IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1394

CITIZENS PROPERTY INSURANCE CORPORATION,

Petitioner,

vs.

MANOR HOUSE, LLC,

Respondent.
_____/

AMICUS BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST

The Florida Defense Lawyer Association ("FDLA") is a statewide organization of civil defense attorneys formed in 1967 and consists of approximately 1,000 members. The FDLA's goal is to "bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties." The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort, insurance, or litigation issues.

The Fifth District certified a question of great public importance potentially affecting all first-party insurance law, procedurally and substantively – whether a plaintiff can recover extra-contractual, consequential damages in a first-party insurance action without first complying with section 624.155, Florida Statutes. The FDLA is uniquely situated to provide input on the far-reaching impact the decision will have on its members, who routinely defend insurance companies in first-party actions. A decision from this Court will have a substantial impact on the legal and insurance industries in Florida.

SUMMARY OF THE ARGUMENT

Relying on common law contract principles alone, *Manor House* allows an insured to seek damages beyond the express terms of the insurance company policy so long as a finder of fact believes they were "contemplated" when the policy was taken out. The holding fails to adhere to this Court's decision in *QBE Insurance Corp. v. Chalfonte Condominium Apartment Ass'n, Inc.*, 94 So. 3d 541 (Fla. 2012) ("*Chalfonte*"). In our state, insureds may not recover consequential damages until they comply with the procedure established by section 624.155, Florida Statutes.

Unlike most states, Florida has consistently deferred to the Legislature to address first-party insurance issues, such as the creation of section 624.155. Rather, the most common method is to allow independent tort actions, a shaky theory promulgated in California and rejected here as recently as *Chalfonte*. A smaller number of state high courts allow insureds to recover consequential damages on a contract theory; this would seem to be how the Fifth District reached its conclusion below. But, Florida sits in the final category – among the states that limit common law contract damages to the express terms of the policy and allowing the Legislature to create additional remedies.

There is no reason to depart from precedent. Respectfully, the Court should answer the certified question in the negative and hold that insureds in standard

breach of contract actions are limited to damages provided in the policy. *Manor House* should be quashed.

ARGUMENT

I. FLORIDA HAS FIRMLY AND CORRECTLY ADOPTED THE MINORITY VIEW FOR FIRST-PARTY CASES, AND THE FIFTH DISTRICT ERRED BY DRASTICALLY DEPARTING FROM OUR STATE'S APPROACH.

There is a decided national split in first-party cases on how to resolve allegations that an insurer failed to reasonably investigate or timely settle an insured's claim and how extra-contractual, consequential damages are addressed.

As the following legal survey demonstrates, the methods states use to address the issue can be placed into three general categories: (1) recognizing an independent common law tort; (2) rejecting the tort but allowing for extra-contractual, consequential damages on the theory that the carrier breached the implied contractual promise to deal in good faith; and (3) limiting recovery to the benefit of the bargain damages while deferring to the Legislature for any extra-contractual redress. This case provides the Court with an opportunity to reaffirm Florida's rightful placement in the third category.

A. The prevailing national view allows an independent tort claim for first-party bad faith insurance claims handling.

"In 1973, the Supreme Court of California became the first court in the United States to recognize a cause of action, sounding in tort, for bad faith denial

of insurance policy benefits." *Rancosky v. Wash. Nat'l Ins. Co.*, 170 A.3d 364, 371 (Pa. 2017). The case was *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973). *Gruenberg* held that where a carrier "fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing." *Id.* at 1037. As a tort, consequential damages, including damages for mental pain and suffering, are recoverable.[1] *Id.* at 1042; *see also Nichols v. State Farm Mut. Auto. Ins. Co.*, 340 S.E.2d 616, 619 (S.C. 1983) ("We hold today that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under the mutually binding insurance contract, he can recover consequential damages in a tort action."), *superseded by statute on other grounds as stated in Duncan v. Provident Mut. Life Ins. Co. of Phila.*, 427 S.E.2d 657 (S.C. 1993).

Gruenberg drew its reasoning from third-party bad faith law, arising from situations where a carrier fails to reasonable settle a third-party's claim against the carrier's insured. 510 P.2d at 1037-38; *see also Chalfonte*, 94 So. 3d at 545 (recounting Florida's history of the third-party bad faith jurisprudence). While incorporating this logic into the first-party context has been criticized, *e.g.*, *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 863 (Wyo. 1990) (Golden, J.,

[1] Of course, Florida's impact rule would likely bar these damages. *See generally Fla. Dep't of Corr. v. Abril*, 969 So. 2d 201 (Fla. 2007).

dissenting), other states have justified the tort because of an insured's alleged vulnerability following economic loss, the adhesive nature of insurance policies, and that insureds purchase "peace of mind" in addition to financial security. *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 152 (Kan. 1980) (refusing to recognize the tort). Florida, however, has unequivocally rejected plaintiffs' attempts to expand tort law in this area, restating its position as recently as 2012. *Chalfonte*, 94 So. 3d at 584 ("[I]t is clear that there is no common law first-party bad-faith action in Florida.").

Nonetheless, under these and similar lines of reasoning, at least half of the state high courts have recognized the tort of first-party insurance bad faith. *See Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981); *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1156 (Alaska 1989); *Noble v. Nat'l Am. Life Ins. Co.*, 624 P.2d 866, 867 (Ariz. 1981); *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 664 S.W.2d 463, 465 (Ark. 1984); *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1270-71 (Colo. 1985); *Buckman v. People Express, Inc.*, 530 A.2d 596, 599 (Conn. 1987); *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 346-47 (Haw. 1996); *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014, 1020 (Idaho 1986); *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 519 (Ind. 1993); *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988); *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176, 178

(Ky. 1989); *Standard Life Ins. Co. of Ind. v. Veal*, 354 So. 2d 239, 248 (Miss. 1977); *Lipinski v. Title Ins. Co.*, 655 P.2d 970, 977 (Mont. 1982); *Braesch v. Union Ins. Co.*, 464 N.W.2d 769, 776 (Neb. 1991), *disapproved of on other grounds by Wortman ex rel. Wortman v. Unger*, 578 N.W.2d 413, 417 (Neb. 1998); *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 197-98 (Nev. 1989); *State Farm Gen. Ins. Co. v. Clifton*, 527 P.2d 798, 799-800 (N.M. 1974); *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638, 643-45 (N.D. 1979); *Staff Builders, Inc. v. Armstrong*, 525 N.E.2d 783, 788 (Ohio 1988), *abrogated on other grounds but reaffirmed in pertinent part as stated in Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 399-400 (Ohio 1994); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1319-20 (Okla. 1983); *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980); *Nichols v. State Farm Mut. Auto. Ins. Co.*, 340 S.E.2d 616, 619 (S.C. 1983); *Champion v. U.S. Fid. & Gaur. Co.*, 399 N.W.2d 320, 321-22 (S.D. 1987); *Arnold v. Nat'l Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167-68 (Tex. 1987); *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 374 (Wis. 1978); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 863 (Wyo. 1990).

In these jurisdictions, plaintiffs must prove the court-made elements of the tort as recognized by their respective states to recover various elements of consequential damages. The subsequently promulgated state-by-state common

law, which unsurprisingly varies greatly, therefore does not aid resolution of the current matter because it is foreign to Florida.

B. Some states that do not recognize the bad faith tort nonetheless allow for consequential damages on a contract-law theory.

Without citing any cases from this Court in its key analysis, the Fifth District apparently adopted the second method of resolving first-party bad faith claims – allowing for the recovery of all consequential damages which might have been contemplated at the time the policy was issued. *Manor House, LLC v. Citizens Prop. Ins. Co.*, 277 So. 3d 658, 661 (Fla. 5th DCA 2019). Perhaps the leading case ascribing to this view is *Beck v. Farmers Insurance Exchange*, 701 P.2d 796, 800-02 (Utah 1985). *Beck* refused to extend *Gruenberg*'s implicit fiduciary analysis to the first party-context, holding that the "duties and obligations of the parties are contractual rather than fiduciary." *Id.* at 800. Regardless, *Beck* continued that "[d]amages recoverable for breach of contract include both general damages, *i.e.*, those flowing naturally from the breach, and consequential damages, *i.e.*, those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Id.* at 801 (citing *Hadley v. Baxendale*, 9 Exch. 341 (1854)). "[C]onsequential damages for breach of contract may reach beyond the bare contract terms." *Id.* at 801. Like California, Utah allows for these consequential damages to include compensation for mental anguish if sufficiently proven. *Id.*

At least eight high courts—that refused to adopt the *Gruenberg* tort—have adopted this view instead. *See Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 512 (Del. 2016); *Marquis v. Farm Family Mut. ins. Co.*, 628 A.2d 644, 652 (Me. 1993); *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 67 (Mo. 2000); *Lawton v. Great S.W. Fire Ins. Co.*, 392 A.2d 576, 579-80 (N.H. 1978); *Pickett v. Lloyd's*, 621 A.2d 445, 474 (N.J. 1993); *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127, 130-31 (N.Y. 2008); *Beck v. Farmers Insurance Exchange*, 701 P.2d 796, 800-02 (Utah 1985); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 80 (W.V. 1986).

As a result, and although there certainly are important differences in framing a bad faith first-party case as either a tort or contract action, there likely would be minimal separation between the two under Florida procedure. The floodgates to expansive discovery and massive awards would seem to open just the same. If *Manor House* is approved, the mere allegation that an investigation, payment, or communication was "delayed" would almost certainly entitle a plaintiff to otherwise privileged claims files because the claims handling would inhere in the breach of contract action without more. *Cf. Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1124 (Fla. 2005) ("A necessary prerequisite for any bad faith action [allowing for the discovery of claims materials] in an underlying claim for coverage or benefits or an action for damages which the insured alleges was

handled in bad faith by the insurer."). Indeed, this Court has noted that it is "precisely this two-tiered nature of bad faith actions that engenders the discovery battles so often waged in bad faith litigation." *Id.* *Manor House* implicitly dissolves that procedure, and approving the decision would herald an upheaval in Florida's discovery practice – to say nothing of the increased risks that are not considered during the underwriting process, settlement leverage, and verdict sizes we can expect to see. This will undeniably increase the cost of insurance for millions of Floridians.

C. Other states, including Florida, leave extra-contractual, consequential damages to the Legislature.

Third party bad faith actions existed at common law. *See, e.g.*, *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852, 853 (Fla. 1938). "There was, however, no first-party action by an insured for bad faith in Florida at common law." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58-9 (Fla. 1995). *See also Macola v. Gov't Emples. Ins. Co.*, 953 So. 2d 451, 455 (Fla. 2006) ("However, this common law cause of action arose only in the third-party context, and did not authorize common law first-party actions by an insured against its own insurer for failing to act in good faith when settling a claim brought by the insured against its insurer, such as in the uninsured motorist context or other claims for first-party benefits."). In 1982, the Legislature enacted section 624.155 and created the first party bad faith action. § 624.155, Fla. Stat.

As *Chalfonte* explains, the legal relationship between an insurer and its insured remained that of "debtor-creditor" when section 624.155 was enacted. 94 So. 3d at 546 (quotation omitted). As shown from the extrajurisdictional decisions cataloged above, this was already a minority view. But, at least five other states continue to limit recovery in first-party actions to the terms of the policy absent truly extraordinary circumstances, such as fraud. *See Cramer v. Ins. Exch. Agency*, 675 N.E.2d 897, 903-04 (Ill. 1996) ("The remedy provided [by Illinois statute] allows an extracontractual award and specifically defines the limits of this award. This court has previously declined to recognize a new common law tort where the legislature has passed a statutory scheme providing a limited remedy."); *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 152 (Kan. 1980) (finding Kansas's statutory scheme sufficient and holding that an insured may only "maintain an action on the contract for his policy benefits, with costs, interest and attorneys' fees … [and] may also report the company to the Department of Insurance"); *Kewin v. Mass. Mut. Life Ins. Co.*, N.W. 2d 50, 53-54 (Mich. 1980) ("Insurance contracts for disability income protection … are commercial in nature; [t]hey are agreements to pay a sum of money upon the occurrence of a specified event. … The damage suffered upon the breach of the agreement is capable of adequate compensation by reference to the terms of the contract."); *Haagenson v. Nat'l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979) ("We have consistently held, in

the absence of a specific statutory provision therefor, that extra-contract damages are not recoverable for breach of contract except in exceptional cases where the breach is accompanied by an independent tort. . . . A malicious of bad-faith motive in breaching an [insurance] contract does not convert a contract action into a tort action." (quotation omitted)); *Rancosky v. Wash. Nat'l Ins. Co.*, 170 A.3d 364, 371 (Pa. 2017).

Pennsylvania's experience demonstrates the prudence of this approach. That state rejected an attempt to adopt the bad faith tort around the time Florida enacted section 624.155. *See D'Ambrosio v. Pa. Nat'l Mut. Cas. Ins. Co.*, 431 A.2d 966, 970 (Pa. 1981) ("Surely it is for the Legislature to announce and implement the Commonwealth's public policy governing the regulation of insurance carriers"), *superseded by statute as stated in Rancosky*, 170 A.3d at 371. The Legislature indeed responded with a first-party bad faith statute nine years later. *Rancosky*, 170 A.3d at 371. The decisional law since has endeavored to apply the statute to effect the will of the legislature as in any other statutory interpretation case – not to unnecessarily expand common law principles that circumvent remedies spelled out by legislation. *See id.*

In contrast, New Jersey (a "second category" state) decided to allow consequential damages as a matter of contract law in part because "legislation has been proposed to provide a [first-party bad faith] remedy, but has not yet passed."

Pickett, 621 A.2d at 470-71. "Generally, we have held that absent forthcoming remedies from our coordinate branches of government, justice would be better served were a court of law to fashion a remedy in a particular case, and perhaps be corrected by the Legislature, than were innocent victims to have no redress at all." *Id.* Whatever the wisdom in that reasoning, it need not guide Florida jurisprudence because our legislature spoke to the issue nearly forty years ago.

II. FLORIDA'S UNIQUE AND DEVELOPED HISTORY WITH FIRST-PARTY CLAIMS UNDER SECTION 624.155 HAS SUCCESSFULLY AND ADEQUATELY REMEDIED INSUREDS WHO HAVE SUFFERED FROM BAD FAITH CLAIMS HANDLING.

Like virtually all states, "Florida contract law does recognize an implied covenant of good faith and fair dealing in every contract." *Chalfonte*, 94 So. 3d at 548. However, "a duty of good faith must relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements." *Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. 4th DCA 1998) (emphasis added). Indeed, one of the two exceptions to the good faith covenant is "where application of the covenant would contravene the express terms of the agreement." *Chalfonte*, 94 So. 3d at 548. Insurance policies, including the one at issue below, articulate exactly what "we will pay" in the event of a defined loss. The Fifth District erred by

circumventing established Florida contract law to rewrite the policy and adopt under a general contract theory the state has never endorsed.

Chalfonte's characterization of that plaintiff's attempt to expand the available coverage is equally apt here – "such first-party claims are actually statutory bad-faith claims that must be brought under section 624.155." *Id.* at 549. Of course, Citizens is immune to the statute, but the decision below would pertain to all Florida insurers if undisturbed.

The potential impact of this decision cannot be overstated. There will be a drastic uptick in first-party litigation depleting scarce judicial resources, increased discovery seeking privileged claims file information, disproportionate settlement leverage between the parties, and increased verdicts will result. This will ultimately increase the cost of insurance for Floridians.

As the dissent wrote in a non-insurance contract case allowing consequential damages, "The majority opinion will be read by insureds and their counsel as justifying an action seeking lost profits wherever there is a loss of commercial property, and the insurer has not paid the claim as promptly as a trier of fact might conclude it should have." *Lawrence v. Will Darrah & Assocs., Inc.*, 516 N.W.2d 43, 52 (Mich. 1994) (Levin, J., dissenting) (footnote omitted). To be sure, <u>all</u> commercial insureds could plausibly claim "contemplated" lost profits if an insurance claim was not timely paid. There is no reason not to expect that measure

of damages being sought in every commercial first-party case if *Manor House* is approved. "This is not the case to let the camel get his nose under the tent." *Id.* at 20.

CONCLUSION

This Court should answer the certified question in the negative. Florida has properly resisted plaintiffs' efforts to unnecessarily expand the common law in the field of first-party insurance litigation. Deference to the Legislature has been and continues to be imminently appropriate in the heavily regulated industry. A plaintiff must satisfy section 624.155 before seeking damages in excess of a policy's express terms. If left undisturbed, the Fifth District's decision will allow plaintiffs to circumvent the requirements of section 624.155.

WHEREFORE, the FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to answer the certified question in the negative and to quash the decision on review.

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