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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC12-323
LOWER TRIBUNAL CASE NO. 10-14714

WASHINGTON NATIONAL INSURANCE CORPORATION

Petitioner/Appellant

vs.

SYDELLE RUDERMAN, et al.

Respondents/Appellees.

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS, IN SUPPORT OF RESPONDENTS SYDELLE RUDERMAN, ET AL.

July 5, 2012

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The financial security that insurance policies provide is embedded in the fabric of our economy and modern society. Adequate protection against the risk of financial loss is so important that our laws require individuals to purchase insurance coverage for many basic societal functions. From a policyholder's perspective, the integrity of their insurance safety net is paramount.

There is tension between consumer expectations and the business of insurance, which must be fundamentally concerned with profits and solvency. Insurers are able to elevate their interests by controlling the terms of coverage when drafting their policies – typically standardized forms filled with terms of art not readily understood by the consumer – and determining which claims get paid. Because of this dynamic, the law has always placed heightened obligations on insurers. The interpretation of insurance contracts and related burdens of proof require special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this critically important role.

UP is a non-profit organization founded in 1991 that serves as an information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor support the organization's work, which is divided into three program areas: Roadmap to Recovery (helping disaster victims navigate the insurance claim process), Roadmap to Preparedness

(promoting disaster preparedness and insurance literacy) and Advocacy and Action (advancing the interests of insurance consumers in courts of law, before regulators, legislators, and in the media).

UP has been active in helping Florida residents solve insurance problems since Hurricane Andrew in 1992, and has previously appeared before this and other Florida courts as *amicus curiae*, and in over three hundred other cases nationwide. UP is an official consumer representative to the National Association of Insurance Commissioners and works with Florida's Commissioner of Insurance Kevin McCarty and the Office of Insurance Regulation in that capacity. The organization responds to inquiries from Florida residents on a regular basis. UP also serves on an Advisory Panel to the American Law Institute on the Principles of Liability Insurance drafting project. The Panel is closely examining legal principles related to the very issues before this Court.

SUMMARY OF THE ARGUMENT

For over a century, this Court has been committed to the principle that ambiguous language in an insurance policy must be interpreted in favor of the policyholder, without permitting an insurer to attempt to explain an ambiguity through extrinsic evidence. Appellant and its *amici* mischaracterize this Court's jurisprudence to suggest that extrinsic evidence must *always* be considered before the ambiguity principle is applied. But Appellant has only located a few outlier lower court decisions that have considered extrinsic evidence, contrary to this Court's consistent guidance. Appellant and its *amici* are not asking to maintain the status quo; rather, they seek to overturn an embedded principle of Florida insurance law in favor of a new rule that would treat insurance policies – the archetype of adhesive contracts – the same as ordinary contracts produced through arms-length negotiation.

This Court has rejected the use of extrinsic evidence to explain ambiguous insurance policy language and long recognized that the extreme advantage insurers wield in drafting their own policy language and deciding which claims get paid warrants a judicially-imposed set of rules that level the playing field for the policyholder. The doctrine of *contra proferentem* – construing ambiguous language against its drafter – is chief among these rules. Permitting extrinsic evidence to resolve ambiguity before applying *contra proferentem* but provides the

carrier another opportunity to present evidence as to the meaning it intended, even though it chose language susceptible of a reasonable interpretation supporting coverage. This Court should not allow carriers to re-write the terms of their policies following a loss.

Appellant's proposed rule is also bad public policy. Examination of extrinsic evidence would significantly multiply proceedings in insurance coverage disputes. Trial courts confronted with ambiguous policy language would be required to hear additional evidence, and appellate courts reversing on a finding of ambiguity would need to remand for further proceedings rather than entry of judgment. Seminal decisions of this Court will be overturned, and future decisions holding policy language ambiguous will lose precedential value since other insurers could introduce evidence to "clarify" what they meant by identical language.

This Court has wisely rejected the insurance industry's efforts to "explain" (read: re-write) ambiguous policy language through extrinsic evidence in order to level the playing field for policyholders, minimize transaction costs, and encourage insurers to use clear language. This Court should stay the course.

ARGUMENT

I. FLORIDA LAW REQUIRES AMBIGUOUS POLICY LANGUAGE TO BE INTERPRETED IN FAVOR OF THE POLICYHOLDER WITHOUT RESORT TO EXTRINSIC EVIDENCE.

Insurance policy language is ambiguous where it is susceptible of more than one reasonable interpretation, at least one of which provides coverage to the insured. *Chandler v. GEICO Indem. Co.*, 78 So. 3d 1293 (Fla. 2011) (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla.2000)). *Contra proferentem*, a centuries-old rule of contract interpretation requiring ambiguous language to be interpreted against its drafter, has been repeatedly applied to insurance policies in Florida. *Id.* The Eleventh Circuit has inquired of this Court whether Florida law permits an "attempt to resolve" an ambiguity in an insurance policy through extrinsic evidence before applying *contra proferentem* in favor of the insured.[1] *Ruderman ex rel. Schwartz v. Washington Nat'l Ins. Corp.*, 671 F.3d 1208 (11th Cir. Feb. 17, 2012). The answer to this question, based upon overwhelming precedent and sound public policy, should be an emphatic "No."

[1] As phrased by the Eleventh Circuit: "If an ambiguity exists in this insurance policy—as we understand that it does—should courts first attempt to resolve the ambiguity by examining available extrinsic evidence?"

A. This Court has universally applied *contra proferentem* to ambiguous insurance policy language without consideration of extrinsic evidence.

This Court has demonstrated an unwavering commitment to the long-standing principle that ambiguous policy language must be resolved in favor of the policyholder without resort to extrinsic evidence. While the Eleventh Circuit recognized *Auto-Owners Insurance Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000), as a leading decision establishing this ambiguity principle, this Court has since re-affirmed the rule on at least twelve occasions.[2] Not one of these decisions suggests that a court may attempt to resolve ambiguous policy language through extrinsic evidence before favoring coverage.

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[2] *Chandler v. GEICO Indem. Co.*, 78 So. 3d 1293 (Fla. 2011); *State Farm Mut. Auto Ins. Co. v. Menendez*, 70 So. 3d 566 (Fla. 2011); *Penzer v. Transportation Ins. Co.*, 29 So. 3d 1000 (Fla. 2010); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007); *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007); *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005); *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005); *Travelers Indem. Co. v. PCR*, 889 So. 2d 779, 785-86, 788 n.9 (Fla. 2004); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003); *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 271 (Fla. 2003); *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 744 (Fla. 2002); *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 735 (Fla. 2002).

The Eleventh Circuit, however, perceived a conflict between this Court's consistent pronouncements and a thirty-two year old decision, *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938 (Fla. 1979), which Appellant argued permits it to explain its ambiguous policy language through extrinsic evidence. *Ruderman*, 671 F.3d at 1211-12. The Eleventh Circuit's certification on this issue is puzzling, not only because of the abundantly clear guidance from this Court, but also because *Excelsior* does not support the insurer's position. In *Excelsior*, this Court did not authorize the introduction of extrinsic evidence to clarify ambiguity because it did not involve ambiguous policy language at all; this Court held that the policy was not ambiguous by reference to the text alone, after applying basic principles of contract construction. 369 So. 2d at 941-42. In this respect, *Excelsior* merely illustrates the oft-cited principle that *contra proferentem* should apply "[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction." 369 So. 2d at 942.

Excelsior and *Anderson* are consistent in applying the long-standing principle of *contra proferentem* without resort to extrinsic evidence. Contrary to the Eleventh's Circuit impression, this Court has harmonized the two decisions, having cited *Excelsior* with approval in *Anderson*, and in continuing to approve both decisions when setting forth rules of policy interpretation. *Anderson*, 756 So.

2d at 34 (citing *Excelsior*); *Taurus*, 913 So. 2d at 532 (citing *Anderson* and *Excelsior*); *Swire Pacific*, 845 So. 2d at 165-66 (same). Appellant conflates Florida's ordinary rules of construction – the threshold rules of textual interpretation employed to determine facial ambiguity – with the impermissible resort to extrinsic evidence to explain the ambiguous language.

In *Exclesior*, for example, this Court applied two rules of construction: (1) reading the policy as a whole *(in pari materia)* to eliminate inconsistencies where possible, and (2) interpreting the policy to give maximum operative effect to all provisions. *Id.* at 941. *Anderson*, following *Exclesior*, applied these same rules of construction. 756 So. 2d at 34. This Court has, of course, recognized several other rules of construction to determine whether policy language is ambiguous before *contra proferentem* will be applied. *See, e.g.*, *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007) (policy language is not necessarily ambiguous because language is complex or requires analysis); *Fayad*, 899 So. 2d at 1088-89 (applying *ejusdem generis*); *Swire Pacific*, 845 So. 2d at 166 (undefined terms are not necessarily ambiguous); *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986) (policy language is not ambiguous solely because it could be more clearly drafted); *see also Federated Mut. Ins. Co.*, 712 So. 2d 1245 (Fla. 5th DCA 1998) (court cannot "put strain and unnatural construction on the terms of the policy in order to create uncertainty or ambiguity").

These rules of construction ensure that a court will thoroughly examine the text in its entirety before finding policy language ambiguous, offering the insurer plentiful shelter from a reflexive application of *contra proferentem*. If the textual interpretation reveals that the policy language can reasonably be construed to provide coverage, however, *contra proferentem* requires a decision for the policyholder.

This Court's extensive jurisprudence on this subject makes clear that the ordinary rules of construction, as applied in *Excelsior* and numerous other decisions, do not include the consideration of extrinsic evidence to explain what the carrier claims it meant to state clearly. Appellee's brief thoroughly recounts this Court's decisions applying *contra proferentem* where the policy language is found to be ambiguous. In each of these decisions, this Court has held for the insured without remanding for consideration of extrinsic evidence that might resolve the ambiguity in the carrier's favor. *See, e.g.*, *Fayad*, 899 So. 2d at 1090; *Rigel v. Nat'l Cas. Co.*, 76 So. 2d 285, 286-87 (Fla. 1954). This Court would overturn decades of its own rulings on this issue if it now, for the first time, permitted introduction of extrinsic evidence to clarify ambiguous policy language.

Appellant notably fails to identify a single decision from this Court either resolving ambiguous policy language through extrinsic evidence or remanding to allow such an effort. The handful of this Court's insurance law decisions that even

mention extrinsic evidence neither articulated nor employed such a rule. *See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998) (refusing to consider drafting history because language was unambiguous); *Dimmitt Chevrolet, Inc. v. Southeastern Fid. Ins. Corp.*, 636 So. 2d 700 (Fla. 1993) (same); *Stuyvesant Ins. Co. v. Butler*, 314 So. 2d 567, 570 (Fla. 1975) (finding coverage after determining meaning of term "minor" as used in maritime industry); *Price v. S. Home Ins. Co. of the Carolinas*, 129 So. 748 (Fla. 1930) (considered evidence to determine what property was insured without determination that policy language was ambiguous); *L'Engle v. Scottish Union & Nat'l Fire Ins. Co.*, 37 So. 462, 467 (Fla. 1904) (judgment for insurer reversed on basis of *contra proferentem* without consideration of extrinsic evidence).[3]

Deni, this Court's last insurance decision to inferentially address the use of

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[3] Of these five decisions, only *L'Engle* and *Price* could even arguably be interpreted to permit an attempt to resolve ambiguous policy language through extrinsic evidence, though neither appears to have applied such a rule in the manner the insurers seek here. It is not clear that the *L'Engle* court considered any extrinsic evidence, as it held for the insured on the basis of *contra proferentem* before even reaching the question. *Price*, on the other hand, did not rule that any portion of the policy was ambiguous, and appears to have considered only the nature of the property insured property. This is entirely consistent with current Florida law, which does not require a court to "interpret the insurance policy in a vacuum." *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779, 788 n.9 (Fla. 2004). Ultimately, *Price* – a 1930 decision – is the last ruling of this Court that could even arguably support the insurer's position, and it does not permit the type of "extrinsic evidence" Washington National advances here, such as agent communications, industry practice, marketing materials, or state actuarial filings.

extrinsic evidence, is particularly instructive. In *Deni*, this Court considered and rejected the "reasonable expectations" doctrine, which holds that an insured's expectations regarding the scope of coverage will be upheld if objectively reasonable. 711 So. 2d at 1140. The doctrine is typically applied only where the policy is ambiguous, and this Court found the doctrine unnecessary because Florida had adopted the strict application of *contra proferentem*. *Id.* ("There is no need for [the reasonable expectations doctrine] if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer."). As one Florida federal court has since explained, "*Deni* has been held to preclude testimony from either the insurer or the insured as to their respective intentions regarding coverage." *Monticello Ins. Co. v. City of Miami Beach*, 2009 WL 667454 (S.D. Fla. Mar. 11, 2009) (citing *Lenhart v. Federated Nat'l Ins. Co.*, 950 So. 2d 454, 460-461 (Fla. 4th DCA 2007)).[4]

Appellant and its *amici's* argument, on the other hand, is rather succinctly summarized: this Court should reverse a well-settled principle of insurance law in favor of a new rule treating insurance policies as ordinary, evenly negotiated

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[4] *Monticello* inexplicably considered extrinsic evidence after noting that *contra proferentem* "may be decisive in the case of contracts of adhesion, such as insurance policies, where the intent must be determined from the words themselves." 2009 WL 667454 at *10 n.8. The court's consideration was irrelevant, and likely out of an abundance of caution, since it ultimately applied *contra proferentem* in favor of the insured. *Id.* at *10.

contracts. Indeed, the insurers focus upon the inapplicable precept that the court should interpret a contract to give effect to the subjective intent of the parties. *See, e.g.*, *Excelsior*, 369 So. 2d at 942 (*contra proferentem* "does not allow courts to ... reach results contrary to the intentions of the parties"). Unsurprisingly, most of the lower court decisions cited by Appellant for the proposition that *contra proferentem* should be applied as a "doctrine of last resort" involve ordinary contracts, not insurance policies.[5] *See* Appellant's Br. at 26-29 n.18.

While this Court unquestionably seeks to give effect to the intent of the parties when interpreting insurance policies, it has correctly refused to consider evidence beyond the Policy's actual terms. This Court has repeatedly held that the insurer, in exercising control over the terms of the policy, has the opportunity to state its intent in the policy and is therefore bound by the language it chooses. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 894 (Fla. 2007) (Lewis, J. concurring) ("the onus is on [the insurers]—not the courts—to clearly express that

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[5] *Holmes v. Kilgore*, 103 So. 825 (Fla. 1925); *Turgman v. MM World Entm't, LLC*, 21 So. 3d 104, 105 (Fla. 3d DCA 2009); *Palm Beach Pain Mgmt., Inc. v. Carroll*, 7 So. 3d 1144, 1146 (Fla. 4th DCA 2009); *Herpich v. Estate of Herpich*, 994 So. 2d 1195, 1197-98 (Fla. 5th DCA 2008); *Emerald Pointe Prop. Owners' Ass'n, Inc. v. Commercial Constr. Indus., Inc.*, 978 So. 2d 873, 878 (Fla. 4th DCA 2008); *DSL Internet Corp. v. TigerDirect, Inc.*, 907 So. 2d 1203, 1205 (Fla. 3d DCA 2005); *Huntington on the Green Condo. v. Lemon Tree 1-Condo.*, 874 So. 2d 1, 4-5 (Fla. 5th DCA 2004); *Child v. Child*, 474 So. 2d 299, 301 (Fla. 3d DCA 1985); *Land O'Sun Realty Ltd. v. REWJB Gas Invs.*, 685 So. 2d 870, 872 n.3 (Fla. 3d DCA 1997). The lower Florida court opinions that have addressed extrinsic evidence in

intent through the CGL policies they issue"); *Berkshire Life Ins. Co. v. Adelberg*, 698 So. 2d 828, 830 (Fla. 1997) ("It has long been a tenet of Florida insurance law that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer." (citing *Firemans Fund Ins. Co. v. Boyd*, 45 So. 2d 499, 501 (Fla. 1950)); *Prudential Prop. & Cas. Co. v. Swindal*, 622 So. 2d 467, 472 (Fla. 1993) (purpose is to "give effect to the intent of the parties *as expressed in the policy language*" (emphasis supplied)). Permitting an insurance company to introduce extrinsic evidence to explain its drafting failures would overturn this cogent, well-established precedent. This Court should decline that invitation.

B. Lower Florida Courts have consistently applied *contra proferentem* to ambiguous insurance policy language without consideration of extrinsic evidence.

Following this Court's lead, in the last five years alone, there are eighteen opinions from Florida District Courts of Appeal that apply the rule of *contra proferentem* to ambiguous insurance policy language without reference to any

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the context of ambiguous policy language are discussed in Section I.B., *infra*.

"attempt to resolve" ambiguities through extrinsic evidence.[6]

In contrast, Appellant and its *amici* identified only a smattering of Florida appellate decisions that purportedly consider extrinsic evidence to resolve ambiguous policy language. It is immediately apparent from these decisions that, contrary to the Appellant's argument, there is no line of Florida decisional law – arising out of *Excelsior* or otherwise – that permits admission of extrinsic evidence to clarify ambiguous policy language. Not one of these cases cites *Excelsior*, *Anderson*, or any other insurance law ruling from this Court for the proposition

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[6] *DCI MRI, Inc. v. GEICO Indem. Co.*, 79 So. 3d 840 (Fla. App. 2012); *GEICO Indem. Co. v. Virtual Imaging Servs., Inc.*, 79 So. 3d 55 (Fla. 3d DCA 2011); *North Pointe Cas. Ins. Co. v. M&S Tractor Servs., Inc.*, 62 So. 3d 1281 (Fla. 2d DCA 2011); *Certain Interested Underwriters at Lloyd's v. Chabad Lubavitch of Greater Ft. Lauderdale, Inc.*, 65 So. 3d 67 (Fla. 4th DCA 2011); *Hale v. State Farm Fla. Ins. Co.*, 51 So. 3d 1169 (Fla. 4th DCA 2010); *Gabbard v. Allstate Prop. & Cas. Co.*, 46 So. 3d 147 (Fla. 5th DCA 2010); *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565 (Fla. 1st DCA 2010); *Dickson v. Economy Premier Assur. Co.*, 36 So. 3d 789 (Fla. 5th DCA 2010); *Bell Care Nurses Registry, Inc. v. Continental Cas. Co.*, 25 So. 3d 13 (Fla. 3d DCA 2009); *Liebel v. Nationwide Ins. Co. of Fla.*, 22 So. 3d 111 (Fla. 4th DCA 2009); *State Farm Mut. Auto Ins. Co. v. Fischer*, 16 So. 3d 1028 (Fla. 2d DCA 2009); *State Farm Mut. Auto Ins. Co. v. Mashburn*, 15 So. 3d 701 (Fla. 1st DCA 2009); *Indian Harbor Ins. Co. v. Williams*, 998 So. 2d 677 (Fla. 4th DCA 2009); *State Farm Fla. Ins. Co. v. Campbell*, 998 So. 2d 1151 (Fla. 5th DCA 2008); *Flaxman v. Gov't Employees Ins. Co.*, 993 So. 2d 597 (Fla. 4th DCA 2008); *First Specialty Ins. Co. v. Caliber One Indem. Co.*, 988 So. 2d 708 (Fla. 2d DCA 2008); *Kohl v. Blue Cross and Blue Shield of Fla., Inc.*, 988 So. 2d 654 (Fla. 4th DCA 2008); *Itnor Corp. v. Markel Int'l Ins. Co.*, 981 So. 2d 661 (Fla. 3d DCA 2008).

that ambiguities should be resolved through extrinsic evidence.[7]

C. Sound public policy supports Florida's Application of *Contra Proferentem.*

Insurance is fundamental to our society and economy, and the protection against fortuitous loss it promises is vital to the consumer. Our laws often require individuals and businesses to purchase insurance if they wish to drive a car, own a home or sell certain products. Yet there is a fundamental tension between the security promised to the insurance consumer, often reflected in the marketing and sales of insurance products (*e.g.*, "You're in good hands"), and the business of insurance, which may increase profit by reducing claim payments. As one commentator noted: "All that an insurance company has to sell is its promise to pay. Yet, all other things being equal, the better an insurance company is at

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[7] *See Kiln PLC v. Advantage Gen. Ins. Co.*, 80 So. 3d 429 (Fla. 4th DCA 2012); *Sch. Bd. of Broward Cty., Fla. v. Great Am. Ins. Co.*, 807 So. 2d 750, 752 (Fla. 4th DCA 2002); *Navy Mut. Aid Ass'n v. Barrs*, 732 So. 2d 345, 347 (Fla. 1st DCA 1999); *Williams v. Essex Ins. Co.*, 712 So. 2d 1232 (Fla. 1st DCA 1998); *Universal Underwriters Ins. Co. v. Steve Hull Chevrolet, Inc.*, 513 So. 2d 218, 219 (Fla. 1st DCA 1987); *First State Ins. Co. v. Gen. Elec. Credit Auto Lease, Inc.*, 518 So. 2d 927 (Fla. 3d DCA 1987); *Mut. Fire, Marine & Inland Ins. Co. v. Fla. Testing & Eng'g Co.*, 511 So. 2d 360, 361-62 (Fla. 5th DCA 1987). Three decisions misconstrue the Court's opinion in *Friedman v. Virginia Metal Products Corp.*, 56 So. 2d 515, 517 (Fla. 1952). *Castillo v. State Farm Fla. Ins. Co.*, 971 So. 2d 820, 823 (Fla. 3d DCA 2007); *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001); *Reinman, Inc. v. Preferred Mut. Ins. Co.*, 513 So. 2d 788 (Fla. 3d DCA 1987). While *Friedman* cited a Michigan case permitting the use of extrinsic evidence to resolve ambiguous policy language, the reference is assuredly dicta as the court was not addressing an insurance policy; the case

avoiding that promise, the more money it makes." Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 Tex. L. Rev. 1395, 1401 (May 1994).

The vast majority of insurance policies sold today are standardized forms, used industry-wide, and offered to consumers on a take-it-or-leave-it basis. Policyholders generally have no opportunity to negotiate the terms of their coverage, and frequently do not even see their policy until after it is purchased. Susan Randall, *Freedom of Contract in Insurance*, 14 Conn. Ins. L. J. 107 (2007); *see also* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. Chi. L. Rev. 1263, 1266 (2011) (discussing the "super-standardization" of property and casualty insurance policies). Even where options may be available, "informed and vigilant consumers are currently unable to comparison shop among carriers on the basis of differences in coverage." Schwarcz, 78 U. Chi. L. Rev. at 1318-37.

It is therefore axiomatic that insurance policies are not ordinary contracts, but rather contracts of adhesion. 43 Am. Jur. 2d Insurance § 185 ("an insurance policy ... is not an ordinary contract, but a 'contract of adhesion,' because the insurance contract is drafted solely by the insurer"). The insurer's superior position in crafting the terms of its deal – along with the industry's quasi-public status – has led courts to depart from ordinary contract law in favor of rules of

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concerned a personal guarantee and applied ordinary contract law.

policy interpretation that favor coverage for policyholders where a carrier uses unclear language.[8] While ordinary contract law often applies *contra proferentem* as a doctrine of last resort after considering extrinsic evidence of the parties' intent, the law has long recognized that extrinsic evidence of subjective intent is ill suited to insurance coverage litigation. As Judge Learned Hand once explained: "[T]he canon *contra proferentem* is more rigorously applied in insurance than in other contracts, in recognition of the difference between the parties in their acquaintance with the subject matter ... insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden

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[8] As one leading treatise explains:

> The fundamental reason which explains [*contra proferentem*] and other examples of judicial predisposition toward the insured is the deep-seated, often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a "take-it-or-leave-it" basis if he or she wishes insurance protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion between unequal parties. This is because ... insurance contracts are generally not the result of the typical bargaining and negotiating processes between roughly equal parties that is the hallmark of freedom to contract.

16 Richard A. Lord, *Williston on Contracts* § 49:15.

of any resulting confusion." *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947). Florida courts have adopted this reasoning, consistently recognizing the adhesive nature of the insurance contract as a justification for the strict application of *contra proferentem*. *Pasteur Health Plan, Inc. v. Salazar*, 658 So.2d 543, 544 (Fla. 3d DCA 1995) ("Florida courts have long held that all ambiguities in insurance contracts, as contracts of adhesion, should be construed in the light most favorable to the insured." (citations omitted)).[9]

Other jurisdictions have likewise rejected the use of extrinsic evidence to resolve ambiguous policy language. *See, e.g.*, *Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. 2010); *Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co.*, 709 S.E.2d 85, 525 (S.C. Ct. App. 2011). The Missouri Supreme Court recently ruled on this issue, rejecting an insurers' attempt to introduce extrinsic evidence in the form of an affidavit from the policyholder stating that he did not believe the policy provided coverage. *Burns*, 303 S.W.3d at 512 n.4. The court refused to examine the parties' subjective intent where the insurer's objective intent was shown in the language it used when drafting its policy. *Id.* at 512. The court stated it "will not

[9] *See also Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, n.1 (Fla. 4th DCA 2010) ("Because insurance policies are often adhesion contracts, the ambiguities are construed against the insurer who prepared the policy." (citations omitted)); *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298, 1304 (Fla. 2d DCA 1977) ("[insurance] contracts are by their very nature 'adhesive'"); *Seaboard Finance Co. v. Mut. Bankers Corp.*, 223 So. 2d 778, 782 (Fla. 2d DCA 1969)

resort to extrinsic evidence offered to demonstrate their positions of coverage and non-coverage. Since the language used is uncertain, the well-established rule applies that it will be construed against the insurer." *Id.* (quotation omitted).

Appellant's contention that Florida courts *always* accept extrinsic evidence to resolve ambiguous policy language is plainly false, but by focusing on principles of ordinary contract law, the argument is a more sinister effort to subvert long-standing Florida insurance law purposely tailored to protect policyholders. This must not be understated: Appellant asks this Court to analyze its highly-specialized, standard-form policies – offered to a captive public without any notion of a bargained-for deal – under the same set of rules that govern contracts produced through arms-length negotiation. Such a massive departure from well-settled principles of Florida insurance law would be a boon to insurers, a catastrophe for Florida policyholders, and a considerable burden for Florida courts.

Insurers naturally seek to admit extrinsic evidence of the otherwise indecipherable "meaning" of ambiguous policy language because, much like the policy language itself, they can often control the creation of this evidence and even protect its dissemination except under favorable circumstances. Examples of such insurer-generated evidence might include policy drafting history, industry custom and practice, claims manuals and guidelines, or as Appellant has introduced here,

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("insurance policies are known in law as contracts of adhesion").

underwriting memoranda and regulatory submissions. This "extrinsic evidence" is entirely one-sided – it is not generally known or available to the average insurance consumer, nor does it provide any evidence of a policyholder's understanding regarding coverage.[10]

Rewriting an insurance policy at the behest of the carrier is a particularly unjust endeavor long after a policyholder has paid a premium for the coverage stated in the policy.[11] Yet under the insurer's proposed rule, the policyholder, already unable to choose the terms of its coverage from the outset, would not even be assured of coverage when supported by a reasonable interpretation of the policy.

Appellant's amicus accordingly concedes that an insurer's one-sided evidence of contractual intent should not be admissible even under the new rule they advance here. CICLA Amicus Br. at 8 ("evidence that reflects one party's

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[10] In fact, insurance carriers routinely refuse to produce such evidence in a coverage dispute. *See Granada Ins. Co. v. Ricks*, 12 So. 3d 276 (Fla. 3d DCA 2009) (collecting cases refusing discovery of claims manuals and business practices).

[11] This Court has previously recognized instances where insurers have employed ambiguous language to deny coverage despite having charged premiums based on industry-wide experience for such loss. *Hartnett v. Southern Ins. Co.*, 181 So. 2d 524, 528 n.3 (Fla. 1965). In *Hartnett*, this Court stated: "There is no reason why [insurance] policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions." *Id.* at 528.

unilateral understanding will be inadmissible because it cannot aid the court in determining the parties' mutual intent"). But even a more limited rule that nonetheless opens the door to evidentiary considerations will have costly consequences for policyholders and Florida courts.

A new rule permitting examination of extrinsic evidence will significantly multiply proceedings in coverage disputes. Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 Mich. L. Rev. 531, 563 (1996) (advocating traditional "strict liability" form of *contra proferentem* because it affords greater predictability with lower error and transaction costs). Trial courts confronted with ambiguous policy language will have to give the parties an opportunity to submit evidence. The cost of insurance coverage litigation will significantly increase, which affects not only a policyholders' ability to obtain competent coverage counsel, but also the insurance industry's exposure to a successful policyholders' attorneys' fees. *See* Fla. Stat. §627.428.

The insurers' rule also engenders litigation. Past and future decisions identifying ambiguous policy language will lose their precedential value for the industry as a whole, since each insurer would be entitled to introduce their own extrinsic evidence regarding a particular policy provision. This could easily lead to decisions where a particular policy provision is declared ambiguous in one carrier's policy but not another, because of varying evidentiary submissions. Such

a rule undercuts an underlying purpose of the rule of *contra proferentem* – to encourage clarity in drafting and predictability in outcomes.

In contrast, insurers suffer no harm from the strict application of *contra proferentem*. This rule maintains the status quo, and the insurance industry has demonstrated its ability to swiftly respond to adverse judicial decisions by changing standard form policy language through amendments and endorsements. Policyholders are ensured the coverage they purchased, while insurers, if they truly intended to exclude the loss, can clarify their policy language.

This Court previously rejected the reasonable expectations doctrine – in favor of the well-established rule of *contra proferentem* – because the doctrine could "only lead to uncertainty and unnecessary litigation." *Deni*, 711 So. 2d at 1140. These same consequences portend if this Court does not affirm its long-standing commitment to the strict application of *contra proferentem* where insurance policy language is reasonably interpreted to provide coverage.

CONCLUSION

United Policyholders, as *amicus curiae* in support of Appellees and on behalf of the insurance consumers of the state of Florida, respectfully requests that this Court confirm for the Eleventh Circuit that ambiguous insurance policy language must be construed in favor of coverage without resort to extrinsic evidence to explain the ambiguity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to *all persons named on the service list* this 5th day of July, 2012.

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(2).

Respectfully submitted,

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