IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,
a foreign insurance company,

Petitioner/Cross-Respondent,

vs.

JULIAN MARTINEZ,

Respondent/Cross-Petitioner.

CASE NO. SC01-1622

Third District
CASE NO. 3D00-2464

REPLY/ANSWER BRIEF OF PETITIONER/CROSS-RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

REPLY TO RESPONDENT'S/CROSS PETITIONER'S STATEMENT OF CASE AND FACTS

With one exception, ALLSTATE is in general agreement with the statement of the case and facts submitted by MARTINEZ. The exception is that it appears that MARTINEZ attempts to justify the trial court's award of prejudgment interest from the date of Hurricane Andrew as a sanction based on ALLSTATE's alleged delay in processing MARTINEZ's claims. On this note, and as we pointed out in our Initial Brief, the supplemental claim was filed five years after the Hurricane. The lower court then denied at least two petitions to compel appraisal since MARTINEZ had not complied with his obligations under the policy. (R. 118; 121-125: 130-133; 134-144).

While MARTINEZ ultimately was successful in persuading the trial court that as a matter of law he was entitled to interest from the date of Hurricane Andrew, at no time did the trial court find that payment had been delayed as a result of ALLSTATE's conduct.

ARGUMENT ON APPEAL

THE TRIAL COURT ERRED IN FAILING TO VACATE THE ARBITRATION AWARD SINCE THE ARBITRATION HEARING WAS CONDUCTED IN A MANNER CONTRARY TO THE PROVISIONS OF THE FLORIDA ARBITRATION CODE WITH THE RESULT THAT ALLSTATE'S RIGHTS WERE SUBSTANTIALLY PREJUDICED

ALLSTATE has no quarrel with MARTINEZ's recitation of the extensive history and background of the **Federal Arbitration Act, 9 U.S.C. § I**, the **Florida Arbitration Code,** and the historical distinctions between appraisal and arbitration. In the light of that history and those distinctions, MARTINEZ asserts that:

> ALLSTATE complains that its defense was one of legal "causation," which must be submitted to appraisal under State Farm Fire and Casualty Company 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 pg. 16).
>
> However, that is precisely what ALLSTATE contracted for. If it wished to litigate this issue, it needed only (1) delete the contractual appraisal provision from its policy; or (2) amend the provision to require formal evidentiary proceedings under §682.06. In the absence of the latter requirement, however, none should be implied.

(MARTINEZ Answer/Initial brief, pg. 28).

This argument by MARTINEZ misses the point. Certainly, it could not be reasonably disputed that the language in the ALLSTATE policy in question appears to limit the issue submitted to the appraisers to the amount of loss - the traditional scope of an appraisal. However, this Court's decision in ***State Farm Fire & Casualty***

Co. v. Licea, indicates that the appraiser/arbitrators determine not only the amount of loss but whether the loss was caused by a covered peril or a cause not covered.

As such, the traditional distinction between appraisal (adjudging the amount of loss only) and arbitration (adjudging causation and amount of loss) have been eradicated, and the most reasonable interpretation of the appraisal/arbitration clause is that it provides for arbitration. Accordingly, we submit that ***Hoenstine v. State Farm Fire & Casualty Company***, 736 So.2d 761 (Fla. 5th DCA 1999) and ***Florida Farm Bureau Casualty Ins. Co. v. Sheaffer***, 687 So.2d 1331 (Fla. 1st DCA 1997), in applying the **Arbitration Code**, reach the proper result.

The Third District's decision , ***Allstate Insurance Co. v. Suarez*** 786 So.2d 745 (Fla. 3rd DCA 2001), is an anomaly. Prior to ***Allstate v. Suarez,*** Florida courts, including the Third District, uniformly treated appraisal provisions as arbitration clauses. ***E.g., Preferred Mutual Ins. Co. v. Martinez***, 643 So.2d 1101, 1102 (Fla. 3rd DCA 1994) (citing ***U.S. Fire Insurance Co. v. Franko***, 443 So.2d 170 (Fla. 1st DCA 1983) and ***Intercostal Ventures Corp. v. Safeco Ins. Company of America***, 540 So.2d 162 (Fla. 4th DCA 1989). ***See also***, ***Fields v. State Farm Fire & Casualty Co.***, 899 F. Supp. 613 (S.D. Fla. 1995) aff'd ***Childs v. State Farm Fire & Casualty Co.***, 158 F.3d 588 (11th Cir. 1998) (under Florida law, appraisal clause in property and business interruption insurance policy was enforceable arbitration provision and subject to **Florida Arbitration Code**).

The decisions of Florida courts interpreting the appraisal provision as an arbitration provision subject to the **Arbitration Code** are hardly unique. Other

jurisdictions have held at least some statutory provisions relating to arbitration apply to appraisal agreements. ***Wailua Associates v. Aetna Casualty & Surety Co.***, 904 F. Supp.1142 (D. Ha. 1995); ***Meineke v. Twins City Fire Ins. Co.***, 181 Ariz. 576, 892 P. 2d. 1365 (Ct. App. Div. 1 1994); ***Middlesex Mutual Assur. Co. v. Clinton***, 38 Conn. App. 555, 662 A.2d 19 (1995).[1] It is also interesting to note that **Couch On Insurance, Third Edition, Section 209:16,** entitled "Applicability Of Arbitration Statute Policy Provisions For Appraisals," n.4, lists two Third District decisions for the proposition that courts have applied arbitration code provisions to appraisal clauses. ***See, American Reliance Ins. Co. v. Village Homes at Country Walk***, 632 So.2d 106 (Fla. 3rd DCA 1994), overruled on other grounds by ***Paradise Plaza Condominium Ass'n, Inc. v. Reinsurance Corp. of New York***, 685 So.2d 937 (Fla. 3rd DCA 1996).

Indeed, the Third District's recent decisions in ***Suarez*** and ***Martinez*** appear to conflict with the court's earlier *en banc* decision in ***United States Fidelity & Guarantee Co. v. Romay***, 744 So.2d 467 (Fla. 3rd DCA 1999). In ***Romay,*** the Third District applied **Florida Arbitration Code** provisions in determining that insureds were required to comply with all post-loss obligations before compelling appraisal under property insurance policies.

As previously indicated, the most reasonable interpretation of the appraisal

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1. Parenthetically, the undersigned is unaware of any cases other than ***Allstate v. Suarez*** and ***Allstate v. Martinez***, wherein a Court has held that an informal appraisal will determine not only the amount of loss but also the factual question as to whether the loss was caused by a covered or uncovered peril.

provision in question, and the one that has been adopted by the majority of Florida courts that have addressed the issue, is that the appraisal provision is subject to the **Florida Arbitration Code**. As such, and since the **Code** provisions were not adhered to below, the arbitration award and judgment in favor of Respondents should be reversed.

ARGUMENT ON CROSS APPEAL

THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS DETERMINING THAT INTEREST IS DUE FROM THE DATE THE PROCEEDS WERE DUE UNDER THE POLICY IS IN CONFORMITY WITH CONTROLLING PRECEDENT FROM THIS COURT.

Since ALLSTATE believes that this Court has previously spoken on the prejudgment interest issue, our response to the lengthy argument contained in Cross-Petitioner's Initial Brief will be short and to the point.

The Third District's decision is in conformity with this Court's decision in ***Lumbermens Mutual Casualty Co. v. Percefull***, 638 So.2d 1026 (Fla. 4th DCA 1994) ***approved***, 653 So.2d 389 (Fla. 1985) and ***DeSalvo v. Scottsdale Insurance Co.***, 705 So.2d 694 (Fla. 1st DCA 1998) ***approved***, 648 So.2d 941 (Fla. 1999). In ***Lumbermens*** this Court approved the lower court's determination that in contract actions, interest is allowed from the date the debt due. ***Id. at 390***. The ***Lumbermens*** court cited with favor, an earlier decision from this Court, ***Parker v. Brinson Construction Co***, 78 So.2d 873, 874 (Fla. 1955), in which this Court observed the general rule that prejudgment interest is allowed in Florida, for actions based on contracts, from the date the debt is due. In ***Parker*** this Court noted:

> The fact that there is an honest 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.

Id. at 874(Emphasis added).

In ***Martinez***, the Third District properly applied this rule and held that interest did not begin to accrue until sixty days after the appraisal award was rendered. As the Third District recognized, if MARTINEZ is entitled to prejudgment interest it is to be calculated sixty days after the date of the appraisal award.

There is simply no valid Florida appellate decision which supports MARTINEZ's position, and there is no uncertainty of what the controlling law is. For example, the Federal Eleventh Circuit, in addressing Florida law, has clearly indicated that it is the court's impression, based on ***Lumbermens***, that Florida courts equate the date of loss with the date the proceeds would have been due under the policy, and hence, prejudgment interest only runs from that date. ***Golden Door Jewelry Creations Inc. v. Lloyd Underwriters Non-Marine Association,*** 117 F.3d 1328, 1341 (11th Cir. 1998); ***Columbia Casualty Company v. Southern Flapjacks, Inc.,*** 868 F.2d 1217, 1219 (11th Cir. 1989).

Likewise, Florida district courts, in decisions too numerous to list, have also universally concluded that the date of loss for the calculation of prejudgment interest equates to the date proceeds would have been due under the policy, **E.g**., ***Liberty Mutual Ins. Co. v. Alvarez***, 785 So.2d 700 (Fla. 3rd DCA 2001); ***Aries Ins. Co. v. Hercas Corp***., 781 So.2d 429 (Fla. 3rd DCA 2001); ***Biscayne Supermarket, Inc. v. Travelers Ins. Co.***, 485 So.2d 861 (Fla. 3rd DCA 1986). In sum, controlling Florida Supreme Court precedent on the question of law at issue supports the Third District's decision. This is not a tort action in which, as ***Argonaut Ins. Co. v. May Plumbing Company***, 474 So.2d 212 (Fla. 1995) holds, prejudgment interest runs from the date

of the tort. This is a contract action with an entirely different rule which was correctly followed by the Third District. The law is well settled, and should not be disturbed at this point.

CONCLUSION

As set forth above, the Court should reverse that portion of the Third District's opinion holding the **Florida Arbitration Code** is inapplicable and approve of the results reached in ***Hoenstine v. State Farm Fire & Casualty Co***., and ***Florida Farm Bureau Casualty Ins. Co. v. Sheaffer***. If the Court upholds the arbitration award, however, the court should simply affirm the Third District's finding that prejudgment interest runs from the date the proceeds were due under the policy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 15 day of October, 2001 to: **Lauri Waldman Ross, Esq.**, Two Datran Center, Suite 1705, 9130 S. Dadeland Blvd., Miami, FL 33156.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply/Answer Brief of Petitioner/Cross-Respondent was prepared in 14-point Time New Roman font.

BY:_____
CHRISTOPHER J. LYNCH

APPENDIX

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