ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-157

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

-vs-

ROBIN CURRAN,

Respondent.

_____/

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION ON BEHALF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTRODUCTION

The Florida Justice Association ("FJA") is a large voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to 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 the Florida appellate courts and this Court.

The lawyer members of the FJA care deeply about the integrity of the legal system and, towards this end, have established an *amicus curiae* committee. This case is important to the FJA because it involves an issue of insurance contract interpretation applicable to many different kinds of insurance coverage which will affect every resident of Florida. In addition, because most insurance claims are made by insured without the benefit of counsel, all such claimants will have their insurance coverage at risk of forfeiture for even the smallest violation of the policy terms if the arguments made by Petitioner are accepted by this Court. The stated policy of this Court has always been to favor adjudication of claims in court rather that to have claims destroyed by technical deficiencies, pleading traps or unreasonable forfeiture. Resolution of the certified question is an important step in the evolution of insurance contract law; one that will either close the courthouse

doors to valid claims or ensure access to the courts. Because of the question presented, the FJA's members are committed to having claims adjudicated on their merits and therefore believe the association's perspective on this issue would assist the Court.

The FJA believes that its input may be of assistance to the Court in resolving the issues raised in this case, and that this Court's decision will have a tremendous impact on its members and their clients. See, e.g., Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So.2d 522 (Fla. 4th DCA 1999) (briefs from *amicus curiae* are generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues). Accord Rathkamp v. Dept. of Community Affairs, 730 So.2d 866 (Fla. 3d DCA 1999) (endorsing and adopting the opinion in Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062 (7th Cir. 1997), regarding the role of *amicus curiae*).

ARGUMENT

Certified Question

> When an insured breaches a CME provision in an uninsured motorist contract, in the absence of contractual language specifying the consequences of the breach does the insured forfeit benefits under the contract without regard to prejudice, or does the prejudice analysis described in Bankers Insurance Company v. Macias, 475 So.2d 1216, 1218 (Fla. 1985), apply? If prejudice must be considered, who bears the burden of pleading and proving that issue?

Amicus proposes that this Court's resolution of the certified question should be that when the insured breaches a policy provision, the Macias analysis must be applied to determine whether the insurer has been prejudiced. In that determination, the burden would be on the insurer to prove the prejudice caused was material and prevented it from obtaining information necessary to decide whether the loss claimed is within coverage and the value of the loss.

Merits

State Farm Mutual Automobile Insurance Company's ("State Farm") argument in this case is a good example of clear overreaching to obtain relief not supported by the policy terms. The insurance policy issued provides that the insured is prohibited from filing suit against State Farm unless the insured has complied with all contractual requirements. It does not state that filing suit prematurely automatically voids the coverage purchased, nor does the policy

provide that failing to attend a Compulsory Medical Examination ("CME") when requested causes a forfeiture of the coverage purchased. The policy simply provides that before filing suit, the insured must attend a CME if one is requested.

Instead of asking the trial court to enforce the contract, however, State Farm asked the court to rewrite the contract to provide that any breach by the insured would result in a forfeiture of coverage. The trial court refused, and the Fifth District affirmed that decision. Nevertheless, State Farm persistently asks this Court to rewrite the contract to give it the windfall it seeks. The request must be denied.

To be a material breach, a party's nonperformance must go to the essence of the contract. Covelli Family, L.P. v. ABG5, L.L.C., 977 So.2d 749, 752 (Fla. 4th DCA 2008). A party's failure to perform some minor part of his or her contractual duties cannot be classified as a material or vital breach. State Farm's argument treats an insured's failure to attend a physical examination before filing suit as a material breach, on par with the insured's failure to pay the premium. In fact, State Farm would have this Court hold that the insured's act of filing suit without first attending the CME is a more serious breach than failing to give timely notice. Amicus would argue that the violation of a contractual provision by the insured is not a material breach unless the breach has the effect of denying the insurer the

ability to investigate and evaluate the claim being made. As this Court wrote in Ramos v. Northwestern Mutual Ins. Co., 336 So.2d 71, 75 (Fla. 1976):

> Not every failure to cooperate will release the insurance company. Only that failure which constitutes a material breach and substantially prejudices the rights of the insurer in defense of the cause will release the insurer of its obligation to pay. The question of whether the failure to cooperate is so substantially prejudicial as to release the insurance company of its obligation is ordinarily a question of fact, but under some circumstances, particularly where the facts are admitted, it may well be a question of law.

State Farm proposes that the rule stated by this Court in Ramos be vacated, and a new rule put in its place which requires that any breach by the insured voids coverage. What State Farm is really asking is that this Court categorize the act of filing a lawsuit without first submitting to an examination as an automatic material breach. However, a material breach must go to the essence of the contract, and the essence of an insurance contract is not to obtain a physical examination of the insured. The essence of an uninsured motorist insurance policy is to obtain a benefit in exchange for a premium. While a physical examination will assist in the early settlement of the claim, a physical examination is not the essence of the policy.

To be a material breach, an insurer must prove the breach denied it the ability to evaluate and defend the claim. In other words, in order to result in a forfeiture of coverage bargained for, the consequences of the insured's breach must

be so significant that the insurer is deprived of its ability to decide whether the claim is within coverage and, if so, to evaluate the value of the claim. In Bankers Insurance Co. v. Macias, 475 So.2d 1216 (Fla. 1985), this Court explained that different presumptions apply depending on the type of provision the insured has breached and placing the burden on the insured if the breach concerns notice or on the insurer if the breach occurs after the claim has been made. Regardless of the burden, however, the central issue is whether the insured's breach has caused a significant loss of rights to the insurer. If the breach caused only minor inconvenience, then it is immaterial; if the breach caused significant loss of rights then it is material. Only a material breach by the insured will result in forfeiture of coverage.

This point is made by Professor Williston (14 Williston on Contracts § 43:5 (4th ed.)):

> However, modern courts, and the Restatement (Second) of Contracts, recognize that something more than a mere default is ordinarily necessary to excuse the other party's performance in the typical situation, subscribing to the general rule that where the performance of one party is due before that of the other party, such as when the former party's performance requires a period of time, an uncured failure of performance by the former can suspend or discharge the latter's duty of performance only if the failure is material or substantial. Thus, if the prior breach of such a contract was slight or minor, as opposed to material or substantial, the nonbreaching party is not relieved of his or her duty of performance, although he or she may recover damages for the breach.

To be a material breach, then, the breach must have some substantial and significant effect on the rights of the other party to the contract. It appears that the Macias prejudice analysis is actually a materiality of the breach analysis; if there was substantial prejudice then the breach was material. This was the conclusion reached by the majority below.

Review of the circumstances of this case show that Robin Curran's ("Curran") breach was immaterial. The insurance policy gives State Farm the right to information from physical and oral examinations prior to a lawsuit and one can easily conclude the purpose of those provisions is so the insurer's investigation is not limited by the Rules of Civil Procedure which would govern similar discovery during litigation. An examination under oath pursuant to the policy, for example, is not governed by the rules regarding depositions. Similarly, a CME under the policy terms does not give the insured the rights which exist under the Rules of Civil Procedure, such as the right to record the examination or have an attorney present.

Importantly, the filing of the complaint by Curran did not rob State Farm of the right to obtain a physical examination, it only changed the timing of the examination. Instead of obtaining the examination before reading the complaint, State Farm was forced to obtain the examination after being served with the complaint. State Farm never claimed the later-performed CME yielded results

which were unequal to the findings it could have obtained from a CME performed earlier, nor did it argue it was deprived of the ability to evaluate the claim for coverage and loss. State Farm has presented this Court with no basis to apply a prejudice analysis of any kind. Its claim of prejudice from the mere filing of suit prematurely and having to defend the litigation falls flat because State Farm created that prejudice itself by refusing to enforce the policy provisions it had available.

The proper remedy when an action is filed prematurely is to abate the action until the deficiency is corrected. Bierman v. Miller, 639 So.2d 627, 628 (Fla. 3d DCA 1994) ("the proper remedy for premature litigation is an abatement or stay of the claim for the period necessary for its maturation under the law."); See also Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So.2d 1289 (Fla.1991). If State Farm had enforced the contract and required the suit to be abated, the only expense of litigation would have been the filing of a Motion to Abate and possibly attending a hearing at a total cost of approximately $1,000. Macias requires "substantial" prejudice, and that small inconvenience would not be substantial prejudice. The trial court could cure whatever prejudice was caused to State Farm by ordering the claimant to pay the associated costs. The only reason State Farm had to defend the litigation beyond a simple motion and hearing was that it waived

its right to abatement and tried to create greater prejudice. The policy language provides the proper remedy, as does decisional law.

Putnal and Goldman Do Not Create an Automatic Forfeiture Rule

Instead of proving prejudice or a material breach, State Farm has taken the unreasonable position that any breach by the insured results in forfeiture of coverage, relying heavily on the Fourth District's decision in Goldman v. State Farm Fire General Ins. Co., 660 So.2d 300 (Fla. 4th DCA 1995). However, Goldman presents a situation which is different from the situation in this case and, indeed, in most every other case which involves this issue. In Goldman, the insured conduct was described as a willful refusal to comply with the demand for examination by the insurer, not simply violating the timing of the examination (before suit vs. after suit). The Goldman court found that proof of prejudice was not necessary because of the willful nature of the insured's breach. The key was that the insured refused to comply.

This same distinction exists in Southern Home Insurance Co. v. Putnal, 57 Fla.199 (Fla. 1909), where the insured willfully refused to sit for an oral examination because he believed the insurer's right to demand an examination had been waived by an offer to pay on the policy and led the insured to believe no examination would be required. Id. at 228-29. Like Goldman, the insured made an outright refusal to comply. The same is true in Pervis v. State Farm Fire and

Casualty Co., 901 F.2d 944 (11th Cir. 1990) (interpreting Georgia law), where the insured, who had been indicted for arson, refused to give a statement as requested. In short, the Putnal – Goldman line of cases stands only for the proposition that if an insured willfully refuses to comply with a policy condition, then the insured has made the conscious decision to forfeit coverage.

The distinction between an insured who willfully refuses to comply with a contract term and one who files suit prematurely without refusing to comply was made in Riviera S. Apartments, Inc. v. QBE Ins. Corp., 07-60934 CIV, 2007 WL 2506682 (S.D. Fla. 2007). The court in Riviera S. Apartments distinguished Goldman and Pervis and denied the insurer's summary judgment because there was a lack of evidence the insured refused to comply because the request was made only in a general sense, not specifically.

The Fourth District expressly made this distinction when it refused to apply Goldman because the insured had complied with the EUO and document production requests by the insurer, but not to the extent the insurer would have liked. Haiman v. Fed. Ins. Co., 798 So.2d 811, 812 (Fla. 4th DCA 2001). The court in Haiman adopted the reasoning in Diamonds & Denims, Inc. v. First of Georgia Insurance Co., 203 Ga.App. 681, 417 S.E.2d 440, 441-42 (1992) to distinguish Goldman (Haiman, at 812):

> [a] total failure to comply with policy provisions made a prerequisite to suit under the policy may constitute a breach

> precluding recovery from the insurer as a matter of law. If, however, the insured cooperates to some degree or provides an explanation for its noncompliance, a fact question is presented for resolution by a jury.

Further support for the limitation of the Putnal – Goldman line of decisions to insureds who have willfully refused to comply with a policy requirement can be found in Wright v. Life Insurance Co. of Georgia, 762 So.2d 992 (Fla. 4th DCA 2000), in which the insured filed suit prematurely in breach of the policy provision that no suit may be filed until 60 days after written proof has been made to the insurer. The trial court granted the insurer's motion for summary judgment without prejudice. Relying on Goldman, the court affirmed the summary judgment finding that the insured could not maintain the action. However, the court also wrote that the summary judgment did not operate as an adjudication on the merits, so the insured was free to file a new lawsuit against the insurer after complying with the contract terms. The insured in Wright did not refuse to comply with the contract requirements, she simply had not complied yet. The court also wrote that a plaintiff should be given a chance to comply with a condition precedent instead of entering summary judgment, citing Willis v. Huff, 736 So.2d 1272, 1273 (Fla. 4th DCA 1999).

In this case, Curran never refused to comply with the requirement of an examination. The parties were working toward resolving the logistics of an examination when Curran filed suit. Even after filing suit Curran offered to appear

for an examination. Under these facts, the Putnal - Goldman line of decisions does not apply.

Coupled with the severity of the sanction imposed – forfeiture of insurance the insured paid for and relied on by the insured – there is no basis to grant the relief State Farm seeks. Forfeiture of coverage should only result in the most serious instances of willful breach by the insured.

The problem in this case is that the proper remedy, abatement or dismissal without prejudice, was never requested. That remedy was waived by State Farm. Instead, State Farm manufactured a crisis and demanded summary judgment as the only remedy. That fact that State Farm has refused to request the appropriate remedy does not make the remedy it requested appropriate. State Farm has presented this Court with no authority making a forfeiture of coverage (and summary judgment in State Farm's favor) appropriate.

The only remedy State Farm was entitled to was to have the action abated:

> 2. **Suit Against Us**
>
> There is no right of action against us
>
> a. until all terms of this policy have been met and
>
> * * *
>
> c. under ... uninsured motor vehicle ... coverages until 30 days after we get the insured's notice of accident or loss.

The remedy set forth in the policy should have been enforced.

There is no basis to apply the Macias prejudice analysis where the policy already provides a remedy which does not include the possibility of forfeiture. The Macias analysis would only apply if State Farm had moved for abatement, obtained the CME and then found that the CME was somehow unequal to the results if the CME had been performed when requested.

The Burden of Proving a Material Breach by the Insured is on the Insurer

The final question posed must be answered that the insurer bears the burden of proof. An insurer in the circumstances of this case is claiming a material breach of contract by the insured which has excused performance by the insurer. When making a claim of breach, the burden is always on the party making the claim. Ausch v. St. Paul Fire & Marine Ins. Co., 125 A.D.2d 43, 45, 511 N.Y.S.2d 919, 922 (N.Y. App. Div. 1987) (Defendant "clearly" had the burden of proof regarding affirmative defense that insured breached the policy by failing to appear for examination under oath). In Johnston v. Sweeney, 68 S.W.3d 398 (Mo. 2002), the court explained that the burden of proving compliance with a notice provision in an insurance policy is on the insured because it is an element of proving coverage. However, once the insured has proven that it gave the required notice and that he is entitled to coverage under the policy, the burden is on the insurer to prove a breach of the cooperation clause sufficient to void coverage.

There appears to be some confusion in terminology as to conditions precedent and subsequent which has confused the analysis of burden of proof. A leading insurance treatise attempts to clarify the meaning of those terms (6 Couch on Ins. § 81:19):

> Conditions are of two kinds, precedent and subsequent. Conditions precedent are those which relate to the attachment of the risk, whereas conditions subsequent are those which pertain to the contract of insurance after the risk has attached and during the existence thereof; that is, those conditions which must be maintained or met after the risk has commenced, in order that the contract may remain in full force and effect. Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but conditions subsequent and are matters of defense to be pleaded and proved by insurer.

The Supreme Court of Nebraska has given examples of conditions precedent as the obligation of the applicant to satisfy the requirements of the insurability, be in good health for life and health policies, pay the required premium, and answer all questions in the application to the best of the applicant's knowledge and belief. D & S Realty, Inc. v. Markel Ins. Co., 280 Neb. 567, 575, 789 N.W.2d 1, 10 (2010).

Loss of coverage due to a breach of the insured is a condition subsequent and an affirmative defense of the insurer. As an affirmative defense, the insurer bears the burden of proof. Custer Medical Center v. United Automobile Ins. Co., 62 So.3d 1086 (Fla. 2010).

CONCLUSION

Under the facts of this case, this Court should find that there was no forfeiture of the policy benefits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to ELIZABETH K. RUSSO, ESQ., 6101 S.W. 76th St., Miami, FL 33143; SCOTT A. TURNER, ESQ., 7370 Cabot Ct., Ste. 101, Viera, FL 32940; O. JOHN ALPIZAR, ESQ., 1528 Palm Bay Rd., N.E., Palm Bay, FL 32905; MARJORIE GADARIAN GRAHAM, ESQ., 11211 Prosperity Farms Rd., Ste. D129, Palm Beach Gardens, FL 33410; and GARY M. FARMER, SR., 425 N. Andrews Ave., Ste. 2, Ft. Lauderdale, FL 33301, by mail, on April 26, 2012.

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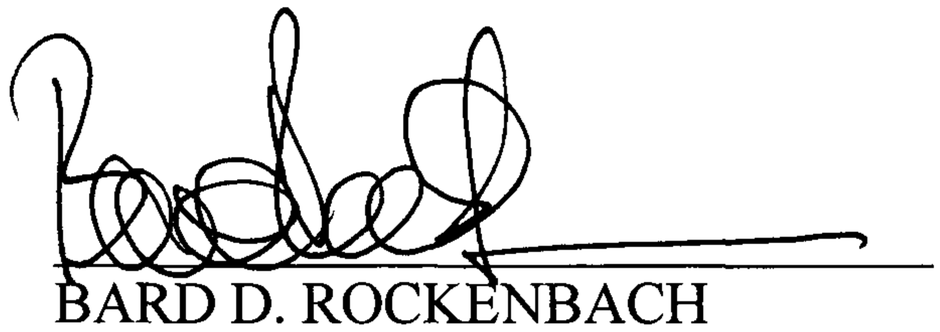
CERTIFICATE OF TYPE SIZE & STYLE

Amicus Curiae, Florida Justice Association, hereby certifies that the type size and style of the Amicus Curiae Brief is Times New Roman 14pt.



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