**IN THE SUPREME COURT OF FLORIDA**

**SUPREME COURT CASE NO. 85,200**

STATE FARM FIRE AND CASUALTY
COMPANY,

Petitioner,

vs.

ELICER and HERMIDA LICEA,

Respondents,

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On Petition for Discretionary Review
From The Third District Court of Appeal

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**BRIEF AMICUS CURIAE OF
ACADEMY OF FLORIDA TRIL LAWYERS**

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## STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Trial Lawyers of Trial Lawyers, adopts the statement of the case and facts of the Respondents, Elicer and Hermida Licea.

## SUMMARY OF THE ARGUMENT

The appraisal provision in the State Farm policy with the non-waiver clause is the equivalent of the clause in America Reliance Insurance Co. v. Village Homes at Countrywalk, 632 So.2d 106 (Fla. 3d DCA 1994). These non-waiver clauses defeat mutuality between the insurer and insured because they give the insurer the unilateral right to deny after appraisal all or any portion of the claim as "not covered" by its policy. The insured has no right after appraisal to require that portions of the claim not considered by the appraisers or not included in the amount set by the appraisers as the amount of the loss be included or added and paid by the insurer. This inequality allows the insurer to take its chances with appraisal and if it does not like the result, deny all or portions of the claim as "not covered" while the insured is bound by the appraisal as the maximum it can ever recover.

The Appellate Courts of Florida have blurred the distinction between the informal appraisal process and formal arbitration. If lack of mutuality does not invalidate them, appraisal provisions with the insurer escape clauses should be strictly construed to require the procedural and substantive safeguards of the Arbitration Code.

The decision below should be affirmed. This Court should reaffirm the insureds' rights to what they paid for, prompt, fair, payment of claims. When an insurance company wishes to deny coverage, that issue should be, absent unusual circumstances, decided first by the Courts so that if appraisal is to be resorted to, the appraisers, and parties, will know what is to be appraised. Insurance companies should not be allowed two bites of the apple, at the expense, inconvenience and delay of their insured.

## ARGUMENT

I.

**THE NON-WAIVER PROVISION IN THE POLICY OF INSURANCE DEFEATS ANY MUTUALITY IN THE APPRAISAL CLAUSE.**

The State Farm policy not only contains an appraisal provision, but also contains the following section:

> Waiver of change of policy provisions. A waiver of change of any provision of this policy must be in writing by us to be valid. A request for an appraisal or examination shall not waive any of our rights. (Emphasis added)

State Farm, and other insurance companies with similar policy provisions, have unilaterally[1] reserved to themselves all of their rights. By so doing, an appraisal fixes the maximum amount of the insured's claim, but the insurer may, after appraisal, deny coverage to all or part of the claim. These escape clauses, as in the State Farm policy and the policy in American Reliance Insurance Company v. Village Homes at Countrywalk, 632 So.2d 106 (Fla. 3d DCA 1994), review denied, 640 So.2d 1106 (Fla. 1994)[2], defeat mutuality

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[1] Insurance contracts are not freely negotiated but are contracts of adhesion. See e.g. Seaboard Finance Co. v. Mutual Bankers Corp., 223 So.2d 778, 782 (Fla. 2d DCA 1969).

[2] The American Reliance policy contained the following sentence after the appraisal clause: "If there is an appraisal, we still retain our right to deny the claim."

for the appraisal[3] and render the appraisal clauses an optional not mandatory means for the insured and insurer to resolve their disagreement on the value of a loss.

With these and similar provisions, State Farm is not simply retaining its right to deny coverage, but also the right to determine after appraisal, whether any item of damages appraised falls within its coverage. State Farm took this position in the Third District Court of Appeal when it argued that, although it submitted to an appraisal, State Farm "retains its right as a matter of law to dispute liability." (Initial Brief of State Farm in the Third District Court of Appeal at 9; R. 90). Liability is separate and distinct from coverage. The appraisal clause in the State Farm policy provides that appraisal is available if the parties cannot "agree on the amount of the loss." While State Farm and the Insurance Amicus Curiae state that the non-waiver clause is in essence irrelevant and limited to coverage, that is not wholly correct. The insurance company is always free to deny coverage where it does not exist. Absent extraordinary circumstances, coverage may not be created by estoppel or waiver. Crown Life Insurance Co. v. McBride, 517 So.2d 660 (Fla. 1988). If the provision is interpreted as State Farm and the Insurance Amicus suggest, the non-waiver sentence is unnecessary, superfluous and meaningless.

State Farm argued below that the phrase "'any of our rights'

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[3] AFTL adopts the Liceas' arguments regarding the requirement for mutuality to support appraisal independent of other policy provision. (R. 225-27)

necessarily means whatever those rights may be." State Farm did not limit its "rights" to a denial of coverage. (Initial Brief of State Farm in the Third District Court of Appeal at 21 (emphasis in original); R. 102).

State Farm did not deny *coverage* for the Liceas' claim for roof damage caused by Hurricane Andrew. Instead, State Farm raised policy defenses and exclusions including wear and tear, design and material defects, inadequate maintenance, payment, failure by the insured to protect property after the loss and misrepresenting facts concerning the roof claim.[4] The issue State Farm raised in this case, and if State Farm is successful here, likely to be raised by other insurance companies in response to similar appraisal clauses, is not whether the loss is a covered claim, but what specific items comprising the total loss are covered or excluded or caused by a covered occurrence.

Note that the appraisal clause is limited to determining the amount of a loss, not its cause; however, if the appraisers do not know before the appraisal what loss the insured sustained due to a "covered" cause, how can they appraise the amount only of that loss?

How are appraisers supposed to resolve, before the court determines the coverage question, whether to determine the amount of indisputably damaged items but which may or may not be due to wear and tear or design defects, etc? The appraisal is of the

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[4] State Farm's Answer to Counterclaim. (Appellee's Appendix at D; R. 231).

"amount" of a loss not the "cause" of a loss.

State Farm's proposed interpretation allows an insurer to invoke the appraisal process, and if the insurer is dissatisfied with the result, the insurer alone can decide for a number of reasons that the appraisal included items not covered by the policy, for example, that the appraisal included damage caused by wear and tear; the appraisal has not considered damage caused by the negligence of the insured. The insured has no ability to ask a court to increase the amount set by the appraisers if they failed to consider items that should have been included. For the insured, appraisal is like playing poker with all the insured's cards dealt up and the insurer's dealt down. The insurer can always fold if clearly beaten, but the insurer can bluff and play the coverage card.

In American Reliance v. Village Homes at Countrywalk, the carrier argued that in addition to coverage, it could raise after appraisal lack of notice, lack of cooperation, and fraud. (Appendix of State Farm Third District Court of Appeal at 61; R. 169). American Reliance would not stipulate to coverage for every item. (R. Id. at 185) Thus, the carrier reserved the right to determine that the appraised amount included items not "covered." Unless both the insurer and insured can contest in court that the appraisal included or excluded covered items, there can be no mutuality in the appraisal provision. And, if the insured and insurer can litigate after appraisal what items should have been included, the process will become superfluous at worst and purely

voluntary at best.

## II.

**A DISTINCTION CAN AND SHOULD BE MADE DEPENDING ON WHICH PARTY INVOKES APPRAISAL.**

For purposes of review by this court, it is irrelevant whether the insured or the carrier first raised the issue of appraisal. State Farm sued to enforce the appraisal provision.

Cases in which the insured demanded arbitration have held that the insureds may not bind the insurer to coverage, merely by the carrier's participation in the process. In Hayston v. Allstate Insurance Company, 290 So.2d 67 (Fla. 3d DCA 1974), the insured demanded arbitration. Although the insurance company appeared at an initial arbitration proceeding, the carrier did not participate in the arbitration. When the insured sought to confirm the arbitration award, the court allowed the insurer to raise the defense that the vehicle in the accident was not an uninsured vehicle. The Court in Hayston further noted that even if the insurance company had fully participated in the arbitration proceeding, it would not have waived its opportunity to challenge coverage.

In Infante v. Preferred Risk Mutual Insurance Company, 364 So.2d 874 (Fla. 3d DCA 1978), the insureds asked for arbitration and the insurance company sought to enjoin it. The trial court enjoined arbitration, but the Third District reversed because the insureds were entitled to uninsured motorist coverage. The carrier had refused to honor a claim for uninsured motorist benefits prior

to the insureds' settlement with the tortfeasor. The carrier having denied coverage that existed, it could not rely upon the insureds' settlement to void coverage.

In Montalvo v. Travelers Indemnity Company, 643 So.2d 648 (Fla. 5th DCA 1994) the insured demanded arbitration. After an arbitration award, the insureds sought confirmation of the award. The Fifth District noted that under the Arbitration Code, Travelers properly raised the extent of coverage at the confirmation hearing. The issue of coverage was not submitted to arbitration and was properly submitted to the trial court. Montalvo involved arbitration not appraisal, as the court discussed the procedural aspects of the Florida Arbitration Code.

In United States Fidelity & Guaranty Company v. Woolard, 523 So.2d 798 (Fla. 5th DCA 1988), the insured requested arbitration after the insurance company had filed a declaratory action to determine no uninsured motorist benefits were available. The trial court compelled arbitration. The Fifth District held that since the insurance carrier filed an action for declaratory relief raising coverage, which the court must determine, compelling arbitration was error. Note also, that in Woolard coverage was to be decided before arbitration. This logically prevents the time and expense of an arbitration or appraisal when the carrier has a coverage defense which precludes any award to the insured.

On the other hand, when the insurance company requested or participated in arbitration, the carrier could not later deny coverage. In Netherlands Insurance Company v. Moore, 190 So.2d 191

(Fla. 1st DCA 1966), the court stated:

> By the filing of its application for an order directing arbitration, appellant [insurance company] admits coverage as a matter of law, and is bound by the laws of the state regarding the extent of the coverage...

Id. at 195-96. The insurer in response to a request for arbitration, attempted to inject issues regarding coverage which the court considered a "red herring". In Moore the Florida Arbitration Code applied. The Arbitration was to decide (1) the right to recover against an uninsured motorist and (2) the amount of damages.

Although it is unclear in Volkswagen Insurance Company v. Taylor, 201 So.2d 624 (Fla. 1st DCA 1967), who demanded arbitration, the court ruled that the insurance company's participation in the arbitration barred it from later raising the defense that the injured insured's execution of a release violated the policy. See also Reserve Insurance Co. v. Pollock, 270 So.2d 469 (Fla. 3d DCA 1972).

The inescapable lack of mutuality created by the escape clauses in the appraisal provisions lurks in the gray area between denials of liability and denials of coverage. While the existence of a policy and therefore coverage may sometimes be black and white, the courts have noted that "concededly, there is some confusion in the cases, probably caused by the use of the terms 'liability' and 'coverage'." See State Farm Fire & Casualty Company v. Glass, 421 So.2d 759 (Fla. 4th DCA 1982), quoted in Allstate Insurance Company v. Candreva, 497 So.2d 980 (Fla. 4th DCA

1986). In Candreva, Allstate claimed that a workers' compensation defense was its basis for denying coverage. The court noted that defenses to the claim are subject to arbitration. In Candreva, the procedure used was arbitration, not appraisal. Thus, State Farm's argument that appraisal, if construed to be a binding agreement for arbitration even of less than all issues, simply denies the amount the carrier must pay is suspect if not outright wrong.

The problem of what is "covered" by the arbitration or appraisal process is also highlighted in J.J.F. of Palm Beach, Inc. v. State Farm Fire & Casualty Company, 634 So.2d 1089 (Fla. 4th DCA 1994). In J.J.F. of Palm Beach, a business interruption claim was submitted to an arbitrator.[5] The trial court set aside the arbitrator's decision based upon its construction of coverage under the policy. The arbitrator apparently decided that the amount to be awarded included down business time costs due to the carrier's refusal to resolve the claim. Although the trial court modified the award because the arbitrator used "a legally incorrect measure of damages", the Fourth District reversed noting that the issue was more simply the amount owed but the defenses as well. It should be noted that based upon the citations in J.J.F. of Palm Beach, the Florida Arbitration Code applied.

If appraisal is simply a synonym for arbitration, the insured may face the insurance company's coverage and liability defenses in

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[5] Although the court uses the term arbitrator, it notes the parties refer to him as "umpire". This suggests that there was actually an appraisal provision that the court treated as synonymous to arbitration.

the appraisal process and, because of the non-waiver clause, again on a denial of coverage. Some courts have held arbitration includes not just setting the amount of the loss, but resolving substantive defenses also. See J.J.F. of Palm Beach, supra; Allstate Insurance Co. v. Candreva, 497 So.2d 980 (Fla. 4th DCA 1986). In the Licea's case, if an umpire were appointed, would the appraisal process simply set the value of repairing and replacing the Licea's roof or may State Farm argue, in the appraisal process, that the value of the roof should be diminished by wear and tear, negligence of the Liceas, etc.? And then, if State Farm is unhappy with the appraisers' determination, may State Farm raise again in court coverage and substantive defenses that certain items included in the determination are not "covered"? The appraisal provisions in both Licea and American Reliance do not make any reference to American Arbitration Association or Florida Arbitration Code. What are the insureds' rights procedurally and substantively in appraisal.

## III.

**AN INSURANCE COMPANY SHOULD NOT BE ALLOWED TO PROCEED FIRST WITH APPRAISAL AND AFTERWARDS DENY COVERAGE.**

State Farm sued to have an umpire appointed. If State Farm truly believed that there was no coverage, a declaratory action should have been brought since only the courts can decide the issue of insurance coverage. Why did State Farm sue for appointment of an umpire to compel appraisal before raising the coverage issues in

its Counterclaim? Could it be State Farm hoped that the appraisal would result in a favorable amount or if not, its coverage defenses would remain in reserve?

State Farm, despite arguing the fairness of the appraisal provision, not only unilaterally reserves to itself the right to contest any award, but further in this case, rejected the initial appraiser chosen by the Liceas and further indicated that it was not intending to "waive any policy defenses." (Appendix of State Farm at 40; R. 148). State Farm states that its non-waiver and reservation of rights were to retain "its right as a matter of law to dispute liability." (Initial Brief of State Farm in the Third District Court of Appeal at 9; R. 90). Thus, coverage has been transmogrified into liability.

The appraisal process as set forth in the State Farm policy and other similar ones establishes an informal procedure. While similar to an arbitration provision, it does not contain the due process and procedural safeguards of Florida Statute §682.01 et seq. (Florida Arbitration Code). Although courts have treated appraisal as similar to arbitration, see Preferred Mutual Insurance Company v. Martinez, 643 So.2d 1101 (Fla. 3d DCA 1994); J.J.F. of Palm Beach, Inc. v. State Farm Fire & Casualty Company, supra; but see Intercoastal Ventures Corporation v. Safeco Insurance Company, 540 So.2d 162 (Fla. 4th DCA 1989), appraisal is not the same as arbitration - a point not contested by State Farm. The Intercoastal Ventures court, cited in Martinez, relied upon U.S. Fire Insurance Company v. Franko, 443 So.2d 170 (Fla. 1st DCA

1980), for the proposition that Franko referred to the appraisal clauses as an arbitration agreement, yet the Fourth District acknowledged that the Franko court did not even discuss whether an appraisal clause should be considered an arbitration agreement with all the consequent formalities.

The problem with blurring the distinction between appraisal and arbitration becomes apparent in the opinion of the Third District Court of Appeal in State Farm Fire and Casualty Company v. Middleton, 468 So.2d 1200 (Fla. 3d DCA 1995). The court in Middleton interchanged the two words. In construing an appraisal provision similar to the one before this court, but apparently without the non-waiver provision and without the additional sentence in American Reliance v. Countrywalk, the court noted that a swift informal decision on the amount of loss could save judicial resources and might result in a settlement. Middleton at 1202 n5. This elevates the pragmatic over the due process safeguards in our so highly and rightly prized justice system. An insurance company should not be allowed to unilaterally insert in its contract of adhesion a binding, non-judicial procedure for resolving claims that do not have at least the due process safeguards provided by formal arbitration.

**CONCLUSION**

This Court should affirm the decision of the Third District Court of Appeal in State Farm Fire and Casualty Company v. Licea. Appraisal provisions allowing insurers to wait until after the appraisal to deny coverage or raise coverage defenses for all or

part of the claims lack mutuality. If upheld, any binding appraisal should be required to be governed by the Florida Arbitration Code.

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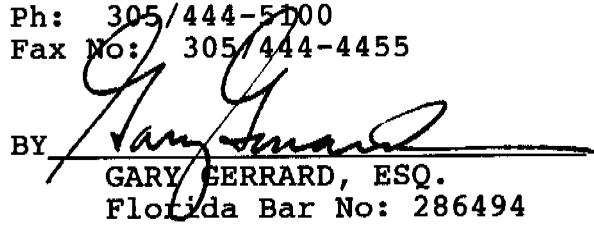

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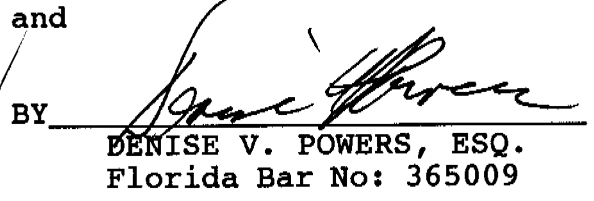

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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of June 1995, to Hal Vogel, Esq., counsel for Respondents, 20801 Biscayne Boulevard, Suite 454, Aventura, Florida 33180; to Barry I. Finkel, Esq., co-counsel for Respondents, 404 E. Atlantic Boulevard, Pompano Beach, Florida 33060; to Linwood Anderson, Esq., co-counsel for Petitioner, 150 Southeast Second Avenue, Suite 200, Miami, Florida 33131; to Elizabeth K. Russo, Esq., co-counsel for Petitioner, Russo & Talisman, P.A., Suite 2001, Terremark Centre, 2601 South Bayshore Drive, Coconut Grove, Florida 33133, to Scott D. Makar, Esq., counsel for Amicus Curiae AIA, Holland & Knight, 50 North Laura Street, Suite 3900, Jacksonville, FL 32202, and to James L. Kimble, Esq., American Insurance Association, 1130 Connecticut Avenue, N.W., Suite 1000, Washington, D.C. 20036.

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