SUPREME COURT OF FLORIDA

CASE NO. SC06-2494

FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

EUGENE A. COX and DEBRA COX,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT CASE NO. 1D05-4111

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondents Eugene A. Cox and Debra Cox accept the statement of the case and facts provided by petitioner Florida Farm Bureau Casualty Insurance Company ("Farm Bureau").

JURISDICTIONAL STATEMENT

The Coxes respectfully suggest that the issue certified by the court below is not a question of "great public importance" as contemplated by Article V, section 3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

First, although Farm Bureau and its amici suggest that the district court's decision raises an industry-wide issue that affects a vast number of pending claims, neither the record nor anecdotal information provided by amici confirm that assumption. To the contrary, Citizens Property Insurance Corporation, the state's largest windstorm insurance carrier, reported to the Task Force on Policyholder Services and Relations for Citizens Property Insurance Corporation on March 23, 2005, that it had received 16,080 claims from Hurricane Ivan and resolved 14,846 of these claims.[1] On that same date, Citizens reported only 314 so-called "Mierzwa claims" for policy limits under the Valued Policy Law. Although

[1] The report is available at http://www.fldfs.com/GeneralCounsel/Task%20Force%203_23_05%20.pdf.

undoubtedly more Mierzwa claims have been filed against Citizens and other insurers since that date, the number of claims affected by this court's decision seems relatively low compared to the total number of claims from Hurricane Ivan.

Second, and most importantly, the legislature drastically revised the Valued Policy Law in 2005, effective for claims filed after June 1, 2005. See Ch. 2005-111, § 16, Laws of Fla. Therefore, the issue addressed by the district court will not recur, and an answer to the certified question will have no bearing on future claims under the Valued Policy Law.

Third, an issue of great public importance under the Florida Constitution means "importance throughout the state, not just in a single geographic area." Raoul G. Cantero, III, Certifying Questions to The Florida Supreme Court: What's So Important?, 76 Fla. Bar J. 40, 40 (May 2002). "[I]ssues which arguably may be of 'great public importance,' but nevertheless are limited in their reach to the jurisdiction of a particular appellate district, are more appropriate for en banc consideration by that district court than for certification to the Florida Supreme Court." Id. The Coxes are not aware of any Mierzwa claims pending outside the area affected by Hurricane Ivan in 2004. Thus, the question certified by the district court directly affects only "a single geographic area"—Escambia, Santa Rosa and possibly Okaloosa counties.

In sum, although the question certified by the First District is certainly important, particularly to the immediate parties and those insured and insurers who have similar claims pending, it does not approach the level of "great public importance" in the constitutional sense. Accordingly, the Coxes urge the court to dismiss this case for lack of jurisdiction.

SUMMARY OF ARGUMENT

The legislature enacted the Valued Policy Law (VPL) in 1899 to encourage settlement of claims and prevent protracted and unproductive litigation between the insurance company and insured after a total loss to the insured property. The result reached by the Fourth District court in Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774 (Fla. 4th DCA 2004), and the court below in Florida Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823 (Fla. 1st DCA 2006), fully promotes that objective. On the other hand, Farm Bureau's position advocated by the dissent below—that an insurer is liable under the VPL only for the portion of the total loss caused by the covered peril—will condemn insureds to time-consuming, expensive litigation to accomplish the almost impossible task of apportioning the total loss between windstorm and tidal surge after a hurricane completely destroys the insured property.

Further, the result reached in Mierzwa and Cox is entirely consistent with the most fundamental principle of statutory construction—when the language of

the statute is unambiguous, the court must give the statute its plain meaning without questioning the wisdom of the legislature or the fairness of the result. In this case, the 2004 VPL unambiguously provides that "[i]n 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 insured . . . ." § 627.702(1), Fla. Stat. (2004) (emphasis supplied). This language means that if the insured suffers a total loss and the insurer has "any" liability for "a" covered peril, it must pay the insured the face amount of the policy even though an excluded peril operates concurrently to produce the total loss.

Farm Bureau argues that Mierzwa and Cox unfairly allow an insured to collect policy limits under the 2004 VPL after a total loss caused primarily by tidal surge excluded by the policy, even though windstorm caused only "1% percent of the total loss." Initial Brief at 1. This concern, however, is not justified because such claims do not exceed Florida's high windstorm deductibles authorized by section 627.701(3), Florida Statutes (2004). Further, it is highly unlikely that a hurricane will produce a tidal surge of sufficient force and depth to destroy a dwelling without simultaneously causing substantial windstorm damage to the structure. In any event, any inequity created by applying the district court's

interpretation of the 2004 VPL is purely a legislative concern which has now been addressed and eliminated for future claims.

Alternatively, if the court finds the 2004 VPL ambiguous, a construction favoring the insured prevails nonetheless because ambiguous insurance statutes incorporated into the policy by operation of law are liberally construed in favor of the insured to provide the greatest possible indemnity.

The legislative history for the 2005 amendments to the VPL fully supports the district court's construction of the 2004 VPL. The 2005 amendments represent the first time that Florida insurers have been permitted to apportion their liability under the VPL between damages caused by covered and excluded perils. The legislature, however, expressly prohibited retroactive application of the 2005 VPL to claims filed before the effective date, June 1, 2005. Therefore, the 2005 VPL does not apply to this case.

The court should categorically reject Farm Bureau's argument that the 2005 amendments clarify prior legislative intent. Although the Senate staff analysis accompanying the 2005 amendments to the VPL criticized the Mierzwa case and suggested legislative clarification, the legislature did not enact a clarifying amendment. In fact, such legislation was proposed in 2005 but did not become law. Further, the 46-year gap between the 2005 amendments and the 1959

amendment to the VPL which added the crucial language "if any" is much too long to consider the 2005 VPL as a clarification of prior legislative intent.

ARGUMENT

I. STANDARD OF REVIEW

Because this case arises from a judgment on the pleadings which construed a statute and interpreted an insurance policy, the de novo standard of review applies. See Borden v. East-European Ins. Co., 921 So. 2d 587, 591 (Fla. 2006) (statutory construction); Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005) (insurance policy interpretation); Martinez v. Florida Power & Light Co., 863 So. 2d 1204, 1205 (Fla. 2003) (judgment on the pleadings).

II. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE 2004 VPL SUPPORTS THE DISTRICT COURT'S CONSTRUCTION

A. History and Purpose of the VPL

Originally enacted in 1899, Florida's Valued Policy Law (VPL) "requires the insurer to fix the insurable value of the building, and to specify such value in the policy, and the measure of damages in case of total loss is fixed at the amount mentioned in the policy upon which a premium is paid." Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62, 65 (1904). The VPL was enacted "to simplify and facilitate prompt settlement of insurance claims when a total loss occurs" and, in such cases, to "suppress . . . haggling over the measure of liability." Springfield

Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 784-85 (Fla. 1st DCA 1964). As the court in Springfield Fire explained:

> It [VPL] 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 insured 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.

Id. at 784 (footnote omitted).

Before 1959, Florida's VPL provided: "In the absence of any change increasing the risk without the consent of the insurers, in case of total loss [by fire or lightning] the whole amount mentioned in the policy upon which the insurers receive a premium shall be paid . . . ." § 631.04, Fla. Stat. (1957). In 1959, the legislature amended the VPL to add the crucial words "if any":

> (1) In the event of total loss by fire or lightning of any building or structure located in this state and insured by any insurer as to such perils, in the absence of any change increasing the risk without the insurer's consent 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 for which premium has been charged and paid.

§ 627.0801(1), Fla. Stat. (1959) (emphasis supplied).

The next significant amendment occurred in 1982 when the legislature expanded the VPL's scope to include perils other than fire and lightning, while retaining the crucial language "if any" in the same location:

> (1) In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(11), located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, 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. (Supp. 1982). The VPL remained essentially unchanged until 2005 when the legislature dramatically altered the statute. See Ch. 2005-111, § 16, Laws of Fla. (Tab 4).[2]

B. Statutory Construction

In construing a statute, the plain meaning of the language selected by the legislature is the court's foremost consideration. See State v. J.M., 824 So. 2d 105, 109 (Fla. 2002). "'[W]hen the language of the statute is clear and unambiguous and

[2] "Tab" citations refer to respondent's appendix.

conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning.'" Florida Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954, 960 (Fla. 2005) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)). When the statute is unambiguous, "it is not this Court's function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute." State v. Rife, 789 So. 2d 288, 292 (Fla. 2001). As noted by the court below, "[j]udicial restraint requires [the courts] to defer to the Legislature's broad power to enact substantive law in conformity with the state and federal constitutions, even if [the courts] are persuaded that a particular law may have negative consequences." Florida Farm Bureau Cas. Ins. Co. v. Cox, 943 So. 2d 823, 827 (Fla. 1st DCA 2006) (slip op. at 3) (Tab 1).

With these principles in mind, the 2004 version of the VPL in effect when the Coxes sustained their total loss from Hurricane Ivan unambiguously provides:

> 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.

§ 627.702(1), Fla. Stat. (2004) (Tab 2) (emphasis supplied).

In interpreting the statute quoted above, the district court below and the court in Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774 (Fla. 4th DCA 2004) (Tab 3), reached the same result. In Mierzwa, the court explained:

> The meaning of the VPL is simple and straightforward. There are two essentials in the statute. The first is that the building be "insured by [an] insurer as to a [e.s.] covered peril." § 627.702(1). The second is that the building be a total loss. If these two facts are true, the VPL mandates that the carrier is liable to the owner for the face amount of the policy, no matter what other facts are involved as to the cost of repairs or replacement. That is to say, if the insurance carrier has any liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy. VPL § 627.702(1) ("[T]he insurer's liability, if any [e.s.] shall be [the face amount of insurance].")

Mierzwa, 877 So. 2d at 775-76 (emphasis the court's). The court below correctly adopted this analysis and explained further:

> If an insurer has any obligation under the policy to pay on account of a covered peril, and the structure is a total loss, then the insurer is responsible for paying the total amount of the policy. The statute provides that the insurer's "liability" "if any" is in the amount for which the property is insured. § 627.702(1), Fla. Stat. (2004). "Liability" means "legal responsibility to another" or the "state of being legally obligated or accountable." Black's Law Dictionary 925 (7th ed. 1999). "Liable" is defined as "legally obligated." Id. at 927. "If any" in the VPL means "if there is any obligation to indemnify for loss attributable to the covered peril."

Cox, 943 So. 2d at 828 (slip op. at 5-6). Applying this straightforward analysis to the present case, because "a" covered peril (windstorm) contributed to the insureds' total loss, Farm Bureau's liability to the insureds under the VPL, "if

any," is the face amount of the policy, not merely the pro rata share of damage attributable to the covered peril (wind).

The dissent below disagrees with Mierzwa, particularly the court's emphasis on the phrase "if any":

> Additionally, the analysis in Mierzwa places great significance on the statutory phrase "if any." The Mierzwa court reasoned that the only meaning the phrase "if any" could have is that if the insurer has to pay anything in connection with a total loss, it must pay the policy face value. The more reasonable meaning of the phrase, however, is that the insurer may have coverage defenses, as a result of which the insurer has no liability at all under the policy.

Cox, 943 So. 2d at 844-45 (slip op. at 48) (Polston, J., dissenting) (emphasis supplied).

With all due respect, the dissent's construction of the VPL is inconsistent with the settled rule which requires the court to construe a statute in its entirety, giving meaning and effect to every part. See Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1273, 1287 (Fla. 2000); Acosta v. Richter, 671 So. 2d 149, 154 (Fla. 1996) (quoting Jackson v. State, 634 So. 2d 1103, 1105 (Fla. 4th DCA 1994)) ("'[S]tatutory phrases are not to be read in isolation, but rather within the context of the entire section.'").

Applying this rule, the statutory phrase "if any" does not preserve the insurer's coverage defenses as suggested by the dissent because the insurer's

coverage defenses are preserved elsewhere in the statute. Specifically, the insurer's defenses under the VPL are limited by the statute to changes increasing the risk without the insurer's consent and fraudulent or criminal fault. See § 627.702(1), Fla. Stat. (2004). Both defenses are preceded with the phrase "in the absence of." Id. ("in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf . . . ."). It would be redundant to include the language "in the absence of" and "if any" **f** both phrases served the same purpose of preserving the insurer's policy defenses. See Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986) ("Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.'") (quoting Patagonia Corp. v. Board of Govs. of the Fed. Reserve Sys., 517 F.2d 803, 813 (9th Cir. 1975)).

Further, by adding the words "if any" in 1959, the legislature intended the VPL to operate as an "all or nothing" statute. In other words, as explained by the Fourth District, "if the insurance carrier has any liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy." Mierzwa, 877 So. 2d at 775-76 (emphasis the court's).

Judge Polston also argues that his construction of the 2004 VPL is consistent with its purpose "to prevent an insured from over-insuring property and ensuring that a property insurer does not value property, collect premiums based on that

valuation, and then withhold payment of the policy limits when the property is a total loss." Cox, 943 So. 2d at 846 (slip op. at 51) (Polston, J., dissenting). Although arguably both the majority and dissent's interpretations promote this objective, the VPL also was enacted to "suppress . . . haggling over the measure of liability" and "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." Springfield Fire, 167 So. 2d at 784, 785. The dissent's construction of the statute conflicts with this legislative purpose because attempting to apportion a total loss between covered and excluded perils after the property has been destroyed condemns the parties to vexatious litigation and the arduous and often unproductive task of "haggling over the measure of liability." Id. at 785. The district court's interpretation of the 2004 VPL eliminates haggling, reduces administrative costs and promotes prompt and fair settlement of claims. See Cox, 943 So. 2d at 832 (slip op. at 16).

C. Case Law Interpreting the Pre-2005 VPL

The district court's construction of the 2004 VPL is consistent with prior case law, particularly this court's decision in American Ins. Co. of Newark, N.J. v. Robinson, 120 Fla. 674, 163 So. 17 (1935). In that case, the insurer defended the insured's fire loss claim under the VPL by arguing that the insured dwelling

depreciated from an infestation of termites or dry rot after the insurer issued the policy. This court rejected that defense based on the following rationale:

> As to defendant's second plea of depreciation by reason of 'termites' or 'dry rot' attacking the property insured after the policy of insurance was issued, the law is that valued policy statutes, such as ours, will not permit a reduction of the amount of insurance specified in the policy by reason of depreciation in value caused by use, decay, accident, casualty, or otherwise, where such change arises from a supervening cause occurring subsequent to the issuance of the policy, and the allowance of such reduction will not amount to a change of the value fixed by the parties pursuant to the statute at the time the contract of insurance was issued.

Id. at 19-20 (emphasis supplied). By inescapable analogy, just as the VPL prevented the insurer in Robinson from avoiding payment of the face amount of the policy by apportioning some of the loss to termites or dry rot, the 2004 VPL prevents the insurer in this case from avoiding payment of the face amount of the policy by apportioning some of the loss to the "casualty" of flood.

The dissent in Cox, which Farm Bureau adopts, argues that Robinson does not control because the only issue addressed in that case was valuation of the insured property. See Cox, 943 So. 2d at 840-41 (slip op. at 38-39) (Polston, J., dissenting). The dissent's analysis is based on the following language from Robinson:

> As to defendant's second plea of depreciation by reason of 'termites' or 'dry rot' attacking the property insured after the policy of insurance was issued, the law is that

> valued policy statutes, such as ours, will not permit a reduction of the amount of insurance specified in the policy by reason of depreciation in value caused by use, decay, accident, casualty, or otherwise, where such change arises from a supervening cause occurring subsequent to the issuance of the policy, and the allowance of such reduction will not amount to a change of the value fixed by the parties pursuant to the statute at the time the contract of insurance was issued.

Robinson, 163 So. at 19-20 (emphasis supplied). Based on the underlined language, the dissent concludes:

> The express language of the court indicates that the insurance company could not change the valuation of the policy because of various causes which may have affected the market value. It was required to pay the policy amount as required by the statute. The issue was valuation of the property. The Court did not address exclusions from the policy at all, contrary to the discussion of the case in the majority opinion.

Cox, 943 So. 2d at 841 (slip op. at 38) (Polston, J., dissenting).

With the utmost respect, the language from Robinson emphasized by the dissent goes beyond the valuation issue. The language means that any attempt by the insurer to pay the insured less than full policy limits after a total loss amounts to a change in the value of the property stated in the policy, which the VPL does not allow. Thus, when Farm Bureau offered the Coxes less than the insured value of their dwelling after Hurricane Ivan rendered their property a total loss, the insurer violated the VPL by effectively reducing the value of the insured property agreed to by the parties when Farm Bureau issued the policy.

Further, Robinson stands for an even broader principle—the VPL limits an insurer's defenses to payment of policy limits for a total loss to those defenses specifically authorized by the statute. In Robinson, the court explained that "[u]nder Florida's valued policy laws, . . . the value of a fire insurance policy, upon total loss by fire or lightning, must be paid to the insured. These statutes, however, do not preclude defenses based on criminal conduct of the insured or upon his affirmative fraud in procurement of insurance." Robinson, 163 So. at 19 (citing Hartford Fire). Because the insurer in that case did not allege criminal conduct or fraud, the Robinson court refused to permit the insurer to assert its non-statutory defense based on depreciation of the insured property from an infestation of termites and dry rot. See id. at 19-20.

As applicable to this case, the 2004 VPL limits the insurer's defenses to "any change increasing the risk without the insurer's consent, . . . and . . . fraudulent or criminal fault on the part of the insured or one acting in her or his behalf." § 627.702(1), Fla. Stat. (2004). Just as the court refused to permit the insurer in Robinson to assert the defense of termites or dry rot, this court should prevent Farm Bureau from asserting as a defense that part of the total loss was caused by a peril not covered by the policy.[3]

[3] In addition to the statutory defenses available under the VPL, the insurer presumably can assert defenses affecting the validity of the policy, such as nonpayment of premiums.

The district court's decision in this case also is supported by Netherlands Ins. Co. v. Fowler, 181 So. 2d 692, 693 (Fla. 2d DCA 1966). In that case, the court applied the VPL even though a cause of loss expressly excluded by the policy—enforcement of ordinances and laws—combined with the covered peril (fire) to create a total loss. As explained by the court below:

> The Fowler court applied the VPL even though another, excluded peril—the city's construction ordinance—also contributed to (actually caused, according to the insurance company) the total loss. The structure in Fowler would not have been deemed a total loss if the court had considered only the covered peril, fire. The fire damage and the ordinance (an excluded peril) combined to cause the total loss. Similarly, a combination of wind and flood caused the total loss of the Coxes' home in the present case.

Cox, 943 So. 2d at 834-35 (slip op. at 23).

Farm Bureau characterizes the district court's reliance on Fowler as "ill-advised" because, the insurer argues, "the building at issue in Fowler was rendered 'a total loss' by fire, according to the municipal authorities who refused to allow reconstruction." Initial Brief at 14 n.4 (citing Fowler, 181 So. 2d 693) (emphasis in original). The Fowler opinion, however, indicates that fire damage alone was insufficient to cause a total loss.

First, the building in Fowler was insured for $10,000, yet the fire caused only $4,619.69 in damage. See Fowler, 181 So. 2d at 693. Thus, the fire damage was less than half the value of the insured building as determined by the policy.

Second, the insurer in Fowler did not argue that the total loss was caused by fire. In fact, the insurer argued that the VPL "involves 'total loss by fire' and that the building here was only partially destroyed by fire . . ., that the fire damage was repairable, that the total destruction of the building was caused by operation of city building codes rather than the fire, [and] that the exculpatory clause in the contract excludes liability for losses occasioned by ordinances regulating construction." Fowler, 181 So. 2d at 693 (emphasis supplied). Despite the insurer's contentions, the Fowler court found the building a total loss under the VPL caused by a combination of a covered cause of loss (fire) and an excluded cause of loss (enforcement of municipal building codes). Farm Bureau has not offered a valid reason why the same rationale should not apply in this case.[4]

D. Farm Bureau's Flood Exclusion

Farm Bureau's policy excludes "water damage," including "[f]lood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind." (R-I 25). This exclusion, however, must yield to the VPL to the extent water damage acted concurrently with windstorm to produce a total loss in this case. As explained by the court below: "No insurance policy can effect the repeal of a statute. It is the other way around: insurance policies are deemed to incorporate applicable statutes, and conflicting policy provisions must

[4] Neither the dissent nor any of the amicus briefs cite Fowler.

give way." Cox, 943 So. 2d at 832 (slip op. at 17). Indeed, in one of its earliest cases interpreting the VPL, this court directed that "any provisions of the policy under consideration in conflict with the statute [VPL] are devitalized by it." Martin v. Sun Ins. Office of London, 83 Fla. 325, 91 So. 363, 365 (1922). Thus, the 2004 VPL takes precedence over Farm Bureau's flood exclusion.

Further, as noted in Mierzwa, the conflict between the flood exclusion and the VPL (which is incorporated by law into the policy) creates a patent ambiguity in the policy. See Mierzwa, 877 So. 2d at 777. Any ambiguity in the policy is resolved in the insureds' favor to afford the greatest possible indemnity. See Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138, 142 (Fla. 1937); Cox, 943 So. 2d at 834 (slip op. at 24); Mierzwa, 877 So. 2d at 777-78.

E. Pro Rata Payment Argument

The dissent's analysis of the 2004 VPL would limit the insurer's liability in concurrent cause cases to the pro rata share of the total loss caused by the covered peril. In other words, according to the dissent, if property insured for $65,000 is rendered a total loss during a hurricane by a combination of windstorm and tidal surge, and windstorm causes ten percent of the total loss, the windstorm insurer's liability under the 2004 VPL is only $6,500. Cox, 943 So. 2d at 841 (slip op. at 36) (Polston, J., dissenting). This formula, however, conflicts with the plain wording of the VPL. As the court in Mierzwa explained:

> The VPL statutory text does not require that a covered peril be the covered peril causing the entire loss; it need merely be a covered peril. VPL § 627.702(1) ("insured by any insurer as to a [e.s.] covered peril"). Plainly when these requisites exist, pro rata liability under the VPL would be in conflict with its terms, because the VPL provides that any liability of a casualty insurer where a covered peril is involved in a total loss must be for the face amount rather than pro rata with other coverages.

Mierzwa, 877 So. 2d at 776 (emphasis the court's; footnote omitted).

The dissent's pro rata analysis also fails to consider section 627.702(2) which fixes the insurer's liability under the policy for a partial loss caused by fire and lightning at "the actual amount of such loss."[5] (emphasis supplied). Thus, if fire combines with an excluded peril to produce a partial loss, the insurer is liable only for its pro rata share of the partial loss caused by fire. By comparison, the insurer's liability for a total loss under section 627.702(1) is not limited to "the actual amount of such loss." Instead, "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 . . . ." § 627.702(1), Fla. Stat. (2004).

[5] Section 627.702(2), Florida Statutes (2004), provides:

> (2) In the case of a partial loss by fire or lightning of any such property, the insurer's liability, if any, under the policy shall be for the actual amount of such loss but shall not exceed the amount of insurance specified in the policy as to such property and such peril.

Farm Bureau and its amici essentially argue that the insurer's liability for a total loss under the 2004 VPL should be limited to "the actual amount of such loss" caused by windstorm in the same manner as partial losses covered by section 627.702(2). The courts, however, cannot insert the language from subsection (2) into subsection (1) to reach that result. See Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999) ("We are not at liberty to add words to statutes that were not placed there by the Legislature.").

The dissent's pro rata analysis also produces anomalous results in cases involving "constructive total loss." A damaged building is considered a constructive total loss under the VPL when a governmental authority refuses to permit repairs and orders the building demolished, even though the cost to repair the building is less than the face amount of the policy. See Citizens Ins. Co. v. Barnes, 98 Fla. 933, 124 So. 722 (1929); Regency Baptist Temple v. Insurance Co. of N. Am., 352 So. 2d 1242, 1244 (Fla. 1st DCA 1977); Fowler, 181 So. 2d at 693. A residential structure located in a floodplain which sustains "substantial damage" of "any origin" is a constructive total loss (requiring removal or elevation above the 100-year flood elevation) when "the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred." 44 C.F.R. § 59.1 (2004). Thus, a residential structure located in a floodplain which sustains 50 percent or more

damage during a hurricane is deemed a constructive total loss under the VPL, even if part of the damage is caused by flood and part by wind.

Applying the constructive total loss principle to the dissent's pro rata analysis, if the Coxes and their next door neighbor owned identical houses insured by Farm Bureau for $65,000, and both were destroyed during a hurricane by a combination of wind and tidal surge, but the Coxes' windstorm damage caused 49 percent of their total loss and the neighbor's windstorm damage caused 50 percent of his total loss, the Coxes would receive $31,850 (.49 x $65,000) from their insurer while the neighbor with only one percent more wind damage would receive the policy limits of $65,000 as a constructive total loss under the VPL. This result is arbitrary and would, if accepted, promote lengthy, expensive litigation that would frustrate the VPL's primary objective to prevent disputes over the amount payable under the policy after a total loss.[6]

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[6] Farm Bureau apparently accepts the anomalous result produced by the dissent's pro rata analysis in constructive total loss cases:

> Farm Bureau does not dispute that if water had damaged the home in part, but the wind acting alone would have been sufficient to cause the total loss, then Farm Bureau would be liable for the entire loss, valued at the amount specified by the policy. However, if wind had damaged the home in part, but the water acting alone would have been sufficient to cause the total loss, Farm Bureau would still be liable for the damage caused by the wind because it is covered under the policy.

Simply put, "[t]he Florida Valued Policy statute does not provide for any prorating." Millers' Mut. Ins. Ass'n of Ill. v. La Pota, 197 So. 2d 21, 23 n.2 (Fla. 2d DCA 1967. In La Pota, two property insurers covered the same property. After a total loss, the court refused to permit one insurer to prorate its payment under the VPL with the other insurer. Although the facts at bar differ somewhat, the basic tenet quoted above applies here with equal force. The insurer is liable under the VPL for either the face amount of the policy or nothing at all. Neither the statute nor the Farm Bureau policy allows the insurer to take the middle ground by prorating a total loss between covered and excluded perils.[7]

F. Payment of Premiums

Farm Bureau and its amici argue that the result reached by the courts in Cox and Mierzwa is contrary to statute and unjust because the insureds did not pay the windstorm carrier separate premiums for flood coverage. This argument lacks merit for several reasons.

Cox, 943 So. 2d at 840 n.16 (slip op. at 36) (Polston, J., dissenting).

[7] Although the overriding principle remains the same, the result reached in La Pota was modified statutorily in 1980 when the legislature enacted section 627.702(3)(a), Florida Statutes (Supp. 1980) ("The provisions of subsections (1) and (2) shall not apply when: (a) Insurance policies are issued or renewed by more than one company insuring the same building, structure, mobile home, or factory-built housing unit against fire and lightning and the existence of such additional insurance is not disclosed by the insured to all insurers issuing such policies."). See Hallcom v. Allstate Ins. Co., 654 So. 2d 245, 247 (Fla. 1st DCA 1995).

First, the Coxes did not make a claim against Farm Bureau for flood coverage. They made a claim under their multi-peril homeowners policy issued by Farm Bureau for "direct loss to property" after Hurricane Ivan's winds and tidal surge combined to render their insured dwelling a total loss. (R 23). The VPL fixes the measure of damage for a total loss from "a" covered peril at policy limits. The fact that tidal surge contributed concurrently with a covered peril to produce the total loss does not reduce the insurer's liability under the VPL.

Second, Florida insurers are charged with understanding the contents of the Florida Insurance Code, including the Valued Policy Law which overrides any conflicting provisions in their polices. See § 627.419(1), Fla. Stat. (2004); Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 896 (Fla. 2003). The fact that Farm Bureau and possibly other insurers may have misread the VPL or failed to give the statute appropriate weight in computing premiums does not relieve them of their obligation to pay the insureds' claims in accordance with the statute. Cf. Suazo v. Del Busto, 587 So. 2d 480 (Fla. 3d DCA 1991) (holding that where insurer issued a liability policy with $10,000 per person limits to the owner and operator of a nonpublic-sector school bus without complying with a statute that required minimum limits of $100,000 per person, the court construed and applied the policy to provide the higher statutory limits), approved, 614 So. 2d 1071 (Fla. 1992).

G. 1982 Amendment

Farm Bureau's reliance on the legislative history accompanying the 1982 amendment to the VPL is misplaced. As noted by Judge Polston's dissenting opinion, the House staff made the following comment regarding the 1982 amendment which extended the VPL to perils other than fire and lightning:

> "Applies the valued policy law to all covered perils, rather than fire and lightning only. Therefore, policy limits would be required to be paid if there is a total loss to a building *as a result of* any covered peril."

Cox, 943 So. 2d at 845 (slip op. at 50) (Polston, J., dissenting) (quoting HB 4F (1982) Staff Analysis 7 (April 13, 1982)) (emphasis in the original). When it made the emphasized statement, the House staff merely explained that the 1982 amendment extended the VPL to "all covered perils," not just the perils of fire and lightning as in the previous version of the statute. The House staff did not signal the legislature's intent to alter then-existing judicial interpretations of the VPL or to limit the VPL's application to total losses caused exclusively by covered perils.

The House staff analysis is not inconsistent with the district court's construction of the VPL because the italicized phrase "as a result of" means proximate cause. Proximate cause is not synonymous with sole cause. Rather, an occurrence is the proximate cause of a loss or injury if the occurrence is "a" material contributing cause. Asgrow-Kilgore Co. v. Mulford Hickerson Corp., 301

So. 2d 441, 443 (Fla. 1974). In this case, windstorm was "a" material contributing cause of the total loss.

H. Parade of Horribles – The "Single-Shingle" Case

The Mierzwa court declined to address the insurer's "parade of horribles" argument whereby the windstorm insurer would be responsible under the 2004 VPL for policy limits even though the covered peril causes only one percent of the total loss. Mierzwa, 877 So. 2d at 778 n.5. In this same vein, Farm Bureau argues that the decision below requires the insurer to pay policy limits under the 2004 VPL "even if the damage was the equivalent of 1% of the total loss." Initial Brief at 1. Similarly, State Farm suggests that if a gust of hurricane wind breaks a $20 windowpane in a house insured for $400,000, and then tidal surge excluded by the policy destroys the structure, the VPL, as construed by Cox, requires the windstorm insurer to pay the $400,000 policy limits on the dwelling. See State Farm's Amicus Brief at 6.

Farm Bureau's one percent argument and State Farm's windowpane argument have been characterized by the insurance industry as the "single-shingle" argument, referring to the prospect that windstorm carriers must pay policy limits under Cox and Mierzwa if hurricane winds blow off only a single shingle from the roof of the insured dwelling and then tidal surge excluded by the policy washes the

insured structure away. Despite its melodramatic appeal, the court should reject the single-shingle argument for several reasons.

First, section 627.701(3), Florida Statutes (2004), authorizes insurers to include windstorm deductibles in their polices ranging from two percent to five percent of the insured value. Thus, one percent and single-shingle claims do not exceed the windstorm deductible, thereby eliminating the insurer's liability completely.

Second, as a practical matter, when a hurricane generates a tidal surge that destroys a structure, the winds in the same vicinity before and during the tidal surge are invariably strong enough to cause substantial damage to the structure. In other words, it is difficult to imagine a case where tidal surge from a hurricane destroys a $400,000 house, yet damage from the wind which preceded or accompanied the tidal surge is limited to a $20 windowpane.

Third, even if the decision below and Mierzwa create inequitable results in certain cases, the "courts may not rewrite legislation or fashion new law that they deem to be 'fair' and 'just.'" Smith v. Crawford, 645 So. 2d 513, 525 (Fla. 1st DCA 1994). As this court explained almost 100 years ago:

> If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed

> improvidently the responsibility is with the Legislature and not the courts.

Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, 694-95 (Fla. 1918). See also Cox, 943 So. 2d at 827 (slip op. at 3) ("Judicial restraint requires [the courts] to defer to the Legislature's broad power to enact substantive law in conformity with the state and federal constitutions, even if [the courts] are persuaded that a particular law may have negative consequences.").

I. Is the 2004 VPL Ambiguous?

Finally, the parties to this case have argued throughout these proceedings that their respective interpretations of the 2004 VPL are supported by clear and unambiguous statutory language, a position maintained by both the majority and dissenting opinions below. Compare Cox, 943 So. 2d at 826-29 (slip op. at 2-8) with Cox, 943 So. 2d at 838-39 (slip op. at 33-34) (Polston, J., dissenting). Despite the professed clarity of the language employed by the legislature, the six appellate court judges who have recently interpreted the pre-2005 VPL have reached three different conclusions. Judges Benton and Thomas in Cox and Judges Farmer and Gunther in Mierzwa construed the pre-2005 VPL in favor of the insureds. Judge Polston in Cox construed the statute in favor of the insurer, while Judge Gross in Mierzwa offered a hybrid approach based on the tort principle of proximate cause. See Mierzwa, 877 So. 2d at 780-82 (Gross, J., concurring specially).

Three presumably reasonable interpretations of the same statute by six distinguished appellate court judges suggests the alternative conclusion that the 2004 VPL is ambiguous. See M.W. v. Davis, 756 So. 2d 90, 101 (Fla. 2000) ("'Ambiguity suggests that reasonable persons can find different meaning in the same language.'") (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992)); Hess v. Walton, 898 So. 2d 1046, 1049 (Fla. 2d DCA 2005) ("A statute is normally regarded as 'ambiguous' when its language may permit two or more outcomes."); rev. denied, 929 So. 2d 1052 (Fla. 2006). If the 2004 VPL is ambiguous, it must be construed in favor of the insureds for two reasons.

First, "the public interest requires . . . that statutes governing insurance contracts be liberally construed so as to protect the public." Praetorians v. Fisher, 89 So. 2d 329, 333 (Fla. 1956) (citations omitted). See also 3A Norman J. Singer, Sutherland Statutory Construction § 72.4 at 713, 715 (2003) ("In keeping with the judicial policy of construing insurance policies in favor of the insured, legislation enacted for his protection has also usually been liberally construed in favor of the public and the insured."). Applying this rule, a liberal construction of the 2004 VPL in favor of the insureds obviously supports the result reached by the courts in Cox and Mierzwa.

Second, the VPL is incorporated into the Coxes' Farm Bureau policy by operation of law as though fully set forth therein. See § 627.419(1), Fla. Stat (2004) ("Any insurance policy, rider, or endorsement otherwise valid which contains any condition or provision not in compliance with the requirements of this code shall not be thereby rendered invalid, . . . but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code."). Ambiguous policy provisions are liberally construed in favor of the insureds and strictly against the insurer. See State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998); Cox, 943 So. 2d at 835 (slip op. at 24).

III. THE 2005 AMENDMENTS TO THE VPL CONFIRM THAT COX AND MIERZWA WERE DECIDED CORRECTLY.

A. The 2005 Amendments to the VPL

In 2005, the legislature substantially revised the Valued Policy Law to permit property insurers to apportion the benefits payable for a total loss between covered and excluded perils. See Ch. 2005-111, § 16, Laws of Fla. (Tab 4 at 30). The legislature expressly provided, however, "that the amendment to this section shall not be applied retroactively and shall apply only to claims filed after effective date of such amendment." § 627.702(1)(c), Fla. Stat. (2005). The effective date of the amendment was June 1, 2005. See Ch. 2005-111, § 30, Laws of Fla (Tab 4 at

41). Because the Coxes' filed their claim before the effective date (R-I 2 at ¶ 7, 39), the amendment quite simply does not apply to this case.

While acknowledging that "the non-retroactivity provision bars application of the apportionment subsection to the Coxes' claim," Farm Bureau contends that "the legislative history plainly shows that the Fourth District [in Mierzwa] misinterpreted the VPL." Initial Brief at 19-20. In response, although the legislature undoubtedly disagreed with the Fourth District's decision in Mierzwa, the legislative history discussed below demonstrates that the 2005 legislature intended a material change in the law applicable only to future claims, not a clarification of the 2004 VPL applicable to this and other pending claims from the 2004 hurricane season.

B. Legislative History for the 2005 Amendments

The 2005 amendments to the VPL were part of Senate Bill (SB) 1486 which became law as Chapter 2005-111 § 16, Laws of Florida. (Tab 4). SB 1486 was filed on February 15, 2005. (Tab 5). That same day, the Senate filed a separate property insurance bill, SB 1488. (Tab 12). Both bills started as barebones legislation, simply stating the legislature's intent to revise property insurance laws. (Tabs 6, 13).[8]

[8] The legislative histories for SB 1486 and SB 1488 are traceable at http://www.leg.state.fl.us/Session/index.cfm?Year=2005&Chamber=Senate&Tab=session&Submenu=1.

On April 7, 2005, the Senate filed an extensive property insurance bill under SB 1488 which, if enacted, would have amended the VPL by leaving subsection 627.702(1) intact (renumbering to subsection (1)(a)) and adding a statement of intent under subsection (b) as follows:[9]

> (1)(a) In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(12), located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, 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.
>
> (b) The legislative intent of this subsection is not to require an insurer to pay for a loss caused by a peril other than the covered peril. In furtherance of such legislative intent, when a loss was caused in part by a covered peril and in part by a noncovered peril, the insurer's liability under this section is limited to the percentage of the loss caused by the covered peril.

SB 1488, § 15, Leg. (Fla. 2005) (Tab 14 at 58). Significantly, the April 7, 2005 version of SB 1488 included the following provision:

> The amendment to section 627.702, Florida Statutes, contained in this act is remedial in nature and intended to clarify the intent of that section.

[9] The underlined text represents proposed additions to the 2004 statute.

SB 1488, § 24, Leg. (Fla. 2005) (Tab 14 at 68) (emphasis supplied). The April 7, 2005 Senate staff analysis quoted by Farm Bureau explains section 24 as follows:

> **Section 24. Additional Legislative Intent for Changes to the Valued Policy Law** – Provides that the amendment to s. 627.702, F.S., in Section 14, above, is remedial in nature and intended to clarify the intent of that section. Although this does not expressly provide that the amendment is retroactive, it may have that result.

Fla. S. Comm. on Banking & Ins., CS/SB 1486 (2005) Staff Analysis and Economic Impact Statement 26 (April 7, 2005) (emphasis supplied) (Tab 18 at 26).

Soon after filing the bill set forth above, the legislature changed course from a clarifying amendment with retroactive effect to a material change in the VPL without retroactive effect. To this end, the Senate filed an amended version of SB 1488 on April 25, 2005, which deleted section 24 referred to above. (Tab 15 at 66). Then on May 5, 2005, the Senate substituted a completely different version of SB 1488 which revised the VPL to the wording which ultimately became law as Chapter 2005-111, § 16, Laws of Florida. (Tab 16). These revisions were incorporated into SB 1486 on May 9, 2005 (posting date), which passed the legislature on May 6, 2005, and became law on June 1, 2005.[10] (Tab 5).

[10] SB 1488 died on the calendar on May 6, 2005. (Tab 12).

As revised to its present form by Chapter 2005-111, § 16, Laws of Florida, the VPL now reads:[11]

> **627.702. Valued policy law**
>
> (1)(a) In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(12), located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, the insurer's liability~~, if any,~~ under the policy for such total loss, if caused by a covered peril, 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.
>
> (b) The intent of this subsection is not to deprive an insurer of any proper defense under the policy, to create new or additional coverage under the policy, or to require an insurer to pay for a loss caused by a peril other than the covered peril. In furtherance of such legislative intent, when a loss was caused in part by a covered peril and in part by a noncovered peril, paragraph (a) does not apply. In such circumstances, the insurer's liability under this section shall be limited to the amount of the loss caused by the covered peril. However, if the covered perils alone would have caused the total loss, paragraph (a) shall apply. The insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss.
>
> (c) It is the intent of the Legislature that the amendment to this section shall not be applied

[11] The underlined text was added in 2005 and the struck-through text deleted in 2005.

> retroactively and shall apply only to claims filed after effective date of such amendment.

§ 627.702(1), Fla. Stat. (2005).

C. Material Change in the Law or Clarifying Amendment

When determining the 2005 legislature's intent in amending the VPL, two competing rules of statutory construction come into play. On the one hand, "when a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment." Arnold v. Shumpert, 217 So. 2d 116, 119 (Fla. 1968). See also Mangold v. Rainforest Golf Sports Ctr., 675 So. 2d 639, 642 (Fla. 1st DCA 1996) ("When the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear."). On the other hand, "[t]he mere change of language does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law." State ex rel. Szabo Food Services, Inc. of N. C. v. Dickinson, 286 So. 2d 529, 531 (Fla. 1973). The 2005 amendments, however, did not merely clarify prior legislative intent as Farm Bureau and its amici contend. Rather, as discussed below, the 2005 legislature materially altered the VPL to convey a completely different meaning from the 2004 VPL which applies in this case.

First, the specific alteration made by the 2005 legislature to the wording of the VPL that effectively overruled Mierzwa for future claims was the omission of the words "if any." See Mierzwa, 877 So. 2d at 775-76. "When the legislature amends a statute by omitting words, the general rule of construction is to presume that the legislature intended the statute to have a different meaning from that accorded it before the amendment." Aetna Cas. & Sur. Co. v. Buck, 594 So. 2d 280, 283 (Fla. 1992). Thus, by omitting the phrase "if any," the 2005 legislature was not clarifying prior legislative intent. Rather, the legislature intended the 2005 version of the VPL to have a different meaning from the 2004 version.

Second, many clarifying amendments simply add a statement of legislative intent without modifying the operative portion of the statute. See, e.g., Palma Del Mar Condo. Ass'n #5 of St. Petersburg, Inc. v. Commercial Laundries of W. Fla., Inc., 586 So. 2d 315, 317 (Fla. 1991). In this case, however, the legislature revised the text of the original statute, signaling its intent to change existing law, not clarify prior legislative intent.

Third, although not required, a clarifying amendment typically includes a statement in the title or preamble that expressly indicates that the amendment is clarifying legislative intent. For example, in the case relied upon by Farm Bureau, State v. Lanier, 464 So. 2d 1192, 1193 (Fla. 1985), the amendment stated in the preamble: "WHEREAS, the intent of the Legislature was and remains . . . ."

(emphasis the court's). Similarly, in Lincoln v. Florida Parole Comm'n, 643 So. 2d 668 (Fla. 1st DCA 1994), the title to the law stated "that one of its purposes lay in 'clarifying that provisions of s. 947.1405, F.S., apply to persons sentenced as habitual offenders.'" Id. at 672. In this case, neither the title, preamble nor text of Chapter 2005-111, Laws of Florida, provides a statement that the VPL amendments were intended to clarify prior legislative intent. To the contrary, although the original version of SB 1488 included a statement that the amendment "is remedial in nature and intended to clarify the intent of that section [section 627.702]," the legislature deleted that provision and substituted an entirely different bill.[12] (Tab 15 at 66).

Fourth, although the April 7, 2005 staff analysis quoted extensively by Farm Bureau (Initial Brief at 22-24) includes several statements which criticize Mierzwa and suggest the need for legislative clarification, that staff analysis was directed to the original April 7, 2005 version of SB 1488 which the legislature abandoned on May 5, 2005, in favor of the bill which ultimately became law.[13] In fact, all the

[12] The legislature also removed the following statement from the title of the April 7, 2005 version of SB 1488: "providing that the amendment to s. 627.702, F.S., is intended to be remedial and clarifying in nature." (Tab 14 at 5).

[13] One statement at page seven of the April 7, 2005 Senate staff analysis quoted by Farm Bureau (Initial Brief at 21) states:

> Valued Policy Law *(Mierzwa)* -- The Legislature should consider amending the valued policy law (s. 627.702, F.S.) to

staff analyses for SB 1488 which discuss the Mierzwa case were directed to the original version of SB 1488 and were all issued before the Senate filed the May 5, 2005 version of the bill which passed the legislature on June 6, 2005. (Tabs 17-19). Further, neither staff analysis accompanying SB 1486 mentions the Mierzwa case. (Tabs 10-11). In short, there are no reported staff analyses for either SB 1486 or SB 1488 which mention the May 5 revised version of the bill which became law as Chapter 2005-111, § 16, Laws of Florida. (Tabs 10-11, 17-19).

The only written explanation for the 2005 VPL amendment is the text of the legislation itself which reflects a material alteration to then-existing law without retroactive effect, not a clarification of then-existing law. Therefore, the legislative history fully supports the district court's conclusion that "[t]he VPL amendment cannot be read as clarification of the legislative intent animating its predecessor, since the amendment states unambiguously that the amended statute is not to be

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> clarify that a property insurer is responsible to pay only for that portion of damage to a structure which is caused by a peril insured under the property insurance policy and is not required to pay for damage caused by excluded perils; thereby clarifying that the Fourth DCA opinion in *Mierzwa v. Florida Windstorm Underwriting Association* was incorrect.

(Tab 18 at 7). As the staff analysis indicates at page four, this statement is not attributable to the Senate staff but is one of the twenty-one recommendations listed in the Final Report and Recommendations of the Joint Selection Committee on Hurricane Insurance available at http://www.flains.org/fic/pubs/factbook/0301JointCommFinalReport.pdf. (Tab 18 at 4).

applied retroactively to claims filed before enactment of the amendment." Cox, 943 So. 2d at 829 (slip op. at 10).

Farm Bureau cites numerous cases (Initial Brief at 23) for the proposition that "[w]hen . . . an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." Lowry v. Parole & Probation Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985). However, this court subsequently explained:

> We did state in Lowry that a clarifying amendment to a statute that is enacted soon after controversies as to the interpretation of a statute arise may be considered as a legislative interpretation of the original law and not as a substantive change. It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature.

State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995). Accord McKenzie Check Advance of Fla., LLC v. Betts, 928 So. 2d 1204, 1210 (Fla. 2006) ("[W]e conclude that seven years is too long to view the amendment as merely a clarification of legislative intent."); M.W. v. Davis, 756 So. 2d 90, 103 n.26 (Fla. 2000) ("Due to the gap between when the language was originally placed in the statute and the most recent amendment, the 1999 amendment cannot

be seen as clarifying the Legislature's intent in 1986 . . .."). Cf. Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1230-31 (Fla. 2006).

In this case, although the 2005 legislature undoubtedly was reacting to Mierzwa, it rewrote a statute which had remained essentially unchanged for twenty-three years and deleted crucial language ("if any") which the legislature added in 1959 before many of the 2005 legislators were born. Paraphrasing Laforet, it would be absurd to consider legislation enacted almost fifty years after the original act as a clarification of original intent.

In sum, the legislative history and principles of statutory construction cited above indicate that the 2005 amendment to the Valued Policy Law, which permits insurers to apportion total losses between covered and excluded perils, represents a material change to the law which applies only to future claims. It follows that the 2004 VPL, which controls this case, prohibits such apportionment in accordance with Mierzwa.

IV. AMICI'S ARGUMENTS

Citizens Property Insurance Corporation argues that Mierzwa and Cox may lead to double recovery by allowing insureds to collect from both their flood insurer and windstorm insurer for the same loss.[14] Citizens' Amicus Brief at 7-8.

[14] The Coxes did not carry flood insurance. (R-I 1 at ¶ 3).

Florida courts, however, have historically rejected the "double recovery" argument when applying the VPL. As noted by one commentator:

> Florida courts have uniformly held that "the Valued policy law is founded upon the theory of 'calculated risk,' while the pro rata insurance clauses are based upon the theory of 'indemnity.'" For this reason, the statute operates like a liquidated damages clause rather than as an indemnity contract. What the insured receives, by law, when he purchases an insurance policy in this state is the right to recover the policy limits if the insured property is totally destroyed, whether in whole or in part, by a covered peril. In other words, the wind carrier need not be concerned about the contractual relationship between the insured and his other peril carrier.

R. Jason Richards, Florida's "Valued Policy Law": Clarifying Some Misconceptions, 79 Fla. Bar J. 18, 20 (Dec. 2005) (emphasis in original; footnotes omitted).

Mr. Richards' analysis is supported by the First District's decision in Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780 (Fla. 1st DCA 1964). In that case, the owners of a dwelling destroyed by fire were covered by two separate fire insurance policies. After the first insurer paid policy limits, the second insurer, Springfield, declined payment. The owners sued Springfield based on the Valued Policy Law and obtained a summary final judgment for the policy limits. The First District affirmed and held that when multiple insurance companies cover the same loss, the VPL requires each insurer to pay its policy

limits even if the policy includes an "other insurance" clause that attempts to limit the insurer's liability to its pro rata share. Id. at 784. As the court explained:

> When there are several permissible concurrent policies of fire insurance and there is a total destruction by fire of the insured premises, the aggregate amount of the insurance written, or the sum of the face amounts in the policies for this peril, is conclusive as to the value of the property insured and the true amount of the loss and measure of damages when so destroyed. Each insurer is liable for the full amount of his policy, provided, of course, there is no fraud or other conduct of the insured which would constitute a valid defense to an action to recover for the loss.

Id. (footnote omitted). See also Cooper v. Alford, 446 So. 2d 1093 (Fla. 1st DCA 1984) (holding that mortgagee under loss payable clause was entitled to receive the proceeds of the policy to the extent of his interest after the insured dwelling was destroyed by fire, even though the mortgagee also recovered under his separate fire policy in which he was the named insured and he would receive more in cumulative insurance proceeds than was owed by the mortgagor at time of the loss); La Pota, 197 So. 2d at 23 (holding that the VPL takes precedence over the policy's "pro rata liability" clause, thereby permitting an insured to recover the face amount of two separate policies covering the same property which was totally destroyed by fire).

State Farm Florida Insurance Company cites several federal district court orders from Louisiana which declined to apply Mierzwa under the Louisiana VPL

for total losses caused concurrently by covered and excluded perils. See Richard v. State Farm Fire & Cas. Co., Civil Action No. 06-1134, 2006 WL 3499901 (W.D. La. Dec. 4, 2006); Chauvin v. State Farm Fire & Cas. Co., 450 F. Supp. 2d 660 (E.D. La. 2006); Turk v. Louisiana Citizens Prop. Ins. Corp., Civil Action No. 06-144, 2006 WL 1635677 (W.D. La. June 6, 2006). These rulings have not been tested by appellate review and are based on principles of Louisiana law which differ from Florida law. The Louisiana VPL provides:

> Under any fire insurance policy insuring inanimate, immovable property in this state, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs during the term of the policy at such valuation without deduction or offset, unless a different method is to be used in the computation of loss, in which latter case, the policy, and any application therefor, shall set forth in type of equal size, the actual method of such loss computation by the insurer. Coverage may be voided under said contract in the event of criminal fault on the part of the insured or the assigns of the insured.

La. Rev. Stat. Ann. § 22:695(A) (2004) (emphasis supplied).[15]

The Chauvin case provides an extensive analysis of the Louisiana VPL as

[15] Although the plain wording of the Louisiana VPL limits its application to single-peril fire insurance policies, there is a conflict under Louisiana law as to whether the term "fire insurance policy" includes multi-peril policies. See Chauvin, 450 F. Supp. 2d at 664-665.

applied to total losses caused concurrently by covered and excluded perils. In that case, the district court judge concluded that the critical language in the Louisiana VPL ("the insurer shall compute and indemnify or compensate any covered loss") is ambiguous. See id. at 665-66 ("A literal reading of this clause can support plaintiffs' assertions that the statute requires insurers to pay any amount of covered loss at the full value of the policy. However, the language also admits of another interpretation. The statute can be read to require that the total loss also be a covered loss in order for the VPL to apply."). Under Louisiana law, "[w]hen statutory language is ambiguous, the Court must look to the context of the law as a whole to determine its meaning. . . . If the statute is susceptible of multiple meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." Id. at 665 (citing La. Civ. Code arts. 10, 12). Applying these principles, the court concluded "that the total loss [must] be a covered loss in order for the VPL to apply." Id. at 666. The court, however, would have reached a different conclusion under Florida law because in our state ambiguous insurance statutes incorporated into policies by operation of law are construed liberally in favor of the insured to provide the greatest possible indemnity. See CTC, 720 So. 2d at 1076; Poole, 179 So. at 142.

In refusing to apply Mierzwa in Louisiana, the district court judge in Chauvin made a glaring error. The Chauvin court cited Citizens Prop. Ins. Corp. v.

Ceballo, 934 So. 2d 546 (Fla. 3d DCA), rev. granted, 940 So. 2d 1124 (Fla. 2006), for the proposition that "[a] second Florida appellate court has directly rejected the logic of the Mierzwa decision." Chauvin, 450 F. Supp. 2d at 668. However, Ceballo disagreed with Mierzwa and certified conflict based solely on the section of the Mierzwa opinion dealing with ordinance and law coverage. See Ceballo, 934 So. 2d at 538. Contrary to the Chauvin court's understanding, the Ceballo court did not "directly reject" Mierzwa's interpretation of the VPL in the context of total losses caused concurrently by covered and excluded perils. Ceballo involved a total loss caused by a single peril. See Ceballo, 934 So. 2d at 537.

The Chauvin court further states that the Florida legislature revised the VPL after Mierzwa was decided "to make clear that an insurer is not responsible for damage caused by excluded perils." Chauvin, 450 F. Supp. 2d at 668. The court failed to note, however, that the revised VPL is not retroactive.

State Farm also argues that the First District's construction of the 2004 VPL raises constitutional concerns, including impairment of contract and taking of property without due process. State Farm Amicus Brief at 15-16. An amicus, however, lacks standing to challenge the constitutionality of a statute when the issue has not been raised by the parties. See Acton v. Ft. Lauderdale Hosp., 418 So. 2d 1099, 1100-01 (Fla. 1st DCA 1982), approved, 440 So. 2d 1282 (Fla. 1983). The parties in this case have not raised any constitutional issues in the courts

below, and such issues were not mentioned by either the majority or the dissent in the district court.

Finally, the American Insurance Association, et al., relies on Opar v. Allstate Ins. Co., 751 So. 2d 758 (Fla. 1st DCA), rev. denied, 767 So. 2d 459 (Fla. 2000), disapproved on other grounds, Johnson v. Nationwide Mut. Ins. Co., 828 So. 2d 1021, 1026 (Fla. 2002). In that case, the court held that a dispute between the insurer and insured over whether hurricane damage was caused by wind or flood was amenable to appraisal under the insurance policy. In remanding the case for appraisal, the court made the following observation:

> If the trial court determines, when the case is fully tried on its merits, that the damage was caused by a covered peril, windstorm, then Allstate will be bound immediately by the amount ascertained by appraisal. . . . If, on the other hand, a coverage defense is determined successful in whole or in part, then Allstate would either not be liable, or would be liable only in part for the amount. See, e.g., Montalvo v. Travelers Indem. Co., 643 So. 2d 648 (Fla. 5th DCA 1994) (insurer liable for only 50 percent of amount determined through arbitration by virtue of policy limits provision).

Opar, 751 So. 2d at 761. As noted by the court below, the quoted statement is dicta because the insurer took "the position that windstorm did not contribute to the loss at all, and sought to avoid any liability whatsoever." Cox, 943 So. 2d at 835 n.9 (slip op. at 23). Opar "held only that the insureds were entitled to an appraisal even before it was determined whether there was coverage. . . . The valued policy law was not in issue and was never addressed by the court." Id.

CONCLUSION

Assuming the court retains jurisdiction, respondents urge the court to answer the certified question in the affirmative and approve the decisions of the district courts in Cox and Mierzwa.

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that this brief was prepared using a Times New Roman 14-point font in accordance with Florida Rule of Appellate Procedure 9.210(a)(2).

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