IN THE SUPREME COURT OF FLORIDA

CITIZENS PROPERTY INSURANCE CORPORATION,

CASE NO. SC19-1394

Petitioner,

v.

MANOR HOUSE, LLC, *et al.*,

Respondents.
_____/

ON DISCRETIONARY REVIEW OF A DECISION
FROM THE FIFTH DISTRICT COURT OF APPEAL
Lower Court Case No.: 5D17-2841

AMICI CURIAE BRIEF OF FLORIDA INSURANCE COUNCIL, PERSONAL INSURANCE FEDERATION OF FLORIDA, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, and NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONER CITIZENS PROPERTY INSURANCE CORPORATION

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STATEMENT OF INTEREST

The Florida Insurance Council's ("Council") "mission is to provide value through education, research, and representation before consumer, legislative, regulatory, and judiciary organizations. The Council is dedicated to the highest standards of business ethics and professionalism; committed to promoting and protecting the viability of the insurance market; resolved to earn consumer confidence and trust, and determined to foster a positive public image of the insurance community." The Council, established in 1962, is a trade association representing 34 insurer-groups, consisting of 318 companies, which write over $38 billion a year in premium volume and provide all lines of coverage. Id. Council members hold more than 90 percent of the market share in residential and private passenger automobile coverage. Id. Further, in the past, the Council filed amicus curiae briefs on important issues concerning the insurance sector. See, Sebo v. American Home Assurance Co., Inc., 208 So.3d 694 (Fla. 2016)(addressing whether concurrent-causation doctrine, not efficient-proximate-cause theory applied when determining causation of insured's loss); Westphal v. City of St. Petersburg, 194 So.3d 311 (Fla. 2016)(addressing workers' compensation attorneys' fees issue); and Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co., 2019 WL 3403438 (Fla. 2019)(addressing whether an insurer may require all insureds on a policy to execute

an assignment of benefits before that assignment is considered valid and enforceable).

The Personal Insurance Federation of Florida, Inc. (PIFF), is a leading voice for the personal lines property and casualty insurance industry in Florida. PIFF represents national insurance carriers and their subsidiaries, including many of the state's top writers of private passenger auto and homeowners multiperil insurance. PIFF advocates for a healthy and competitive insurance marketplace for the benefit of Florida consumers. PIFF has worked with the legislative and executive branches of government, as well as state regulators, the business community and consumer groups "to make Florida a better place in which to insure a vehicle or home."

American Property Casualty Insurance Association ("APCIA") is the preeminent national trade association representing property and casualty insurers doing business in Florida, nationwide, and globally. APCIA's members, which range from small companies to the largest insurers with global operations, represent nearly 60% of the U.S. property and casualty marketplace. APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives on matters that shape and develop the law. APCIA's interests are in the clear,

consistent, and reasoned development of law that affects its members and the policyholders they insure.

The National Association of Mutual Insurance Companies ("NAMIC") includes more than 1,400 member companies. The association supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC member companies write $268 billion in annual premiums. Its members account for 59 percent of homeowners, 46 percent of automobile, and 29 percent of the business insurance markets. Through its advocacy programs, NAMIC promotes public policy solutions that benefit member companies and the policyholders, recognizing the unique alignment of interests between management and policyholders of mutual companies.

The Council, PIFF, APCIA, and NAMIC, collectively referred to as Amici, have extensive knowledge concerning insurance policies, underwriting, and the process by which an insured party may seek extra-contractual damages through the bad faith process outlined in § 624.155, Fla. Stat. (2019). Together, the Amici offer their specialized knowledge regarding the likely pitfalls and harm that will occur from expanding the scope of a first party insured's ability to seek extra-contractual damages outside of the clearly defined process created by the Legislature in § 624.155, Fla. Stat. (2019), to Florida's policyholders and insurers.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's opinion in Manor House et al., v. Citizens Property Insurance Corp., 277 So. 3d 658 (Fla. 5th DCA 2019)[1] seeks to overturn this Court's well-established precedent that Florida does not follow the doctrine of reasonable expectations in the context of a breach of an insurance contract,[2] and that in a common-law breach of an insurance contract action, the "damages are limited to those contemplated by the parties in the insurance policy."[3] The Amici adopt the Appellant's arguments addressing the lower court's error in ignoring these rules of law. See Initial Brief at pages 10-11.

The Amici offer three additional critiques of the lower court's opinion:

First, the lower court's erroneous decision will adversely impact Florida's policyholders by increasing loss costs and putting upward pressure on premiums for risks that are neither identified nor covered within the four corners of the insurance contract, and will result in courts' unilateral rewriting of insurance contracts, thus, creating uncertainty for policyholders;

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[1] The Fifth District Court of Appeal is referred to as the "lower court" court in the Amici Curiae brief.
[2] QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n., 94 So. 3d 541 (Fla. 2012).
[3] Macola v. Gov't Empls. Ins. Co., 953 So. 2d 451, 455-56 (Fla. 2006).

Second, the lower court's opinion improperly overrides the legislature's prerogative in creating the framework for a first-party bad faith cause of action, as set out in section 624.155, Florida Statutes, by allowing the same extra-contractual damages in a breach of an insurance contract action, *absent a bad faith showing.*

Third, and finally, the lower court's opinion substantially rewrites the insurance contract to create a judicial remedy for the party's "reasonable expectations," in order to justify an award of extra-contractual damages not expressly set out in the insurance contract, thus, preempting the legislature's determination that the Florida Office of Insurance Regulation is authorized to review and approve insurance contracts and rates for fairness and compliance with the law.

Based on the foregoing, the Amici urge this Court to reverse the Fifth District Court of Appeal's decision on review and answer the certified question in the negative.

ARGUMENT

A. The lower court's decision adversely affects Florida policyholders by increasing loss costs, thus putting upward pressure on premiums and opening the door to possible two-way extra-contractual obligations.

An insurance premium is the amount of money paid in return for an insurance contract. Amos v. State, 711 So. 2d 1197, 1199 (Fla. 2d DCA 1998); see also, § 627.403, Florida Statutes (2019), defining "premium" as "the consideration for insurance, by whatever name called." "The amount of the premium varies in

proportion to the risk assumed." 5 Couch on Ins. Third Edition § 69:1. Dec. 2019 Update. The greater the risk assumed, the greater the premiums charged. For example, a policyholder, who purchases a loss of business income endorsement along with their property damage coverage, will pay premiums for both types of insurance coverage. If a policyholder decides not to purchase the loss of business income endorsement, then the premium will not contemplate that risk, and the policyholder will pay a lower premium for the lower coverage they opted to obtain. This example illustrates the simple economic truth that policyholders and insurers are free to contract and make decisions that fit their respective needs and that are priced accordingly.

The lower court's opinion ignores this simple economic truth by adopting the doctrine of "reasonable expectations" in interpreting the insurance policy, by allowing the policyholder to seek extra-contractual damages not contemplated in the insurance contract. The decision ignores that the policyholder and insurer have already accounted for their "reasonable expectations" by agreeing to coverage terms for the policy at the time of contracting.[4] Thus, the lower court's opinion rewrites the insurance contract to include coverage for a risk not contemplated within the four corners of the insurance contract—a risk that the insured did not bargain or pay for,

[4] The record below shows that the insurance contract at issue did not contain coverage for lost rents. R. 4367; Initial Brief at 5-6.

and the insurer did not agree to cover.

If this Court accepts the lower court's reasoning[5], then the inevitable result will be higher costs that will ultimately be reflected in premiums paid by Florida policyholders. The additional costs for covering an insured's "reasonable expectations" and the extra-contractual damages that may potentially flow from a purported common-law breach of the insurance contract will be reflected in the greater overall lost costs. Those losses will be a necessary component of insurance premium calculations. For example, under the lower court's analysis, if it is a "reasonable expectation" that a policyholder, who purchases property insurance, would also suffer "business losses" – even though the policyholder did not purchase the business loss endorsement – then the premium for the property insurance coverage will be increased to compensate the insurer for the increased and undefined potential risk and losses. All policyholders, whether they decide to purchase the business loss endorsement or not, will pay a higher premiums. This outcome defeats the idea of allowing policyholders freedom to contract and make decisions that best protect their interests.

Currently, a policyholder is only be entitled to recover these extra-contractual damages if they availed themselves of the protections of section 624.155, Fla. Stat.,

[5] Such a decision would require the Court to recede from its decisions in Chalfonte Condo Ass'n., and Macola, *supra, footnotes 2 and 3*.

and proved that the insurance company acted in bad faith in the handling of their claim. The legislature determined the appropriate avenue and remedy for such "bad faith" in enacting section 624.155, Fla. Stat. The protections afforded to the policyholder under section 624.155, Fla. Stat., likewise do not result in increased premiums for all policyholders. Section 624.155, addresses facts when an insurer has been proven to act in "bad faith" toward its insured, and therefore represents the outlier, not the norm. However, allowing common law claims for extra-contractual damages in all insurance cases, changes these extra-contractual damages from being an "outlier" into the norm. This results in increased costs and puts an upward pressure on premiums for all insureds in order to cover the risks associated with same.

A second unintended consequence of the lower court's flawed reasoning is that it may actually create a new liability for policyholders, in what can be described as a "what is good for the goose is good for the gander" rule. The lower court's decision allows a party to seek extra-contractual damages that naturally flow from a common-law breach of the insurance agreement. This reasoning might be arguable applied to allow extra-contractual damages against a policyholder that breaches an insurance contract. For example, an insurance policy may requires a policyholder, who has made a claim, to appear for a scheduled Examination Under Oath. The Examination is for the policyholder to provide the insurer with supporting

information concerning the claimed loss. Because attendance at the Examination is a requirement of the insurance contract, should the policyholder fail to attend the Examination, the policyholder would be in breach of the insurance contract. Under the lower court's analysis, the policyholder may be liable for extra-contractual damages that naturally flow from the policyholder's breach, such as attorney's fees, travel costs, and court reporter fees.

The lower court's decision to essentially rewrite the insurance contract conflicts with this Court's well-established rules of law that support the premise that parties are free to bargain, and enter into the agreement that best suits that party's specific requirements. This Court's rule of law that Florida does not follow the "reasonable expectations" doctrine in actions for breach of an insurance contract is consistent with freedom of contract principles. Policyholders are free to determine the risk or risks that the policyholder wants to purchase insurance coverage for, and to control the costs of that coverage by determining and purchasing the coverages that meet their specific needs. Similarly, this Court's rule of law that the damages are those which are set out in the insurance contract provides clarity for both the policyholder and the insurer. See Talat Enters. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1283 (Fla. 2000)(holding "in the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy.").

B. The lower court's decision improperly invades the Florida legislature's determination to allow first party bad faith actions in limited instances, as set out in section 624.155, Florida Statutes.

At the onset, it is clear that Florida common-law does not recognize the tort of first-party bad faith in the context of an insurance contract. See State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58-59 (Fla. 1995). However, with the enactment of section 624.155, Florida Statutes, the Florida legislature created a first-party bad faith cause of action based on specified circumstances that allows for extra-contractual damages upon an "adverse adjudication at trial or upon appeal" including "damages, together with court costs and reasonable attorney's fees incurred by the plaintiff." § 624.155(1)(a), (4), Fla. Stat. The first party bad faith action follows the underlying coverage litigation, and the insurer is not required to litigate both coverage and bad faith at the same time under the statutory bad faith framework.

As the Appellant's Initial Brief points out, the claim below is a first-party bad-faith action thinly disguised as a common-law breach of contract claim. Initial Brief at page 14. Despite the underlying facts (and the lower court's apparent distaste for the Appellant's statutory immunity from bad faith), the lower court's holding and the certified question broadly assert that extra-contractual damages are awardable based on the common-law breach of the insurance contract in all first-party claims for breach of contract, even in the absence of any bad faith. This holding does two things: 1) it creates a common-law bad faith tort action for a first-party breach of

insurance contract claim; and 2) undermines the legislature's prerogative in defining when Florida courts will hear a first-party bad faith action.

In enacting section 624.155(1)(a), and (b), Florida Statutes, the legislature set out the specific instances when a claimant may bring a bad faith civil action against an insurer. Further, the statute requires certain conditions precedent before filing the tort action, like giving written notice to the department and insurer[6], giving the insurer an opportunity to cure the alleged breach[7], and obtaining an adverse adjudication,[8] before filing a bad faith civil action. In contrast to section 624.155, the lower court's decision undermines the legislature's direction in section 624.155 by allowing a policyholder to immediately file a common-law claim for extra-contractual damages without following the legislatively mandated requirements. Under the lower court's analysis, a policyholder may file a breach of contract claim alleging the insurer failed to timely adjust the loss, while also claiming entitlement to extra-contractual damages from the alleged breach, without first having obtained an "adverse adjudication" against the insurer, filed a civil remedy notice, or given the insurer the opportunity to cure the alleged breach. This holding is directly contrary to the legislature's bad faith framework set out in section 624.155.

[6] § 624.155(3)(a), Fla. Stat.
[7] § 624.155(3)(c), Fla. Stat.
[8] § 624.155(4), Fla. Stat.

C. The lower court's decision undermines the legislature's determination that the Florida Office of Insurance Regulation reviews and approves insurance contracts and rates for fairness and compliance with the law.

In Florida, all insurance policies and insurance rates of authorized insurers are regulated by the Florida Office of Insurance Regulation ("Office"). In the context of property and casualty insurance rates, the standards used for setting insurance rates are found in section 627.062, Florida Statutes (2019). Any rate filing and form filing by an insurer is reviewed by the Office to determine "if a rate is excessive, inadequate or unfairly discriminatory." § 627.062(2)(b)1., Fla. Stat. The Office considers whether the proposed rate is "excessive, inadequate, or unfairly discriminatory" by reviewing the legislative factors set out in section 627.062(2)(b)1.-12., Florida Statutes. Section 626.062(2)(e)1.-6., Florida Statutes, sets out the standards for the Office to consider in determining whether the proposed rate is acceptable. The statute gives the Office ultimate authority about whether or not to approve or deny the insurer's proposed rate. Similarly, the Office is given the statutory authority to review an insurer's proposed form filing, and determine whether or not the proposed form complies with Florida law. §§ 627.410; 627.411, Fla. Stat. Consumer protection is enhanced by the legislature's directive that the Office determine in reviewing a proposed insurance policy form is "whether the benefits are reasonable in relation to the premium charged" in accordance with "reasonable actuarial techniques." § 627.411(2), Fla. Stat.

Turning to the instant case, as a matter of law, the Office reviewed and approved Citizens' insurance policy and rates at issue. The Office approved the property loss policy and premiums charged for that policy. An insurance policy that did not include an endorsement for lost rental income. Without dispute, the Office, in reviewing and approving the Citizens' insurance policy and the proposed rates, considered the statutory factors it was required to apply. In contrast to the Office's statutorily-guided review of the insurance policy and proposed rates, the lower court rewrites the insurance contract in order to meet the policyholder's alleged "reasonable expectations," and provide an award of extra-contractual damages not set out in the insurance policy.[9] Clearly, the lower court's rewriting of the insurance contract does not take into consideration the required statutory factors and standards that are used to set insurance rates and create insurance policies. Rather than conducting a measured determination, the lower court's rewriting of the insurance contract unilaterally creates an insurance coverage and liability that was not considered by the Office when reviewing the form and the rates, and not contemplated by the insurer in charging the premium for the policy. This bold action not only ignores this Court's precedent, it invades the legislature's regulatory framework for reviewing proposed insurance policies and rates—a legislative

[9] In fact, the lower court expressly recognizes the fact that "the insurance policy essentially provided for property damage coverage, but did not provide coverage for lost rent." Manor House, 277 So. 3d at 661.

framework that provides for clarity and affordable insurance for Florida's policyholders.

CONCLUSION

The Amici Curiae request that this Court reverse the Fifth District Court of Appeal decision below and answer the certified question in the negative by reaffirming this Court's precedent that Florida does not follow the "reasonable expectations" doctrine in the breach of an insurance contract, and that the damages for a first-party breach of an insurance contract are limited to the amount owed pursuant to the express terms and conditions of the insurance policy.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 9.210(a)(2), Florida Rules of Appellate Procedure, the undersigned hereby certifies that this amicus curiae brief complies with the font requirements of the rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the parties listed below via electronic mail and filed with the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1) on January 13, 2020:

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