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IN THE SUPREME COURT OF FLORIDA

MARVIN CASTELLANOS,

Petitioner,

vs.

NEXT DOOR COMPANY, ET AL.,

Respondents.
_____/

CASE NO.: SC13-2082

L.T. Case Nos.:
1D12-3639
OJCC No.: 09-027890GCC

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, FLORIDA INSURANCE COUNCIL, AMERICAN INSURANCE ASSOCIATION, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AS *AMICUS CURIAE* FOR RESPONDENT

COLODNY, FASS, TALENFELD,
KARLINSKY, ABATE & WEBB, P.A.
Amy L. Koltnow, Esq.
Maria E. Abate, Esq.
One Financial Plaza, 23rd Floor
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394
Telephone: (954) 492-4010
Facsimile: (954) 492-1144

Counsel for Property Casualty Insurers Association of America, Florida Insurance Council, American Insurance Association, and National Association of Mutual Insurance Companies

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SUMMARY OF ARGUMENT

The statutory limitation on prevailing-party attorney's fees is rationally related to the legitimate state interest of decreasing workers' compensation insurance rates and increasing the affordability and availability of insurance in Florida. The data supporting the need for reforms in attorney's fee legislation in Florida, both prior to and after 2003, demonstrates that section 440.34, Fla. Stat., is economically and socially beneficial in achieving its public intent and purpose.

If this court were to overturn the above legislation, the result would significantly impact the workers' compensation insurance market in Florida, and will directly impact the availability and affordability of workers' compensation insurance in Florida. This Court, therefore, should affirm the First DCA's opinion and uphold the constitutionality of section 440.34 of the Florida Workers' Compensation Law.

ARGUMENT

THE "WISDOM, POLICY OR MOTIVES" WHICH PROMPTED THE LEGISLATURE TO ENACT SECTION 440.34, FLORIDA STATUTES, WAS WELL-VETTED AND WELL-REASONED TO STABILIZE THE INSURANCE MARKETPLACE.

In their Answer Brief, Respondents set forth the legal arguments supporting the constitutionality of section 440.34 of the Florida Workers' Compensation Law. Respondents reference *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013), wherein this Court held:

> The wisdom, policy, or motives which prompt a legislative enactment, so far as they do not contravene some portion of the express or implied limitation upon legislative power found in the Constitution, are not subject to judicial control.

Id. at 385. We submit, therefore, that to understand the "wisdom, policy, or motives" behind the enactment of section 440.34, an historical overview of the purpose and intent of the Workers' Compensation Law, including the impact of attorney's fees, would be helpful to this Court.

The Florida Workers' Compensation Law is designed to assure the quick and efficient delivery of disability and medical benefits to an injured worker, and to facilitate the workers' return to gainful reemployment at a reasonable cost to the employer." § 440.015, Fla. Stat. (2009). The legislation is both remedial and social, the fundamental purpose of which is to relieve society and injured worker of the burden of caring for an injured employee by placing such burden on the industry involved. *See Florida Erection Serv. Inc. v. McDonald*, 395 So. 2d 203 (Fla. 1st DCA 1981) (internal citations omitted). The legislative intent was, and is, that the workers' compensation law should be self-executing, and that benefits should be paid without the necessity of any legal or administrative proceedings. *Id.* at 209 (internal citations omitted); *see also*, § 440.015, Fla. Stat. Indeed,

> . . . the act as a whole is so designed as to facilitate a claimant's prosecuting his own claim without the necessity of any assistance from an attorney.

Florida Erection Serv., 395 So. 2d at 210 (citing *City of Miami Beach v. Schiffman*, 144 So.2d 799 (Fla.1962)). This creates a balance in workers' compensation law between relieving society of the burden of injured workers, and keeping costs reasonable for the employer.

Since the inception of workers' compensation insurance in Florida, the Legislature has attempted to ensure that a bulk of the claim awarded goes to the injured employee and not to the attorney. *See Murray v. Mariner*, 994 So. 2d 1051, 1057 (Fla. 2008). Over the course of time, the Legislature has changed the law to include provisions such as the employee/carrier paying for the injured worker to have an attorney and to set boundaries on fees. *Id.* at 1057. In 1977, the Legislature codified six factors, set forth by the Supreme Court of Florida in *Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968), which factors were used as a basis for calculating a reasonable fee. This was the substantive law until 2003, when the Legislature significantly reformed the law.

A. The Need for Reform and the Supporting Data

Prior to 2003, Florida was in the midst of a workers' compensation crisis driven, in part, by an hourly attorney's fee paid by the employer/carrier. This encouraged litigation over any—and all—benefits. Florida's average cost per

claim was among the highest in the nation, since the workers' compensation system had a very high incidence of attorney involvement. Claims involving attorneys are significantly more costly than similar claims without attorneys.

Rising claim costs and increasing premiums greatly reduced the availability and affordability of workers' compensation coverage. Florida was headed toward a coverage crises and was recognized by independent studies as having the highest or second highest rates nationwide.[2] Thus, Florida legislators began examining the need for reforms.

1. Committee on Banking and Insurance Report Prepared for The Florida Senate

In 2001, the Committee on Banking and Insurance for The Florida Senate (the "Committee") undertook a comprehensive analysis of the workers' compensation system. The Committee reviewed data on workers' compensation costs and benefits obtained from the Workers' Compensation Research Institute (WCRI), National Counsel on Compensation Insurance (NCCI), National Association of Insurance Commissioners, Division of Workers' Compensation,

[2] Florida was noted as having the highest workers' compensation premium rates of all 50 states in the 2000 Oregon Worker's Compensation Premium Rate Ranking published by the State of Oregon Department of Consumer and Business Services. In 2001, the Workers' Compensation Research Institute's *Compscope Benchmarks: Multistate Comparisons, 1994-1999*, ranked Florida second highest in cost per worker, based on benefit costs per claims and frequency per claim per 100,000 workers for policy year 1996.

insurance carriers, and other sources. The Committee also reviewed comparable information from other states, and compared Florida laws to the laws of other states. In November 2001, the Committee published its findings in *How Does the Workers' Compensation System in Florida Compare to Other States*, Report No. 2002-117, http://archive.flsenate.gov/data/Publications/2002/Senate/reports/interim_reports/pdf/2002-117bilong.pdf ("Senate Committee Report").

WCRI's report, entitled *Compscope Benchmarks, Florida, 1994-99*, noted that the average total cost per paid claim rose from 1995 through 1998 at a rate of 10 percent per year. In September 2001, NCCI issued a report entitled, *Florida Workers' Compensation-Cost Drivers Overview*, which identified "attorney involvement" as one of several cost drivers. See Senate Committee Report, at p. 12. The Committee concluded:

> If attorneys are not involved, the difference in claim costs between Florida and countrywide was minimal; however, if attorneys are involved, the difference in claim size in Florida and countrywide is nearly 40 percent. The [NCCI] report suggested that attorneys might contribute to the frequency of permanent total claims and to the increased medical services.

The Committee noted that even though the attorney's fee schedule was reduced in 1993, Florida was experiencing significant growth in litigation rates. According to WCRI's *Multistate Comparisons, 1994-1999*, Florida had the highest

attorney involvement in comparison with eight other states. NCCI also reported that attorney involvement in Florida had a more significant fiscal impact in Florida than countrywide. The Florida Division of Workers' Compensation reviewed attorney's fees for settlements received in April 2011, and found that approximately 75 percent of the settlements reported attorney's fees averaged 33 percent in excess of the statutory formula. See Senate Committee Report, at pp. 21-24.

The Committee concluded that attorney involvement in Florida was "unusually high," and recommended legislative changes that included revising the attorney's fee provisions and establishing a per accident cap on discretionary hourly fee awards. See Senate Committee Report, at pp. 30-31.

2. The Governor's Commission on Workers' Compensation Reform

In May 2002, then Governor Jeb Bush created a commission to study and make policy recommendations regarding the availability and affordability of workers' compensation insurance, impediments to quicker resolution of workers' compensation claims, changes necessary to reduce the cost of workers' compensation insurance, and the adequacy of benefits for injured workers. See State of Florida, Office of the Governor, Executive Order No. 02-158 (May 22, 2002), http://edocs.dlis.state.fl.us/fldocs/governor/orders/2002/02-158.pdf. The Governor charged the Commission with proposing reforms to "better serve those

[the system] is intended to benefit, both employers and injured employees." Jeff Atwater, Florida Chief Financial Officer, Press Release, May 22, 2002, http://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=1276.

On January 31, 2003, the Commission issued its Final Report and Recommendations, finding that Florida's workers' compensation system "has fallen short of the purpose it was expected to achieve." See App. Ex. 1, at p. 4, *The Governor's Commission on Worker's Compensation Reform*, Final Report and Recommendations, January 31, 2003. Florida's workers' compensation system was also unduly burdened by extensive litigation. In cases with attorney involvement, medical and indemnity costs were more than 37 percent higher than the national average.

The Commission made policy recommendations in four critical areas:

(1) The availability and affordability of workers' compensation insurance;

(2) Impediments to quick resolution of disputes;

(3) Major cost factors in the workers' compensation system; and

(4) The adequacy of compensatory benefits for injured workers.

The Commission concluded that because of escalating claim costs, along with other market factors, employers were "having difficulty in obtaining worker's compensation coverage." See App. Ex. 1, at p. 5. The Division of Workers'

Compensation reported a 76 percent increase in applications for self-insurance from 2001 to 2002. Similarly, the Florida Workers' Compensation Joint Underwriting Association (JUA)—Florida's insurer of last resort—reported substantial increases in the number of applications received, policies issued, and premiums written compared to 2001.[3] Based on this data, the Commission concluded that that the "availability of workers' compensation insurance will continue to be a major problem . . . ." See App. Ex. 1, at p. 6.

The Commission also reported that workers' compensation underwriting in Florida was one of the poorest performing sectors of the insurance industry. Florida insurers paid out $1.27 in losses and expenses for every dollar in premium they collected. As a result, two of the largest workers' compensation underwriters in Florida discontinued writing new policies. See App. Ex. 1, at p. 6. Although the Commission identified several areas of systemic failures, one of the "core issues" in need of reform was the dispute resolution system. The Commission recognized that the litigation of disputes in Florida was a main "cost driver" in the workers compensation system. The Commission recommended the Legislature eliminate the hourly attorney fee provision of section 440.34, Fla. Stat., and limit attorney's fees to a contingency basis. See App. Ex. 1, at pp. 7, 30.

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[3] The residual market is a sound measure of the health of the voluntary market since the more policies underwritten in the voluntary private market, the less there is a need for employers to turn to state-subsidized coverage.

The Commission urged legislators to use the findings and recommendations in its report "as the foundation for legislative proposal and statutory changes during the upcoming legislative session." See App. Ex. 1, at p. 5. Governor Bush also appealed to the Legislature to pass comprehensive reforms stating:

> Florida's current workers' compensation system is crumbling under the weight of increasing cost, endless litigation and rampant fraud. Florida's businesses simply cannot afford to pay the skyrocketing workers' compensation insurance costs any longer. Without these changes, workers' compensation costs will continue to drive businesses out of the state, and even worse, out of business altogether.

Associated Industries of Florida, April 7, 2003, http://aif.com/information/2003/otr030407.html.

B. Senate Bill 50-A: Comprehensive Reforms Designed to Reduce Costs

Against this backdrop, in 2003, the Legislature sought to significantly reform the workers' compensation laws.[4] Senate Bill 50-A provided changes to the workers' compensation system designed to expedite the dispute resolution process; to provide greater compliance and enforcement authority for the Division

[4] The Legislature did not pass new workers' compensation laws in the 2003 regular Legislative session. Governor Bush, however, expanded the special session agenda to include workers' compensation reform that will "greatly benefit the people of our State". Proclamation, State of Florida, Executive Office of the Governor, dated May 15, 2003. See App. Ex. 2.

of Workers' Compensation to combat fraud; to revise certain indemnity benefits for injured workers; to increase medical reimbursement fees for physicians and surgical procedures; and to increase availability and affordability of coverage. See Senate Staff Analysis and Economic Impact Statement, May 19, 2003, http://www.leg.state.fl.us/data/session/2003A/Senate/bills/analysis/pdf/2003s0050A.bi.pdf. ("Senate Staff Analysis").

The bill addressed many of the "cost drivers" identified by NCCI, which included the attorney fee schedule. The fee schedule was designed to reduce the cost driving effect of attorney involvement and to contain claim costs which, in turn, would reduce premium rates. NCCI estimated that the proposed reforms would decrease system costs by 14.15 percent, which equaled $425 million in savings.[5] The new law took effect on October 1, 2003.

1. Claimants' Attorney's Fees Prior to 2003 Reforms

In Florida, the judges of compensation claims used a three-tier fee schedule to award attorneys' fees based upon the amount of benefits secured. The fee schedule limited prevailing claimants' attorney's fees to 20 percent of the first $5,000 of the benefits secured, 15 percent of the next $5,000, 10 percent of the remaining benefits to be provided during the first 10 years, and 5 percent of the

[5] NCCI files rates for member companies with the Office of Insurance Regulation ("OIR") for Florida's workers' compensation insurance coverage.

remaining benefits thereafter. [6] § 440.34, F.S. (1993). Prior to the 2003 reforms, the judges had the discretion to increase or decrease the attorney's fees, without any dollar limitation, based on the following factors: 1) time and labor involved; 2) fee customarily charged in the locality for similar services; 3) amount involved in controversy and the benefits resulting; 4) time limitation imposed by claimant or circumstances; 5) experience, reputation, and the ability of the lawyer; and 6) contingency or certainty of fee.

2. Claimants' Attorney's Fees After 2003 Reforms

The new legislation continued the contingency fee schedule for attorney's fees, but eliminated hourly fees. This included removing the six *Lee Engineering* factors instituted in 1977. *See Murray*, 994 So. 2d at 1059. Instead, the Legislature created a schedule of fees to be used, while also placing a cap on the total fee that could be awarded. Under the new law, therefore, attorney's fees that deviated from the fee schedule could no longer be awarded. The only exception was for medical-only claim petitions, which were capped at $1,500 in fees. Also, assuming that an offer has been made to the claimant or his attorney, at least 30 days before the final hearing, the benefit secured amount, for the purposes of

[6] As a result of reforms to the Workers' Compensation Law enacted in 1994, also intended to reduce costs and address high premium rates, the attorney's fee schedule was reduced from 25/20/15 to 20/15/10 percent of benefits secured.

attorney fee computations, was limited to the amount of benefits awarded at trial above the settlement offer.

The new legislation was designed to reduce litigation, as well as provide clear incentives for attorneys to resolve cases instead of dragging them out only for the purposes of increasing attorney's fees. The Legislature thus shifted the focus of a claimant's attorney's fee award from "services rendered" to "benefits secured". The amendments further allowed an employer/carrier to recover prevailing party costs against a claimant. These changes were intended to reduce litigation over frivolous claims by tying fees awarded to benefits secured and by placing a risk of cost assessed against non-prevailing claimants.

The attorney's fee provision withstood a constitutionality challenge in *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 509 (Fla. 1st DCA 2006), wherein the First DCA held:

> [W]orkers' compensation is a creature of statute governed by the provisions of Chapter 440, Florida Statutes. The legislature may limit the amount of fees that a claimant's attorney may charge because the state has a legitimate interest in regulating attorney's fees in workers' compensation cases.

C. The Effect of Post-Reform Rate Reductions

The new reforms were instrumental in keeping Florida's workers' compensation costs under control. It ensured that workers' compensation benefits were being provided to injured workers whom the system is designed to protect,

indemnify, and rehabilitate. After the enactment of SB 50-A, rates for new and renewal policies effective as of October 1, 2003, were reduced by 14.0 percent. See The Florida Senate *Interim Project Report 2004-110*, December 2003, http://archive.flsenate.gov/data/Publications/2004/Senate/reports/interim_reports/pdf/2004-110bi.pdf.

This was followed by a 5.1 percent reduction in January 2005, a 13.5 percent reduction in 2006, and a 15.7 percent reduction in 2007. By 2007, the cumulative overall statewide average rate decrease since the 2003 reforms totaled over 40 percent. See Florida Office of Insurance Regulation Press Release, October 17, 2006, http://www.floir.com/pressreleases/ViewMediaRelease.aspx?ID=1504. In October 2007, the OIR ordered another 18.4 percent reduction in the workers' compensation rate effective January 1, 2008. See Florida Office of Insurance Regulation Final Order on Rate Filing, Case No. 91678-07-CO (October 2007), http://www.floir.com/siteDocuments/KMBT35020071031084854.pdf. It was estimated that the 2008 reduction would save $700 million for Florida employers and created a reduction in the rate of more than 50 percent since the 2003 legislation. The collective effort was striking: Florida dramatically dropped from being the top one or two states in high workers' compensation rates, prior to 2003,

to being in the middle of all states by 2008.[7] In 2008, before the *Murray* decision was published, the OIR approved an 18.6 percent reduction in Florida's workers' compensation insurance rates effective January 1, 2009. This was the largest one-year reduction ever. The cumulative net effect of these rate reductions was a net decrease in the rate of more than 60 percent. It was estimated that the 2008 rate reduction would save Florida employers more than $610 million. See Florida OIR Press Release, January 7, 2009, http://www.floir.com/pressreleases/viewmediarelease.aspx?id=1731. In January 2009, the Florida OIR released its 2008 Workers' Compensation Annual Report on the state of the market for workers' compensation insurance. The report analyzed the availability and affordability of coverage for workers' compensation insurance in Florida for the calendar year 2007, and concluded that the Florida workers' compensation market was competitive. See Florida OIR 2008 Annual Report, http://www.floir.com/siteDocuments/2008AnnualReport.pdf.

It was evident that the 2003 legislative reforms had an enduring effect on workers' compensation rates and Florida continued to offer a good environment for employers to do business. The insurance market likewise remained competitive. In 2007, 12 new worker's compensation insurers started doing business in Florida, bringing to 241 the number of companies actively writing workers' compensation

[7] See Oregon Worker's Compensation Premium Rate Ranking Summary (2008), http://www.cbs.state.or.us/imd/rasums/2082/08web/08_2082.pdf.

insurance in the voluntary market. See Florida OIR Press Release, January 7, 2009. http://www.floir.com/PressReleases/viewmediarelease.aspx?id=1731.

D. The *Murray* Decision and its After Effects

In 2008, however, section 440.34, Fla. Stat., was struck down by this Court in *Murray v. Mariners Health*, based on an ambiguity under rules of statutory construction. Although this Court did not reach any of the constitutional issues regarding the statutory limitations on prevailing-party attorney's fees, this Court held the Legislature's use of the word "reasonable" in subsection (1), mandating a non-discretionary fee schedule, conflicted with subsection (3) which allowed a prevailing claimant to recover a "reasonable" attorney's fee. The resulting ambiguity effectively eviscerated the statutory fee schedule and the claimant's attorney was entitled to a "reasonable attorney's fee" using the factors using rule 4-1.5(b) of the Rules Regulating the Florida Bar, including the factors set forth in *Lee Engineering*—thus reverting back to pre-2003 reform.

Based on this Court's decision, and the anticipated increase in claims costs due to more attorney involvement—and, now, increased fees for their services—NCCI proposed implementing an 18.6 percent increase in rates spread over two years. See Florida OIR Press Release, January 26, 2009, http://www.floir.com/pressreleases/viewmediarelease.aspx?id=1733. In February 2009, Insurance Commissioner Kevin McCarty, recognizing the effect of the

Murray decision, approved a 6.4 percent one-year increase worth $170 million in workers' compensation rates effective April 1, 2009. See Florida OIR Press Release, February 10, 2009, http://www.floir.com/pressreleases/viewmediarelease.aspx?id=1737.

E. The *Murray* "Fix" – The 2009 Statute Now Under Review

In 2009, the Florida Legislature amended § 440.34, Fla. Stat., in order to address the *Murray* decision, by clarifying awards of attorney's fees, except in certain medical only cases, so that same are to be calculated based *solely* on the fee schedule. See Florida House of Representatives Staff Analysis, HB 903, dated March 4, 2009, http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0903.IBFA.doc&DocumentType=Analysis&BillNumber=0903&Session=2009.

By removing the word "reasonable"—which this Court held rendered the statute ambiguous—the new law eliminated the ability of a judge to award claimant's attorney's fees in workers' compensation lawsuits outside of the fee schedule. With the exception of an alternative attorney's fee not to exceed $1,500 per claim for specific medical cases, all attorney's fees must be awarded according to the existing contingency fee schedule. With this clarification, the intent of the Legislature was that attorney's fees be calculated in the manner intended from the effective date of the 2003 reform. *Id.*

An earlier version of HB 903 contained the following preamble that provides significant insight as to legislative intent for section 440.34—both in 2003, and as revised in 2009:[8]

> WHEREAS, in 2003, premiums for workers' compensation insurance in Florida ranked among the highest in the nation, financially crippling Florida businesses and hurting Florida's ability to attract business and limiting economic growth, and
>
> WHEREAS, in 2003, upon a thorough analysis of the workers' compensation system, the Florida Legislature recognized that the ability of hourly attorney fee awards operated as a significant cost driver with respect to workers' compensation premiums and that the reliable and effective way to contain those costs was to provide certainty in the awards of attorney's fees, and
>
> WHEREAS, in 2003, the Florida Legislature enacted comprehensive workers' compensation reform, a critical element of which amended section 440.34, Florida Statutes, to impose concrete limitations on awards of attorney's fees and delete the Lee Engineering v. Fellows discretionary factors which previously fostered an excessive litigation volume by allowing awards of unpredictable and unbridled hourly fees, and
>
> WHEREAS, since the enactment of this reform, and in material part because of the attorney's fee reform, workers' compensation insurance has become vastly more available and affordable for Florida's businesses, and
>
> WHEREAS, following the enactment of the 2003 reforms, the Legislature's goal of affordability was

[8] See App. Ex. 3. The "whereas" clauses were removed prior to final passage of the bill.

achieved as evidenced by the premium decrease in workers' compensation premiums over the next 5 consecutive years, by an average aggregate amount of 60.2 percent, to their lowest levels since 1984, including the greatest one-year reduction in workers' compensation premiums in Florida history in 2007, and

WHEREAS, on October 23, 2008, the Florida Supreme Court effectively revived the discretionary factors in its ruling on Murray v. Mariner Health, despite the express removal of those factors, and

WHEREAS, this judicial nullification of critical workers' compensation reform presents a real threat to the continued availability and affordability of workers' compensation insurance, particularly in these challenging economic times, and

WHEREAS, it is the intent of the Legislature to clarify beyond dispute that the reforms on awards of attorney's fees are an essential element if a functioning and self-executing workers' compensation system, NOW, THEREFORE,

F. Today's Competitive and Healthy Market—a Direct Result of the 2003 Reforms

The insurance industry is a vital part of Florida's economy. Once among the most expensive, least competitive, and least efficient workers' compensation markets in the country, Florida is now one of the most competitive, efficient and affordable. The Florida OIR attributes this to the comprehensive reforms enacted in 2003, and reinforced in 2009. Before the reforms, Florida's workers' compensation rates consistently ranked first or second highest among all states. As of January 2012, Florida was in 29th place, well below the national median rate.

See Florida OIR 2013 Annual Report, p. 15, http://www.floir.com/siteDocuments/2013AnnualReport.pdf. The Florida OIR concluded, based on a comparative analysis across a variety of economic measures, the workers' compensation market in Florida today is competitive. See Florida OIR Worker's Compensation 2013 Annual Report, http://www.floir.com/siteDocuments/2013WorkersCompensationAnnual%20Report.pdf.

CONCLUSION

The Legislature identified a legitimate government interest in passing the statutory attorney's fee limitations, namely to reduce the cost of worker's compensation premiums and to stabilize the insurance market. The research and data—both prior to the 2003 reforms and after—demonstrated a cap on claimants' attorney's fees bore an obvious relationship to reduce the cost driving effect of attorney involvement and discourage excessive litigation. The Legislature reasonably concluded that such a cap on attorneys' fees would reduce claim costs, deter frivolous litigation, and in turn, make workers' compensation insurance more affordable, available, and promote economic growth.

The "wisdom, policy, and motives" which prompted The Florida Legislature to enact section 440.34, Fla. Stat., both in 2003 and revised in 2009, were, and are now, valid and constitutional.

Respectfully submitted,

COLODNY, FASS, TALENFELD,
KARLINSKY, ABATE & WEBB, P.A.
One Financial Plaza, 23rd Floor
100 Southeast Third Avenue
Ft. Lauderdale, Florida 33394
Tel.: (954) 492-4010 (Broward)
AKoltnow@cftlaw.com

By: */s/ Amy L. Koltnow*
Amy L. Koltnow, Esq.
Fla. Bar No. 899010
Maria Elena Abate, Esq.
Fla. Bar No. 770418

Counsel for Property Casualty Insurers Association of America, Florida Insurance Council, American Insurance Association, and National Association of Mutual Insurance Companies

CERTIFICATE OF COMPLIANCE

I certify that this brief is submitted in Time New Roman 14-point font, which complies with the font requirement. See Fla. R. App. P. 9.210(a)(2).

By: */s/ Amy L. Koltnow*
Amy L. Koltnow, Esq.

CERTIFICATE OF SERVICE

I certify that a copy of this brief was furnished by electronic mail on this **16th** day of June, 2014, to counsel on the attached service list.

By: */s/ Amy L. Koltnow*
Amy L. Koltnow, Esq.

SERVICE LIST

MARK A. TOUBY ESQ.
RICHARD E. CHAIT, ESQ.
Co-counsel for Petitioner
Touby, Chait & Sicking, P.L.
2030 South Douglas Road, Suite 217
Coral Gables, FL 33134
mark.touby@tgclegal.com
richard.chait@fortheworkers.com

RAOUL G. CANTERO, ESQ.
DAVID P. DRAIGH, ESQ.
Co-Counsel for Respondents
White & Case LLP
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, FL 33131
raoul.cantero@whitecase.com
ldominguez@whitecase.com
ddraigh@whitecase.com
mgaulding@whitecase.com

RICHARD A. SICKING, ESQ.
Co-counsel for Petitioner
Touby, Chait & Sicking, P.L.
1313 Ponce de Leon Blvd., Suite 300
Coral Gables, FL 33134
sickingpa@aol.com

ROBERT MENDEZ, ESQ.
Co-counsels for Respondents
The Law Group of Mendez & Mendez, P.A.
7061 Taft Street
Hollywood, FL 33024
rmendez@mendezlawgroup.com

MICHAEL J. WINER, ESQ.
Co-counsel for Petitioner
Law Offices of Michael J. Winer, P.A.
110 North 11th Street, 2nd Floor
Tampa, FL 33602
mike@mikewinerlaw.com

GEOFFREY BICHLER, ESQ.,
Amicus Curiae for the Fraternal Order of Police
Bichler, Kelly, Oliver & Longo, PLLC
541 South Orlando Avenue, Suite 310
Maitland, FL 32751
geoff@bichlerlaw.com

KIMBERLY A. HILL, ESQ.
Co-counsel for Amicus Curiae for Florida Workers' Compensation Advocates
Kimberly A. Hill, P.L.
821 SE 7th Street
Ft. Lauderdale, FL 33301
kimberlyhillappellatelaw@gmail.com

MARK LAWRENCE ZIENTZ, ESQ.
Amicus Curiae for MP Workers' Injury Law and Advocacy Group WILG
Two Datran Center
9130 S. Dadeland Blvd., Suite 1619
Miami, FL 33156
Mark.zientz@mzlaw.com

CHRISTOPHER J. SMITH, ESQ.,
Amicus Curiae for The Workers' Compensation Section of the Florida Bar
2805 W. Busch Boulevard, Suite 219
Tampa, FL 33618
chris@cjsmithlaw.com

NOAH SCOTT WARMAN, ESQ.
Counsel for Amicus Curiae, Florida Professional Firefighters, Inc., International Association of Firefighters, AFL-CIO
Sugarman & Susskind, P.A.
100 Miracle Mile, Suite 300
Coral Gables, FL 33134
NWarman@sugarmansusskind.com

KENNETH B. SCHWARTZ, ESQ.
Co-counsel for Amicus Curiae, Florida Workers' Compensation
Kenneth B. Schwartz, P.A.
1803 S. Australian Ave., Suite F West
Palm Beach, FL 33409
KBS@flalaw.com

WILLIAM J. McCABE, ESQ.,
Amicus Curiae for Voices, Inc.
1250 S. Hwy 17-92, Suite 210
Longwood, FL 32750
Billjmccabe@earthlink.net

SUSAN W. FOX, ESQ.
Co-counsel for Amicus Curiae, Florida Justice Association
Fox & Loquasto, P.A.
122 East Colonial Drive, Suite 100
Orlando, FL 32801,
susanfox@flappeal.com,

RICHARD W. ERVIN, II, ESQ.
Co-counsel for Amicus Curiae, Florida Justice Association
Fox & Loquasto, P.A.
1201 Hays Street, Suite 100
Tallahassee, FL 32301
richardervin@flappeal.com
admin2@flappeal.com

MARK K. DELEGAL, ESQ.
MATTHEW H. MEARS, ESQ.
Attorneys for Florida Justice Reform Institute and the Florida Chamber of Commerce, Inc.
Holland & Knight, LLP
315 S. Calhoun Street, Suite 600
Tallahassee, FL 32301
Mark.delegal@hklaw.com
Matthew.mears@hklaw.com

WILLIAM W. LARGE, ESQ.
Attorney for Florida Justice Reform Institute
210 S. Monroe Street
Tallahassee, FL 32301
William@fljustice.org

RAYFORD H. TAYLOR, ESQ.
Attorneys for Associated Industries of Florida, Inc.; Associated Builders & Contractors; Florida Electric Cooperatives Association; Florida Retail Federation; Florida Roofing, Sheet Metal and Air Conditioning Contractors Association; Florida United Businesses Association; Publix Supermarkets.
Casey Gilson, PC
980 Hammond Drive, Suite 800
Atlanta, GA 30328
rtaylor@caseygilson.com