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IN THE

SUPREME COURT OF FLORIDA

Case No. 90,869

TIME INSURANCE COMPANY, INC.,

Appellant,

vs.

HARVEY BURGER,

Appellee.

APPEAL ON A QUESTION OF LAW
CERTIFIED BY THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE MERLIN LAW GROUP, AMICUS CURIAE, IN SUPPORT OF APPELLEE

William F. Merlin, Jr.
Fla. Bar No. 364721
THE MERLIN LAW GROUP, P.A.
1100 North Florida Avenue
Suite 300
Tampa, Florida 33602
Telephone: (813) 229-1000

Attorneys for Amicus Curiae

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STATEMENT OF THE CASE AND FACTS

The Merlin Law Group, P.A., amicus curiae, joins appellee Harvey Burger in this appeal for the limited purpose of addressing whether emotional damages are recoverable under Florida Statutes section 624.155. To the extent that the rulings in the Federal Courts permit recovery under that statute, the Merlin Law Group respectfully urges this court to affirm.

The Merlin Law Group accepts and adopts appellee's statement of the case and the facts.

ISSUE PRESENTED FOR APPEAL

WHETHER THE DAMAGES ALLEGED BY THE APPELLEE QUALIFY AS COMPENSATORY DAMAGES UNDER FLA. STAT. § 624.155(7)? ALTERNATIVELY, WHETHER THE TYPE OF EMOTIONAL DISTRESS ALLEGED BY THE APPELLEE QUALIFIES AS DAMAGE THAT IS A "REASONABLY FORESEEABLE RESULT" OF A VIOLATION OF FLA. STAT. § 624.155, AND THUS SERVES AS AN APPROPRIATE BASIS FOR COMPENSATORY DAMAGES UNDER THE STATUTE?

SUMMARY OF THE ARGUMENT

The Florida Legislature passed the Civil Remedy Statute 624.155 which provided a private cause of action for individuals damaged as a result of wrongful insurance company conduct. This statute was passed as a result of Florida courts failing to follow the growing majority trend affording a common law remedy for bad faith conduct by insurance companies. The majority of other sister-state courts recognize that insurance contracts were significantly different than commercial contracts and that common law remedies for breach of insurance contracts should also be different.

In 1990, the Florida Legislature amended the Civil Remedy Statute by allowing for "reasonably foreseeable" damages resulting from violations of Florida Statute 624.155. Since insurance by its very nature is purchased for protection of possible and unknown future catastrophies, individuals are buying peace of mind that they will be protected from financial catastrophy and to soften the blow of uncertain events which may occur during their lives. Accordingly, the insurance industry, knowing that they sell their product for this very purpose, should expect that emotional distress damages will be a reasonably foreseeable result if they breach statutory duties owed to claimants. The Florida Legislature never limited "reasonably foreseeable" damages only to economic damages.

AMICUS CURIAE BRIEF

I. GIVEN THE HISTORY OF INSURANCE DEVELOPMENT AND THE LEGISLATIVE INTENT IN CREATING FLORIDA STATUTE 624.155, FLORIDA RECOGNIZES THAT EMOTIONAL DAMAGES ARE A REASONABLY FORESEEABLE RESULT FOR VIOLATIONS OF SECTION 624.155.

A. The History and Development of Insurance Law Recognizes The Need For Extra-Contractual Damages

Abusive insurance claim settlement practices are nothing new. Since the first insurance company opened its doors, well over several hundred years ago, the insurance industry has enjoyed a consistently favorable position. An insurer had the luxury to choose between settling the claim against its insured or paying the claim of the insured. Unfortunately, the insurer knew that if it refused to pay, even on a totally valid claim, the most that the insured could recover on a breach of contract claim would be limited to the terms contained within the policy and possibly interest. This harsh result is what naturally flowed from the traditional common law rule of Hadley v. Baxendale[1].

Even though the policyholder was faced with the harsh reality that the courts and the legal system were affording the insurance industry virtual impunity for breaching their

[1] Hadley v. Baxendale, 156 Eng Rep 145 (Ex 1854), (holding that a victim of a breach of contract may recover compensation only for harm "arising naturally, i.e., according to the usual course of things, from such breach of contract itself" or harm "in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.") Id.

contracts and abusive claims settlement practices, a policyholder faced with non-payment of a valid claim could still explore other common law avenues of recovery. Such avenues were traditionally negligence, fraud or intentional infliction of emotional distress.[2]

These traditional extra-contractual remedies, however, were generally only applicable to the most extreme cases. For example, in 1983 the Third District Court of Appeal stated that the Florida Supreme Court had yet to conclusively identify a cause of action for emotional distress damages related to breach of an insurance contract.[3] In Dominguez, the trial court dismissed the cause for failure to state a cause of action because the alleged damage for severe emotional distress was unrelated to any other tort claim. On appeal, the Court looked to the underlying facts where the insured suffered from a terrible and totally debilitating auto accident. Moreover, following his accident and subsequent to receiving several full disability payments, such payments were unilaterally and unjustly terminated; then misrepresentations were made with the intent to achieve a voluntary surrender of the policy. The Court found that the insurance company had knowledge of the insured's acute condition and turned on the fact that the insurance company knew their actions would create emotional distress in the insured.

Following this finding, the Third District Court of Appeal elected to engage the modern trend and held, "[t]his combination of the unjustified assertion of power by one party, and impotence of the other, would, we think, be viewed by a civilized community as outrageous and

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[2] See generally, Johnson v. Hardware Mut. Casualty Co., 108 Vt. 269, 281-282, 187 A 788, 794 (1936) (liability for fraud, negligence or bad faith); see also, Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 469, 139 NW 955, 957-58 (1913) (suggesting possibility of liability for negligence).

[3] Dominguez v. Equitable Life Assur. Soc., 438 So. 2d 58 (Fla. 3 DCA 1983).

not as an indignity, annoyance or petty oppression for which the law affords no relief."[4] The Court then supported its holding by concluding that the alleged conduct "is outrageous [and] is amply supported by case law."[5]

Even though common law courts began to recognize extra-contractual theories, most claims failed. A cause of action for fraud often failed because of the difficulty in proving that the insurer had no intention of paying claims at the moment it issued the policy. Likewise, relief based upon an action for intentional infliction of emotional distress required intentional and utterly outrageous conduct causing severe emotional distress. Therefore, the rules of common law placed the insurer in a much greater position to affect, and ultimately create, a result that benefited the insurer's economic interests with impunity to the insured.

As a result of cases like Fletcher v. Western National Life Insurance Co.,[6] and Gruenberg v. Aetna Insurance Co.,[7] the majority of state courts this century have retracted from the common law protection afforded insurance companies, and are now recognizing new causes of action and new common law theories of recovery.[8] The intent behind this modern trend is to protect the rights and interests of the economically inferior party to the contract. Except in third party situations, Florida was not a part of this modern movement.[9]

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[4] Id. at 61.

[5] Id. at 61.

[6] Fletcher v. Western National Life Insurance Co., 10 Cal App 3d 376, 89 Cal Rptr 78 (1970).

[7] Gruenberg v. Aetna Insurance Co., 50 Cal. 2d 654, 328 P. 2d 198 (1973) (justifying an extension of the cause of action for bad faith to first party cases).

[8] Ashley Bad Faith Actions, § 2:14 (1996)

[9] See, Opperman v. Nationwide Mut. Fire Ins., 515 So. 2d 263 (Fla. 1987); see also, Butchikas v. Travelers Indemnity Co., 343 So. 2d 816 (Fla. 1976).

As a result of the failure of Florida courts to recognize a common law remedy for insureds to recover for damages inflicted by insurers failing to act in good faith, the Florida Legislature codified section 654.155 Florida Statutes providing for remedies. In essence, what the Florida Legislature created by enacting section 624.155 was a means for claimants to receive an avenue of redress so that "damages recoverable . . . shall include those damages which are a **reasonably foreseeable** result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits."[10] The statute created a cause of action against an insurer, other than the traditional common law theories. Clearly the intent was to remove the protection afforded to the insurer that existed at common law, mandate standards of conduct for the insurance industry, and provide new remedies not recognized at common law if insurers breached those specified standards of conduct.

Furthermore, the Legislature clearly removed the limited avenues of redress the common law afforded insured's by leaving the issue of "reasonably foreseeable" damages up to a jury. This is unambiguously shown through a plain reading of the words of section 624.155, specifically, "damages which are a reasonably foreseeable result of a specified violation." Therefore, "emotional damages" suffered by an insured at the hands of the insurer are tantamount to damages reasonably foreseeable by a jury in this statutory claim against an insurer. The only limitation is that the type of damage be "reasonably foreseeable" — clearly a decision left to the people through a jury or judge. Significantly, the legislature made no other restriction.

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[10] Fla. Stat. ch. 624.155 (1997) (emphasis added).

B. Florida Courts Recognize Emotional Damages Arising Out of Wrongful Insurer Conduct.

In 1987 the Fifth District Court of Appeal decided Harris, a case where the issue directly addressed punitive damages for wrongful infliction of emotional distress related to an insurance company's bad faith refusal to pay as per its policy agreement.[11] In Harris, the insured was diagnosed totally disabled and was receiving payments from the insurer for over a year. Whereupon, following a new claims manager handling the insured's file, the insurer unilaterally stopped payments to the insured, verbally abused the insured and threatened him with lawsuits. After losing his car, his dignity, and being too ill to work, the insured became severely depressed and emotionally distraught.

In addressing the factual scenario the Fifth District Court of Appeal relied upon a Florida Supreme Court case authored by Justice Ehrlich.[12] It was a 1985 case where the Court held that in a suit on an insurance policy brought by the insured against the insurance company, where damages for intentional infliction of emotional distress are sought, Florida courts are to use the Restatement (Second) of Torts for a definition the elements of the charge. Applying the law, in Harris, the Fifth District Court of Appeal held that the jury properly found the actions of the new claims manager and the insurance company to meet the elements of intentional infliction of emotional distress. Therefore, the Court above, and the jury below, properly found that emotional damages are a reasonably foreseeable result when an insurance company acts in bad faith. Accordingly, first-party actions brought against an insurance company by the insured are

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[11] Dependable Life Insurance Co. v. Harris, 510 So. 2d 985 (5th DCA 1987).

[12] Metropolitan Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985).

now recognized in Florida through the people of the State of Florida. The obvious intent was to accelerate the opportunity to maintain such an action, and to harmonize Florida law with the vast majority of other common law jurisdictions.

Indeed, as shown through Campbell v. Government Employees Insurance Co., a pre-624.155 case, Florida law allows recovery of punitive damages in common law bad faith actions when the insurer's conduct involves "elements of concealment and misrepresentation --a continued course of dishonest dealing on the part of the insurer towards the insured."[13] In Campbell, an award of punitive damages against the insurer was sustained because the insurer misrepresented to the insured prior to trial the gravity of the claim and then after trial concealed from the insured a reasonable offer of settlement that would have discharged the insured's personal exposure without payment on his part. It is exactly this type of behavior that warranted the recognition of first-party actions.

Campbell was followed by Butchikas v. Travelers Indemnity Co., where the Florida Supreme Court stated that punitive damages in bad faith actions are not available for cases involving mere "non-feasance" or "a complete lack of essential communication between the insurance company and its insured," but could be assessed if the insurer's conduct evinces "deliberate, overt and dishonest dealing."[14] The Butchikas Court also held that the same level of conduct necessary to support an award of punitive damages would sustain recovery of damages for mental anguish caused by the insurer's misconduct.[15] Therefore, although the two cases are

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[13] Campbell v. Government Employees Insurance Co., 306 So. 2d 525, 532 (Fla. 1974).

[14] Butchikas v. Travelers Indemnity Co., 343 So. 2d 816, 817-818 (Fla. 1976).

[15] Id. at 818-819.

factually opposed, the means of recovery, via punitive emotional distress damages, remained anchored within Florida common law. [16]

Florida courts specifically have recognized emotional distress or mental anguish as viable elements of damages in actions brought pursuant to section 624.155(1).[17] Like the common law standard established in Butchikas, damages for emotional distress and mental anguish are recoverable under section 624.155.[18] Clearly, following the 1990 enactment of paren seven to 624.155, all types of damage, which are "reasonably foreseeable" in bad faith actions are recoverable. Emotional distress damages are woven into the very fabric of the action itself.

The foregoing analysis of Florida law confirms that a party bringing a cause of action under section 624.155 may recover extra contractual damages for emotional distress or mental anguish.[19] Indeed, the enactment of Florida's statutory bad faith scheme is not to serve as a shield for insurance companies, but must be viewed as the quintessential use of the legislative process by affording greater remedies which Florida courts, unlike its sister states, failed to recognize at common law. This use removes the dichotomy of bad faith causes of action as they existed at common law. Moreover, because of the manner in which the personal contracts for insurance are presented and marketed by insurers and the insurer's subsequent bad faith, Florida's statutory bad faith scheme permits insureds to obtain those remedies, as modern justice requires.

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[16] Dunn v. National Security Fire and Casualty Co., 631 So. 2d 1103, 1109 (Fla. 5th DCA 1993); see also, Home Insurance Co. v. Owens, 573 So. 2d 343 (Fla. 4th DCA 1990).

[17] See, Vega v. Travelers Indemnity Co., 520 So. 2d 73, 75 n.4 (Fla. 3d DCA), rev. denied, 531 So. 2d 169 (Fla. 1988); see also, DiDomenico v. New York Life Insurance Co., 837 F. Supp. 1203 (M.D. Fla. 1993).

[18] Dunn v. National Security Fire and Casualty Co., 631 So. 2d 1103, 1107 (Fla. 5th DCA 1993).

[19] Butchikas, 343 So. 2d 816, 817-818.

II. A CONTRACT FOR INSURANCE IS NOT MERELY A COMMERCIAL CONTRACT IN THE LEGAL SENSE, BUT IS ACCEPTED AS A UNIQUE TYPE OF CONTRACT FOR SECURITY AND FOR PEACE OF MIND.

In the 1977 case of Jarret v. L. Harper & Sons, Inc.[20], Justice Neely, in a concurring opinion, authored the following:

> Insurance is different from any other business. If a man goes into a butcher shop, asks for two pounds of ground meat, and tenders $2.89 in payment, he will expect his meat to be forthcoming from the grinder. Imagine the scene were the customer to ask for his meat, and be answered that the butcher has no intention to deliver the same. "Where is my meat"? the customer would reply, possibly in other than dulcet tones. "I won't give you any meat," replies the butcher firmly. "Then give me back my $2.89 and I shall go elsewhere," says the customer. "I won't give you back the $2.89 either," replies the butcher, "for you must bring a lawsuit to get it from me." Sock! Pow! Blam! And much property damage of a different sort.
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> Yet such a colloquy proceeds with regularity in the area of insurance. The case of fire insurance leaps instantly to mind when companies frequently deny liability under contracts with their own insureds. Furthermore, if a man's car is damaged negligently by another party, the tort-feasors insurance carrier, recognizing full well the liability, may well decline to pay forthwith, relying instead upon its ability to wear the injured victim down with legal expenses and the cost of stamps for the exchange of meaningless correspondence.[21]

As the preceding passage makes ironically clear, the insurance industry enjoyed a much more favorable legal position in common law jurisprudence than the purchaser of an insurance policy. In fact, when comparing purchasers of private insurance contracts, whether for auto,

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[20] Jarret v. L. Harper & Sons, Inc., 160 W. Va. 399, 235 S.E 2d 362 (1977).

[21] Id. W. Va. at 405, S.E. 2d at 366.

property or casualty, against purchasers of commercial contracts in general, one can begin to delineate a fine line distinction. The distinction is that an insurance policy is more than a general contractual obligation. In fact, an insurance policy contains more than a mutuality of obligation, it contains an implied warranty of security and peace of mind that one would be indemnified following a future unknown catastrophe.

Laws governing the agreements made between individuals have been in existence for centuries. The common law has been an ever-evolving body of law that became so abstract and confusing that the American Law Institute drafted the Uniform Commercial Code. Moreover, nearly every state has statutory law that in some manner incorporates some, if not all, of the Code. Therefore, the laws governing commercial contracts are nothing new.

On the other hand, from the commercial contractual setting a new breed of contract has evolved - the personal insurance contract. If studied even in a casual manner, the history of the insurance industry proves that in the United States, as nowhere else in the world, the intent behind insurance is to set a person's mind free from economic duress and worry so that one could think about more constructive things knowing that calamities could be softened by insurance. In fact, insurance contracts have provided the means to rebuild burned, shattered, or blown away cities and towns, to replace both private and public property that has been damaged in any manner.

Unfortunately, the intent behind insurance is not conforming to the reality of its product. This is because, "In a typical contract, the non-breaching party can replace the performance of the breaching party by paying the then-prevailing market price for the counter performance. With insurance this is simply not possible."[22] In fact, the Supreme Court of Arizona has stated,

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[22] E.I. DuPont de Nemours & Co. v. Pressman, 679 A. 2d 436, 447 (Del. 1996).

> [t]he special nature of an insurance contract has been recognized by courts and legislatures for many years . . . . An insurance policy is not obtained for commercial advantage; it is obtained as protection against calamity. In securing the reasonable expectations of the insured under the insurance policy there is usually an unequal bargaining position between the insured and the insurance company. . . . Often the insured is in an especially vulnerable economic position when such a calamity loss occurs. The whole purpose of insurance is defeated if an insurance company can refuse or fail, without justification, to pay a valid claim.[23]

In lieu of these differing features, insurance contracts reasonably can be characterized as different than commercial contracts, and as such, justifies the availability of extra-contractual damages for their breach.[24] Although the notion of insurance protecting individual security interests is admirable and common, in reality such protection is commonly misused and misrepresented.

Most bad faith conduct occurs during the claims handling process.[25] Some insurance companies are notorious for refusing to provide insurance coverage for engaging in sloppy, slow or deliberately bad claims handling.[26] It does not take a financial genius to figure out that an insurance company can make more money by collecting premiums and not paying claims, than

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[23] Noble v. National Am. Life Ins. Co., 624 P. 2d 866, 867-68 (Ariz. 1981).

[24] See generally, Civil Action--Cross Petition for Certification and Brief in Opposition to Defendant-Appellant Petition for Certification (filed Dec. 7, 1976), at 13, 16 Firemans's Fund Ins. Co. v. Security Ins. Co. of Hartford, 367 A. 2d 864 (N.J. 1976) (where even insurance companies recognize that punitive damages should be used to deter insurance company bad faith).

[25] See generally Lia B. Royle, Insuring Good Faith, ABA Journal, Oct. 1996, at 86.

[26] See Joseph Segal, Sluggish Claim Process Can Cause Insured Business' Demise, Claims, Feb. 1995, at 86; Jim Urban, Take It Or Leave It, EXEC. REP., Aug. 1996, at 18; Leslie Scism, Disputed Claims, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, Wall Street Journal, Oct. 15 1996, at A1.

the insurance company can make by collecting premiums and paying claims. Even the pro-industry press has picked up on this.[27] Clearly "the bargaining power of an insurance carrier vis-à-vis the bargaining power of the policyholder is disparate in the extreme."[28] Moreover, unless an insurance company is confronted with the prospect of paying all damages caused by its wrongful conduct, it will have no incentive to honor its obligations under its existing insurance policies:

> Unlike most other commercial actors fighting for supremacy in a world where possession is nine-tenths of the law, insurers always have the nine-tenths advantage: They hold the money. Consequently, insurers always get to play "play the float" in any dispute. Even where the judicial system acts rapidly and efficiently to provide compensation to wronged policyholders, the carrier may find that it made money by delaying payment of the claim. If its investments have been good, it may even have made enough money to cover any prejudgment interest, costs, or consequential damages award, or counsel fees collected by the policyholder.[29]

Policyholders have attempted to level the playing field by making it less profitable and far riskier for insurance companies to breach their insurance policies by seeking, and getting, extra-contractual damages. The paying of damages caused by the bad faith breach adds an element of unpredictability to the insurance company's potential liability. Yet while greater risk

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[27] See Leslie Scism, Disputed Claims, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, WALL ST. J., Oct. 15 1996, at A1; Robert H. Gettlin, Fighting The Client, BEST'S REVIEW P/C, Feb 1997, at 49, 50 (noting that insurance companies spend over $1 billion a year litigating against their policyholders). See also, Charles E. Schmidt, Jr., Industry Executives Receive New Marching Orders, BEST'S REV. P/C, Feb. 1996, at 40 (discussing the industry-wide imperative to stay "sharply focused on bottom-line results and capital justification").

[28] Hayseeds, Inc. v. State Farm Fire and Cas., 352 S.E. 2d 73, 77 (W. Va. 1986).

[29] Jeffery W. Stempel,Interpretation of Insurance Contracts: Law And Strategy For Insurers and Policyholders § 19.3, at 466-67 (1994).

may deter some insurance companies, the *status quo* is still clear: "The insurance company is in no hurry. It has the money. It has your premium. It has an army of lawyers."[30]

Fundamental jurisprudence dictates that for every wrong there is a remedy for which compensation for foreseeable damages is available. Unfortunately, through the common law, that sound principal has been generally ignored when an insured sues on an insurance contract. Yet, through the application of a modern trend of recognizing the inherent difference between commercial contracts and insurance, the scales of justice are balancing. Clearly insurance companies are in the business of making money. By drawing a distinction between commercial contracts and private insurance contracts, courts force insurance companies to engage in fair dealing or to pay for damages caused by their failure to do so. This general position is not new. As early as 1921, Dean Roscoe Pound wrote:

> [W]e have taken the law of insurance practically out of the category of contract, and we have established that the duties of the public service companies are not contractual, as the nineteenth century sought to make them, but are instead relational; they do not flow from the agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.[31]

In the health insurance and "managed care" contest, a denial of insurance coverage can mean the difference between life and death. Bob Herbert, a columnist for the New York Times, touched upon this subject discussing a horrifying instance in which a health maintenance organization ("HMO") and one of its doctors denied specific medical care to a

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[30] Herb Denenberg, "How Insurance Companies Avoid Payment of Claims" Reading Eagle, May 26, 1995, at A12 (Mr. Denenberg is a former Commissioner of Insurance for Pennsylvania and Professor of Insurance at the Wharton School of the University of Pennsylvania).

[31] Comment, Extracontractual Insurance Damages: Pennsylvania Insured Demand a Piece of the Rock, 85 DICK. L. REV. 321, 322 (1981) (quoting Roscoe Pound, The Spirit of the Common Law 29 (1921)).

child.[32] This denial came despite the pleas of a specialist who had previously treated the child successfully. The child subsequently died.

The insurance companies - paper entities that have no human emotion - would have the law limit extra contractual damages to the funeral expenses plus pre-judgment interest. **How can an industry which sells itself with slogans such as, "A Good Neighbor", "An Umbrella", and "The Good Hands People", which clearly appeal to the emotional security it sells, not expect that emotional distress damages will result when it creates a second catastrophe?**

The business of claims adjusting and the relationships between insurance companies and claimants is in a period of significant change. At the beginning of this century, Courts viewed the relationship between policyholders and claimants as nothing other than adversarial. As Courts became aware of the fiduciary obligation which liability insurers had to their policyholders, notions of good faith and fair dealing became commonplace. Indeed, as many Courts began to acknowledge the societal purpose of insurance, those underlying notions of claims handling being conducted in good faith extended to both policyholders and claimants. Accordingly, Florida jurists should examine antiquated case law which improperly notes that insurance policies are just like other commercial contracts. Today, by practice, statute or regulation, insurance companies owe duties to policyholders and claimants that can never be thought of as truly adversarial.

The primary purpose of insurance is to spread the risk among various parties and provide prompt and proper payment for those who suffer catastrophes to their person or property. Natural disasters are prominent in the news. Buildings burn, airplanes crash, tractor trailers collide, bridges collapse, communities are besieged with riots and devastated by hurricanes.

Automobile accidents maim and slaughter hundreds of thousands of people every year. Products malfunction, worker and children are exposed to toxins, and dangerous chemicals are unknowingly consumed by completely innocent victims. These calamities are the reasons why modern insurance companies exist. The public depends upon skilled professionals to act honestly, promptly and thoroughly to ensure that a just and fair resolution through the mechanism of insurance is made. Accordingly, adjusting can be one of the most gratifying, as well as one of the most demanding, careers which requires highly trained, educated and motivated individuals if victims of these calamities are to be compensated adequately, fairly and promptly.

Today, many adjusters are in a "no win" situation. Their employers, large insurance companies, are typically only interested in cutting costs and earning a profit. Adjusters must improperly choose between paying prompt and full indemnity or being criticized by management for not controlling severity. The adjuster must yield to corporate objectives. Even the independent adjuster is competing against other independent adjusters for services from insurers who are more often concerned with the amount paid rather than the proper adjustment for the claimant.

Sadly, it is not surprising that insurance companies, non-living entities, have others argue on their behalf that humans are not entitled to "emotional" damages. While these entities sell a product that protects humans' most valuable interests: life, health and property, it was the Florida Legislature that allowed for human damages when those insurers breached statutory duties.

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[32] Bob Herbert, "Hidden Agenda", New York Times, July 15, 1996, at A13.

CONCLUSION

Based upon the aforementioned, amicus respectfully contends that this Court should answer the certified question in the affirmative. The Court should also answer the alternative certified question in the affirmative and hold that emotional distress is among the "reasonably foreseeable result[s]" of an insurer's bad faith and thus an appropriate basis for compensatory damages

Respectfully submitted,

William F. Merlin, Jr.
Florida Bar No. 364721
THE MERLIN LAW GROUP, P.A.
1100 North Florida Avenue, Ste. 300
Tampa, Florida 33602
Telephone: (813) 229-1000

Amicus for Harvey Burger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true a correct copy of the foregoing has been furnished via regular U.S. Mail to: Scott E. Perwin, KENNY NACHWALTER SEYMOUR ARNOLD CRITCHLOW & SPECTOR, P.A., 1100 Miami Center, 201 South Biscayne Boulevard, Miami, Florida 33131-2305; Brian S. Keif, BRIAN S. KEIF, P.A., 30 West Mashta Drive, Suite 500, Key Biscayne, Florida 33149; R. Fred Lewis, KUVIN LEWIS RESTANI & STETTIN, P.A., 7325 S.W. 63rd Avenue, Suite 201, Miami, Florida 33143, and Kevin P. O'Connor, O'CONNOR & MYERS, P.A., 2801 Ponce de Leon Boulevard, 9th Floor, Coral Gables, Florida 33134, this 29th day of August, 1997.

William F. Merlin, Jr.