IN AND FOR THE SUPREME COURT OF FLORIDA

STATE FARM FLORIDA INSURANCE COMPANY,

Petitioner,

v.

CHARLES SANDERS AND DIANA SANDERS,

Respondents,

_____/

Case No: SC20-596

Appellate Case No: 3D19-927

L.T. Case No: 18-027366-CA-01

AMICUS CURAE BRIEF OF FLORIDA POLICYHOLDERS COOPERATIVE IN SUPPORT OF RESPONDENTS, CHARLES SANDERS AND DIANA SANDERS

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PRELIMINARY STATEMENT

This *amicus curiae* brief is respectfully submitted by Florida Policyholders Cooperative ("FPC") in support of the Respondents Charles Sanders and Diana Sanders.

Any reference to the appendix filed herewith will be cited to as "[FPC A. __]."

STATEMENT OF IDENTITY AND INTEREST

FPC is a Florida political committee dedicated to protecting consumers' rights in the property insurance industry through advocacy and legislative efforts. FPC members routinely engage with State legislators and testify before Florida's legislative chambers to ensure that any reform to Florida's insurance laws is enacted with consumers' rights in mind. While FPC recognizes the need for a healthy and balanced insurance market in the State of Florida, FPC also recognizes that consumers' rights related to property insurance, particularly in a State which perennially finds itself at the top of any list related to real estate, tourism, relocations, and second homes, are of dire importance to maintaining healthy statewide economy. It is for this reason that FPC seeks to fill "the classic role of *amicus curiae* by assisting 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 & Industry*, 694 F.2d 203, 204 (9th Cir. 1982); *see also Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974); 3A C.J.S. Amicus Curiae § 6, at 427 (1973).

SUMMARY OF THE ARGUMENT

This Honorable Court has accepted jurisdiction to address the merits of the Third District Court of Appeal's certified question of great public importance. The question reads as follows:

> CAN A FIDUCIARY, SUCH AS A PUBLIC ADJUSTER OR APPRAISER WHO IS IN A CONTRACTUAL AGENT-PRINCIPAL RELATIONSHIP WITH THE INSUREDS AND WHO RECEIVES A CONTINGENCY FEE FROM THE APPRAISAL AWARD, BE A DISINTERESTED APPRAISER AS A MATTER OF LAW?

State Farm Fla. Ins. Co. v. Sanders, 3D19-927, 2020 WL 1870776 (Fla. 3d DCA Apr. 15, 2020), *review granted*, SC20-596, 2020 WL 5946343 (Fla. Oct. 7, 2020). As outlined *infra*, FPC contends that the narrow reading of the "disinterested" appraiser requirement outlined by the *Sanders* court is improper considering the nature of the appraisers utilized by insurance companies, generally, and State Farm, specifically. Additionally, based on this improperly narrow

definition, the requirement that an insured utilize a "disinterested" appraiser renders the appraisal provision unconscionable, at least in part.

ARGUMENT

I. The trend to narrowly define the term "disinterested" to include only public adjusters retained on a contingency basis ignores the repeated use of appraisers by insurance companies who operate with a much broader yet still direct, quantifiable, and, ultimately, problematic pecuniary interest in their performance as appraisers.

It is well known in the property insurance industry is that insurance carriers prefer certain appraisers because those appraisers know how to minimize claims. State Farm, the Petitioner in this particular matter, is no exception. State Farm routinely chooses appraisers with whom they have extensive history who they know will appraise claims in a manner most beneficial to the insurer. One such example can be found in the matter of *Richard Cauffman v. State Farm Florida Insurance Company*, Case No. 2019 CA 004829, in and for the Tenth Circuit Court of Polk County, Florida (hereinafter "*Cauffman*")[1].

[1] The documents contained within FPC's appendix comprise all relevant documents from the *Cauffman* claim to be referenced herein.

In *Cauffman*, the insured filed an action alleging breach of contract due to an underpaid Hurricane Irma claim. [FPC A. 1-77]. On February 24, 2020, three months after the *Cauffman* lawsuit was filed, State Farm, for the first time, invoked the appraisal provision of the governing policy. [FPC A. 202-204]. Of note in the correspondence invoking appraisal is the appraisal provision from the *Cauffman* policy, the very same provision at issue in the matter *sub judice*, which mandates that, within 20 days of the written demand for appraisal, "[e]ach party will select a qualified, disinterested appraiser." [FPC A. 202]; *see also* [FPC A. 56]. In alleged compliance with the appraisal provision, State Farm selected Henry Diaz from Precision Claim Associates Inc. [FPC A. 203].

On February 27, 2020, in response to the invocation of appraisal, counsel for Mr. Cauffman sent correspondence requesting guidance on whether State Farm would allow Mr. Cauffman's public adjuster to serve as a "disinterested" appraiser. [FPC A. 227]. On March 2, 2020, counsel for State Farm advised that Mr. Cauffman's public adjuster could not serve as a "disinterested" appraiser as he was retained subject to a contingency fee agreement. [FPC A. 228]. On March 6, 2020, counsel for Mr. Cauffman sent a response

advising that it must be determined whether State Farm complied with its own requirement for a "disinterested" appraiser in naming Henry Diaz. [FPC A. 229-230]. To that point, the following information was requested:

- Mr. Diaz's curriculum vitae;
- Mr. Diaz's fee schedule or compensation agreement with regards to the appraisal in the instant claim;
- The number of appraisals Mr. Diaz has conducted on behalf of State Farm;
- The number of appraisals Mr. Diaz has conducted in claims in which the carrier, State Farm or otherwise, is represented by Killgore, Pearlman, Semanie, Denius & Squires, P.A.;
- The percentage of Mr. Diaz's income derived from State Farm, whether through appraisals or other such adjustment of claims;
- The percentage of Mr. Diaz's income derived from claims in which the carrier, State Farm or otherwise, is represented by Killgore, Pearlman, Semanie, Denius & Squires, P.A.;
- The percentage of Mr. Diaz's income derived from representing insurance carriers whether through appraisals or other such adjustment of claims; and
- The percentage of claims in which Mr. Diaz's has represented the carrier versus the policyholder in appraisal.

Id. In response, counsel for State Farm advised that the request for information was premature and the only way State Farm would

provide same was through an order of the court. [FPC A. 231]. Counsel for State Farm further disclosed that Henry Diaz did not have "a pecuniary interest in the Cauffman claim by way of any type of agreement with State Farm." *Id.* According to counsel for State Farm, this was all that was needed to render Henry Diaz "disinterested." *Id.*

On March 9, 2020, merely 14 days after first invoking appraisal, State Farm filed their Motion to Compel Appraisal. [FPC A. 78-204]. In response, Mr. Cauffman propounded Interrogatories mirroring and formalizing the requests outlined in the March 6, 2020, correspondence regarding Henry Diaz's "disinterested" nature as appraiser. After Mr. Cauffman's response to the motion was filed attaching the correspondences outlined above, [FPC A. 214-240], a hearing was held on State Farm's motion. The Honorable Wayne Durden, Circuit Court Judge of Polk County, Florida, granted State Farm's motion and ordered the parties to appraisal. [FPC A. 241]. In ruling for State Farm, Judge Durden also ruled that "the parties may engage in discovery for the limited purpose of rendering a determination as to the 'disinterested' nature of the opposing party's appraiser." *Id.* Additionally, the order mandated as follows:

> Within 20 days after Plaintiff has named his appraiser, the parties shall exchange information regarding their selected "disinterested" appraisers including the appraisers' curriculum vitae, the number of appraisals conducted on behalf of the respective parties along with the general percentage of the appraisers' income derived from same, the number of appraisals conducted involving the respective attorneys and law firms along with the general percentage of the appraisers' income derived from same, and a general percentage of appraisals conducted on behalf of policyholders versus insurance carriers along with the general percentage of the appraisers' income derived from same.

[FPC A. 241-242].

Subsequent to the court's order, State Farm responded both to the March 6, 2020, email [FPC A. 245-246], and interrogatories citing to said correspondence [FPC A. 243-244]. In their responses, the following information regarding Henry Diaz was disclosed for the first time: Mr. Diaz worked for State Farm from 1998 to 2006; Mr. Diaz conducted approximately 148 appraisals on behalf of State Farm from January 2017 through December 2019; Mr. Diaz derives 100% of his income by working as an appraiser representing insurance carriers; and, perhaps most importantly, Mr. Diaz derived approximately 53.4% of his income over the last five years serving as an appraiser (or in other similar roles) on behalf of State Farm. [FPC A. 245-246].

Cauffman is but one case and Mr. Diaz is but one appraiser of many utilized by State Farm. There is no doubt that State Farm chose Mr. Diaz as its appraiser more due to his loyalty to State Farm and not because State Farm felt Mr. Diaz would draft a fair and accurate estimate of damages in the insured's best interest. This is further established in Mr. Diaz's curriculum vitae which touts numerous State Farm credentials as qualifications including having been "[s]elected as one of eight Fire Claim Representatives in Florida to attend State Farm's 'Florida Development Group'" and "[s]elected as first member of State Farm's 'Special Handling Unit' (SHU)." [FPC A. 247]. Furthermore, Mr. Diaz's CV boasts about a "[l]andmark appraisal victory," something that only needs to be included on a CV in order to showcase Mr. Diaz's ability to "win" appraisals on behalf of carriers. *Id.*

"An appraiser may be considered interested in a number of ways, such as being frequently or habitually employed by insurers as an appraiser and ... by his conduct [making] it clear that he understands that he is acting in their interests." *TAMKO Bldg. Products, Inc. v. Factual Mut. Ins. Co.*, 890 F. Supp. 2d 1129, 1140 (E.D. Mo. 2012) (citations and internal quotations omitted). "An

appraiser may also become biased by having a financial interest in the outcome of the appraisal, even if indirectly." *Id.* Such indirect financial bias may come from a prior employer-employee relationship. *See Land v. State Farm Mut. Ins. Co.*, 410 Pa. Super. 579 (PA Supr. Ct. 1991) (finding that the existence of a past employer-employee relationship was sufficient to deem the insurer selected arbitrator interested in the outcome of the arbitration.). Interestingly, in *Cauffman*, even when questions regarding Mr. Diaz's disinterestedness were raised, there was no voluntary disclosure of his prior relationship to State Farm, only a statement that "Mr. Diaz does not have a pecuniary interest in the Cauffman claim by way of any type of agreement with State Farm." [FPC. A. 231].

To reiterate, more than half of Mr. Diaz's income over five years is derived from State Farm yet, somehow, in State Farm's eyes, he qualifies as a "disinterested" appraiser. For State Farm to, on one hand, assert that someone operating on a 10-20% contingency basis cannot be considered a "disinterested" appraiser because they stand to recover a portion of the appraisal award whilst simultaneously holding a former employee who boasts of his inclusion in State Farm programs and whose livelihood, or at least a majority thereof,

depends on being hired by State Farm as a "disinterested" appraiser is wholly disingenuous. As of now, it seems as though courts have opined on the definition of "disinterested" in only a micro sense whilst completely ignoring the macro implications and, if any of State Farm's arguments in the instant case are to be considered, so too must their conduct in relation to the selection of their own appraisers.

II. Enforcement of the "disinterested" requirement as it relates to a party's appraiser to solely mean that a public adjuster operating on a contingency basis cannot be named appraiser renders the appraisal provision unconscionable.

"Unconscionability is a common law doctrine that courts have used to prevent the enforcement of contractual provisions that are overreaches by one party to gain 'an unjust and undeserved advantage which it would be inequitable to permit him to enforce.'" *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1157 (Fla. 2014) *quoting Steinhardt v. Rudolph*, 422 So. 2d 884, 889 (Fla. 3d DCA 1982); *Peacock Hotel, Inc. v. Shipman*, 103 Fla. 633, 138 So. 44, 46 (1931). In order to obtain a ruling that a contract provision is unconscionable, "a party must demonstrate both procedural and substantive unconscionability." *Zephyr Haven Health & Rehab Ctr.,*

Inc. v. Hardin, 122 So. 3d 916, 920 (Fla. 2d DCA 2013) (citing *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259 (Fla. 2d DCA 2004)). "Procedural unconscionability concerns the manner in which the contract is entered, whereas substantive unconscionability looks to whether the contractual terms are unreasonable and unfair." *Fonte v. AT&T Wireless Services, Inc.*, 903 So. 2d 1019, 1025 (Fla. 4th DCA 2005) (*citing Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003)). The burden of proving unconscionability lies with the party seeking to avoid the complained of provision. *FI-Pompano Rehab, LLC v. Irving*, 221 So. 3d 781, 784 (Fla. 4th DCA 2017) *citing Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1158 (Fla. 2014).

Addressing whether a contract provision is procedurally unconscionable "involves consideration of facts such as the relative bargaining power of the parties and their ability to understand the contract terms." *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 265 (Fla. 2d DCA 2004). There is no doubt that the "disinterested" appraiser requirement contained within the Subject Policy is procedurally unconscionable as it was never presented to the insured prior to the insurance contract taking effect. As has been noted in

the past, "[i]nsurance contracts are unusual in that, at the onset of the contractual relationship, one of the contracting parties, i.e., the insured, has not yet had the opportunity to review the terms of the insurance contract." *Lloyds Underwriters at London v. Keystone Equip. Fin. Corp.*, 25 So. 3d 89, 93–94 (Fla. 4th DCA 2009); *see also Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1160–61 (Fla. 2014)("In the typical case of consumer adhesion contracts, where there is virtually no bargaining between the parties, the commercial enterprise or business responsible for drafting the contract is in a position to unilaterally create one-sided terms that are oppressive to the consumer, the party lacking bargaining power."). As such, there is no doubt that the element of procedural unconscionability can be met.

A term that is "substantively unconscionable" is "one that 'no man in his senses and not under delusion would make ... and as no honest and fair man would accept...'" *Florida Holdings III, LLC v. Duerst ex rel. Duerst*, 198 So. 3d 834, 842 (Fla. 2d DCA 2016) *quoting Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630, 632 (Fla. 2d DCA 2008). Florida law provides insureds the right to contract with a public adjuster for assistance in submitting their claims to

savvy and sophisticated insurance carriers. *See* Fla. Stat. § 626.854 (2020). Insurance companies have tried to take away this statutory right to a public adjuster for portions of claims by requiring insured to hire a different claims professional for appraisal based on an arbitrary, unbargained for term of insurance policies for which no consideration is given. While, in many situations, appraisal is an expeditious option for a fair and final resolution afforded by the terms of the Subject Policy, no reasonable person would knowingly enter into an agreement which would force them further out of pocket after hiring the claims adjuster necessary to assist with the presentation of a complicated insurance claim. Because the "disinterested" appraiser requirement is wholly one sided and designed to prevent an insured from utilizing a public adjuster for both the adjustment and appraisal of a loss and force the insured further out of pocket, the element of substantive unconscionability can be similarly met.

It is recognized that appraisal may be an quick method of resolution in many insurance claims, especially given the ongoing pandemic affecting our ability as a legal system to engage in jury trials; however, it seems only fair that this process be entered into without resulting in excessive out of pocket expenses beyond those

which were necessarily incurred to engage assistance in adjusting complex insurance claims. Frankly, it seems as though this unbargained for term in the verbose insurance contract is included solely to discourage an insured from utilizing the appraisal process for fear that it will result in excessive out of pocket expenses. For these reasons, it is clear that each of the elements of unconscionability of contract are met through the inclusion of the "disinterested" appraisal requirement in the appraisal provision.

To illustrate this, take, for example, the *Cauffman* claim discussed *surpa*. State Farm determined that, despite some damage having occurred to the roof, the claim fell below the $8,095.00 hurricane deductible. [FPC. A. 160-168]. Mr. Cauffman hired a public adjuster subject to a contingency fee agreement for 10% of the total recovery obtained. [FPC A. 173-175]. The public adjuster submitted an estimate for damages in the amount of $22,060.95. [FPC A. 176-189]. This estimate contained a line item for a re-roof proposal in the amount of $12,600.00. [FPC A. 181].

In looking solely at the roof portion of Mr. Cauffman's claim, the requirement of a "disinterested" would likely result in very little money for Mr. Cauffman to perform the necessary repairs. An

appraiser can cost anywhere from $1,000 to $1,500. Of course, this all depends on the size of the claim, the time necessary to inspect, the number of documents to be reviewed, etc. Assuming *arguendo* that an appraisal on Mr. Cauffman's roof was completed, the $12,600 would have been reduced by the deductible resulting in a total award of $4,505.00. The public adjuster would be owed 10% or $450.50 with $4,054.50 remaining to pay the appraiser and umpire. If the appraiser fee was $1,000, the appraiser's fee will exceed 20% of the total amount due and owing to Mr. Cauffman for his roof. Now, nearly 30% of the roof claim is consumed by out-of-pocket expenses without even considering the likely more expensive costs associated with paying an umpire.

The purpose of appraisal is to finalize a claim expeditiously to net an insured the amount of money required in order to place the property in its pre-loss condition. By requiring an insured to hire another claims professional in order to assist as a "disinterested" appraiser, insurers are simply forcing insureds further out of pocket so as to ensure they are never left with enough money to perform repairs. There is no doubt Mr. Cauffman, representing the reasonable insured, would never enter such a contract if the terms

were disclosed before execution. As such, the *Cuaffman* matter presents a clear example of the unconscionability of the "disinterested" appraiser requirement.

While it does not apply to insurance contracts, Section 672.302, Florida Statutes, governing unconscionable contracts related to the sale of goods provides persuasive authority regarding the general scope of a court's ability to enforce or modify an unconscionable contract. The statute states, in pertinent part, that "the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." *See* Fla. Stat. § 672.302(1) (2020). Again, while this particular statutory provision does not specifically apply to insurance contracts, courts have used the statutory language as a guideline in determining how a court may handle a contract containing an unconscionable term. *See, generally, Bennett v. Behring Corp.*, 466 F. Supp. 689 (S.D. Fla. 1979). To that end, this Honorable Court is well within its right to determine the "disinterested" appraiser requirement is unconscionable, strike only that portion of the contract which contains the requirement that

"disinterested" appraisers be utilized, and enforce the remainder of the otherwise proper appraisal provision.

CONCLUSION

It is abundently clear that insurance companies, State Farm in particular, have attempted to create a narrative that public adjusters operating on a contingency fee basis cannot serve as disinterested appraisers despite, and perhaps because of, the clear benefit same would provide to insureds. With that said, however, insurance carriers such as State Farm continue to utilize appraisers who have clear pecuniary interests in the outcomes of appraisal despite policy requirements against same. This results in an inequtiable definition of "disinterested" applied to appraisal provisions thereby rendering the inclusion of same in insurance policies unconscionable. As such, this Honorable Court should rule in favor of the Respondents and maintain equity and fairness for policyholders across the State of Florida.

Respectfully submitted this 30th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.045(e), this document has been prepared in 14-point Bookman Old Style font as required by Fla. R. App. P. 9.045(b) and contains 3,386 words as required by Fla. R. App. P. 9.370.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Florida's e-portal on March 30, 2021, to the following recipients:

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