IN THE SUPREME COURT OF FLORIDA

AMERICAN CAPITAL ASSURANCE CORPORATION,

Petitioner,

v.

LEEWARD BAY AT TARPON BAY CONDOMINIUM ASSOCIATION, INC.,

Respondents.

Case No. SC20-1766

Appellate Case No. 2D20-165

L.T. Case No. 2019-CA-003114

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF AMICUS CURIAE'S INTEREST

Effectuating the purpose of insurance and interpreting insurance contracts, laws, and regulations requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Florida residents and businesses through three programs: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (disaster preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of

insureds). 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 serving Florida residents since 1992 when we helped promote fair claim settlements in the aftermath of Hurricane Andrew. Our activities in the Sunshine State have included long-term disaster recovery assistance; consumer advocacy related to homeowners' insurance rates and availability (i.e. depopulating Citizens); promoting preparedness and mitigation; educating and assisting consumers navigating the complicated insurance claims process under wind, flood, and liability policies. State insurance regulators, including the Florida Office of Insurance Regulation, academics, and journalists throughout the U.S. routinely engage with UP on issues impacting policyholders. UP's Executive Director, Amy Bach, Esq., has served as an official consumer representative to the National Association of Insurance Commissioners since 2009.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as amicus curiae in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. Information and arguments in United

Policyholders' briefs have been cited by the US Supreme Court as well as by numerous state and federal appellate courts. *See, e.g.*, *Humana, Inc. v. Forsyth,* No. 97-303, 525 U.S. 299, 119 S. Ct. 710, 142 L.Ed.2d 753 (1999). United Policyholders has also weighed in on important insurance issues affecting homeowners and businesses in matters adjudicated before this Court, Florida appellate courts, and the United States Court of Appeals for the 11th Circuit.

UP has been engaged for decades in promoting and protecting consumer laws and regulations that aim to dissuade insurers from low-balling and underpaying insurance claims. UP also educates consumers on how to identify these practices. UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of the general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an amicus curiae is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)). UP seeks

to assist this Court in helping preserve policyholders' rights and more appropriately level the playing field beyond just this case.

UP has a substantial interest in this appeal because the analysis to be addressed by the Court presents an issue of general application and significance that is expected to impact virtually every insurance policy issued in Florida. Specifically, UP addresses the availability of appraisal under the policy, the discretionary power of the courts in determining this process, and the role of appraisal when fraud is alleged.

UP can assist the Court in the disposition of this issue by drawing on its knowledge of the challenges policyholders face in the appraisal process…a process that insurers are expert at navigating. Undersigned counsel, representing UP's interests *pro bono* in this matter, have significant experience litigating a wide variety of insurance disputes, and submit that they will be able to provide assistance to this Court in analyzing the key issues and their impact on public policy.

SUMMARY OF THE ARGUMENT

Insurance companies design and control the insurance policy form and the claim process. Property insurance carriers typically place appraisal provisions in their policies to resolve disputes over the amount of loss. Nothing in the policy dictates that issues of coverage must be determined prior to appraisal. To the contrary, AmCap's policy, and most modern property policies, recognizes a trial court's discretion to compel appraisal in advance of resolving all coverage issues.

The fraud defense here is merely a dispute over the valuation and amount of the loss, which is subject to appraisal. Not all fraud defenses are the same. Some, like policy misrepresentation, truly concern coverage. Other fraud allegations, like those made by AmCap, concern the amount of loss. This court should reject AmCap's invitation to create a bright-line rule that ignores critical distinctions between different fraud allegations and should leave the determination to the sound discretion of the trial court. Otherwise, if AmCap's position were correct, any insurance company could avoid appraisal regarding the entire loss by claiming misrepresentation or fraud based on even a de minimis valuation dispute. This legal

paradigm would leave the appraisal process in tatters and subject to manipulation by insurers.

ARGUMENT

I. THE POLICY REQUIRES THAT THIS DISPUTE BE RESOLVED BY THE APPRAISAL PROCESS.

This Court generally follows the "supremacy-of-text principle." *Ham v. Portfolio Recovery Assocs.*, LLC, 308 So. 3d 942, 946 (Fla. 2020) (quoting A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012)). In furtherance of that principle, this Court has explained that "the goal of interpretation is to arrive at a 'fair reading' of the text" based on "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." *Id.* at 947 (internal quotation marks omitted) (quoting SCALIA & GARNER, READING LAW at 33).

Appraisal is a contractual right, limited and bound up in the policy language drafted by the insurer and sold to insured. *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014); *Hill v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 961 (Fla. 2d DCA 2010); *Citizens Prop. Ins. Cor. v. Casar*, 104 So. 3d 384, 385-86 (Fla. 3d DCA

2013) (citing *Gibney v. Pillifant*, 32 So. 3d 784, 785 (Fla. 2d DCA 2010)).

In the insurance context, appraisals are "creatures of contract," *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014), and "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," *Washington Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 950 (Fla. 2013). This is because "insurance policies are prepared by experts employed by insurance companies," and can be "difficult for laymen to understand or fully appreciate." *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 223 (Fla. 3d DCA 2006) (internal quotation marks omitted).

That principle is informed by longstanding Florida law on how insurance policies are to be interpreted. "[I]n construing insurance policies, courts should read each policy as a whole" and "give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *Beach Towing Servs., Inc. v. Sunset Land Assocs., LLC*, 278 So. 3d 857, 861 (Fla. 3d DCA 2019) (discussing canon that "a single contractual term must not be read

in isolation," as "the goal is to arrive at a reasonable interpretation of the entire agreement").

Like any other language in an insurance policy, AmCap's appraisal clause must be interpreted (1) in light of the other language of the policy, and (2) in accordance with its plain meaning. *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So. 3d 494, 497 (Fla. 2014). Any ambiguity must be resolved in Leeward Bay's favor. *Anderson*, 756 So. 2d at 34.

The Policy's appraisal provision provides:

> If we and you disagree on the value of the property or the amount of loss, either may request:
>
> 2. An appraisal of the loss, in writing. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each parity will:
>
> (1) Pay its chosen appraiser; and
> (2) Bear the other expenses of the appraisal and umpire equally.
>
> *If there is an appraisal, we still retain our right to deny the claim.*

(Initial Br. App. 86) (emphasis added).

This reservation clause allows for the insurer to preserve coverage issues despite proceeding to appraisal. The Second District in *Liberty American Ins. Co. v. Kennedy*, recognized this " dichotomy between the issue of coverage and the issue of valuation of a covered loss," and concluded that, "submission of the claim to appraisal does not foreclose Liberty American from challenging an element of loss as not being covered by the policy." 890 So. 2d 539, 541 (Fla. 2d DCA 2005).

Under these principles and on a fair reading of the appraisal clause at the time the policy was issued, the only pre-requisite to either party triggering the appraisal clause once post-loss conditions have been met, is a disagreement over the amount of loss. AmCap's chosen language does not require a trial court to determine an insurer's misrepresentation defense prior to appraisal. *Id.* at 542. To the contrary, the plain language of the policy specifies that when there is a dispute regarding the amount of damages appraisal is an appropriate method of resolution.

Furthermore, AmCap's argument renders that portion of its policy which provides, "If there is an appraisal, we still retain our right to deny the claim" surplusage, as the policy by its own terms

contemplates appraisal in advance of the resolution of all coverage issues. (Initial Br. App. 86)

If AmCap intended to limit the right to appraisal in circumstances like these, it could have easily drafted policy language to achieve that result. *See, Anderson*, 756 So. 2d at 33 ("Clearly, if Auto–Owners had intended to treat the two separately covered vehicles as a single covered automobile when operated in tandem, it could have drafted the policy to achieve that result."); *see also Rios v. Tri-State Ins. Co.*, 714 So. 2d 547, 549 (Fla. 3d DCA 1998).

Since the policy is devoid of any express requirement that an insurer's misrepresentation defense must be resolved prior to appraisal, the trial court was well within its discretion to order appraisal.

II. THE DETERMINATION OF WHETHER APPRAISAL SHOULD PROCEED BEFORE AN INSURER'S COVERAGE DEFENSE SHOULD BE LEFT TO THE INFORMED DISCRETION OF THE TRIAL COURTS.

AmCap is requesting a bright-line rule that anytime an insurer attempts to wholly deny a claim it is inappropriate to proceed with appraisal. Determining whether appraisal should proceed before an insurer's coverage defense, however, should be made on a case by

case basis considering those factors - including the nature of the defense, its timing and the economics of the case and parties – best evaluated by the trial court given its knowledge of these issues and others deserving of consideration. "The order in which issues are determined respectively by arbitration or in judicial proceedings is ordinarily for the discretion of the trial court." *See Ronbeck Constr. Co. v. Savanna Club Corp.*, 592 So. 2d 344 (Fla. 4th DCA 1992). Trial courts have always had the power to control their own dockets, and how that is done (absent policy language dictating otherwise) is up to the sound discretion of the trial court. If the quantum of loss can inform whether the amount of loss was exaggerated, then the court should have discretion to so hold.

Allowing a trial court to decide whether to proceed with appraisal is no different than a trial court bifurcating damages and liability coverage, as was done in *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 16 (Fla. 2004). In *Higgins*, this Court determined whether an insurer may validly pursue a coverage determination in a declaratory judgment suit when the policy language is not ambiguous and the objective of the insurer's suit is simply to resolve contested facts on which coverage turns. In making this

determination, the Court did not craft a bright-line rule regarding the timing of the insurer's coverage suit vis-à-vis the underlying tort action; instead, this Court left this determination to the informed discretion of the trial courts.

Furthermore, AmCap's reliance on judicial economy to support addressing its coverage defense prior to appraisal is illogical. The exact circumstances before this Court demonstrate that an appraisal would allow for a determination as to loss, which is the crux of the issue. In *State Farm Fire & Cas. Co. v. Middleton*, the court held that while the order in which these issues are determined is ordinarily in the discretion of the trail court, where the amount of damages may inform the result, considerations of judicial economy require that appraisal proceed first. 648 So. 2d 1200, 1203 (Fla. 4th DCA 1995).

This logic applies here, as the fraud allegations are based solely on a dispute over the quantum and scope of loss. It is thus judicially efficient to proceed with appraisal first, as a favorable appraisal award will be relevant to (and potentially dispositive of) AmCap's assertions of exaggeration and overbreadth. This is a disagreement over the amount of loss plainly driven by disputes over scope and the cost to repair or replace, which numerous courts (including this one)

have found proper for appraisal. *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1025 (Fla. 2002)(holding appraisals are appropriate where there is no dispute that the damage falls within the insuring provisions, but there is a disagreement on the amount of loss.); *see, e.g.*, *Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess & Surplus Lines Ins. Co.*, 916 So. 2d 12, 15-16 (Fla. 3d DCA 2005)(holding that whenever parties do not dispute a covered loss has occurred (however minimal), issues of cause and scope are appropriate for appraisal); *People's Trust Insurance Co. v. Tracey*, 251 So. 3d 931 (Fla. 4th DCA 2018)(holding that causation and amount of loss were to be determined by appraisal); *State Farm Fla. Ins. Co. v. Sheppard*, 268 So. 3d 1006, 1007 (Fla. 1st DCA 2019) ("because State Farm acknowledged that some portion of the total loss is covered, the trial court should have granted the motion to compel appraisal."); *People's Trust Ins. Co. v. Garcia*, 263 So. 3d 231, 234-38 (Fla. 3d DCA 2019) (relying on *Johnson*, *Kendall Lakes*, and *Tracey* and finding whether roof damages were caused by covered or excluded causes was an "amount of loss" question for appraisers).

There is no dispute that a covered peril affected the property and caused at least some damage. AmCap's coverage determination

states, "a portion of the loss is covered by the policy of insurance" and AmCap enclosed payment for the estimated damages. (Initial Br. App. 307). Resolution of these issues in appraisal conserves rather than wastes court resources by allowing competent insurance and construction professionals to decide complex factual disputes in an informal, cost effective way without court involvement.

The appraisal panel consists of one appraiser appointed by each side, both of whom must be "competent and impartial" and a neutral umpire selected by agreement between the two appraisers. (Initial Br. App. 86). This method was designed to provide a fair process and prevent an "inflated" appraisal award. And, while the appraisal panel will not consider whether fraud was committed, it will examine the evidence upon which the fraud allegations are based in order to determine the amount of the loss, including causation. The panel will also determine whether any portion of the claim is "inflated," and will make appropriate reductions or, if the insurer's estimate is low or incomplete in scope, rectify that omission as well.

Bluntly, as AmCap's misrepresentation claim is a dispute over the amount of loss mislabeled as fraud, the trial court did not abuse its discretion in ordering appraisal.

III. THE MISREPRESENTATIONS ALLEGED BY AMCAP AMOUNT TO NOTHING MORE THAN A DISPUTE AS TO THE AMOUNT AND SCOPE OF THE LOSS, WHICH THE APPRAISAL PROCESS IS DESIGNED TO RESOLVE.

AmCap argues that the trial court was required to resolve the fraud issue before ordering appraisal, but ignores established precedent. The carrier gives short shrift to, Judge (now Chief Justice) Canady's opinion in *Kennedy*. At issue was whether submission of a claim to appraisal prevents the carrier from later disputing coverage in whole or in part. *Kennedy*, 890 So. 2d at 541-542. The court noted that despite language in *Licea* that seemingly "established a dichotomy between the issue of coverage and the issue of a covered loss," coverage is not always a matter of all or nothing. *Id.* at 541. This Court in *Licea* did not consider the specific circumstance where the scope of coverage (as opposed to coverage in its entirety) is disputed. *Id.* This Court held that nothing prevented the carrier from moving forward with appraisal when the scope of coverage is disputed, and then once the appraisal award was entered, challenging elements of the award as uncovered. *Id.* at 541-42.

It is an undeniable reality that an "insurance company and assured often entertain widely different views concerning the

policy…" because "different views of values are common," *Soler & Co. v. United Firemen's Ins. Co. of Philadelphia*, 299 U.S. 45, 50 (1936).

Such a dispute does not fraud make. "[R]easonable men may differ as to the values which they place on particular objects," and thus, "an overestimate of the value of goods…, an error in judgment with respect to fixing a value, a mistake, or an inadvertence, will not render an insurance contract void." *Mut. Ins. Co. v. Moffett*, 378 F. 2d 1007, 1012 (5th Cir. 1967) (applying Florida law); *200 Leslie Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 965 F. Supp. 2d 1386, 1405 (S.D. Fla. 2013) (citations omitted); *Smith v. Austin Dev. Co.*, 538 So. 2d 128, 129 (Fla. 2d DCA 1989) ("[U]ncertainty as to the amount of damages, or difficulty in proving the exact amount, will not preclude recovery….").

There are different "types" of misrepresentation, and not every fraud or misrepresentation allegation is a coverage dispute. While misrepresentations made on an application for insurance constitute a coverage dispute which may need to be addressed prior to appraisal to determine whether a valid contract even exists or is instead void *ab initio*, alleged misrepresentations as to the amount of loss is not a coverage dispute. Supposed misrepresentations that do not amount

to a coverage dispute should be allowed to proceed to appraisal. Virtually no property insurance cases would ever go to appraisal if the insurer can simply avoid appraisal by arguing that the policyholder has items in the estimate that should not be included or that the amounts requested by the policyholder are inflated.

That is why courts applying Florida law have held assertions of fraud, like that asserted by AmCap, truly concern the amount of loss claimed by the insured:

> [b]y raising fraud as an affirmative defense, Great American has put at issue whether certain damages and repairs were caused by the water leak or whether these damages and repairs were material misrepresentations. In other words, Great American has put the scope of the loss, which is a question for the appraisal panel, at issue. Because the court cannot determine whether there was fraud without a determination of whether certain damages and repairs were caused by the water leak, appraisal is appropriate here.

Island Shores Condominium Association v. Great American Insurance Co. of New York, No. 1:14-CV-24490-UU, 2015 WL 12780951, at *3 (S.D. Fla. May 7, 2015). Thus, AmCap must appraise Leeward Bay's claim because:

> any dispute on the amount of loss suffered is appropriate for appraisal. Notably, in evaluating the amount of loss, an appraiser is necessarily tasked with determining both the *extent* of covered damage

> and the *amount* to be paid for repairs. Thus, the question of what repairs are needed to restore a piece of covered property is a question relating to the amount of "loss" and not coverage. Ipso facto, the scope of damage to a property would necessarily dictate the amount and type of repairs needed to return the property to its original state, and an estimate on the value to be paid for those would depend on the repair method utilized. The method of repair required to return the covered property to its original state is thus an integral part of the appraisal, separate and apart from any *coverage* question.

Cincinnati Insurance Co. v. Cannon Ranch Partners, *Inc.* 162 So. 3d 140, 143 (Fla. 2d DCA 2014) (internal citations omitted).

Since all fraud allegations are not the same, the trial court is in the best position to determine if appraisal should precede coverage defenses.

CONCLUSION

WHEREFORE, United Policyholders respectfully request this Court affirm the trial court's order and confirm that the trial courts power of discretion regarding compelling appraisal.

DATED May 3, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 2021, a true and correct copy of the foregoing has been served via the Court's electronic filing system upon those listed for counsel of record on the Florida Courts E-Filing Portal:

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Bookman Old Style font and contains 3,593 words as required by the Florida Rules of Appellate Procedure.