have retained him to assist us in the coordination and handling of the various BI claims which are surely to follow in the near future.

***With five fatalities and six injuries, the eleven claimants will be competing for the \$300,000 in BI coverage.***

While Florida law gives us the right to settle these claims on a first come, first served basis without any regard to those claimants who might be left without any compensation, ***it would certainly be in our insured's best interest if we could somehow coordinate all eleven claims so that the available BI coverage can be divided up among them and releases taken from all of them on behalf of the insured.***

The amount of UM coverage which the various claimants might have from their own households will certainly be a factor in determining how easily these claims might settle.

Depending on what occurs, we may need to discuss with John Bulfin the practicality of petitioning the circuit court in Palm Beach County and tendering the money with the court to determine how it should be divided among the claimants. (R.20 p.3529)[emphasis supplied]

That same day, Willis wrote Nicholas T. Copertino advising him that FFB had retained John Bulfin to represent him and his son. (R.20 p.3531-3532) Willis also

advised the insured:

Attached is a copy of your Personal Auto Policy Declaration sheet which indicates your limits of liability are \$100,000 for one person and \$300,000 for each accident. Thus, the most we can pay on your behalf from your Bodily Injury coverage toward all of the claimants in this accident is the grand total of \$300,000. ***We will have to endeavor to distribute this \$300,000 amount among the various and competing claims.*** (R.20 p.3531)[emphasis supplied]

On February 27, Willis sent a message to Dennis Moosbrugger, another FFB claims representative, instructing him not to provide information to anyone regarding Copertino's insurance coverage limits over the telephone. Instead, Willis asked him to stall so that FFB could coordinate the claims with defense counsel, John Bulfin:

If any one calls your office to ask about coverage limits on the Copertino auto accident, do not give out the info. over the phone.

Don't give out our fax numbers.

Instead, advise the callers to send a written disclosure request to John Potter at the Delray Beach address. Tell them we will reply within the 30 day time period allowed by Florida-statute.

John, when the disclosure requests arrive, send me the originals and send a copy to John Bulfin and retain a copy for your file.

Don't reply to them immediately. Instead, we will save them up and reply to them all at once about 25 to 30 days after they are received.

The law allows us to take that long and for such a castastrophic [sic]

claim as this, we will need to use that time to allow us to properly coordinate matters with John Bulfin.

If we start receiving time limit demand packages too quickly, our ability to best respond in a manner that protects our insured's best interest may be compromised. (Exhibit III to deposition of John Potter taken April 13, 2001)(R.11 p.1783-1978)

On February 29, FFB received a 48-hour time limit demand from an attorney representing Lisa Boccia and Petra Rettig for \$100,000 to settle each of their claims. (R.20 p.3571) Boccia sustained a pelvic fracture, ankle and foot fractures, and facial cuts. Rettig was in a coma and sustained severe injuries to her lower extremities which necessitated numerous surgeries.

Willis immediately informed Frank Leonard, vice president of claims for FFB, of the demand, noting that this was a case of liability on the part of FFB's insured, with "multiple claimants and limited liability coverage which will not be sufficient to compensate all of the claimants for their damages." (R.6 p.964) Willis wrote:

Thus, it appears we are only left with one option under Florida law as we approach the settlement of these various claims.

The case of Harmon v. State Farm, 232 So.2d 206 (Fla. 2<sup>nd</sup> DCA, 1970) determined; "Where multiple claims arise out of one accident, liability insurer has right to enter reasonable settlements with some claimants regardless of whether settlements deplete or even exhaust policy limits to extent that one or more claimants are left without recourse..."

It also recites prior law that indicates; “Whether multiple claims are to be treated one at a time or collected and evaluated together, is a choice solely within the discretion of the insurer.”

There is a federal case, Liberty Mutual Insurance Company v. Davis, 412 F.2d 475 (5<sup>th</sup> Cir. 1969) which interpreted Florida law and discusses this topic and includes the concept that the carrier must make a reasonable settlement as “if the fund is needlessly exhausted on one claim, when it might cancel out others as well, the insured suffers from the company’s readiness to settle.”

Thus, I am left with the impression that we should proceed to engage in reasonable settlements with as many claimants as possible on a first come, first served basis.

The case law indicates the carrier should use diligence in being reasonable with the settlements and to not simply seek to exhaust the money as quickly as possible. (R.6 p.965-966)

That same day Attorney John Bulfin wrote Willis a letter enclosing a letter memorandum regarding Florida law in situations where there are multiple claimants and insufficient insurance coverage (the “Bass” memorandum). Bulfin invited Willis to call him to discuss the letter memorandum after he had reviewed it. (R.6 p.971)

Willis never called attorney Bulfin to discuss the memorandum. (R.12 p.2177)

That letter memorandum cautioned “. . . the general rule that should be followed by the insurer is to chose the course of action that is in the best interest of

the insured, i.e., limit the insured's exposure to the extent possible and settle the maximum number of claims." (R.6 p.972) The letter enclosed various articles, including materials from the Defense Research Institute's Fifth Annual Symposium on Insurance Coverage and Practice dealing with "Settlement With Less Than All Claimants . . . Good Faith, Bad Faith, Your Choice . . . Or Is It?" (R.6 p.974) The letter memorandum also included a list of procedures for handling such claims, which specified in part:

1 .  
The insurer and the defense counsel must keep in mind the insured's interest. This does not mean, in most jurisdictions, that the insurer's interest have to be relegated to a secondary position, but neither can the interest of the insurer be elevated above that of its insured.

a .  
The insured should be kept up to date as to what the insurer is trying to do and its approval should be sought;

b .  
The insured's approval is not mandatory.

2 .  
An effort must be made to settle all of the claims.

a .  
The insurer has a duty to initiate settlement discussions with all claimants. (R.6 p.975-976)

The letter memorandum also cautioned:

P a g e s F - 2 2 - F - 2 3 .  
Suggestions concerning the procedures and methods by which a liability insurance carrier should address a situation in which there has been multiple claims arising out of one accident were made by Stephen S. Ashley in the Bad Faith Law Report, August, 1987. Mr. Ashley stated that:

The problem for the insurer is to adopt a plan that tests the possibility of a comprehensive settlement and, failing that, utilizes the process to “blot out” as much of the insured’s potential liability as possible. Consider the following procedures:

( 1 )  
The insurer should ascertain how many months it will take the claimants and their attorneys to estimate the settlement value of each claimant’s claim.

( 2 )  
At a meeting with the insured, represented by independent counsel, the insurer should attempt to obtain the insured’s approval of the insurer’s settlement plan.

( 3 )  
The insurer should send a letter to all of the claimants tendering the policy limits on the condition that all of the claimants release all of their claims against the insured. The letter should notify the claimants that if they are unwilling to accept the policy limits in settlement of all their claims or if they are unable to agree on the division of the policy proceeds, the insurer will use the policy proceeds to settle the claims individually in a manner that will maximize the insured’s protection from liability. The insurer should inform the claimants that this conditional offer to tender the policy proceeds will remain open for the time necessary for the

claimants to determine the settlement values of all of their claims, and that the insurer will not entertain individual settlement offers until the expiration of the conditional tender of the policy limits. The insurer should invite the claimants to request a longer time if they feel that they need it.

( 4 )  
If the claimants do not accept the tender of the policy limits within the time set, the insurer should send these claimants a second letter setting forth the insurer's estimates of the settlement values of the claimants' claims. The letter should give each claimant a short, fixed period of time in which to: a) make a settlement demand, and b) present arguments why the insurer has set too low a value on the claimant's claim and too high a value on the other claimant's claims. The letter should announce the insurer's intention to accept those settlement offers which, in its judgment, will release the insured from the maximum potential liability per settlement dollar.

( 5 )  
At the end of the fixed period of time, the insurer, with the advice and, if possible, consent of the insured, should accept the most attractive settlement offers. (R.6 p.976-977)

After FFB received Lisa Boccia's 48 hour demand letter, Cliff Willis wrote Boccia's attorney, Mark Kaire, asking for additional information in order to evaluate Boccia's bodily injury claims. In that letter, Willis noted "Without a doubt, the Bodily Injury liability coverage . . . available . . . will be insufficient to fully compensate all of the claims arising from this accident." *Id.* Willis acknowledged in the letter "While Ms. Boccia received injuries in this accident, her damages are far less in comparison to the

five death claims.” (1SR.9 p.5413-5414)

The activity log maintained by FFB’s adjuster, John Potter, reveals that on February 28, 1996, the adjuster spoke with someone at Allstate Insurance Company regarding the Schehr death claim and refused to disclose the Copertino policy limits over the telephone. (R.20 p.3551) On that same day Potter spoke to Mr. Botero regarding the Carolina Gil death claim, advised him that no information could be given over the telephone, and suggested that the family report the claim to their own insurance carrier. (R.20 p.3551)

On March 4, 1996, Potter received a facsimile request from Farinas’ attorney requesting a disclosure of policy limits. (R.20 p.3550) The next day he received a similar request for policy limits disclosure from the attorney for Ryan Rashidian’s estate. (R.20 p.3550) On March 6, Farinas’ attorney wrote Potter advising him that the Farinas’ claim would be a policy limits case and instructing him not to settle with any other claimants until the Farinas claim was resolved. (R.20 p.3550; 1SR.10 p.5522-5540) Maribel Farinas is a quadriplegic as a result of the injuries sustained in the accident. That same day, Potter received another telephone call on behalf of the estate of Margaux Schehr demanding the policy limits. (R.20 p.3549)

On March 7, Attorney Kimmelman called John Potter on behalf of the estate of Margaux Schehr and inquired regarding the policy limits and whether any claims had been paid. (R.20 p.3619-3620) Potter was very curt, refused to provide any information, and told Kimmelman to put the request in writing. (R.20 p.3619) Kimmelman felt something was going on, so that same day, not even knowing the policy limits, he wrote a policy limits demand letter to Potter. (R.20 p.3621, 3625) On March 7, Potter received the written policy limits demand for the estate of Margaux Schehr from Ned Kimmelman. (R.20 p.3549; R.20 p.3620-3621; 1SR.9 p.5434-5435) FFB was given 30 days to respond to that demand. (R.20 p.3621)

This was the third demand for policy limits received by John Potter. The first two policy limits demands that he received were sent by Attorney Mark Kaire on behalf of Lisa Boccia and Petra Rettig. (R.20 p.3571; 3700) FFB never responded to the demand made on behalf of the estate of Margaux Schehr. Instead, on March 15, FFB wrote Attorney Kimmelman and informed him that the policy limits had been exhausted by payments to other claimants. (R.20 p.3622)

In a telephone conversation, Cliff Willis of FFB informed Attorney Kimmelman that the policy limits had been paid to the Rashidian estate, the Cordes estate, and

Boccia, whose respective demands of March 5, March 6, and February 29 predated his demand on behalf of the estate of Margaux Schehr. (R.20 p.3626) Discovery proved this representation by Cliff Willis was false. At that time, there was no demand made on behalf of the Cordes estate. R.21 p.3774) There was never a policy limits demand made on the Rashidian claim. (R.21 p.3762)

On March 21, Attorney Kimmelman wrote Willis, telling him to make no disbursements prior to a full evaluation of all claims. (R.20 p.3626) At that juncture, FFB had made the decision to pay the Rashidian, Cordes, and Boccia claims, but had not disbursed the funds. (R.20 p.3626) FFB did not heed Attorney Kimmelman's admonition, but instead paid out the policy limits for the Boccia, Rashidian, and Cordes claims. FFB made the decision to disburse on March 8, the day following receipt of Attorney Kimmelman's demand letter. (R.20 p.3626) Willis admitted that FFB made no investigation of all of the claims to determine the severity of the claims before deciding post-haste to settle these three claims. (R.20 p.3593-3594)

On March 8, 1996, FFB tendered \$100,000 each to settle Boccia's bodily injury claim and to settle the claims for the deaths of Ryan Rashidian and Crystal Cordes. (R.4 p.675Q, 675R, 675S; R.20 p.3548) Payment of these three claims, which

exhausted the policy limits, was made without the knowledge or consent of the Copertinos or their attorney, John Bulfin. (R.12 p.2172-2173, 2178-2179)

At the time FFB paid these three claims, it had been contacted by attorneys representing all of the potential claimants, except David Grossman, who did not sustain incapacitating injuries. (R.20 p.3523; R.21 p.3691-3696) When FFB tendered its \$100,000 limits to Cordes' attorney, that attorney had not even made a demand. (R.21 p.3772) The attorney for the Cordes estate did not send a demand letter until March 11. (R.21 p.3773) A policy limits demand was never made for the death of Ryan Rashidian. (R.21 p.3762)

At the time that FFB paid its policy limits, the traffic homicide investigation was still pending. That report was not issued until April 8, 1996. (1SR.1 p.3943) Once FFB paid its policy limits, it wrote the other claimants' attorneys, advising them that its policy limits had been paid. (R.20 p.3543, 3544, 3545, 3547)

On March 13, 1996, the Copertinos specifically asked FFB whether they would be provided with a defense once FFB exhausted its policy limits. (R.8 p.1220-1221; 1SR.10 p.5549) FFB did not respond to the Copertinos' inquiry. (R.8 p.1221) Instead, it filed a declaratory decree action against its insureds and asked the trial court

to determine that issue. (1SR.1 p.3840-3874)

**D. Settlement by Boccia's Insurer**

Lisa Boccia, the driver of the other vehicle involved in this accident, had automobile liability insurance coverage with State Farm of \$100,000 per person, \$300,000 per accident. State Farm contacted all potential claimants, tendered its full per person policy limits of \$300,000 and scheduled a mediation. (R.19 p.3502) The mediation occurred on June 11, 1997. (R.19 p.3503) Nine of the ten possible claimants, all except David Grossman, appeared at the mediation and settled all of their claims for the total \$300,000 policy limits. The settlement was on a pro rata basis, with \$100,000 paid to Farinas, and \$25,000 to each of the other claimants, except Petra Rettig, who received \$24,999. (R.19 p.3503-3505)

**E. The Declaratory Decree Action and Bad Faith Claims**

After FFB dumped its policy limits, with knowledge that there were eight potential additional claims against its insureds, FFB filed a declaratory judgment action against its named insured and his son in July 1996. (1SR.1 p.3840 *et seq.*) FFB requested a declaration that it did not have a duty to defend or indemnify Copertino with respect to any pending or future claims arising out of the accident.

FFB gave no notice to Attorney Bulfin or to the Copertinos that it was filing the declaratory decree action. FFB did not provide a defense for the Copertinos in the declaratory decree action. Instead, FFB obtained a default against the Copertinos. (1SR.1 p.3877-3879)

In December 1996, several of the victims were permitted to intervene in the declaratory decree action. (1SR.1 p.3885-3889; 3894) FFB filed a petition for common law certiorari seeking review of the order permitting intervention. The Fourth District denied certiorari. *Florida Farm Bureau v. Copertino*, 693 So. 2d 642 (Fla. 4<sup>th</sup> DCA 1997).

Maribel Farinas, Emily Slosberg, the estates of Margaux Schehr, Dori Slosberg, and Carolina Gil, each answered the complaint for declaratory decree, raising as affirmative defenses both common law and statutory bad faith, and asserting that FFB had failed properly to investigate or evaluate all of the claims. (1SR.1 p.3879, 3909 *et seq.*; 3923 *et seq.*; 4002) The intervenors, except Farinas, also filed a civil remedy notice pursuant to section 624.155, Florida Statutes (1995), for statutory bad faith.

Once the Copertinos learned about the declaratory decree action filed against them, they moved to set aside the default. (1SR.1 p.4023-4039) The trial court set

aside the default entered against the Copertinos and permitted them to file an answer that asserted lack of good faith as an affirmative defense. (R.1 p.140, 141; 1SR.2 p.4057-4058; 4035 *et seq.*)

In December 1997, all of the intervenors, except Farinas, filed a complaint against FFB for bad faith. (1SR.2 p.4066 *et seq.*) Farinas pursued a civil lawsuit against Copertino and obtained a judgment for \$29.2 million. (R.4 p.684) Farinas then filed a bad faith complaint against FFB in October 2000. (1SR.15 p.6605-6616)

The other intervenors' suits against Nicholas Frank Copertino proceeded to trial. On January 16, 2001, Emily Slosberg obtained a judgment for \$1,524,494.00 against Copertino; Rochelle Slosberg obtained a judgment of \$1,550,000.00 against Copertino; Irving Slosberg obtained a judgment \$1,610,000.00 against Copertino; Susan Walker, individually, and as representative of the estate of Margaux Schehr obtained a judgment against Copertino of \$3,000,000.00; and Liggia Gallego, individually and as representative of the estate of Carolina Gil obtained a judgment against Copertino of \$3,000,000.00.

These intervenors then filed an amended complaint for bad faith against FFB, asserting claims for both common law bad faith and statutory bad faith pursuant to

§624.155, Florida Statutes. (R.4 p.603-635) Nicholas Frank Copertino and his father also filed a counter-claim against FFB for violation of the Claims Administration Act and for common law bad faith. (1SR.3 p.4416 *et seq.*)

FFB filed a motion for summary judgment on all claims of the defendant and of the intervenors. (1SR.13 p.6220-6278) The trial court continued the hearing on that summary judgment motion. (R.14 p.6464-6465) FFB filed a motion for partial summary judgment on its declaratory decree action regarding its duty to defend Copertino. (1SR.14 p.6456-6460) The trial court denied that motion for partial summary judgment. (1SR.15 p.6679-6680)

Copertino moved for summary judgment on his claims against FFB for violation of the Claims Administration Act and filed a renewed motion to determine his entitlement to attorney's fees. (1SR.16 p.6817-6828; 1SR.18 p.7115-7172) Judge Wessel granted Copertino's motion for summary judgment and determined that he was entitled to attorney's fees. (1SR.18 p.7263; 1SR.19 p.7315-7316) FFB appealed the final summary judgment entered in favor of Copertino. (1SR.19 p.7319)

While FFB's appeal was pending, FFB and the Copertinos secretly settled the Copertinos' bad faith and other claims. FFB and the Copertinos filed a joint motion

asking the Fourth District to relinquish jurisdiction to the trial court to vacate the appealed orders. FFB then filed a motion pursuant to Rule 1.540(b), Florida R. Civ. Pro., to vacate the appealed orders, which was granted. (R.4 p.642-644; 654-655; R.17 p.3057-3059) The Copertinos voluntarily dismissed their bad faith complaint against FFB with prejudice. (R.19 p.3347-3350) Despite the fact that there were preexisting recorded judgments and liens for nearly \$40 million against Nicholas Frank Copertino, FFB secretly paid one million dollars to the Copertinos and their lawyers to settle the Copertinos' bad faith and other claims against FFB. (AA.1 *et seq.*)<sup>2</sup>

#### **F. The Second Motion for Summary Judgment**

After FFB and the Copertinos secretly settled, FFB filed a second motion for summary judgment on the intervenors' bad faith claims, asserting precisely the same grounds set forth in the prior motion for summary judgment. (R.4 p.666-675) These intervenors filed a lengthy response in opposition to FFB's motion for summary judgment, attaching numerous documents and portions of depositions. (R.20

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FFB refused to produce the secret settlement documents to respondents and the trial judge denied production. On appeal to the Fourth District, these respondents asserted an issue regarding the denial of production. The issue became moot when FFB finally produced the settlement documents. The documents are in the appendix at page 1 *et seq.*

p.3508-3780)

Cliff Willis, the district claims manager for FFB, admitted that he received the “Bass memorandum” from John Bulfin. (R.20 p.3588) As of February 27, FFB knew there were five fatalities and six injuries. (R.20 p.3587) In entering reserves for the claims against Copertino, Willis divided the \$300,000 policy limits among the eleven claimants. (R.20 p.3508; R.20 p.3510) Willis posts reserves that are appropriate to the policy limits. (R.20 p.3510)

Willis admitted that although this was a complex case, he did not seek legal advice from anyone before making the decision to settle the three claims. (R.20 p.3591) Willis admitted that he reviewed and considered the decisions in *Harmon v. State Farm Mutual Automobile Ins. Co.*, 232 So. 2d 206 (Fla. 2d DCA 1970); *Liberty Mutual Ins. Co. v. Davis*, 412 F.2d 475 (5<sup>th</sup> Cir. 1969); *Powell v. Prudential*, 584 So. 2d 12 (Fla. 3d DCA 1991); and *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980). (R.20 p.3592)

When Willis settled the Boccia claim, he had no information regarding the severity of the other bodily injury claims. (R.20 p.3593) Willis did not evaluate the other claims before paying the three claims. (R.20 p.3594) When he settled the Boccia

claim, Willis did not know which was the most serious bodily injury claim. (R.20 p.3594)

Willis admitted that FFB's highest duty is to its insured and that FFB cannot act in its own best interests. He agreed that FFB must use available insurance proceeds to settle as many claims as possible. (R.20 p.3595) Willis told the Copertinos that FFB would endeavor to distribute the \$300,000 among *all* competing claims. (R.20 p.3596) Willis admitted that in settling the three claims, FFB assured that excess verdicts would be entered against its insured. (R.20 p.3598)

Although Willis agreed that pro rata settlement is an option where there are multiple claimants, he made no attempt to achieve a pro rata settlement. He thought it was impractical because the damages were too great in comparison to the relatively low policy limits. (R.20 p.3599-3600) Willis never asked Attorney Bulfin to tender the policy limits to all claimants, nor did FFB make any kind of conditional offer to settle all claims, leaving it to the claimants to agree on proration of the policy limits. (R.20 p.3601)

Willis never asked for any medical records or uninsured motorist information except on the Boccia claim. (R.20 p.3601) Willis and Frank Leonard admitted that

Boccia's forty-eight hour time limit demand was unreasonable and that the case law does not support such a short time limit. (R.20 p.3611, 3662)

FFB did not train Willis how to handle multiple claims (R.20 p.3606) Although Willis thought about a global settlement, he felt that it was absurd and impossible. (R.20 p.3608-3610) In response to a hypothetical question, Willis admitted that if FFB could have settled with all claimants, that would have been the most proper thing to do. (R.20 p.3610) Willis nonetheless never tried to divide the policy limits among all claimants. (R.20 p.3612) According to Willis, FFB was not required to settle the most substantial claims in order to lessen the amount of any excess verdict against its insured. (R.20 p.3613) Willis decided to settle the Boccia claim solely because that claim came in first. (R.20 p.3614)

Frank Leonard, vice president of claims for FFB, testified that it is the responsibility of district claims managers to establish and adjust the reserves. (R.20 p.3661) Leonard conceded that the Boccia bodily injury claim was worth less than the death claims. (R.20 p.3662, 3669) Leonard agreed that Willis should have investigated all claims. (R.20 p.3662) Leonard read the Bass memorandum. (R.20 p.3664)

Leonard admitted that FFB did not tender its policy limits to the group of

claimants. (R.20 p.3665) According to Leonard, FFB did not try to achieve a global settlement because it would have been too complex. (R.20 p.3666) Leonard admitted that Willis, in a letter to its insured, quoted a portion of *Liberty Mutual Ins. Co. v. Davis, supra*, that an insured's funds should not be exhausted without attempting to settle as many claims as possible. (R.20 p.3667) Leonard conceded that an insured buys the expertise of the insurance company when he purchases a liability policy. (R.20 p.3668) He conceded the insured would have excess judgments against him, regardless of whether FFB settled with Boccia, but because FFB settled the Boccia claim instead of a death claim or Farinas' claim, the excess judgments would be greater. (R.20 p.3669-3670)

Leonard testified that although the same attorney represented Boccia and Rettig and made policy limits demands for both of them in the same letter, FFB only considered settling the Boccia claim because it received her medical records first. (R.20 p.3672) According to Leonard, FFB made the decision to settle on March 7, and extended the offers on March 8. (R.20 p.3674)

Leonard conceded that FFB received a letter of representation for the estate of Margaux Schehr on March 7. (R.20 p.3675) As of March 7, FFB had notice of all

potential claims. (R.20 p.3676) FFB made no inquiries of the attorneys regarding any of the death claims that were not settled. (R.21 p.3681) Even though FFB paid the Rashidian death claim on March 8, there was *no demand* for settlement of that claim. (R.21 p.3682)

Leonard conceded that FFB would have listened to Attorney Bulfin, the Copertinos' lawyer, regarding how to disburse the \$300,000 policy limits. (R.20 p.3678) Nonetheless, FFB did not advise Attorney Bulfin or Copertino of its decision to settle the three claims until the settlements were a fait accompli. Leonard also conceded that FFB paid its policy limits to the estate of Crystal Cordes on March 8, but did not receive a policy limits demand from her lawyer until March 11. (R.20 p.3679) FFB had notice of Farinas' claim on March 4, 1996. (R.20 p.3680)

John Potter, claims adjuster, testified that FFB's highest duty is to its insured. (R.21 p.3685) He admitted that coordination of all eleven claims so that policy limits could be divided among all claimants would be in the insured's best interests. (R.21 p.3686) Willis' memo to Potter states that FFB should somehow coordinate all eleven claims, so that the bodily injury coverage could be divided among all claimants and releases obtained. (R.21 p.3687) Potter conceded that the amount of uninsured

motorist coverage available to each claimant might be a factor in determining which claims to settle. (R.21 p.3688) Potter did nothing to determine the uninsured motorist coverage available to the claimants. (R.21 p.3688-3690)

Potter's daily logs showed that by March 7 he had received notice from all claimants, and that the three claims settled were not the first demands received. (R.21 p.3691-3692) Potter admitted that the first three demands, in order, were Boccia, Rettig and Schehr. (R.21 p.3699) Potter testified that the letters of representation were received in the order of Boccia, Rettig, Farinas, Rashidian, Cordes, Schehr. (R.21 p.3670) As of March 7, Potter had received notices of representation or demands from all claimants and reported them to the insured's attorney, John Bulfin. (R.21 p.3701; 3702) Potter was never asked to evaluate all the bodily injury claims. (R.21 p.3705)

Potter denied making any representation to Farinas' attorney that he would not distribute the policy limits. (R.21 p.3706) Potter denied that he was told that Maribel Farinas was a quadriplegic. (R.21 p.3707) Potter denied that he agreed not to settle any claims without considering Farinas' claim. (R.21 p.3708) He admitted that he never responded to the Farinas attorney's letter. (R.21 p.3715)

John Bulfin testified that an insurance company has a fiduciary relationship with its insured and owes the utmost duty of good faith to protect its insured from excess verdicts where there are multiple claims. (R.21 p.3733) An insurance company must put its insured's interests before its own. (R.21 p.3733) According to Attorney Bulfin, if FFB could have settled all the claims, that would have been in Copertino's best interest. (R.21 p.3735) Attorney Bulfin was not told that FFB was considering settling some of the claims against his clients. (R.21 p.3736) In response to a hypothetical question, Attorney Bulfin admitted that if FFB could have settled all of the claims against Copertino for its policy limits, but failed to try, that could be bad faith. (R.21 p.3749-3750)

Attorney Bulfin sent the Bass letter memorandum to Willis because he thought it would be instructive on how to handle multiple claims. (R.21 p.3737) Bulfin was surprised when he learned that the three claims were settled. (R.21 p.3738) According to Bulfin, under Florida law, whether the settlement method or procedure is done in good faith is a jury question. (R.21 p.3740)

Attorney Bulfin agreed that the entire insurance policy proceeds should have been used to blot out as much of Copertino's potential liability as possible. (R.21

p.3742-3743) Bulfin agreed that forty-eight hours is not enough time for an insurance company to evaluate a claim. (R.21 p.3745) Before an insurance company can enter into reasonable settlements in a multiple claims case, it needs information regarding the multiple claims. (R.21 p.3746) Bulfin admitted that an insured purchases the expertise of the insurance company in handling claims. (R.21 p.3748) If all claims could be settled, and FFB failed to attempt to do so, that could be bad faith. (R.21 p.3748-3750)

Nicholas T. Copertino expressed dissatisfaction with the Boccia settlement to his attorney, John Bulfin. (R.21 p.3713-3715) Mr. Copertino disapproved of the Boccia settlement because she was partially at fault, and other claimants were more deserving. (R.21 p.3723-3726) Copertino assumed his insurance policy proceeds would be distributed among all claimants, on an equal basis. (R.21 p.3716) He trusted FFB to resolve all of the claims together. (R.21 p.3717-3718) FFB told Mr. Copertino that it would act in his and his son's best interest and would get everyone to settle the claims. (R.21 p.3718; 3720-3721)

Mr. Copertino complained that FFB did not communicate with the other claimants before settling. (R.21 p.3722) He felt that if FFB had tried to settle, they

could have avoided years of civil litigation. (R.21 p.3727) FFB left him hanging. (R.21 p.3728) He criticized FFB for suing him, when it was supposed to represent him, and for failing to discuss settlement with him until after it had paid its policy limits. Copertino was critical of FFB for not trying to settle the most serious cases. (R.21 p.3729) He understood that FFB would distribute \$300,000 among all the various and competing claims. (R.21 p.3730)

Deborah Waller, attorney for Southern Farm Bureau, testified that in determining whether an insurance company has acted in bad faith, consideration would be given to whether the insurer followed the advice of its own counsel. (R.21 p.3756) She agreed that if an insurer cannot settle multiple claims on a pro rata basis, it should prioritize the claims and settle the larger claims in order to reduce or minimize the exposure to its insured. (R.21 p.3758)

Brian Pearl, attorney for estate of Ryan Rashidian, never wrote a policy limits demand letter to FFB. (R.21 p.3762) He did not know why FFB paid policy limits for Ryan Rashidian's death as opposed to other claims. (R.21 p.3762) A representative of the Rashidian estate attended State Farm's group mediation with all of the claimants (on the Boccia policy) and all of the claimants agreed to a pro rata settlement. (R.21

p.3763-3766) Attorney Pearl testified that he would have participated in a pro rata settlement with FFB if asked to do so. (R.21 p.3767)

Robert Gluck, the attorney for the Cordes estate, did not provide FFB with any information about his client prior to settlement of that claim, other than a letter of representation. (R.21 p.3769) FFB told him that it was settling with his client because the Cordes claim was one of the first three claims that came in. (R.21 p.3770) According to him, FFB tendered its limits before he made a demand. (R.21 p.3772) Gluck attended the State Farm mediation that resulted in a pro rata settlement of the claims against Boccia. (R.21 p.3773)

Art D'Almedia, Farinas' attorney, testified that Farinas would have accepted FFB's \$100,000 policy limits. (R.21 p.3776-3777) He instructed FFB not to settle any other claims until FFB considered the Farinas claim. (R.21 p.3778)

In addition to these depositions, the record contains the affidavit of Attorney Justus Reid that was filed by the Copertinos in opposition to FFB's motion for summary judgment on the bad faith claim. (1SR.15 p.6646 *et seq.*) Attorney Reid, a highly experienced trial lawyer who has handled numerous bad faith cases, opined that FFB violated its duty of good faith in the following ways: (1) not initiating or

attempting to engage in settlement negotiations with all of the claimants or, to settle all or as many claims as possible; (2) making no attempt to distribute the policy limits to all of the claimants; (3) failing properly to investigate the nature and extent of the claims to determine the respective severity of claims, and attempting to settle the most serious claims in order to minimize its insureds' exposure; (4) failing to communicate with the Copertinos regarding settlement opportunities, and the steps that could be taken that might avoid an excess judgment; (5) indiscriminately settling with just three of the claimants, thus, exposing its insured to excess judgments from the remaining claimants. (1SR. 15 p. 6646)

In addition, Farinas filed the affidavit of Peter Reo, an insurance adjuster, in opposition to FFB's motion for summary judgment. (1SR.15 p.6681-6686) Reo is an experienced all lines insurance adjuster. According to him, FFB did not act with due regard for its insured's interests.

Judge Wessel granted FFB's second motion for summary judgment and entered final judgment against the intervenors on their bad faith claims. The intervenors filed a timely notice of appeal seeking review of that final judgment and of the order denying

their request to review the settlement documents pertaining to the settlement reached between FFB and the Copertinos. (3SR. 7491-7504) The Fourth District reversed the summary judgment, holding that there were factual issues for a jury to decide and certifying a question of great public importance to this court.

## QUESTION CERTIFIED

**In an automobile accident scenario involving clear liability, multiple claims, and inadequate policy limits, does insurance good faith law require that an insurer reasonably investigate all claims prior to payment of any claim, keep the insured informed of the claims resolution process, and attempt to minimize the magnitude of possible excess judgments against the insured? <sup>3</sup>**

## SUMMARY OF ARGUMENT

This case could be the blueprint for how *not* to handle and settle multiple claims where there is inadequate insurance coverage. By its own admission, FFB made no

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The issue in this case is not one of great public importance. It is of importance to FFB because it mishandled the case. For at least a decade the Defense Research Institute has taught insurance claimsmen that the best way to handle multiple claimant/inadequate limits cases is as set forth at pages 8-9 of this brief. (R.6 p.974) FFB had this information, but chose to ignore it. Moreover, there is no direct and express conflict with other Florida appellate decisions. This court should decline jurisdiction on that basis. “Conflict” exists when two decisions are wholly irreconcilable or when the decisions collide so as to create an inconsistency or conflict among the precedents. *Williams v. Duggan*, 153 So. 2d 726 (Fla. 1963); *Kincaid v. World Insurance Co.*, 157 So. 2d 517 (Fla. 1963). This court’s conflict jurisdiction may be invoked where: (1) the District Court of Appeal announces a rule of law that conflicts with a rule previously announced by the Supreme Court or another District Court of Appeal, or (2) the District Court of Appeal applies a rule of law to produce a different result in a case that involves substantially the same controlling facts as a prior decision. *Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960). As shown below, neither scenario applies here.

investigation of the facts regarding the competing claims. FFB advised its insureds that it would endeavor to distribute the policy limits among all the claimants. Nonetheless, it made no effort to do so. FFB had a duty to keep its insureds apprised of settlement negotiations and promised to do so. *Powell v. Prudential Property & Casualty Ins. Co.*, 583 So. 2d 12 (Fla. 3d DCA 1991) It never informed the Copertinos of the three settlements until after the fact.

FFB's game plan was to stall its responses to requests for policy information, to dump its policy limits as quickly as possible (before the homicide investigation was complete) and to then seek a judicial declaration that it had no duty to defend its insured. FFB made absolutely no effort to minimize the magnitude of excess judgments against its insured. It settled the personal injury claim of the other driver who was also at fault without attempting to settle the Farinas quadraplegia case or the other death claims which it admitted exceeded the Boccia claim in value.

An insurer may have discretion to choose which of the multiple claims to settle in a multiple claims/inadequate policy limits case. However, that discretion is not unbridled. The insurer is still bound to act in good faith towards its insured. Florida bad faith law requires the insurer to investigate the facts of all claims, to keep its

insured informed during the claims resolution process and to advise the insured of settlement opportunities. An insurance company is required to exercise the same degree of care and diligence as a person of ordinary care and prudence would exercise in the management of his own business and to minimize the insured's exposure to excess judgments. FFB did none of these things. Under the circumstances of this case, there was a jury question regarding whether FFB acted in bad faith.

FFB asks this court to adopt a rule of law that would create absolute immunity from bad faith for insurers who act in bad faith in settling multiple claim/inadequate policy limits cases. This court should decline to do so. The opinion of the Fourth District is correct and should be approved by this court.

### **STANDARD OF REVIEW**

The proper standard of review of a summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000); *Krol v. City of Orlando*, 778 So. 2d 490 (Fla. 5<sup>th</sup> DCA 2001); *Sierra v. Shevin*, 767 So. 2d 524 (Fla. 3d DCA 2000).

### **ARGUMENT**

#### **A. FFB Owed Its Insured a Duty to Conduct Settlement Discussions in Good Faith and With Due Regard for the Insured's Interests**

The Fourth District did not misinterpret *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980). In settling claims and defending its insured, a liability insurer is held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business. The insurer must act in good faith toward its insured in its efforts to negotiate a settlement. *Auto Mutual Indemnity Co. v. Shaw*, 184 So. 2d 852 (Fla. 1938). In *Boston Old Colony*, this court set forth the duty of a liability insurer:

For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to the litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. *Liberty Mutual Ins. Co. v. Davis*, 412 F.2d 475 (5<sup>th</sup> Cir. 1969). This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. *Ging v. American Liberty Ins. Co.*, 423 F.2d 115 (5<sup>th</sup> Cir. 1970). The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. 386 So. 2d 785

*See also, Hollar v. International Bankers Ins. Co.*, 572 So. 2d 937, 939 (Fla. 3d DCA 1990). Citing *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525 (Fla. 1974), this court said in *Boston Old Colony*: “The question of failure to act in good

faith with due regard for the interests of the insured is for the jury.” 386 So. 2d at 785. Relying on *Boston Old Colony*, the Fourth District correctly concluded that in this case because of the factual conflicts, whether FFB acted in bad faith was a jury question. See *King v. National Security Fire & Cas. Co.*, 656 So. 2d 1335 (Fla. 4<sup>th</sup> DCA 1995); *Thomas v. Lumbermen’s*, 424 So. 2d 36 (Fla. 3d DCA 1982). Contrary to FFB’s assertions, the Fourth District did not hold that there is a universal right to a jury trial in *every* bad faith case.

The Fourth District did not adopt a new bad faith standard for multiple claimant cases. Rather, it did exactly what this court indicated is appropriate in *Shuster v. South Broward Hospital District*, 591 So. 2d 174 (Fla. 1992). In *Shuster*, this court recognized that an insurer who *indiscriminately* settles and pays its full policy limits to one or more parties where there are multiple claimants is not protected from a bad faith case where there is an excess judgment. In *Shuster*, the physician/insured sued his insurer, contending that its “nuisance” settlement of a malpractice suit against him caused him harm, affected his professional standing and precluded him from maintaining malpractice insurance. The policy provided that the insurance company could investigate and settle claims “as it deems expedient.” This court held that settling

a claim for nuisance value is not a bad faith exercise of the right to settle as one “deems expedient.” However, this court noted that the “deems expedient” provision does not grant an insurance company absolute discretion with respect to settlement:

For example, when there are multiple parties to a suit, we do not believe a “deems expedient” clause will protect an insurer who, in bad faith, indiscriminately settles with one or more of the parties for the full policy limits, thus exposing the insured to an excess judgment from the remaining parties. 591 So. 2d at 177.

There is ample evidence in this case which demonstrates that FFB indiscriminately and in bad faith settled in an effort to escape its duty to defend its insured. This is demonstrated by the fact that as soon as it paid out its policy limits, FFB sued its insureds, seeking a declaration that it owed no further duty to defend and took a default against its insureds.

In *Boston Old Colony*, this court cited *Liberty Mutual Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969), with approval. In *Davis*, the Fifth Circuit, applying Florida law, determined that the trial court correctly denied a motion for directed verdict on a bad faith claim brought against a liability insurer for its conduct in a multiple claimants/inadequate limits situation. The *Davis* court held that it was an issue for the jury to decide whether the insurer had failed to exercise proper diligence to determine the facts regarding damages, and to explore the possibility of settling with all claimants

when it knew that the insured's exposure to damages would far exceed the policy limits. The court stated:

When several claimants are involved, and liability is evident, rejection of a single offer to compromise within policy limits does not necessarily conflict with the interest of the insured. He hopes to see the insurance fund used to compromise as much of his potential liability as possible. Of course, if the fund is needlessly exhausted on one claim, when it might cancel out others as well, the insured suffers from the company's readiness to settle. To put the point another way, even if liability be conceded, plaintiffs will usually settle for less than they would ultimately recover after trial, if only to save time and attorney's fees. Each settlement dollar will thus cancel out more than a dollar's worth of potential liability. Insured defendants will want their policy funds to blot out as large a share of the potential claim against them as possible. ***It follows that, insofar as the insured's interest governs, the fund should not be exhausted without an attempt to settle as many claims as possible.*** 412 F.2d at 480-481 [emphasis supplied]

The *Davis* court concluded that the question of bad faith is usually for the jury to decide, since the sequence of events, the magnitude of the claims, the nature of the insured's exposure, and other factors must be considered in analyzing the rights and duties of the parties:

We conclude therefore that efforts to achieve a prorated, comprehensive settlement may excuse an insurer's reluctance to settle with less than all of the claimants, but need not do so. The question is for the jury to decide. As this Court put it in *Springer v. Citizens Casualty Company*, 5 Cir. 1957, 246 F.2d 123, 128-129, it is "a question for jury decision whether the insurer had not acted too much for its own protection and

with too little regard for the rights of the insured in refusing to settle within the policy limits.” *Here, bearing in mind the existence of multiple claims and the insured’s exposure to heavy damages, did the insurer act in good faith in managing the proceeds in a manner reasonably calculated to protect the insured by minimizing his total liability? In many cases, efforts to achieve an overall agreement, even though entailing a refusal to settle immediately with one or more parties, will accord with the insurer’s duty. In other cases, use of the whole fund to cancel out a single claim will best serve to minimize the defendant’s liability.* 412 F.2d at 481. [emphasis supplied]

**B. The Harmon Decision**

Contrary to FFB’s assertions, the Fourth District did not misapply *Harmon v. State Farm Mutual Automobile Ins. Co.*, 232 So. 2d 206 (Fla. 2d DCA 1970). Just because an insurer has discretion in deciding what claims to settle in a multiple claims case does not mean it is immune from suit. Where an insurer is overeager to settle, makes no investigation regarding the severity of the competing claims, makes no attempt to blot out as much liability as possible, and fails to keep its insured advised regarding settlement, it can be liable for bad faith. Whether it has acted in bad faith in such circumstances is a jury issue.

Careful analysis of *Harmon* and the applicable case law regarding bad faith shows that *Harmon* is distinguishable and does not address the precise issues in this

case. The correct standard was discussed by this court in *Shuster*—an insurer cannot indiscriminately settle some claims in a multiple claims/inadequate limits case. As the Fifth Circuit, applying Florida law recognized in *Davis*, in such situations the insurer should not exhaust its policy limits without first attempting to settle as many claims as possible.

*Harmon*, unlike this case, did not involve a bad faith claim brought by the insured and his third party judgment creditors against the liability insurance carrier. *Harmon* was a declaratory decree action brought to establish coverage and liability of an insurance company under the uninsured motorist provisions of its policy. In *Harmon*, Spencer Bokor was the named insured under the State Farm policy. Bokor's minor son was involved in an accident while driving the insured automobile. Harmon, a guest passenger in the Bokor vehicle, was killed in the accident. An uninsured motorist caused the accident.

Harmon's father collected the full policy limits from his own uninsured motorist policy and then demanded State Farm's uninsured motorists policy limits. State Farm had already paid its \$20,000 policy limits to other claimants. Harmon brought a declaratory decree action against State Farm, seeking to establish uninsured motorist

coverage. He contended that as an insured under the policy, State Farm owed him a duty not to exhaust the policy limits by settling with other insureds without Harmon's knowledge or consent. The trial court rejected that argument and dismissed the complaint. Harmon appealed. The Second District Court of Appeal affirmed, stating:

It is generally held that where multiple claims arise out of one accident, the liability insurer has the right to enter *reasonable settlements* with some of those claimants, regardless of whether the settlements deplete or even exhaust the policy limits to the extent that one or more claimants are left without recourse against the insurance company. *See Richard v. Southern Farm Bureau Casualty Ins. Co.*, 254 La. 429, 223 So.2d 858, 861 (1969); *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823, 828 (1957); 46 C.J.S. Insurance § 1191c(9) (1946). The court in *Liguori v. Allstate Ins. Co.*, 76 N.J.Super. 204, 184 A.2d 12 (1962) stated:

“Whether multiple claims are to be treated one at a time or collected and evaluated together, is a choice solely within the discretion of the insurer.” (184 A.2d at 17) So. 2d at 207-208 [emphasis supplied]

The Second District Court of Appeal concluded that accepting Harmon's argument would defeat the purpose of uninsured motorist coverage and put Harmon in a better position than if the tortfeasor had liability coverage. *Id.* at 208.

*Harmon* did not address the duty owed by a liability insurer to its insured when there are multiple claims against the insured that exceed the policy limits. *Harmon* should be limited to an uninsured motorist situation, in which the insurance company

owes no fiduciary duty to its insured to investigate, evaluate, negotiate, or defend a liability claim. None of the foreign decisions relied upon by the *Harmon* court hold that the duty owed by a liability insurer to its insured can be satisfied by indiscriminately and unreasonably paying select claims while making no investigation where there are multiple claimants.

The *Harmon* court relied upon *Richard v. Southern Farm Bureau Casualty Ins. Co.*, 223 So. 2d 858 (La. 1969). In *Richard*, three sets of claimants asserted claims arising out of an automobile accident. The policy provided liability coverage of \$5,000 per person and \$10,000 per accident. The insurer settled with two sets of claimants, reducing the available policy proceeds to \$3,772.61. The third claimant filed suit against the insurance company under Louisiana's Direct Action Statute. The trial court found that the claimant's damages were at least \$5,500, but only entered judgment for \$3,772.61. The court concluded that the other settlements had to be set off against the available policy limits.

The plaintiff appealed, contending that under Louisiana's Direct Action Statute, the insurer became unconditionally bound to the plaintiff for a certain proportionate amount of the policy proceeds, and that his rights could not be lost or diminished,

except by the claimant's own actions. 223 So. 2d at 860. The Louisiana Supreme Court noted that there was no suggestion of bad faith on the part of the insurer, and that the settlements with the two other claimants were made in good faith and were reasonable. The court concluded that the plaintiff was not entitled to a proportionate share of the insurance proceeds simply because the law permitted a direct action against the insurer. The decision related only to the rights of claimants under Louisiana's Direct Action Statute and was not a bad faith claim.

The *Harmon* court also relied on *Liguori v. Allstate Ins. Co.*, 184 A.2d 12 (N.J.Super. 1962). That case arose out of an automobile accident involving multiple claimants. One claimant sued to enjoin a settlement between the liability insurer and another claimant, arguing that the settlement was an inequitable preference which would irreparably harm him. In denying injunctive relief, the court noted that the plaintiff's claim was not reduced to judgment and, thus, could not constitute a lien on any proceeds, nor form the basis for any right of direct action by the plaintiff. The court concluded that the claimant could not enjoin the settlement. In *Liguori*, the insured did not claim any wrongdoing or bad faith by the insurer.

The *Harmon* court also relied on *Bennett v. Conrady*, 305 P.2d 823 (Kan.

1957). That case arose out of a two car collision. Five injuries resulted. Before any lawsuits were filed, the liability insurer sent a letter to all five claimants informing them that there were \$10,000 maximum limits available under the defendant's policy. Without admitting liability, the insurer offered to pay \$10,000 in settlement of all of the claims. The letter specified that all claimants would have to agree concerning the division of the \$10,000 among them. The insurer also notified its insured of this offer to settle.

The claimants did not accept the insurer's offer, and filed separate actions against the defendant. Two claimants later offered to settle their cases for \$4,000 each. The insurer relayed this information to its insured and his attorney, who immediately consented to the settlements. The three remaining cases were consolidated and resulted in judgments against the insured totaling \$19,500. The three judgment creditors claimed entitlement to the entire \$10,000 policy limits, arguing that the prior settlements constituted an equitable preference that was unauthorized by the policy, that the settlements were not made in good faith, and the settlements were designed to defeat the plaintiffs' claims.

The Kansas Supreme Court rejected those contentions and determined that there

was no bad faith. The court adopted the “good faith” standard that requires an insurance company to be held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business. The *Bennett* court concluded that the three remaining claimants would not have been entitled to enjoin the settlements between the insurer and the other two claimants, and that such settlements were not contrary to public policy. Those settlements reduced the limits available under the policy to \$2,000, which the court concluded should be divided pro rata among the remaining three plaintiffs.

In *Bennett*, the insurer did precisely what FFB should have done in this case. The insurer made an initial effort to settle all claims against its insured by informing all potential claimants of the policy limits available, and that those funds were available if they could agree to a division of them. In this case, not only was such an offer never made, despite FFB’s knowledge of the potential magnitude of the claims against Copertino and the likelihood of excess judgments, but FFB also deliberately stalled and delayed informing the claimants of the policy limits.

In *Bennett*, the insurer settled some of the claims only after its attempt to settle with all of the claimants was unsuccessful. Moreover, in *Bennett*, unlike this case, the

insurer obtained the express approval of its insured and his attorney prior to accepting the offers. FFB made no such effort to keep its insured informed about the settlements in this case; indeed, Copertino and his lawyer never knew about the settlements until the settlements were concluded.

Neither *Harmon*, nor any of the out-of-state cases it relies upon, address the issue before this court. None of those cases involved the conduct of a liability insurer in handling the investigation, negotiation, and settlement of multiple claims. The insurer's conduct in *Bennett*, as well as State Farm's conduct in this case (Boccia's insurer), illustrate the course of conduct that FFB should have taken, had it acted fairly, honestly and with due regard for the interests of the insured.

FFB and the amicus rely on *Harmon* for the proposition that if insurers are to be required to make a reasonable investigation of the multiple claims, to keep the insured informed of the claims resolution process and to attempt to minimize potential excess judgments against the insured, the legislature should impose the duty, not the courts. FFB quotes *Harmon* out of context. Petitioner's Brief at page 18. What the *Harmon* court said was:

If such a duty is to be imposed *under the uninsured motorist* statute, it must be done by the legislature. [emphasis supplied]

Uninsured motorist coverage is a creature of statute. Third party liability coverage is not. Thus, it is not up to the legislature to create the duty in a third party case. The duty of good faith in a third party case is based on common law. That the legislature has not amended the uninsured motorist statute in light of *Harmon* is irrelevant. The relationship between the parties under liability coverage and uninsured motorist coverage differs substantially

The relationship between the insurer and the insured arising from the bodily injury liability provisions of the policy is fiduciary in nature. Because of that fiduciary relationship, the insurer owes a duty to its insured to exercise the utmost good faith. *Baxter v. Royal Indemnity Co.*, 285 So. 2d 652, 655. The relationship of the parties under the uninsured motorist provision of an automobile policy is the antithesis of their relationship under the bodily injury liability provisions. *Id.* at 656. Their relationship is adversarial and there is no basis for a fiduciary relationship between the uninsured motorists carrier and the insured. *Id.*

The arguments of the amicus and FFB regarding §624.155 are without merit. That statute created a first party bad faith claim. Enactment of §624.155(1)(b) had the effect of codifying *Thompson v. Commercial Union Ins. Co.*, 250 So. 2d 259 (Fla.

1971). *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997). That statute authorizes a third party who obtains an excess judgment to file a bad faith claim directly against the insurer without obtaining an assignment from the insured. The statute did not eliminate the common law obligation of good faith. *Hollar v. Int'l Bankers Ins. Co.*, 572 So. 2d 937, 939 (Fla. 3d DCA 1990).

The decisions that FFB cites are inapplicable. For instance, *Gathings v. West American Ins. Co.*, 561 So. 2d 450 (Fla. 5<sup>th</sup> DCA 1990), did not involve a third party bad faith action, but was an uninsured motorist claim involving multiple claimants. *Unigard Ins. Co. v. Yerdon*, 417 So. 2d 713 (Fla. 4<sup>th</sup> DCA 1982), also involved a claim for uninsured motorist benefits and addressed how the insurer should pay policy proceeds to Class I and Class II insureds. *Baxter v. Royal Indemnity Co.*, 317 So. 2d 725 (Fla. 1975), involved an uninsured motorist claim and dealt with whether an uninsured motorist carrier can be liable for bad faith.

*Hewko v. Genovese*, 739 So. 2d 1189 (Fla. 4<sup>th</sup> DCA 1999), was a legal malpractice action brought by an insured against his insurance carrier's attorney. The trial court directed a verdict for the attorney, which was affirmed by the Fourth District. The court held that the plaintiff failed to produce any evidence from which the

jury could find that the insured was the intended third party beneficiary of the insurance carrier's contract with the attorney and thus the insured could not bring a legal malpractice action against that attorney, citing *Harmon, supra*, for the proposition that an insurance company may settle certain claims by paying policy limits without regard for other claims. This is dicta and is not the holding in *Hewko*

*DeCrane v. Allstate Ins. Co.*, 793 So. 2d 942 (Fla. 2d DCA 2001), is a per curiam affirmance that simply cites *Harmon* and *Gathings*. No facts are given in the per curiam affirmance and it is not persuasive authority for the proposition that summary judgment is proper in this case. See *State v. Swartz*, 734 So. 2d 448 (Fla. 4<sup>th</sup> DCA 1999). *Fidelity and Casualty Co. of New York v. Cope*, 444 So. 2d 1041 (Fla. 2d DCA 1984), is factually distinguishable and does not support entry of summary judgment in this case. Although *Cope* cites *Harmon*, the case did not involve settlement on a "first-come, first-served" basis.

*Scharnitzki v. Bienenfeld*, 534 A.2d 825 (Pa. Super. 1987), was not a bad faith case. That was an appeal from an order denying a motion to intervene. There, the homeowner's insurer wished to intervene, deposit its policy limits into the court, and have the court decide how to distribute the policy proceeds. In dicta the court cited

the Annotation, 70 ALR 2d 416, and the rule that an insurance carrier may distribute its policy proceeds on a first-come, first-served basis according to priority. In this case FFB did not even do that.

In *Texas Farmers Ins. Co. v. Soriano*, 881 S.W. 2d 312 (Tex. 1994), there was no policy limits demand made by the plaintiff prior to the first settlement. In this case, there is ample evidence demonstrating that there were policy limits demands made by Schehr and Farinas prior to the payment of policy limits to others by FFB. Moreover, in *Soriano*, unlike this case, the insurer offered its policy limits to the plaintiff, who rejected the settlement offer.

*Lane v. State Farm Mutual Auto. Ins. Co.*, 992 S.W. 2d 545 (Tex. App. 1999), was a breach of contract and bad faith action brought by an insured's mother against the insurer on an uninsured motorist policy. That case did not involve a third party liability claim for bad faith and is inapplicable.

Authority from other jurisdictions indicates that, in a multiple claim/inadequate limits case, the better practice is to attempt to settle all claims before entering into piecemeal settlements. The Kansas Supreme Court addressed this issue in *Farmers Ins. Exch. v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977). That case arose out of

a two-car accident between Sohl and Blackman, which accident was Sohl's fault. Sohl and his passenger were killed; all of the Blackman passengers were injured. Michael Schropp was the most seriously injured. Farmers Insurance provided Sohl with \$25,000/\$50,000 liability insurance limits. Immediately after the accident Farmers Insurance told Schropp's mother it would pay his medical bills. Schropp's attorney forwarded Schropp's medical bills and a 10-day limited offer to settle for the policy limits. Farmers Insurance refused to pay the bills, denied liability, initiated a declaratory judgment action and paid its limits into the court. Farmers Insurance settled with everyone but Schropp. Farmers' handling of the Schropp claim was found to be bad faith.

Addressing what Farmers could have done to avoid bad faith, the Kansas Supreme Court laid out three possibilities: (1) Farmers could have notified all claimants and invited them to settle within the policy limits; (2) Farmers could have settled the claims in the order presented; or (3) Farmers could have filed an interpleader action and paid its limits into court. The court indicated that settling all claims was preferable and one means by which Farmers Insurance could have demonstrated its good faith.

In *Voccio v. Reliance Ins. Co.*, 703 F.2d 1 (1<sup>st</sup> Cir. 1983), the First Circuit, citing *Schropp*, noted that an insurance carrier's meeting with claimants and its attempt to settle all claims was evidence of the carrier's good faith.

In *Brown v. United States Fidelity & Guar. Co.*, 314 F.2d 675 (2d Cir. 1963), the son of USF&G's insured (Marion Brown) was driving the insured's car and struck a taxicab. The taxi driver, two taxi passengers and a passenger in the Brown vehicle were seriously injured. USF&G provided \$10,000/\$20,000 of coverage for the Brown vehicle. The USF&G superintendent contacted the attorney representing the two taxi passengers, and told him that the policy was limited to \$20,000. USF&G agreed not to settle any of the claims until all claims were submitted to the company and had been investigated. USF&G agreed all claims would be dealt with together. The attorney for the passengers agreed to a pro rata distribution of the policy proceeds if the other claimants would also agree to that distribution. The insureds were not informed of these agreements.

USF&G failed to investigate the issue of contributory negligence of the taxi driver, and the relative seriousness of the claimant's injuries. USF&G settled the claim of the Brown passenger for \$6,000. The taxi passengers' attorney objected because

the settlement was contrary to his prior agreements with USF&G for pro rata distribution, and renewed his pro rata settlement offer. The insurer then settled the claim of the taxi driver for \$8,000. A jury awarded the taxi passengers \$25,000 and \$20,000 respectively. The insured sued USF&G for bad faith. The trial court directed a verdict for the insurer. The insured appealed. The Second Circuit reversed and determined that the case should have been submitted to a jury:

We need not decide whether any one of the elements of misconduct charged here—e.g., failure to abide by the agreement to try to effect settlement of the four claims within \$20,000, failure to conduct an adequate investigation, the settlement with [the Brown passenger] without informing the other claimants and *without adequate information of the relative seriousness of the claims*, the apparent concern for O’Dwyer’s renewal of the proposal, the assertion of what appears to be a gross misrepresentation as to O’Dwyer’s intention to reach the personal assets of the assured, the failure to inform the assured of any of the settlement proposals or possibilities—would be sufficient to warrant submitting the case to the jury. But it does seem clear to us that the case as presented by the plaintiffs—viewing the testimony, documents, and inferences in a light most favorable to them was *prima facie* sufficient on the issue of bad faith to take the case to the jury. 314 F.2d at 682.

At least one court has said that in a multiple claims/inadequate limits case the insurer’s duty is to use the policy limits to purchase as much release from liability as possible for the insured. *Peckham v. Continental Cas. Ins. Co.*, 895 F.2d 830 (1<sup>st</sup> Cir. 1989). That is what the Defense Research Institute teaches claimsmen and what FFB

should have done in this case.

The Florida courts have consistently required insurance companies to implement reasonable settlement processes that comport with the insurer's duty to act with due regard for the interests of its insured. *See Fox v. Canal Ins. Co.*, 566 So. 2d 286, 288 (Fla. 4<sup>th</sup> DCA 1990)(insurer's claim that it had no time to become adequately informed when it made no attempt to investigate is no excuse); *Aetna Ins. Co. v. Borrell-Bigby Electric Co.*, 541 So. 2d 139 (Fla. 2d DCA 1989)(an insurer commits bad faith by "leaping to pay" claims in an effort to truncate defense obligation); *Powell v. Prudential Property and Casualty Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991)(summary judgment in favor of insurer is erroneous when there is evidence of a failure to properly inform the insured of the gravit of a claim). In this case the Fourth District followed longstanding precedent that requires insurers to act with due regard for its insured's interests.

Ordinarily, whether an insurer acted in bad faith in connection with settlement of claims against its insured is a question of fact to be considered in the totality of the circumstances, unless only one conclusion may reasonably be drawn from the evidence. *Couch on Insurance* 3d § 170: 29; *State Farm v. LaForet*, 658 So. 2d 55,

62 (Fla. 1995)(Totality of the circumstances approach should be used); *Boston Old Colony v. Gutierrez, supra*, (The question of failure to act in good faith with due regard for the interests of the insured is for the jury); *Liberty Mutual Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969)(Jury question whether liability insurer acted with too little regard for the insured, whether it failed to exercise proper diligence to determine facts as to damages and whether it failed to explore the possibility of settling with all of the claimants); *Vest v. Travelers*, 753 So. 2d 1270, 1275 (Fla. 2000) (The questions of good faith or bad faith are usually issues of fact for the fact finder). As shown below, this is not a case where only one conclusion—that there was no bad faith—can be drawn from the facts. This case should be submitted to a jury to determine whether FFB acted in bad faith.

**C. There is a Factual Dispute Whether FFB Acted in Good Faith by Paying The Three Claims Without Making Any Investigation or Evaluation of the Other Seven Claims Which Precludes Entry of Summary Judgment.**

The depositions, exhibits and affidavits establish that FFB conducted no investigation before settling the Boccia, Cordes, and Rashidian claims. FFB's own correspondence and files reflect that it knew that any of the three death claims of these intervenors would exceed its \$100,000 policy limits. Nonetheless, it chose to pay a

portion of its policy limits for a leg/pelvis injury. FFB made no effort to get all potential claimants together and made no attempt to settle on a pro rata basis, despite that fact that it set reserves on a pro rata basis. All the claimants were willing to, and did, settle with State Farm Insurance Company on a pro rata basis.

The affidavits of Attorney Justus Reid and Insurance Adjuster Reo establish that FFB acted in bad faith. The depositions, exhibits, and affidavits create a jury issue regarding whether or not FFB acted in bad faith and whether the settlements were reasonable. This case was not appropriate for disposition by summary judgment. Whether FFB's actions were "reasonable" and in good faith is a jury issue. The decision of the Fourth District is correct and should be approved by this court.

**D. Prospective Application**

The suggestion that the Fourth District's decision should be applied prospectively only and should not be applied to this case is without merit. The court's decision does not drastically change bad faith law. The decision does not announce a new principle of law and has not changed or modified any prior decisions; hence, the decision should be applied retroactively. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So. 2d 899 (Fla. 1987).





**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this **11th** day of **December, 2003** to: **Greg M. Gaebe**, Gaebe Murphy Mullen & Antonelli, 420 South Dixie Highway, 3<sup>rd</sup> Floor, Coral Gables, FL 33146 (counsel for FFB); **J. Michael Burman**, Burman Critton Luttier & Coleman, 515 North Flagler Drive, #400, West Palm Beach, FL 33401 (additional counsel for FFB); **Donald H. Partington**, Clark Partington Hart, P.O. Box 13010, Pensacola, FL 32591 (counsel for FFB); **Jane Kreuzler-Walsh and Rebecca Mercier-Vargas**, 501 S. Flagler Dr., Suite 503, West Palm Beach, FL 33401 (counsel for FFB); **Gary E. Sherman**, 440 South Andrews Avenue, Fort Lauderdale, FL 33301 (counsel for Farinas); **Sylvia H. Walbolt, F. Townsend Hawkes, Joseph H. Lang, Jr.**, Carlton Fields, P.O. Box 2861, St. Petersburg, FL 33731-2861 (amicus for Florida Defense Lawyers' Association); and **Louis Rosenbloum**, 4300 Bayu Boulevard, Suite 36, Pensacola, FL 32503 (amicus for Academy of Trial Lawyers).

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Marjorie Gadarian Graham

Florida Bar No. 142053

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief is written in 14 point “Times New Roman”  
font.

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Marjorie Gadarian Graham

Florida Bar No. 142053