THE SUPREME COURT OF FLORIDA

S.Ct. Case No.: SC01-1622
3DCA Case No.: 3D00-2464

Lt. Case No.: 97-18291 CA 20

ALLSTATE INSURANCE COMPANY,
a foreign insurance company,

Petitioner/Cross-Respondent,

vs.

JULIAN MARTINEZ,

Respondent/Cross-Petitioner
_____/

RESPONDENT'S ANSWER BRIEF/CROSS-PETITIONER'S INITIAL BRIEF

Respectfully submitted,

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INTRODUCTION

Allstate Insurance Company ("Allstate" or "insurer") seeks further review of a District Court decision holding that the contractual insurance appraisal process differs from formal arbitration, in material respects, and that section §682.06 of Florida's Arbitration Code, ("the Code"), does not govern appraisal hearings. Julian Martinez ("Martinez" or "the insured") seeks review of that portion of the decision which held that "the trial court erred when it ordered prejudgment interest to be paid from the date of loss." For purposes of both issues, all references are to the record on appeal (R.), as supplemented by court order in the Third District Court of Appeal. (S.R.).

STATEMENT OF THE CASE AND FACTS

The insured **rejects** Allstate's statement of the case and facts, as incomplete, and replete with editorial comment, taken from neither the District Court's opinion, nor the underlying record. (See Allstate's Initial Brief, p. 7.) This new statement of the case and facts follows.

Julian Martinez was insured under a homeowner's policy with Allstate, covering all property located at 1911 S.W. 32 Court, Miami, Florida 33145. (R. 3, 26-68). On August 24th, 1992, the insured suffered a Hurricane Andrew-related loss. (R. 3). The policy at issue contains the following, now-familiar appraisal provision:

> 7. Appraisal. If you and we fail to agree on the amount of loss, either party may make written demand for an appraisal. Upon such demand

> each party must select a competent and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. **If the 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 appraiser shall then determine the amount of loss, stating separately the actual cash value and the amount of loss to each item.** If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of loss. **If they can not agree, they will submit their differences to the umpire.** A written award by any two will determine the amount of loss.
>
> Each party will pay the appraiser it chooses, and equally bear expenses for the umpire and all other appraisal expenses. (R. 53-54, emphasis added).

Following Hurricane Andrew, the insured made an initial claim, which Allstate paid. On May 22, 1997, the insured made a supplemental claim for damage, invoked the foregoing contractual appraisal clause, and named his appraiser. (R. 86). Allstate responded on June 17, 1997, asserting that "appraisal is not properly invoked and is not an appropriate method for claim resolution at this point." Allstate also demanded voluminous documentation from the insured, and an inspection of the premises, but named its appraiser in the event "[a]ppraisal may prove appropriate at a later date." (R. 89-94).

On August 14, 1997, the insured filed a "Petition to Compel Appraisal and Demand for Declaratory Relief" in Dade County Circuit Court. (R. 2-12). Allstate answered the complaint asserting as

affirmative defenses that the insured failed to comply with conditions precedent in that (1) there was "no disagreement" over the amount of the loss and could not be one until the insured complied with Allstate's requests for additional information; and (2) the insured "failed to comply with the policy conditions by failing to submit the requested documentation, submit a sworn proof of loss, allow inspection of the premises and/or submit to examination under oath." (R. 15-16). In addition to claiming appraisal was "premature," (R. 15), Allstate also claimed appraisal was "waived." (R. 16-17). The trial court denied appraisal, without prejudice to the insured "again petition[ing] this Court . . . after he has complied with the policy conditions." (R. 118).

For the next two years, the parties skirmished *inter alia* over what documents Allstate deemed adequate. (R. 120-146). By letter of February 24th, 1999, Allstate finally "elected" to proceed with the appraisal process, but demanded "an evidentiary hearing to be held before the appraisers and the umpire pursuant to the Florida Arbitration Code and the First District's decision in Florida Farm Bureau Casualty Ins. Co. v. Sheaffer, 687 So. 2d 1331 (Fla. 1st DCA 1997)." (S.R. 1).[1] The insured disagreed with this procedure, asserting that appraisal proceedings were "informal," and filed a renewed motion to compel appraisal on September 8, 1999. (S.R. 2-4).

By order of September 30th, 1999, the trial court again denied the insured's renewed motion to compel as "premature," but agreed

[1] Allstate also named a different appraiser. (S.R. 1).

with the insured regarding the manner in which the appraisal was to be conducted. The trial court specifically ruled that:

> 2. [T]he appraisal procedure to be followed is that which is set forth in Liberty Mutual Insurance Company v. Hernandez, 735 So. 2d 587, 589 (Fla. 3d DCA 1999)("Whether the party-appointed appraisers visit the premises together or separately, the clause contemplates inspection and valuation by each appraiser individually, **not a trial-type hearing**.").
>
> 3. In determining the procedure, the Court disregards Defendant's arguments and reliance upon Florida Farm Bureau Insurance Co. v. Schaefer, 687 So. 2d 1331 ((Fla. 1st DCA 1997); Hoenstine v. State Farm Fire & Cas. Co.,(Fla. 5th DCA 1999); and footnote 4 of USF&G v. Romay, 744 So. 2d 467 (Fla. 3d DCA 1999). (R. 132-133, emphasis added).

Allstate continued to resist appraisal notwithstanding the insurance policy, and the trial court's order, resulting in the insured's **third** motion to compel appraisal on October 18, 1999. (R. 130-31). On November 15, 1999, the trial court deemed this motion "moot," based on Allstate's assurance that the appraisal was already underway. (S.R. 5-6).

On January 13, 2000, the appraisers chosen by each side met to determine the amount of the insured's loss. Despite the trial court's order, and without prior notice, Allstate's counsel appeared at the meeting with a court reporter to argue her client's position. (S.R. 7-9). As a result, the meeting was aborted and nothing further took place. (S.R. 9).

The insured filed a motion for sanctions against Allstate, for its disregard of the trial court's order. (S.R. 7-9). The trial

court declined to impose sanctions, but reiterated its ruling in another order,[2] which specifically addressed Allstate's prior conduct:

> **[T]he Court directs that the appraisal process is governed by the procedures set forth in Liberty Mutual Insurance Co. v. Hernandez, 735 So. 2d 587 (Fla. 3d DCA 1999) and directs that the Defendant is precluded from having a court reporter present in order to create a record of the proceedings and also, over Defendant's objection, that attorneys are precluded from participating in the appraisal hearing. If defense counsel elects to attend the appraisal hearing, she is directed to be an "absolutely silent presence."** (S.R.10-11, emphasis added).

Allstate raised the issue anew in its motion for "Clarification on Appraisal/Arbitration procedures and/or Ruling as to the Applicability of the Florida Arbitration Code." (R. 147-150). On April 20th, 2000, the trial court ruled **for yet the third time that:**

> [T]he Florida Arbitration Code (F.S. §§682.01-682.22) does not govern and is not applicable to the appraisal proceeding/process in the instant case. In making this determination, **the Court follows plaintiff's argument that the appraisal process is governed by the procedures set forth in Liberty Mutual Ins. Co. v. Hernandez, 735 So. 2d 587 (Fla. 3d DCA 1999) and rejects Defendant's argument that the subject appraisal provision is analogous to an arbitration provision and therefore governed by the Florida Arbitration Code.** See Florida Farm Ins. Bureau and Casualty Co. v.

[2] The order Allstate points to in its initial brief was thus the **second** order entered on this subject. (I.B. p. 7).

> Schaeffer, 687 So. 2d 1331 (Fla. 1st DCA 1997); Hoenstine v. State Farm Fire and Casualty Co., 736 So. 2d 761 (Fla. 5th DCA 1999) and USF&G v. Romay, 744 So. 2d 467 (Fla. 3d DCA 1999)(emphasis to Footnote 4). (R.151-15, emphasis added).

After entry of this third order, the two appraisers and the umpire again met to determine the amount of the insured's loss. The umpire agreed with the insured's appraiser, assessing the amount of the insured's supplemental loss at $33,323.78, less the policy deductible and the losses already paid, for a total of $18,782.44, exclusive of interest, costs, and attorney's fees. (R. 155-56; 174-75). On April 27, 2000, the insured moved to confirm the award. (R. 153-56).

Citing Section 682.06 of the Code, Sections 682.01-682.22, *et seq.*, Fla. Stat. (1999), on May 6, 2000, Allstate moved to vacate the appraisal award because *inter alia* the appraisal proceedings were not conducted in a formal hearing. Allstate also moved to amend its affirmative defenses. (R. 157-171). Based on its **three** prior rulings against Allstate's position, the trial court denied Allstate's motion to vacate. (R. 183). Instead, the trial court confirmed the appraisal award on May 17th, 2000, and reserved jurisdiction "to adjudicate . . . Allstate's . . . remaining affirmative defenses, if any" and "to determine the amount of prejudgment interest, to determine entitlement to and the amount of attorney's fees, to determine the amount of costs, and to enter judgment." (R. 172-73). The trial court permitted Allstate's amendment. (R. 184).

In its amended answer, Allstate asserted a baseless affirmative defense of fraud, claiming the policy was void. (R. 185-91; aff. def. 5). In addition, Allstate asserted that the "Plaintiffs have claimed losses **that are not covered** under the subject policy. . .." (Id., affirmative defense 6).

The trial court struck all of Allstate's affirmative defenses, granting leave to amend only as to fraud. (R. 207-209). Once amended, on July 26, 2000, the trial court struck the fraud defense as well, leaving no affirmative defenses and no merits issues to decide. (R. 260-261). Accordingly, on July 26, 2000, the trial court granted the insured's motion to enter final judgment. (R. 262).

The insured moved to add prejudgment interest to the judgment, back from the date of his 1992 hurricane loss. (R. 263-68). Citing Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985), the insured urged that an insurance company's failure to pay the full amount owed on an insurance claim constituted a breach of contract, and prejudgment interest followed principal, as a matter of law, from the date of loss. The insured added:

> [t]o hold otherwise would allow an insurance company to dispute a claim (as it has done here) for several years after depriving its insured of the amount owed and the interest to which the insured would otherwise be entitled. **The position urged by the Insurance Company would encourage insurance companies to delay payment because there is no adverse consequence for it doing so.** (R. 266, emphasis added).

Allstate responded by resort to the "Settlement of Loss"

provision in its policy, asserting that prejudgment interest could not begin to run until 60 days after the appraisal award, or June 24, 2000. (R. 274-75). The pertinent policy clause provides:

> Our Settlement of Loss
>
> We will settle any covered losses with you. We will settle with you unless another payee is named in the policy. **We will settle within 60 days after the amount of loss is finally determined. This amount may be determined by an agreement between you and us, an appraisal award or a court judgment.** (R. 269-73, emphasis added).

The trial court sided with the insured, and on August 17, 2001, entered final judgment for $18,782.44 in damages, together with $15,431.39 in pre-judgment interest, dating from the insured's loss. (R. 287-88).[3] Over three years had elapsed between the time this insured first invoked his appraisal rights and the entry of final judgment.

Allstate appealed the final judgment to the Third District Court of Appeal. Allstate did **not** appeal the striking of its meritless "defenses," but contested the denial of an "evidentiary hearing" on the amount of loss, based on section 682.06, Fla. Stats. (1999). On appeal, the Third District agreed with the trial court and ruled that "appraisal and arbitration are not identical processes." It concluded that "Appraisers are expected to act on their expertise. They need to meet only to iron out any

[3] The trial court further determined insured's entitlement to attorney's fees and reserved jurisdiction to determine the amount. (R. 287-88). The amount of such fees remains for determination below.

differences in their opinion." The Third District further certified conflict on this issue with the First and Fifth Districts. Allstate Ins. Co. v. Martinez, 2001 WL 769952, 26 Fla. L. Wkly D1681 (Fla. 3d DCA 2001).

The Third District sided with Allstate on the second issue raised, concluding that "[t]he trial court erred when it ordered prejudgment interest to be paid from the date of loss." Id. The District Court held that the policy gave Allstate sixty days from the appraisal award, within which to make payment, and that the intervening three years of litigation did not matter one whit. It rejected the insured's argument that "he should be awarded interest from an earlier date," concluding that any delaying tactics on the insurer's part "[were] not borne out by the record." (Slip Op. p. 4). Both parties seek further review. On August 3, 2001, this Court ordered the parties to brief the merits and reserved ruling on the issue of jurisdiction.

JURISDICTION

This Court has jurisdiction to review a district court of appeal decision which is certified to conflict with the decision of another district court of appeal. Fla. Const. art V, §3(b)(3); see also Jollie v. State, 405 So. 2d 418 (Fla. 1981). Here, the Third District certified that its decision was in conflict with decisions of the First and Fifth Districts on the same controlling legal issue. See Allstate Ins. Co. v. Martinez, 26 Fla. L. Wkly. D1681, n.2 (Fla. 3d DCA 2001), noting conflict with Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So. 2d 1331 (Fla. 1st DCA), rev.

den., 697 So. 2d 510 (Fla. 1997); Hoenstine v. State Farm Fire & Cas. Co., 736 So. 2d 761 (Fla. 5th DCA 1999). That this is an issue which should be resolved is reflected by the fact that the contractual provision is a form clause, contained in an overwhelming number of insurance contracts, as well as the amount of litigation on the issue which has already occurred.

The only other legal issue which needs to be decided in this case, is whether or not the insured was entitled to prejudgment interest from the date of his loss. Once this Court has jurisdiction it may, if it chooses to do so, consider any **other** legal issue that affects the case. See Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982); Miami Gardens, Inc. v. Conway, 102 So. 2d 622 (Fla. 1958); Vance v. Bliss Properties, Inc., 109 Fla. 388, 149 So. 370 (Fla. 1933) (appeal from final decree brings entire record up for consideration).

Here, Mr. Martinez has taken the additional step of filing a cross-notice to invoke jurisdiction, setting forth an independent basis for conflict jurisdiction. In Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985), this Court adopted the "loss theory" of prejudgment interest, holding that once a finder of fact has determined a defendant's liability, and the amount of damages, "Plaintiff is to be made whole from the date of the loss."

This Court concluded that the trial court had no discretion in making such award, and that, once the amount of damages is determined, "Plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that

loss." Id. at 215. Here, the trial court assessed prejudgment interest on the insurance appraisal award to Mr. Martinez from the date of his loss. The Third District reversed, holding that "[t]he trial court erred when it ordered prejudgment interest to be paid from the date of loss." Allstate Ins. Co. v. Martinez,, 26 Fla. L. Wkly. at 1681 (Fla. 3d DCA 2001). This ruling is squarely in conflict with Argonaut, and deserving of further review. Fla. Const. art. V, §3(b)(3).

STANDARD OF REVIEW

The parties agree that the issue on appeal is a legal one, governed by the *de novo* standard. The issue on cross-appeal can be viewed differing ways. If the trial court has discretion to determine whether the insurer's conduct was unreasonable, the standard is abuse of discretion. See Nichols v. Preferred National Ins. Co., 704 So. 2d 1371 (Fla. 1997). Otherwise the assessment of prejudgment interest is a **legal** issue, and may be reviewed anew, without any deference to the lower courts' decisions. See generally Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985); Walter v. Walter, 464 So. 2d 538 (Fla. 1985) (erroneous application of a rule of law).

SUMMARY OF THE ARGUMENTS

In its decision, the Third District concluded that insurance appraisal proceedings are conducted informally and are not governed by section 682.06 of the Code. That decision is supported by the overwhelming majority of cases in the country, the statute itself, and the contractual language. Arbitration and appraisal are

generally treated the same because both are supposed to be speedy methods of dispute resolution, alternative to judicial proceedings. However, there are several key distinctions between them: (1) an agreement for arbitration resolves the entire controversy, while appraisal only resolves certain loss issues; (2) the qualifications of arbitrators and appraisers may differ; and critical here, (3) arbitrators hear evidence and must meet together at all hearings, while appraisers appraise the loss separately and submit their differences to an umpire, in proceedings which need **not** be evidentiary. Even historically, there were distinctions between the two processes. Arbitration agreements were disfavored at common law, because they ostensibly deprived courts of jurisdiction to adjudicate the controversy. In contrast, appraisal proceedings were limited to resolving valuation issues, and found no such disfavor because unlikely to usurp the judicial role.

On its face, section 682.06 of the Code applies "unless otherwise provided by the agreement." The insurance agreement at issue here clearly "provides otherwise" in that it contemplates an informal proceeding, which allows an umpire to iron out differences between expert appraisers. By demanding formal evidentiary proceedings, Allstate was attempting to add new provisions to its contract. To the extent that the First and Fifth Districts disagreed with the Third, their decisions were based on general similarities between arbitration and appraisal, rather than the limited distinctions. The Third District's decision is correct on this issue and should, respectfully, be approved.

On the cross-appeal, once a fact finder determines the amount of the loss and the insurer's liability therefore, an insured is entitled to be made whole. An insured can only be made whole if awarded prejudgment interest from the date of loss, in accordance with Argonaut Ins. Co. v. May Plumbing, Co., 474 So. 2d 212 (Fla. 1985). Underpayment of the amount of the loss is no less a breach of the insurance contract than nonpayment, and should be treated as a wrongful refusal to pay. Once an appraisal award liquidates the amount of damages and an insurer is deemed liable therefore, an insured is entitled to be made whole from the date of loss by an award of interest back to that date. Accepting the insurer's position allows it to prolong the date the amount of loss is "finally determined," in contravention of public policy encouraging the prompt settlement of insurance claims and the expedition due appraisal proceedings. It gives the insurer "an advantage wholly disproportionate to the harm befalling its insured." Parker v. Brinson Construction Co., 78 So. 2d 873, 874 (Fla. 1955). In sum, that portion of the Third District's decision holding erroneous the trial court's assessment of interest back to the date of the insured's loss is in conflict with Argonaut and should be quashed.

ARGUMENT ON APPEAL

INSURANCE APPRAISAL PROCEEDINGS ARE INFORMAL AND GOVERNED BY CONTRACT, NOT BY SECTION 682.06 (ISSUE I, REPHRASED).

A. Overview.

The Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, was enacted in 1925. The purpose of the Act was to "revers[e] centuries of

judicial hostility to arbitration agreements," Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974) by placing such agreements "upon the same footing as other contracts." Id. at 511, quoting H.R. Rep. No. 96, 68th Cong. 1st Sess. 1, 2 (1924). The Federal Act accomplished this purpose by providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

The Federal Act authorized a district court to enter an order compelling arbitration if there was a "failure, neglect, or refusal" to comply with the arbitration agreement. 9 U.S.C. §4. It set forth a method of appointing arbitrators, if no method was provided by agreement, 9 U.S.C. §5, a method for compelling the attendance of witnesses, 9 U.S.C. §7, and the manner for conduct of the arbitration hearing. 9 U.S.C. §5. The Federal Act established certain limited bases for vacating, modifying or correcting an arbitration award, 9 U.S.C. §§10, 11, and the time for filing such motion. 9 U.S.C. §12. Absent such relief, an arbitration award was subject to mandatory confirmation and reduction to judgment, enforceable by court process like any other judgment. 9 U.S.C. §§9, 13. The Federal Act also required a federal district court to stay its proceedings if it was satisfied that an issue before it was arbitrable under the agreement. 9 U.S.C. §3.

The Federal Act encompassed "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the

contrary." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). The Act, as a whole, guaranteed the rigorous enforcement of private contractual arrangements. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985); ("we are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution"); see also Shearson/ American Express, Inc. v. McMahon, 482 U.S. 220, 232 (Fla. 1987) ("we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.").[4]

The Federal Act called for the "summary and speedy disposition" of petitions to enforce arbitration clauses. Moses H. Cone, supra, 460 U.S. at 29. Orders staying the enforcement of such petitions pending litigation were appealable as **final** orders, Id. at 11, while orders vacating arbitral awards were also appealable as interlocutory **injunctive** orders. See Forsythe International S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1020 (5th Cir. 1990); see also Willemijn Houdstermaatschappij, B.V. v. Standard Microsystems Corp., 103 F.3d 9 (2nd Cir. 1997); 9 U.S.C. §16.

Florida's Arbitration Code has been in force and effect in some form since 1957. Laws. 1957, c. 57-402, §22. In 1967, the

[4] Interpreting 28 U.S.C. §1291.

Code provisions previously embodied in section 57.10 through 57.31, Florida Statutes, were transferred to Chapter 682, Florida Statutes and renumbered as sections 682.01-682.22, Fla. Stat. See Laws. 1967, c. 67-254, §12.[5] Florida's code is structured similarly to the Federal Code. Contractual agreements or provisions to arbitrate are "valid, enforceable and irrevocable without regard to the justiciable character of the controversy. . . ." Fla. Stats. §682.02. The Code sets forth a method for appointment of arbitrators, if none is set forth by agreement. Fla. Stats. §682.04. It provides for compulsory process, Fla. Stats. §682.08, and a formal hearing. Fla. Stats. §682.06. It requires a court to compel arbitration, upon application, and to stay further legal proceedings. Fla. Stats. §682.03. The Code further renders confirmation of an arbitration award mandatory "unless within the time limits . . . imposed grounds are urged for vacating or modifying or correcting the award. . . ." Section 682.12, Fla. Stats. (1997).

The time limits for obtaining relief from an award, as well as the bases for obtaining such relief, are found at §§682.13 and 682.14, Fla. Stat. (1997), and all of these are strictly construed. See Verzura Const. Inc. v. Surfside Ocean, Inc., 708 So. 2d 994 (Fla. 3d DCA 1998); Packard v. Ripple, 531 So. 2d 991 (Fla. 3d DCA 1988).

Like the Federal Arbitration Act, the Florida Code has long

[5] The text of Florida's Code is similar, in substantial part, to provisions found in the Uniform Arbitration Act of 1955, 7 U.L.A. sections 1-25.

contained an appeal provision, listing the type of orders which ostensibly may be appealed. See §57.29, Fla. Stats. (1965), renumbered §682.20, Fla. Stat. (1997). That list includes orders which confirm and deny confirmation of an award, §682.20(1)(c), Fla. Stat., as well as orders "vacating an award without directing a rehearing." §682.20(1)(E), Fla. Stat. (1997).

However, Florida Constitution, article V, section 4(b)(1), permits district courts of appeal to review non-final orders only to "the extent provided by rules adopted by the supreme court." Section 682.20(2), Fla. Stats. (1997) also states that, in the event of appeal, such appeal "shall be taken in the manner and to the extent as from orders or judgment in a civil action." Several district courts have deemed §682.20 "invalid," because it conflicts with the Florida Constitution, which vests rule-making power in this Court, and this Court has never adopted section 682.20 as a rule of procedure. See Crawford v. Dwoskin, 729 So. 2d 520 (Fla. 3d DCA 1999); Health Care Associates, Inc. v. Brevard Physicians Group, 701 So. 2d 118 (Fla. 5th DCA 1997); see also City of Tallahassee v. Big Bend PBA, 703 So. 2d 1066 (Fla. 1st DCA 1997).

Historically, orders denying motions to compel arbitration were appealable by writ of common law certiorari. See Lipton Professional Soccer, Inc. v. Mijatovic, 416 So. 2d 1236 (Fla. 1st DCA 1982); Miller Construction Co., Inc. v. First Baptist Church of Live Oak, Inc., 396 So. 2d 281 (Fla. 1st DCA 1981); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Westwind Transportation, Inc., 442 So. 2d 414 (Fla. 2d DCA 1983); Ripple v. Packard, 471 So. 2d 1293

(Fla. 3d DCA 1985); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So. 2d 790 (Fla. 4th DCA 1981); Paine, Webber, Jackson & Curtis, Inc. v. Lucas, 411 So. 2d 1369 (Fla. 5th DCA 1981).

In 1984, Rule 9.130, Fla. R. App. Proc was amended to add a new provision authorizing the immediate interlocutory review of non-final orders determining whether a party was entitled to arbitration. The Florida Bar Re Rules of Appellate Procedure, 463 So. 2d 1114 (Fla. 1984). The rule was silent on the appealability of orders compelling "appraisal".

B. The Distinctions Between Arbitration And Appraisal

Even prior to passage of Florida's arbitration code, Florida courts referred to "arbitration" and "appraisal" synonymously. See Southern Home Ins. Co. v. Faulkner, 57 Fla. 194, 49 So. 542 (Fla. 1909) (insurance appraisal or award pursuant to policy on amount of the loss was condition precedent to suit on the contract). See also New Amsterdam Cas. Co. v. J.H. Blackshear, Inc., 116 Fla. 289, 156 So. 695 (Fla. 1934) (stating, with reference to an insurance appraisal provision, that "covenants in policies of insurance, which provide for appraisal by arbitrators of the amount of any loss claimed by an insured, are valid and are binding upon the parties if they are appropriately invoked").

Some Florida cases equated appraisal with arbitration for the purpose of appealability under 9.130(a)(3)(C)(iv), formerly 9.130(a)(3)(C)(v), Fla. R. App. Proc.; see Commercial Union Ins. Co. v. Swain, 694 So. 2d 39 (Fla. 1st DCA 1997); Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So. 2d 1331 (Fla. 1st DCA), rev.

denied, 697 So. 2d 510 (Fla. 1997); Florida Select Ins. Co. v. Keelean, 727 So. 2d 1131 (Fla. 2d DCA 1999); Nationwide Mutual Ins. Co. v. Johnson, 774 So. 2d 779 (Fla. 2d DCA 2000); Atencio v. U.S. Security Ins. Co., 676 So. 2d 489 (Fla. 3d DCA 1996).[6]

In addition, most agreed that appraisal and arbitration were synonymous for purposes of enforcing contractual provisions. See Intracoastal Ventures Corp. v. Safeco Ins. Co. of America, 540 So. 2d 162 (Fla. 4th DCA 1989), citing U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983) and TransAmerica Ins. Co. v. Weed, 420 So. 2d 370 (Fla. 1st DCA 1982); Preferred Mutual Ins. Co. v. Martinez, 643 So. 2d 1101 (Fla. 3d DCA 1994); Hoenstine v. State Farm Fire & Casualty Co., 736 So. 2d 761 (Fla. 5th DCA 1999).

Arbitration and appraisal were **both** designed to effect speedy and efficient resolutions, in lieu of judicial proceedings. See Nationwide Property & Casualty Ins. Co. v. Bobinski, 776 So. 2d 1047, 1049 (Fla. 5th DCA), rev. denied, SC01-455 (Fla. July 9, 2001) ("Arbitration and appraisal **are** alternative methods of dispute resolution that provide quick and less expensive resolution of conflicts); U.S. Fidelity & Guar. Co. v. Romay, 744 So. 2d 467 (Fla. 3d DCA 1999) (en banc); State Farm Fire & Cas. Co. v. Middleton, 648 So. 2d 1200 (Fla. 3d DCA 1995). The scope of review

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[6] Orders **rescinding** compelled appraisal, in contrast, have been deemed nonappealable because they ostensibly do not **deny** a party's right to appraisal, but merely place "conditions" on the exercise of such rights. See A.G. Edwards & Sons, Inc. v. Wilson, 523 So. 2d 1150, 1151 (Fla. 2d DCA 1987); Gonzalez v. State Farm & Cas. Co., 2000 WL 1671415, 25 Fla. L. Wkly D2614, (Fla. 3d DCA 2000); El Cid Condominium Ass'n Inc., No. II v. Public Service Mutual Ins. Co., 780 So. 2d 325 (Fla. 3d DCA 2001).

of the fact-finders' decision also appears to be the same. See Hirt v. Hervey, 117 Ariz. 543, 578 P.2d 624 (Ariz. Ct. App. 1978).

Early on, however, courts and commentators alike recognized that the square peg of appraisal did not readily fit into the round hole of arbitration for all purposes. In City of Omaha v. Omaha Water Co., 218 U.S. 180 (1910), the City of Omaha had the right to purchase a system of waterworks under an 1880 ordinance at an appraised valuation, to be established by the estimate of three engineers, "one to be selected by the City council, one by the waterworks company, and these two to select a third." The City exercised its option, and the appraisers proceeded to fix the waterwork's value, by a majority of two engineers. The City's appraiser did not concur, and the City rejected the award. Omaha Water than sued for specific performance, but the case was dismissed "upon the sole ground of misconduct of the appraisers."

The Court of Appeals reversed. On petition for *certiorari*, the City argued that the appraisers engaged in misconduct which vitiated the appraisal because "the appraisers heard evidence in the absence of the city and without the opportunity to reply. . .." Id. at 194. The Supreme Court disagreed, and **affirmed**, concluding that there was no misconduct. The Court wrote:

> If this was a technical arbitration of a matter of dispute or difference between the parties, to be heard and decided upon evidence submitted, the examination of the company's books without the consent of the city or the presence of its representatives would be such misconduct as would vitiate the award. In such a matter, the rules relating to judicial inquiry would apply. **But in an appraisement,**

> **such as that here involved, the strict rules relating to arbitration and awards do not apply, and the appraisers were not rigidly required to confine themselves either to matters within their own knowledge, or those submitted to them formally in the presence of the parties; but might reject, if they saw fit, evidence so submitted, and inform themselves from any other source, as experts who were at last to act upon their own judgment.** Id. at 199, emphasis added.

This analysis is equally applicable here. The following are the common distinctions made between arbitration and appraisal. First, an agreement for arbitration encompasses disposition of the entire controversy between the parties, whereas an agreement for appraisal resolves specific issues of loss. Second, the qualifications of arbitrators and appraisers may differ. Third, arbitrators must meet together at all hearings and may receive evidence of parties only after notice and in the course of adversary proceedings. In contrast, appraisers may make decisions by a more informal process. See e.g. Southeast Nursing Home, Inc. v. St. Paul Fire & Marine Ins. Co., 750 F.2d 1531, 1537-38 (11th Cir. 1985) (applying Alabama law); Hartford Lloyd's Ins. Co. v. Teachworth, 898 F. 2d 1058, 1061-62 (5th Cir. 1990) (applying Texas law to determining that insurance appraisal provision was not an arbitration agreement, and concluding that such state law was not in conflict with the purposes of the Federal Arbitration Act); Portland General Electric Co. v. U.S. Bank Trust Natl. Assn as Trustee for Trust No. 1, 218 F.3d 1085, 1090 (9th Cir. 2000) (same applying Oregon law); Jupiter Aluminum Corp. v. Home Ins. Co., 52 F. Supp. 2d 885, 888 (N.D. Ill. 1999), aff'd, 225 F.3d 868 (7th Cir.

2000)(applying Indiana law); Northeast Financial Corp. v. Insurance Company of North America, 757 F. Supp. 381, 383-84 (D.Del.1991) (applying Delaware law); see also Casualty Indemnity Exchange v. Yother, 439 So. 2d 77, 79 (Ala. 1983); Litman v. Holtzman, 219 Md. 353, 149 A.2d 385, 388-89 (Md. Ct. App. 1959); Eliot v. Coulter, 322 Mass. 86, 76 N.E. 2d 19, 21 (Mass. 1947); Moore v. Eastman, 98 N.H. 28, 93 A.2d 671 (N.H. 1953)(where agreement for appraisal did not require notice or hearing, neither was required); In re Delmar Box Co., 309 N.Y. 60, 127 N.E. 2d 808 (N.Y. 1955); Kawa v. Nationwide Mutual Fire Ins. Co., 174 Misc. 2d 407, 664 N.Y.S.2d 430 (N.Y. Ct. App. 1997) (recognizing a clear distinction under New York law between appraisal and arbitration, and refusing to follow First District's analysis in Florida Farm Bureau Ins. Co. v. Sheaffer, 687 So. 2d 1331 (Fla. 1st DCA 1998)); Elberon Bathing Co. Inc. v. Ambassador Ins. Co., Inc., 77 N.J. 1, 389 A.2d 439, 446 (N.J. 1978); Minot Town & Country v. Fireman's Fund Ins. Co., 587 N.W. 2d 189, 190 (N. Da. 1998); Royal Ins. Co. v. Ries, 80 Ohio. St. 272, 88 N.E. 638 (Ohio 1909) (court erred in setting aside appraisal on the ground that insured was not given a hearing); Smithson v. United States Fidelity & Guaranty Co., 186 W. Va. 195, 411 S.E. 2d 850 (W. Va. 1991) (appraisal process not converted into arbitration by agreement to select AAA Arbitrator); 4 Am. Jur. 2d, Alternative Dispute Resolution §12 (1995); 44 Am. Jur. 2d, Insurance §1680 (1982) (distinctions between general agreement to submit to arbitration and a limited agreement for appraisal); 14 G. Couch, Cyclopedia of Insurance Law §50:5-6 (1982); A. Windt,

Insurance Claims & Disputes §9.32 (2nd ed. 1988) (appraiser's function is more limited than that of an arbitrator, in that he evaluates only the loss, and does not consider policy interpretation or scope of coverage); 6 C.J.S., Arbitration §3 (1975).

The Second District Court of Appeal addressed these long-standing legal principles in Preferred Ins. Co. v. Richard Parks Trucking Co., 158 So. 2d 817 (Fla. 2d DCA 1963). The insured sustained a property damage loss under a policy which required that when disputes arose concerning the amount of damages, that dispute should be submitted to appraisers. An agent of the insurer called a meeting of appraisers, at which the vehicle was determined a total loss and a value set. The trial court approved the award, and entered judgment against the insurance company. The trial court found that:

> Under said paragraph 15, two appraisers were selected, and they agreed upon a third man, which the contract refers to as an Umpire. The insurance contracts require that the appraisers shall appraise the loss, and, failing to agree, shall submit their differences to the Umpire. Further, that an award in writing by any two shall determine the amount of the loss. **No reference is made to the law of Florida or the law of Ohio, with reference to the arbitration and award and no specific formality is required.** The evidence shows that the three men were qualified experts in this particular field, and had viewed the damaged trailer in question, and had met and discussed the matter, and that two of the three men had submitted to the plaintiff and the Defendant their award in writing, determining that the amount of the loss was $12,320.00. **The arbitration and award thus made complies with the insurance**

> **contract and is binding upon the defendant company.** Id. at 819 (citations omitted, emphasis added).

On appeal, the Second District **rejected** the insurer's argument that the appraisal proceedings needed to be conducted with the same formality as arbitration proceedings. Id.; see generally Prestige Protective Corp. v. Burns International Security Services Corp., 776 So. 2d 311, 313-14 (Fla. 4th DCA 2001) ("Both Illinois and Florida law enforce agreements to various forms of alternative dispute resolution, just as binding arbitration agreements are enforced. This is so even though the scope of the dispute resolver's authority may be more limited than that afforded an arbitrator and the proceedings may not resemble a traditional arbitration."); Weiss v. Insurance Co. of State of Pennsylvania, 497 So. 2d 285, 296 n.4 (Fla. 3d DCA 1987) (citing Fla. Jr. 2d, Insurance §891 (1981) for the proposition that "although the term "appraisal" or "appraisement" and the term "arbitration" are generally used interchangeably or in a loose sense in insurance policies and cases, there is a distinction between a limited agreement for appraisal of the amount of the loss and a general agreement to submit to arbitration.").[7]

[7] Historically, arbitration agreements were not enforced at common law on the ground that they deprived courts of jurisdiction to adjudicate a controversy. In contrast, appraisal agreements "never encountered hostility at common law" because only isolated issues were submitted to appraisal, and there was no perceived usurpation of judicial authority to resolve a case as a whole. Appraisal agreements were "typically limited to ministerial determinations, such as the ascertainment of quality or quantity of items, the ascertainment of loss or damage to property, or the ascertainment of the value of property." Budget Rent-A-Car of

It is this line of reasoning which was adopted by the Third District, here, and rightfully so. See Liberty Mutual Fire Ins. Co. v. Hernandez, 735 So. 2d 587 (Fla. 3d DCA 1999); Allstate Ins. Co. v. Suarez, 786 So. 2d 645 (Fla. 3d DCA 2001); Preferred National Ins. Co. v. Miami Springs Golf Villas, Inc., 789 So. 2d 1156 (Fla. 3d DCA 2001); Allstate Ins. Co. v. Martinez, 26 Fla. L. Wkly. at 1681. Both the foregoing law of appraisal and the appraisal provision contained in Allstate's policy demonstrates the correctness of the Third District's decision.

C. The Contractual Provision at Issue.

Insurance policies are construed in accordance with their plain language, with ambiguities interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. Gulf Life Ins. Co. v. Nash, 97 So. 2d 4, 9-10 (Fla. 1957); Lyng v. Bugbee Dist. Co., 133 Fla. 419, 182 So. 801 (1938) (meaning of a contract is deduced by the unambiguous language of the contract).

The appraisal provision, **drafted by the insurer**, calls for each party to select an impartial appraiser, who, in turn, will select a competent and impartial umpire. The appraisers are then to "determine the amount of loss" and, if they cannot agree, to "submit their differences to the umpire." (R. 53-54). The policy does **not** incorporate Section 682.06 of the Code by reference, requires no formal hearing, and no **evidentiary** proceeding. Thus,

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Washington-Oregon, Inc. v. Todd Inv. Co., 43 Or. App. 519, 603 P.2d 1199, 1200-02 & n.4 (Ore. 1979).

the insurer is asking this Court to rewrite its contract to add terms which were never previously contemplated, a practice which is forbidden. See State Farm Mutual Auto Ins. Co. v. Pridgen, 498 So. 2d 1245 (Fla. 1986); Aetna Casualty & Surety Co. v. Cartmel, 87 Fla. 495, 100 So. 802 (1924); Goldsby v. Gulf Life Ins. Co., 117 Fla. 889, 158 So. 502 (1935).

In addition, Section 682.06, by its own terms, applies "unless otherwise provided by the agreement." Here, the agreement "provided otherwise." It contemplated an informal process, which allowed an umpire to iron out differences between appraisers, to the extent any such existed.

Allstate complains that its defense was one of legal "causation," which must be submitted to appraisal under State Farm Fire & Casualty Co. v. Licea, 685 So. 2d 1285 (Fla. 1996). It urges that there was no way for even the most experienced appraiser or umpire to determine causation "absent the presentation of evidence testimony and cross-examination." (Initial Brief p. 16). However, that is precisely what Allstate contracted for. If it wished to litigate this issue, it needed only (1) to delete the contractual appraisal provision from its policy; or (2) amend the provision to require formal evidentiary proceedings under Section 682.06. In the absence of the latter requirement, however, none should be implied.

The Third District's holding that "appraisal and arbitration are not identical processes" in that appraisers act on their expertise, and "need meet only to iron out any differences in their

opinions," is in line with the overwhelming weight of authority in this country. The superimposition of formality on appraisal, would otherwise "transgress the fundamental nature of an appraisal proceeding." Allstate Ins. Co. v. Suarez, 786 So. 2d at 647; Liberty Mutual Fire Ins. Co. v. Hernandez, 735 So. 2d at 589.

To the extent that the First and Fifth District Courts disagree, they focused on the **general** similarities between arbitration and appraisal, without addressing a **specific** distinguishing feature – i.e., the different type of hearing contemplated by each. See Hoenstine, 736 So. 2d at 762 (finding generally that "the appraisal clause in the instant case is an arbitration clause and that the procedures set forth in the arbitration code apply"); Sheaffer, 687 So. 2d at 1335 (same). In Sheaffer, the First District concluded that the appraisal provision "neither excludes application of the Florida Arbitration Code . . . nor sets forth proceedings inconsistent with it." This decision clearly added terms to the policy which were not contemplated. The appraisal provision, construed against the insurer who drafted it, did not require **any** hearing at all.

In sum, the Third District's decision is more consistent with the law of appraisal, the weight of authority in the country, and the terms of the policy. The Court should approve Martinez, and quash the decisions in Hoenstine and Sheaffer, to the extent that they disagree.

ARGUMENT ON CROSS-APPEAL

THE INSURED WAS ENTITLED TO PREJUDGMENT INTEREST FROM THE DATE OF LOSS, RATHER THAN THE DATE OF PAYMENT UNDER THE POLICY.

The very first rule of the Florida Rules of Civil Procedure states that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 1.010, Fla. R. Civ. Proc. The purpose of an appraisal provision, like that of an arbitration provision, is to create "a method of resolving disputes that avoids the delay and expense of litigation." A. Windt, Insurance Claims & Disputes §9.32 (2nd ed 1988). In the now near-decade since Hurricane Andrew struck South Florida, the simple expedient process of insurance appraisal has been used as a basis for delay, and has actually fomented litigation. Courts have been called to intervene and resolve protracted legal battles over:

(1) the documentary and other requirements insureds must satisfy before appraisal (as a condition precedent to litigation) can commence, see Allstate v. Sierra, 705 So. 2d 119 (Fla. 3d DCA 1998); Perez v. Allstate Ins. Co., 709 So. 2d 591 (Fla. 3d DCA 1998); Llaguno v. ARI Mutual Ins. Co., 719 So. 2d 311 (Fla. 3d DCA 1998); Harrah v. Allstate Ins. Co., 721 So. 2d 1266 (Fla. 3d DCA 1999) (sworn proof of loss only), overruled, U. S. Fidelity & Guar. Co. v. Romay, 744 So. 2d 467 (Fla. 3d DCA 1999) (en banc) (**all** policy post-loss obligations);

(2) the order in which appraisal and coverage disputes should be resolved, see American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d DCA), rev. den., 640 So. 2d 1106 (Fla. 1994), overruled, Paradise Plaza Condominium Ass'n Inc. v. Reinsurance Corp. of New York, 685 So. 2d 937 (Fla. 3d DCA 1996)(en banc) (order of appraisal and coverage disputes to be left to the discretion of the trial judge); but see Opar v. Allstate Ins. Co., 751 So. 2d 758 (Fla. 1st DCA), rev. den., 767 So. 2d 459 (Fla. 2000) (appraisal before coverage);

(3) the scope of appraisers' authority, see State Farm Fire & Casualty Co. v. Licea, 685 So. 2d 1285 (Fla. 1996) (only "defenses" remaining for insurer to assert where there is a demand for appraisal, in that there is "no coverage for loss as a whole" or a violation of the usual policy conditions such as fraud, lack of notice and failure to cooperate), which Allstate advises is being relitigated in Nationwide Mutual Ins. Co. v. Johnson, 774 So. 2d 779 (Fla. 2d DCA 2000), jurisdictional determination deferred, S.Ct. Case No.: 0191 (oral argument set 12/7/01) and Gonzalez v. State Farm Fire & Casualty Co., 2000 WL 1671415 (Fla. 3d DCA 2000), jurisdictional determination deferred, S.Ct. Case No.: 01321 (oral argument set 12/7/01)

(Initial Brief p. 17, n. 5);

(4) Whether appraisal provisions are void for lack of mutuality where insurers still have the ability to decline coverage, State Farm Fire & Casualty Co. v. Licea, 649 So. 2d 910 (Fla. 3d DCA 1995), quashed, 685 So. 2d 1285 (Fla. 1996) (retained rights provision valid); and

(5) whether or not appraisal requires a formal evidentiary hearing, Liberty Mutual Fire Ins. Co. v. Hernandez, 735 So. 2d 587 (Fla. 3d DCA 1999) (and cases collected *infra*).

Strong public policy likewise favors the prompt and expeditious resolution of insurance suits. See §627.428, Fla. Stats. (1999); Insurance Co. of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992) (purpose of statute is "to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorneys fees when they are compelled to defend or sue to enforce their insurance contracts."); accord Bell v. U.S.B. Acquisition Co., 734 So. 2d 403, 410-11, n.10 (Fla. 1999).

Interest is compensation for the use and detention of money. Sullivan v. McMillan, 37 Fla. 134, 19 So. 340 (1896). In contract cases – as opposed to cases involving personal injuries – "[w]hen it is ascertained that at a particular time money ought to have been paid . . . interest attaches as an incident." Id. at 343; Parker v. Brinson Construction Co., 78 So. 2d 873, 874 (Fla. 1955):

> The fact that there is an honest and bona-fide dispute as to whether the debt is actually due has no bearing on the question. The rule is that **if it is finally determined that the debt was due, the person to whom it was due is entitled not only to the payment of the principal of the debt but to interest at the lawful rate from the due date thereof**. (Emphasis added).

Under the "loss theory" of interest, adopted by this Court, once a fact finder determines the amount of damages and defendant's liability therefore, the plaintiff is entitled to be made whole from the date of the loss. Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985).[8] This includes an award of prejudgment interest as "merely another element of pecuniary damages." Id. at 214. As this Court explained:

> **Plaintiff is to be made whole from the date of the loss** once a finder of fact has determined the amount of damages and defendant's liability therefore.
>
> * * *
>
> Once a verdict has liquidated the damages as of a date certain, computation of prejudgment interest is merely a mathematical computation. There is no 'finding of fact' needed. Thus, it is a purely ministerial duty of the trial judge or clerk of the court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict.
>
> * * *
>
> Furthermore, just as the loss theory **forecloses discretion** in the award of prejudgment interest, there is **no discretion**

[8] In contrast, the "penalty theory" of prejudgment interest awarded interest as a penalty for a defendant's "wrongful" act of disputing a claim found just and owing. Id. at 215.

> in the rate of that interest. The legislature has established a statutory interest rate which controls prejudgment interest.
>
> * * *
>
> The judiciary does not have discretion in this matter but must apply the statutory interest rate in effect at the time the interest accrues.
>
> * * *
>
> In short, when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, **as a matter of law**, to prejudgment interest at the statutory rate **from the date of that loss**.

Id. at 215. (Emphasis added).

Since Argonaut, our courts have been in disarray over the appropriate date for assessment of prejudgment interest in insurance appraisal cases. In Independent Fire Ins. Co. v. Lugassy, 593 So. 2d 570 (Fla. 3d DCA 1992), the District Court applied the loss theory in Argonaut, to a first-party insurance claim. The insurer denied the Lugassy's claim for property loss caused by fire. The insured sued and obtained a jury verdict and an award of prejudgment interest from the date of the loss. The insurer appealed, arguing that the award of prejudgment interest, calculated from the date of the fire, ignored the terms of the insurance contract. The loss payment provision of the insurance contract provided, in pertinent part, that a:

> [l]oss will be payable 60 days after we receive your proof of loss and:
>
> A. reach an agreement with you
> B. there is an entry of final judgment, or
> C. there is a filing of an appraisal award with us.

The insurer contended that it was not liable for prejudgment interest because, under the terms of the policy, its obligation to pay did not arise until the court entered final judgment against it. The District Court rejected the insurer's argument and made it clear that **an insurance company is not permitted to contract out its obligations to pay prejudgment interest on its policy.** It held that:

> An insurer is liable for prejudgment interest on the amount payable for an insured fire loss **on the theory that failure to pay within the time frame contemplated by the agreement constitutes a breach of a contract to pay money**. (Citations omitted, emphasis added).

Id. at 571-72. It also explained that:

> Holding the insurer liable for prejudgment interest recoverable from the time of the loss – where there is a wrongful refusal to pay – is consistent with two public policies as expressed by the Supreme Court of Florida: **(1) it encourages the prompt settlement of insurance claims**, and **(2) corrects the inequity created in contracts crafted by insurers which would deny prejudgment interest to the insured as an element of "just compensation' for pecuniary loss.** Id. at 572. citations omitted, emphasis added).

In State Farm Fire & Casualty Co. v. Albert, 618 So. 2d 278 (Fla. 3d DCA), rev. den., 629 So. 2d 135 (Fla. 1993), a property theft case, where there was a dispute over the value of property stolen, the Third District reiterated that prejudgment interest "should have been awarded from the date of loss." The policy language was **not** detailed in the court's opinion.

In DeSalvo v. Scottsdale Ins. Co., 705 So. 2d 694, 697 (Fla. 1st DCA 1998), approved on other grounds, 748 So. 2d 941 (Fla.

1999), the District Court found no error in the trial court's determination to award prejudgment interest from the date of the appraisal, "as damages were liquidated as of that date." See also Underwriters Inc. Co. v. Kirkland, 490 So. 2d 149 (Fla. 1st DCA 1986) (where insured's property was a total loss, she was entitled to prejudgment interest back to date of loss based on Argonaut, notwithstanding payment provision in policy).

In Aries Ins. Co. v. Hercas Corp., 781 So. 2d 429 (Fla. 3d DCA 2001), the trial court awarded prejudgment interest from the date of loss, in a theft case. The Third District reversed, noting that "The parties did not litigate the issue of coverage." It held that Hercas was entitled to interest from the date of the appraisal award "as that is the date on which the damages were liquidated."[9]

The Federal courts have likewise stepped into the fray. In Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association, 117 F.3d 1328 (11th Cir. 1998), the District Court awarded the insureds, in a theft loss claim, interest back to the date of their loss. The Eleventh Circuit opined that **this** Court "seemingly reversed Lugassy" in Lumbermen's Mutual Casualty Co. v. Percefull, 653 So. 2d 389, 390 (Fla. 1995). Golden Door, 117 F.3d at 1341. The Eleventh Circuit reversed the imposition of

[9] The DeSalvo and Hercas analysis harkens back to the pre-Argonaut line of cases. See Chicago Ins. Co. v. Argonaut Insurance Co., 451 So. 2d 876, 877 (Fla. 4th DCA 1984) (error in award of prejudgment interest where there was dispute as to amount of loss, because "interest may not be added to the principal award unless there can be a conclusive determination of an exact amount due and a date from which interest can be computed"), quashed sub. nom Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d at 215.

prejudgment interest from the date of loss, holding that it should be reassessed "from the date payment became due." Id. at 1343.

However, the issue that this Court resolved in Percefull was whether the insured was required to come out of pocket on its medical bills in order to recover prejudgment interest. See Lumberman's Mutual Casualty Co. v. Percefull, 653 So. 2d 389 (Fla. 1995). This Court's holding was that the insurer breached its contract by failure to pay its insured medical benefits immediately on proof of loss, because the debt was immediately due. The Third District has further continued to recognize the efficacy of Lugassy, but distinguished it as based on "a carrier's repudiation of coverage." Liberty Mutual Ins. Co. v. Alvarez, 785 So. 2d 700, 701 (Fla. 3d DCA 2001).

In the instant case, the trial court's decision awarding pre-judgment interest from the date of loss should be reinstated for several interrelated reasons. First, the "settlement of loss' provision relied upon by the insured does not preclude such assessment. It is silent on the question of interest, stating only that Allstate "**will settle** within 60 days after the amount of loss is finally determined." (Emphasis added). "Settlement" clearly relates to the **date** the insurer must pay – it does **not** relate to the **amount** that is due, i.e., principal plus any prejudgment interest. This language only establishes the date for payment; it does not change the date of loss or otherwise abrogate Florida law on prejudgment interest. See generally State Farm Fire & Casualty Co. v. CTC Development Corp., 720 So. 2d 1072, 1076 (Fla. 1998)

(where policy language is subject to differing interpretations, terms are construed against insured, and when insurer fails to define a term, the insurer cannot take a narrow restrictive interpretation of coverage afforded under the policy).

The fallacy of Allstate's position is apparent from one simple extension of its argument. Imagine that the policy provided that payment was due within 60 days of a judgment. Under that scenario, the insurance company would never have to pay prejudgment interest. Clearly, the insurance company cannot abrogate Florida law by adopting language in its policy that contravenes Florida law.

Second, by its decision, the trial court, who was in the best position to observe the insurer's conduct, clearly found that the insurer's delay in payment was unreasonable. See Nichols v. Preferred National Ins. Co., 704 So. 2d 1371, 1375 (Fla. 1997) (in assessing attorneys fees against the surety, trial court makes such assessment, and "each claim will present different circumstances and must be evaluated on a case-by-case basis to determine whether any delay in paying claim was unreasonable"). The delay in offering to pay the proper amount due "amounts to a wrongful withholding ...." See generally South Carolina Ins. Co. v. Pensacola Home & Savings Ass'n, 393 So. 2d 1124, 1126 (Fla. 1st DCA 1980) (emphasis added).

Third, the insurer did, in fact, contest coverage. By affirmative defense it asserted that the policy was void for "fraud" and that the losses were "not covered" by the policy. These defenses were stricken for lack of merit, and the insurer did not

appeal the issue. The policy provision relating to the time of payment was thus "rendered immaterial by the insurer's denial of liability." Independent Fire Ins. Co. v. Lugassy, 593 So. 2d at 571-72.

Fourth, insurance polices are contracts of adhesion. For the policy reasons stated in Lugassy, the same analysis applies to underpayment, as does to nonpayment. Prejudgment interest takes into account that insurance promises to indemnify the policy holder for property damage, and to return him to his preloss condition. When an insurer **underpays** a covered claim and unnecessarily prolongs litigation, the result is the same as non-payment. Only an award of prejudgment interest from the date of loss serves to make the insured whole.

Fifth, if an insurer can avoid paying prejudgment interest by postponing the date an appraisal award is "finally determined," common sense tells us it will do precisely that. Placing this weapon in the hands of the insurer is the antithesis of **all** of the foregoing public policy. It is further exemplified by what happened here. In the trial court, Allstate claimed – erroneously – that it was entitled to an "evidentiary" appraisal hearing. This issue was raised and resolved by the trial court no less than **five** separate times. (S. R. 2-4; 10-11; R. 132-33; 147-50; 157-71). The award of prejudgment interest is not meant to penalize Allstate – but to ensure that an insured is not placed in an inferior position when an insurer insists on extended litigation of such claims. Any other rule gives an insurer "an advantage wholly disproportionate

to the harm befalling its insured." Parker, 78 So. 2d at 873.

In the instant case, the Allstate policy gave the insurer sixty days from the date of the appraisal award within which to make payment. However, in line with Argonaut and its progeny, the trial court awarded prejudgment interest from the date of loss. The Third District's reversal based on the policy's "settlement of loss" provision is directly in conflict with Argonaut and should respectfully be quashed on both legal and public policy grounds.

CONCLUSION

The Court should approve the Third District's decision on the type of hearing to be afforded in appraisal proceedings. The Third District's decision on prejudgment interest is in conflict with Argonaut, and that portion of it should be quashed.

Respectfully submitted,

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Undersigned counsel hereby certifies that the size and type of this brief is Courier New, 12 pt.

By: _____
Lauri Waldman Ross, Esq.