IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-441

QBE INSURANCE CORPORATION,

Appellant,

vs.

CHALFONTE CONDOMINIUM APARTMENT ASSOCIATION, INC.,

Appellee.

BRIEF OF AMICUS CURIAE, FLORIDA JUSTICE ASSOCIATION, IN SUPPORT OF CHALFONTE CONDOMINIUM APARTMENT ASSOCIATION, INC.

On Review of Certified Questions from the United States Court of Appeals for the Eleventh Circuit, Case Nos. 08-10009-HH and 08-11337-H

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Association (formerly the Academy of Florida Trial Lawyers) is a voluntary statewide association of more than 3,000 trial lawyers representing individual and corporate citizens of Florida in litigation concerning all areas of the law. Members of the FJA are pledged to foster the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law and the right of access to courts. The FJA has been involved as *amicus curiae* in hundreds of cases in this Court and Florida's District Courts of Appeal. The FJA believes this case involves an issue that is significant to the vast number of individuals and corporations in the State of Florida who purchased and were issued insurance policies protecting them against damage to their homes, offices and property, requiring its participation on their behalf.

SUMMARY OF THE ARGUMENT

When the courts of this state "are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance."[1] This Court evidenced an understanding of that premise in *Allstate Indem. Co. v. Ruiz* and *Foundation Health v. Westside EKG Assoc.*, combining within those decisions an acknowledgement of Legislative intent, societal needs and practical application. As it travels through the evolution of Fla. Stat.

[1] Benjamin N. Cardozo, *The Nature of the Judicial Process*, 66 (1921).

§624.155 and its interrelation with Florida's common law, this Court should continue to be guided by those polestars.

The certified questions seek confirmation that common law duties and statutory regulations are inherent in every insurance contract entered into under Florida law. Given the well-recognized fiduciary relationship between insurer and insured, there is no reasonable dispute that the duty of good faith and fair dealing is embedded within insurance policies issued in Florida. Nor is there any doubt that the principle of statutory incorporation makes statutory limitations and requirements part of the insurance contract. The certified questions, taken in a broad sense, are thus easily answered.

It is the details underlying the certified questions that require the Court's deliberation. The practical applications as to discovery and damages are the driving force behind this appeal. Appellant and its *amici* urge this Court to validate improper restrictions on discovery, unnecessary litigation and the willful disregard for the intent of the Florida Legislature. The invitation should be declined. This Court should confirm that causes of action exist for an insurer's breach of the duty of good faith and fair dealing and for its violations of Fla. Stat. §627.701. This Court should also articulate the practical manner in which such causes of action are to be litigated.

ARGUMENT

The first two certified questions involve the existence and application of a claim for breach of the implied warranty of good faith and fair dealing. The third and fourth questions address the enforcement of Fla. Stat. §627.701(4)(a). We address these questions, grouped together in the manner adopted by QBE, leaving to the parties and other *amici* a discussion of the fifth question regarding the timing of payment of a judgment.

I. TO CORRECT INEQUITIES IN PERMISSIBLE DISCOVERY AND RECOVERABLE DAMAGES, THIS COURT SHOULD CONFIRM THAT A CAUSE OF ACTION EXISTS UNDER FLORIDA'S COMMON LAW FOR AN INSURER'S BREACH OF THE IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING UNDER AN INSURANCE CONTRACT

The parties agree that Florida law instills into every contract the duty of good faith and fair dealing. QBE argues, however, that the duty does not extend to insurance contracts, even though such contracts "occupy a unique institutional role in modern society." *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1125 (Fla. 2005) (quotations omitted); *accord German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 414-15 (1914) ("the business of insurance … [has] become clothed with a public interest, and therefore subject to be controlled by the public for the common good"). QBE's position is grounded on the mistaken assertions that "under the common law, an insurer has a duty to act in good faith only with respect to third-party claims" because there is no fiduciary duty owed in a first-party cause of action and "in a first-party

action the interests of the insurer and insured are wholly adverse."

QBE completely ignores this Court's reasoning in *Ruiz*.[2] Taking a "fresh look" at its decision in *Manhattan Nat'l Life Ins. Co. v. Kujawa*, 541 So.2d 1168 (Fla. 1989), the Court stated that it was "a misdescription of the nature of the parties' relationship in first-party actions as being totally adversarial." *Ruiz* at 1127. The Court further observed that the "Legislature has mandated that insurance companies act in good faith and deal fairly with insureds, regardless of the nature of the claim presented." *Id.*

The relationship of the parties during the claim process is not subject to reasonable dispute; an insurer accepts premiums and has a resulting legal duty to investigate, adjust and pay covered claims. As evidenced by the arguments of the Florida Defense Lawyer's Association, it is the relationship of the parties in litigation that is the real issue.

A. The Court Should Permit Discovery Of And Damages Arising From An Insurer's Delays

The motivation for the *Ruiz* Court's "fresh look" is found in the practical, rather than general, application of its prior decision. Following the rendering of *Kujawa*, the trial and District courts of the state treated discovery requests differently as between

[2] QBE relies heavily on this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995), even though the Court stated that *Laforet* addressed different issues and "the rules of law articulated therein are not grounded on" the distinctions between first- and third-party claims. *Ruiz* at 1126, n.2.

first- and third-party bad faith claims. This Court graciously acknowledged that it had accepted the notion that an adversarial relationship existed between the parties in a first-party bad faith action without allowing much analysis. *Ruiz* at 1127-28. The Court went on to consider the effect that *Kujawa* had on discovery issues, and found that "a portion of our decision in *Kujawa* is both legally and practically untenable." *Id.* at 1131.

The conflict *sub judice* arises under very similar circumstances. The need for this Court to confirm the common law duty of good faith and fair dealing inherent in an insurance contract arises from artificial limitations placed on the discovery and damages available to a policyholder in litigation against an insurer. The policyholder is generally – and without any reasonable basis – denied consequential damages that would otherwise be available in an action to enforce a non-insurance contract. Similarly, a policyholder's requests for pre-litigation claims file documents is rejected, on the legally unsupported grounds that the documents are either work-product protected or irrelevant.

This Court should consider the certified questions in the context of their practical application as to damages and discovery, as it must do "when an established rule of law has proven unacceptable or unworkable in practice." *Ruiz* at 1131 (*citing Brown v. State*, 719 So.2d 882 (Fla. 1998)).

1. Consequential Damages Arising From An Insurer's Delay Are Recoverable In A First-Party Contract Action

Common law causes of action arise and are recognized to correct social and legal injustice. In most cases, Florida law will allow recovery in a breach of contract action those damages that arise from the breach, such as loss of opportunity or additional costs incurred in mitigating against further loss. *See Scott v. Rolling Hills Place Inc.*, 688 So.2d 937, 940 (Fla. 5th DCA 1996) (allowing that "[d]amages which flow naturally from the breach, and were foreseeable by the breaching party at the time the contract was entered, are recoverable"). In the context of an insurer's breach of the policy, however, courts have construed the damages arising from the breach to be limited to the policy proceeds. *See, e.g., Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 485 F.Supp.2d 1302, 1305-1308 (M.D. Fla. 2006) (finding that damages to a business resulting from an insurer's wrongful refusal to defend were not recoverable in an action against the insurer).

Noticeable by its absence in QBE's brief is any denial that the resolution of Chalfonte's claim was delayed. Nor does QBE deny that damages may have been incurred by Chalfonte as a result. Instead, QBE argues that policyholders should have to consume additional judicial and economic resources by filing a separate action under §624.155 in order to recover damages arising from QBE's claims handling delays.

There is no legal or practical support for QBE's position. First, QBE's argument that §624.155 is the sole remedy available to a policyholder is undermined by the language of the statute itself.[3] The statute merely requires that an election be made as between the causes of action prior to entry of judgment; if delay damages were recovered as part of the underlying contract action, those damages could not be recovered in any subsequent action for statutory violations and unfair business practices. Moreover, in the current litigation environment that is short on funding and long on new case filings (particularly foreclosure actions), it makes little sense to force policyholders into court a second time to recover those damages that clearly flow from the manner in which the underlying claim resolution was delayed.[4]

2. The Claim File Is Not Irrelevant Or Work-Product Protected In A First-Party Contract Action

The best proof of an insurer's delay in adjusting a claim is in the pre-litigation section of the claims file. Yet policyholders are met with powerful resistance to requests for those portions of the file. *See State Farm Fire & Cas. Co. v. Valido*, 662

[3] *See* Fla. Stat. §624.155(8) ("The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state.")

[4] Arguably, if the Court recognizes a common law theory that allows a policyholder to prove and recover damages arising from an insurer's delay in handling a claim, the number of first-party actions under §624.155 would be reduced to those cases where the insured suffered consequential damages as a result of a statutory violation and/or the insurer's business practices.

So.2d 1012 (Fla. 3rd DCA 1995) (holding, without analysis, that claim files are irrelevant and photos and repair estimates are "protected by the work product privilege"). These conclusions without reasoning ignore the fact that an insurer has a legal duty to investigate claims, and actions taken in the course of performing a legal duty are not work-product protected. *Pete Rinaldi's Fast Foods, Inc. v. Great Amer. Ins. Co.*, 123 F.R.D. 198, 202 (M.D. N.C. 1988). These decisions also overlook the special relationship between an insurer and its policyholder, where the premiums are paid (in part) to fund the investigation and handling of a claim on their behalf.

In many jurisdictions, the files containing investigative documents are usually not entitled to work product protection. *Bogan v. Northwestern Mut. Life Ins. Co.*, 163 F.R.D. 460, 464 (S.D.N.Y. 1995) ("[i]nvestigation and evaluation of insurance claims is the regular, ordinary, and principal business of insurance companies"); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 662 (S.D. Ind. 1991) ("[m]ost courts have held that documents constituting any part of a factual inquiry into or evaluation of a claim, undertaken in order to arrive at a claim decision, are produced in the ordinary course of an insurer's business and not work product"). Florida's Federal District courts have also begun to recognize that "[m]aterials or documents drafted in the ordinary course of business are not protected." *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 698 (S.D. Fla. 2007); *1550 Brickell Assoc. v. QBE Ins. Co.*, 253 F.R.D. 697, 699 (S.D. Fla. 2008) (acknowledging the Southern District's adoption of the *Harper* approach and

requiring production of certain claims file documents).

It makes no sense to hold that the actions an insurer is legally obligated to undertake, designed to arrive at a decision on whether to pay or resist a claim, are protected from discovery by the person who (through premiums) funded the investigation and to whom the insurer owes a fiduciary duty. This Court should allow a policyholder to discover the portions of a claim file that might evidence an insurer's delay in reaching a claim decision or in paying the undisputed amount of the loss. Doing so would create greater transparency, thereby advancing the Legislature's goal of prompt payment of claims.[5]

B. There Is No Reason To Bifurcate A Claim For Breach Of The Implied Warranty Of Good Faith And Fair Dealing

The core argument in favor of bifurcating an action for breach of contract from a claim for a breach of the warranty of good faith and fair dealing rests on the discovery available to the policyholder.[6] Insurance companies have done a commendable job of perpetuating the myth that that the world as we know it will end

[5] *See* Fla. Stat. §627.70131(5) (requiring a property insurance carrier to pay or deny a claim within 90 days of receiving notice thereof).

[6] In an effort to frame the certified questions in a light most favorable to their arguments, QBE and its *amici* assume that a breach of the implied warranty of good faith and fair dealing is the same cause of action as a claim under §624.155. Clearly they are not. The pleading requirements and prerequisites are different, the damages available under each action are different, and the statute expressly recognizes that alternate common law relief may be available.

if a policyholder is permitted access to the claim file during litigation over a breach of the insurance contract. Many states, however, allow an insured to litigate the contract and bad faith actions together, and in the process to obtain a copy of the entire claim file.[7] This Court should recognize that a cause of action for breach of the implied warranty of good faith and fair dealing would allow discovery of information that should rightly be in the policyholder's hands as a matter of law prior to litigation.[8]

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[7] Arizona and California, for example, allow concurrent litigation of contract and bad faith actions. Those states, however, typically view an insurer's bad faith as a tort action, while courts in Florida have found that an action under §624.155 arises *ex contractu*. *See Pastor v. Union Central Life Ins. Co.,* 184 F.Supp.2d 1301 (S.D. Fla. 2002) (holding that an action for statutory bad faith sounds in contract, not tort, therefore the doctrine of *lex loci contractus* determines the applicable law); *Continental Cas. Co. v. City of Jacksonville,* 550 F.Supp.2d 1312, 1339 n. 24 (M.D. Fla. 2007) (stating that under Florida law, bad faith actions against insurers, like cooperation claim actions, arise *ex contractu*, rather than in tort); *Allstate Ins. Co. v. Regar,* 942 So.2d 969 (Fla. 2d DCA 2006) (finding the insurer's duty of good faith is a contractual duty, and an action for its breach is governed by contract law). *But see Teachers Ins. Co. v. Berry,* 901 F. Supp. 322 (N.D. Fla. 1995) (holding that "matters concerning performance [of an insurance policy] are determined by the law of place of performance under traditional conflict of laws principles"). In clarifying the relationship between §624.155 and the common law, this Court should also resolve the confusion surrounding the nature of a claim under §624.155, specifically, that it is a statutory cause of action, not a contract or tort action. There can be "no conflict of law with respect to the statutory claim because there is only one state's law involved." Houser, Douglas G., *Choice of Law for Bad Faith Insurance Claims,* 30 Tort & Ins. L.J. 37 (Fall 1994).

[8] The Court may also wish to reconsider whether there is a sound legal basis for bifurcating the contract action from the bad faith action, particularly in first-party cases like the one under consideration. QBE and its *amici* repeat the statement that there must first be a determination of coverage and damages before a bad faith claim is ripe. In cases such as the one at bar, there was never a question of coverage *per se* –

The issue again rests on the relationship of the parties. A policyholder pays premiums so that, in the event of a loss, a professional claims handler will investigate and evaluate the claim. In essence, the policyholder has paid for the investigation and the results should be provided. Where insurers handle claims in the manner that QBE was found guilty of, the insureds are not only deprived of the benefit of the bargain (a fair claim investigation and the results thereof), but they are forced to investigate and quantify their own claims. Eliminating this inequity will resolve the discovery dispute that forms the basis for a bifurcation of claims.

II. FLORIDA STATUTE §627.701 IS INCORPORATED INTO EVERY PROPERTY INSURANCE POLICY ISSUED IN FLORIDA AND SHOULD BE ENFORCED

The second category of certified questions focuses on the ramifications of QBE's failure to comply with Fla. Stat. §627.701. The insurer does not dispute that it had an obligation to comply with §627.701(4)(a) and that it failed to do so. Instead,

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the hurricane loss was clearly covered under the policy. The insurer argued (unsuccessfully) that not all of the claimed damages were related to a windstorm, but not that the loss itself was not an insured loss. In a similar context, this Court has held that the question of which damages are covered and which are not is properly left for the trier of fact (the appraisers). *See Johnson v. Nationwide Mut. Ins. Co.*, 828 So.2d 1021 (Fla. 2002). It logically follows that a policyholder who has a covered loss and who has complied with the notice requirements of §624.155(4) should be permitted to bring an action under the statute and to recover the unpaid portion of the covered claim as consequential damages arising from the insurer's violation of its duties under §624.155.

QBE argues "substantial compliance"[9] with the statute and that there is no private cause of action for (and therefore no damages recoverable from) the violation. A plain reading of *Foundation Health v. Westside EKG Associates*, 944 So.2d 188 (Fla. 2006) disposes of QBE's arguments.

A. Violations Of A Statutory Regulation May Be Incorporated Into A Common Law Action

Where the parties contract upon a subject that is surrounded by statutory limitations and requirements, they are presumed to have entered into the contract with reference to those statutes, and they becomes part of the contract. *Westside* at 195 (*citing Citizens Ins. Co. v. Barnes*, 124 So. 772 (Fla. 1929)). This eighty year old legal doctrine has been repeated numerous times, confirming that the Florida Insurance Code is a part of every insurance contract issued in Florida.

The *Westside* Court addressed circumstances nearly identical to those presently before this Court. An insurer sought judgment on the pleadings, arguing that Fla. Stat. §641.3155, part of the HMO Act, did not authorize a direct cause of action. The Court found that the statute "is not sufficient by itself to establish a private cause of action"

[9] QBE's "substantial compliance" argument is without merit. Florida Statute §627.701 requires 18-point type. There is no provision allowing type of an approximately similar size. Further, QBE's acknowledgement that it employed 16.2-point type and should not be compelled to "meticulously comply" with the Legislature's mandates evidences the arrogance and knowing disregard for the Florida Insurance Code that likely inspired a jury to render a verdict against it.

but could in effect be coupled with a recognized common law cause of action. *Id*. at 194. This is precisely what Chalfonte did: it sued QBE for breach of the policy by failing to comply with Fla. Stat. §627.701. *See Westside* at 196 ("the HMO Act does not foreclose a common law contract action for breach of the statutorily imposed prompt pay provision [in §641.3155]").

While the *Westside* Court relied on the principles of statutory incorporation to reach its decision, the legislative intent and public policy considerations were clearly factors supporting the conclusion. This Court should anchor its responses to the certified questions on the same bedrock.

B. The Legislative Intent Of §627.701 Should Be Given Effect

Chalfonte seeks to bar QBE from enforcing policy provisions that do not meet the typeface regulatory standard of §627.701(4)(a). The standard is clear, and is one of many examples where the Florida Legislature mandates typeface of a certain size, to ensure that consumers will be aware of certain information. *See, e.g.*, Fla. Stat. §627.6515(2) (setting similar requirements for certain group health insurance policies). Equally clear is that the Legislature chose a specific typeface so as to plainly convey certain policy information and to avoid the inherent interpretive difficulty in statutory language such as "large typeface" or "prominently displayed." In mandating a size for the typeface, it is easily inferred that the Legislature sought to avoid the

slippery slope that QBE would like this Court to traverse.[10] Moreover, the insured's knowledge of the information sought to be conveyed is of no consequence, and the inclusion of non-compliant typeface is therefore irrelevant. *United States Fire Ins. Co. v. Roberts*, 541 So.2d 1297, 1300 (Fla. 1st DCA 1989) (finding that the insured's awareness of the provision "is of no consequence; the coinsurance clause is nevertheless void and of no effect because of the carrier's violation of the statutory requirement").

The statutory language in this case is similar to the language found in Fla. Stat. §627.7263, and the cases interpreting that section provide guidance here. Section 627.7263 concerns the shifting of the liability to provide primary insurance from the owner to a lessee of the vehicle provides:

> (2) If the lessee's coverage is to be primary, the rental or lease agreement must contain the following language, in at least 10-point type:
>
> "The valid and collectible liability insurance and personal injury protection insurance of any authorized rental or leasing driver is primary for the limits of liability and personal injury protection coverage required by ss. 324.021(7) and 627.736, Florida Statutes."

It is well settled that a lessor's failure to include this notice in the lease makes

[10] A court must avoid statutory interpretations which would render part of a statute meaningless. *State v. Goode*, 830 So.2d 817 (Fla. 2002). The interpretation offered by QBE renders both the specificity as to typeface and the consequence of a violation meaningless.

the lessor's insurance primary and is an ineffectual shifting of the primary insurance burden to the lessee. *Allstate Ins. Co. v. Executive Car and Truck Leasing, Inc.*, 494 So.2d 487, 488 (Fla. 1986). Like §627.701, there is no statement in §627.7263 mandating a penalty for failure to include the required notice. The statute simply says that "if the lessee's coverage is to be primary," the contract must contain the required language. Similarly, §627.701 states "[a]ny policy that contains a separate hurricane deductible must on its face include…" Both are mandatory provisions. Florida courts have treated §627.7263 as a requirement before a separate shifting term of the contract will be effective. This Court should interpret §627.701(4) the same way and hold that any non-compliant provision in a policy seeking to enforce a separate windstorm deductible is void, because that is the result which effectuates the legislative intent. That result is the only way to give meaning to §627.701(4).

The same result was reached in *Republic National Life Ins. Co. v. Hiatt*, 400 So. 2d 854 (Fla. 1st DCA 1981). The *Hiatt* court decided that the insurer's violation of an insurance statute would render the offending policy terms unenforceable:

> We agree with the trial court's determination that the deductible provision, paragraph B(2), is an excess insurance provision as defined in Section 627.635(1) because its effect is to limit the insurer's liability to only those covered medical expenses which exceed the benefits payable under other insurance policies. Since the policy, containing the excess insurance provision, was not conspicuously imprinted or stamped with the designation "excess insurance" or appropriate words of similar import

> as required by Section 627.635(2), the trial court properly concluded that the excess insurance provision, paragraph B(2), was ineffective and unenforceable. The obvious purpose of Section 627.635(2) is to assure that the policyholder is clearly made aware that the policy he has purchased contains an excess insurance provision and is thus given notice of his true coverage. It has generally been held that where such statutes are violated, the violative provision should be given no effect and the policy interpreted as if it did not contain the violative provisions.

Hiatt at 855 (emphasis added).

There is no difference between the notice provisions of §627.635, §627.7263, or §627.429 and the notice provision in §627.701(4). The statutes exist for the sole purpose of making sure the insured knows exactly what is being purchased, and any deviation from the required notice by the insurer negates the policy provision which violates the law. Any other result renders the statute meaningless and encourages insurers to violate the law.

Given QBE's admission that the hurricane deductible provision did not comply with the mandates of §627.701(4)(a), this Court must respect the Legislative intent and find that the provision is void and cannot be enforced.

CONCLUSION

The role of *amicus curiae* is to bring to the Court's attention matters of public importance that sometimes go beyond the case-specific issues addressed by the parties on appeal. The certified questions before this Court go to the heart of the relationship between insurance companies and policyholders in Florida, a relationship that has become increasingly strained since the state was battered by hurricanes in 2004. This Court has the opportunity to respond to the certified questions and clarify not only the relationship between Florida's statutory regulation of insurance and the common law, but also potentially reduce the litigation between insurers and their insureds. As it has done in the past, this Court should consider the practical implications of its present and prior decisions. The needs of Florida's citizens, including the needs of the judicial system, should play a role in the Court's formulation of its answers to the certified questions. This Court should reject QBE's argument that, when peeled to its core, is simply: "we should continue to interpret the law this way because that is how it has always been done." Florida's common law and its bad faith statute are not repugnant to each other. Recognizing that the dispute at bar arises, in part, from uncertainty as to the correct measure of discovery and damages in a first-party insurance dispute, the Court should dictate that measurement. The Court should also declare that the Legislature's intentions will be respected and enforced. In providing clarity on these

matters, the Court will serve the interests of justice, economy and the common good.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished *via* facsimile and Federal Express this 16th day of July 2009 upon:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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