Case No. 12-14794-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GARDITH S. LEMY, et al., etc.,

Plaintiffs-Appellants,

v.

DIRECT GENERAL FINANCE COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

AMICUS BRIEF OF UNITED POLICHOLDERS IN SUPPORT OF MOTION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

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14. Direct Bay, LLC - affiliate of Defendants-Appellees Direct General Insurance Company, Direct General Insurance Agency, Inc., and Direct General Financial Services, Inc.

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16. Direct General Agency of Georgia, Inc. - affiliate of Defendants-Appellees Direct General Insurance Company, Direct General Insurance Agency, Inc., and Direct General Financial Services, Inc.

17. Direct General Agency of Kentucky, Inc. - affiliate of Defendants-Appellees Direct General Insurance Company, Direct General Insurance Agency, Inc., and Direct General Financial Services, Inc.

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21. Direct General Insurance Agency, Inc. – Defendant-Appellee

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56. Nation Safe Drivers, LLC – Defendant-Appellee

57. National Adjustment Bureau, Inc. – Defendant-Appellee

58. National Insurance Underwriters, Inc. – Defendant-Appellee

59. NSD Group, LLC – Defendant-Appellee

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62. Porcelli, Anthony E. – Magistrate Judge, Middle District of Florida

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By: 
Gary M. Farmer, Jr.

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AMICI'S IDENTITY, INTEREST, SOURCE OF AUTHORITY AND DISCLOSURE

United Policyholders, ("UP") is a non-profit 501(c) (3) organization founded in 1991 that is an information resource and a voice for insurance consumers in Florida and throughout the United States. The organization assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations and volunteers support our work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP has been active in Florida since Hurricane Andrew in 1992. We work with the Insurance Commissioner Kevin McCarty and the Office of Insurance Regulation, other non-profits and individual home and business owners. We are involved in projects related to property insurance availability, depopulating Citizens, promoting disaster preparedness and mitigation and educating and assisting consumers navigating claims.

State insurance regulators, academics and journalists throughout the U.S. routinely seek United Policyholders' input on insurance and legal matters. We have been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners.

United Policyholders assists courts as *amicus curiae* in appellate proceedings throughout the United States. UP has appeared as *amicus curiae* in many cases in Alabama, Georgia, and Florida, including the following cases reaching the 11th Circuit Court of Appeals: *Gilbert, Bill vs. Alta Health & Life Insurance and Great-West Life & Annuity Insurance* (Case No. 01-10829-GG, Alabama 2002); *Southern Realty Management Inc. et. al. vs. Aspen Specialty Insurance Co. et. al.* (Case No. 10-11513-G, Georgia 2010); *Amelia Island Company v. Amerisure Insurance Company* (Case No. 10-10960G, Florida 2010); and *Tri-Star Lodging, Inc. vs. Arch Specialty Insurance Company* (Case No. 06-13989-HH, Florida 2006).

United Policyholders has a keen interest in this matter because of the potential for misuse of the surplus lines market to sell products that a former Florida Insurance Commissioner opined is a "scam". United Policyholders is also concerned about how a broad reading of *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541 (Fla. 2012) will adversely affect Floridians

and that the Panel' reading of *Chalfonte* conflicts with *Foundation Health v. Westside EKG Associates*, 944 So. 2d 188, 194 (Fla. 2006).

Pursuant to F.R.A.P. Rule 29(e), Edward H. Zebersky, Plaintiffs' counsel in the Trial Court, authored the brief in whole or in part.

STATEMENT OF ISSUES PRESENTED THAT MERIT REHEARING

Whether Florida Law renders a surplus lines insurance policy, sold in blatant violation of the Florida Insurance Code, void and illegal based on Florida Supreme Court precedent..

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Panel should grant rehearing because it misapplied the holding in *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541 (Fla. 2012) in this matter and failed to address the holdings in *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003), *Town of Boca Raton v. Raulerson*, 146 So. 576 (Fla. 1933); *Foundation Health v. Westside EKG Associates*, 944 So. 2d 188, 194 (Fla. 2006); *Harris v. Gonzalez*, 789 So.2d 405, 409 (Fla. 4th DCA 2001) and *Vista Designs, Inc. v. Melvin K. Silverman, P.C.*, 774 So. 2d 884 (Fla. Dist. Ct. App. 2001).

Florida's public policy is to protect the rights of its insureds by requiring that policies are sold by authorized insurance companies that are subject to the rate and form regulations. This public policy is designed to protect Floridians from

excessive insurance premiums. Under very limited circumstances, unauthorized insurance companies may sell policies through the surplus lines insurance market, but only if the transactions are done in accordance with the Florida Surplus Lines Law.

Florida law also provides that when contracts, including insurance policies, are sold in violation of Florida's public policy or statutory schemes the contracts are rendered invalid. *Town of Boca, Harris,* and *Vista Designs*. Because the insurance policies at issue in this case were sold in violation of Florida public policy *and* Florida law, they are void and illegal under Florida precedent. This very issue was addressed by this Court's published opinion in *London,* which entitled the plaintiff to assert a cause of action for common law restitution against an insurance company that sold an insurance product in blatant violation of the Florida Insurance Code.

Rather than addressing these legal precedents in its initial opinion, the Panel held, as a matter of law, that the recent Florida Supreme Court decision in *Chalfonte* prohibits any cause of action based on statutory violations where the relevant statute does not provide for a specific penalty. This interpretation is an overbroad reading of *Chalfonte* and ignores the Florida Supreme Court's opinion in *Foundation* which specifically holds that statutory violations, even when the statute does not provide a penalty, ***can*** form the basis for common law claims like

the claims asserted in this matter. Accordingly, the Panel should rehear this matter and apply the *London, Foundation, Town of Boca, Harris and Vista Design* opinions or at the very least certify, this issue of purely Florida State law as a question of great public importance to the Florida Supreme Court.

ARGUMENT

I. REHEARING SHOULD BE GRANTED BECAUSE THE COURT FAILED TO ADDRESS FLORIDA'S LONG STANDING PRECEDENT THAT CONTRACTS THAT DO NOT COMPLY WITH STATUTES AND THAT RUN COUNTER TO FLORIDA PUBLIC POLICY ARE VOID

a. ESTABLISHED PUBLIC POLICY IN THE STATE OF WARRANTS REHEARDING OF THIS PANEL'S OPINION

As recognized by the McCarron—Ferguson Act, the relationship between insurer and insured, and issues related to whether a type of insurance policy can be sold in a given state, are inherently state issues. *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.,* 393 U.S. 453, 460 (1969). The misuse of the surplus lines market to circumvent consumer protections directly impacts the relationship between insurers and insureds and is clearly a state issue of concern to United Policyholders and all Floridians.

One of the significant differences between surplus lines and authorized insurance is the level of regulation. Surplus lines policies are immune from rate and form regulation. *Fla. Stat.*. § 626.913 (4). Conversely, authorized companies

are required to file and receive approval for rates. *Fla. Stat.*. § 627.031 (the public purpose of requiring rate filings is to "promote the public welfare by regulating insurance rates" by insuring that the rates are not excessive); and forms *Fla. Stat.* § 627.410.

The rationale for this lack of regulation was recently addressed by the Florida Legislature: "[t]he different regulatory treatment is due to the unique nature of surplus lines insurance because it covers consumer needs arising from emerging technologies, new business practices, or changing legal environments which require a quick response that is often difficult for admitted insurers to provide..." *Staff Analysis* - CS/CS/SB 1894 (April 20, 2009). Accordingly, Florida only permits the sale of surplus lines insurance products on a very limited basis[1].

To counter balance the lack of rate regulation, surplus lines coverages can only be sold if the products are not available in the authorized market after retailing agents conduct a diligent effort to ensure that they cannot procure the coverage in the admitted market. *Fla. Stat.*. § 626.916. This dichotomy is further addressed in *Fla. Stat.*. § 624.401 (1) which provides that: "[n]o person shall act as

[1] This point was also recently made by the Florida Legislature: [s]urplus lines insurance is an alternative type of insurance coverage for consumers to buy property-liability insurance from unauthorized (non-admitted) insurers when consumers are unable to purchase the coverage they need from admitted insurers." *Id.*

an insurer, and no insurer or its agents, attorneys, subscribers, or representatives shall directly or indirectly transact insurance, in this state except as authorized by a subsisting certificate of authority issued to the insurer by the office". *Fla. Stat.*. § 624.401 (1). One of the few exceptions is for "[t]ransactions pursuant to surplus lines coverages ***lawfully*** written under part VIII of chapter 626". *Fla. Stat.*. § 624.402 (3) (emphasis added). Additionally any person, including an insurance company, who transacts insurance without the proper authorization and is not exempt from the authorization requirement is guilty of a felony. *Fla. Stat.*. § 624.401 (4). Accordingly, it is contrary to Florida public policy, and Florida's Insurance Code, for any person to engage in the sale of surplus lines insurance unless the transaction complies with the surplus lines law, including the requirements of *Fla.Stat.* § 626.916 .

In short, the Florida Insurance Code narrowly circumscribes the conditions under which surplus lines products, with limited regulation, can be sold in the State of Florida and requires strict adherence to these requirements. Otherwise, those persons involved in the sale of the unauthorized product are guilty of a state crime.

b. THE PANEL'S BROAD READING OF *CHALFONTE* CONFLICTS WITH PRIOR FLORIDA STATE COURT PRECEDENT AND WARRANTS REHEARING

The holding in *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541 (Fla. 2012), on which the Panel relied in its original opinion, warrants a narrow, not expansive reading. That opinion merely recognizes that statutes do not give rise to private causes of action for violation of specific statutes unless there is specific penalty language in the statute. But the holding does not, and cannot, serve as an across the board immunity from civil litigation for an insurance company that violates the Florida Insurance Code. This broad reading conflicts with *Foundation Health v. Westside EKG Associates*, 944 So. 2d 188 (Fla. 2006), which, like *Chalfonte,* addressed a statutory violation that did not give rise to a statutory cause of action. While the Florida Supreme Court in *Foundation* recognized that a statutory cause of action does not exist unless there is specific intent in the statute itself, this failure "does not ... preclude the right to bring a common law ... claim based upon the same allegations." *Id.* at 194. Accordingly, *Foundation* permits common law causes of action that are based on conduct that results in statutory violations, notwithstanding that the same conduct does not give rise to a private cause of action for a statutory violation.

The *Foundation* holding, which was not addressed in the Panel's opinion, is also consistent with a body of Florida law that has long recognized that a contract that violates Florida's statutes and public policy is invalid. *Town of Boca Raton v. Raulerson*, 146 So. 576 (Fla. 1933); *See also Harris v. Gonzalez,* 789 So.2d 405,

409 (Fla. 4th DCA 2001), *cited with approval in Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 864 (Fla. 2005) *opinion withdrawn on other grounds*, 930 So. 2d 610 (Fla. 2006) ("A contract which violates a provision of the constitution or a statute is void and illegal and will not be enforced in our courts"); and *Vista Designs, Inc. v. Melvin K. Silverman, P.C.*, 774 So. 2d 884 (Fla. 4th DCA 2001).

The *Foundation* holding is also consistent with this Court's published decision in *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003), which recognized that an insurance policy that violates multiple Florida Statutes is illegal and entitles policyholders, like the Plaintiffs in this case, to restitution of their premiums.

Accordingly, this case should be able to proceed, notwithstanding *Chalfonte,* because Florida Supreme Court precedent permits a cause of action, based on statutory violations and a violation of Florida's public policy, so long as those activities give rise to a common law cause of action.

II. IMPORTANCE OF THIS ISSUE

According to the Florida Senate there were about 700,000 surplus lines insurance policies were sold in Florida in 2008. *See Staff Analysis* CS/CS/SB 1894 (April 20, 2009). Based on discovery done in the *Lemy* case there were over

140,000 of the subject policies sold to Floridians in 2007 and 2008 alone. (Doc. 83, p. 15). If we assume that ½ of these policies were sold each year, this product accounts for 10% of the entire surplus lines policies sold in the State of Florida for 2008. It is also *Amicus* understanding that the Defendants also sell slightly different products under slightly different names, so the real percentage of surplus lines market share for this type of add-on product alone is extremely substantial.

Moreover, according to a former Florida Insurance Commissioner, Thomas Gallagher:

> The sale of VPI with the PIP/PD mandatory automobile coverage appears to be a scam using a surplus lines insurer calling it "excess" insurance. The surplus lines carrier is being used in order to attempt to circumvent consumer protections afforded to insureds under Florida Statutes. If VPI's rates and forms would have been submitted to Department of Insurance when I was Insurance Commissioner, the VPI product would not have been approved. It is also my opinion that if VPI was submitted to the Florida Office of Insurance Regulation today, it still would not be approved. This opinion is based, in part, on the Second Affidavit of Lisa M. Robison, in which she testified that the Direct General Defendants retain 80% of the VPI premiums "as commissions and other consideration for the services provided under such agreements relating to VPI." I believe it is important to know the claims history of the VPI product because that would assist me in assessing the validity (or lack thereof) of this policy.

(Doc. 83-1).

UP is very concerned that insurance products dubbed a "scam" by a former Florida Insurance Commissioner are permitted to be sold in the State of Florida. It

is apparent that one of the only reasons that this policy can be sold is based on the very nature of all surplus lines products---no rate or from regulation. Very simply, where regulation of insurance products doesn't exist or is lacking, it is imperative that consumers have access to courts to seek redress for policy terms that are in violation of Florida law. If allowed to stand, this Panel's opinion will encourage companies to evade rate and form regulation and sell these types of products through the surplus lines market. This will result in more Floridians being subject to purchasing "scam" insurance in what is designed as a very limited market to provide only *needed* insurance.

III. CONCLUSION

While *Amicus* respects that the panel has relied upon the *Chalfonte* decision, its broad reading of the opinion conflicts with the *Foundation* decision and Florida's long standing precedent (recognized in the *London* opinion) that insurance policies sold in violation of Florida's insurance code and statutory scheme should be deemed invalid.

If left undisturbed, the challenged holding will incentivize unscrupulous people and companies to sell products illegally in the surplus lines market to avoid rate and form regulation costing Floridians millions of dollars for essentially

worthless insurance. As importantly, there are 140,000 Floridians that will have no right to restitution if this case cannot proceed.

In light of the significance of this issue, if the Panel is not inclined to revisit its opinion, it should send this matter, through a certified question, to the Florida Supreme Court to determine questions that are of great importance to Floridians.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure, in that it contains less than 7000 words (including words in footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)) according to Microsoft Word 2010, the word-processing system used to prepare this brief.

Gary M. Farmer, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by email, pursuant to the written consent of counsel for Appellees, this 16th day of April, 2014, to:

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