In the Supreme Court of Florida

CASE NO. SC06-2494

FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

Petitioner,

v.

EUGENE A. COX and DEBRA COX,

Respondents.

BRIEF OF AMICUS CURIAE CITIZENS PROPERTY INSURANCE CORPORATION IN SUPPORT OF PETITIONER FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY

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I. STATEMENT OF AMICUS' IDENTITY AND INTEREST IN THE CASE

Citizens Property Insurance Corporation ("Citizens") is a statutorily-created insurer of last resort. Citizens is authorized to write insurance in Florida in accordance with Section 627.351(6), Fla. Stat. (2004). The Florida Legislature created Citizens in 2002 by combining the Florida Residential Property and Casualty Joint Underwriting Association and the Florida Windstorm Underwriting Association. Citizens was created "to assist in assuring that property in the state is insured so as to facilitate . . . replacement of damaged or destroyed property in order to reduce or avoid the negative effects otherwise resulting to the public health, safety and welfare; to the economy of the state; and to the revenues of the state and local governments needed to provide for the public welfare." Section 627.351(6)(a)(1).

Citizens insures more property in Florida than any private insurer. Currently, Citizens has approximately 1.3 million policies in force. Many properties insured by Citizens are in high-risk areas for windstorm, and Citizens insures more high-risk properties than any private insurer.

The issue in this case, as certified by the First District, is whether the valued policy law ("VPL"), § 627.702, Fla. Stat. (2004), requires an insurance carrier to pay policy limits to the owner of a structure which is deemed a total loss where the structure was damaged in part by a covered peril, but is significantly damaged by

an excluded peril.

Citizens seeks to participate as an *amicus* herein because resolution of the issues presented in this case as to the meaning and application of the VPL is of great importance in hundreds of cases pending against Citizens, in which insureds are making many of the same claims which are the subject of this case.

The First District, in *Litvak v. Scylla Properties, LLC*, --- So. 2d. ---, 2006 WL 3740640 (Fla. 1st DCA Dec. 1, 2006), stated that this case does not determine the effect of the VPL on Citizens, since Citizens was created by statute and its enabling legislation must be taken into account in construing its policies. *Litvak*, 2006 WL 3740640, fn. 1. Nonetheless, Citizens maintains a great interest in the issue certified to this Court. For example, if this Court agrees with Farm Bureau and Citizens that the VPL does not require payment of policy limits where the covered peril did not cause a total loss, Citizens would benefit from such a holding.

Amicus Citizens supports the position of Petitioner Farm Bureau. Both Citizens and Farm Bureau seek an answer to the certified question that the VPL does not mandate payment of policy limits unless an insured peril caused a total loss. Citizens submits that the dissenting opinion of Judge Polston in the opinion below is the correct analysis of the meaning and application of the VPL.

II. SUMMARY OF ARGUMENT

The majority opinion below misconstrued the VPL as requiring payment of policy limits when the insured peril does not cause a total loss. The holding that the VPL requires an insurer to pay policy limits if an insured structure is a total loss, and the insured peril caused any damage above the deductible, is contrary to the history, purpose and wording of the VPL. The VPL only applies when an insured peril causes a total loss.

Requiring a wind insurer to pay policy limits where a structure is rendered a total loss by flood, so long as the insured can demonstrate the existence of any wind damage, would render the wind carrier a *de facto* flood carrier. Such construction is contrary to the plain language of the VPL, Florida public policy and federal public policy as manifested in the national flood insurance program. This Court should reverse the majority decision below and hold that the VPL does not require an insurer to pay policy limits unless the covered peril caused a total loss.

III. STANDARD OF REVIEW

A judgment on the pleadings is subject to *de novo* review on appeal. *E.g., Henao v. Prof'l. Shoe Repair, Inc.*, 929 So. 2d 723, 725 (Fla. 5th DCA 2006). A *de novo* standard also applies to questions of statutory construction on appeal. *E.g. Waste Management, Inc. v. Mora*, 940 So. 2d 1105, 1107 (Fla. 2006).

IV. ARGUMENT

1. The VPL Statutory Interpretation Issue

The 2004 version of Florida's VPL provided in pertinent part:

> In the event of the total loss of any building . . . insured by any insurer as to a covered peril . . . the insurer's **liability, if any,** under the policy **for such total loss** shall be in the amount of money for which such property was so insured as specified in the policy and **for which a premium has been charged and paid**. (emphasis supplied)

Section 627.702, Fla. Stat. (2004).

The basic statutory construction issue in this case is whether "if any" in the 2004 VPL refers to "liability", or whether it refers to "liability … under the policy for such total loss." The First District read "if any" as applying only to the word "liability", which led to its conclusion that any liability at all meant liability for policy limits. Citizens submits that "if any" refers to whether the carrier has liability under the policy **for a total loss**. If a carrier has liability for a total loss, the VPL dictates that the carrier's liability is for the face amount of the policy. If a carrier does not have liability for a total loss, the VPL simply does not apply. In the instant case, since the insured peril of wind did not cause a total loss, Farm Bureau does not have liability for a total loss, and the VPL does not apply to it.

In addition, the VPL states that an insurer's liability for a total loss is "in the amount of money for which such property was so insured as specified in the policy

and for which a premium has been charged and paid." Section 627.702, Fla. Stat. (2004)(emphasis supplied). Wind insurers' premium rates are based on the risk of loss due to wind damage, not flood damage. The Coxes did not pay premiums to Farm Bureau based on exposure for flood damage. In the event of a multi-peril loss, it is contrary to the terms of the VPL to apply it to separately-insured single peril coverages such as windstorm coverage. In such circumstances, the total losses alleged were not caused by the insured peril for which a premium was "charged and paid", as required by the VPL.

2. <u>Wind and Flood Risks are Separately Underwritten and Insured</u>

Coverage for wind losses and for flood losses are subject to entirely separate insurance, pursuant to the National Flood Insurance Act ("NFIA"), 42 U.S.C. § 4001, *et seq.*, passed in 1968 as a matter of national policy because of previous disasters from flood for which property owners had not purchased insurance at all.[1] The NFIA established a unified national flood insurance program ("NFIP"), under which the federal government provides flood insurance and in exchange mandates that participating communities undertake appropriate flood control measures.

[1] Congress found that "many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions." 42 U.S.C. § 4001(b). *See also, Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 387-388 (9th Cir. 2000). Congress sought to establish "as a matter of national policy" a program of flood insurance that would "complement and encourage preventive and protective measures" (42 U.S.C. § 4001(a)(3)) and would be integrally related to a unified national program for flood plain management." *Id.* § 4001(c)(2).

Flood policies are governed exclusively by federal law, 44 C.F.R. Part 61 App. A(1), Art. IX; *see also, e.g. Gibson v. American Bankers Ins. Co.*, 289 F.3d 943, 949 (6th Cir. 2002), and are not subject to state valued policy laws. *See, e.g., Greer v. Owners Ins. Co.*, 433 F.Supp.2d, 1267 (N.D. Fla. 2006). Flood insurance policies are issued directly by the Federal Emergency Management Agency ("FEMA") or through private insurers acting as "fiscal agents" of the federal government. *See, e.g. Gowland v. Aetna*, 143 F.3d 951, 952 (5th Cir. 1998).

The NFIA established a pool of private insurance companies which undertook the administrative implementation of the program. In return, the private insurance companies received a percentage of the premiums paid and are exposed to a minimum risk of loss because the federal government, as guarantor, pays all allowable claims. *See Eddins v. Omega Insurance Co.*, 825 F.Supp. 752, 753 (N.D. Miss. 1993). NFIP premiums are deposited in the National Flood Insurance Fund in the Treasury, after deducting fees and costs. 42 U.S.C. § 4071(d). Flood insurance claims are paid from United States Treasury funds. 44 C.F.R. Pt. 62, App. A, Art. IV. *See, Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 165 (3rd Cir. 1998) (regardless of whether FEMA or a private insurer issues a flood insurance policy, United States Treasury funds pay the claims).

While flood coverage is provided under federal flood policies, windstorm coverage is included in the property coverage of homeowners policies for

residential properties and commercial general liability ("CGL") policies for business properties. Both homeowners and CGL policies exclude flood coverage due to the federal preemption of the field of flood insurance.

The federal program for flood insurance does not cover wind damage. *See, e.g., Greer v. Owners Ins. Co.*, 434 F.Supp.2d 1267, 1274-1275 (N.D. Fla. 2006). Similarly, there is nothing in the Florida Insurance Code that indicates the Legislature ever intended for wind insurers to pay for flood damage. Citizens submits that, if the Legislature had intended in the 1982 VPL amendment (Initial Brief p. 17) to make such a massive change as requiring wind insurers to pay for flood damage, thereby completely undermining the NFIP incentives, it would have made it clear that it was doing so.

Application of the VPL to windstorm and flood coverage is contrary to and undermines the incentives and limited protections provided by the NFIP and Florida's windstorm legislation. NFIP was crafted to create disincentives for building in high risk areas. Allowing insureds a double recovery from wind and flood carriers for the same loss is contrary to the stated public policy goals of both the NFIA and Citizens' enabling legislation and could have the effect of encouraging building in high risk areas.

Under the VPL, if two fire insurers issue policies on a house which is totally destroyed by fire and the property owner paid the premium on both policies, then

both insurers are required to pay policy limits. Such a requirement honors the contracts of insurance between the property owner and the respective insurers and serves the purposes of the VPL as set forth in *Springfield Fire & Marine Insurance Company v. Boswell*, 167 So. 2d 780 (Fla. 1st DCA 1964).

On the other hand, the same does not hold true for carriers insuring different risks with respect to the same property. For example, if a wind carrier determines that a dwelling is worth $200,000 and issues windstorm coverage (which excludes flood coverage) in that amount, the fact that another insurer issues flood coverage in the amount of $200,000 does not mean the property has an insurable value of $400,000. It simply means two carriers covering separate risks agree that the insurable value of the property is $200,000. The opinion on review would hold that the insured receives $400,000, if the structure is destroyed 95% by flood damage and also has 5% wind damage.

3. Requiring Insurers to Pay for Uninsured Losses Would Hinder Legislative Efforts to Maintain an Orderly Insurance Market in Florida

Farm Bureau's and Citizens' argument that the VPL applies to a total loss caused by a covered peril, but does not apply to a total loss caused by an excluded peril, is consistent with the language of the VPL and the Legislature's findings and enactments regarding windstorm coverage. For example, the first paragraph of Citizens' enabling legislation states that:

> The Legislature finds that actual and threatened catastrophic losses to property in this State from hurricanes have caused insurers to be unwilling or unable to provide property insurance coverage to the extent sought and needed.
>
> Section 627.351(6)(a)(1), Fla. Stat.

The statute intended to depopulate the size of Citizens states that:

> It is the intent of the Legislature to provide a variety of financial incentives to encourage the replacement of the highest possible number of Citizens Property Insurance Corporation policies with policies written by admitted insurers at approved rates.
>
> Section 627.3511(1), Fla. Stat.

More recently, the Legislature held Special Session 2007A, and enacted CS/HB 1A. In the preamble to the bill, the Legislature states various findings, including that Florida homeowners are struggling under increased insurance costs, that the increase in cost of property insurance demands immediate attention, that affordability of property insurance creates financial burdens and financial crises for property owners, and that the availability and stability of property insurance rates are critical issues to the residents of this State.

The Staff Analysis for CS/HB 1A recognizes that the number of companies writing property residential coverage has been declining steadily, and that "it appears the private industry may have reached its threshold for risk in Florida's residential property markets." *House of Representative Staff Analysis*, HB 1A CS,

p. 4 (January 17, 2007). The Staff Analysis further notes that the number of policies issued by Citizens has increased, and that such increase is a symptom of a troubled private insurance market. *Id.*

Holding insurers liable for policy limits, when total losses were caused by an excluded peril, would only make market conditions worse.[2] The overriding goal of the Legislature in creating the Florida Windstorm Underwriting Association, the Florida Residential Property & Casualty Joint Underwriting Association, Citizens and the Hurricane Catastrophe Fund was to maintain a viable and orderly insurance market to protect the economy of the State. Requiring wind carriers to pay policy limits for houses destroyed by flood, where there was any wind damage, would undermine the many efforts made by the Legislature to improve the insurance situation. It could drive insurers from the State. It would increase the size of Citizens, and Citizens' premiums would dramatically increase based on the new exposure of paying policy limits where a structure is destroyed by flood and minimally damaged by wind. Such a premium increase is mandated by law in the case of Citizens, since Citizens is required to charge actuarially sound premiums. Section 627.351(6)(d)1, *Florida Statutes*.[3]

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[2] The 2005 Legislature overturned the *Mierzwa* decision going forward, but perceptions in the private market remain important to attracting private insurers and depopulating Citizens.

[3] Section 627.351(6)(d)1 provides: "It is the intent of the Legislature that the rates for coverage provided by the corporation be actuarially sound and not competitive

Also, Citizens is required by statute to levy assessments to cover its operating deficits. Section 627.351(6)(b)(3). Deficits occur when claims and operating expenses exceed premiums and reserves. Deficit assessments are paid by virtually all residents of the State. Requiring wind carriers, including Citizens, to pay for flood damage for which they do not collect premiums, increases the risk of deficits and assessments. The residents of Florida should not have to subsidize property owners who either: (1) choose not to purchase flood insurance and have a total loss caused by flood, or (2) purchase and collect flood insurance, and still seek wind policy limits in addition to their flood insurance recovery. Allowing such property owners a double recovery (from both their wind and flood carriers) is a perversion of state and national public policy and is contrary to the plain language of the VPL.

V. CONCLUSION

Based upon the foregoing, *Amicus* Citizens Property Insurance Corporation hereby respectfully submits that the First District's decision herein should be reversed, and the certified question answered in the negative.

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with approved rates charged in the admitted voluntary market, so that the corporation functions as a residual market mechanism to provide insurance only when the insurance cannot be procured in the voluntary market."

Dated this ___ day of February, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Mark J. Upton, Esq., Daniell, Upton, Perry & Morris, P.C., Post Office Box 1800, Daphne, AL 36524; Elliot H. Scherker, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131; and Charles F. Beall, Jr., Esq., Moore, Hill & Westmoreland, P.A., P.O. Box 13290, Pensacola, Florida 32591-3290; Louis K. Rosenbloum, Esq., 4300 Bayou Boulevard, Suite 36, Pensacola, FL 32503; Elizabeth K. Russo, Russo Appellate Firm, P.A., 6101 Southwest 76th Street, Miami, FL 33143; and Gregory M. Shoemaker, Esq., P.O. Box 13510, Pensacola, FL 32591, on this ___ day of February, 2007.

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CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that the text of this Brief complies with the font requirements set forth in Rule 9.210, Florida Rules of Appellate Procedure.

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