IN THE SUPREME COURT OF FLORIDA

QBE INSURANCE CORPORATION,

Appellant/Cross-Appellee,

vs. CASE NO.: SC09-441

CHALFONTE CONDOMINIUM
APARTMENT ASSOCIATION, INC.

Appellee/Cross-Appellant.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT

Case Nos. 08-10009-HH, 08-11337-H

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF CHALFONTE CONDOMINIUM APARTMENT ASSOCIATION, INC.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit charitable organization founded in 1991 that is helping preserve the integrity of the insurance system by serving as an information resource and a voice for policyholders' interests. The financial security that insurance policies provide is critical to business and property owners and to the fabric of our economy and our society. UP monitors the national insurance marketplace with a particular focus on regions impacted by large-scale natural disasters. Donations, grants, and volunteer labor support the organization's work.

UP has filed over two hundred and thirty-five *amicus* briefs, since it was founded, in state and federal appellate courts throughout the United States. The organization has participated by court invitation in briefing and oral argument, and many arguments from UP's *amicus curiae* briefs have been cited with approval by reviewing courts. UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

UP seeks to fulfill the "classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). UP hopes to provide assistance

in analyzing the issues in this case and their public policy implications in a way that compliments the arguments raised by counsel for the parties to this appeal.

This case concerns whether or not Florida law recognizes a claim for breach of the implied warranty of good faith and fair dealing. This matter will have a substantial impact on other insurance carriers and policyholders, and will also impact the consistency of court decisions on a statewide basis, in determining how to review such claims. UP's perspective on this issue should provide assistance in analyzing the issues of this case.

STATEMENT OF ISSUES ADDRESSED

The district court's decision to allow the Chalfonte claim for breach of the implied warranty of good faith and fair dealing to go forward appropriately recognized that this cause of action is and should be viable under Florida law. (Certified question #1).

SUMMARY OF THE ARGUMENT

Nowhere is the contractual concept of an "implied warranty of good faith and fair dealing" more important than in the insurance setting, due to the unique nature of the product and the disparate circumstances of the parties to the contract. Although Florida courts have previously and explicitly recognized a common law

claim arising from the nature of an insurer's obligation to its insured in the third-party setting, Florida should join the majority of states that recognize a common law remedy for damages caused by first party insurers breaching their recognized obligations of good faith and fair dealing.

Legislation passed in Florida recognizes the obligation of insurers to act in the utmost of good faith and fair dealing to their insureds. § 624.155, Fla. Stat., and § 626.9541, Fla. Stat. These obligations are further evidenced by pertinent portions of the Florida Administrative Code, requiring claims adjusters to provide ethical and good faith treatment to policyholders. The insurance industry recognizes its obligation to act in the utmost of good faith and fair dealing as evidenced in the training and reference textbooks for claims handlers and in internal claims handling documents prepared by individual insurance companies. Since Florida public policy, demonstrated in legislation and regulation, recognize a duty of good faith, and even the insurance industry recognizes such a duty, it would be a strange quirk in Florida common law for it to not to recognize what everybody else is requiring insurers to do—act in accordance of a duty of good faith and fair dealing to its own customers.

Florida should align itself with that majority of states, and allow this important alternative remedy to stand.

ARGUMENT

I. THE BUSINESS OF INSURANCE AND THE PUBLIC TRUST.

Historically, insurance was first developed as a product to protect business interests in commerce through spreading the risk of known perils and preventing businesses from going into bankruptcy. Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 1.02 (3d ed. 2009). The product itself was then more recently developed for sale to individuals, as those individuals gained more affluence and needed the protection of their assets.

The field of insurance is different from any other business involving commercial contracts, based on the high degree of interaction with a potentially vulnerable portion of the consuming public. As explained in an insurance industry treatise, *The Legal Environment of Insurance,* in its chapters on Insurance Contract Law:

> Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations . . . .
>
> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a business affected with a public interest, as reflected in legislative and judicial decisions.
>
> State laws restrict contractual rights for insurers in the public interest . . . .

James J. Lorimar, *The Legal Environment of Insurance* 179, 180 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993).

The insurance industry is highly regulated, in part, because of the public importance of insurance in today's modern society. From one industry expert's perspective:

> Because the essence of the insurance contract is a promise to provide benefits in the future, perhaps years after the premiums are paid, the essence of insurance regulation is the enforcement of that promise in real, practical terms by making certain that insurers have adequate, liquid funds to pay claims, whether days or decades after the corresponding premiums have been paid. In addition to solvency, insurance regulation is largely devoted to making certain that all legitimate needs for insurance are met, and to promoting fairness and equity on the part of insurers in their dealings with policyholders and claimants, with regard to the content of policies, premium classifications and rates, and marketing and claim practices.

Peter M. Lencsis, *Insurance Regulation in the United States, an Overview for Business and Government* viii (Quorum Books 1997).

Because of this unique nature of insurance, jurists, regulators and legislators have promulgated a specialized field of law with numerous safeguards, rules, statutes and regulations that all must follow. The current insurance system of regulation and state common law rules benefit insurers, policyholders, and the general public. Stempel, *supra*, at § 1.02. Accordingly, public policy and the longstanding common law rules cited by the policyholder in this case are extremely critical, because insurance companies conducting business in the various

states know that the products they are selling are subject to and involved with the public trust.

II. FLORIDA SHOULD RECOGNIZE AND PROVIDE A REMEDY FOR THE COMMON LAW BREACH OF THE IMPLIED WARRANTY OF GOOD FAITH AND FAIR DEALING IN AN INSURANCE CLAIM.

A. THE BASIC PREMISE FOR THIS CAUSE OF ACTION ALREADY EXISTS IN FLORIDA COMMON LAW.

Many treatises discuss, and scholarly works tackle, the subject and history of the implied warranty of good faith and fair dealing throughout the various jurisdictions around the country.[1] *See, e.g.,* Stephen S. Ashley, *One Hundred Years of Bad Faith*, 15 Bad Faith L. Rept. 207 (1999); Robert H. Jerry, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 Tex. L. Rev. 1317 (1994); Stempel, *supra*, §§ 10.01-10.11.

As at least one scholar has noted, the case of *Industrial & General Trust v. Tod*, 180 N.Y. 215, 73 N.E. 7 (1905), was the first apparent example of a court in this country relying on the principle of the implied warranty of good faith and fair dealing in crafting its legal analysis. *See* Ashley, *supra*, at 207. As explained by the *Tod* court: "The law requires the exercise of good faith, and, no matter how

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[1] As one Florida court recently noted, litigants and courts appear to use the terms "covenant of good faith and fair dealing" and "implied warranty of good faith and fair dealing" interchangeably, and there does not appear to be a substantive difference in the two concepts. *See Citizens Prop. Ins. Co. v. Bertot*, 2009 Fla. App. LEXIS 8213 (Fla. 3d DCA June 3, 2009).

strong the provision to shield from liability may be, there is no protection unless good faith is observed." *Tod* at 215-16, 73 N.E. at 9-10.

The concept of the implied warranty of good faith and fair dealing was later given greater credence when it was addressed in the Uniform Commercial Code, section 1-203, which states: "Every contract or duty within this Act imposes a duty of good faith in its performance or enforcement." Stephen S. Ashley, *Bad Faith Actions: Liability and Damages* § 2.14 (2d ed. 1997). This led to the American Law Institute's inclusion of a provision in the Restatement (Second) of Contracts, § 205, providing that: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.*

The requirement of good faith and fair dealing in the first-party insurance context was first addressed by the landmark California case of *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973). *Gruenberg* extended the concept of tort liability to a first-party insurer that had previously only been recognized in California in the third-party context. *See id.*

In Florida, courts have begun to recognize the concept of the implied warranty in various settings. *See Co. of Brevard v. Miorelli Engr., Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997) (noting the existence in every contract of an implied covenant to perform obligations under the contract in good faith); *Fernandez v. Vasquez*, 397 So. 2d 1171, 1174 (Fla. 3d DCA 1981) (holding that withholding of

consent to assign a lease fails the test for good faith and reasonableness, and is a breach of the lease); *N. Am. Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325, 1330-31 (Fla. 4th DCA 1996) (stating that "a good faith obligation is implied in all insurance contracts"); *O'Shields v. U. S. Auto. Ins. Co.*, 790 So. 2d 570 (Fla. 3d DCA 2001) (recognizing the duty of good faith and fair dealing owed by an insurer to its insured).

As noted by Florida's Third District Court of Appeal in *Citizens Prop. Ins. Co. v. Bertot*, 2009 Fla. App. LEXIS 8213 (Fla. 3d DCA June 3, 2009), several recent federal district courts, including the *Chalfonte* district court, have not only recognized the implied warranty, but have allowed a cause of action for breach of the implied warranty to proceed in a first-party insurance setting. *See Arlen House E. Condo. Ass'n. v. QBE Insurance (Europe) Ltd.*, 2008 U.S. Dist. LEXIS 84029 (S.D. Fla. Sept. 30, 2008); *Townhouses of Highland Beach Condo. Ass'n. v. QBE Ins. Corp.*, 504 F. Supp. 2d 1307 (S.D. Fla. 2007) As explained by the *Townhouses of Highland Beach* court:

> Under Florida law, the covenant of good faith and fair dealing is implied in every contract, requiring the parties to follow standards of good faith and fair dealing designed to protect the parties' reasonable contractual expectations. A claim for breach of the implied covenant of good faith and fair dealing cannot be maintained in the absence of a breach of an express term of the contract.

Id. at 1310 (internal citations omitted).

In the case currently before this Court, the policyholder appropriately and adequately demonstrated a breach of an express provision of the insurance contract, along with proven evidence of delay, and further demonstrated to the jury and the trial court the necessity for this alternative theory of recovery.

B. THE DUTY OF GOOD FAITH AND FAIR DEALING IN THE FIRST PARTY CONTEXT IS BECOMING THE NORM.

A majority of jurisdictions today recognize some type of common law cause of action based on the implied warranty in the first-party context, whether under a tort-based or contract-based theory. *See, e.g.,* Dominick C. Capozzola, Note, *First-Party Bad Faith: The Search for a Uniform Standard of Culpability*, 52 Hastings L. J. 181, 182 (2000); Ashley, *Bad Faith Actions: Liability and Damages* at § 2.14 (2d ed. 1997) (explaining that a common law claim has not yet been recognized by the highest state courts in only Florida, Georgia, Illinois, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, New York, Oregon, Pennsylvania and Tennessee). The importance of this information is that the majority of states recognize the special and fiduciary relationship owed by an insurer to its insureds, and have approved a common law claim as a way to protect policyholders.

As noted by one court:

> [A]n insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured . . . The parties are not similarly situated. The company and its representatives are experts in the field; the applicant is not. A court

> should not be unaware of this reality and subordinate its significance to strict legal doctrine.

Prudential Ins. Co. of Am. v. Lamme, 425 P.2d 346, 347 (Nev. 1967).

By enacting § 624.155, Fla. Stat., the Florida Legislature has extended the good faith obligation previously applicable to only liability insurers to bind all insurers to this duty; insurance companies now have a legal duty, independent of the contract, to handle the claims of all insureds in "good faith." Michael K. Green, Comment, *The Other Insurance Crisis: Bad Faith Refusal To Pay First-Party Benefits*, 15 Fla. St. U. L. Rev. 521, 544 (1987).

Unfortunately, it is far more profitable for an insurer to take a person's money and not pay reasonably and promptly when a claim is made, rather than to promptly and fully pay what is owed. That this financial incentive conflicts with the extreme public trust placed in the insurance industry is the reason why Adjuster Codes of Ethics, good faith duties, regulations and common law remedies are imposed upon insurers and adjusters. Public policy demands that Florida common law recognize these practical and generally-recognized duties so that its own citizens are not mistreated at the very time they need the best treatment they purchased from their insurers. Otherwise, is there truly financial security and "peace of mind" purchased when the performer can breach its recognized and assumed good faith duty without accountability?

C. FLORIDA REGULATORY LAW IMPOSES A REQUIREMENT OF GOOD FAITH AND ETHICAL CLAIMS CONDUCT BY WAY OF THE FLORIDA ADMINISTRATIVE CODE.

Insurance adjusters in the State of Florida are required to be licensed, and they must follow the rules set forth in the Florida Administrative Code, requiring them to provide fair honest, prompt, truthful and ethical treatment to policyholders as follows:

> 69B-220.201 Ethical Requirements.
>
> . . . .
>
> (3) Code of Ethics. **The work of adjusting insurance claims engages the public trust.** An adjuster shall put the duty for fair and honest treatment of the claimant above the adjuster's own interests, in every instance. The following are standards of conduct that define ethical behavior, and shall constitute a code of ethics that shall be binding on all adjusters:
>
> . . . .
>
> (b) An adjuster shall treat all claimants equally.
>
> 1. An adjuster shall not provide favored treatment to any claimant.
>
> 2. An adjuster shall adjust all claims strictly in accordance with the insurance contract.
>
> (c) An adjuster shall not approach investigations, adjustments, and settlements in a manner prejudicial to the insured.
>
> (d) An adjuster shall make truthful and unbiased reports of the facts after making a complete investigation.

(e) An adjuster shall handle each and every adjustment and settlement with honesty and integrity and allow a fair adjustment or settlement to all parties without any remuneration to himself except that to which he is legally entitled.

(f) An adjuster, upon undertaking the handling of a claim, shall act with dispatch and due diligence in achieving a proper disposition thereof.

. . . .

(m) An adjuster shall not knowingly fail to advise a claimant of their claim rights in accordance with the terms and conditions of the contract and of the applicable laws of this state . . . .

§ 69B-220.201 F.A.C. (2009). (emphasis added).

Florida adjusters are also required by the State to take continuing education courses that include two hours of ethics every two years. § 626.869, Fla. Stat. (2009).

D. INSURERS RECOGNIZE THEIR SPECIAL RELATIONSHIP WITH POLICYHOLDERS AND THE OBLIGATION OF UTMOST GOOD FAITH AND ETHICAL CLAIMS CONDUCT.

Respectfully, for the same reason one would not expect to learn medicine by reading malpractice cases, no person can expect to learn how adjusters are taught to treat policyholders by only reading case law. Claims representatives are taught honest and honorable ways to handle claims. The standard textbook for claims handlers, which leads to an Associate in Claims designation, was historically James J. Markham, et al., *The Claims Environment* (1st ed., Insurance Institute of

America 1993). There is now a second edition of *The Claims Environment.*[2] These textbooks for claims handlers and students of insurance set forth simple, clear claims handling principles, that highlight duties of ethical and good faith treatment owed to policyholders. *Id.* Indeed, the Insurance Institute of America has published a treatise dealing exclusively with this basic relationship. William Park Rokes, *Aggressive Good Faith and Successful Claims Handling* (1st ed., Insurance Institute of America 1987).

In another claims management reference specifically discussing ethical behavior, the Insurance Institute of America provided:

> The business of insurance, perhaps more than any other, is based on trust and commitment. Insurance products are intangible and simply reflect a promise on the part of insurance companies to indemnify insureds for financial losses if an insured event occurs in the future. The contract between the insurer and the insured is a contract of utmost good faith and requires honesty and trust from both parties.

George A. White, Ronald Duska & Victor D. Lincoln, *Organizational Behavior in Insurance,* vol. 1, 62 (1st ed., Insurance Institute of America 1992).

Many, if not most, executive claims managers possess the Society of Chartered Property and Casualty Underwriters designation, CPCU. A CPCU agrees to abide by the Canons of the CPCU Code of Professional Ethics, which include, in part:

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[2] Doris Hoopes, *The Claims Environment* (2d ed., Insurance Institute of America 2000).

CANON 1: CPCUs should endeavor at all times to place the public interest above their own.

CANON 2: CPCUs should seek continually to maintain and improve their professional knowledge, skills and competence.

CANON 3: CPCUs should obey all laws and regulations; and should avoid any conduct or activity which would cause unjust harm to others.

CANON 4: CPCUs should be diligent in the performance of their occupational duties and should continually strive to improve the functioning of the insurance mechanism.

CANON 5: CPCUs should assist in maintaining and raising professional standards in the insurance business.

CANON 6: CPCUs should strive to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance practitioners, and with members of other professions.

The Canons and Rules of the Code of Professional Ethics,

http://www.aicpcu.org/doc/canons.pdf (accessed July 11, 2009).

Accordingly major insurance companies recognize and teach that claims adjustment must be done in the utmost of good faith. While its attorneys may argue for the law to be different, the insurance claims industry has adopted a duty of good faith and fair dealing as a fundamental obligation to the insurer's customer in first-party settings.

E. FLORIDA COMMON LAW SHOULD REFLECT WHAT EVERYONE RECOGNIZES: THE GOOD FAITH DUTY OF A FIRST PARTY INSURER TO ITS POLICYHOLDER AND PROVIDE A REMEDY FOR ITS BREACH.

As noted very recently by one Florida court, the state of Florida law on the viability of a cause of action for breach of the implied warranty of good faith and fair dealing is "in vigorous flux, with divergent conclusions reached by diligent and experienced federal judges after extensive briefing and analysis of Florida law." *Bertot, supra*, at *5.

This Court had previously determined it appropriate to revisit the state of the law as concerning first-party insurance claims. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), held that it was appropriate to recede from the court's prior holding in *Kujawa v. Manhattan Nat'l. Life Ins. Co.*, 541 So. 2d 1168 (Fla. 1989), when certain premises in *Kujawa* were deemed unworkable in light of the enactment of § 624.155, Fla. Stat. Although Allstate had relied on language in *Kujawa* for the proposition that the relationship between first-party insurers and insureds should be considered "adversarial," the Court held otherwise. *Ruiz,* 899 So. 2d at 1132. In particular, *Ruiz* found that an insurer's good faith obligation to process claims in the first-party context creates a relationship that requires fair dealing, similar to the relationship found in a third-party situation. *Ruiz*, 899 So. 2d at 1128. Thus, the distinction previously found to exist by the court in *Kujawa*

with respect to the discoverability of claims file materials in first-party actions versus third-party actions could no longer stand. *Id.* at 1130.

The *Ruiz* court further stated:

> In rendering this holding, we are mindful of the principle of stare decisis as "providing stability to the law and to the society governed by that law." *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995); *see also: Delgado v. State*, 776 So. 2d 233, 241 (Fla. 2000). However, despite the avowed importance of the principle of stare decisis, this Court has also acknowledged that the doctrine "does not command blind allegiance to precedent." *Gray*, 654 So. 2d at 554; *see also Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992) ("Stare decisis is not an ironclad and unwavering rule that the present always must bend to the voice of the past, however outmoded or meaningless that voice may have become."). This court has departed from precedent to correct legally erroneous decisions, *see: Gray*, 654 So. 2d at 554, when such departure is "necessary to vindicate other principles of law or to remedy continued injustice," *Haag*, 591 So. 2d at 618, and when an established rule of law has proven unacceptable or unworkable in practice. *See: Brown v. State*, 719 So. 2d 882, 890 (Fla. 1998) (Wells, J., dissenting). This is the situation we address today.

Ruiz, 899 So. 2d at 1131.

Although the Court in *Ruiz* stated that receding from a portion of the *Kujawa* opinion would "not offend the principle of stare decisis", *id.*, the fact remains that the law evolves in this context and in others.[3] Since consumers, insurance statutes

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[3] In fact, when this Court has not previously and expressly recognized a particular cause of action, express recognition has been granted. *See, e.g., Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985) (stating that Florida should recognize a tort claim for intentional infliction of emotional distress, although such a cause of action had not previously been expressly recognized by the Florida Supreme Court).

and regulations, and insurance companies all demand that an insurer's relationship with policyholders be one imposing a duty of utmost good faith rather than the antiquated notion of a debtor and creditor relationship, Florida common law should harmonize this as well. This cause of action allows an insured a remedy only when the insurer acts in breach of a well recognized duty.

A particularly scholarly discussion explaining why insurance law and breaches of the good faith duty are treated differently by courts is found in an article written by Professor Henderson which includes the following discussion:

> In a free enterprise system, economic development steadily increases the number of situations in which individuals can suffer "loss." At the same time, economic development enhances the ability to avoid the prospect of "loss." In other words, in a relatively affluent society, there is much more to lose in the way of property and other economic interests as the human condition improves. In such a society, however, individuals are more likely to have the requisite discretionary income to transfer and to spread the attendant risks of loss. Disruptive losses to society, as well as to the individual, are obviated or minimized by private agreements among similarly situated people. In this way, the insurance industry plays a very important institutional role by providing the level of predictability requisite for the planning and execution that leads to further development. Without effective planning and execution, a society cannot progress.
>
> . . .
>
> This perceived social significance has set apart insurance contracts from most other contracts in the eyes of the law. Insurance is purchased routinely and has become pervasive in our society. It protects against losses that otherwise would disrupt our lives, individually and collectively. The public interest, as well as the individual interests of millions of insureds, is at stake. This is the

> foundation for the general judicial conclusion that the business of insurance is cloaked with a public purpose or interest. This perception also explains the extensive regulation of the insurance industry in the United States, not just through legislative and administrative processes, but also through the judicial process. In fact, as with developments in other areas of tort law, the recognition of the tort of bad faith in insurance cases represents a judicial response to the perceived failure of the other branches of government to regulate adequately the claims processes of the insurance industry. Had the early attempts at regulation been more effective, the tort of bad faith might never have come into existence.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies By Statute,* 26 U. Mich. J.L. Ref. 1, 10-12 (1992).

In the situation at hand, this Court should appropriately recognize that a common law claim for breach of the implied warranty of good faith and fair dealing is the majority view throughout the various jurisdictions, and should be embraced as the law in Florida. The insurance industry, sister courts, consumer advocates, the Florida Legislature, and regulatory bodies all recognize what this Court has not – the special duty that must give rise to a remedy for the policyholder.

F. THE COMMON LAW CAUSE OF ACTION IS APPROPRIATE AS AN ALTERNATIVE REMEDY.

The claim brought by the policyholders in this case is not necessarily "duplicative" of a statutory civil remedy claim under § 624.155, Fla. Stat., as has

been suggested by the insurer in this action. An insured should have the opportunity to pursue as many alternative theories as are available, and courts routinely allow alternative theories in litigation as the theories can "complement each other and be presented together in order to adequately address all pertinent issues." *Hendry Tractor Co. v. Fernandez*, 432 So. 2d 1315 (Fla. 1983).

The insurer in this case has argued that Florida's Civil Remedy Statute, § 624.155, Fla. Stat., provides, and should provide, an insured's sole remedy in a first-party claims handling context. However, the statute itself recognizes that: "The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state." § 624.155(8), Fla. Stat. (2009). Again, if a need exists for an alternative theory upon which to impose liability, that opportunity should be made available to a litigant. The fact that the matter arose in an insurance context should not foreclose recovery.

Unfortunately, insurers constantly look for ways to avoid any penalties under Florida's statutory scheme, and consistently attack the viability of "Civil Remedy Notices", which are a condition precedent to pursuing a statutory claim under § 624.155. *See, e.g., Tropical Paradise Resorts, LLC v. Clarendon America Ins. Co.*, 2008 U.S. Dist. LEXIS 66496 (S.D. Fla. Aug. 20, 2008) (holding that, although the insurer claimed that the Civil Remedy Notice was not sufficient

enough to withstand judicial scrutiny, the complaint could withstand a motion to dismiss); *Lane v. Westfield Ins. Co.*, 862 So. 2d 774 (Fla. 5th DCA 2004) (holding that the Civil Remedy Notice was too "vague").

Making an insurer accountable for causing additional damages that naturally flow from the breach of its mandated obligation of utmost good faith is good public policy and logically required if accountability is important to the law. Without accountability for breaches of these insurance good faith duties that most recognize as involving the public trust, the law would minimize these concepts and the importance of personal responsibility for insurers to do what they are obligated to do.

CONCLUSION

Based on the foregoing, United Policyholders requests that this Court answer certified question #1 in the affirmative, finding that a claim for breach of the implied warranty of good faith and fair dealing in the first party insurance context exists in Florida common law.