IN THE SUPREME COURT OF FLORIDA

Case No. SC09-441

QBE INSURANCE CORPORATION,

Appellant/Cross-Appellee,

v.

CHALFONTE CONDOMINIUM APARTMENT ASSOCIATION, INC.,

Appellee/Cross-Appellant.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT OF FLORIDA

Case Nos. 08-10009-HH, 08-11337-H

BRIEF OF AMICI CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION & FEDERATION OF DEFENSE & CORPORATE COUNSEL IN SUPPORT OF QBE INSURANCE CORPORATION (FILED WITH AGREEMENT OF PARTIES)

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STATEMENT OF IDENTITY AND INTEREST

The Florida Defense Lawyers Association (FDLA), formed in 1967, has a statewide membership of over 1,000 lawyers engaged in civil litigation, primarily for the defense of insurance companies and insureds. Among the aims of the FDLA and its members are "impro[ving] the adversary system of jurisprudence and . . . the administration of justice." *See* www.fdla.org/ByLaws.asp. The FDLA maintains an active amicus curiae program in which FDLA members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts. The FDLA screens those cases for their content of significant legal issues which affect the interests of the defense trial bar or the fair administration of justice. *See* www.fdla.org/about/amicus.asp. The FDLA brings a great wealth of actual, practical experience in the litigation of insurance coverage, breach of contract, and insurer bad faith claims in the State of Florida.

The Federation of Defense & Corporate Counsel (FDCC), formed in 1936, has an international membership of approximately 1,400 lawyers. FDCC members are experienced attorneys in private practice, as well as general counsel and insurance claims executives from throughout the world who have been judged by their peers to have achieved professional distinction, and to have demonstrated leadership in their field. The FDCC is

committed to promoting knowledge and professionalism in its ranks, and has organized itself to this end. The FDCC membership brings a national perspective to the questions presented in this case, as well as long experience in the field of insurance coverage, contract, and insurer bad faith litigation. This case affects the rights and duties of insurers who comprise a substantial portion of the FDCC's membership.

This case substantially alters the manner in which first-party insurance contract and bad faith claims are litigated, a matter in which both the FDLA and FDCC lawyer members have long and deep experience.

The FDLA and FDCC will be referred to hereinafter collectively as "Amicus."

ISSUE STATEMENT

The district court's decision to recognize a cause of action for breach of implied warranty of good faith and fair dealing, in the context of a first party insurance dispute, is incompatible with well-established Florida law governing the adjudication of insurance contract disputes and bad faith litigation. This issue is directly related to the second certified question from the Eleventh Circuit Court of Appeal as to bifurcation of contract and bad faith claims.

SUMMARY OF ARGUMENT

The federal district court's decision to recognize a cause of action for breach of implied warranty of good faith is inconsistent with established Florida law that bifurcates the adjudication of, and regulates the scope of discovery in, contract and first party bad faith actions.

Florida law bifurcates breach of contract and bad faith actions, and attaches a work product privilege to an insurer's claims files and internal materials that persists through the conclusion of the contract case. However, once the contract case is concluded, and presuming a bad faith suit has ripened, the insurer's claims files and internal documents may lose this work product immunity. This bifurcated procedure protects insurers from discovery of their work product during the coverage or contract dispute, but permits the insured access to direct evidence of the essential issue of the insurance company's handling of the insured's claim, in the first-party bad faith suit that may follow.

The breach of implied warranty claim recognized by the federal district court raises the same issues as a first-party bad faith suit. And because this new cause of action is stated simultaneously with the breach of contract claim, this new cause of action will generate discovery requests for insurers' protected materials before conclusion of the contract litigation. In

this way, the district court's ruling sets insurance companies and insureds on a collision course with respect to discovery of protected materials. The district court's ruling substantially conflicts with established Florida law, and will act to destroy existing rights of the parties.

If the district court's ruling were to be adopted as the law of Florida by this court, an important question will arise: What is the permitted scope of discovery where the insured sues the insurer for both breach of contract and for breach of implied warranty of good faith and fair dealing? If, as the insured argues, the insurance company has mishandled its claim, then would the insured be permitted discovery of the insurer's claims files and internal claims documents, materials that are now immune from discovery while the contract action proceeds? Or must the insured wait until the breach of contract and breach of implied warranty claims are concluded, and a bad faith cause of action ripens, to obtain discovery of these documents?

The federal district court's decision, if affirmed, would upset the order established by the weave of Florida statutory law and case law requiring the serial adjudication of breach of contract claims and insurer bad faith cases. The consequences of that decision will be confusion in the state courts over the scope of discovery, unnecessary conflict between the parties on

discovery issues, and unfair prejudice to the insurers, should their work product immunity be lost during the contract or coverage action.

ARGUMENT

The federal district court's decision to recognize a cause of action for breach of implied warranty of good faith and fair dealing, in the context of a first party insurance dispute, is incompatible with well-established Florida law governing the adjudication of insurance contract disputes and bad faith litigation.

The federal district court's decision to allow the insured to simultaneously state a breach of contract claim and a claim for breach of implied warranty of good faith and fair dealing, departs from Florida law governing the adjudication of insurance contract disputes and bad faith litigation in three fundamental ways.

First, the district court has done what no Florida state court has ever done, it has recognized a common law, first-party, bad faith claim. Second, contrary to plain precedent from this court, the federal district court's decision permitted this bad faith claim to proceed before it was ripened by the conclusion of the breach of contract claim. Third, the decision is incompatible with Florida's well-established, highly-regulated, bifurcated discovery scheme for breach of contract litigation and for bad faith suits.

This discovery problem was not raised in the case between QBE and Chalfonte, and so the consequences of the district court's decision will not be addressed in the parties' briefs. For Amicus, however, the prospect of

significant disputes over the scope of discovery in future cases raising both breach of contract and breach of implied warranty claims is readily foreseeable. Amicus urges this Court, in section C below, to consider the negative impact the district court's ruling would have, if it were adopted by this court as the law of Florida, on the substantive rights of insurers provided by Florida's bifurcated discovery scheme.

A

Florida law does not recognize a first-party, common-law cause of action for insurer bad faith. *State Farm Mut. Auto Ins. Co. v. Laforet*, 658 So. 2d 55, 58-59(Fla. 1995) ("When the legislature enacted section 624.155, . . . [t]here was . . . no first-party action by an insured for bad faith in Florida at common law . . ."). Some states recognize the insurer owes a common law duty of good faith and fair dealing to its insureds in the first party context, but others, including Florida, have adopted instead a statute to "provide a remedy to an insured whose claim has not been settled in good faith." *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 267 (Fla. 5th DCA 1987).

Amicus believes the question presented in the first certified question will not be squarely resolved by focusing on some unrecognized, ill-defined, common law implied duty. *See Laforet*, 658 So. 2d 55, 58-59 (no remedy for

first party, insurer bad faith is provided by the common law). Rather, the issue is readily resolved by focusing on the existing, explicit statutory remedy established by the Florida Legislature for insurer bad faith. *See Opperman*, 515 So. 2d 263 (the remedy for first party insurer bad faith is provided exclusively by section 624.155). The district court, by recognizing a remedy for first party insurer bad faith arising from the common law, and outside the domain of the statute, conflicts with the bedrock principles expressed in these two cases.

B

All parties agree that Florida's first party, bad faith remedy does not accrue until the insured successfully concludes its breach of contract or coverage claim against the insurer. *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991)(holding an insured's first-party action for insurance benefits against the insurer must be resolved favorably to the insured before the cause of action for bad faith accrues.) This rule is deeply entrenched in the jurisprudence of Florida's intermediate appellate courts.[1] Florida's bifurcation of breach of contract and bad faith actions -

[1] Orders that deny insurers' motions to dismiss bad-faith suits before the insured has successfully completed its coverage action are routinely quashed. *See, e.g., Hartford Ins. Co. v. Mainstream Const'n. Group, Inc.,* 864 So. 2d 1270 (Fla. 5th DCA 2004) (certiorari granted when trial court allows breach of contract and insurer bad-faith claims to proceed

breach of contract first, bad faith to follow - has three practical, and beneficial, results, all of which are imperiled by the federal district court's ruling.

First, the bifurcation scheme limits the issues for trial in the breach of contract or coverage action, precluding the introduction of evidence related to the bad faith claim. This barrier protects insurers from the unfair prejudice that results from defending against simultaneous breach of contract claims and bad faith allegations. "[A]n insurer would be prejudiced by having to litigate either a bad faith claim or an unfair settlement practices claim in tandem with a coverage claim, because the evidence used to prove either bad faith or unfair settlement practices could jaundice the jury's view

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simultaneously), *and see OneBeacon Ins. Co. v. Delta Fire Sprinklers, Inc.*, 898 So. 2d 113(Fla. 5th DCA 2005) (granting certiorari quashing order that allowed a bad faith claim against surety before the coverage issue had been resolved); *State Farm Mut. Auto. Ins. Co. v. Cook*, 744 So. 2d 567 (Fla. 2d DCA 1999) (granting certiorari as bad faith claim did not accrue until coverage claims were decided); *Allstate Ins. Co. v. Baughman*, 741 So. 2d 624 (Fla. 2d DCA 1999)(granting certiorari in similar circumstances); *General Star Indem. Co. v. Anheuser Busch Companies, Inc.*, 741 So. 2d 1259 (Fla. 5th DCA 1999)(certiorari granted to quash trial court order denying insurer's motion to dismiss bad faith count in lawsuit which also involved disputed insurance coverage issues); *Liberty Mut. Ins. Co. v. Cook*, 696 So. 2d 497 (Fla. 3d 1997) (quashing order that refused to stay a bad faith claim before the resolution of the underlying coverage dispute); *Utah Home Fire Ins. Co. v. Navarro*, 642 So. 2d 1200 (Fla. 3d DCA 1994) (accord); *Michigan Millers Mut. Ins. Co. v. Bourke*, 581 So. 2d 1368 (Fla. 2d DCA 1991)(trial court departed from the essential requirements of law by not abating premature bad faith claim).

on the coverage issue." *Maryland Cas. Co. v. Alicia Diagnostic, Inc.*, 961 So. 2d 1091, 1092 (Fla. 5th DCA 2007).

This case provides a true example of the problem foreseen in *Alicia Diagnostic, Inc.*, 961 So. 2d 1091. The Insured's closing argument, portions of which are cited in QBE's Initial Brief in the Eleventh Circuit proceedings, at pages 26-29, heaped scorn on QBE for the way it purportedly handled the claim. That inflammatory argument may have been acceptable in a bad faith claim, but it was irrelevant to the contract case. The jury's view of the contract case was undeniably prejudiced by the Insured's bad faith argument. Under Florida law, that prejudice is deemed to be unfair, and so such argument is forbidden. The federal district court's decision, however, could allow such argument in all cases like it.

Second, Florida's bifurcation scheme controls the types of damages recoverable in a breach of contract or coverage action, generally restricting recovery to contractual damages, meaning policy proceeds. This is true in the third party context. *See Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1126 (Fla. 2005) (noting that in first-party context, "the insurer's ultimate responsibility could not exceed the policy limits in the absence of a viable

bad faith cause of action.").[2] And in the first party context, the recovery of such extra-contractual damages are provided by section 624.155, Florida Statutes. A statute that enables an insured to recover extra-contractual damages would not have been necessary had the common law already provided a route to recover such damages. Moreover, Florida law forbids recovery of these extra-contractual damages until the contract or coverage action is concluded. The federal district court's ruling, by permitting the insured to recover these extra-contractual damages before the conclusion of the contract litigation, conflicts with Florida law as stated in *Blanchard*, 575 So. 2d 1289.

Third, Florida law fixes a narrow scope of discovery in a breach of contract action, and then widens that scope in a subsequent bad faith suit. This point is the focus of the separate section C, immediately below.

C

Amicus concludes the federal district court's decision is fundamentally inconsistent with Florida law governing the scope of discovery in contract and bad faith actions. The scope of discovery in breach

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[2] "[I]n insurance contracts or other contracts for the payment of money, the parties have already told us what damages they contemplated; in the case of insurance, it is payment equal to the losses covered by the policy, up to the policy limits." *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, 2008 WL 423451, *6 (C.A.N.Y.,2008)(dissent)

of contract cases, as opposed to bad faith cases, is tightly regulated by Florida law. Florida law attaches a work product privilege to an insurer's claims files and internal materials. The immunity provided by this designation persists through the conclusion of a breach of contract or coverage action. *Ruiz,* 899 So. 2d 1121. Thus, Florida courts will not permit the insured to obtain discovery of the insurer's claims files and internal claim documents before the conclusion of the contract or coverage action. *See, e.g., GEICO General Ins. Co. v. Hoy*, 927 So. 2d 122 (Fla. 2d DCA 2006) (granting petition and quashing order compelling the insurer to produce its claims file in coverage case). The claims files and other internal documents are irrelevant in a first party coverage or contract dispute, where the only issue is whether the contract terms obligate the insurer to pay for the loss.

Florida appellate decisions granting certiorari, and quashing trial court orders that would have allowed the insured to take discovery of an insurer's claims files and internal documents during a breach of contract or coverage action, are abundant.[3] Florida law is clear: a trial court's ruling that

[3] The following cases granted certiorari and quashed orders that permitted the insured to take discovery of an insurer's claims files, underwriting files, or other internal documents in a breach of contract or coverage action. *State Farm Mut. Auto. Ins. Co. v. O'Hearn,* 975 So. 2d 633(Fla. 2d DCA 2008) (quashing order to produce notes, minutes,

permits an insured discovery of the insurer's claims files and internal documents while the contract or coverage action is pending, constitutes a departure from the essential requirements of law, for which there is no remedy on appeal.

However, after the contract or coverage action is concluded, and presuming a bad faith suit has ripened, the insurer's claims files and internal documents may lose their work product protection and become discoverable *See Ruiz,* 899 So. 2d 1121, 1129. The immunity is permitted to expire at the

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memoranda, e-mails, statistical and financial data found in insurer's claims and underwriting files); *Liberty Mut. Ins. Co. v. The Farm, Inc.*, 754 So. 2d 865(Fla. 3d DCA 2000) (quashing order to insurer to produce materials responsive to the premature bad faith claim); *State Farm Mut. Auto. Ins. Co. v. Cook*, 744 So. 2d 567 (Fla. 2d DCA 1999) (insurer's claims and litigation files and its internal manuals were not subject to discovery until the bad faith claims ripen following resolution of the coverage and contract claims); *State Farm Fire & Cas. Co. v. Martin*, 673 So. 2d 518 (Fla. 5th DCA 1996) (discovery of insurer's claim file impermissible in an action to determine coverage); *Superior Ins. Co. v. Holden*, 642 So. 2d 1139 (Fla. 4th DCA 1994) (quashing order compelling production of insurer's entire 'claims and investigative' file before coverage issue was resolved); *Allstate Ins. Co. v. Lovell*, 530 So. 2d 1106 (Fla. 3d DCA 1988) (quashing order compelling production of entire claims file prior to resolution of coverage dispute); *Balboa v. Vanscooter*, 526 So. 2d 779 (Fla. 2d DCA 1988) (quashing order compelling production of insurer's claim file because insurer's coverage obligation had not been yet established); *Utica Mut. Ins. Co. v. Croft*, 432 So. 2d 196 (Fla. 1st DCA 1983) (personal thoughts of insurer's employees regarding the evaluation of the claim and possible settlement offers was work product not to be disclosed to the insured in a coverage action); *Allstate v. Shupack*, 335 So. 2d 620 (Fla. 3d DCA 1976) (quashing order compelling production of claims file when determination of benefits to insured was still at issue).

end of the contract action because in a bad faith case, the "claim file type material presents virtually the only source of direct evidence with regard to the essential issue of the insurance company's handling of the insured's claim." *Ruiz*, 899 So. 2d 1121, 1128.

If the federal district court's ruling were to be affirmed, an important, insoluble question will arise: What is the permitted scope of discovery where the insured sues the insurer for both breach of contract and for breach of implied warranty of good faith and fair dealing? If, as the insured argues, the insurance company has mishandled its claim, then would the insured be permitted discovery of the insurer's claims files and internal claims documents, materials that are now immune from discovery while the contract action proceeds? Or must the insured wait until the breach of contract and breach of implied warranty claims are concluded, and a bad faith cause of action ripens, to obtain discovery of these documents?

Amicus urges the Court to anticipate this conundrum that will arise from the district court's decision, and to see that this problem is born from the inherent inconsistency of the federal district court's decision with Florida's established discovery principles. These established principles provide practical, bright-line guidance for the courts, the litigants, and their attorneys. The federal district court's ruling, if affirmed, would either

subject the insurer to premature, unfairly-prejudicial discovery of their claims and internal files during a contract or coverage action; or it would prevent the insured from obtaining discovery of materials that they will likely argue are essential to prosecute their implied warranty cause of action.

Amicus' concern is not unfounded. Case examples from California and Utah, jurisdictions that allow the simultaneous litigation of breach of contract and breach of implied warranty claims, demonstrate the way these problems will arise. In *J & M Associates, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 06-CV-0903, 2008 WL 638137 (S.D. Cal. 2008), the insured sued its carrier for breach of contract and for breach of the covenant of good faith and fair dealing.[4] The insured sought discovery of the insurer's claims files, claims files from other similar claims, and internal company information related to the claims. *Id.* at *2. The insurer objected, arguing the documents were not relevant to the breach of contract issues. Florida insurers, in like circumstances, can be expected to respond similarly. The California court agreed with the insured, however, and ruled the discovery was relevant for determining whether the insurer acted in bad faith, and so permitted the discovery. *Id.* at *3.

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[4] The breach of the implied covenant of good faith and fair dealing is referred to as "bad faith" in California law, and California does not bifurcate breach of contract claims from bad faith claims as Florida does.

The same result was obtained in *Christiansen v. Farmers Ins. Exchange*, 116 P.3d 259 (Utah 2005), where the insured similarly sued its carrier asserting simultaneous breach of contract and breach of implied warranty of good faith and fair dealing claims. The insured served interrogatories related solely to the implied warranty/bad faith claim. The court overruled the insurer's objections that this discovery should not proceed until the insured established a breach of the insurance contract.

These foreign cases demonstrate how a decision to allow insureds to state simultaneous breach of contract and breach of implied warranty claims, in the first party context, generates discovery requests that will result in a collision of principles that cannot be resolved in a manner consistent with Florida's established, bifurcated discovery format.

CONCLUSION

Amicus urges this Court to avoid this foreseeable collision of principles by answering the first certified question in the negative, and the second, if reached, in the affirmative. The federal district court's decision, if affirmed, will result in confusion in the courts over the scope of discovery, unnecessary conflict between the parties on discovery issues, and unfair prejudice to the insurers, should their work product immunity be lost during the contract or coverage action. Amicus urges this Court to preserve the

narrow focus of discovery shielding an insurer's work product from discovery, and its adjustors, administrators and employees, from deposition on claims handling issues, before a breach of contract or coverage action is concluded.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE & STYLE

The undersigned certifies that the type, size, and style utilized in this Brief is 14 point Times New Roman. This brief contains 3645 words.

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