IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA,

Petitioner,

v.

NORGE TORRES,

Respondent.
_____/

CASE NO.: 3D14-0685

Lower Cases: 12-38540, 12-38540

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. To that end, 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 the Florida 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, Petitioner, American Integrity Insurance Company of Florida ("American"), seeks certiorari review and requests this Court to quash a trial court order compelling it to produce a significant volume of documents and information in a first-party bad faith lawsuit. The trial court issued this order despite the fact that Respondent, Mr. Torres, *voluntarily dismissed* his prior action for breach of contract: Consequently, there has not been a determination of liability and damages for breach of contract against American, which—as this Court has expressly recognized—is an essential prerequisite to a bad faith cause of action. *See North Pointe Ins. Co. v. Tomas*, 999 So. 2d 728, 729 (Fla. 3d DCA 2008), *receded from in part, State Farm Fla. Ins. Co. v. Seville Place Condo. Ass'n, Inc.*, 74 So. 3d 105, 108 (Fla. 3d DCA 2011).[1]

4. After this certiorari proceeding was initially briefed by the parties, the

[1] In *Seville Place*, this Court receded in part from *Tomas* to the extent it held that a non-final order denying a motion to dismiss a bad faith claim was immediately reviewable by certiorari. *See Seville Place*, 74 So. 3d at 108. In this case, American seeks review of an order denying a motion for protective order, not a motion to dismiss. Discovery orders are reviewable by certiorari. *Id.* at 109.

Respondent filed a Notice of Supplemental Authority, citing the Fourth District's decision in *Cammarata*. There, the Fourth District receded from its earlier holding in *Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co.*, 94 So. 3d 698 (Fla. 4th DCA 2012), and held that a determination that the insurer is liable for breach of contract is not required before a bad faith action becomes ripe. The *Cammarata* court reasoned that it was "compelled" to reach this result "based on the evolution of our supreme court's holdings from *Blanchard v. State Farm Mutual Automobile Insurance Co.*, 575 So. 2d 1289 (Fla. 1991), to *Vest v. Travelers Insurance Co.*, 753 So. 2d 1270 (Fla. 2000)." *Cammarata,* 152 So. 3d at 609-10. Subsequently, this Court directed the parties "to file supplemental briefs regarding new case law not previously discussed in their briefs," and American filed its Supplemental Brief in Support of its Petition for Certiorari ("Supplemental Brief").

5. The Chamber agrees with American that this Court should reject *Cammarata* and reaffirm its prior holding in *Tomas* that a bad faith action was barred when it was brought prior to any determination that the insured had been damaged by a breach of contract. *See Tomas*, 999 So. 2d at 729. This Court reached this conclusion even though the insured's claim was previously submitted to appraisal for determination of the amount of the loss and an appraisal award was issued—the precise circumstances of this case. *See id.* at 728. The Chamber concurs with American that, in departing from *Tomas*, *Cammarata* misinterpreted the Florida Supreme Court decisions on which it attempted to rely and failed to take into account longstanding Florida law requiring a breach of contract as an

essential prerequisite to a breach of the duty of good faith.

6. Moreover, removing the breach of contract requirement, as the Fourth District has done, will 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).

7. Here, the Chamber's long experience in evaluating the adverse effects of bad faith causes of action and advocating for reforms in this area, which will be 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.

8. 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 determining whether certiorari relief is appropriate.

9. Florida Rule of Appellate Procedure 9.370(c) provides that, generally, "[a]n amicus curiae must serve its brief no later than 10 days after the ***first*** brief, petition, or response of the party being supported is filed." (Emphasis added). This Court, however, may "grant leave for later service . . . ." *Id.*; *see also Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718 (Fla. 4th DCA 2010) (granting motion for leave to appear as amicus curiae for purpose of filing a motion for rehearing). Here, the Chamber desires to appear in this matter as a result of this Court's order directing supplemental briefing to address the Fourth District's decision in *Cammarata,* in which the Chamber appeared as *amicus curiae*. The Chamber's brief has been filed within 10 days of American's Supplemental Brief. Accordingly, the Chamber requests that this Court accept its brief as timely.

10. American has consented to the Chamber's filing of its brief as *amicus curiae* in this appeal. Although Respondent 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*.

Date: May 21, 2015

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished on May 21, 2015, to the following via e-mail:

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IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CASE NO. 3D14-0685

AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA,

Petitioner,

v.

NORGE TORRES,

Respondent.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF AMERICAN'S PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI FROM A NON-FINAL ORDER ENTERED IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

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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. *See* 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. To that end, 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 the Florida 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.

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[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 respectfully urges this Court to grant American Integrity Insurance Company of Florida's ("American") Petition for Certiorari ("Petition"), in accordance with this Court's precedent requiring that 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 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 Florida 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. Consistent with this principle, this Court has required a breach of contract before first-party bad faith claims under section 624.155 can be brought by an insured. Indeed, this Court expressly recognized in *North Pointe Insurance Co. v. Tomas*, that the mere payment of an appraisal award by the insurer, as here, is not sufficient for a bad faith claim to proceed.

Although the Fourth District's recent decision in *Cammarata v. State Farm Florida Insurance Co.* held, contrary to *Tomas*, that a breach of contract determination is not required, the Chamber concurs with American that this Court should follow its existing precedent in *Tomas* and decline to follow *Cammarata*. As set forth in American's Supplemental Brief in Support of its Petition for Certiorari ("Supplemental Brief"), *Cammarata* is based on a misinterpretation of Florida Supreme Court decisions in the specific context of uninsured motorist coverage, which is not at issue here. Further, *Cammarata* never addressed more

recent Florida Supreme Court precedent expressly requiring a breach of contract as a necessary prerequisite to a breach of the duty of good faith and fair dealing.

The effect of the Fourth District's approach, if followed, will be to discourage alternative dispute resolution for insurance claims and, instead, to encourage litigation. If any payment under the contract is sufficient for an insured to bring a bad faith claim, then the utility of the appraisal process is greatly reduced. At a minimum, insurers may be forced to enter into settlements that would not otherwise be warranted simply to avoid the risks 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 *Cammarata*'s contravention of longstanding Florida precedent, as well as the potential legal and policy repercussions of Fourth District's approach, the Chamber respectfully submits its brief as *amicus curiae* and requests that this Court grant American's Petition, reject the Fourth District's decision in *Cammarata*, and reaffirm this Court's prior decision in *Tomas*.

ARGUMENT

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

In its Petition, American asks this Court to quash an order of the trial court compelling American to produce a significant volume of documents and information in a first-party bad faith lawsuit under section 624.155 of the Florida

Statutes. It is well-recognized that bad faith discovery, in the absence of a viable bad faith claim, results in the type of "irreparable harm" that justifies the issuance of a writ of certiorari. *See, e.g.*, *Gen. Star Indem. Co. v. Atl. Hospitality of Fla., LLC*, 93 So. 3d 501, 502-03 (Fla. 3d DCA 2012). Thus, where the insured's claim for bad faith is fundamentally deficient, an order compelling discovery on the claim is a departure from the essential requirements of law. *Id.*

In this case, the Chamber concurs with American that the insured, Mr. Norge Torres, has not asserted and, indeed, cannot assert a viable bad faith claim under the facts presented. Specifically, Florida law requires that the insurer's liability for breach of the insurance contract, and not merely its coverage obligation, be resolved in favor of the insured before a bad faith claim can be asserted. *See North Pointe Ins. Co. v. Tomas*, 999 So. 2d 728, 729 (Fla. 3d DCA 2008), *receded from in part*, *State Farm Fla. Ins. Co. v. Seville Place Condo. Ass'n, Inc.*, 74 So. 3d 105 (Fla. 3d DCA 2011).[2] Here, because Mr. Torres's claim under his homeowner's insurance policy was resolved through the contractually-established appraisal process, and Mr. Torres voluntarily dismissed his breach of contract claim against American, there is no basis for a bad faith claim.

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[2] In *Seville Place*, this Court receded in part from *Tomas* to the extent *Tomas* held that a non-final order denying a motion to dismiss a bad faith claim was immediately reviewable by petition for certiorari. *See Seville Place*, 74 So. 3d at 108. In this case, however, American seeks review of an order denying a motion for protective order, not an order denying a motion to dismiss. *See id.* at 109 (stating that although a premature bad faith claim would not, without more, satisfy the irreparable harm requirement, the same is not true of an order compelling bad faith discovery); *see also Publix Supermarkets, Inc. v. Santos*, 118 So. 3d 317, 319 (Fla. 3d DCA 2013).

This Court has requested supplemental briefing in light of *Cammarata v. State Farm Florida Insurance Co*., 152 So. 3d 606 (Fla. 4th DCA 2014), which was decided after the parties initially briefed this case. As discussed below, the Chamber concurs with American's position in its Supplemental Brief that the Fourth District's decision misinterprets the Florida Supreme Court precedent on which it purports to rely and should not be followed by this Court.

A. Breach Of The Covenant Of Good Faith And Fair Dealing, Which The Florida Legislature Applied To Insurance Contracts Through Section 624.155, Requires A Breach Of The Contract.

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.[3] 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:

> 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 plainly

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[3] 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)).

stated 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).[4]

There is no indication that the Legislature intended to alter this well-settled principle for insurance contracts when it enacted section 624.155. In fact, 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.*

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[4] One leading treatise expressly recognizes Florida 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. Financial 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, his claim for breach of the implied covenant of good faith and fair dealing also failed).

B. Payment Of An Appraisal Award Does Not Satisfy The Breach Of Contract Requirement.

In accordance with this precedent, this Court has refused to allow bad faith actions to proceed, or otherwise to allow bad faith discovery to go forward, absent a prior determination that the insurer was liable for breach of contract. *See, e.g., General Star. Indem. Co.*, 93 So. 3d at 503 (granting certiorari and quashing order requiring bad faith discovery where insured's action for breach of contract for failure to pay property insurance claim was still pending); *Liberty Mut. Ins. Co. v. Farm, Inc.*, 754 So. 2d 865, 866-67 (Fla. 3d DCA 2000) (same).

Further, this Court has held that the mere issuance of an appraisal award is not sufficient. In *Tomas*, 999 So. 2d at 728, the insured homeowners submitted a claim to the insurer for replacement of marble tile flooring damaged by a dropped cooking pan. Pursuant to the insurance policy, the claim was submitted to appraisal for determination of the amount of the loss, and an appraisal award of $115,899.52 was issued, which the insurer paid. *Id.* at 728-29 & n.2. Subsequently, the homeowners filed an amended complaint alleging breach of the insurance contract, breach of the covenant of good faith and fair dealing, and seeking damages for bad faith. The insurer then filed a motion to dismiss or abate the bad faith cause of action, which the trial court denied. *Id.* at 729.

This Court granted the insurer's petition for writ of certiorari and quashed the trial court's order, stating: "[T]he action for breach of contract, which remains pending below for a determination of damages relating to the allegations of [the insurer]'s breach of the insurance contract, renders premature the cause of action

for bad faith." *Id.* The Court further explained that "[s]ince the record d[id] not reflect and the [homeowners] ha[d] not alleged that damages under the insurance contract ha[d] been ascertained ***for the alleged breach***, the trial court departed from the essential requirements of law by not dismissing or abating the bad faith action as premature." *Id.* (emphasis added).

Here, as in *Tomas*, the parties participated in the appraisal process and American paid the appraisal award. Moreover, because Mr. Torres voluntarily dismissed his breach of contract claim, there has not and will not be any determination that American breached the insurance contract. Indeed, there can be no breach because "[t]he appraisal process . . . is not legal work arising from an insurance company's denial of coverage or breach of contract; it is simply work done ***within the terms of the contract*** to resolve the claim." *Hill v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 961 (Fla. 2d DCA 2010) (emphasis added).

Accordingly, because American paid the appraisal award, there is simply no basis for a bad faith claim and the trial court therefore erred in authorizing Mr. Torres to proceed with bad faith discovery.

C. The Fourth District's Decision In *Cammarata* Is Based On A Misinterpretation Of Florida Supreme Court Precedent And Should Be Rejected.

Previously, the Fourth District was in alignment with this Court on this issue. In *Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co.*, 94 So. 3d 698 (Fla. 4th DCA 2012), the Fourth District affirmed a trial court order dismissing a bad faith claim where the insured's breach of contract action remained pending, despite the parties' participation in the appraisal process and

payment of the appraisal award by the insurer (*i.e.*, the same facts at issue in *Tomas*). Consistent with this Court's decision in *Tomas*, the *Lime Bay* court held that, in order for the bad faith claim to proceed, "the trial court must first resolve the issue of State Farm's liability for breach of contract, as well as the significance, if any, of the appraisal award." *Id.* at 699.

In *Cammarata*, the Fourth District receded from *Lime Bay* and held that a determination that the insurer is liable for breach of contract is not required before a bad faith action becomes ripe, reasoning that it was "compelled" to reach this result "based on the evolution of our supreme court's holdings from *Blanchard v. State Farm Mutual Automobile Insurance Co.*, 575 So. 2d 1289 (Fla. 1991), to *Vest v. Travelers Insurance Co.*, 753 So. 2d 1270 (Fla. 2000)." 152 So. 3d at 609-10. However, *Cammarata* failed to discuss or acknowledge that *Blanchard* and *Vest* involved the "unique subject of uninsured motorist coverage," *Roderigo v. State Farm Fla. Ins. Co.*, 144 So. 3d 690, 692 (Fla. 4th DCA 2014), in which a "determination of the existence of liability ***on the part of the uninsured tortfeasor***" is an element of a cause of action for bad faith. *Vest*, 753 So. 2d at 1275 (quoting *Blanchard*, 575 So. 2d at 1291) (emphasis added). As thoroughly discussed in American's Supplemental Brief, no comparable determination is required in cases concerning property insurance, rendering uninsured motorist cases inapposite. Thus, *Blanchard* does not compel a mechanical application of the phrase "determination of the existence of liability" here. Instead, the issue is, when does a bad faith claim properly accrue in the completely different context of a property insurance claim? *See* Supp. Br. at pp. 13-18.

Contrary to the Fourth District's reasoning in *Cammarata*, neither *Blanchard* nor *Vest* held that a mere determination that there is a coverage obligation under the insurance contract—without a prior action for breach of the contract—is sufficient for a bad faith failure to settle claim to accrue in the context of property insurance. Moreover, *Blanchard* and *Vest* were followed by the Florida Supreme Court's more recent 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" 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)).

In *Cammarata*—as in this case—there was not, and could not have been, a claim for breach of contract. As the Fourth District acknowledged in its opinion, following State Farm's invocation of the policy's appraisal process and issuance of the neutral umpire's damage estimate, it "paid the insureds the umpire's damage estimate minus the policy deductible." *Cammarata*, 152 So. 3d at 607. And as Judge Gerber, writing separately, observed:

> [T]he record here provides no basis indicating that the insurer breached the contract, much less failed to act in good faith to settle the claim. On the contrary, the record here indicates that the insurer merely exercised its rights under the contract's agreed-upon dispute resolution process of appraisal.

Id. at 614 (Gerber, J., concurring specially).

And the same is true here. Thus, by authorizing a plaintiff to bring a bad faith claim in the absence of a prior determination—or, indeed, any possible claim—that the defendant breached the parties' contract, the Fourth District in *Cammarata* departed from longstanding Florida law based solely on its interpretation of the purported "evolution" of Florida Supreme Court precedent—despite the absence of any clear direction from the Florida Supreme Court requiring it to do so. 152 So. 3d at 610. In light of *Cammarata*'s failure to address *Chalfonte*, or any other Florida precedent expressly making a breach of contract a necessary prerequisite to a breach of the duty of good faith and fair dealing, this Court should decline to follow the Fourth District's decision.

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

The Chamber believes that the implications of *Cammarata* should lead this Court to decline to follow the Fourth District's approach absent clear direction from this state's highest court. Specifically, by removing the requirement that a bad faith claim cannot be brought unless there has been a determination that the insurer breached the contract, *Cammarata* opens 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 will 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.

The immediate effect of removing the breach of contract requirement will be to discourage the resolution of insurance claims through alternative dispute resolution and other contractual means. It is, of course, well recognized that "[p]ublic policy . . . favors arbitration because it is efficient and avoids the time delay and expense associated with litigation." *Regency Grp., Inc. v. McDaniels*, 647 So. 2d 192, 193 (Fla. 1st DCA 1994); *see also Federal Contracting, Inc. v. Bimini Shipping, LLC*, 128 So. 3d 904, 905 (Fla. 3d DCA 2013) ("Florida law favors arbitration as a matter of public policy . . . ."). Florida courts have likewise explained that "[a]ppraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits." *Fla. Ins. Guar. Ass'n, Inc. v. Olympus Ass'n, Inc.*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010); *see also Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001) ("[I]t [is] the better policy of this state to encourage insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention.").

Under *Cammarata*'s approach, the appraisal process, rather than being the end of the dispute between the parties, becomes merely a precursor to litigation. Previously, a party would have to establish that the insurer breached a term of the contract ***before*** having the ability to bring an action for bad faith. Now, any payment under the contract—even in full compliance with the contract's strict terms—authorizes the insured to bring a bad faith claim. *See Cammarata*, 152 So. 3d at 613 ("In theory, the majority opinion would open the door to allow an insured to sue an insurer for bad faith any time the insurer dares to dispute a claim,

but then pays the insured just a penny more than the insurer's initial offer to settle, without a determination that the insurer breached the contract.") (Gerber, J., specially concurring).[5]

Such litigation necessarily imposes costs on insurers. This case is illustrative: despite the fact that Mr. Torres and American participated in the appraisal process, and American ***paid the appraisal award*** according to the contract's terms, Mr. Torres is now attempting to compel wide-ranging discovery from American, seeking not only the claim file, but also, among other things, (a) American's written guidelines for handling property claims; (b) training materials for American's employees; (c) sales brochures and other marketing materials; (d) property claims audits for the three years preceding the underlying claim; (e) all documents relating to American's "ethical and good faith claims handling" for the same three-year period; and (f) any documents concerning reward and bonus incentive programs for American's adjusters for that three-year period. *See* Petition at p. 6. This extensive "bad faith" discovery has been sought

[5] 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 May 18, 2015). In addition, an insurance trade association representing several insurers reported a significant increase in plaintiff attorney involvement in bodily injury claims and uninsured and underinsured motorist claims between 2006 and 2011. *Id.*

despite the fact that Mr. Torres has no possible claim that American failed to comply with the contract's terms.

In light of these potential costs of litigation, insurers may be prompted to enter into settlements in cases where they would not otherwise be warranted. As one attorney noted in response to *Cammarata*: "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 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.*

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, 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).

Ultimately, the increased costs resulting from litigation and settlement of often meritless bad faith claims will be borne by consumers. 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").[6]

[6] 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***

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. Unless and until the Florida Supreme Court clearly states that the breach of contract requirement has been eliminated, this Court should reject the Fourth District's approach in *Cammarata* and reaffirm its prior decision in *Tomas*.

CONCLUSION

Based on the foregoing, the Chamber respectfully requests that the Court grant American's Petition for Certiorari, quash the trial court's order, and hold that an insurer's liability for breach of contract, and not merely its coverage obligation, must be resolved before an insured may bring an action for bad faith under section 624.155 of the Florida Statutes.

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states with a first-party bad faith cause 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. *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 May 18, 2015).

Date: May 21, 2015

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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.

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