IN THE FLORIDA SUPREME COURT

CASE NO. 88,206

JOHN ROSEMURGY,

Petitioner,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 95-1913

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

Appellant, JOHN ROSEMURGY, will be referred to as ROSEMURGY in this brief. Appellee, STATE FARM FIRE AND CASUALTY COMPANY, will be referred to as STATE FARM.

All references to the record will appear as follows:

(R._____)

All references to the Respondent's Appendix will appear as follows:

(A._____)

STATEMENT OF THE CASE AND FACTS

The Appellant/Petitioner JOHN ROSEMURGY (ROSEMURGY) filed suit against STATE FARM for benefits allegedly due under his Homeowner's policy. (R.1-2) ROSEMURGY did not allege that STATE FARM denied coverage under the policy; he alleged only that STATE FARM had partially paid for the loss suffered but had "refused" to pay the remainder of ROSEMURGY'S claim. (R.2) ROSEMURGY did not attach a copy of the policy to his Complaint but alleged that a copy thereof was in STATE FARM'S possession. (R.1)

STATE FARM moved to dismiss the Complaint and attached a copy of the Policy to the Motion. (R.3-31) As grounds for the dismissal, STATE FARM cited to its appraisal clause which provides:

> 6. Appraisal. If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

(R.4, 20)[1] In its Motion, STATE FARM exercised its rights under the policy and demanded appraisal in lieu of litigation. (R.3-5)

ROSEMURGY moved to strike STATE FARM'S appraisal demand alleging that STATE FARM was estopped from asserting and/or had waived its right to assert the clause based upon STATE FARM'S alleged offer to arbitrate the claim after suit had been filed. (R.32-33) On December 21, 1994, after the hearing on both Motions, the trial court, Honorable John Hoy, granted STATE FARM'S Motion to Dismiss without Prejudice and gave ROSEMURGY ten (10) days within which to file an Amended Complaint attaching a copy of the Policy to his Complaint.[2] (R.34)

On January 18, 1995, almost a month later, ROSEMURGY filed his Amended Complaint, but did not attach a copy of the Policy to his Complaint, in violation of the previous Court order. (R.35-41) In the Amended Complaint, ROSEMURGY once again plead a claim for breach of contract and added a claim for declaratory judgment alleging, in pertinent part, that the appraisal clause was "void of all language that obligates [ROSEMURGY] to abandon judicial remedy after the appraisal clause is invoked" and "void of all language waiving [ROSEMURGY'S] rights to proceed judicially and void of language that [ROSEMURGY] has waived a judicial remedy." (R.37)

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[1] The Policy also provides that, in the event the parties are unable to agree on the amount of the loss, losses are payable sixty (60) days after receipt of the insured's proof of loss and final judgment is entered or an appraisal award is filed with the carrier. (R.21) In another portion of the policy, there is the provision that "[o]ur request for an appraisal or examination shall not waive any of our rights." (R.26)

[2] The hearing was reported but was not transcribed by the Appellant.

STATE FARM moved to dismiss ROSEMURGY'S Amended Complaint on the grounds that ROSEMURGY had defied the Court's previous Order to amend the Complaint within ten (10) days and to attach the policy to the Complaint. (R.42-43) In addition, STATE FARM readopted the arguments contained in its first Motion to Dismiss and further cited numerous cases upholding the validity of similar appraisal clauses. (R.42-43)

On April 24, 1995, Judge Hoy heard the Motion to Dismiss at a second, reported hearing.[3] (R.44-45) On May 4, 1995, the trial court issued its Order granting STATE FARM'S Motion and dismissing the claim. (R.44-45) The Court retained jurisdiction for the purpose of enforcement of the appraisal award, if necessary. (R.44-45)

On May 30, 1995, ROSEMURGY filed a Motion for Rehearing arguing that, in accordance with State Farm v. Licea, 649 So. 2d 910 (Fla. 1st DCA 1995), a case decided before the hearing on the Motion to Dismiss, the Court should reconsider its decision and determine that STATE FARM'S appraisal clause lacked mutuality and was therefore void. (R.46-51) The Court denied the Motion for Rehearing on June 2, 1995. (R.52) ROSEMURGY timely filed his appeal to the Fourth District Court of Appeal on June 5, 1995. (R.53)

While the case was pending before the Fourth District, the First District Court of Appeal rendered its decision in Scottsdale Insurance Co. v. Desalvo, 666 So. 2d 944 (Fla. 1st DCA 1995) and the undersigned counsel filed a Notice of Supplemental Authority with the Court in order to notify it of the additional case law. (A.9-12) After

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[3] That hearing has not been transcribed by the Appellant.

briefing was concluded and oral argument had, the appellate Court issued its decision on May 29, 1996. (A.13) The Court held:

> Appellant appeals a trial court order dismissing his amended complaint and directing the parties to appraisal pursuant to an appraisal provision in State Farm's insurance policy. We affirm and align ourselves with the reasoning expressed by the first district in Scottsdale Insurance Co. v. Desalvo, 666 So. 2d 944 (Fla. 1st DCA 1995). Accordingly, we certify conflict with State Farm Fire and Casualty Co. v. Licea, 649 So. 2d 910 (Fla. 3d DCA), rev. granted, 662 So. 2d 933 (Fla. 1995), Gables Court Professional Centre, Inc. v. Merrimack Mutual Fire Insurance Co., 642 So. 2d 74 (Fla. 3d DCA), rev. dismissed, 650 So. 2d 990 (Fla. 1994), Robles v. Harco National Insurance Co., 20 Fla. L. Weekly D215 (Fla. 3d DCA, Jan. 19, 1995), rev. granted, 667 So. 2d 774 (Fla. 1996), and American Reliance Insurance Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d DCA), rev. denied, 640 So. 2d 1106 (Fla. 1994).
>
> AFFIRMED.

(A.13) The Petitioner filed his Notice to Invoke Discretionary Jurisdiction on June 3, 1996. (A.14) This Court postponed its decision on jurisdiction pending briefing on the merits. (A.15)

POINTS ON APPEAL

ARGUMENT I

THE APPRAISAL CLAUSE IN STATE FARM'S POLICY IS VALID AND ENFORCEABLE ALTHOUGH NOT FOR THE REASONS EXPRESSED IN SCOTTSDALE INSURANCE COMPANY v. DESALVO

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SUMMARY OF ARGUMENT

ROSEMURGY never addresses the certified question on review, but instead simply argues that the appraisal clause is unenforceable as lacking in mutuality of obligation and is also unfair in that the insured is not awarded attorneys' fees for engaging in the process. ROSEMURGY also argues, without any record support that STATE FARM had waived its right to invoke the appraisal clause by allegedly inconsistent conduct. None of ROSEMURGY'S arguments have merit.

It is beyond dispute that this Court has jurisdiction to consider the certified question in light of the clear conflict among the District Courts of Appeal as well as this Court. The Third District Court of Appeal has held that the clause at issue is void and enunforceable, while the First and Fourth District Courts of Appeal have held that the clause is valid, but only if its invocation by the insurer is construed to waive the insurer's right to question coverage at a later time. This Court has held, albeit over a century ago, that the clause is perfectly valid and enforceable in that both parties are equally bound to the appraisers' determination on the amount of the loss. Thus, it is submitted that this Court should accept jurisdiction for the purpose of laying this dissension among the Florida courts to rest.

Contrary to ROSEMURGY'S arguments assailing the viability of the appraisal clause, given that the policy at issue expressly binds STATE FARM to the decision of the appraisers insofar as the amount of the loss is concerned, ROSEMURGY'S argument that the clause lacks mutuality of obligation is groundless. Likewise, ROSEMURGY'S claim that the

appraisal clause is, or should be unenforceable, by virtue of the fact that the insured may not recover his or her attorneys' fees for engaging in the process, is unsupported by any law or public policy. ROSEMURGY would have this Court invalidate a reasonable and cost-effective alternative to litigation simply because his attorney is not compensated when an attorney is superfluous to the process.

Finally, ROSEMURGY'S argument that STATE FARM has waived its right to participate in the appraisal process is unsupported by the Record. After his appeal was filed, ROSEMURGY attempted to supplement the Record with correspondence between the parties which was never before the trial court. The Fourth District Court of Appeal struck the filings, but ROSEMURGY has nevertheless attempted to utilize this correspondence, which is no longer in the Record, as the sole factual support for his allegations. As such, ROSEMURGY has failed to support his arguments with Record citations and the arguments must necessarily fail.

ARGUMENT I

THE APPRAISAL CLAUSE IN STATE FARM'S POLICY IS VALID AND ENFORCEABLE ALTHOUGH NOT FOR THE REASONS EXPRESSED IN SCOTTSDALE INSURANCE COMPANY v. DESALVO

A. Introduction

ROSEMURGY does not dispute that STATE FARM timely exercised its right to appraisal. Rather, ROSEMURGY claims, in passing, that 1) STATE FARM waived its right to appraisal by alleged inconsistent conduct and further argues that 2) the appraisal clause is invalid and unenforceable as lacking in mutuality. In addition, ROSEMURGY argues that 3) the appraisal clause is unfair by virtue of the fact that an insured is not awarded attorneys' fees for engaging in that process. Nowhere in his Brief does ROSEMURGY directly address the certified question on appeal and, in fact, the case of Scottsdale Insurance Company v. DeSalvo, 666 So. 2d 944 (Fla. 1st DCA 1995), is never even cited in ROSEMURGY'S Brief on the merits. As such, the Respondent is at somewhat of a disadvantage in having to respond to arguments that have yet to be made. Moreover, ROSEMURGY impermissably cites to and adopts as his own an Amicus Brief filed in an unidentified case, presumably pending before this Court, that has not been provided to undersigned counsel and which should not be considered as having been filed in this cause. Nevertheless, STATE FARM will attempt to address the certified question to the best of undersigned's ability under these circumstances.

B. Jurisdiction

This Court has postponed its acceptance of jurisdiction pending its review of the merits of this cause. It is respectfully submitted that this Court should accept jurisdiction on the basis that the Fourth District Court's decision in this case, which adopted the First District's reasoning in Scottsdale, 666 So. 2d 944, is in direct conflict with the decisions of the Third District Court of Appeal in American Reliance Insurance Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d DCA), rev. denied, 640 So. 2d 1106 (Fla. 1994), which in turn is in conflict with the numerous cases cited in State Farm Fire and Casualty Co. v. Licea, 649 So. 2d 910 (Fla. 3d DCA), rev. granted, 662 So. 2d 933 (Fla. 1995).

The crux of the conflict presented by the appellate court herein is that the Fourth and First District Court of Appeals have determined that the appraisal clause is valid and enforceable, if construed to waive the insurer's right to deny coverage once invoked by the insurer, while the Third District Court of Appeal in Country Walk has determined the same clause to be invalid and unenforceable as lacking in mutuality. A later panel of the Third District Court of Appeals certified the Licea decision, which followed Country Walk, as in direct conflict with numerous cases from other jurisdictions that have generally determined that the submission of part of a dispute, in this case the amount of the insured's loss, is proper even where another portion of the dispute, is reserved for another forum. In sum, the Third District Court of Appeals has held that appraisal clauses containing a reservation of the insurer's right to deny coverage are

void and unenforceable. The First and Fourth District Courts of Appeals have determined that the same clause is valid as long as it's invocation is construed to waive the insurer's right to deny coverage. These decisions are, in turn, in conflict with earlier decisions of every appellate court, including this Court, to the effect that "by participating in an arbitration proceeding to determine the amount of loss suffered by an insured the insurer is in no way deprived of the right to later contest the existence of insurance coverage for that loss." Licea, 649 So. 2d at 911. See, Hanover Fire Insurance Co. v. Lewis, 10 So. 296 (Fla. 1891)(appraisal clause in policy was binding on both parties and not lacking in mutuality even though the issue of coverage was reserved for another forum). The decisions cited in Licea, as well as the decision of this Court in Hanover Fire, necessarily imply that the appraisal clause at issue is perfectly valid and enforceable.

It is submitted that the aforementioned decisions are clearly in conflict with one another such that this Court should accept jurisdiction to resolve the conflict among the District Courts of Appeal on this issue, as it already has in Licea, 662 So. 2d 933. While Licea did not address the specific question at issue in this case, namely, whether the appraisal clause should be interpreted as valid on the assumption that the insurer waives its right to contest coverage by invoking the clause, the decision is Licea will necessarily impact, if not dispose of, the conflict in this case. In order to avoid any potential inconsistency between the Licea decision and the Fourth District's decision in this case, it is respectfully submitted

that this Court should accept jurisdiction and consider the issues raised herein in conjunction with those raised in Licea. See, Kincaid v. World Ins. Co., 157 So. 2d 517 (Fla. 1963)(measure of the Supreme Court's jurisdiction under conflict theory is whether the District Court's decision "collides" with another District Court on the same point of law so as to create an inconsistency or conflict among the appellate courts).

C. The Appraisal Clause in STATE FARM'S policy is not void and unenforceable as lacking in mutuality of obligation

Although ROSEMURGY characterizes the appraisal clause at issue as void and unenforceable by virtue of the insurer's alleged ability to reject the decision of the appraisers, even a cursory review of the policy demonstrates the fallacy of this argument. According to the plain language in its policy, STATE FARM has no right whatsoever to reject the appraisal award. Rather, STATE FARM is bound to the award in the same manner and to the same extent as is the insured.

What ROSEMURGY apparently does not understand is that STATE FARM'S reservation of its rights under Florida law does not mean that STATE FARM has the right to disavow the appraisal award. In fact, the clear language of the appraisal clause demonstrates that under no circumstances does STATE FARM have the right to dispute the appraisers' decision as to the amount of the loss sustained by the insured. The only rights reserved to STATE FARM are its rights to disavow coverage, a unilateral right that it has always had under Florida law.

As Judge Cope noted in his now infamous dissent in American Reliance Insurance Co. v. Village Homes at Country Walk, 632 So. 2d 106

(Fla. 3d DCA 1994), where the appraisal clause at issue plainly binds both parties to the decision of the appraisers and/or umpire as to the amount of the loss sustained, the fact that the policy also reserves unto the insurer the right to deny coverage is not inconsistent with the clause and the insurer is still bound to the amount of the loss determined by the appraisers if, in fact, there is coverage for the loss.

As a later panel of the Third District Court of Appeal recognized, Judge Cope's dissent in Country Walk succinctly demonstrated that the majority opinion was an aberration. State Farm Fire and Casualty Co. v. Licea, 649 So. 2d 910 (Fla. 3d DCA), rev. granted, 662 So 2d 933 (Fla. 1995). In Licea, the panel opined that:

> This panel is of the opinion that Judge Cope's dissent in Country Walk sets forth the correct rule of law, to wit: That by participating in an arbitration proceeding to determine the amount of loss suffered by an insured the insurer is in no way deprived of the right to later contest the existence of insurance coverage for that loss.

Id. at 911 (citations omitted). There is no rule of law compelling parties to submit all of their disputes to either appraisal or litigation; it is perfectly acceptable under prevailing law to submit the disputed amount of the claim to appraisal, but to reserve for the court the issue of coverage, which obviously can not be decided by a layman appraiser in any event. See, e.g., id., (and cases cited therein); Allstate v. Candreva, 497 So. 2d 980 (Fla. 4th DCA 1986)(it is for the court to determine the issue of insurance coverage and the arbitrator to determine the issue of the extent of loss); Kenilworth Ins. v. Drake, 396 So. 2d 836 (Fla. 2d DCA 1981)(policy provisions

requiring the submission of the issue of damages to arbitration are binding, while questions regarding coverage must be adjudicated by the Court).[4]

In the present case, the Fourth District Court of Appeal, for reasons unexpressed in its brief opinion, determined that neither Country Walk nor Licea set forth the appropriate rule of law in determining the viability of the appraisal clause at issue. Rather, the District Court adopted as its own the reasoning of the First District Court of Appeal in Scottsdale Ins. Co. v. DeSalvo, 666 So. 2d 944 (Fla. 1st DCA 1995). In DeSalvo, the First District adopted what it perceived to be the reasoning behind Judge Cope's dissent:

> We believe that the construction proposed by Judge Cope in his Country Walk dissent is the most reasonable interpretation of the appraisal provision read in its entirety -- i.e. that an insurer may not demand an appraisal while at the same time denying coverage; but that, rather, the language is intended merely to ensure that an insurer is not deemed to have waived any coverage defense it might have when it participates in an appraisal requested by the insured.
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> . . .
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> Accordingly, we construe the language of the appraisal provision as intended to permit either party to request an appraisal the results of which will be binding as to the value of the property and the amount of loss. Should the insurer make

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[4] In this context, appraisal clauses are often considered tantamount to arbitration clauses by the courts and therefore, the terms are used interchangeably herein. See, American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d DCA 1994); Intracoastal Ventures v. Safeco Ins. Co., 540 So. 2d 162 (Fla. 4th DCA 1989); State Farm Fire and Cas. Co. v. Feminine Fashions, Inc., 509 So. 2d 376 (Fla. 3d DCA 1987); U.S. Fire Insurance Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983); Transamerica Insurance Co. v. Weed, 420 So. 2d 370 (Fla. 1st DCA 1982).

> the request, it thereby waives any coverage defense it might otherwise have had. However, if the insured requests appraisal, the insurer does not, simply by participating in the appraisal, waive coverage defenses it might have -- while the results of the appraisal will be binding on the issues of value of property and amount of loss, the insurer may still litigate the issue of coverage. Based upon this construction of the language, we conclude, further, that the provision is not lacking in mutuality of obligation but, rather, is valid and enforceable.

Id. at 946.

It is respectfully submitted that the First District's conclusion that the appraisal clause was valid and enforceable was correct, but for the wrong reason, because the appellate court clearly misconstrued Judge Cope's dissent. In his dissent, Judge Cope opined:

> The insurer correctly argues that this [appraisal] clause cannot be reasonably construed to allow the insurance company an open-ended escape from the results of the appraisal. The appraisal clause sets out the procedure for appraisal. It then expressly provides, "A decision agreed to by any two [appraisers] will be binding." . . . "Will be binding" means "will be binding". Thus, once the appraisers have reached a decision, both the insured and the insurer are bound thereby, because the contract says so.
>
> What, then, is the proper interpretation of the final sentence, which states "If there is an appraisal, we still retain our right to deny the claim"? It must be remembered that the appraisal clause in this case allows either the insured or the insurer to make a request for an appraisal. The purpose of the "right to deny" sentence is to state, quite simply, that if the insured requests an appraisal and the insurer proceeds with the appraisal process, the insurer has not thereby abandoned any coverage defenses which may be available to it.
>
> The appraisal clause in the present case is a "plain langauge" version of a similar appraisal clause interpreted in Hanover Fire Insurance Co.

> v. Lewis, 28 Fla. 209, 10 So. 297 (1891). There, the appraisal clause provided that the award 'shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy." Id. at 242, 10 So. at 301. The Florida Supreme Court held that the clause was
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> > binding to the extent of the loss on the assured as well as upon the insurers . . . Hence, if, after such ascertainment of the amount of the loss, it should be found that the insurers were legally liable for such loss, they at once became bound for the 'amount' ascertained and awarded by such arbitrators.
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> Id. at 248, 10 So. at 302-303. Cf. Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 280 (Fla. 1988)('parties may select certain issues and not others to submit to arbitration, and . . . an award would be binding only as to those issues submitted').

Id. at 108-109.

It is obvious that, when his dissent is quoted in context, Judge Cope did not conclude that an appraisal clause, if invoked by the insurer, waives the insurer's right to contest coverage. Rather, Judge Cope was simply making the point that both parties are bound to the amount of the award, but the submission of the amount to appraisal does not affect the submission of coverage issues to litigation. The fact that Judge Cope chose to make an example of the insured's invocation of the clause does not mean that the insurer's invocation waives any of its rights insofar as coverage disputes are concerned since those rights are expressly reserved, as they must be, for a Court of law. To hold otherwise would divest the insurance company of the right to litigate a viable coverage defense, such as fraud in the presentation

of the insured's claim, that it might discover after appraisal has commenced or even concluded. Ultimately, the insurance company would be faced with the Hobson's choice of choosing appraisal over litigation, thereby waiving any coverage issues that may arise in the investigation process, or choosing litigation over appraisal, which would, under Scottsdale, preserve its coverage defenses but potentially cost more than the claim is worth.

ARGUMENT II

THE APPRAISAL CLAUSE IS NOT VOID AND UNENFORCEABLE BY VIRTUE OF THE FACT THAT THE INSURED MAY NOT RECOVER HIS OR HER ATTORNEYS' FEES FOR PARTICIPATING IN THE APPRAISAL PROCESS

ROSEMURGY'S primary point before this Court is that the appraisal clause is void and unenforceable because a "successful" insured is not awarded attorneys' fees at the conclusion of the appraisal process.[5] ROSEMURGY cites no authority for this proposition and, in fact, there is no precedent even arguably supporting his contention.

The obvious purpose of Florida Statute 627.428, which awards attorneys' fees to an insured who prevails in litigation against his or her insurer, is to discourage an insurer from contesting a valid claim and to reimburse an insured who was compelled to litigate against the insurer who has breached its policy. Insurance Co. of North America v. Lexow, 602 So. 2d 58 (Fla. 1992). Contrary to ROSEMURGY'S contention,

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[5] ROSEMURGY'S argument is based upon the misconception that in appraisal, as in litigation, there is a "prevailing party". In reality, the appraisal award is rarely the figure proposed by the insured or the insurer, but is often some figure in between. Hence, there is usually no "successful" party, as that term is used by ROSEMURGY.

this public policy does not extend to an insured who chooses to litigate when he or she does not have to, especially where, as here, the insurer has not breached the insurance policy, but instead, has opted to submit the issue of the amount of loss to an impartial and cost-effective forum.

On the other hand, should STATE FARM breach its contract by wrongfully failing to pay the appraiser's award within the time period allotted by its policy, ROSEMURGY is then entitled to sue for breach of contract and, if he prevails, he would then be entitled to recover his attorney fees. STATE FARM has no concomitant right to recover its fees if it prevails in that action. In light of this, it can hardly be said that STATE FARM is utilizing the comparatively inexpensive appraisal process as an "economic club", especially in light of ROSEMURGY'S insistence on litigating when he clearly does not have to. Litigation is the insured's economic club and public policy dictates that it should be avoided when more reasonable means are available to the parties.

Finally, ROSEMURGY'S policy diatribe is misguided in that he completely ignores the established public policy of encouraging the resolution of liability disputes outside of the courtroom. See, Intracoastal Ventures Corp. v. Safeco Ins. Co. of America, 540 So. 2d 162 (Fla. 4th DCA 1989)("arbitration agreements are valid and enforceable, and public policy favors arbitration as an alternative to litigation"); Franko, 443 So. 2d at 172 (arbitration agreements are favored in the law). ROSEMURGY would have this Court discard appraisal as a viable, economically feasible alternative to costly litigation for

the sole reason that ROSEMURGY can recover his attorney's fees in the latter tribunal. In light of the delay and expense attendant in any litigation, the only party benefitting from such a choice would be ROSEMURGY'S counsel. The insurance laws were not designed for the benefit of the claimant's bar and this Court should not be persuaded that attorney compensation is the polestar guiding public policy. For this reason, ROSEMURGY'S argument that the appraisal clause is void simply because it does not provide a means for his counsel to obtain his attorneys' fees is groundless.

ARGUMENT III

ASSUMING THAT THE APPRAISAL CLAUSE IS VALID AND ENFORCEABLE THE RECORD BEFORE THIS COURT DEMONSTRATES THAT THE TRIAL COURT WAS CORRECT IN DETERMINING THAT STATE FARM HAD NOT WAIVED ITS RIGHT TO INVOKE THE APPRAISAL CLAUSE

It is undisputed that STATE FARM timely invoked the appraisal clause in its Motion to Dismiss. Preferred Mutual Ins. Co. v. Martinez, 643 So. 2d 1101 (Fla. 3d DCA 1994). It is further undisputed that STATE FARM did not actively litigate this cause in such a manner as to waive its right to enforce the appraisal clause. See, e.g., Balboa Inc. v. Mills, 403 So. 2d 1149 (Fla. 2d DCA 1981)(party can be deemed to have waived its right to appraisal/arbitration by actively participating in the litigation or seeking some affirmative relief before the trial court).

At the appellate court level, ROSEMURGY attempted to supplement the Record on Appeal with several letters that he claimed demonstrated that STATE FARM waived its right to invoke the appraisal clause by virtue of its alleged offer to "arbitrate" the claim. Given that these

letters were not part of the Record at the trial court level and had never been seen by the trial court, undersigned counsel objected and that objection was sustained and the Supplemental Record stricken by Court Order. (A.1-8)

Since these letters are not, and have never been, part of the Record on Appeal, ROSEMURGY'S argument, on pages 7 and 8 of his Initial Brief, has no merit since it is based upon correspondence that is not before this Court. Since ROSEMURGY has never argued that STATE FARM has otherwise waived its right to appraise the amount of ROSEMURGY'S loss, ROSEMURGY'S argument regarding waiver must necessarily fail.

In the present case, the record reflects that STATE FARM timely moved to dismiss the Complaint based on the appraisal clause and that it had not acted in a manner inconsistent with its right to have the amount of its liability determined out of court. Since there is nothing in the record to the effect that STATE FARM had otherwise waived its right to demand appraisal, the trial court was eminently correct in granting STATE FARM'S Motion to Dismiss for failure to comply with the condition precedent to payment and/or suit.[6]

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[6] The policy expressly provides that "[n]o action shall be brought unless there has been compliance with the policy provisions." (R.21)

CONCLUSION

For the foregoing reasons, the Respondent, STATE FARM FIRE AND CASUALTY COMPANY, respectfully requests that this Court accept jurisdiction of the certified question and hold that the appraisal clause in its policy is valid and enforceable and that the trial court's dismissal of Petitioner's Complaint was proper in light of his admitted failure to comply with the condition precedent of submitting his claim to appraisal.

Respectfully submitted,

Hinda Klein

HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/~~hand-delivered~~ this 25th day of July, 1996, to: David J. Weiss, Parrillo, Weiss & O'Halloran, 100 S. Biscayne Blvd., Suite 1300, Miami, Florida 33131.

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