IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JOSEPH AND JUDY CAMMARATA,

Appellants,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Appellee.
_____/

CASE NO.: 4D13-185

Lower Case: 11-27972 (14)

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. *See* 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. *See, e.g.*, *Perera v. U.S. Fidelity & Guar. Co.*, 35 So. 3d 893 (Fla. 2010).

3. In its opinion in *Cammarata v. State Farm Florida Insurance Co.*, 39 Fla. L. Weekly D1880, 2014 WL 4327948, at *7 (Fla. 4th DCA Sept. 3, 2014), this Court receded from its earlier decision 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 Court explained 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*, 2014 WL 4327948, at *3.

4. The Chamber concurs with the legal analysis and conclusions articulated in Appellee, State Farm Florida Insurance Company's ("State Farm") Motion for Rehearing and/or Certification ("Rehearing Motion") that this Court's opinion overlooks or misapprehends previous decisions of the Florida Supreme Court and other Florida courts concerning bad faith actions. Therefore, rehearing is appropriate. *See* Fla. R. App. P. 9.330(a).

5. Further, the Chamber believes that this Court's opinion expands the availability of bad faith claims in a manner not intended by either (1) the Florida

Legislature, through its enactment of section 624.155 of the Florida Statutes, or (2) the Florida Supreme Court, through its decisions in *Blanchard* and *Vest*. This Court's decision will increase the cost of property insurance in Florida and decrease the availability of that insurance—perennial concerns for the citizens of this State, as well as for the Chamber and its membership. Thus, the question of whether this Court's decision is in accordance with section 624.155—and the Florida Supreme Court's interpretation of the statute—is undoubtedly a matter of "great public importance," warranting certification pursuant to article V, section 3(b)(4) of the Florida Constitution. As stated in State Farm's Rehearing Motion, certification is also warranted because this Court's decision directly conflicts with the decision of the Third District in *North Pointe Insurance Co. v. Tomas*, 999 So. 2d 728 (Fla. 3d DCA 2008).

6. The Chamber 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. This Court has previously approved the appearance of *amicus curiae* for the purpose of seeking rehearing from an opinion of this Court. *See Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718 (Fla. 4th DCA 2010). Moreover, the Florida Supreme Court has previously authorized the Chamber to appear as

amicus curiae in a bad faith insurance case, recognizing the benefit of considering the Chamber's viewpoint in such matters. *See Perera*, 35 So. 3d at 893.

8. Here, the Chamber's long experience in evaluating the impacts caused by, and advocating for reform of, bad faith causes of action, reflected in its brief, will be of assistance to this Court in deciding State Farm's Rehearing Motion. 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 due to (often tenuous) bad faith claims increase, 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 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 and further increasing premiums.

9. Therefore, it is of the utmost importance that bad faith claims only be permitted when 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 rehearing or certification is appropriate.

10. State Farm has consented to the Chamber's filing of its brief as *amicus curiae* in this appeal. Although Appellees have 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: October 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished on October 9, 2014, to the following via e-mail:

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IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CASE NO. 4D13-0185

JOSEPH AND JUDY CAMMARATA,

Appellants,

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 MOTION FOR REHEARING AND/OR CERTIFICATION

ON APPEAL FROM A FINAL ORDER ENTERED IN THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD 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. *See, e.g.*, *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893 (Fla. 2010).

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.

SUMMARY OF ARGUMENT

The Chamber respectfully urges this Court to grant Appellee, State Farm

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

Florida Insurance Company's ("State Farm") Motion for Rehearing and/or Certification ("Rehearing Motion").

The Chamber concurs with State Farm's conclusion that this Court's decision in *Cammarata* overlooks or misapprehends important points of Florida law in holding that only an insurer's coverage obligation, and not its liability for breach of contract, must be determined before an insured can bring a bad faith action against the insurer. First, well-established Florida precedent requires a breach of the insurance 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 the bad faith statute. Moreover, (1) the Florida Supreme Court has consistently held that bad faith claims must be founded on a breach of contract, (2) this Court has always required a breach of contract before such claims can be brought, and (3) the Florida Supreme Court decisions relied upon by this Court do not eliminate this requirement.

The implications of this Court's decision should cause this Court to reconsider its approach or, if not, certify this matter for resolution by the Florida Supreme Court. The immediate effect of the decision will be to discourage alternative dispute resolution for insurance claims and 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 the potential legal and policy repercussions of this Court's decision, the Chamber respectfully submits its brief as *amicus curiae* and requests that this Court either (1) grant rehearing, vacate its opinion in *Cammarata*, and issue a revised decision reaffirming its prior ruling in *Lime Bay*, or (2) certify this matter for review by the Florida Supreme Court.

ARGUMENT

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

In *Cammarata v. State Farm Florida Insurance Co*., 39 Fla. L. Weekly D1880, 2014 WL 4327948 (Fla. 4th DCA Sept. 3, 2014), this Court receded from its previous decision in *Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co.*, 94 So. 3d 698 (Fla. 4th DCA 2012), and held that only an insurer's coverage obligation, and not its liability for breach of contract, must be determined before an insured may bring a bad faith action against the insurer under section 624.155 of the Florida Statutes. The Chamber concurs with State Farm's conclusion, articulated in its Rehearing Motion, that this Court's decision overlooks or misapprehends important points of Florida law pertaining to bad faith actions. *See* Rehearing Motion, at pp. 7-21.[2]

[2] The Chamber takes no position on State Farm's threshold argument that Appellants' claim is barred by the doctrine of collateral estoppel.

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 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

[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)).

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. (2014). 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. As this Court has made clear,

> [t]he "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."

Avatar Dev. Corp. v. De Pani Constr., Inc., 834 So. 2d 873, 876 (Fla. 4th DCA 2002) (quoting *Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 574 (Fla. 4th DCA 1998)). Likewise, the Florida Supreme Court has plainly 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***." *Chalfonte*, 94 So. 3d at 548 (emphasis added).[4]

[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 (4th ed. 2014). Federal courts applying Florida law have likewise recognized this key limitation on actions for breach of the covenant of

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.*; *see also Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275 (Fla. 2000) ("[W]e expressly hold that a claim for bad faith pursuant to section 624.155(1)(b)1 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.").

In accordance with this precedent, this Court's decisions have consistently permitted bad faith actions to proceed only where there has been a prior

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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).

determination that the insurer was liable for breach of contract.[5] And in *Lime Bay*, this Court held that, even when the insurer had paid the appraisal award, as here, the bad faith claim could not proceed because the insured's breach of contract action was still pending, holding that "the trial court must first resolve the issue of [the insurer's] liability for breach of contract . . . ." 94 So. 3d at 699.

The Florida Supreme Court's decisions in *Blanchard*[6] and *Vest*, relied upon by this Court in *Cammarata*, do not alter or even purport to alter this requirement. In *Blanchard*, the Supreme Court was asked to resolve the question of whether, when the insurer had denied coverage and the insured filed suit for breach of contract, the insured's claim for failing to settle in good faith accrued "before the conclusion of the underlying litigation for the contractual . . . insurance benefits[.]" 575 So. 2d at 1290 (some capitalization omitted). The *Blanchard* court answered the question in the negative, holding that "an insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured ***before*** the cause of action for bad faith in settlement negotiations can accrue." *Id.* at 1291 (emphasis added).

In *Vest*, the question presented was whether, after the insurer settled the insured's breach of contract claim, the insured—in the subsequent bad faith

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[5] *See, e.g.*, *Landmark Am. Ins. Co. v. Studio Imports, Ltd., Inc.*, 76 So. 3d 963, 964-65 (Fla. 4th DCA 2011) (reversing trial court's refusal to dismiss or abate bad faith clam pending resolution of breach of contract claim); *21st Century Ins. Co. of Cal., Inc. v. Morneau*, 46 So. 3d 1108, 1109 (Fla. 4th DCA 2010) (same); *Progressive Select Ins. Co. v. Shockley*, 951 So. 2d 20, 20 (Fla. 4th DCA 2007) (same).

[6] *Blanchard v. State Farm Mut. Auto. Ins. Co*., 575 So. 2d 1289 (Fla. 1991).

action—could recover damages incurred before the settlement. *See* 753 So. 2d at 1274. The Florida Supreme Court answered that question in the affirmative, reasoning that when an insurance company has failed, in bad faith, to settle a claim, the damages begin to accrue "from the date that the conditions for payment of benefits under the policy have been fulfilled . . . ." *Id.* Thus, a fundamental premise of the bad faith action is that the insurer ***breached the contract*** by refusing to settle when it was obligated, under the contract, to do so. *See id.* at 1275.

In neither case, however, did the Florida Supreme Court hold 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. Indeed, because both cases involved preceding actions for breach of contract resolved in the insured's favor, there was simply no reason to address the issue.

By contrast, in the instant case, there was not and could not have been a claim for breach of contract. As this Court acknowledges 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*, 2014 WL 4327948, at *1. And as Judge Gerber observes: "[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 *8 (Gerber, J., concurring specially). There could 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." *Id.* (quoting *Hill v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 961 (Fla. 2d DCA 2010)).

Accordingly, this Court's decision departs from well-recognized Florida law 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. This Court's decision thus opens the door to meritless bad faith claims by insureds, even where the insurer has scrupulously complied with the contract and paid according to its terms.

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 requirement that a bad faith claim cannot be brought unless there has been a determination that the insurer breached the contract 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 this Court's decision 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 . . . ."). This Court has likewise expressed its view 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 this Court's opinion, the appraisal process, rather than being the end of the dispute between the parties, becomes merely a precursor to further litigation. Previously, a party would have to establish that the insurer breached a term of the contract ***before*** obtaining 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*, 2014 WL 4327948 at *7 ("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).[7]

[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

At a minimum, insurers may be forced to enter into settlements in cases where they would not otherwise be warranted. As one attorney has already noted in response to this Court's decision: "When a situation like that posed in *Cammarata* arises . . . smart policyholder lawyers will agree to a settlement number 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.

Content/Session/2012/InterimReports/2012-132ju.pdf (last visited Oct. 9, 2014). 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.*

> 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").[8]

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.

III. THIS COURT SHOULD GRANT REHEARING AND VACATE ITS DECISION OR, IN THE ALTERNATIVE, CERTIFY THIS CASE FOR REVIEW BY THE FLORIDA SUPREME COURT.

For the reasons discussed in Section I, *supra*, and for those expressed in State Farm's Rehearing Motion, the Chamber believes that this Court's opinion overlooks or misapprehends previous Florida Supreme Court decisions concerning bad faith actions. This Court should, therefore, grant rehearing, vacate its decision,

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[8] 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 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 Oct. 9, 2014).

and issue a revised opinion reaffirming its prior ruling in *Lime Bay*. *See* Fla. R. App. P. 9.330(a).

If, however, this Court chooses not to do so, it should nonetheless certify this matter for review by the Florida Supreme Court pursuant to article V, section 3(b)(4) of the Florida Constitution.

First, the Chamber concurs with State Farm that this Court's decision directly conflicts with the decision of the Third District in *North Pointe Insurance Co. v. Tomas*, 999 So. 2d 728 (Fla. 3d DCA 2008). *See* Rehearing Motion, at p. 22. In *North Pointe*, the Third District held that, even where the insurer paid the appraisal award, as here, the insureds' bad faith action was "premature," concluding that the bad faith action should have been dismissed or abated by the trial court because "the record d[id] not reflect and the [insureds] [did] not allege[] that damages under the insurance contract have been ascertained for the alleged breach . . . ." *Id.* at 729. This decision is consistent with this Court's decision in *Lime Bay*, and cannot be squared with its holding in *Cammarata*.

Second, in light of the public policy implications of this Court's decision, the question of whether it is in accordance with section 624.155—and the Florida Supreme Court's interpretation of the statute—is undoubtedly a matter of "great public importance." Art. V, § 3(b)(4), Fla. Const. The Court reached its decision in this case because it determined that it was "compelled" to do so by binding precedent of the Florida Supreme Court. *Cammarata*, 2014 WL 4327948, at *3. It is, therefore, entirely appropriate to allow the Florida Supreme Court to deliver the

final word. The Chamber thus concurs with State Farm that this Court should certify the following question for review:

> UNDER *BLANCHARD V. STATE FARM MUT. AUTO. INS. CO.*, 753 SO. 2D 1270 (FLA. 1991), AND ITS PROGENY, IS A DETERMINATION OF AN INSURER'S LIABILITY FOR BREACH OF THE INSURANCE CONTRACT NECESSARY BEFORE AN ACTION FOR FIRST-PARTY BAD FAITH UNDER SECTION 624.155, FLORIDA STATUTES, ACCRUES, OR IS A MERE DETERMINATION OF LIABILITY FOR COVERAGE SUFFICIENT?

Rehearing Motion, at p. 28.

If the Florida Supreme Court concludes that a breach of contract is required, it will clarify its own case law and mitigate the negative consequences of an expansion of the bad faith cause of action. If it agrees with this Court, an analysis of the current state of the law by this State's highest court will nonetheless result in uniformity on the law governing this issue. It may also impose other limitations on such actions not addressed by this Court. Regardless of the outcome, a decision by the Florida Supreme Court will result in further clarity as to the meaning of section 624.155, assisting the Chamber, and other advocates, in promoting needed reforms among the respective branches of this State's government.

CONCLUSION

Based on the foregoing, the Chamber respectfully requests that the Court grant Appellee's Motion for Rehearing and/or Certification, and either (1) grant rehearing, vacate its opinion, and issue a revised decision reaffirming *Lime Bay*, or (2) certify this matter for review by the Florida Supreme Court.

Date: October 9, 2013

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to the following by e-mail on October 9, 2013:

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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.

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