IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT
MIAMI, FLORIDA

AMERICAN INTEGRITY INSURANCE
COMPANY OF FLORIDA,

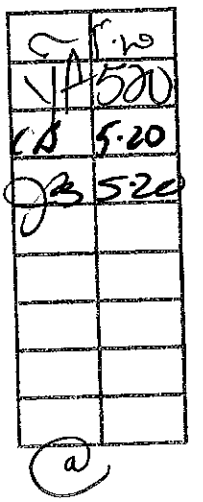
Petitioner,

vs. CASE NO.: 3D14-0685

NORGE TORRES,

Respondent.
_____/

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA



RESPONSE TO PETITION FOR CERTIORARI

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INTRODUCTION AND OVERVIEW

The cases American relies on for certiorari review differ from this case in a crucial way: in those cases the underlying dispute between the insurer and the insured had not concluded, so the bad faith action was not ripe. Here the underlying case was fully resolved by American's payment of the appraisal award and the insured's attorney's fees in the underlying suit – so the insured can pursue the bad faith claim. Once the underlying dispute resolves – whether by litigation, arbitration, appraisal or some combination – the insured is authorized to initiate a bad faith action (should the insured choose to do so).

Torres respectfully requests this Court deny the petition, and grant him conditional attorney's fees, as requested below.

Unless noted, all references are to the 2013 version of Florida Statutes.

BASIS FOR INVOKING JURISDICTION

American says it realizes that it cannot use certiorari to seek review of the denial of its motion to dismiss Torres' bad faith complaint (IB 3, n. 2). American then purports to seek certiorari review of an order to produce documents – documents a plaintiff in a first party bad faith case is clearly entitled to discover. This reveals American's petition as an attempt to end the bad faith case – masquerading as a discovery dispute. As discussed in more detail below, recent Florida decisions confirm certiorari review is not available here. *See Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344 (Fla. 2012); *State Farm Ins. Co. v. Ulrich*, 120 So. 3d 217 (Fla. 4th DCA 2013).

STATEMENT OF THE FACTS

American's factual recitation glides over the key events. American notes it raised coverage defenses in the suit, and then it demanded appraisal (IB 4; A 422). American could have insisted Torres comply with the conditions American contends he did not satisfy, but American elected not to, and invoked appraisal (A 422).[1]

American complains that its coverage defenses were never heard in the underlying action (IB 5, 8). That is because American's payment waived its asserted defenses.[2]

American spends a page and a half describing the documents requested – but then makes no argument as to any specific document ordered produced (IB 6-7). American's position is that it should not have to produce any "bad faith" discovery because the bad faith claim has not "accrued" (IB 9).

American ultimately asks this Court to rule Torres is not entitled to any bad faith discovery because he "does not and cannot have any action for bad faith" (IB 20). As discussed herein, this shows American's petition is really an attempt to have this Court rule that Torres cannot pursue his bad faith claim.

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[1] *See, e.g., United Property and Cas. Ins. Co. v. Concepcion*, 83 So. 3d 908 (Fla. 3d DCA 2012).

[2] *See, e.g., Llerena v. Lumbermens Mut. Cas. Co.*, 379 So. 2d 166 (Fla. 3d DCA 1980).

NATURE OF THE RELIEF SOUGHT

Torres agrees American has sought the issuance of a writ of certiorari, but disagrees the request is well taken for the reasons set forth herein.

ARGUMENT

Standard of review.

As the Florida Supreme Court recently reiterated: "Before a court may grant certiorari relief from the denial of a motion to dismiss, the petitioner must establish the following three elements: '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'" *Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012).

I. The Insurer's Payment of the Appraisal Award Concludes the Underlying Dispute and Enables the Insured to Bring a Bad Faith Claim, Consistent with the Opinions in *Trafalgar, Hunt* and *Ulrich.*

Torres' suit against American for insurance proceeds concluded when American paid the appraisal award, thereby electing not to litigate what it claims were breaches of policy conditions by Torres -- or the question of whether American breached the policy (for example, by refusing initially to pay the amounts due to its insured).

American does not dispute that it must provide bad faith discovery in a first party bad faith action. *See Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005).

Instead, it seeks to use the order requiring this discovery to thwart Torres' now ripe bad faith action.

American seeks to have this Court engraft additional requirements onto Florida's civil remedy statute. But Section 624.155 imposes no requirement that an insured must obtain a judgment (of any type) against an insurer as a prerequisite to filing a bad faith claim. Instead, it is the resolution of the claim, more than 60 days following the acceptance of the civil remedy notice, that is required to file a bad faith suit. *See Hunt v. State Farm Florida Ins. Co.*, 112 So. 3d 547 (Fla. 2d DCA 2013); *Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.*, 100 So. 3d 1155 (Fla. 4th DCA 2012).

Hunt and *Trafalgar* are consistent with a long line of well-reasoned state and federal cases, including the Florida Supreme Court decision in *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1276 (Fla. 2000). These decisions make clear that a judgment of liability for breach is not required.

Vest holds a bad faith action cannot be combined with the underlying claim for policy benefits, and is premature until "there is a determination of liability and extent of damages owed on the first-party insurance contract." There is nothing in *Vest* that requires the "determination of liability and extent of damages" be in the form of a

judgment – much less a judgment for breach of contract, as American argues. In fact, as *Vest* proves, the insurer's later voluntary payment satisfies these requirements.

In *Vest*, the insurer paid the insured's first-party claim after suit was filed. 753 So. 2d at 1272. There was no judgment or finding of breach in *Vest* – there was not even an appraisal or other award. The Florida Supreme Court quoted with approval from *Brookins*[3] that the voluntary payment was the "functional equivalent of an allegation that there has been a determination of the insured's damages." 753 So. 2d at 1273. The supreme court held the insured's suit for bad faith had ripened with the payment of the first-party benefits. 753 So. 2d at 1276 (the insured in *Vest* had brought the bad faith claim prematurely, with his suit for benefits).

Brookins also observes that "engrafting a judicial requirement that a determination of damages by litigation must precede a first party bad faith claim would foster no stated legislative purpose, would lead to an absurd result and would needlessly increase the costs of litigation to both sides by requiring the insured to litigate the underlying action to conclusion. The result would foster litigation rather than promote settlement – it would promote form over substance." 640 So. 2d at 114.

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[3] *Brookins v. Goodson*, 640 So. 2d 110 (Fla. 4th DCA 1994), disapproved on separate retroactivity application in *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995).

As *Vest* proves (contrary to American's position), a judgment is not the only way to achieve a determination of liability and the extent of damages. Liability can be determined through other means, including voluntary payment, appraisal, arbitration, settlement, or any other basis where the claim resolves in the insured's favor. *See Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983) ("A settlement is the functional equivalent of a confession of judgment or verdict in favor of the insured."). *See also Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000) (insurer's payment of claim after suit was filed was a "confession of judgment"). When American paid the appraisal award – and elected not to litigate coverage issues – liability and the extent of damages had been determined.

Requiring a judgment would leave many insureds without a remedy under §624.155 in instances (like this case) where the payment of contract damages follows a court ordered (or voluntary) alternative means of dispute resolution. In *Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, 945 So. 2d 1216 (Fla. 2006), the Florida Supreme Court held that an arbitration award in favor of the insured was a sufficient basis for the commencement of a bad faith claim. In this instance, American's payment of contract damages pursuant to the appraisal award has resolved the underlying claims – and was the determination of liability and damages necessary to bring the bad faith action.

Years before *Trafalgar*, that court recognized that a "judgment" is not a prerequisite to bringing a bad faith suit in *Scott v. Progressive Express Ins. Co.*, 932 So. 2d 475, 479 (Fla. 4th DCA 2006). The court held the insured was entitled to bring a bad faith suit because "[the insurer's] settlement of its obligation to [the insured] is the equivalent of a verdict in favor of [the insured] and therefore [the insured's] actions for benefits have been resolved in his favor."

Federal courts interpreting Florida law agree an insurer's payment after the 60-day cure period enables the insured to pursue a §624.155 bad faith action – a judgment is not required. *See All Moving Servs., Inc. v. Stonington Ins. Co.*, 2012 WL 718786, *4 (S.D. Fla. 2012); *Porcelli v. OneBeacon Ins. Co. Inc.*, 635 F. Supp. 2d 1312, 1318 (M.D. Fla. 2008); *Tropical Paradise Resorts, LLC v. Clarendon Am. Ins. Co.*, 2008 WL 3889577, *2 (S.D. Fla. 2008); *Makes and Models Magazine, Inc. v. Assurance Co. of Am.*, 2005 WL 2045780, *1 (M.D. Fla. 2005); *Plante v. USF & G Specialty Ins. Co.*, 2004 WL 741382, *4 (S.D. Fla. 2004).

American's implicit argument that an insurer's payment of an appraisal award immunizes it from all prior bad acts is refuted by a simple example. Consider a homeowner who presents a property damage claim that clearly exceeds policy limits, and for which – if the limits were promptly paid – repairs could be made and the insured's home saved from a collapse. The insurance company attempts to save

money by underpaying and delaying the claim, and refuses to further adjust the loss. Instead, when the insured files a §624.155 civil remedy notice and expresses disagreement with the insurer's conduct, the insurer demands appraisal, which it knows will cause further delay. Because of these delays, including while appraisal takes place, the home collapses. The appraisal results in a policy limits award, which the insurer promptly pays. In American's world, the insurer is immune from the consequences of its bad faith claims handling – including additional consequential damages to the insured – because the insured did not (and could not) get a "judgment for breach."

For American to prevail, this Court would have to hold there could never be a bad faith case resulting from any type of first party claim without the insured first filing a lawsuit and obtaining a judgment against the insurer – even in the example just discussed. *Trafalgar* and *Hunt* reject that erroneous position.

There is simply no requirement in the plain language of §624.155 that an insured must obtain a judgment in order to bring a bad faith action, and *Vest*, *Trafalgar*, and *Hunt* confirm that. The actual holding of the cases American cites is simply that the underlying claim must conclude before the insureds can proceed with

a bad faith claim or bad faith discovery.[4] That principle is satisfied here, where the underlying dispute has been fully resolved when American paid the appraisal award – without litigating the coverage defenses it had raised.

If American really believed it had an "absolute defense to liability," it should have litigated that contention, rather than paying the appraisal award (IB 12). *See Citizens Property Ins. Corp. v. Mango Hill #6 Condo. Ass'n, Inc.*, 117 So. 3d 1226 (Fla. 3d DCA 2013); *see also United Property and Cas. Ins. Co. v. Concepcion*, 83 So. 3d 908 (Fla. 3d DCA 2012)(court must be satisfied insured has complied with post-loss obligations before granting insured's request ordering appraisal).

American cites the *Mango Hill* case, but fails to appreciate its significance. The opinion shows that American could have insisted on litigating its coverage defenses if it had wished – but it did not and paid the award. American's payment constituted a waiver. *See Llerena.*

Contrary to American's claim, *Lime Bay*[5] is easily reconcilable with *Trafalgar* (IB 15). As the description of the procedural posture in *Lime Bay* makes clear, "the

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[4] *E.g., State Farm Florida Ins. Co. v. Ramirez,* 86 So. 3d 1198 (Fla. 3d DCA 2012); *Government Employees Ins. Co. v. Rodriguez,* 960 So. 2d 794 (Fla. 3d DCA 2007).

[5] *Lime Bay Condo. Inc. v. State Farm Florida Ins. Co.,* 94 So. 3d 698 (Fla. 4th DCA 2012).

breach of contract case was still pending." 94 So. 3d at 699. The opinion describes earlier that the breach of contract case was abated during the appraisal process, and remained pending at the time of State Farm's motion to dismiss the bad faith complaint. Thus, *Lime Bay* was simply another case where the bad faith claim was deemed premature – because there was still a pending underlying case.

The *Lime Bay* opinion said "the trial court must first resolve the issue of liability for breach of contract, as well as the significance, if any, of the appraisal award." 94 So. 3d at 699. The *Trafalgar* opinion has now addressed the significance of an appraisal award in a first-party property case.

There is no conflict between *Trafalgar* and *Lime Bay*, so the discussion of the power of one three-judge panel to recede from an opinion is irrelevant (IB 15). The online docket for the *Trafalgar* case reflects the carrier filed a motion for rehearing en banc, which the court denied on December 5, 2012.

American's other attempts to distinguish the pertinent cases are equally misplaced. American says the *Hunt* decision did not indicate if the insurer had admitted liability or had defenses to assert (IB 14). That is because those things did not matter. Once the insured paid the appraisal award, the underlying action concluded, and the insured could pursue his bad faith action. American's attempt to

distinguish arbitration continues to miss the point that there is no requirement of a judicial determination of liability for breach of contract (IB 13).

American's discussion of the *Lorenzo*[6] decision might have some relevance if this were still the underlying action, and American were contending it did not owe attorney's fees (IB 17-18). But here American paid not only the appraisal amount, but also paid the attorney's fees in the underlying action (IB 5; A 210). This again confirms the underlying action is completely resolved.

Torres' case is like *Trafalgar* and *Hunt,* and other cases where the underlying dispute between the parties has completely resolved. The complete resolution of the underlying dispute clears the way for the insureds to proceed with a bad faith claim, should they decide to do so. If American properly handled the case, it will prevail on the merits. If it did not, then it will be held accountable for its actions.

II. American Has Filed to Meet the Jurisdictional Requirements for Certiorari.

The clearest proof that American is wrong is the supreme court's recent decision in *Citizens Property Ins. Corp.* That case involved a insurance bad faith

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[6] *State Farm Florida Ins. Co. v. Lorenzo*, 969 So. 2d 393 (Fla. 5th DCA 2007).

claim against Citizens. 104 So. 3d at 345. Citizens sought review of the denial of its motion to dismiss based on the limited statutory sovereign immunity afforded it.

After holding prohibition was unavailable, the supreme court held Citizens' attempt to review the refusal to dismiss the bad faith claim did not meet the jurisdictional elements of certiorari. As the supreme court stated: "if we held that a party can show irreparable harm simply through the continuation of defending a lawsuit, such harm would apply to a multitude of situations well beyond this type of suit." 104 So. 3d at 355. If a claim of sovereign immunity is not sufficient to warrant review on certiorari to avoid further litigation, American's factually based claims cannot be, as a matter of law.

American cites *Ulrich* in a misplaced effort to discredit *Trafalgar*, but then ignores *Ulrich*'s clear holding that there is no certiorari jurisdiction for American's petition (IB 16). *Ulrich* rejected the argument American advances here and dismissed the insurer's petition for certiorari. 120 So. 3d at 220. The opinion observed the insurer's "argument that *Trafalgar* was wrongly decided essentially concedes the trial court did not depart from any clearly established law." 120 So. 3d at 220. American makes the same argument here.

As shown above, American misplaces its reliance on cases that granted certiorari because the underlying claim for damages under the contract remained unresolved. Torres' contract claim is fully resolved, and his §624.155 claim is ripe.

III. Torres Requests an Award of Attorney's Fees.

Pursuant to Fla. R. App. P. 9.400, Respondent, Norge Torres, requests a conditional award of attorney's fees pursuant to §624.155(4) and §627.428(1), Florida Statutes (2012), if he prevails in this appeal and ultimately prevails in the action below.[7]

Torres brought his civil remedy action under §624.155. Section 624.155(4) provides: "Upon adverse adjudication at trial or upon appeal, the authorized insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff."

Section 627.428(1) provides in pertinent part that "in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation."

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[7] He includes this request in his response pursuant to *Advanced Chiropractic and Rehabilitation Center Corp. v. United Auto. Ins. Co.*, 103 So. 3d 869 (Fla. 4th DCA 2012); *review pending*, as SC13-153.

Florida case law makes clear that prevailing in a certiorari petition entitles the insured to recover fees under §627.428. In *Ivy v. Allstate*, 774 So. 2d 679 (Fla. 2000), the Florida Supreme Court held the insured was entitled to fees where the action proceeded from circuit court to the district court of appeal based on common law certiorari.

Arango v. United Auto. Ins. Co., 901 So. 2d 320, 322 (Fla. 3d DCA 2005), held a circuit court erred in failing to award mandatory attorney's fees to an insured where the insurer's appeal was dismissed. *Arango* cited to a Florida Supreme Court decision where the supreme court had initially granted, but then later discharged a writ of certiorari. This Court observed: "Despite not reaching the merits of the petition, the Florida Supreme Court granted the respondent Drescher's application for attorneys fees filed under the predecessor to the current fee statute, which language insofar as pertinent here was identical, and awarded Drescher $750 for its fees incurred in the Florida Supreme Court."

Arango went on to hold that when the circuit court appellate division had dismissed the insurer's appeal below, the insured became the prevailing party for purposes of §627.428. *See also Nat'l Union Fire Ins. Co. v. Brown*, 211 So. 2d 13 (Fla. 1968) (awarding the insured fees under the predecessor statute when the court denied former supreme court certiorari for lack of jurisdiction).

The court held an insured was entitled to a conditional fee for prevailing in a certiorari proceeding in *Allstate Ins. Co. v. Barnes Family Chiropractic*, 875 So. 2d 14 (Fla. 5th DCA 2004). The court denied the insurer's certiorari petitions and held "the Circuit Court correctly determined that the respondents were entitled to receive a provisional award of attorney's fees based upon their successful defense of Allstate's Petitions for Writs of Certiorari filed in relation to the motions to stay the disqualification proceedings." 875 So. 2d at 16. The court rejected the insurer's argument that the proceedings were collateral matters unrelated to insurance coverage. Here, that is not an issue, as the certiorari petition directly addresses the bad faith action, and thus is subject to the attorney's fee statutes.

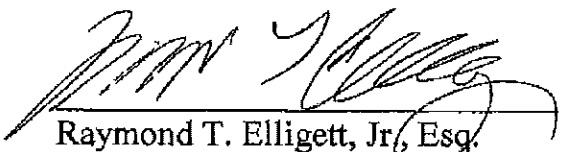
Based on the foregoing, Respondent, Norge Torres, respectfully requests this Court enter an order granting his entitlement to attorney's fees.

CONCLUSION

American's motive is clear. It wants to obtain immunity for its conduct in handling property claims, no matter how egregious. American would simply invoke appraisal and pay the award. The insured could obtain no judgment for breach, and American could act with impunity.

Fortunately for Florida insureds, §624.155 as written protects them. Insureds are authorized to proceed with a bad faith case once the underlying dispute has resolved – whether by litigation, appraisal or a combination of the two. American is not entitled to have the statute rewritten. American must face Torres' claim on the merits, and that includes providing the discovery to which he is entitled under the law.

Respectfully submitted,



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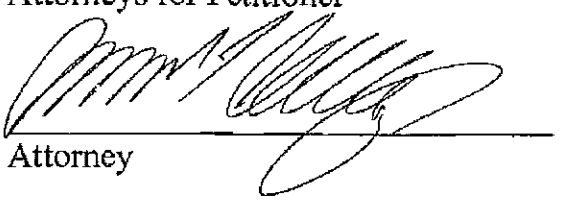

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CERTIFICATE OF COMPLIANCE

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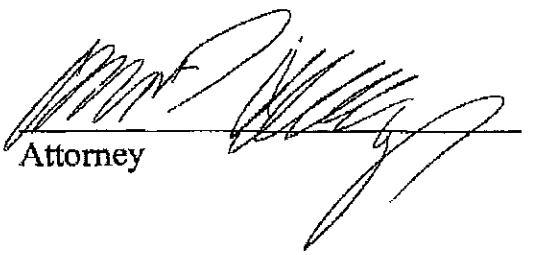

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