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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,365

ALLAN GEE, as Official
Liquidator of UNIVERSAL
CASUALTY & SURETY COMPANY,
LTD. (in Liquidation),

Petitioner,

v.

SEIDMAN & SEIDMAN, and
BINDER DIJKE OTTE & CO., et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

This case is one of first impression in this state, and it calls upon the Court to make a policy decision that selects the best and most equitable rule to govern this and similar cases. The issue presented is whether liquidators of failed insurance companies should be able to recover from the companies' auditors where the auditors' negligence in failing to detect management fraud was a legal cause of the company's failure and ultimate indebtedness.

We have submitted in our initial brief — and reiterate here — that the answer should be in the affirmative, precisely as well held in the leading insurance liquidation case on this very issue - *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1982) *cert. denied*, 464 U.S. 1002 (1983) — and in all of the other insurance liquidation cases which have addressed the question.[1] A rule permitting such recoveries by insurance liquidators will work to the ultimate benefit and protection of the insurance buying public. The rule will impose liability on auditors whose conduct is found tortious, but not in any unusual manner; tortfeasing auditors will simply be required to respond to tort judgments like any other tortfeasors. We are joined by the Florida Department of Insurance and by the National Association of Insurance Commissioners in urging the Court to adopt the equitable and rational rule enunciated in *Schacht* as a matter of public policy.

The Respondent auditors and their *amici*, on the other hand, have proposed no equitable or fair solutions as an alternative answer for this Court to consider. Instead, they have first tried to get this Court not to consider the question at all by advancing a completely incorrect jurisdictional

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[1]*See Kempe as Liquidator of Dover Insurance Co. v. Monitor Intermediaries, Inc.*, 785 F.2d 1443 (9th Cir. 1986); *Foster as Rehabilitator of Mutual Fire, Marine & Inland Insurance Co. v. Peat Marwick Main & Co.*, 587 A.2d 382 (Pa. Commw. Ct. 1991); *In re Liquidation of Integrity Insurance Co.*, 573 A.2d 928 (N.J. Super Ct. App. Div. 1990); *Corcoran as Liquidator of Union Indemnity Insurance Co. v. Hall & Co.*, 545 N.Y.S.2d 278, 149 A.D.2d 165 (App. Div. 1989); *Bonhiver v.Graff*, 248 N.W.2d 291 (Minn. 1976).

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argument. They then go on to suggest a variety of technical defense doctrines (which arose *not* in insurance liquidation cases, but in entirely different contexts), which they suggest can be used to fashion a rule to shield auditors from liability even where, as here, they have *conceded* their negligence. Notably, the defenses suggested by the Respondent auditors have all been specifically *rejected* by *Schacht* and its progeny.

The Respondent auditors and their *amici* suggest, for example, that there is a principle under which management's fraud can be imputed to liquidators to prevent them from recovering for the harm caused by the negligence of the companies' auditors. Or, the Respondent auditors say, an insurance company can be deemed an 'engine of theft', under a rather ill-defined concept developed in some non-insurance company cases, to shield the auditors from the consequences of their negligence.[2] Another avenue the Respondent auditors have suggested the Court could take to protect negligent auditors from liability is to add 'reliance' as an element of causation in auditing negligence cases, so that the auditors can argue that the fraudulent managers did not rely on the audits (and ignore the fact that the *company* relies on the audits to sell insurance). The Respondents also say that there are 'dominating shareholder' concepts which can be utilized to protect them from liability for the damages caused by their negligence.

In short, the Respondent auditors and their *amici* have amassed a variety of principles and concepts from other areas of the law which they suggest Court can use to set up a rule protecting negligent auditors from liability, particularly if this Court is willing to accept the Respondent auditors' invitation to ignore the insurance liquidation cases on point. The question is whether there is any legal

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[2]As the Florida Department of Insurance has pointed out, an insurance company should never be deemed an engine of theft (i.e., designed only to steal from outsiders), because policyholders are not ever really outsiders to their company; they have an ongoing dependence on the company to be there to provide coverage when the insured's losses or other calamities arise.

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or policy basis for the Court to do as the Respondent auditors and their *amici* suggest. We submit that there is not.

When all is said and done, the Respondent auditors and their *amici* are asking this Court to endorse a rule which will protect concededly negligent parties from liability for the damage they have caused.[3] We, on the other hand, ask the Court to adopt a rule that serves equity and the public interest by allowing insurance liquidators to recover on behalf of failed insurance companies from *any proven tortfeasors* whose tortious conduct was a legal cause of the company's failure and indebtedness, whether the tortfeasors be the company's managers or the company's auditors. Both groups — i.e., managers and auditors – have duties of care to exercise on behalf of the insurance company to ensure that it will be able to fulfill its insuring obligation to the insurance buying public. If either group tortiously breaches its duties, it is only fair — and in keeping with long-established and basic tort law - that payment be required for the damages caused.

The Petitioner Liquidator here proved at a jury trial that there was negligence on the part of the Respondent auditors which was a legal cause of $15.7 million in damages to the Respondent auditors' client, Universal Casualty & Surety Company. There is no question about the evidentiary support for the verdict, so the auditors should just be required to pay the judgment. The 'equitable estoppel' wand waved by the Third District to absolve the auditors from liability for their negligence produced an inequitable result and required adoption of a bad rule of law which aids no one but negligent auditors.

The law should be concerned with promoting the rights of innocent parties; not with

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[3]The auditors' only 'policy' argument is that if they keep getting judgments entered against them for breaching their duties to detect management fraud, they will be less willing to perform audits in the future — an argument which should hardly generate any sympathy. The short answer on that score is that auditors will not *have* judgments entered against them if they do their jobs right, so they themselves have complete control over the litigation 'floodgates'.

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protecting tortfeasors. We here ask the Court to adopt the *Schacht* rule, and to restore the Petitioner Liquidator's judgment against the negligent Respondent auditors.

ARGUMENT

A. A PROPER BASIS EXISTS FOR EXERCISE OF THIS COURT'S JURISDICTION

1. The Third District's certified question

The Respondent auditors begin their brief with a protracted – and completely unfounded – argument that the Third District has certified a question that was not passed upon in its decision. The Respondents are only able to create this argument by a deliberate misreading of the certified question, which misreading suggests that the certified question is about liquidators' standing to bring *creditors*' claims against auditors. This spurious argument is completely refuted by the Third District's order denying rehearing, which explicitly stated that it was *not* reaching any questions about liquidators' standing to bring creditor's claims against auditors because *this* Liquidator has always been clear that he brings only the liquidated company's claim against its auditors.[4] (R. 2089-2090).

The Third District has thus made its own *record* statement that its decision did *not* pass

[4]We still are clear on that point, and have always been straightforward in asserting this position. (*See, e.g.*, R. 843; S.R. 92-93). The Respondent auditors on the other hand, are somewhat less straightforward in now suggesting that perhaps the creditors *do* have claims against the Respondent auditors and that only the Liquidator's suit is impermissible. In fact, the Respondent auditors were absolutely adamant throughout the trial proceedings that the creditors had *no* claims against the auditors because they lacked the requisite legal privity. (R. 234, 737 (*see* pp. 9, 17-20), 1079; S.R. 14, 29, 32-33). Since, as stated in text, *supra*, a policy decision is presently before the Court, we also note here the impracticality of the Respondent auditors' attempt to suggest that suits against insurance company auditors for negligence should be brought by policyholders. Not only are there usually thousands of policyholders — often geographically far-flung — which would make for an incredible multiplicity of suits, but the Respondent auditors well know that their very first defense to such direct policyholder suits will be precisely that which they raised here, i.e., that policyholders do not have the requisite privity under the prevailing standard set for example by this Court's decision in *First Florida Bank, N.A. v. Max Mitchell & Company*, 558 So. 2d 9 (Fla. 1990). There is no question that the company itself has a claim against its auditors if the auditors were negligent, and a liquidator's suit on behalf of the company under *Schacht* and progeny is clearly the most efficient and appropriate means for proceeding.

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upon liquidators' rights to bring creditors' claims. What the decision *did* pass upon is also clear from the decision itself, in which the Third District designated the following as its holding:

> Where it is shown, without dispute, that a corporate officer's fraud intended to and did benefit the corporation, to the detriment of outsiders, *the fraud is imputed to the corporation and is an absolute defense* ***to the corporation's action*** *against its accounting firm for negligent failure to discover the fraud.*

625 So. 2d at 3. We, of course, contend as a matter of law and as a matter of fact that Universal did *not* benefit from the corporate manager's fraud, as set out in our initial brief and below. But, for present purposes, we note that the Third District's decision is self-evidently passing upon the question of whether management's fraud (which the Third District designates as "on behalf of the company") should act as a defense to the *company's* action brought by the Liquidator for the negligence of the company's auditors in failing to discover the fraud.

It is in this context that the Third District certified the following question to this Court:

> ***Whether the liquidator of a bankrupt company should be permitted to recover*** for losses suffered by the company's customers and creditors, ***against an auditor which negligently failed to discovery the fraud of the company's manager, where the manager's fraudulent act was intended to and did benefit the company.***

(R. 2091). The Respondent auditors now suggest -- solely in order to try to construct a jurisdictional argument -- that the point of this question is really to ask whether a liquidator should be permitted to bring the claims of creditors against company's auditors. Given the Third District's decision and its order denying rehearing -- which make it emphatically clear that the decision does not address the issue of whether liquidators may bring creditors' claims (as opposed to the company's claims) against auditors -- it is self-evident that the certified question is *not* directed to that issue, but rather to the issue of whether management fraud should defeat a liquidator's recovery for the injury caused to the company by the auditors' negligence in failing to discover the fraud.

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The Respondent auditors' attempt to parlay the Third District's phrasing into a jurisdictional argument — that the Third District certified a question it had not passed upon — is thus simply inaccurate. Respondents are really just quarreling with the wording of the certification — as did the Florida Department of Insurance in its amicus brief and, for that matter, as does the Petitioner Liquidator.[5] This Court, however, clearly has the power to rephrase the question, as the Respondent auditors own brief acknowledges. (Respondents' Answer Brief, p. 9). This Court has restated certified questions where, for example, the question does not conform to the facts of the case, *Thomason v. State,* 620 So. 2d 1234, 1235 (Fla. 1993); *Lawton v. Alpine Engineered Products, Inc.*, 498 So. 2d 879, 880 (Fla. 1986); or where this Court sees the central issue differently than did the district court; *Department of Transportation v. Fortune Federal Savings & Loan,* 532 So. 2d 1267 (Fla. 1988); or where the question is inconsistent with the analysis required by the body of law under review. *Riley v. State,* 511 So. 2d 282 (Fla. 1987). As Respondents themselves put it, "in these cases, the question was not whether the district court had *passed upon* the question certified, but whether it had correctly formulated or articulated the question it *had* passed upon." (Respondents' Answer Brief, p. 9). Correct formulation is *precisely* the issue here. As the Respondents' argument perhaps demonstrates, the phrase "customers and creditors" can be deleted as extraneous to the question passed upon and presented for review. Furthermore, we suggest that the phrase "where the manager's fraudulent act was intended to and did benefit the company" should also be deleted because it does *not* conform to the facts of the case. *See Thomason* and *Lawton, supra.* The rephrasing we suggest is:

> Whether the liquidator of a failed insurance company should be permitted to recover from the company's auditors where the auditors' negligence in failing to detect management fraud was a legal cause of the

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[5]As set forth in detail in the Petitioner's initial brief on the merits and elsewhere in this brief, Shah's fraud was *not* intended to and did *not* benefit Universal, as a matter of fact and as a matter of law.

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company's failure and ultimate indebtedness.

However the question is rephrased, if at all, it is clear that the Third District was certifying the core question that its decision had passed upon, not the isolated (and contextually superfluous) phrase which the Respondent auditors have seized upon to make a jurisdictional argument intended to deflect this Court from considering the merits of this case.

2. **Great public importance**

Not only did the Third District pass upon the question it certified, but the question is also of undeniable public importance and not – as the Respondents suggest – an individualized dispute of import only to the two particular parties to this suit. Eloquent testimony to the public interest created by this case is the desire of concerned governmental entities and other organizations to participate as *amici*, including the Florida Department of Insurance, the National Association of Insurance Commissioners, the American Institute of Certified Public Accountants, and an apparently self-assembled group of commercial law firms.

Additionally, the Third District itself clearly believed that its decision passed upon a question of great public importance, and its certification of that belief is of significance in the system of appellate review presently in effect in this state. The district courts have been given a substantial role in making sure that appropriate questions get to this Court for exercise of its most significant functions as the highest court of the state — including the determination of issues of great public importance. Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities - An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. of Fla. L. Rev. 80, 84. The Third District must be presumed to respect the gravity of its certification duties and not, as the Respondent auditors' argument suggests, to certify matters of no public import.

The question presented also speaks for itself in terms of its public importance because

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it asks this Court to join the quest of courts throughout the country for judicial means of protecting the public from the fallout of corporate fraud. Fraudulent managers and officers within companies have, unfortunately, become an all too common problem. Society, the law, and certainly auditors have been made keenly aware of the potential for, and prevalence of, fraud in the business sector. Society and the law are grappling with the effects of such fraud, and the hundreds of suits involving savings and loan failures are a high-profile example of the problem. Insurance company liquidations are also an ever more frequent calamity. Because of the known prevalence of the possibilities for management fraud, auditors have specifically designed, and recently intensified, standards for themselves to respond to signs of fraud uncovered during audit procedures. (T. 3088-3094).

The issue here -- far from being an individualized dispute between this liquidator and these auditors -- is thus both far-reaching and of great public importance, precisely as the Third District has certified. The issue is whether auditors who have *negligently -- i.e., in breach of their own standards for responding to signs of management fraud* -- enabled a fraud to continue, and whose negligence has caused a company to incur losses and debts which would not have been incurred *but for their negligence,* should be required to pay for those losses caused by their negligence. The Respondent auditors urge when they respond on the merits (and, tellingly, their argument on the merits *does* address this actual question posed by the Third District's decision and certified question -- not the standing question the Respondent auditors purport to believe the Third District was certifying), that auditors should be relieved from liability because, after all, they were only *negligent* while the company had a manager who engaged in *fraud.* This plea for exemption is most unseemly coming from the auditor sector of society whose self-imposed mission in performing audits -- for which most substantial compensation is exacted at rates set by the auditors themselves -- ***includes the duty to uncover management fraud where signs of it appear during audit procedures***.

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Notably, auditors' standards do not require them to uncover and track down *all* fraudulent schemes no matter how sophisticated and well-concealed, or even *any* such schemes. Auditors' duties with respect to uncovering management fraud are triggered only where - as concededly happened here - they come upon signs of fraud in the course of their audits. As the court in *Cenco v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982) put it:

> Auditors are not detectives hired to ferret out fraud, but if they chance on signs of fraud they may not avert their eyes — they must investigate. The references to keeping an eye out for fraud in the accounting standards . . . would have little point if not interpreted to impose a duty on auditors to follow up on any signs of fraud that came to their attention.

686 F.2d at 454. In short, auditors have set themselves up as a profession that will independently investigate and report on companies' affairs, and that will follow up on any signs of management fraud presented during an audit investigation. Insurance commissioners — and, derivatively, the insurance buying public — have accepted auditors at their word and rely on auditors in permitting insurance companies to commence and continue selling insurance.

The auditors suggest here that there should be a rule exempting them from liability for their *negligent* failure to follow up signs of management fraud. We maintain that clearly the better — and infinitely simpler — answer is to maintain the status quo of basic tort law and of auditors' own standards with regard to detection of management fraud. If auditors negligently breach their own standards and cause damage, they should pay the resulting tort judgment.

Whichever way it is decided, the question certified by the Third District *is* important, and it presents a proper basis for exercise of this Court's jurisdiction.

B. THE JUDGMENT IN THE LIQUIDATOR'S FAVOR SHOULD BE REINSTATED ON THE MERITS

1. The Respondent auditors' arguments fail on the record facts

The Respondent auditors have provided ***no statement of the case and facts*** in their answer

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brief, and thus have accepted the Petitioner Liquidator's statement. Fla. R. App. P. 9.210(c) required the Respondent auditors to file a statement of the case and facts if they had *any areas of disagreement* with the Liquidator's statement, and to *clearly specify those areas of disagreement*. This Court has specifically cautioned that adherence to that rule will be required. *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1122 (Fla. 1984). *See also Trolinger v. State*, 296 So. 2d 87, 88 (Fla. 2d DCA 1974) (if answer brief does not specify any factual disputes, court will assume there are none).

Because the Respondent auditors did not dispute the Liquidator's statement, they have conceded the following pivotal record facts: (1) Universal was a legitimate insurance company which pre-existed and post-dated manager Shah's unfortunate appearance on the scene, and Universal carried on legitimate insurance business throughout its existence from 1978 through 1984, paying out over $6.2 million in policyholder losses; (2) the Respondent auditors were hired to perform audits as to Universal's true financial state of affairs and to issue audit reports accurately reflecting Universal's financial condition; (3) the Respondent auditors negligently performed their audits for *years*, and issued materially inaccurate audit reports for each year in question; (4) the Respondent auditors knew that their audits were being disseminated by the hundreds and were necessary for Universal to sell insurance in the international reinsurance market and for Universal to continue in business when the Insurance Commissioner imposed licensing requirements; (5) the Respondent auditors' negligently-issued audit reports 'affirming' Universal's $10 million capitalization were a legal cause of Universal's losses because, but for those audits, Universal would not have been licensed when licensing requirements were introduced by the Insurance Commissioner, and, but for the audits, Universal would not have sold the insurance in the international reinsurance market which resulted in Universal's losses and indebtedness; (6) Shah's misrepresentations about Universal's $10 million capitalization had nothing whatsoever to do with Universal's losses since neither the Insurance Commissioner nor those who purchased insurance

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from Universal would have relied - or did rely – on what Shah had to say about Universal's assets; (7) Shah looted Universal's assets, thus acting adversely to Universal's interests; and (8) according to the Respondent auditors' own audit papers, Shah was *not* the sole managing director of Universal and his control was only approved by the auditors themselves *because there was another* managing director, Llewellyn Jones, whom no one has ever asserted was a participant in Shah's fraudulent activities.

Given these uncontroverted record facts, the Respondent auditors have no factual basis in this record for *making any* of the following arguments, which constitute the totality of their answer brief on the merits.

First, the Respondent auditors may *not* advance their main argument that manager Shah's fraud should be imputed to Universal and its Liquidator because, as a matter of *fact*, it has been conceded that Shah was looting the company and thus not acting for its benefit. For the same reason, the Respondent auditors have no factual basis for advancing an argument that Universal was an 'engine of theft'. The record evidence shows that Universal was a legitimate company before and after Shah which paid at least $6.2 million in policyholder losses over the course of its existence. Universal was a *victim* of Shah's looting as it otherwise struggled to meet its insuring obligations. As the *Cenco* court itself noted *distinguishing* looting cases from the 'engine of theft'/benefit-to-the-company cases:

> The auditor [in the looting-type case] had failed to discover that the company's manager, by misrepresenting the profits of the company, had caused the company to pay out dividends, directors' fees, and bonuses for himself . . . as a result of which the company went broke. *This was stealing from, not for, the company.*

686 F.2d 449, 455. Precisely the same situation is presented on the conceded facts of this case, and the Respondent auditors have no factual basis whatsoever for their arguments that Shah's fraud 'benefited' Universal or that Universal was an 'engine of theft'.

The Respondent auditors are also precluded by their factual concessions from attempting

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to gain any benefit from 'dominating shareholder' legal concepts. Their own audit papers show that they approved Universal's internal control system only because there were *two* managing directors. This evidence at a minimum created a factual issue on the subject. Because our position and proposed ruling are in no way dependent upon *how many* fraudulent managers exist within an insurance company, we believe the point is legally irrelevant. If the Respondent auditors thought otherwise, it was their burden to develop a factual basis for the argument if they wished any ruling based upon it. They did not do so at trial, and are in no position to simply create the needed facts by stating them as such in a brief to this Court.

Finally, the Respondent auditors have no *factual* support for their causation argument about 'reliance'. It has not been shown that 'reliance' is an element of causation in a negligence case anyway[6], but even if it were an element the causation question is still whether the Respondent auditors' negligence in preparing and issuing their audits produced or substantially contributed to Universal's losses. The Respondent auditors' 'reliance' argument digresses into an irrelevant inquiry as to whether *Shah* relied on their audit representations to determine Universal's worth — a red herring since clearly Shah did not. The real inquiry is *whose misrepresentations caused Universal's losses*; that is, whose misrepresentations Universal relied upon in obtaining a license from the Insurance Commissioner and in acquiring insuring obligations to its international reinsurance policyholders. The answer from the uncontradicted record facts is that Shah's misrepresentations were completely powerless, and that Universal relied only on the audits in transacting business with the Insurance Commissioner and with international reinsurance policyholders. Uncontrovertedly, the 'reliance' which caused Universal's

[6]Florida Standard Jury Instruction 5.1 on legal cause — requested by the Respondent auditors and given by the trial court (R. 1008-1009; T. 3818), certainly does not contain 'reliance' as an element.

damages was on the negligent audits; *not* Shah's fraud.[7]

2. The Respondent auditors did raise defenses of estoppel and imputation

The Respondent auditors say they never raised estoppel or imputation as affirmative defenses (Answer Brief, pp. 26-27), but the record clearly shows otherwise. While the Respondent auditors – irrelevantly – make a point of listing the affirmative defenses from their *initial* pleadings, they fail to advise this Court that by the time of trial they had specifically identified estoppel and imputation as affirmative defenses on which they had the burden of proof, and had specifically requested jury instructions on those defenses. (R. 991, 996, 1031, 1035).

The Respondent auditors also relied on the *Cenco* case throughout their arguments at trial and at the Third District (R. 1088, 1167; S.R. 24, 107), and *Cenco* unquestionably treats imputation of fraud as a *defense* to a claim against negligent auditors. 686 F.2d at 454. In fact, the Third District's decision specifically noted the auditors' reliance on *Cenco,* (R. 2082; 625 So. 2d at 2), and, based on the auditors arguments, reached the pivotal holding: "A *Cenco* estoppel is applicable." (R. 2085; 625 So. 2d at 3). In short, the auditors did raise imputation and estoppel as defenses, and may not state otherwise now.

3. Formulating the right rule

The Respondent auditors' and their *amici* determinedly downplay *Schacht,* the leading insurance liquidation case which is most directly on point on the question before this Court, because *Schacht* so clearly, rationally, and equitably shows that the Liquidator's recovery on behalf of Universal pursuant to the jury verdict was the right result here and represents the right result in any case where an auditor's *tortious* conduct substantially contributes to artificially prolonging an insurance company's

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[7]*FDIC v. Ernst & Young,* 967 F.2d 166 (5th Cir. 1992), on which the auditors rely is completely distinguishable because there was no showing in that case that the bank relied on the negligent audits in order to get business or licensing for the bank.

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life causing it to acquire ever greater indebtedness.[8]

The Seventh Circuit in *Schacht* applied the very tort law goals of compensation and deterrence set out in that court's *Cenco* decision a year before, and concluded that, in order to secure the *Cenco* goals in insurance liquidation cases, a liquidator should be permitted to recover *on behalf of the company* via the company's *own* action for artificial prolongation. The *Schacht* court noted that the goal of compensation will be furthered by such actions because – under statutory insurance liquidation plans (and the Cayman and U.S. statutory plans are uncontrovertedly identical in all material respects) - the ultimate recipients of compensation recovered by the company will be its innocent policyholder creditors, *not* any wrongdoing shareholders or managers. 711 F.2d at 1348-1349. The goal of deterrence will also be served by imposing liability on both managers *and* auditors for their tortious conduct that injures the insurance company, thus hopefully discouraging such conduct in the future. 711 F.2d at 1349.

The Respondent auditors insist that – for some unarticulated reason – this Court should *not* look to insurance liquidation cases like *Schacht* in determining how Florida should treat this important issue. Notwithstanding the plethora of FDIC cases (some of which are good for the Liquidator and some for Seidman – the conflict having now reached the U.S. Supreme Court), there is no need to digress unduly into FDIC case law, which unquestionably is governed by a different - and very detailed – federal regulatory scheme which does not touch upon the insurance liquidation issues

[8]The Respondent auditors incorrectly suggests that the *Schacht* rule somehow applies only in cases where the auditors themselves participate in the fraud. Not only does *Schacht* make no such point, but the case law shows that the *Schacht* rationale applies whether the auditors' tortious conduct consists of negligence and/or fraud. *See, e.g., Foster as Rehabilitator of Mutual Fire, Marine & Inland Insurance Co. v. Peat Marwick Main & Co.*, 587 A.2d 382 (Pa. Commw. Ct. 1991); *In re Liquidation of Integrity Insurance Co.*, 573 A.2d 928 (N.J. Super Ct. App. Div. 1990); *Robertson as Trustee of the Farmer's Co-Op v. White*, 633 F. Supp. 954 (W.D. Ark. 1986); *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976).

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involved here. Insurance is a matter of state and local concern directly within this Court's policy decision making jurisdiction, so the federal rulings on federal banking systems are of limited assistance.

We note that the one FDIC case which contains an extended discussion of generally applicable tort principles specifically adopts the *Schacht* rationale, and goes on to note the straightforward — and dispositive — equity principle we cited in our initial brief, i.e., that *only the innocent may invoke an estoppel defense. FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 750-51 (9th Cir. 1992), *cert. granted*, S.Ct. 543 (1993). This equitable principle has very recently been articulated also by the Florida Second District Court of Appeals in *State of Florida Department of Insurance v. Blackburn*, 19 Fla. L. Weekly D559 (March 9, 1994), and presents the proper state law rule for adoption by this Court.[9]

In attempting to avoid *Schacht*, the Respondent auditors, bottom line, are urging a two-wrongs-make-a-right type rule which simply should not be established as the law of Florida. *Schacht* should be adopted by this Court. It has established a good rule that will produce equitable results and contribute to protection of the insurance buying public.

CONCLUSION

Wherefore the Petitioner Liquidator respectfully prays for the relief requested in the initial brief.[10]

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[9]The Second District's decision is in conflict with the subject Third District's decision on this point, and thus another basis for exercise of this Court's jurisdiction is presented.

[10]The Respondent auditors have incorrectly indicated that if they lose on the certified question, the case should be remanded to the Third District to look at some other arguments the auditors feel they have. If this Court accepts jurisdiction, the jurisdiction extends to the entire case, and it was incumbent on the Respondent auditors to present this Court with any and all arguments in favor of affirmance. *See, e.g., Dania Jai-Alai, supra; Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977); *Marley v. Saunders*, 249 So. 2d 30 (Fla. 1971); *Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959).

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CERTIFICATE OF SERVICE

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