**CASE NO. 21-10611-E**

**UNITED STATES COURT OF APPEALS**
**ELEVENTH CIRCUIT**

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**TREASURE CAY CONDOMINIUM ASSOCIATION, INC. A/K/A TREASURE CAY CONDO ASSOC, INC.,**

**Appellant,**

**vs.**

**FRONTLINE INSURANCE UNLIMITED COMPANY,**

**Appellee.**

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On Appeal from the United States District Court Southern District of Florida
Case No. 4:19-cv-10211-KING/BECERRA

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# BRIEF OF AMICUS CURIAE IN SUPPORT OF REVERSAL FOR APPELLANT, TREASURE CAY CONDOMINIUM ASSOCIATION, INC.

August 2, 2021

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## CERTIFICATE OF INTERESTED PARTIES

Amicus curiae, United Policyholders, pursuant to Federal Rule of Appellate Procedure 26 and Eleventh Circuit Rule 26.1, certify that the following persons and entities have or may have an interest in the outcome of this case:

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United Policyholders

Pursuant to Local Rule 26.1 of the United States Court of Appeals for the Eleventh Circuit, United Policyholders ("UP") is a non-profit 50(c)(6), tax exempt organization, organized under the laws of the State of the California and funded by donations and grants. UP does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

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## STATEMENT IDENTIFYING AMICUS, ITS INTEREST IN CASE, AND SOURCE OF AUTHORITY OF AMICUS CURIAE

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 appraisal process, the relationship between the parties and their respective appraisers, the appraiser's role in the process and his or her relationship to the umpire.

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.

The undersigned has authored this brief in whole. No party has contributed money to fund this brief and the undersigned has prepared this brief *pro bono*.

## STATEMENT OF ISSUES

For purposes of this brief, Amicus Curiae United Policyholders will address whether the district court erred in determining appraisal was not ripe under the terms of the policy when the carrier admitted coverage but disputed the amount of damage.

## SUMMARY OF THE ARGUMENT

The District Court erred in holding that Treasure Cay's demand for appraisal was premature. The purpose of appraisal is to allow for out of court resolution of disputes regarding the amount of the loss in question. Appraisal was appropriate once Frontline investigated this matter sufficiently enough to determine the loss was covered but then disputed the amount of the loss. The plain language and intent of the policy requires that that this dispute be resolved by the appraisal process.

## ARGUMENT

### I. The Purpose of Appraisal is to Allow Expedient Resolution.

Appraisals provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits. *MKL Enterprises LLC v. Am. Traditions Ins. Co.*, 265 So. 2d 730 (Fla. 2d DCA 2019) (internal citations omitted). Appraisals conserve judicial resources by allowing competent insurance and construction professionals to decide complex factual disputes in an informal, cost effective way without court involvement. *See Paradise Plaza Condo. Ass'n v. Reinsurance Corp. of N.Y.*, 685 So. 2d 937, 941 (Fla. 3d DCA 1996). Florida courts have held, "the better policy of this state is to encourage insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention." *Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001).

Once an insurer admits coverage and disputes the amount of loss, it is proper to proceed to appraisal, and an insurer is precluded from arguing that the loss was not subject to appraisal based on a dispute as to the scope and amount of loss. *Suite 225, Inc. v. Lantana Ins., Ltd.*, No. 10-81026-CIV, 2011 WL 13107425, at *1 (S.D. Fla. Jan. 28, 2011). *See also MKL Enterprises*, 265 So. 3d at 730 ("Appraisals are appropriate where an insurance company admits that there is a covered loss, but there is a disagreement as to the amount of loss.") When the parties do not dispute a covered loss has occurred (however minimal), issues of causation and scope are

appropriate for appraisal. *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).

Here, the parties should have proceeded to appraisal. On September 20, 2017, Treasure Cay reported the loss at issue to Frontline. Doc. 50 - pg. 2. Frontline investigated the claim and on October 10, 2017, determined that Treasure Cay's losses were covered, but disputed the amount of damage. Doc. 50 - pg. 3. Treasure Cay contacted Frontline requesting information and further investigation while taking the necessary steps to remediate the covered damage, which Frontline refused to pay. On September 18, 2019, Treasure Cay demanded appraisal. Doc. 50 – pg. 7.

Once the demand was made, appraisal was appropriate. Treasure Cay demanded appraisal after Frontline conducted and completed its investigation, after Frontline admitted that the loss was covered under the policy, and after Frontline disputed the amount of damage. Frontline had sufficient opportunity from September 2017 until September 2019 to investigate Treasure Cay's claim. Frontline demonstrated that it obtained all necessary documentation and finished its investigation by providing the coverage determination on October 10, 2017. A disagreement or arbitrable issue exists when "some meaningful exchange of information **sufficient for each party to arrive at a conclusion**" has taken place. *See U.S. Fid. & Guar. Co. v. Romay*, 744 So. 2d 467, 470 (Fla. 3d DCA 1999)

(emphasis added).

The purpose of the post-loss conditions is to provide the insurer the opportunity to fulfill its obligations under the Policy and Florida law: to timely investigate, adjust, and ultimately pay the insured's covered losses. *Scottsdale Ins. Co. v. Univ. at 107th Ave., Inc.*, 827 So. 2d 1016 (Fla. 3d DCA 2002); *Whistler's Park, Inc. v. Fla. Ins. Guar. Ass'n*, 90 So. 3d 841, 845 (Fla. 5th DCA 2012) ("The actual, if unglamorous, true purpose of the EUO [is the] verification of the insured's loss."); *see also Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342, 344 (Fla. 2d DCA 2011) (the requirement of compliance with post-loss conditions as a condition precedent to appraisal is to ensure that "the insurer has a reasonable opportunity to investigate and adjust the claim" such that there is a "'disagreement' (for purposes of the appraisal provision in the policy) regarding the value of the property or the amount of loss' to be appraised").

Frontline had a reasonable opportunity to conduct further investigation after Treasure Cay submitted its claim, prior to Treasure Cay's request for appraisal. Frontline – not Treasure Cay – bears the burden of investigating and adjusting Treasure Cay's claim. *See One Call Prop. Services Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 755 (Fla. 4th DCA 2015) ("[A] 'duty to adjust' is not among the insured's duties in the section of the policy listing the insured's Duties After Loss. An insured is not an 'adjuster" and does not 'adjust' losses."); *Boston Old Colony*

*Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980).

Furthermore, Treasure Cay substantially complied with the post-loss conditions. Courts have recognized that because the insured's post-loss conditions are conditions precedent to contractual performance, the insured need only substantially comply. *See Allstate Floridian Ins. Co. v. Farmer*, 104 So. 3d 1242, 1246 (Fla. 5th DCA 2012). A "meaningful exchange" of information between the insured and insurer is enough to find substantial compliance and allow appraisal of the loss. *Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.*, 256 So. 3d 245, 247-48 (Fla. 3d DCA 2018). In *Brickell Harbour*, the court held the parties exchanges of information met the test of a "meaningful" exchange where the parties exchanged photographs, labor and materials estimates, updates regarding the claim and adjusters and consultants for the parties met for inspections prior to the insurer's demand for appraisal. *Brickell Harbour*, 256 So. 3d at 247.

The nature and quality of the information exchanged by the insured is governed by a standard of reasonableness so as not to pervert the purpose of post-loss conditions. *See, e.g.*, *Fla. Gaming Corp. v. Affiliated FM Ins. Co.*, 502 F. Supp. 2d 1257, 1261 (S.D. Fla. 2007). This achieves a balance between the insurer's legitimate interest in ascertaining the validity of the claim and the insured's right to prompt payment. *Id*. Once the insurer receives enough information to make an informed decision on whether to pay and how much, it cannot use the failure to

comply with post-loss conditions as a shield against appraisal or contractual performance. *Parkview Point Condo. Ass'n Inc. v. QBE Ins. Corp.*, No. 10-23731-CV, 2011 WL 13099890, at *7 (S.D. Fla. Sept. 9, 2011) ("[I]t would be patently unjust for the 'shield' [protecting insurers from premature appraisals] to be stretched to its illogical extreme and used as a 'sword' against insureds."). It is clear on this record that Frontline has been able to fully assess its exposure.

Since a "meaningful exchange of information occurred," the dispute is nothing more than a disagreement regarding the amount of loss. The "post-loss condition" issue injected at the eleventh hour by Frontline is really just an attempt to defeat Treasure Cay's right to appraisal. 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. *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1025 (Fla. 2002).

The real danger of this case lies not in reversal, but in affirmance, and the risk that this Court inadvertently provides a road map to insurers to delay payment of claims or participation in appraisal in perpetuity by a never ending request for "additional documentation" where there is a disagreement over the amount of loss.

## II. 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)). "The appraisal process . . . is simply work done within the terms of the contract to resolve the claim." *Hill*, 35 So. 3d at 961.

In the insurance context, appraisals are "creatures of contract," *Branco*, 148 So. 3d at 491, 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, Frontline'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 Treasure Cay's favor. *Anderson*, 756 So. 2d at 34.

The Policy's appraisal provision provides:

> If we and you :
>
> . . .
>
> B. Disagree on the value of the property or the amount of loss, either may request 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.

Doc. 1-6 - Ex. A, pg. 55.

This last 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. 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.

If Frontline 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 allows for appraisal once there is a dispute to the amount of a covered loss the demand for appraisal must be honored according to the terms of the policy.

## CONCLUSION

United Policyholders, respectfully requests that this Court reverse the District Court's order granting summary judgment in favor of Appellee, Frontline Insurance Unlimited Company, and grant Treasure Cay's Motion for Summary Judgment, and remand for further proceedings consistent with the Court's opinion.

* * *

Dated: August 2, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in FRAP 29(a) This brief contains 2,990 words.

/s/ Molly Chafe Brockmeyer
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United Policy Holders on August 2, 2021 to:

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