IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

KIMBERLY ALTRUI,

Appellant,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Appellee.
_____/

CASE NO.: 2D14-6052

Lower Case: 51-2012-CA-004199-WS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber"), by counsel and pursuant to Rule 9.370(a) of the Florida Rules of Appellate Procedure, respectfully submits its Motion for Leave to File Brief as *Amicus Curiae*, and states as follows:

1. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country, including the State of Florida. https://www.uschamber.com.

2. An important function of the Chamber is to represent the interests of its members in matters before the executive, legislative, and judicial branches. Accordingly, the Chamber regularly appears as *amicus curiae* in state and federal cases that raise issues of concern to the business community. Pertinent to this case,

the Chamber's Institute for Legal Reform educates the public and policy makers on the consequences of expanding "bad faith" causes of action, and the Chamber frequently files amicus briefs in bad faith cases, including in the Florida Supreme Court and our District Courts of Appeal. *See, e.g.*, *Perera v. U.S. Fidelity & Guar. Co.*, 35 So. 3d 893 (Fla. 2010); *Cammarata v. State Farm Fla. Ins. Co.*, 152 So. 3d 606 (Fla. 4th DCA 2014).

3. In this case, the Chamber concurs with the trial court's ruling that Appellant, Kimberly Altrui, failed to meet the necessary prerequisites for bringing a bad faith action under section 624.155 of the Florida Statutes. Florida courts have long recognized that the contractual duty of good faith and fair dealing, which the Legislature applied to insurance contracts by enacting section 624.155, is not violated unless there has been a breach of an express term of the contract. For this reason, an insurer's liability for breach of the insurance contract—and not merely its coverage obligation—must be determined before an insured can bring a bad faith action against its insurer.

4. Here, there was no determination that State Farm breached the contract. On the contrary, after State Farm voluntarily paid the policy limits, Appellant abandoned her breach of contract lawsuit and the trial court subsequently dismissed the case for lack of prosecution.[1]

---

[1] The Chamber disagrees with Appellant that, under these facts, payment of the policy limits constituted a "confession of judgment" in the breach of contract action. *See State Farm Fla. Ins. Co. v. Colella*, 95 So. 3d 891, 895-96 (Fla. 2d DCA 2012) (holding that payment of the policy limits did not constitute a confession of judgment in materially identical circumstances).

5. Removing the breach of contract requirement, as Appellant urges, would increase the cost of property insurance in Florida and decrease the availability of that insurance. These are perennial concerns for the citizens of this State, as well as for the Chamber and its membership. The Chamber, therefore, respectfully requests leave to submit its brief to this Court as *amicus curiae* because it "can assist the court in the disposition of the case" by providing additional information and a unique perspective on the issues that are not presented by the parties. Fla. R. App. P. 9.370(a). This information will "assist[] the court in [a] case[] which [is] of general public interest" and will "aid[] in the presentation of [the] difficult issues" raised by this case. *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522, 523 (Fla. 4th DCA 1996).

6. The Chamber's long experience in evaluating the adverse effects of bad faith causes of action and advocating for reforms in this area, reflected in its *amicus curiae* brief, will assist this Court in resolving this case. In particular, the Chamber's experience bears out the logical conclusion that expansion of bad faith actions beyond well-defined limits reduces the availability of insurance and harms consumers. This is because, as litigation costs increase due to (often tenuous) bad faith claims, insurers must internalize these costs and raise premiums accordingly. *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 686 (Fla. 2004) (Wells, J., dissenting) (describing liability insurance as a "pool of money" which "is filled by premiums and drained by claims," and explaining that amounts drained by litigation will eventually have to be refilled by "the other insureds, whose premiums are increased"). This, in turn, can make certain types of liability

insurance prohibitively expensive for low-income or even middle-income individuals. It may even force some insurers out of the market altogether, reducing competition and further increasing premiums.

7. Therefore, it is of the utmost importance that bad faith claims be permitted only when they are tied to a breach of an existing obligation under the contract—as, indeed, Florida courts have always done. The Chamber's brief, which is attached to, and filed contemporaneously with, this motion, will assist the Court in resolving this appeal.

8. State Farm has consented to the Chamber's filing of its brief as *amicus curiae* in this appeal. Although Appellant has not, this Court should nonetheless grant the Chamber leave to do so. *See Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) ("Even when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.").

WHEREFORE, the Chamber respectfully requests that this Court grant its Motion for Leave to File Brief as *Amicus Curiae*.

[Attorney's Signature Appears on the Following Page]

Date: July 2, 2015

Respectfully submitted,

David B. Weinstein (FBN 604410)
weinsteind@gtlaw.com
Jonathan S. Tannen (FBN 70842)
tannenj@gtlaw.com
GREENBERG TRAURIG, P.A.
625 E. Twiggs St., Ste. 100
Tampa, FL 33602
Telephone: 813.318.5700
Facsimile: 813.318.5900
Secondary Email: dunnla@gtlaw.com;
FLService@gtlaw.com

By: /s/ David B. Weinstein
David B. Weinstein

Counsel for The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I CERTIFY that on July 2, 2015, I electronically filed the foregoing with the Clerk of Court via the Florida E-Filing Portal, which shall cause a copy to be served via email to the following:

Lee Craig
Matthew J. Lavisky
BUTLER WEIHMULLER KATZ CRAIG, LLP
400 N. Ashley Drive, Suite 2300
Tampa, FL 33602
lcraig@butler.legal
mlavisky@butler.legal
eservice@butler.legal

Scot E. Samis
TRAUB LIEBERMAN STRAUS
& SHREWSBERRY, LLP
360 Central Avenue, 10th Floor St.
Petersburg, FL 33731
flpleadings@traublieberman.com
ssamis@traublieberman.com
cbunsa@traublieberman.com

Elizabeth K. Russo
RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, FL 33143
ekr@russoappeals.com
e-service@russoappeals.com

Counsel for Appellee

Raymond T. Elligett, Jr.
BUELL & ELLIGETT, P.A.
3003 W. Azeele St., Ste. 100
Tampa, FL 33609
elligett@belawtampa.com
scalise@belawtampa.com

Matthew R. Danahy
David C. Murray
DANAHY & MURRAY, P.A.
901 W. Swann Avenue
Tampa, FL 33606
firm@danahyandmurray.com

Counsel for Appellant

/s/ David B. Weinstein
David B. Weinstein

TPA 512049831

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CASE NO. 2D14-6052

KIMBERLY ALTRUI,

Appellant,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Appellee.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

David B. Weinstein
Florida Bar No. 604410
weinsteind@gtlaw.com
Jonathan S. Tannen
Florida Bar No. 70842
tannenj@gtlaw.com
GREENBERG TRAURIG, P.A.
625 E. Twiggs St., Ste. 100
Tampa, FL 33602
Telephone: 813.318.5700
Facsimile: 813.318.5900

Counsel for The Chamber of Commerce of the United States of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae, The Chamber of Commerce of the United States of America (the "Chamber"), is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country, including the State of Florida. https://www.uschamber.com.

An important function of the Chamber is to represent the interests of its members in matters before the executive, legislative, and judicial branches. Accordingly, the Chamber regularly appears as *amicus curiae* in state and federal cases that raise issues of concern to the business community. Pertinent to this case, the Chamber's Institute for Legal Reform educates the public and policy makers on the consequences of expanding "bad faith" causes of action and the Chamber frequently files amicus briefs in bad faith cases, including in the Florida Supreme Court and our District Courts of Appeal. *See, e.g.*, *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893 (Fla. 2010); *Cammarata v. State Farm Fla. Ins. Co.*, 152 So. 3d 606 (Fla. 4th DCA 2014).

The Chamber consistently weighs in on this issue because its membership includes both insurers—who are the targets of bad faith claims—and insureds, who rely on insurance coverage to manage risk and, therefore, have an interest in its availability and affordability.

---

[1] The Chamber's Motion for Leave to File Brief as *Amicus Curiae* has been filed contemporaneously with this brief.

SUMMARY OF ARGUMENT

The Chamber concurs with both the trial court and Appellee, State Farm Florida Insurance Company ("State Farm"), that under Florida law, an insurer's liability for breach of contract—and not merely its coverage obligation—must be determined before an insured can bring a bad faith action.

First, well-established Florida precedent requires a breach of the parties' contract as an essential prerequisite to any claim for breach of the covenant of good faith and fair dealing, which the Legislature applied to insurance contracts by enacting Florida's bad faith statute. There is no indication that the Legislature intended to eliminate the breach of contract requirement in the context of insurance contracts, nor has the Florida Supreme Court held that it did so. Accordingly, where, as here, the insured's breach of contract action was not resolved its favor, but was instead involuntarily dismissed by the trial court, there is no basis for a bad faith claim under section 624.155 of the Florida Statutes.

Moreover, removing the breach of contract requirement, as Appellant urges, would have a negative effect on the cost of insurance in Florida. Under Appellant's approach, ***any*** payment under the contract, regardless of whether it is made in accordance with the contract's terms, would open the door to a subsequent bad faith action by the insured provided it occurs more than 60 days after written notice is sent pursuant to section 624.155(3)(a). Such litigation would necessarily impose additional costs on insurers by requiring them to respond to and litigate meritless bad faith claims. At a minimum, insurers may be forced to enter into settlements that would not otherwise be warranted simply to avoid the risks and

expense of litigation. The costs of such settlements will ultimately be passed on to consumers—including members of the Chamber—increasing premiums, decreasing the availability of insurance, and harming this State's insurance market and its citizens, for whom the cost of property insurance, in particular, is a perennial concern.

In light of these potential consequences, the Chamber respectfully urges this Court to affirm the trial court's Order on Defendant's Amended Motion to Dismiss Plaintiff's Amended Complaint ("Order").

ARGUMENT

I. FLORIDA LAW REQUIRES LIABILITY FOR BREACH OF THE INSURANCE CONTRACT BEFORE A BAD FAITH ACTION MAY BE BROUGHT BY THE INSURED.

As the Florida Supreme Court has made clear, any proper construction of section 624.155 "must take into account the entire civil remedy statute and place it in historical context." *Talat Enters., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1282 (Fla. 2000). Importantly, Florida has long recognized a common law covenant of good faith and fair dealing in contractual relationships, the purpose of which is "to protect 'the reasonable expectations of the contracting parties in light of their express agreement.'" *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 548 (Fla. 2012) (quoting *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001)). Yet, Florida courts have historically refused to extend the covenant to insurance contracts, reasoning that "construing insurance policies under this doctrine 'can only lead to

uncertainty and unnecessary litigation.'" *Id.* at 549 (quoting *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998)).

In 1982, this jurisprudence was altered in part by the Legislature's adoption of section 624.155, which, for the first time, created a first-party bad faith cause of action.[2] Among other things, the statute authorizes "[a]ny person [to] bring a civil action against an insurer when such person is damaged . . . by the insurer . . . [n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests . . . ." § 624.155(1)(b)1, Fla. Stat. (2015). The Legislature's intent, as the Florida Supreme Court has recognized, was "to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating [insurance] claims . . . ." *Chalfonte*, 94 So. 3d at 548-49 (quoting *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1128 (Fla. 2005)).

A fundamental principle of Florida law is that the duty of good faith and fair dealing cannot be breached unless there has been a breach of the express terms of the contract. The Florida Supreme Court has stated as follows:

---

[2] Prior to the enactment of section 624.155, Florida common law recognized and permitted ***third-party*** bad faith actions because "insurers owe[] a duty to their insureds to refrain from acting solely in the insurers' own interests" when settling or refusing to settle claims against the insured. *Chalfonte*, 94 So. 3d at 545. By contrast, Florida courts held that no such duty was owed in the context of ***first-party*** claims—in which an insured sues his or her own insurance company for improper denial of benefits—because the legal relationship between the insured and the insurer is "that of 'debtor and creditor.'" *Id.* at 546 (quoting *Baxter v. Royal Indem. Co.*, 285 So. 2d 652, 657 (Fla. 1st DCA 1973)).

> A duty of good faith must "relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements."

Id. at 548 (quoting *Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 574 (Fla. 4th DCA 1998)). For this reason, the Florida Supreme Court has unequivocally held that there are "two limitations" on such claims: "(1) where application of the covenant would contravene the express terms of the agreement; and (2) ***where there is no accompanying action for breach of an express term of the agreement***." *Id.* (emphasis added).

These principles are well-established. One leading treatise expressly recognizes Florida courts as among "the majority of courts [which have] declined to find a breach of the implied covenant of good faith and fair dealing absent breach of an express term of the contract." 23 Williston on Contracts § 63:22 & n.75 (4th ed. 2015). Federal courts applying Florida law have likewise recognized this key limitation on actions for breach of the covenant of good faith and fair dealing. *See, e.g.*, *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1318 (11th Cir. 1999) ("Under Florida law, Weaver's failure to identify an express contractual provision that has been breached dooms his claim for breach of the implied covenant of good faith and fair dealing."); *Degutis v. Fin. Freedom, LLC*, 978 F. Supp. 2d 1243, 1263-64 (M.D. Fla. 2013) (holding that because the plaintiff failed to state a claim for breach of contract, the court was also required to dismiss his claim for breach of the implied covenant of good faith and fair dealing).

The Legislature did not alter this well-settled principle for insurance

contracts when it enacted section 624.155. Indeed, the entire premise of the "failure to settle" cause of action is that the insurer, acting in bad faith, has breached the contract by refusing to pay "the contractual amount due the insured." *Talat*, 753 So. 2d at 1283. And, "[i]n the context of a first-party insurance claim, the contractual amount due the insured is the amount owed ***pursuant to the express terms and conditions of the policy*** after all of the conditions precedent of the insurance policy in respect to payment are fulfilled." *Id.* (emphasis added). It, therefore, follows that, unless there has first been a determination that the insurer breached "the express terms and conditions of the policy," there is simply no basis for a first-party bad faith action. *Id.*

Consistent with this precedent, the Florida Supreme Court in *Blanchard v. State Farm Mutual Automobile Insurance Co.*, 575 So. 2d 1289, 1291 (Fla. 1991), held that—as a condition precedent to the initiation of a bad faith action under section 624.155—"an insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured . . . ." Here, the trial court correctly ruled that this condition precedent was not satisfied because Appellant's initial action for breach of contract was not resolved favorably to her. On the contrary, after State Farm voluntarily paid the policy limits, Appellant abandoned her breach of contract lawsuit and the trial court subsequently dismissed the case for lack of prosecution. And although, as the trial court acknowledged, the settlement of a lawsuit may constitute a "confession of judgment" under some circumstances, satisfying the "favorable resolution" requirement, this Court held in *State Farm Florida Insurance Co. v. Colella*, 95

So. 3d 891, 895-96 (Fla. 2d DCA 2012), that payment of the policy limits in materially identical circumstances did not constitute a confession of judgment.[3]

Although Appellant relies on this Court's decision in *Hunt v. State Farm Florida Insurance Co.*, 112 So. 3d 547 (Fla. 2d DCA 2013), that decision is inapposite. There, after the policy holder filed suit for breach of the insurance contract for the insurer's failure to pay a claim for sinkhole damage, the insurer invoked the policy's appraisal provision and an appraisal award was subsequently issued in favor of the insured. This Court held that, under those circumstances, the payment of the appraisal award "establishe[d] the validity of Mr. Hunt's claim and satisfies [the *Blanchard*] condition precedent." *Id.* at 549.

Contrary to Appellant's argument, this Court did not state whether *Blanchard* was satisfied because the award established the validity of the insured's ***breach of contract claim***, or whether it was sufficient that it established the validity of the underlying ***claim for benefits***. However, even if *Hunt* were given the latter interpretation—as Appellant urges—it would be in direct conflict with the Florida Supreme Court's decision in *Chalfonte*, which expressly recognized that (1) breach of the duty of good faith and fair dealing requires that there be a "breach of an express term of the agreement," and (2) the duty of good faith was applied to insurance contracts through the enactment of section 624.155. *Chalfonte*, 94 So. 3d at 548-49. Indeed, *Chalfonte* made clear that "good faith"

---

[3] The court reached the same conclusion in *Omega Insurance Co. v. Johnson*, 39 Fla. L. Weekly D1911 (Fla. 5th DCA Sept. 5, 2014), *review granted*, *Johnson v. Omega Ins. Co.*, No. SC14-2124, 2015 WL 1781625 (Fla. Apr. 15, 2015).

and "bad faith" are simply "two sides of the same coin." *Id.* at 549 (quoting *Continental Cas. Co. v. City of Jacksonville*, 550 F. Supp. 2d 1312, 1337 (M.D. Fla. 2007), *aff'd*, 283 F. App'x 686 (11th Cir. 2008)).

Also contrary to Appellant's argument, the Florida Supreme Court's decision in *Vest v. Travelers Insurance Co.*, 753 So. 2d 1270 (Fla. 2000), does not eliminate or even affect the breach of contract requirement for bad faith claims. As discussed in State Farm's Answer Brief, *Vest* involved a claim for ***uninsured motorist benefits***, which operates differently than other types of insurance claims. *See* Answer Brief, pp. 61-66.[4]

In this case, there was no determination that State Farm breached an express term of the contract, whether through an appraisal award, a judgment, or a

---

[4] Specifically, when an insurer refuses to pay under, *e.g.*, a homeowner's insurance policy, as here, the question is whether the insurer breached the contract by failing to pay, as its terms require. By contrast, in an uninsured motorist case, the question is ***not*** whether the insurer breached the contract, but instead whether the uninsured motorist is liable in tort to the policy holder. The insurance company, therefore, "stands in the shoes" of the uninsured motorist in the insured's lawsuit for policy benefits. *Diaz-Hernandez v. State Farm Fire & Cas. Co*, 19 So. 3d 996, 999 (Fla. 3d DCA 2009). Thus, in *Vest*, the court held that a "determination of the existence of liability ***on the part of the uninsured tortfeasor***" is required before a cause of action for bad faith can accrue. *Vest*, 753 So. 2d at 1275 (quoting *Blanchard*, 575 So. 2d at 1291) (emphasis added). Outside the uninsured motorist context, the equivalent accrual point is a determination that the insurer breached the contract by failing to pay when its conditions required. *See id.* ("[A] claim for bad faith pursuant to section 624.155(1)(b) is founded upon the obligation of the insurer to pay ***when all conditions under the policy*** would require an insurer exercising good faith and fair dealing towards its insured to pay.") (emphasis added). Moreover, *Vest* was followed over a decade later by *Chalfonte*, which expressly recognizes that the duty of good faith cannot be breached unless there has also been a breach of contract.

settlement constituting a confession of judgment.[5] Absent a favorable resolution of Appellant's breach of contract action, there is simply no basis for a claim of bad faith under section 624.155.

II. REMOVING THE BREACH OF CONTRACT REQUIREMENT HARMS FLORIDA'S INSURANCE MARKET, CONSUMERS, AND THE CITIZENS OF THIS STATE.

The Chamber believes that removing the breach of contract requirement, as Appellant advocates, would open the door to meritless bad faith claims by insureds, even where the insurer has scrupulously complied with the contract and paid in full according to its terms. Such a decision would have negative repercussions for Florida's insurance market, business and individual consumers, and, ultimately, the citizens of this State, by increasing the cost of property insurance and decreasing its availability.

As a threshold matter, there can be no question that the availability of bad faith claims increases the cost of insurance. These effects are documented by a 2010 study commissioned by the Chamber's Institute for Legal Reform. Reviewing data pertaining to uninsured and underinsured motorist premiums, the study finds that the average premium in all states with a first-party bad faith cause

[5] In its Amicus Brief in *Cammarata*, 152 So. 3d at 606, the Chamber argued that payment of an appraisal award, alone, does not constitute a favorable resolution of an insured's breach of contract claim that permits the filing of a subsequent bad faith action. While the Chamber maintains this position, there was no appraisal award in this case. Therefore, this issue has no impact on the correctness of the trial court's Order.

of action was ***80.8 percent higher*** than in the states without one. In fact, Florida's average premium, in particular, was found to be a full ***188 percent higher***.[6]

Under Appellant's approach, the availability of bad faith claims would be significantly expanded. Indeed, any payment under the contract—even in strict compliance with its terms—would authorize the insured to bring a bad faith claim, provided the payment occurs more than 60 days after written notice of a "violation" pursuant to section 624.155(3)(a). This would be the case regardless of whether, as here, the insurer was justified as a matter of law in denying the claim in the first instance, or whether payment was otherwise not required under the contract at the time the notice was filed.

Such litigation would necessarily impose further costs on insurers by requiring them to respond to and litigate meritless bad faith claims. At a minimum, it will encourage insurers to settle in cases when it would not otherwise be warranted. As one attorney noted in response to the Fourth District's decision in *Cammarata*, holding that an appraisal award was sufficient to allow a bad faith claim to proceed: "When a situation like that posed in *Cammarata* arises . . . smart policyholder lawyers will agree to a settlement number [for breach of contract] without a bad faith release . . . [and] [i]f the insurer tries to insert bad faith release language into the release, policyholder lawyers are going to demand an extra

---

[6] *See* William G. Hamm et al., *The Impact of Bad Faith Lawsuits on Consumers in Florida and Nationwide* 22 (Sept. 2010), *available at* http://www.bizjournals.com/tampabay/pdf/william_hamm_study_-_the_impact_of_ bad_faith_lawsuits_on_consumers_in_florida%5B1%5D.pdf (last visited June 26, 2015).

payment for that release." Jeff Sistrunk, *Fla. Bad Faith Ruling Gives Policyholders Leg Up On Insurers*, Law360 (Oct. 3, 2014, 6:29 PM), http://www.law360.com/florida/articles/581526. Further, insurers may "pursue settlements in order to avoid the potential of an adverse finding by a jury on a bad faith action, which carries the risk of additional damages . . . ." *Id.* The reason is that, regardless of the underlying merits of the case, "[i]t is too likely the jury will check 'yes' next to the box asking if the insurer violated its obligation to settle in good faith, and it is then up to the jury to fill in the damages box, which could include punitive damages . . . ." *Id.*[7]

The reasons for such settlements—even when a threatened bad faith claim is wholly without merit—have been noted by other commentators and are aptly explained as follows:

> Choosing to litigate an insurance claim is a costly undertaking for an insurer, regardless of the economies of scale an insurer might possess. There are attorneys' fees and other unavoidable costs, and the outcome is uncertain. Insurers are also not blind to the poor public perception of their industry; a perception that contributed to the creation of tort liability in insurance contracts where it does not exist in other contexts. The prospect of paying extra-contractual damages,

[7] These concerns are well taken. A November 2011 report by the Florida Senate Committee on the Judiciary, assessing the impact of bad faith litigation in Florida, notes that two insurers who were solicited for data respectively estimated that, in the preceding three years, attorney involvement was featured in 90 percent and 77 percent of claims. *See* Florida Senate Committee on the Judiciary, *Insurance Bad Faith* 14 (Nov. 2011), *available at* http://www.flsenate.gov/Published Content/Session/2012/InterimReports/2012-132ju.pdf (last visited June 26, 2015). In addition, an insurance trade association reported a significant increase in plaintiff attorney involvement in bodily injury claims and uninsured and underinsured motorist claims between 2006 and 2011. *Id.*

> especially punitive damages, is itself daunting; this daunting prospect is enhanced by the insurer's position as an unpopular defendant and the belief of many juries that insurers have deep pockets and can afford it. In addition, any plaintiff verdict could lead to negative press, which could cause existing policyholders to change insurers or could deter future customers. A particularly high damage award could also provide harmful precedential value and inflate other award amounts. For these reasons, insurers are poised to settle claims they reasonably believe they will lose, as well as some they believe they should win. Settlement simply becomes the better option.

Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477, 1520-21 (2009) (footnotes omitted).

Consumers will ultimately bear the increased costs resulting from litigation and settlement of often meritless bad faith claims. This is because, as litigation costs due to such claims increase, "[i]nsurers internalize the systemic risks of bad-faith litigation and raise premiums accordingly. Because this happens, in part, on an industry-wide level, the increase in cost occurs independent of a specific insurer's risks of bad-faith litigation . . . ." *Id.* at 1529; *see also Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 686 (Fla. 2004) (Wells, J., dissenting) (describing liability insurance as a "pool of money" which "is filled by premiums and drained by claims," and explaining that amounts drained by litigation will eventually have to be refilled by "the other insureds, whose premiums are increased").

Authorizing bad faith actions even where the insurer has complied with the terms of the policy would only increase these costs further. There can be no doubt that these effects are harmful to the citizens of Florida, for whom the cost of property insurance, in particular, is a perennial concern. Increased premiums can

render certain types of liability insurance prohibitively expensive for low-income or even middle-income individuals. It may even force some insurers out of the market altogether, reducing competition, harming this State's business climate, and further increasing premiums. Therefore, it is of the utmost importance that bad faith claims be permitted ***only*** when tied to a breach of an existing obligation under the contract—as Florida courts have always done.

CONCLUSION

Based on the foregoing, the Chamber respectfully requests the Court to affirm the trial court's Order and hold that an insurer's liability for breach of contract—and not merely its coverage obligation—must be determined before an insured may bring an action for bad faith under section 624.155 of the Florida Statutes.

[Attorney's Signature Appears on the Following Page]

Date: July 2, 2015

Respectfully submitted,

David B. Weinstein
Florida Bar No. 604410
weinsteind@gtlaw.com
Jonathan S. Tannen
Florida Bar No. 70842
tannenj@gtlaw.com
GREENBERG TRAURIG, P.A.
625 E. Twiggs St., Ste. 100
Tampa, FL 33602
Telephone: 813.318.5700
Facsimile: 813.318.5900
Secondary Email: dunnla@gtlaw.com;
FLService@gtlaw.com

By: /s/ David B. Weinstein
David B. Weinstein

Counsel for The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I CERTIFY that on July 2, 2015, I electronically filed the foregoing with the Clerk of Court via the Florida E-Filing Portal, which shall cause a copy to be served via email to the following:

Lee Craig
Matthew J. Lavisky
BUTLER WEIHMULLER KATZ CRAIG, LLP
400 N. Ashley Drive, Suite 2300
Tampa, FL 33602
lcraig@butler.legal
mlavisky@butler.legal
eservice@butler.legal

Scot E. Samis
TRAUB LIEBERMAN STRAUS
& SHREWSBERRY, LLP
360 Central Avenue, 10th Floor St.
Petersburg, FL 33731
flpleadings@traublieberman.com
ssamis@traublieberman.com
cbunsa@traublieberman.com

Elizabeth K. Russo
RUSSO APPELLATE FIRM, P.A.
6101 Southwest 76th Street
Miami, FL 33143
ekr@russoappeals.com
e-service@russoappeals.com

Counsel for Appellee

Raymond T. Elligett, Jr.
BUELL & ELLIGETT, P.A.
3003 W. Azeele St., Ste. 100
Tampa, FL 33609
elligett@belawtampa.com
scalise@belawtampa.com

Matthew R. Danahy
David C. Murray
DANAHY & MURRAY, P.A.
901 W. Swann Avenue
Tampa, FL 33606
firm@danahyandmurray.com

Counsel for Appellant

/s/ David B. Weinstein
David B. Weinstein

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ David B. Weinstein
David B. Weinstein

TPA 512052090