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* STATE FARM FLORIDA INSURANCE COMPANY FILED IN SUPPORT OF PETITIONER

Respectfully submitted,

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STATEMENT OF *AMICUS* IDENTITY AND INTEREST IN THE CASE

State Farm Florida Insurance Company is a Florida insurer that is authorized to write, and is engaged in the business of writing, insurance in Florida, including homeowners and commercial policies that provide property coverage. State Farm Florida is one of the largest private writers of property insurance in Florida. The State Farm Florida property policies are like the Florida Farm Bureau policy at issue here in that both expressly provide coverage for losses from wind damage and both expressly exclude coverage for losses from flood damage. State Farm is currently processing pre-June 1, 2005 claims throughout Florida which involve structures that sustained wind damage and flood damage during hurricanes.

State Farm Florida's interest in participation as an *amicus curiae* herein is based on a need shared by all windstorm carriers, their insureds, and the trial courts throughout Florida to obtain one, definitive final ruling from this Court as to how, if at all, the pre-June 1, 2005 version of Florida's valued policy law applies to structures that sustained partial losses from wind and partial losses from flood during pre-2005 hurricanes.

SUMMARY OF ARGUMENT

Amicus curiae State Farm believes that the First District decision has misconstrued the pre-2005 version of the Florida valued policy law, and in a way that both conflicts with and goes vastly beyond the Fourth District's decision in

Florida Windstorm Joint Underwriting Ass'n v. Mierzwa, 877 So. 2d 774 (Fla. 4th DCA 2004), also a misconstruction of the statute but far more limited in reach. As a result of the uncertainties as to how or if the pre-2005 valued policy law should be applied, confusion now reigns throughout Florida for insurers, insureds, and courts attempting to reach the proper decisions for dealing with, and paying for, the repairing and rebuilding of pre-2005 hurricane damaged structures.

A final answer is clearly needed. The answer should establish that the valued policy law does not apply to *partial* losses caused by covered perils, and does not apply to require property insurers to cover losses clearly excluded from the policies purchased by the insureds. The *Cox* and *Mierzwa* decisions - requiring insurers to pay for losses they did not insure - are aberrations in the law and should be disapproved.

ARGUMENT

A. Overview of the current state of the law

Amicus curiae State Farm Florida Insurance Company respectfully submits that the First District's decision in this case has construed Florida's valued policy statute, §627.702(1), Fla. Stat., in a manner that creates obligations that were never intended by the statute or its wording, and has activated the constitutional concerns that this Court expressed in *AIU Insurance Co. v. Block Marina Investment, Inc.*,

544 So. 2d 998 (Fla. 1989). Because of the importance of the First District's ruling, *amicus curiae* State Farm sought leave to file this brief in support of Petitioner**.**

The vast number of cases involving the issue, and the need for resolution of the issue by this Court, was pointed out in *Arenson v. Citizens Property Ins. Corp.*, 2005 WL 2807153, 1 (N.D. Fla. 2005). The *Arenson* court issued a stay of a case in which insureds sought full face value payments on their homeowners policies based on the valued policy law as interpreted in the Fourth District's decision in *Mierzwa v Florida Windstorm Underwriting Association*, 877 So. 2d 774 (Fla. 4th DCA 2004), which decision was cited in (and vastly expanded by) the First District's decision here:

> This is an issue of major significance throughout the state of Florida. In *Mierzwa v. Florida Windstorm Underwriting Assoc.*, 877 So. 2d 774 (Fla. 4th DCA 2004), the Fourth District Court of Appeal for Florida held that Section 627.702 requires an insurer to pay the face amount of the policy when a property is considered a "total loss" due in any part to the risk covered by the policy. Because of the widespread application of this statute to similar factual situations throughout Florida, it seems certain that a decision from the Supreme Court of Florida will be necessary for final resolution.

2005 WL 2807153, p 1. In staying the case before it, the *Arenson* court articulated the need for a definitive ruling from this Court:

> Exceptional circumstances exist in this case. In resolving the issues presented, this court would be called upon to decide an issue of unsettled state law which significantly affects a substantial portion of Florida's citizens. The major issue presented in this case is ubiquitous and affects more than just the parties to this federal action. ***Both federal and state courts across the state of Florida have had hundreds of lawsuits filed***

> ***following the 2004 hurricane season, all of which hinge predominantly on the interpretation of Section 627.702, and its application to structural damage caused by flooding.*** Thus, there is little doubt that this issue will eventually be resolved by the Supreme Court of Florida.

2005 WL 2807153 at 4. As indicated in *Chance v. Auto-Owners Ins. Co.*, 2007 WL 220415, p 1 (N.D. Fla. 2007), other federal district judges in Florida have now also stayed hurricane cases presenting similar issues pending this Court's resolution.

At present, cases arising in the counties that are subject to the Fourth District are governed by the *Mierzwa* decision referenced above. The issuance of the broader ruling by the First District in the instant case, and this Court's acceptance of the case for review, means that trial courts throughout the state no longer have just one appellate court decision on the issue to follow. Such circumstances create instability in the law, and bear the potential for differing rulings from judge to judge or county to county. And, as the Court is aware, the Third District already certified a conflict question as to one aspect of the *Mierzwa* decision to the Court in *Citizens Property Ins. Corp. v. Ceballo*, 934 So. 2d 536 (Fla. 3d DCA 2006), currently pending under Case No. SC06-1088 and scheduled for oral argument on February 15, 2007. Also, the First District recently issued a decision in V*anguard Fire and Cas. Co. v. Golmon*, 2006 WL 3299196 (Fla. 1st DCA Nov 15, 2006), which appears to agree with *Ceballo*, and thus disagree with *Mierzwa* on the law and ordinance coverage point in question.

In the midst of this ongoing uncertainty, insureds, insurance companies and their claims representatives, attorneys, and trial courts must make decisions daily as to what should be paid; whether structures should be demolished or repaired; how to determine what losses are - and are not - covered; what issues are subject to appraisal; and how innumerable sub-issues stemming from the uncertainties as to the main issues should be resolved. The protracted uncertainty is hard on all of the affected individuals, entities, and institutions. *Amicus curiae* State Farm Florida respectfully submits that, under the circumstances, this Court providently exercised jurisdiction over this matter and should proceed to resolution on the merits.[1]

B. The First District's decision

The First District decision herein went far beyond the Fourth District's *Mierzwa* decision, which, respectfully, was already a disastrous misconstruction of the valued policy statute. The *Mierzwa* majority held that if a partial loss from the covered peril of wind combines with a partial loss from the excluded peril of flood to render an insured structure a total loss, the windstorm insurer must pay the full face value of its policy. The *Mierzwa* decision, however, was at least limited by the facts before the *Mierzwa* court, i.e., it was limited to cases in which the partial loss

[1] It is noted that the decision to accept jurisdiction was not unanimous, and *Amicus* State Farm thus included the information recited in text to urge the Court to issue a decision on the merits. There truly is a question of great public importance presented herein.

from the covered peril of wind was responsible for the majority, i.e., more than 50%, of the total damage. *See Mierzwa, supra*, 877 So. 2d at 778, n 5.

The First District decision herein, however, construed the valued policy statute to require windstorm insurers to pay the full face value of their policies if there was *any* wind damage at all, even if it amounted to less than 1% - or less than .00001%, for that matter - of the total damage. Thus, if a gust of hurricane wind caused a tree branch to break a $20 window pane, followed by a tidal surge that inundated and destroyed the entire $400,000 house, the valued policy law - according to the First District's construction - requires the windstorm carrier to pay the full $400,000 face value of the wind policy. Of that payment, $399,980 would be for damage caused by the excluded peril of flood, for which no premium was paid by the insured or received by the insurer.

The First District's decision did indicate concern (and properly so, *amicus* respectfully submits) that its construction of the statute does not comport with "considerations like ease of actuarial analysis, the economics of the insurance industry, and even our own notions of fairness[.]" 943 So. 2d at 826. Yet, the First District indicated that it felt compelled to reach its construction of the valued policy statute in essence for two reasons: (1) because the court thought that there was no other reasonable construction of the statute; and (2) because the court

thought that the history of the amendments to the statute permit no other construction.

Amicus curiae State Farm respectfully submits that both reasons are demonstrably incorrect. The legitimate concerns voiced by the First District, not least over the unfairness of the construction it felt compelled to make, are resolved when the valued policy statute is given the reasonable construction that accords with its history and intent, as detailed fully in the initial brief of Petitioner.

C. The unsoundness of the First District's reasoning

1. Misconstruction of the "liability of the insurer, if any" language

The Florida valued policy law, like other valued policy statutes, is directed only to mandating the amount to be paid for total losses caused by covered perils for which premiums have been received.[2] Valued policy laws have never required insurers to pay the valued policy amount for losses caused by perils *not covered by their policies*.

Florida's valued policy law was originally passed as Chapter 4677 of the General Laws of 1899. This Court first addressed the valued policy statute in 1904, shortly after its enactment, holding it to be constitutional and describing its

[2] A good background discussion of valued policy statutes throughout the country is provided in K. Hual and M. Schofield, VALUED POLICY LAW: A HISTORICAL PERSPECTIVE ON THE COMPOUNDING EQUATION, 24 No. 3 Trial Advoc. Q. 29 (Summer, 2005).

purpose, i.e., that parties agree on a liquidated amount for a total loss prior to the time that any such loss occurs. *Hartford Fire Ins. Co. v. Redding*, 37 So. 62, 67 (Fla. 1904). As explained by the Court:

> [The valued policy law] serves to remove what would otherwise be a very troublesome and difficult issue to resolve either between the parties by negotiation or by the courts in litigation. This issue is the money loss sustained which the insurer must indemnify. The value specific property had is hard to ascertain after its destruction because the usual evidence relied upon for such assessment is unavailable. ***The difficulties and uncertainties this created were productive of suspicions of and opportunities for false or exaggerated claims on the one hand and for accusations, minimizations and oppressions on the other. Thus, vexatious contests on this issue would persist when the best interests of all demanded prompt settlement and relief from the loss. A solution to this is found in the statute which in effect requires the parties to ascertain and agree in advance what the value is and in the case of total loss by the insured peril this amount shall be paid as liquidated damages***.

Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784 (Fla. 1st DCA 1964). The point of valued policies with respect to total losses is thus to have the parties agree beforehand to the value of the property, such that, upon the happening of a total loss, no time or court resources need be wasted on arguments about the amount the insured should recover. The insurer cannot argue about depreciation, and the insured cannot argue that the property has appreciated in value due to improvements made, etc.

Absolutely nothing about valued policy statutes, however, contemplates or provides that in the event of a total loss an insurer will be required to pay for losses resulting from perils ***that are not covered by the policy sold to the insured***.

Reference to Florida's own valued policy law makes clear what also seems apparent as a matter of basic contract law and fairness, i.e., that the statute only applies if a loss from a covered peril has occurred, and the insurer has received the premium for providing coverage for that loss. The pertinent language of the statute is: ***"In the event of the total loss of any building*** ... located in this state and 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."*** §627.702(1), Fla. Stat. (2004).

State Farm Florida respectfully submits that the first reason that the First District's decision is incorrect is that it disregarded these portions of the statute. The First District focused instead on the "if any" phrase in the statute, virtually in isolation, reasoning that the ***only*** meaning to be derived from the "if any" language is that *if* the insurer has to pay *anything* in connection with a structure that has become a total loss, it must pay the whole policy face value.

The actual meaning of the phrase "the insurer's liability, if any" in the valued policy law was explained by this shortly after the valued policy law was first adopted, as follows: "The Valued Policy Law does not undertake to deprive the insurer of any proper defense it may have to an action upon the policy, except in respect to the measure of damages[.]" *Hartford Fire Ins. Co. v. Redding*, *supra*, 37

So. 62, 67 (Fla. 1904). The "liability, if any" language confirms that, notwithstanding the fact that a peril covered by the policy has caused an insured structure to become a total loss, the insurer still may have coverage defenses to a claim (e.g., arson on the part of the insured in the case of a total loss from fire) as a result of which the insurer may have *no liability* under the policy at all.

2. Misapprehension of the significance of the statutory amendments

The First District also expressed a belief that the manner in which the valued policy statute was amended over the course of its history compelled its holding that the pre-June 1, 2005 version of the statute requires payment of excluded losses. In so doing, the First District focused on the 2005 amendment, which, although not made retroactive, was obviously clarifying that the valued policy had never been meant to require insurers to pay for losses not covered by their policies.

The more significant amendment, however, for purposes of the present analysis was the amendment made in 1982, *see* Ch. 82-243, §539, at 1551-1552, Laws of Florida - the first amendment ever to be made after the statute's original enactment in 1899. *See* Chapter 4677 of the General Laws of 1899. The history leading to the 1982 amendment shows why the First District placed undue emphasis on the difference between the 1982 version and the 2005 version.

In the late 1800s and early 1900s, when valued policy laws were first adopted by various states, including Florida, the property insurance policies to which they

were addressed were fire insurance policies, as fire was then the main peril to property for which the insurance industry had developed property coverage. *See generally, e.g., Chauvin v. State Fire and Cas. Co.*, 2006 WL 2228946, *6 (E.D. La. 2006). Florida's valued policy statute, for example, applied only to total losses from fire or lightning from 1899, when the statute was first passed, until the 1982 amendment. In the interim, the insurance industry developed coverages for losses from various additional perils (windstorm being one of them). Since the valued policy law was directed at liquidating the payment to be made under the policy if a ***covered*** peril caused a ***total*** loss, valued policy laws, including Florida's, were also eventually amended to apply to all ***covered*** perils.

As the First District itself noted, and yet ignored, the Senate Staff Report for the 1982 amendment to Florida's valued policy law made it clear that the statute was being expanded so that it would require payment of face value *not* just for total losses from fire or lightning, but also for total losses from any of the ***covered*** perils which had come to be included within the coverage of property insurance policies:

> According to the Staff Report, the Law was changed in 1982 because "[u]nder current law the coverage applies only to loss by fire or lightning. At the time the valued policy law was originally written most coverage did just cover those perils. ***Now, coverage is much broader, and to the extent that the valued policy law is good public policy it should apply to all covered perils."*** Fla. H.R. Comm. on Ins., HB 4-F, as amended by HB 10-G (1982) Bill Analysis 91 (rev. June 3, 1982)(on file with the Fla. State Archives, Dep't of State).

943 So. 2d at 829, n 3. The critical point of the amendment is that while additional perils were now to be brought within the ambit of the valued policy statute, the statute was still only intended to serve its original purpose of requiring payment of a liquidated sum in the event of a ***total loss from a covered peril.***

The significance of the historical origins of valued policy laws at a time when property insurance generally covered only the peril of fire is that, as originally conceived in their historical context, valued policy laws were only intended to differentiate between (1) fires which caused a property to become a ***total loss***, and (2) fires which caused only a ***partial loss***. Valued policy laws were designed for the sole purpose of addressing ***total losses***, to provide an easy process for getting an insured paid if the insured property became a total loss from a fire, the only peril then covered by a property insurance policy.

Valued policy laws were never, however, intended to address ***partial loss*** situations. Partial losses do not, for obvious reasons, lend themselves to a pre-determined flat sum payment, but rather must be adjusted based on what damage has actually occurred. A grease fire in a kitchen, for example, might cause damage only to the stove; might spread to other areas in the kitchen; or might also cause smoke damage throughout other sections of the house. The insurance amount owing on such partial damage can only be determined after the fact by calculating what must be done to repair the damaged areas.

The problem when Florida got around to amending the statute in 1982 to make it apply to total losses from the more expanded list of perils for which the property insurance industry had developed coverage (beyond just fire and lightning) was that the amendment was made inartfully, at least in hindsight taking into account the then not-contemplated circumstances of combining excluded partial losses with covered partial losses. The Legislature merely removed the words "from fire or lightning" after the words "In the event of the total loss of any building..." and did not think to add "from any covered peril", although that was precisely the mission of the amendment, as directly stated in the Senate Staff Report referenced above. It was only this over-simplified approach to rewording the statute that even opened the door for the *Mierzwa* court's incorrect conclusion - thereafter adopted by the First District in this case - that the valued policy law requires payments for excluded losses.

With this historical background, it is easier to understand why valued policy laws do not apply, and should not be held to apply, in hurricane cases like Respondents' herein. Such cases almost always involve separate, partial losses caused by two distinct perils - wind and flood. Of course, in instances where the covered peril of wind alone causes a structure to become a total loss, the valued policy law does require payment of the face value of a homeowners policy, and no property insurer would contend otherwise. But where, as here, the insureds have

suffered only a ***partial loss*** from wind, the valued policy law does not apply to require payment for both the covered wind loss and the excluded flood loss.

Courts in Louisiana dealing with similar arguments as to the effect of valued policy laws on claims being made by insureds with Hurricane Katrina damage have come to precisely this conclusion - i.e., that valued policy laws "require an insurer to pay the full value of the policy only when a covered peril causes a total loss; the loss must be both total and covered." *Turk v. Louisiana Citizens Property Ins. Corp*., 2006 WL 1635677, *1 (W.D. La. 2006). *See also Richard v. State Farm Fire and Cas. Co.*, 2006 WL 3499901, *4 (W.D. La. 2006); *Chauvin v. State Fire and Casualty Co.*, 450 F. Supp. 2d 660 (E.D. La. 2006). The *Turk* court stated:

> The Petitioners sought a judgment declaring that the Valued Policy Law, LA R.S. 22:695, required the defendants to pay the full face amount of the homeowner's policy ***as long as the covered property was rendered a total loss and any portion of the damages sustained by the premises was attributable to a peril covered by the policy***, such as wind. The defendants sought a judgment declaring that the Valued Policy Law does not require payment of the full face amount of the homeowner's policy limits unless the property is rendered a total loss by a covered peril.
>
> ***[B]ecause the homeowner policies at issue exclude coverage for damage caused by flood water, and thus the policyholders did not pay a premium for flood coverage under their homeowner policies, LA R.S. 22:695 cannot be construed to require State Farm or LA Citizens to pay the policy limits under their respective policies when the insured property was rendered a total loss, in whole or in part, by a non-covered peril such as flood waters, rather than in whole by a covered peril such as wind damage.***

> That is, if the property damage is equal to a 100% loss and 50% of that loss is attributable to a covered peril and 50% of that loss is attributable to a non-covered peril, the Court does not read LA R.S. 22:695 to require insurers to pay the policy limit (i.e. 100% of the policy amount) in that instance. ***In such a case, the insurer would be responsible for paying only for the percentage of loss which is attributable to the covered peril.***

Turk v. Louisiana Citizens Property Ins. Corp., 2006 WL 1635677, *1 (W.D. La. 2006). As the *Richard* court later agreed:

> The [Louisiana Valued Policy Law] applies to require an insurer to pay the full value of the policy only when a covered peril causes a total loss; the loss must be both total and covered. [cites omitted]. In the event that the loss was caused in whole or in part by a non-covered peril, rather than in whole by a covered peril, the Court does not read the LVPL to require insurers to pay the full value of the policy limit.

Richard v. State Farm Fire and Cas. Co., supra, 2006 WL 3499901, at 4.

D. Constitutional concerns raised by the First District's construction

The construction given the valued policy statute by the First District here and by the *Mierzwa* court raises the constitutional concerns that this Court expressed in *AIU Insurance Co. v. Block Marina Investment, Inc.*, 544 So. 2d 998 (Fla. 1989) by requiring windstorm carriers to provide coverage for risks they have expressly declined to accept. In *AIU*, this Court reversed a Third District decision which held that an insurer would be prohibited from denying coverage for an excluded loss if the insurer failed to comply with the notice provisions of §627.426(2)(requiring insurers to inform insureds of the basis for a denial of coverage). This Court brought up the point that the Third District's construction of the statue in question

would require insurers to give insurance coverage to insureds where their policies "expressly excluded such losses from coverage." 544 So. 2d at 999. This Court pointed out that such a construction of the statute "[h]ad the effect of rewriting an insurance policy when section 627.426(2) is not complied with, thus placing upon the insurer a financial burden which it specifically declined to accept. Such a construction presents grave constitutional questions, the impairment of contracts and the taking of property without due process of law." 544 So. 2d at 1000.

The windstorm policies here undisputedly exclude coverage for loss caused by flood. The First District's decision, like the *Mierzwa* decision before it, nonetheless construed the valued policy statute to require homeowners insurers to pay for losses from flood, a peril expressly excluded by their policies, thus effectively re-writing the policies to impose on these insurers 'a financial burden which they had specifically declined to accept.' The same constitutional concerns expressed by this Court in *AIU* are activated here, and warrant a similar rejection of a statutory construction which, by creating coverages that do not exist under the policies as written, imposes on insurers financial burdens that they expressly declined to accept. Notably, the valued policy statute was only held constitutional in the first instance because this Court determined that that statute was not intended to - and did *not* - deprive insurers of any of their existing policy defenses. *Hartford Fire Insurance Co. v. Redding*, 37 So. 62, 65 (Fla. 1904).

E. Adverse effects on the public

The First District clearly believed that its construction of the valued policy statute would protect the public's interests, stating: "Statutes governing insurance contracts are to be construed to protect the public." 943 So. 2d at 845. The reverse, however, is true. The First District's decision (like *Mierzwa)*construes the valued policy statute to require property insurers to pay excluded losses for which no premium was received. This is roughly the equivalent of construing a statute regulating automobile sales to require motor vehicle sellers to give every customer two vehicles for the price of one. Outside the realm of fairy tales, gold cannot be spun from hay; the financial shortfall will have to be made up somewhere.

The most concrete example of how the public will bear some of the financial shortfall appears in the form of the statutorily-created Citizens Property Insurance Corporation, which is required under its enacting statute to pass on all losses it is unable to pay from premiums it has collected to *all insured homeowners in Florida*. *See* '627.351(6)(b) and '627.3512, Fla. Stat. The money Citizens is required to pay for the flood losses excluded by its policies (and for which Citizens accordingly never assessed or received premiums) must now be collected from all insured homeowners in the state through special additional assessments that the homeowners must pay on top of the current rates for their own homeowners policy premiums. *See* '627.351(6)(b) and '627.3512, Fla. Stat.

In an appeal that was pending before the First District involving many of the same issues as those presented here - *Citizens Property Insurance Corp. v. Scylla Properties, LLC,* et al., 1st DCA Case No. 1D05-3480 - Citizens reported a $516 million deficit for 2004 as of the time of filing its initial brief in September of 2005. (See Initial Brief of Appellant Citizens, Case No. 1D05-3480, p 29, n 11).[3] In short, the First District may have believed that its construction of the valued policy statute would "protect the public", but the reality is otherwise.

F. Valued policy laws should be left to their intended purpose

The fact is that, under current statutory schemes, wind losses and flood losses are the subject of entirely separate insurance schemes and policies. The separate flood insurance scheme was created by the federal government's enactment of the National Flood Insurance Act (ANFIA@), 42 U.S.C.A. ' 4001 *et seq*., passed in 1968 as a matter of national policy because of previous disasters from flood for which citizens had not purchased insurance at all. 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. Under the NFIP, flood insurance is limited to $250,000 for the structure, and issued in the form of NFIP standard flood

[3] The *Citizens v Scylla* case was remanded on grounds that final summary judgment was premature. *See* 32 Fla. L. Weekly D60 (Fla. 1st DCA 2006).

policies.[4]

Whatever limitations on recoveries for flood losses sustained during hurricanes may currently exist under NFIP flood policies, the answer is not distortion of state valued policy laws to require wind insurers to pay for flood losses that were *not* covered under *their* policies. Valued policy laws only set the values that must be paid when covered perils cause total losses. As summed up by the court in *Chauvin, supra* - which conducted a very careful and thoughtful analysis of the history and purpose of valued policy laws - however difficult the situations caused by nature's hurricane forces may be, neither legal nor moral answer can be found in attempting to use state valued policy laws to require insurers to pay excluded losses:

> The Court is mindful that Hurricanes Katrina and Rita have led to uninsured losses of catastrophic proportions. The Court would have welcomed a valid basis to alleviate the financial losses suffered by so many Louisiana homeowners. Unfortunately, the Court must recognize that the [valued policy law] was designed to fix valuations of losses and was not intended to expand coverage to excluded perils. The Court concludes that Louisiana's

[4] Homeowners purchase NFIP flood insurance directly from the Federal Emergency Management Agency (AFEMA@) or through private insurers, known as AWrite-Your-Own@ (AWYO@) carriers. All policies sold by FEMA and by WYO carriers are in the form of the Standard Flood Insurance Policy, the terms of which are prescribed by FEMA regulation. 44 C.F.R. Part 61 App. A. *See also* 44 C.F.R. '' 61.4(b), 61.13(d), (e), 62.23(c). Federal funds pay all of the claims under the flood policies, i.e., the federal government bears the risk of loss, with the WYO private carriers acting as its fiscal agents. *See* 42 U.S.C. ' 4071(a)(1); 44 C.F.R. ' 62.23(g)); *Wright v. Allstate Ins. Co.*, 415 F.3d 384 (5th Cir. 2005).

> Valued Policy Law does not apply when a total loss is not caused by a covered peril.

Chauvin, supra, 450 F. Supp. 2d at 669.

Amicus curiae State Farm Florida joins Petitioner in asking this Court to disapprove the First District decision under review and the *Mierzwa* decision that was used as its launching point. Those decisions represent a misuse of Florida's valued policy statute and should not be allowed to stand.

CONCLUSION

Based on the foregoing facts and authorities, *amicus curiae* State Farm Florida Insurance Company respectfully submits that the decision of the First District herein and the decision of the Fourth District in *Mierzwa* should be disapproved, and that the 2004 valued policy law should be held to apply, as intended, only to total losses caused by covered perils.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail this 12th day of February, 2007 to: Elliot Scherker, Esquire, Greenberg Traurig, P.A., Counsel for Petitioner Florida Farm Bureau Casualty Company, 1221 Brickell Avenue, Miami, FL 33131; Mark J. Upton, Esquire, Daniell, Upton, Perry & Morris, P.A., Co-Counsel for Petitioner Florida Farm Bureau Casualty Insurance Company, P.O. Box 1800, Daphne, AL 36526; Gregory M. Shoemaker, Esquire, Schofield, Wade, Roane & Shoemaker, P.A., Counsel for Respondents Eugene and Debra Cox, 25 West Cedar Street, Suite 450, Pensacola, FL 32502-5909; Louis K. Rosenbloum, Esquire, Louis K. Rosenbloum, P.A., Co-Counsel for Respondents Eugene and Debra Cox, 4300 Bayou Boulevard, Suite 36, Pensacola, FL 32503-2671; and Charles F. Beall, Jr., Esquire, Moore, Hill & Westmoreland, P.A., P.O. Box 13290, Pensacola, FL 32591.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing *Amicus* Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.
