IN THE SUPREME COURT OF FLORIDA

AMADO TRINIDAD,

Appellant

vs. CASE No. SC11-1643

FLORIDA PENINSULA INSURANCE COMPANY,

Appellee.

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The financial security insurance policies provide is embedded in the fabric of our economy and modern society. From a policyholder's perspective, the integrity of their insurance safety net is paramount. Because people are legally required to buy insurance to own a home or business and drive a car, and because policies are contracts of adhesion entered into by parties with vastly unequal economic power, the law has always placed heightened obligations on insurers, the interpretation of insurance contracts and related burdens of proof require special judicial handling. United Policyholders respectfully seeks to assist this Court in fulfilling this critically important role.

United Policyholders, ("UP") is a non-profit 501(c) (3) organization founded in 1991 that serves as an information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor support the organization's work. United Policyholders work is divided into three program areas: Roadmap to Recovery, (helping disaster victims navigate the insurance claim process), Roadmap to Preparedness, (promoting disaster preparedness and insurance literacy) and Advocacy and Action (advancing the interests of insurance consumers in courts of law, before regulators, legislators, and in the media). UP offers a library of tips, sample forms and articles on the full range of insurance products, coverage

and the claims process at http://uphelp.org.

United Policyholders is an official consumer representative to the National Association of Insurance Commissioners and works with Florida's Commissioner of Insurance Kevin M. McCarty and the Florida Office of Insurance Regulation in that capacity. The organization responds to inquiries from Florida residents on a regular basis. United Policyholders is serving on an Advisory Panel to the American Law Institute on the Principles of Liability Insurance drafting project. The Panel and the reporters are closely examining legal principles related to the very issues in this case. United Policyholders has previously appeared before this and other Florida Courts as *amicus curiae* and in over three hundred other cases throughout the United States.

SUMMARY OF THE ARGUMENT

The decision issued below by the Third District Court of Appeal of Florida ("Third District") improperly allowed that court's interpretation of policy language to supercede an existing statute. The Insurance Company in the instant case sold the Plaintiff a policy of insurance (the "Policy") which required payment of Replacement Cost Value after a loss ("Replacement Cost Value" or "RCV") because Section 627.7011(3), Florida Statutes (2008), expressly provides that an insurer issuing such a policy was required to pay its insured the Replacement Cost Value regardless of whether the insured repaired or replaced the property.

Nonetheless, the court below affirmed summary judgment for the Insurance Company based upon an argument that policy language could permit the Insurance Company to pay only part of the Replacement Cost Value and withhold payment of a portion of the Replacement Cost Value attributed to Profit and Overhead. The trial court erred in interpreting the policy to allow a limited RCV payment contrary to the express terms of the controlling statute.

By requiring that the Replacement Cost Value be paid regardless of whether the property was repaired or replaced, the legislature required payment of the full Replacement Cost Value, not just a portion it. Prior to the completion of any construction project, Replacement Cost Value may be calculated in any number of

ways, some ways that may include an additional percentage for contractor's overhead and profit over base cost amounts, other methods include a contractor's fee above the basic cost, still other methods of determining value are based on calculating parts plus labor, and various costs and conditions are built into the construction estimate. Nevertheless, Replacement Cost Value is unquestionably defined under Florida law as the "full market value of the cost to repair or replace."

The Replacement Cost Value of property is a whole dollar figure. A holdback of any element of the Replacement Cost Value "until incurred" under a policy providing indemnity and a statute requiring payment of same means the insurance company has the power to hold back payment for **any and all** portions of the Replacement Cost Value, which violates the statute and the public policy supporting it. When the statutes require payment of the RCV regardless of whether the work was done, the Insurance Company cannot try to break up the RCV into its different parts and just pay the portions it wants to. To the contrary, it must pay the full Replacement Cost Value it agreed to pay by selling the insured a policy with replacement cost coverage.

ARGUMENT

I. POLICY LANGUAGE CANNOT BE INTERPRETED TO SUPERCEDE STATUTORY REQUIREMENTS.

The opinion issued below by the Third District Court of Appeal of Florida ("Third District") allows policy language to supercede an existing statute. This is not consistent with Florida law or even well-established jurisprudence. See Flores v. Allstate Ins. Co., 819 So. 2d 740, 745 (Fla. 2002) (noting that courts have an obligation to invalidate exclusions on coverage that are inconsistent with the purpose of the statute that mandates the coverage); Salas v. Liberty Mut. Fire. Ins. Co., 272 So. 2d 1, 5 (Fla.1972) (recognizing that insurance coverage that is a creature of statute is not susceptible to the attempts of the insurer to limit or negate the protection afforded by the law); Diaz-Hernandez v. State Farm Fire & Casualty Co., 19 So. 3d 996, 1000 (Fla. 3d DCA 2009) (concluding that a provision in a policy was invalid because it was against the public policy of the statute); Vasques v. Mercury Cas. Co., 947 So. 2d 1265, 1269 (Fla. 5th DCA 2007) (stating that restrictions on statutorily mandated coverage must be carefully examined because exclusions that are inconsistent with the purpose of the statute are invalid) (citing Flores, 819 So. 2d at 745.

As the Third District noted below, the policy at issue in this action is a replacement cost policy. Trinidad v. Florida Peninsula Ins. Co., __ So. 3d __, 36 Fla. L. Weekly D1081, 2011 WL 1878115, *1 (Fla. 3d DCA 2011). At the time relevant to this action, section 627.7011(3), Florida Statutes (2008), required:

> In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, **whether or not the insured replaces or repairs the dwelling or property**.

(Emphasis added.)

Although the statutory language is quite clear, the Third District reached a contrary result in the instant action based upon its interpretation of language in the Policy. The Policy provided that the Insurance Company would pay no more than the least of the following amounts:

> (a) The limit of liability under this policy that applies to the building;
>
> (b) The replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) The necessary amount actually spent to repair or replace the damaged building.

Trinidad, at *2. Relying on this language, the Third District concluded that the Policy at issue "is a replacement cost policy, which only requires Florida Peninsula to pay costs **incurred** by Trinidad" when repairing the property. Trinidad, *2 (emphasis

added.) This directly contradicts the language of Section 627.7011(3)(2008) which required that the Insurance Company pay the Replacement Cost Value without reservation "whether or not the insured replaces or repairs the dwelling or property."

II. REPLACEMENT COST VALUE IS THE FULL COST OF REPAIR

In Florida, an insurance policy for Replacement Cost Value of property is an agreement to indemnify a homeowner for the full cost to repair the entire dwelling, including systems and parts of the dwelling, such as the plumbing system or roofing system, based on the existing dwelling design, without deduction for depreciation. Glens Falls Ins. Co. v. Gulf Breeze Cottages, 38 So. 2d 828 (Fla. 1949). An insured is "entitled to recover the amount required to make the most economical repairs so as to place the property in as nearly the same condition as it was before the loss even though the property was in better condition after the repairs were made than it was before" Glens Falls Ins. Co. v. Beachcrest of Hollywood, Inc., 220 So. 2d 385, 385-86 (Fla. 4th DCA 1969); See also Davis v. Allstate Ins. Co., 781 So. 2d 1143, 1144 (Fla. 3d DCA 2001) ("Replacement cost under the "Guaranteed Replacement Coverage" provision is measured by what it would cost to replace the damaged structure on the same premises.") (Citation omitted); Magnum Marine Corp., N.V. v. Great Am. Ins. Co., 835 F.2d 265, 269 (11th Cir. 1988)(Replacement value of property insured included accrued overhead and profit on labor and material, not

exceeding the agreed value between the parties.)

Replacement Cost Value was not defined in the Policy at issue. Nevertheless, when damage to part of a dwelling occurs, calculating the cost to repair or replace the damages necessarily requires consideration of all the elements of the cost of the repair, without allowing for depreciation. Glens Falls Ins. Co. v. Beachcrest of Hollywood, Inc., 220 So. 2d 385, 385-86 (Fla. 4th DCA 1969). Under Florida law, for homeowners policies, even adjoining, matching portions of the property are considered in determining the Replacement Cost Value. See Section 626.9744 (2), Florida Statutes ("When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas.")

A consumer pays a premium for this kind of "RCV" coverage, and it is an accepted legal principal that Insurance Companies generally underwrite policies which pay Replacement Cost Value based on the cost to repair or replace. Citizens Prop. Ins. Corp. v. Hamilton, 43 So. 3d 746, 755 (Fla. 1st DCA 2010)("A fiscally prudent insurer will surely derive its premium in consideration of the statutorily-mandated exposure of maximum risk under [Florida law.]") It makes no sense to allow an insurance company to **underwrite** the cost of insurance based on one definition of RCV to then pay claims based on a completely different definition

of RCV (and one with notably lesser value.)

The Replacement Cost Value thus is the full amount it would cost to return the property to its pre-loss condition, regardless of the fact that the materials are new. Section 627.7011(3), Florida Statutes (2008), mandated for policies issued since October 2005 that the Insurance Company pay RCV "whether or not the insured replaces or repairs the dwelling or property." It necessarily follows that the Insurance Company was without power to limit its liability required by the statute. Standard Acc. Ins. Co. v. Gavin, 184 So. 2d 229, 232 (Fla. 1st DCA 1966).

It is a true leap of logic to allow an Insurance Company, which is required to pay the Replacement Cost Value by statute, to then be allowed to withhold blanket categories of miscellaneous elements of the Replacement Cost Value under a bargained-for contract of indemnity. Glens Falls Ins. Co. v. Gulf Breeze Cottages, 38 So. 2d 828, 830 (Fla. 1949)("Bearing in mind that the purpose of the contract was to indemnify the owner against loss, we think the chancellor adopted a rule [determining value] which was fair and just and that the property should have been placed in as nearly as possible the same condition that it was before the loss, without allowing depreciation for the materials used.") See also S. Am. Fire Ins. Co. v. Rinzler, 324 So. 2d 133, 133 (Fla. 1st DCA 1975) (There is no deductible applied to fire loss payment when coverage intended was evidently for full indemnity); Sperling

v. Liberty Mut. Ins. Co., 281 So. 2d 297, 298 (Fla. 1973) ("In Glens Falls we held that, since the purpose of an insurance contract is to indemnify the owner of property against loss, the measure of value of partial destruction of a building by fire should be the cost of placing the building in as nearly as possible the same condition that it was before the loss, without allowing depreciation for the materials used. We see no reason for receding from this decision.)[1]

As discussed above, Section 627.7011(3), Florida Statutes (2008), was intended to prohibit an insurance company from withholding payment after a dwelling sustains physical damage, **regardless of whether the work is performed**. To support the premise that one element (O&P) of the cost of the repair or replacement (the "Replacement Cost Value") must first be incurred is to support the proposition that **all elements** of the Replacement Cost Value must first be incurred.[2]

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[1] In interpreting a similar law requiring payment of Replacement Cost Value and comparing policy language which arguably allowed for withholding of depreciation therefrom, a Missouri court held that a statue controls and that no deductions can be withheld by the insurance company. McMillin v. American Family Ins. Co., 950 S.W.2d 242, 248 (Mo. Ct. App. 1997).

[2] In Salesin v. State Farm Fire & Casualty Company, 581 NW 2d 781, 791 (Mich. Ct. App. 1998), a Michigan Appeals Court explains this one-thing-equals-all-things-in a hypothetical estimate:

> The original estimate of the "actual cash value of the damage" is just that, an estimate. Certainly, the insured has not incurred the cost of contractor's overhead and profit at this point. Neither, however, has the

III. "OVERHEAD AND PROFIT" ON LABOR AND MATERIALS IS INDIVISIBLE FROM REPLACEMENT COST VALUE

"Overhead and Profit" on labor (including supervision) and materials is unequivocally a part of the Replacement Cost Value, as it is part of the market value of any and all construction. Timbercraft Enterprises, Inc. v. Adams, 563 So. 2d 1090, 1092 (Fla. 4th DCA 1990)(Florida case law recognizes profit and overhead as recoverable items in a quantum meruit action); Dean v. Blank, 267 So. 2d 670, 671 (Fla. 4th DCA 1972) (In an action on a quantum meruit the measure of damages is the reasonable value of the labor performed and the market value of the materials furnished) citing Fred Howland, Inc. v. Hollywood Tile & Terrazzo Co., 207 So. 2d 700 (Fla. 4th DCA 1968); See also Broderick v. Overhead Door Co. of Fort Lauderdale, 117 So. 2d 240, 243 (Fla. 2d DCA 1959) (Completed construction includes the reasonable value of labor and services, including supervision) citing

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> insured incurred the cost of labor or materials. It is no more logical to exclude the former on the grounds that it is a "non damage factor" than it is to exclude the latter.

Id.

Nor can the Insurance Company argue that full RCV payment will result in a "windfall" to the insured because consideration for the bargained for indemnity was provided for in the premium, and performance of the construction is not relevant to the payment due. See e.g. Ghoman v. New Hampshire Insurance Company, et al., 159 F.Supp.2d 928, 934-35 (N.D.Tex.2001) ("[Windfalls were] legally irrelevant … the plaintiff contracted for the Actual Cash Value of his loss. His recovery is not tied to the repair or replacement of his property.")

Golub v. De Linardy Flooring Co., 44 So. 2d 75, 76 (Fla. 1950).

Section 768.81(b), Florida Statutes, defines "economic damages" as "past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; **costs of construction repairs, including labor, overhead, and profit**; and any other economic loss that would not have occurred but for the injury giving rise to the cause of action." (Emphasis added). It makes no sense for Florida legal jurisprudence if a tortfeasor's liability is greater than that which is bargained and paid for under an indemnity contract. Similarly, in a mechanic's lien action, in the absence of an agreed total contract price, an estimate of the reasonable value of work and labor furnished will require consideration of such factors as the actual cost of work done and material supplied, and includes the overhead and profit. Haney Chevrolet, Inc. v. Poli Bros., Inc., 262 So. 2d 230, 231 (Fla. 4th DCA 1972).

Thus, Florida law clearly indicates that "Overhead and Profit" is part of the construction cost and thus an integral part of the Replacement Cost Value of the property insured. Citizens Ins. Co. v. Barnes, 124 So. 722, 723-24 (Fla. 1929) (Holding that costs affecting the value of the construction at the time the insurance contract was entered into are presumed to be part of the insured value because such

costs are "an integral part of all contracts of insurance upon property within the [coverage] limits to which they apply"). See also Nationwide Mut. Ins. Co. v. Chillura, 952 So. 2d 547, 550 (Fla. 2d DCA 2007) (Determination of actual cash value is the repair or replacement cost reduced by depreciation to all items except for those items which were not used in the construction previously).

The Insurance Company's position that "Overhead and Profit" can be arbitrarily withheld as a payment to the insured under an indemnity contract could be taken to absurd lengths. For example, in a homeowner's claim for partial damages to a home due to a kitchen fire, an insurer could conceivably withhold payment to the insured for "overhead and profit" from the purchase cost of the materials (i.e., a local hardware store's potential 100% markup on cans of paint and drywall). The same kind of reasoning can be used to withhold any cost for labor, costs, or supervision (i.e. an estimate for a plumber and his assistant to repair a broken pipe could, excluding the licensed plumber's labor and supervision, leave only a $5.50 payment for PVC parts). Such interpretation, limitation or exclusion would completely contradict the policy provisions making the insurance coverage illusory. Purrelli v. State Farm Fire & Cas. Co., 698 So. 2d 618, 620 (Fla. 2d DCA 1997). Utilizing such distorted reasoning to withhold payment would result in payments so potentially low or non-existent, there would be no consideration for the premium paid for the

indemnity contract. An insurance company could invent so many bits and pieces of the Replacement Cost Value to be "withheld" from payment until incurred, it would result in a zero payment for an old, but completely workable kitchen despite the fact that the insured paid a premium to be indemnified for Replacement Cost Value. A contract in which one party enjoys a "heads-I-win, tails-you-lose" bargain renders a contract unreasonable, illusory and unenforceable. See Hardwick Properties, Inc. v. Newbern, 711 So. 2d 35, 38 (Fla. 1st DCA 1998).

Accordingly, an Insurance Company's withholding of the complete and across-the-board element of "Overhead and Profit" specifically ignores the fact that it is part of the reasonable value of the property for which the homeowner should be indemnified, because it is an element of the "Replacement Cost Value" of that property. There is no basis under Florida law, or in the insurance contract at issue which allows for an Insurance Company to wield such an expansive power as wholly excluding an established value so entrenched within definition of the cost of repair or replacement of any part of a dwelling (RCV).

IV. OVERHEAD AND PROFIT CANNOT BE ELIMINATED FROM REPLACEMENT COST VALUE OF DAMAGED PROPERTY AS UNDER THE BROAD EVIDENCE RULE THE COURT SHOULD CONSIDER ALL EVIDENCE RELATED TO THE COST OF REPLACEMENT OR REPAIR

Further, "Overhead and Profit" cannot be wholly excluded from Replacement Cost Value based on a blanket pronouncement. Am. Reliance Ins. Co. v. Perez, 689 So. 2d 290, 291-92 (Fla. 3d DCA 1997) (We observe then, that the purpose of the [ACV/RCV] policy is either to compensate those insureds who elect not to repair or replace the damaged portion of their property by paying them fair market value (which inherently includes a deduction for depreciation) for the loss or damage they suffered, or, if repair or replacement is made, to compensate the insureds at cost without depreciation (as repair or replacement is to be made with new materials) . . . The dollar amount of value, cost, and depreciation are all factors to be considered through accepted appraisal practices.")

Interestingly, this Court in New York Cent. Mut. Fire Ins. Co. v. Diaks, 69 So. 2d 786, 789 (Fla. 1954) established that ACV is determined by utilizing the "Broad Evidence Rule," but no such case exists which specifically proposes the same broad standard in determining value under RCV.[3] Under this Rule, any evidence logically

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[3] In cases establishing what evidence can be used to determine Replacement Cost Value under an insurance contract, several Florida Courts have noted that the difference between Replacement Cost Value and Actual Cash Value is simply

tending to establish a correct estimate of the value of the damaged or destroyed property may be considered by the trier of facts. Worcester Mut. Fire Ins. Co. v. Eisenberg, 147 So. 2d 575, 576 (Fla. 3d DCA 1962). The Broad Evidence Rule is consistent with the proposition that insurance coverage must be construed broadly and exclusions narrowly. Young v. Progressive Southeastern Insurance Co., 753 So. 2d 80, 84 (Fla. 2000); Hudson v. Prudential Ins. Co., 450 So. 2d 565, 568 (Fla. 2nd DCA 1984). Furthermore, using the Broad Evidence Rule to establish Replacement Cost Value is ultimately to the benefit of the insured so that blanket pronouncements by an Insurance Company (i.e. "we will not pay overhead and profit until incurred" or "all walls over 20 years old are depreciated at 75%") cannot defeat the insureds' opportunity to argue payment should be higher because of its' specific character. See

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depreciation. Florida Ins. Guar. Ass'n v. Somerset Homeowners Ass'n, Inc., 83 So. 3d 850, 851 (Fla. 4th DCA 2011) ("The difference between [RCV and ACV] is withheld as depreciation until the insured actually repairs or replaces the damaged structure") quoting Goff v. State Farm Fla. Ins. Co., 999 So.2d 684, 690 (Fla. 2d DCA 2008). This contradicts the express language in New York Cent. Mut. Fire Ins. Co. v. Diaks, 69 So. 2d 786, 788-89 (Fla. 1954) which states: "'[A]ctual cash value' is not, of course, synonymous with replacement cost, or even replacement cost less depreciation. . . 'actual cash value'' means the *actual value expressed in terms of money* of the thing for the purpose for which it was used . . . By that rule, it is plain that the value to be determined is the value of the particular property which was lost or destroyed. In making such a valuation, depreciation rates based on the average useful life of similar equipment would not necessarily be controlling, where, as in the instant case, testimony is adduced as to the actual condition or value of the specific property lost. And bearing in mind that the purpose of the contract was to indemnify the owner against loss." (Emphasis supplied)(Citations omitted.)

e.g. Berkshire Mut. Ins. Co. v. Moffett, 378 F.2d 1007, 1011 (5th Cir. 1967) ("the plaintiff's loss must be expressed in terms of money, which was a matter of opinion, that the trier of fact in determining that question might receive evidence as to whether there was a fair market value or replacement cost and in either case what it might be, and that while fair market value and replacement cost were permissible standards for determining fire losses, they were standards and not shackles. Thus, the cardinal principle is that the purpose of the insurance contract is to indemnify the owner against loss, that is, to place him in the same position in which he would have been if no fire had occurred.")(Citations omitted.)

In the instant case, such a holding would also defeat summary judgment in the Insurance Company's favor because it is the Insurance Company's burden to establish there are no questions of material fact at issue[4] and cannot do so by issuing a naked decree regarding non-payment of overhead and profit. Hanover Fire Ins. Co. v. Lewis, 1 So. 863 (Fla. 1887) ("A policy of insurance against loss by fire, which

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[4] The burden is initially on the movant for summary judgment to demonstrate the nonexistence of any question of material fact, and only when the movant has tendered competent evidence in support of its motion does the burden shift and fall on the other party to come forward with opposing evidence to show that a question of material fact exists. Moreover, the movant's proof of the nonexistence of a genuine issue of fact must be conclusive, such that all reasonable inferences which may be drawn in favor of the opposing party are overcome. Landers v. Milton, 370 So. 2d 368, 370 (Fla.1979); Holl v. Talcott, 191 So. 2d 40, 43-44 (Fla.1966)

provides that such loss shall be estimated according to the actual cash value of the property at the time of the loss, not exceeding the sum insured, leaves the question of value open.")

CONCLUSION

Reality dictates that the cost of repairs includes labor, materials, mark-ups, and all other costs associated with the repair and replacement of the damages. To define it as anything less would be ill conceived, impractical and useless. "Overhead and Profit" is an established element of value within the definition of Replacement Cost Value of a dwelling. The Insurance Company's effort to reserve payment of that portion of the RCV was contrary to the statutory requirement that the Replacement Cost Value be paid regardless of whether the property was repaired or replaced. The Third District's decision should be reversed.

Finally, to fully ensure that the legislature's intent to require insurance companies pay for damaged property (and not bits and pieces of a property) is uniformly and consistently implemented, no part of the Replacement Cost Value for which a premium was paid for full indemnity, including Overhead and Profit, can be withheld by the Insurance Company.

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CERTIFICATE OF SERVICE

This is to certify that I have on this July 12, 2012, served a true and correct copy of United Policyholder's *Amicus Curiae* Brief in Support of the Position of the Appellant via U.S. Mail and email upon the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using 14-point Times New Roman type, a font that is proportionately spaced.

Adrian Neiman Arkin