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## THE OPTION TO REPAIR: GOOD OR BAD?

STEVEN SILVERBERG<sup>1</sup>

### ABSTRACT

Insurance companies that deal with homeowner's insurance strategize around not protecting the insured; unlike the commercials say, "you're in good hands." Rather, their strategy is to "delay, deny, and defend." This is never more prevalent than in the new option to repair provision in many property insurance policies. Due to the ever-evolving nature of insurance and its trying to find more ways to deny claims, insurance companies, such as People's Trust Insurance Company, are employing the option to repair provision, which is anything but trustworthy. Since this provision is new to the state of Florida, the courts have yet to develop a common interpretation of it.

Ultimately, this paper will bring light to the flaws of the homeowner's insurance industry, as it stands today in Florida, while explaining what the law says about how the industry should be. Since the law states there are no punitive damages in breach of contract actions, insurance companies are maintaining their position of power to take advantage of their insured no matter how much their premiums are. This paper's goal is to show judges another avenue of how the law should be interpreted according to our common sense of what is right, and how the Office of Insurance Regulation should treat insurance companies.

### I. INTRODUCTION

Congratulations, your family has found the house of their dreams; it is a three story house with a finished basement, a big backyard for the dog to play and run around in, a white picket fence, a two-car garage, and enough bedrooms for the entire family.<sup>2</sup> Come to find out, three weeks later, a category three hurricane<sup>3</sup> comes barreling through the neighborhood

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2. E.g., Mark W. Guay, *How Millennials Are Redefining the American Dream*, THE HUFFINGTON POST (Apr. 19, 2015), [http://www.huffingtonpost.com/mark-w-guay/how-millennials-are-redef\\_1\\_b\\_7092990.html](http://www.huffingtonpost.com/mark-w-guay/how-millennials-are-redef_1_b_7092990.html) (showing an example of the "American Dream").

3. See National Weather Service, *Saffir-Simpson Hurricane Wind Scale*, NATIONAL HURRICANE CENTER (last visited Sept. 11, 2013), <http://www.nhc.noaa.gov/aboutsshws.php>

destroying everything in sight.<sup>4</sup> Luckily, you remember that your mortgage<sup>5</sup> company required you to purchase an insurance policy on your home.<sup>6</sup> A claim<sup>7</sup> is reported that the home suffered damage as a result of windstorm.<sup>8</sup> Within ninety days of the reported claim,<sup>9</sup> a letter is received

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(defining a category three hurricane as major with wind speeds between 111–129 miles per hour). See generally Jack Willaims, *Hurricane scale invented to communicate storm danger*, USA TODAY (May 17, 2005), <http://usatoday30.usatoday.com/weather/hurricane/whscale.htm> (illuminating the fact that “Herbert Saffir, a consulting engineer in Coral Gables, Fla., and Robert Simpson, who was director of the National Hurricane Center from 1967 through 1973[. . .]” developed and instituted the scale to show the danger each storm posed). According to the scale, if a category three hurricane makes landfall: “Devastating damage will occur: Well-built framed homes may incur major damage or removal of roof decking and gable ends. Many trees will be snapped or uprooted, blocking numerous roads. Electricity and water will be unavailable for several days to weeks after the storm passes.” National Weather Service, *supra*.

4. See National Weather Service, *supra* note 3 and accompanying text (explaining that a hurricane with a category of three or higher are considered major hurricanes, which can and will cause major damage to all structures).

5. *Mortgage*, BLACK’S LAW DICTIONARY (10th ed. 2010) (“A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms.”).

6. See FLA. STAT. § 624.6085 (2013) (“[C]ommercial property insurance under which a creditor is the primary beneficiary and policyholder and which protects or covers an interest of the creditor arising out of a credit transaction secured by real or personal property.”); see e.g., Andrew Ahrens, *With hurricane season upon us once again, it is important to remember one of the enduring lessons of Hurricane Sandy: Natural disasters no longer discriminate on the basis of geography*, INVESTMENT NEWS (last updated Sept. 11, 2013, 9:34 am) (demonstrating that virtually all South Florida homeowners are required, as a condition of their mortgage lending agreement, to procure and maintain homeowner’s insurance, as well as windstorm coverage); see generally Paola Iuspa-Abbott, *South Florida Attorneys Lead Force-Placed Insurance Fight*, DAILY BUSINESS REVIEW (May 22, 2013), <http://completechoiceinsurance.com/south-florida-attorneys-lead-force-placed-insurance-fight> (explaining the concept the concept of forced placed insurance); see also *Forced Place Insurance*, INVESTOPEDIA (2015), <http://www.investopedia.com/terms/f/forced-place-insurance.asp>. If a homeowner has his homeowner’s insurance policy lapse, the lending bank is allowed to purchase and charge the homeowner for the money he spent on the insurance coverage. See *id.* Currently, there is a lot of ongoing litigation regarding the amount of money these forced-placed insurance policies are costing. See *id.* As detailed in Iuspa-Abbott’s article, two homeowners, whose annual policy cost approximately \$5,007 a year, exploded to roughly \$54,142.56 a year for the forced-placed insurance. Iuspa-Abbott, *supra*. As such, there is ongoing litigation regarding the price of these extraordinary policies. See *id.*

7. *Claim*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining a claim as “[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional.”). Although this is the second definition in Black’s Law Dictionary, it is more akin to what an insurance claim is. *Id.*

8. See Frank Artiles, *State’s Approach to Windstorm Insurance Hurts Consumers*, MIAMI HERALD (Mar. 3, 2013), <http://www.miamiherald.com/2013/03/03/3262019/states-approach-to-windstorm-insurance.html> (explaining insurance coverage for windstorm or hurricanes is a separate and distinct part of the policy, which costs policyholders millions of dollars each year).

9. See Fla. Stat. § 627.70131 (5)(a) (2013) (requiring insurance companies to adjust each and every claim within ninety days of the reported loss); see also *State Farm Fla. Ins. Co. v.*

in the mail stating that the claim is denied because of faulty construction,<sup>10</sup> wear and tear,<sup>11</sup> and inadequate maintenance.<sup>12</sup> Unfortunately, these are conditions many Americans experience every year!<sup>13</sup> However, these are the principles our law has allowed insurance companies to take advantage of because of the fact that punitive damages are not allowed in breach of contract cases.<sup>14</sup> What this means is that insurance companies can breach

Silber, 72 So. 3d 286, 289–90 (Fla. Dist. Ct. App. 2011) (memorializing that the insurance company’s failure to adequately adjust a claim within the ninety days prescribed by the statute shall not be the sole basis for a private cause of action; therefore, there must be an underlying breach of contract action or other action of the sort).

10. See Robert E. Frankel, *Defective Workmanship and Insurance*, LORMAN, at 2–3 (February 19, 2009, 8:26 PM), <http://www.lorman.com/resources/defective-workmanship-and-insurance-15110>; see also *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 875–76 (Fla. 2007) (exemplifying that a common exclusion amongst many home insurance policies is faulty workmanship).

11. *Cheetham v. Southern Oak Ins. Co.*, 114 So. 3d 257, 259–60 (Fla. Dist. Ct. App. 2013) (showing that common amongst many insurance policies is damage to property caused by wear and tear). The policy in *Cheetham* stated in pertinent part:

SECTION I — PERILS INSURED AGAINST  
A. Coverage A — Dwelling And Coverage B — Other Structures

1. We insure against risk of direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:

a. Excluded under Section I — Exclusions;

....

c. Caused by:

....

(6) Any of the following:

(a) Wear and tear, marring, *deterioration*.

*Id.*

12. See Frankel, *supra* note 10, at 2–3 (illustrating that faulty maintenance, among other things, is an exclusion in home insurance policies, which enables the insurance company not to pay a claim).

13. See, e.g., Chris Kissel, *Health Insurance Claim is Denied. What now?*, BANKRATE (July 8, 2014), <http://www.bankrate.com/finance/financial-literacy/denied-insurance-what-now-1.aspx> (stating that approximately eleven to twenty-four percent of claims are wrongfully denied, forcing insureds into litigation); see also Kimberly Lankford, *How to Get Insurance Companies to Pay Your Claim*, KIPLINGER (May 2012), <http://www.kiplinger.com/article/insurance/T027-C000-S002-how-to-get-insurance-companies-to-pay-your-claims.html> (listing many things homeowners can do to try limit the chances an insurance company will deny their claim).

14. See William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 629 (1999) (“The majority of American jurisdictions do not allow punitive damages for breach of contract unless the breach constitutes an independent tort. Increasingly, courts and commentators have relied on the theory of ‘efficient breach’ to explain the rule against punitive damages in contracts.”) (emphasis in original); see generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 131 (5th ed. 1998) (describing how efficient breach of contract works and why the doctrine is necessary in our society). Sometimes laws allow for people to breach their promise because “in many cases it is uneconomical to induce completion of performance of a contract.” Dodge, *supra*, at 631 (citing *Posner* at 131). Therefore, our society is only interested in the most

their insurance contract, avoid paying their insurance claims, and never be liable for more than the face value of the claim.<sup>15</sup>

This trend is never more evident than in the ways of the corporate giant; The Allstate Corporation<sup>16</sup> (“Allstate”) and its change of slogan from “you’re in good hands,”<sup>17</sup> to its new slogan, coined by consulting giant McKinsey and Company,<sup>18</sup> “Good Hands or Boxing Gloves.”<sup>19</sup> For Allstate, this strategy increased their profit margins<sup>20</sup> exponentially, and in 2010, allowed its Chief Executive Officer to earn \$9,300,000.<sup>21</sup>

This article will discuss the present environment of property insurance with an emphasis on Florida law, specifically, the option to repair. Part II will discuss the background of insurance, how it started, and the development of the industry over the past twenty years.<sup>22</sup> Part III will delve into how mortgagees<sup>23</sup> protect their investments through insurance.<sup>24</sup>

economically efficient outcome; even if that hurts someone emotionally. *See generally id.*

15. *See* Dodge, *supra* note 14, at 629, 631.

16. *See The Allstate Corporation*, NASDAQ, <http://www.nasdaq.com/symbol/all> (last visited Sept. 22, 2013); *see generally* Shawn M. Grimsley, *Does a Corporation Owe Fiduciary Duty to Shareholder?* DEMAND MEDIA, <http://yourbusiness.azcentral.com/corporation-owe-fiduciary-duty-shareholders-21523.html> (portraying the insurance giant’s primary goal as money-making, even though it must employ the best practice possible as it had a fiduciary obligation to its shareholders).

17. THE ALLSTATE CORPORATION, <http://www.allstate.com/> (last visited Sept. 22, 2013) (showing its slogan as, “You’re in good hands.”).

18. *McKinsey and Co.*, FORBES, <http://www.forbes.com/companies/mckinsey-company/> (last visited Sept. 22, 2013) (detailing the giant corporation and listing it in the top fifty American Largest Private Companies).

19. *See, e.g.*, Mollie Reilly & Max J. Rosenthal, *Insurance Claim Delays Deliver Massive Profits To Industry By Shorting Customers*, HUFFINGTON POST (Dec. 13, 2011, 5:52 PM), [http://www.huffingtonpost.com/2011/12/13/insurance-claim-delays-industry-profits-allstate-mckinsey-company\\_n\\_1139102.html](http://www.huffingtonpost.com/2011/12/13/insurance-claim-delays-industry-profits-allstate-mckinsey-company_n_1139102.html) (illuminating McKinsey and Company’s assessment of the insurance industry and their findings as to becoming the most profitable); *see generally* FORBES, *supra* note 18 (stating that McKinsey & Company provides “strategic advice to corporations”). The McKinsey report explained that it was better, economically, to deny claims while attempting to convince customers to accept “low ball offers,” and fight as many claims as possible in litigation before paying rightful claims promptly. Reilly & Rosenthal, *supra*. Further the McKinsey report showed, in its 12,500 PowerPoint slide presentation that insurance companies stood to make more money by fighting the small claims because it would cost homeowners too much money in litigation, which would cost more than the actual claim was worth. *Id.* Therefore, insured’s would have to essentially waste money in order to prove a point. *Id.*

20. *Profit Margin*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/profitmargin.asp> (2015) (defining profit margins as a measurement of how much income “a company actually keeps in earnings.”).

21. Reilly & Rosenthal, *supra* note 19 (detailing that even though Allstate’s CEO took home \$9,300,000, he was not even listed “on the top 10 list of best-paid insurance executives.”).

22. *See* discussion *infra* Part II.

23. *Mortgagee*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“One to whom property is

Part IV will discuss the problems with the option to repair.<sup>25</sup> Part V will illustrate the solution of the problem by using regulation to restrict insurance companies from being “publicly traded companies,”<sup>26</sup> and restrict the option to repair from insurance policies in Florida.<sup>27</sup> Lastly, Part V will conclude this Article and recap its major principles.<sup>28</sup>

## II. BACKGROUND OF INSURANCE

Modern insurance has its origins in protecting boats and ships of the Greeks, Phoenicians, and Romans, in or around the 500’s A.D.<sup>29</sup> The first known standalone contract of insurance was created in 1347 “between an insurer Georgius Levavellium and an insured Bartholomeus Bassus.”<sup>30</sup> After the development of countries, governments, and laws throughout the Middle Ages,<sup>31</sup> the Hanseatic League<sup>32</sup> was formed to develop and maintain the business of sea travel.<sup>33</sup> However, due to its profitability, the Hanseatic League was ripped apart by the western European countries’ individual governments, most notably, Queen Elizabeth I.<sup>34</sup> Thereby, within the late

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mortgaged . . .”).

24. See discussion *infra* Part III.

25. See discussion *infra* Part IV.

26. *Public Corporation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining public corporation as “a corporation whose shares are traded to and among the general public.”).

27. See discussion *infra* Part V.

28. *Id.*

29. See *Property—Casualty Insurance Basics*, AMERICAN INSURANCE ASSOCIATION, 2; see also *Bottomry*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining bottomry as “a contract by which a shipowner pledges the ship as a security for a loan to finance a voyage.”); see generally discussion *supra* Part II. This article demonstrates that the origin of insurance was first used for bottomry, which is where the owner of a ship borrows money to make a voyage, pledging the ship as security. *Id.*

30. Curt Benson, *Persuading and Dissuading: The Degree of Proof In Insurance Fraud Cases*, 23 T.M. COOLEY L. REV. 503, 506 (2006). The contract stated that Bartholomeus would give a “loan” to Levavellium with security in Bartholomeus’ ship. *Id.* However, if the ship were to be lost at sea, then Levavellium would have to repay the “loan.” *Id.* This was a clear contract for insurance because the money Bartholomeus gave to Levavellium was never really a loan, but in reality was a payment of a premium. *Id.*

31. See *History, Middle Ages*, HISTORY, <http://www.history.com/topics/middle-ages> (last visited Sept. 27, 2015) (describing the European era between the fall of Rome in 476 CE and the beginning of the Renaissance in the 14th century).

32. See The Editors of the Encyclopedia Britannica, *Hanseatic League*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Hanseatic-League> (last updated Nov. 27, 2014) (describing the northern European era from the thirteenth to fifteenth centuries).

33. See Margrit Schulte Beerbühl, *Networks of the Hanseatic League*, EUROPEAN HISTORY ONLINE (Jan. 13, 2012), <http://ieg-ego.eu/en/threads/european-networks/economic-networks/margrit-schulte-beerbuehl-networks-of-the-hanseatic-league>.

34. See *Hanseatic League*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/Hanseatic\\_League](http://www.newworldencyclopedia.org/entry/Hanseatic_League) (last updated Jan. 29, 2014).

1600's, prior to the great fire of London,<sup>35</sup> one of the first major insurance companies was born, Lloyd's of London Underwriters ("Lloyd's").<sup>36</sup>

The largest rise in the need for insurance was due to the Great Fire of London, which almost destroyed the entire city of London when it ripped through in 1666.<sup>37</sup> A business man that flourished because of this tragedy was Nicholas Barbon ("Nicholas").<sup>38</sup> After the Great Fire of London, Nicholas became the first person in the world to issue fire insurance<sup>39</sup> through his joint-stock company.<sup>40</sup> Eventually, this venture and Nicholas' notoriety landed him a seat in parliament.<sup>41</sup>

Lloyd's began to demonstrate the necessity of insurance through war.<sup>42</sup> Lloyd's dominated the maritime<sup>43</sup> shipping insurance industry in London, England throughout the eighteenth century.<sup>44</sup> Lloyd's particularly showed its dominance and excellence through the wars fought by England including, but not limited to, the American Revolution<sup>45</sup> and Napoleonic

35. See Anniina Jokinen, *The Great Fire of London, 1666*, LUMINARIUM: ENCYCLOPEDIA PROJECT, <http://www.luminarium.org/encyclopedia/greatfire.htm> (last updated Mar. 23, 2012).

36. See *The Early Days*, LLOYD'S, <http://www.lloyds.com/lloyds/about-us/history/corporate-history/the-early-days> (last visited Sept. 22, 2013) [hereinafter *Lloyd's*] (explaining the history of the Lloyd's company and how Lloyd started by insuring the shipping industry within the coffee houses of London).

37. See NEIL HANSON, *THE GREAT FIRE OF LONDON 168* (1st ed. 2002) (describing the damage caused by the Great Fire of London); see also Andrew Beattie, *The History of Insurance*, INVESTOPEDIA, <http://www.investopedia.com/articles/08/history-of-insurance.asp> (last visited Nov. 2, 2015) (recounting the emergence of fire insurance as a result of the great fire of London in 1666); *History of Insurance*, LONSDALE & ASSOCIATES, <http://www.lonsdalebrokers.com/en/knowledge-centre/78.aspx> (last visited Nov. 2, 2015) (tracing back the insurance we know today to the Great Fire of London). The book goes on to describe that, "Five-sixths of the entire area within the walls, approaching 400 acres, and a further 60 acres outside the walls had been destroyed. Over thirteen thousand houses, eighty-seven churches, and the halls of fifty-two livery companies had been burned to the ground." HANSON, *supra*, at 168. This just describes how great this fire was, especially in an up-and-coming city. See *id.* at 168–69. Furthermore, due to this extensive nature damage, people everywhere were dying for money, so the insurance industry began to flourish with its high demand by all land owners throughout the city. See Beattie, *supra*; *History of Insurance*, *supra*.

38. See *Nicholas Barbon*, INSURANCE HALL OF FAME, <http://www.insurancehalloffame.org/laureateprofile.php?laureate=117> (last visited Sept. 23, 2013) (portraying Nicholas as the pioneer of insuring private homes and businesses to protect against damage caused by fire).

39. See Barry Klein, *The World's First Insurance Company*, IRMI (July 2001), <https://www.irmi.com/articles/expert-commentary/the-world's-first-insurance-company>.

40. See INSURANCE HALL OF FAME, *supra* note 38.

41. *Id.*

42. LLOYD'S, *supra* note 36.

43. *Id.*

44. *Id.*

45. See Willard M. Wallace, *American Revolution*, ENCYCLOPEDIA BRITANNICA,

wars.<sup>46</sup> During that time, Lloyd's became globally known; even Thomas Jefferson<sup>47</sup> published its name because of its global recognition.<sup>48</sup> Lloyd's became somewhat of a giant in the insurance industry, even moving its coffee house to "Lombard Street, the London center of international commerce."<sup>49</sup> Edward Lloyd<sup>50</sup> died on February 15, 1713, but the legacy he created with Lloyd's has lived on as it continues to do business today.<sup>51</sup>

When the United States of America ("United States") won its independence from England, it imported many of England's features to the United States.<sup>52</sup> Business in the United States flourished throughout the nineteenth century with the insurance industry valued as a multi-million dollar industry; even Ben Franklin<sup>53</sup> was a director of an insurance company in the late eighteenth century.<sup>54</sup>

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<http://www.britannica.com/event/American-Revolution> (last updated Sept. 21, 2015) (referencing the insurrection of North American colonies against the British to form the United States of America).

46. LLOYD'S, *supra* note 36; *see also* The Editors of Encyclopedia Britannica, *French revolutionary Napoleonic wars*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/event/French-revolutionary-wars#ref171789> (last updated July 16, 2014) (referencing a series of wars between 1792 and 1815).

47. *Presidents: Thomas Jefferson*, THE WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/thomasjefferson> (describing Thomas Jefferson as "a spokesman for democracy, [an] American Founding Father, the principle author of the Declaration of Independence (1776), and the third President of the United States (1801–1809).")

48. LLOYD'S, *supra* note 36.

49. Benson, *supra* note 30, at 508; *see also* WILLIAM R. VANCE & BUIST M. ANDERSON, *Vance on Insurance* 19 (3d ed. 1951). Not only was Lombard Street the international commerce capital, but the coffee house of Lloyd's also turned into an important location for maritime insurance. Benson, *supra* note 30, at 508.

50. *See Edward Lloyd*, LLOYD'S, <http://www.lloyds.com/lloyds/about-us/history/historic-heroes-of-lloyds/edward-lloyd> (last visited Sept. 22, 2015) (explaining how Edward Lloyd became an entrepreneurial business man, established a coffee house, and attracted everyone concerned with shipping); *see also* Benson, *supra* note 30, at 507 (stating that Edward Lloyd established the most famous coffee house in the seventeenth century).

51. Benson, *supra* note 30, at 508; *see New Insurance Enquiries*, LLOYD'S, [http://www.lloyds.com/lloyds/key-contacts/new\\_insurance\\_enquiries](http://www.lloyds.com/lloyds/key-contacts/new_insurance_enquiries) (last visited Sept. 23, 2013) (explaining how to obtain coverage today by contacting a suitable broker or insurance intermediary).

52. *See* Benson, *supra* note 30, at 511 (showing how the United States implemented the capitalistic features of England to the United States to ensure prosperous markets).

53. Gordon S. Wood, *Benjamin Franklin*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/biography/Benjamin-Franklin> (last updated Apr. 27, 2015); *see generally Benjamin Franklin*, BIOGRAPHY, <http://www.biography.com/people/benjamin-franklin-9301234#synopsis> (last visited Sept. 22, 2015) ("Benjamin Franklin is best known as one of the Founding Fathers who drafted the Declaration of Independence and the Constitution of the United States.").

54. Benson, *supra* note 30, at 511–12; *compare Center for the Study of the Pacific Northwest*, UNIVERSITY OF WASHINGTON,



Prior to and during the Civil War,<sup>55</sup> many slave owners purchased insurance policies on their best slaves in order for the slave owners to recapture the money they lost in the work of their slaves.<sup>56</sup> Many scholars believe this to be similar to property insurance because slaves were thought of as property.<sup>57</sup> However, in the early 21<sup>st</sup> century, many insurance companies issued public apologies for taking part in the slave insurance industry.<sup>58</sup>

In 1871, the Chicago Fire<sup>59</sup> erupted and caused a lot of damage throughout the city.<sup>60</sup> Another eruption occurred in 1872, the Boston Fire,<sup>61</sup>

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<http://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Homesteading/Documents/Price%20of%20Goods.html> (last visited Sept. 22, 2015) (asserting that in 1870, the price of one bushel of wheat was \$1.02), with *Wheat Daily Price, INDEX MUNDI*, <http://www.indexmundi.com/commodities/?commodity=wheat> (July 2013) (showing that in July 2013, the price of one bushel of wheat was around \$301.20). Therefore, when it is stated that insurance was a multi-million dollar industry, while the price of wheat increased by almost 300% over the same time period, shows just how enormous the market was for insurance in that day. See Benson, *supra* note 30, at 512 (explaining growth of insurance company in United States after the Civil War).

55. See generally James McPherson, *A Brief Overview of the American Civil War*, CIVIL WAR TRUST, <http://www.civilwar.org/education/history/civil-war-overview/overview.html> (last visited Sept. 22, 2015) (explaining that the Civil War occurred from 1861–1865, and resolved two important questions to determine what kind of nation the United States would be). The two questions were, “[W]hether the United States was to be a dissolvable confederation . . . or an indivisible nation with a sovereign national government; and whether this nation . . . would continue to exist as the largest slaveholding country in the world.” *Id.*

56. See Michael Sean Quinn, *Slavery & Insurance Examining slave insurance in a world 150 years removed*, INSURANCE JOURNAL (May 15, 2000), <http://www.insurancejournal.com/magazines/legalbeat/2000/05/15/21120.htm> (describing the circumstances under, which many of these companies operated).

57. See *Slavery and Indentured Servants*, LAW LIBRARY OF CONGRESS <http://memory.loc.gov/ammem/awhhtml/awlaw3/slavery.html> (last visited Sept. 27, 2015) (stating slaves and indentured servants were considered personal property, and they or their descendants could be sold or inherited like any other personalty).

58. See Quinn, *supra* note 56 and accompanying text; see also *supra* Part II (noting that despite the above, the history of insurance during the Civil War, especially slave insurance, is outside the scope of this paper).

59. *The Great Chicago Fire*, THE CHICAGO FIRE, <https://www.chicagohs.org/history/fire.html> (last visited Sept. 27, 2015) (detailing the evening of October 8, 1871, when a fire broke out in a barn, and lasted over two days).

60. See Richard F. Bales, *Did the Cow Do It? A New Look at the Cause of the Great Chicago Fire*, THE CHICAGO FIRE, <http://www.thechicagofire.com/index.php> (last updated May 12, 2004) (explaining the extent of the damage caused by the Chicago Fire approximating “\$192,000,000 in property damage was sustained, 100,000 people were left homeless, and 300 people lost their lives.”); see also Benson, *supra* note 30, at 512.

61. *Boston Burnt: The Great Fire of 1872*, Damrell’s Fire, [http://www.damrellsfire.com/Boston\\_1872\\_Fire\\_1.html](http://www.damrellsfire.com/Boston_1872_Fire_1.html) (last visited Sept. 24, 2015) (stating Boston’s Great Fire started in the basement of a five-story warehouse building on the evening of November 9, 1872).

which caused extensive damage throughout Massachusetts.<sup>62</sup> Due to the extensive damage caused by these two historic fires, over 150 million dollars were paid out in insurance claims, and over ninety insurance companies had to go out of business because of it.<sup>63</sup>

After the late nineteenth century, the Great Depression<sup>64</sup> decimated the economy of the United States.<sup>65</sup> In particular, the Great Depression caused many insurance companies to close or merge with other companies, resulting in larger companies.<sup>66</sup> However, despite the hard times of these insurance companies and their financial hardships, insurance companies assured clients that they would pay out insurance proceeds<sup>67</sup> to those deserving; even if one company was unable to make a payment, another insurance company would step in and make good on the payment.<sup>68</sup> In the past twenty years, this sentiment of pride and commitment is rarely seen in insurance companies due to their need to make more profits for their shareholders.<sup>69</sup>

62. Damrell's Fire, *Memoirs of Boston's Great Fire of 1872*, BOSTON MORNING JOURNAL (last visited Sept. 23, 2013), [http://www.damrellsfire.com/article\\_BMJ\\_1\\_year\\_later.html](http://www.damrellsfire.com/article_BMJ_1_year_later.html) (detailing that the fire spread across sixty-five acres of downtown Boston, causing damage to 650 buildings and much of the financial district, and \$73.5 million in damage); Benson, *supra* note 30, at 512.

63. Benson, *supra* note 30, at 512 (citing Scott A. Taylor, *Taking Captive Insurance: A New Solution for an Old Problem*, 42 TAX LAW. 859, 868 (1989)).

64. Ben S. Bernanke, *Non-Monetary Effects of the Financial Crisis in the Propagation of the Great Depression*, NAT'L BUREAU OF ECON. RESEARCH, Working Paper No. 1054, 1983), (discussing the non-monetary effects of the Great Depression). The scope of the damages caused by the Great Depression on businesses in the United States, especially insurance companies, is outside the scope of this Article. See *supra* Abstract. For the best discussion of the economic cause and effects of the non-monetary effects, refer to our current Chairman of the Federal Reserve Bank. See generally Bernanke, *supra*.

65. Bernanke, *supra* note 64, at 17–18.

66. See *id.* at 33. This article states that “[l]ife insurance companies, which made \$525 million in mortgage loans in 1929, made \$10 million in new loans in 1933 and \$16 million in 1934.” *Id.* This not only shows the downturn in the economy, but also in the credit market, which refused to lend money out at that time. *Id.* at 20.

67. See *Proceeds*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining proceeds as “[s]omething received upon selling, exchanging, collecting, or otherwise disposing of collateral.”).

68. Compare Bob MacDonald, *Insurance Industry a Guarantee for Trouble*, BOB MAC ON BUSINESS (Nov. 18, 2008), <http://bobmaconbusiness.com/?p=112>, with *Cede & Co. v. Technicolor*, 634 A.2d 345, 360–61 (Del. 1993) (holding that directors possess an “unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.”). Even though these companies were in dire financial straits, their word and promise were more important than their bottom line (profits). See MacDonald, *supra*. Compare this principle with today's insurance companies whose primary objective is to generate higher profits so shareholders can reap the company's benefits. See *Technicolor*, 634 A.2d at 360–61.

69. See Rosenthal, *supra* note 19; see also JAY M. FEINMAN, *DELAY DENY DEFEND: WHY*

### a. DEVELOPMENT OF HOMEOWNERS INSURANCE OVER THE PAST TWENTY YEARS

Over the past twenty years, there has been a dynamic shift in the way insurance companies treat their customers.<sup>70</sup> One of the biggest developments occurred in the 1990's when many major insurance companies hired mega giant consulting firm McKinsey & Co.,<sup>71</sup> in an effort to increase profits.<sup>72</sup>

One example was in Missouri, when Dale Deer ("Deer") sued Allstate-insured Paul Aldridge for injuries Deer sustained in a car accident with Aldridge.<sup>73</sup> Deer prevailed and ultimately filed a bad faith action

INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT 24 (Portfolio/Penguin, 2010); Allstate Corp., Annual Report (Form 10-K) 122 (Feb. 19, 2015) (standing for the proposition that insurance companies need to make the most amount of money for their shareholders, which consists mostly of directors and officers of the company, due to the stock options they receive as compensation for their labor). This book is written by Jay M. Feinman, a distinguished and authoritative scholar in the field of contract law. FEINMAN, *supra*, at third cover.

70. See Rosenthal, *supra* note 19 (implying that insurance companies are now concerned more with profit-gain than they are with the satisfaction of their customers). This contrasts from the "public trust" entity previously portrayed by insurance companies. *Id.*

71. See David Leonhardt, *Consultant Nation*, N.Y. TIMES (Dec. 10, 2011), <http://www.nytimes.com/2011/12/11/sunday-review/consultant-nation.html> (listing McKinsey & Co. as one of the most prestigious consulting firms in the world); see also Rosenthal, *supra* note 19 (explaining the system that McKinsey & Co., instilled to boost profits);

The change started when consulting giant McKinsey & Company sold Allstate and other leading insurance companies on a new system to boost the bottom line: Rather than adjusting claims the traditional way, which gave claims managers wide latitude to serve customers, insurers embraced a computer driven method that produced purposefully low offers to claimants.

*Id.* McKinsey & Co., is an American multinational firm dealing in management consulting, conducting research through qualitative and quantitative methods. See Leonhardt, *supra*. The company serves eighty percent of the world's largest corporations, and publishes a magazine every quarter year entitled the "*McKinsey Quarterly*." *Id.* The firm's foundation arose out of James McKinsey's idea to combine accounting and management principles. *Id.* McKinsey & Co., is known for their "up or out" policy in which a consultant, if not promoted, is asked to leave the firm. *Id.*

72. See FEINMAN, *supra* note 69, at 5; see also Rosenthal, *supra* note 19.

73. See *In re Hasty*, 290 Kan. 386, 387-92 (Kan. 2010) (citing *Deer v. Aldridge*). Aldridge collided with Deer in Missouri, wherein Deer sustained damage to his car and person, and Deer filed suit against Aldridge's insurance company for failing to pay for the damages caused by its client, Aldridge. *Id.* at 387-92. Deer eventually prevailed against Allstate for insurance coverage; however, Allstate still failed to pay. *Id.* Deer was forced to file an equitable garnishment claim against Allstate and added a bad faith allegation for delaying the payment of the insurance proceeds. *Id.* Hasty entered the litigation at this point to defend Allstate against the equitable garnishment and bad faith allegations. *Id.* Hasty failed to advise Allstate, his client,

against Allstate for the wrongful denial of his claim.<sup>74</sup> Eventually, Deer filed a motion to compel disclosure of the McKinsey documents, which Allstate vehemently opposed; however, due to its attorney's wrongful conduct, Allstate did not receive the motion, so it did not respond.<sup>75</sup> Judge Michael Manners<sup>76</sup> excused Allstate for its non-compliance and granted Allstate an additional thirty days to produce the documents.<sup>77</sup> Despite its knowledge of the issue, Allstate continued to refuse to produce the McKinsey documents.<sup>78</sup> Judge Michael Manners had no choice but to hold Allstate in contempt of court for its failure to produce discoverable documents. Judge Manners further imposed a fine of \$25,000 per day beginning on September 4, 2007 for every day Allstate failed to provide the McKinsey documents.<sup>79</sup>

Even with the enormous daily fine imposed against Allstate, it refused to produce the documents and eventually incurred \$2,400,000 in fines for being in contempt of court.<sup>80</sup> The only reason Allstate disclosed the documents was because of the actions taken by Florida, which were later followed by many other states.<sup>81</sup>

#### i. FLORIDA SHUTS THE DOOR TO ALLSTATE

In October 2007, the Florida legislature implemented new laws to

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that the Deers filed a motion for enforcement of discovery to obtain the McKinsey documents. *Id.* Hasty was ultimately sanctioned by the Kansas and Missouri Bar for failing to communicate effectively with his client. *Id.*

74. See *In re Hasty*, 290 Kan. at 387–92 (citing *Deer v. Aldridge*); see also FEINMAN, *supra* note 69, at 11 (describing the above litigation as the most remarkable situation Allstate dealt with in regards to disclosure of the McKinsey documents). Both Hasty and Feinman recognized that Allstate needed a huge shock to its bottom line profit to ever respond to any allegation or produce any documents. See *In re Hasty*, 290 Kan. at 387–92 (citing *Deer v. Aldridge*); see also FEINMAN, *supra* note 69, at 11.

75. See *In re Hasty*, 290 Kan. at 387–92 (citing *Deer v. Aldridge*). This case was a disciplinary hearing before the Kansas Bar imposed sanctions against Hasty for his actions towards his client. *Id.* The Missouri Bar imposed a punishment against Hasty, which was followed and furthered by the Kansas Bar's extension of those sanctions to Kansas. *Id.*

76. Michael W. Manners, YOUR MISSOURI JUDGES, <http://www.yourmissourijudges.org/judges/manners/> (last visited Oct. 22, 2015).

77. See *In re Hasty*, 290 Kan. at 92; see also FEINMAN, *supra* note 69, at 11.

78. See *In re Hasty*, 290 Kan. at 389–91.

79. *Id.* at 392. This illuminates the principle that has and will be reiterated throughout this article that the only way to change or affect an insurance company nowadays is either by regulation, through our states, or by affecting their bottom-line profit, which is not the best practice, as will be explained. *Id.*

80. *Id.*

81. *Id.*

lower insurance premiums. If companies failed to lower premiums, Florida regulators would investigate those companies.<sup>82</sup> On October 16, 2007, after defying the legislature's intent, Kevin McCarty, the Florida Insurance Commissioner, issued a subpoena requesting Allstate and its Florida subsidiaries to appear in a public hearing in Tallahassee to testify before the Office regarding: "[T]he compan[y's] reinsurance program, [its] relationships to risk modeling companies, insurance rating organizations or companies and insurance trade associations. All appropriate company documents related to the above topics also are to be provided."<sup>83</sup> Allstate attended the hearing on January 15, 2008, but failed to provide any documents claiming that they were a trade secret<sup>84</sup> and thus not discoverable.<sup>85</sup> On January 17, 2008, after McKinsey & Co.'s suggestions were implemented by Allstate, the Florida Insurance Commissioner<sup>86</sup>

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82. *E.g., Fla. Off. of Ins. Reg. Subpoenas Allstate For Public Hearing On Policies And Rates*, FLA. OFF. OF INS. REG., (Oct. 16, 2007), <http://www.flair.com/PressReleases/viewmediarelease.aspx?ID=1603> (dissecting the necessity of the subpoena to further the new legislation).

83. *See id.* (describing the extent and necessity of the subpoena). Also, in this press release, the Florida Office of Insurance Regulation stated the Florida legislature's goals in enacting its new legislation, and that this subpoena was aimed at discovering new information to help insureds. *See id.*

84. *See Trade Secrets*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors . . .").

85. *See Fla. Ins. Comm'r Stops Allstate Hearing*, FLA. OFF. OF INS. REG., (Jan. 15, 2008), <http://www.flair.com/PressReleases/viewmediarelease.aspx?ID=1628>; *see also Fla. Ins. Comm'r and Allstate Resolve Pending Litigation, Co. to Expand Writing Homeowners Ins. in Fla.*, FLA. OFF. OF INS. REG., (Aug. 15, 2008), <http://www.flair.com/PressReleases/viewmediarelease.aspx?id=1689>. In the press release, insurance commissioner, Kevin McCarty, was quoted stating that he suspended the Allstate hearing because:

Allstate's total lack of cooperation and responsiveness made it unproductive to continue the hearing . . . . The bottom line is that it is not fair to Florida consumers that this company has not complied with our subpoenas and is not willing to explain to us their relationships with rating agencies, modeling companies and trade groups and how these relationships might have influenced the huge rate increases they have requested.

*Fla. Ins. Comm'r Stops Allstate Hearing*, *supra*; *see also Fla. Ins. Comm'r and Allstate Resolve Pending Litigation*, *supra*.

86. Mollie Reilly & Max J. Rosenthal, *Insurance Claim Delays Deliver Massive Profits To Industry By Shorting Customers*, HUFFINGTON POST (Dec. 13, 2011), [http://www.huffingtonpost.com/2011/12/13/insurance-claim-delays-industry-profits-allstate-mckinsey-company\\_n\\_1139102.html](http://www.huffingtonpost.com/2011/12/13/insurance-claim-delays-industry-profits-allstate-mckinsey-company_n_1139102.html); *Fla. Comm'r of Ins. Reg.*, BALLOTPEDIA, [http://ballotpedia.org/Florida\\_Commissioner\\_of\\_Insurance\\_Regulation](http://ballotpedia.org/Florida_Commissioner_of_Insurance_Regulation) (last visited Oct. 7, 2015). The Florida Commissioner of Insurance Regulation is a state executive in the Florida state government who heads the Florida Office of Insurance Regulation, which regulates the state's insurance providers. *Id.*

suspended Allstate's and its subsidiaries' right to "writ[e] new insurance business in Florida until the companies fully comply with the subpoenas served Oct. 16 by the Florida Office of Insurance Regulation."<sup>87</sup>

On February 19, 2008, the Insurance Office filed its official complaint to suspend Allstate's license.<sup>88</sup> On April 4, 2008, after the Florida Office of Insurance Regulation appealed its suspension to the First District Court of Appeal,<sup>89</sup> the First District upheld the suspension.<sup>90</sup> Lastly, on June 18, 2008, after appealing to the Supreme Court of Florida, the Court denied

87. Gary Fineout & Monica Hatcher, *Florida Bans Allstate from Selling New Auto Policies*, MIAMI HERALD (Jan. 17, 2008), <http://www.bakersanders.com/article/?5e03>; see also *Fla. Ins. Comm'r Kevin McCarty Suspends Allstate Cos. from Writing New Ins. Bus.*, FLA. OFF. OF INS. REG., (Jan. 17, 2008), <http://www.floir.com/PressReleases/viewmediarelease.aspx?ID=1631> (illuminating the details around the state issued subpoena and what it covered). The Office risked the fact that the insurance company could decide not to sell its product in the state, which risked the livelihood of many citizens. See Fineout & Hatcher, *supra*. However, the litigation that ensued was necessary to flush out their trade practices to help citizens in the end from facing unnecessary and daunting litigation, which would ultimately lead to more harm than benefit. *Id.* The Florida Office's subpoena and ultimate suspension of Allstate's license to issue new insurance policies in the State of Florida was the first of its kind to exert that much pressure on a large corporation. See *Fla. Ins. Comm'r Kevin McCarty Suspends Allstate Cos. from Writing New Ins. Bus.*, *supra*.

88. See *Fla. Off. of Ins. Reg. Files Formal Complaint To Suspend Allstate Companies' Licenses*, FLA. OFF. OF INS. REG., (Feb. 19, 2008), <http://www.floir.com/PressReleases/viewmediarelease.aspx?id=1639>; see also *Fla. Ins. Comm'r and Allstate Resolve Pending Litigation, Co. to Expand Writing Homeowners Ins. in Fla.*, *supra* note 85. Even after the Office of Insurance Regulation filed its subpoena, Allstate filed a fifty-one page objection to it, citing, among other things, privilege and trade secrets. *Id.*

89. See Petitioners' Brief on Jurisdiction on Review from the First Dist. Court of Appeal at 1, *Allstate Floridian Ins. Co. v. Office of Ins. Regulation*, No. SC08-782 (Fla. May 20, 2008); see also *Fla. Off. of Ins. Regulation Files Argument to Reinstate Allstate Suspension*, FLA. OFF. OF INS. REG., (Jan. 23, 2008), <http://www.floir.com/PressReleases/viewmediarelease.aspx?id=1633>; *Statement by Fla. Ins. Comm'r Kevin McCarty on Allstate's Emergency Motion for Immediate Relief*, FLA. OFF. OF INS. REG., (Jan. 18, 2008), <http://www.floir.com/PressReleases/viewmediarelease.aspx?id=1632>. Immediately after the Florida Office of Insurance Regulation suspended Allstate's license, Allstate filed a Motion for Immediate Relief seeking to have the suspension removed. *Id.* The First District Court of Appeals granted Allstate's motion and the suspension was removed. Petitioners' Brief on Jurisdiction on Review from the First Dist. Court of Appeal, *supra*, at 1. The Florida Office of Insurance Regulation filed a response to the Court's order granting Allstate's motion, arguing the suspension on Allstate's license should be upheld and requesting the Court to reinstate the suspension. *Fla. Off. of Ins. Regulation Files Argument to Reinstate Allstate Suspension*, *supra*.

90. See *First Dist. Court of Appeal Upholds Fla. Off. of Ins. Reg. Immediate Final Order Against Allstate*, FLA. OFF. OF INS. REG., (Apr. 4, 2008), <http://www.floir.com/PressReleases/viewmediarelease.aspx?ID=1649> (attaching the order of the First District Court of Appeal, which upheld the Florida Office of Insurance Regulation Immediate Final Order, suspending the licenses of the Allstate Companies from writing any new business in Florida). The Florida Office of Insurance Regulation's suspension on Allstate's license was reinstated. *Id.*

jurisdiction.<sup>91</sup> Therefore, on August 15, 2008, after exhausting their judicial options, Allstate and the Florida Office of Insurance Regulation entered into an agreement.<sup>92</sup> Allstate and the Florida Office of Insurance Regulation agreed that Allstate would pay a \$5,000,000 fine for its “failure to freely provide the documents requested in the October subpoenas; falsely asserting trade secrets in its September rate filing and false certification of its September rate filing.”<sup>93</sup> Furthermore, Allstate agreed to reduce its premiums by 5.6%.<sup>94</sup> Moreover, “Allstate [was required to] write 100,000 new homeowners insurance policies over the next three years [while cancelling] a \$175,000,000 surplus note it issued to the Florida Allstate companies.”<sup>95</sup> Lastly, Allstate was ordered to continue cooperating with the Office’s investigation on matters related to McKinsey & Co.<sup>96</sup>

#### b. CASE EXAMPLE OF DELAY, DENY, AND DEFEND

One perfect example of how and why these giant insurance companies are employing the delay, deny, and defend strategy can be seen in the example of Larry Silverstein.<sup>97</sup> In July 2001, Larry Silverstein purchased a ninety-nine-year lease for the two buildings in Manhattan,

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91. See FLA. CONST. art. V, § 3(b); see also *Allstate Floridian Ins. Co. v. Off. of Ins. Reg.*, No. SC08-782, 2008 WL 2521871, at \*1 (Fla. June 18, 2008), 987 So. 2d 79 (Fla. June 18, 2008) (holding that the Court did not have jurisdiction to hear the case). The Supreme Court of Florida declined jurisdiction under Article V, Section 3(b) of the Florida Constitution. *Id.* Article V, Section 3(b) of the Florida Constitution establishes when the Supreme Court has jurisdiction to hear a case. FLA. CONST. art. V, § 3(b). There are ten reasons the Supreme Court of Florida would have jurisdiction; the court found none of them applied. *Id.*; See *Allstate*, 2008 WL 2521871, at \*1.

92. See *Allstate*, 2008 WL 2521871, at \*1; see also *Fla. Ins. Comm’r and Allstate Resolve Pending Litigation, Co. to Expand Writing Homeowners Ins. in Fla.*, *supra* note 85. The Florida Supreme Court denied Allstate’s appeal of the First District Court’s decision to uphold and reinstate the Florida Office of Insurance Regulation’s suspension on Allstate’s license. *Allstate*, 2008 WL 2521871, at \*1. Additionally, the Court denied Allstate from filing a motion for rehearing on its decision not to hear the appeal, thereby exhausting all of Allstate’s judicial options to have the suspension against them removed. *Id.*

93. *Fla. Ins. Comm’r and Allstate Resolve Pending Litigation, Co. to Expand Writing Homeowners Ins. in Fla.*, *supra* note 85.

94. *Id.*

95. *Id.*

96. *Id.*

97. E.g., Greg Levine, *Silverstein: WTC Leaseholder May Collect Up To \$4.6B*, FORBES (Dec. 6, 2004, 7:52 PM), <http://www.forbes.com/2004/12/06/1206autofacescan06.html>; see FEINMAN, *supra* note 69, at 14 (detailing the dispute between Silverstein and his insurers based on his 99 year lease for the world trade center’s buildings). After his victory in the United States District Court, Larry Silverstein stated “insurers have an obligation to pay their fair share, to help make Lower Manhattan whole again[.]” Levine, *supra*.

New York, the World Trade Center.<sup>98</sup> Luckily, Larry Silverstein had the foresight to purchase insurance for the two office buildings with policy limits for each building fixed between \$3 and \$4.5 billion.<sup>99</sup> However, we all know the unfortunate tale of what happened on September 11, 2001, which took place approximately three months after Larry Silverstein obtained his lease.<sup>100</sup> On September 11, 2001, two planes flown by terrorists crashed into the World Trade Center buildings. As a result, the buildings collapsed and caused the death of approximately 2,600 people inside the buildings, in addition to around 128 more people inside the planes themselves.<sup>101</sup>

Soon after the tragic events of September 11th, Larry Silverstein filed a claim with his insurance company, claiming policy limits<sup>102</sup> for the acts of terrorism.<sup>103</sup> Some insurers acknowledged Larry Silverstein's claim, but disputed its amount.<sup>104</sup> The insurer insisted that they were only required to pay policy limits due to one act of terrorism; however, Larry Silverstein argued that since two separate airplanes hit each building at two different

98. See FEINMAN, *supra* note 69, at 14 (noting that Silverstein unfortunately leased the World Trade Center buildings for ninety-nine years right before the September 11<sup>th</sup> attacks); see also *The World Trade Center History, 9/11 MEM'L*, <http://www.911memorial.org/world-trade-center-history> (last visited on Sept. 23, 2015) (explaining where the World Trade Center was located and how, together, the North and South Towers offered "nearly 10-million-square feet of office space for about 35,000 people and 430 companies.").

99. Compare Levine, *supra* note 97 (stating that Silverstein may have recovered approximately \$4.6 billion in insurance proceeds upon a jury verdict stating the insurance policy covered the September 11<sup>th</sup> attacks as two separate occurrences under the policy); with FEINMAN, *supra* note 69, at 14 (illuminating that Silverstein would be owed \$3.5 billion in insurance proceeds if a jury determined that the September 11<sup>th</sup> attacks constituted one occurrence where two planes struck two towers; or \$7 billion if a jury determined the attacks constituted two separate occurrences, where each plane hit a separate tower).

100. FEINMAN, *supra* note 69, at 14.

101. See, e.g., U.S. GOVERNMENT PUBLISHING OFFICE, *The 9/11 Commission Report, Executive Summary*, 1–2 (last visited Sept. 22, 2015), <http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/pdf/GPO-911REPORT-24.pdf> (memorializing the 9/11 commission's findings of the events leading up to, on, and our Federal Government's response to the events of 9/11).

102. *Policy Limit*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining policy limit as liability limit, which is the maximum amount of coverage that an insurance company will provide on a single claim under an insurance policy).

103. See FEINMAN, *supra* note 69 and accompanying text; see also Levine, *supra* note 97 and accompanying text.

104. See Levine, *supra* note 97; see also Phil Hirschhorn & Jonathan Wald, *Verdict in 9/11 insurance battle*, CNN.COM (Apr. 30, 2004), <http://www.cnn.com/2004/LAW/04/29/attacks.insurance/>. Silverstein contracted with twenty-four different insurance companies in order to protect his investment. Hirschhorn & Wald, *supra*. However, a jury ruled that only nine insurance companies were bound by the contracts because the deal was not finalized. See *id.*



times, it was to be considered two acts of terrorism, one for each airplane that hit.<sup>105</sup> Since there was a disagreement as to the amount of damages, litigation ensued between the two parties.<sup>106</sup>

This epitomizes the new insurance company mentality; delay, deny, and defend. Most people would assume that Larry Silverstein deserved policy limits for each of the World Trade Center buildings, as he paid a premium for multiple policies. However, due to the vast amount of money each policy was worth, the insurer found it in its best interest to fight a common interpretation of the event. In the end, a jury in the U.S. District Court in Manhattan found in favor of Larry Silverstein, stating that there were two occurrences of terrorism entitling Silverstein to policy limits for each tower valued at approximately \$4.6 billion.<sup>107</sup> Regardless of the above, what happens if there is no insurance?<sup>108</sup>

### III. MORTGAGE COMPANIES PROTECTING THEIR INVESTMENT

Insurance is a way to force homeowners across all actuarial degrees to save money in an attempt to ensure there is enough money in the case of disaster.<sup>109</sup> One big problem that allows big banks and mortgagees to force

105. See FEINMAN, *supra* note 69 and accompanying text; see also Levine, *supra* note 97 and accompanying text.

106. Levine, *supra* note 97 (explaining how although the jury returned a verdict in favor of Silverstein, the attacks on the World Trade Center were two separate occurrences). Silverstein was still required to appear before a three-person panel in order to collect the money, and the insurance companies were also expected to appeal the decision. *Id.*

107. See Levine, *supra* note 97 (finding for Silverstein, a Federal District Court jury found that the 9/11 attacks constituted two separate occurrences); see also *supra* text accompanying note 98; but see Hirschorn & Wald, *supra* note 104. The jury of the Federal District Court found that the tragedy constituted one event for nine of the insurers, entitling Silverstein to recover \$1 billion in insurance proceeds. Hirschorn & Wald, *supra* note 104. However, Swiss Reinsurance Co., the largest of the World Trade Center's insurers, was responsible for twenty-five percent of its insurance coverage. *Id.* The jury later came back after further deliberations and found that for Swiss Reinsurance Co., the tragedy constituted two events entitling Silverstein to recover \$3.55 billion. Levine *supra* note 97. Therefore, Silverstein, as a result of the litigation, was entitled to receive a total of \$4.55 billion in insurance proceeds. *Id.*

108. See generally *The Consumer's Guide to Homeowner's Insurance*, TRUSTED CHOICE 6 (last visited Oct. 23, 2013), <http://insurance24.com/files/home-insurance.pdf> (explaining that if one were to suddenly lose his or her home due to fire or tornado, he or she would not be able to afford replacing everything all at once).

109. See Martin Haracz, *What is the Purpose of Insurance?*, ERUPTING MIND (last visited Nov. 11, 2013), <http://www.eruptingmind.com/what-is-the-purpose-of-insurance/> (“[T]he purpose of insurance is, to provide you with a form of protection against a possible risk.”). Typically, people insure themselves against risk of large financial loss, even though the risk of the event occurring is very small. *Id.* People insure themselves so if that event were to occur, they would not have to pay for it because a person usually could not afford to cover such a large financial burden, like a home. *Id.*

their homeowners to purchase homeowner's insurance is the ongoing threat of a homeowner walking away from his or her loan and forcing the mortgagee to foreclose on its home.<sup>110</sup>

Generally, different insurances are required in the United States.<sup>111</sup> For instance, if you drive a car in Florida, you are required to get auto insurance.<sup>112</sup> Now, you must have health insurance, or you receive a penalty from the Internal Revenue Service.<sup>113</sup> Lastly, if you have a mortgage on your home, you are generally required to have homeowners insurance.<sup>114</sup>

There is no question insurance is beneficial to most of America to help individuals plan for events they cannot foresee.<sup>115</sup> Insurance works to

110. See TRUSTED CHOICE, *supra* note 108; see generally Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1040 (2010) (detailing how mortgage contracts are contracts of adhesion and how there should be legislation against mortgage companies due to their efforts causing our financial meltdown, which has come to be known as "The Great Recession"). This article poses a question and answer to a common question by home buyers: do I really need insurance for my home? TRUSTED CHOICE, *supra* note 108. Of course, the answer is yes, which is described by multiple reasons as to why it is necessary. *Id.* But, it also states that mortgage banks require homeowners to get insurance in order to protect their investment in their homes. *Id.* One example of why mortgage companies must secure their investments by requiring their home buyers to have insurance is shown in the text above. *Supra* text accompanying note 112. The legality and scope of mortgage companies' adhesion provision requiring homeowners to have insurance is outside the scope of this paper. See Smith, *supra*.

111. See, e.g., FLA. STAT. § 324.021 (2013); see also 26 U.S.C § 5000A(a) (2013).

112. FLA. STAT. § 324.021; see generally Jennifer B. Wriggins, *Article: Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act*, 19 CONN. INS. L. J. 275, 306–08 (2012) (comparing and contrasting the differences between the Affordable Care Act's "requirement" to obtain health insurance, with states' mandates to obtain and maintain automobile insurance).

113. 26 U.S.C § 5000A; see generally OBAMA CARE FACTS, <http://obamacarefacts.com/obamacare-facts.php> (last visited Nov. 11, 2013) (showing that the Patient Protection and Affordable Care Act has been nicknamed "Obamacare"). This has now become known as the Obamacare tax penalty. OBAMA CARE FACTS, *supra*. This statute imposes a tax penalty for each individual and their dependents who do not maintain the minimum necessary health insurance. 26 U.S.C § 5000A (2013). The extent of this requirement and its constitutionality is outside the scope of this Article. However, for more information, see *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). *Infra* note 116 and accompanying text.

114. See e.g., NAT'L ASS'N OF INS. COMM'RS, *A CONSUMER'S GUIDE TO HOME INSURANCE 1* (2010), [http://www.naic.org/documents/consumer\\_guide\\_home.pdf](http://www.naic.org/documents/consumer_guide_home.pdf) ("Most mortgage lenders require you to have insurance as long as you have a mortgage and to list them as the mortgagee on the policy.").

115. See Haracz, *supra* note 109; see also *supra* text accompanying note 109. Although Americans over time may be able to afford hurricane damage to their home in South Florida, they do not know when it will occur and thus purchase insurance to ensure they will have money to fix the damages when the event does occur. Haracz, *supra* note 109.

shift the economic burden of a loss onto someone else.<sup>116</sup> Mortgage companies force homeowners, as a condition of their mortgage loan, to buy and maintain property and casualty insurance<sup>117</sup> throughout the life of the loan.<sup>118</sup> Mortgagees are able to do this due to their interest in the property and under the freedom of contract doctrine.<sup>119</sup>

#### a. FREEDOM OF CONTRACT

There are two sides to the argument of whether a mortgage company, usually a bank, can force a homeowner to purchase insurance. On the one side, you have freedom of contract, and on the other side is the fact that a mortgage company cannot force someone to pay thousands or hundreds of thousands of dollars over the course of the loan.<sup>120</sup> This argument was decided by the Supreme Court in 1905,<sup>121</sup> and was a major topic in constitutional law.<sup>122</sup> Freedom of contract, or liberty of contract as it is

116. See Haracz, *supra* note 109.

117. See *What Is Property Casualty Insurance?*, ALLSTATE INS. CO. (Nov. 2012), <https://www.allstate.com/tools-and-resources/home-insurance/property-casualty-insurance.aspx>. Casualty insurance helps protect homeowners against financial losses that come as a result of being held liable for an accident that causes damage to another person or another person's belongings. *Id.* Casualty insurance may help homeowners pay for a person's injuries or legal costs that are incurred as a result of the person being injured on the homeowner's property due to the homeowner's negligence. *Id.*

118. See NAT'L ASS'N OF INS. COMM'RS, *supra* note 114 and accompanying text.

119. See discussion *infra* Part III.a (discussing the doctrine of freedom of contract). In order to protect their interest in the property, upon a possible breach of contract, mortgagees force the mortgagors to pay and maintain property and casualty insurance. *Id.*

120. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630–31 (1943).

121. See *Lochner v. New York*, 198 U.S. 45, 56 (1905) (invalidating a state statute on the grounds that it was an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract); *but see West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (finding that freedom of contract is a qualified, and not absolute right; there is no freedom to do as one wills or to contract as one chooses). *Lochner*, was a challenge to a New York state statute, which limited the amount of hours an employee could work to ten hours a day. *Lochner*, 198 U.S. at 52. The Bakers employer challenged a fine for forcing his workers to work for more than sixty hours a week. *Id.* The Supreme Court of the United States found the statute to be an unconstitutional exercise of the state's police power, and found that the workers agreed in their contracts to work that many hours, which thereby dismissed the fine. *Id.* at 64–65.

122. See Ed Grabianowski, *10 Overturned Supreme Court Cases*, HOW STUFF WORKS (last visited Oct. 21, 2015), <http://money.howstuffworks.com/10-overturned-supreme-court-cases.htm#page=1> (explaining how the Supreme Court's reign from the early twentieth century to 1937 was described as the "Lochner era" due to its substantial nature in constitutional law history).

sometimes called, is a necessary principle to have in a capitalistic market to allow parties to determine the terms of their promises.<sup>123</sup>

However, this fundamental principle of being able to negotiate the terms of your contract fails in regards to mortgage agreements.<sup>124</sup> Whatever terms mortgage companies feel will make them the most money are usually in the mortgage agreement, which are included without any regard for the consumer.<sup>125</sup> One of the many requirements of a mortgage contract, which is a large financial burden of the loan, is homeowners insurance.<sup>126</sup> In Florida, the average homeowners insurance policy for a

123. See Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454, 454–87 (1909) (showing the liberty of contract doctrine and the freedom that each individual employee and employer have, including unequivocal freedom to determine the terms of their individual contracts); see generally *Adair v. United States*, 208 U.S. 161, 174–75 (1908) (explaining how the liberty of contract doctrine applies to labor law and why it is fair for employers to decrease the amount of money they pay employees). The theory rests upon each labor market determining wage scales and conditions for employees. See Pound, *supra*, at 476–77, 485–86. The doctrine purports that the less available talent there is for a particular market, the more the company will have to pay to entice the employee to join their company and fight over him or her. See generally *id.* On an economic efficiency level, employers face all the risk in a business, whereas the employees do not, which allows employees to become beneficiaries of something they have only contributed to in the form of labor. *Id.* at 478. Justice Harlan further explains, “The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.” *Adair*, 208 U.S. at 174.

124. Smith, *supra* note 110, at 1040–41, 1082 (citing *In re Petroff*, No. 00-8085, 2001 WL 34041797, at \*2 (B.A.P. 6th Cir. July 25, 2001)); *In re Tudor*, 342 B.R. 540, 562–63 (Bankr. S.D. Ohio 2005); *In re Woodham*, 174 B.R. 346, 349 (Bankr. M.D. Fla. 1994); *Rau v. Cavanaugh*, 500 F. Supp. 204, 207–08 (D.S.D. 1980); *Ricker v. United States*, 417 F. Supp. 133, 139 (D. Me. 1976); but cf. *Branco v. Nw. Bank Minn., N.A.*, 381 F. Supp. 2d 1274, 1280–81 (D. Haw. 2005) (noting with approval a state court decision reasoning that mortgages are not contracts of adhesion given the number of mortgage lenders available to borrowers, and holding that the plaintiffs’ mortgage was not adhesive). According to Professor Smith, mortgage contracts are classic examples of contracts of adhesion because “their terms are selected by professional lenders for unsophisticated borrowers who have no choice but to accept the lenders’ terms or forego purchasing their home.” Smith, *supra* note 110, at 1040.

125. Smith, *supra* note 110, at 1043, 1071–72; see generally Jim Lardner, *Return of the Predatory Lending Ripoff*, U.S. NEWS & WORLD REPORT (June 19, 2013, 10:00AM), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/06/19/mortgage-lender-kickbacks-bring-ugly-home-lending-back> (illuminating the role of predatory lending practices, such as teaser rate mortgages, in the financial crisis of 2008). Professor Smith describes that negotiating the terms of one’s mortgage is not possible. Smith, *supra* note 110, at 1043. Professor Smith goes on to show the predatory nature of mortgage companies, especially as seen in their teaser-rate mortgages, which may have precipitated the financial crisis of 2008. *Id.* at 1041–43; see also Lardner, *supra*.

126. See, e.g., Zac Anderson, *Home insurance high on Florida stress list*, HERALD-TRIBUNE (last modified Oct. 21, 2012 at 9:44 p.m.), <http://www.heraldtribune.com/article/20121021/ARTICLE/310219990>. This article brings to light that many Florida homeowners are experiencing homeowners insurance prices at rates

home constructed prior to 2001 without wind mitigation features<sup>127</sup> costs between \$4,000–\$7,000, depending on the insurance company.<sup>128</sup> However, this cost is considered conscionable due to the interest charged by the mortgagee on the property, and the huge risk that potentially catastrophic hurricanes pose to South Florida.<sup>129</sup>

#### IV. PROBLEMS WITH THE OPTION TO REPAIR

Now, this article will shift gears to a problem that is becoming more prevalent among many homeowners in South Florida and across the country, which is the introduction of the option to repair in insurance policies.<sup>130</sup> We all know the insurance system, which is exemplified by the examples I have explained above. For instance, you pay for years of insurance until you finally need to it to come through because of a loss, so

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exceeding property taxes. *Id.* The article further explains that despite the fact that homeowner's insurance rates are exceeding reasonable rates, Citizens Property Insurance Company, the largest insurer in Florida, was approved by the State of Florida to increase rates by 10.8 percent. *Id.*

127. *Wind Mitigation Inspections*, CITIZENS PROPERTY INSURANCE CORPORATION, <https://www.citizensfla.com/policyholder/inspections/?defaultinfo=/shared/inspection/WindMitigationInspections.cfm> (last visited Sept. 25, 2015) (defining wind mitigating features as those which make a house strong enough to protect houses from wind damage).

128. See Julie Patel, *House Keys Buying, Selling, Insuring Your Property*, SUN SENTINEL (July 26, 2011, 12:22PM), [http://weblogs.sun-sentinel.com/business/realestate/housekeys/blog/2011/07/compare\\_home\\_insurance\\_rates\\_i.html](http://weblogs.sun-sentinel.com/business/realestate/housekeys/blog/2011/07/compare_home_insurance_rates_i.html); see also *CHOICES: Auto and Homeowners Rate Comparison System*, FLA. OFFICE OF INS. REG. [https://choices.fldfs.com/pandc/homeowners?\\_ga=1.23411898.1228826940.1443022437](https://choices.fldfs.com/pandc/homeowners?_ga=1.23411898.1228826940.1443022437) (last visited Sept. 25, 2015) (allowing a user to choose between a \$150,000 policy for a home constructed prior to 2001 without wind mitigation, a \$150,000 policy for a home constructed prior to 2001 with wind mitigation, and a \$300,000 policy for a home constructed on or after 2005, all the while assuming a \$500 non-hurricane deductible, a two percent hurricane deductible, and no claims in the past three years).

129. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 389 (1937); but see *Lochner v. New York*, 198 U.S. 45, 57–58 (1905); see also Kessler, *supra* note 120 (discussing that courts tend to uphold contracts that are entered into freely and voluntarily); NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *supra* note 114 and accompanying text; see generally Mike Schneider, Jennifer Kay & Melissa Nelson-Gabriel, *Florida Coasts Have Grown, but Hurricane Damage Risk Hasn't, Experts Say*, MIAMI HERALD, (May 27, 2015) <http://www.miamiherald.com/news/business/real-estate-news/article22486149.html> (discussing insurance premiums in Florida are approximately double the national average, despite building improvements, and the danger of catastrophic hurricanes).

130. See Chip Merlin, *The Insurer's Option to Repair Turns an Insurance Contract into a Repair or Construction Contract*, PROP. INS. COVERAGE L. BLOG (Oct. 1, 2010), <http://www.propertyinsurancecoveragelaw.com/2010/10/articles/insurance/the-insurers-option-to-repair-turns-an-insurance-contract-into-a-repair-or-construction-contract/> (explaining how Florida courts are dealing with the option to repair in insurance contracts when it comes to automobile insurance).

you submit a claim.<sup>131</sup> However, in Florida, a majority of the claims take a different route.

In Florida, you call a public adjuster<sup>132</sup> to come out to your home, create an estimate, and submit the loss to the insurance company on your behalf.<sup>133</sup> The public adjuster will then contact specialty experts on your behalf, whether those experts are engineers for windstorm claims, plumbers for water claims, or any other experts for related specialties.<sup>134</sup> It is

131. See *Filing a Claim*; NATIONWIDE, <http://www.nationwide.com/filing-a-claim.jsp> (last visited Sept. 25, 2015) (setting forth seven tips for a homeowner or renter filing an insurance claim); see also *Filing a Homeowner's Insurance Claim*, AMERIPRISE AUTO & HOME INS., <http://www.ameriprise.com/auto-home-insurance/claims/claims-process/filing-a-homeowners-insurance-claim.asp> (last visited Sept. 25, 2015) (explaining that the first step is to call the insurance company and report the claim so the insurance company can adjust the claim and gather all the necessary facts in determining whether the specific policy provides coverage for the specific loss); *Homeowners Claims*, STATE FARM, <http://www.statefarm.com/insurance/claim-center/homeowner/homeowner.asp> (last visited Sept. 25, 2015) (illuminating the first steps a homeowner should take); *How to File a Claim*, ALLSTATE, <https://www.allstate.com/tools-and-resources/know-your-policy/home/home-file-a-claim.aspx> (last visited Sept. 25, 2015) (explaining how to make a homeowner's insurance claim and the typical claim process); *Life of a Claim*, CITIZENS PROPERTY INSURANCE CORPORATION, [https://www.citizensfla.com/shared/claims/Life\\_of\\_a\\_claim.pdf](https://www.citizensfla.com/shared/claims/Life_of_a_claim.pdf) (last visited Sept. 25, 2015). One example of the steps illustrated above is shown on State Farm's website, which states that the first steps after a property loss are for the homeowner or its representative to call State Farm or the homeowner's insurance agent and:

Take reasonable steps to prevent potential safety risks and/or further damage[;] [i]f the loss is caused by theft, notify the police[;] [n]otify banks and credit card companies about any missing debit or credit cards[;] [k]eep accurate records of what you spend repairing things[;] [s]eparate items that may be cleaned and/or repaired[;] [c]heck with your claim representative before you discard any items you plan to claim as damaged[;] and [r]eview your policy for specific coverage information.

STATE FARM, *supra*. Across major insurance companies, the one constant that is usually listed as the first step is to call the insurance company and report the loss. AMERIPRISE AUTO & HOME INSURANCE, *supra*; STATE FARM, *supra*; NATIONWIDE, *supra*; ALLSTATE, *supra*; CITIZENS PROPERTY INSURANCE CORPORATION, *supra*.

132. See FLA. STAT. § 626.854(1) (2015). Under the statute, a public adjuster is defined as:

[A]ny person, except a duly licensed attorney at law as exempted under s. 626.860, who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims. The term also includes any person who, for money, commission, or any other thing of value, solicits, investigates, or adjusts such claims on behalf of a public adjuster.

*Id.*

133. *Id.* § 626.854(15) (placing an affirmative duty on the public adjuster to ensure that prompt notice is given to the insurance company on behalf of the homeowner).

134. See *About Us*, SPECIALTY PUBLIC ADJUSTERS, [http://specialtypublicadjusters.com/?page\\_id=13](http://specialtypublicadjusters.com/?page_id=13) (last visited Sept. 22, 2015) (telling prospective clients that Specialty Public Adjusters offers clients the option of a team of experts when

customary that, in exchange for the public adjuster's service, the public adjuster takes a portion of the recovery, which cannot exceed twenty percent under the law.<sup>135</sup> Now that you have submitted the claim, there may be many "hoops"<sup>136</sup> the insurance company forces you to jump through. For example, the insurance company may require you to submit to an Examination Under Oath,<sup>137</sup> recorded statement, inspection, or the like.<sup>138</sup> After the last request has been complied with, the insurance company has ninety days from the time the insurance company receives notice of the loss, or fifteen days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, to render a decision and fully adjust the loss.<sup>139</sup> After this pre-litigation

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resolving their insurance claims); *Services*, FLORIDA'S BEST PUBLIC ADJUSTERS, <http://www.flbestpublicadjusters.com/services/> (last visited Sept. 22, 2015), (detailing lists of services they preform including but not limited to: plumbers, relocation specialists, and water and mold clean up specialists); *The Epic Approach*, EPIC GROUP PUBLIC ADJUSTERS, [http://epicgroup.com/?page\\_id=86](http://epicgroup.com/?page_id=86) (last visited Sept. 22, 2015) (illustrating to prospective clients that Epic Group works with "an army of support" to protect the homeowner's interest).

135. See Polyana da Costa, *Hiring a Public Adjuster*, BANKRATE, <http://www.bankrate.com/finance/insurance/hiring-a-public-adjuster-1.aspx> (last visited Sept. 24, 2015); see also EPIC GROUP PUBLIC ADJUSTERS, *supra* note 134 accompanying text; FLORIDA'S BEST PUBLIC ADJUSTERS, *supra* note 134 and accompanying text; SPECIALTY PUBLIC ADJUSTERS, *supra* note 134 and accompanying text.

136. See *Goldman v. State Farm*, 660 So. 2d 300, 304 (Fla. Dist. Ct. App.) (finding that the examination under oath provision of the policy is a condition precedent to the lawsuit); Wesley Todd, *Compliance with the Examination Under Oath Request: A Must or A Maybe?*, CLAIMS JOURNAL (July 30, 2013), <http://www.claimsjournal.com/news/southeast/2013/07/30/233860.htm> (examining the different districts throughout Florida to ultimately show that the examination under oath provision depends on what the law requires in the particular Florida jurisdiction). The examination under oath is just one of the many conditions inside an insurance policy, which can prolong an insured's ability to file a lawsuit and ultimately collect damages. See generally *Goldman*, 660 So. 2d at 305.

137. Denise Johnson, *How to Effectively Use Examinations Under Oath*, CLAIMS J. (March 27, 2012) <http://www.claimsjournal.com/news/national/2012/03/27/203719.htm> ("An examination under oath (EUO) is a formal proceeding during which an insured, under oath and in the presence of a court reporter, is questioned by an insurance company representative.").

138. See *Goldman*, 660 So. 2d at 304 (finding that the examination under oath provision of the policy is a condition precedent to the lawsuit); Todd, *supra* note 136 and accompanying text.

139. FLA. STAT. § 627.70131(5)(a). The Florida Statute provides:

Within 90 days after an insurer receives notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment. Any payment of an initial or supplemental claim or portion of such claim made 90 days after the insurer receives notice of the claim, or made more than 15 days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, whichever is later, bears interest at the rate set forth in s. 55.03. Interest begins to accrue from the date the insurer receives notice of the claim. The provisions of this subsection may not be waived, voided, or nullified by the terms of the insurance policy. If there is a right to prejudgment interest, the insured shall select whether to

period, if the claim has not already been referred to an attorney, the public adjuster and the homeowner work to find an attorney to competently represent the homeowner's interest.<sup>140</sup> If a denial is issued, or the insurance company fails to render a decision, the homeowner is free to pursue a declaratory action, or file a lawsuit alleging breach of contract.<sup>141</sup>

At the end of the case, if the case in fact goes to trial, a jury will render a verdict. Let us assume the case involves a water loss resulting from a broken pipe, and the jury verdict is in favor of the insured for damages resulting from the insurance company's breach of contract for failing to pay insurance proceeds. There are many players at work in a situation like this: (1) the attorney filing the lawsuit and representing the homeowner through litigation, (2) the plumber determining the cause and solution to the damages, (3) the public adjuster creating an estimate as to the scope of the damages, and maybe (4) a water mitigation company to protect the property from further damage.<sup>142</sup> All of these components work together to protect the homeowner's interest, and all are paid by the insurance company.<sup>143</sup>

This is how a typical water claim is resolved. However, this can all be destroyed by the option to repair. All of the foregoing parties work on

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receive prejudgment interest or interest under this subsection. Interest is payable when the claim or portion of the claim is paid. Failure to comply with this subsection constitutes a violation of this code. However, failure to comply with this subsection does not form the sole basis for a private cause of action.

*Id.* Therefore, the insurance company has ninety days from getting notice of the loss to pay the homeowner, deny the claim, or request more information. *Id.* If the insurance company requests more information to fully adjust the loss, the insurance company has fifteen days from the time there are no longer outstanding requests to either pay the homeowner, or deny the claim. *Id.*

140. See FLA. STAT. § 626.854 (stating that the law regulating public adjusters was enacted to prevent public adjusters from the unauthorized practice of law, forcing public adjusters, once the claim is denied, to refer their business to attorney's); see also Chip Merlin, *Claim Denied? Do Not Give Up!*, PROP. INS. COVERAGE L. BLOG (Feb. 11, 2009), <http://www.propertyinsurancecoveragelaw.com/2009/02/articles/insurance/claim-denied-do-not-give-up/> (exemplifying that even if your claim is denied, do not accept that you, as the homeowner, have to pay for the \$350,000 repair bill, and consult an attorney to determine if you can sue the insurance company to recover your expenses).

141. See FLA. STAT. § 627.70131(5)(a) (stating the insurance company has ninety days to fully adjust any claim). However, a breach of this statute does not rise to a cause of action for the insured. *Id.*

142. See generally EPIC GROUP PUBLIC ADJUSTERS, *supra* note 134 accompanying text; FLORIDA'S BEST PUBLIC ADJUSTERS, *supra* note 134 accompanying text; SPECIALTY PUBLIC ADJUSTERS, *supra* note 134 and accompanying text.

143. See generally EPIC GROUP PUBLIC ADJUSTERS, *supra* note 134 accompanying text; FLORIDA'S BEST PUBLIC ADJUSTERS, *supra* note 134 accompanying text; SPECIALTY PUBLIC ADJUSTERS, *supra* note 134 and accompanying text.



behalf of the homeowner and receive their money because the homeowner assigns benefits acquired from the insurance company.<sup>144</sup> Of course, a homeowner's damages cannot be repaired by the insurance company unless the policy expressly grants the insurance company such a right.<sup>145</sup> This article will work though the issue of how parties obtain payment when insurance companies want to come in and fix the problem themselves.<sup>146</sup>

The goal of homeowners insurance is to restore the homeowner to the position he was in before the loss by repairing or replacing his home to the condition it was in prior to the loss. However, how do we value the services provided in repairing the property?<sup>147</sup> Without all these parties, who would be representing the homeowner's interest?<sup>148</sup> The insurance company will contract with the cheapest general contractor it can find and will not think twice about the quality of the services rendered.<sup>149</sup> Then, what is the homeowner left with when faulty workmanship causes another loss to the home?<sup>150</sup> Is there a time period in which the insurance company can invoke its option to repair?<sup>151</sup> How is the deductible going to be paid?<sup>152</sup> Lastly, how long are homeowners going to have to live in almost unlivable conditions?<sup>153</sup>

#### a. VALUATION

The first problem with the option to repair is the valuation and scope of the damages caused by a loss. After a loss, the insurance company comes into the homeowner's house and adjusts the loss.<sup>154</sup> Soon after the

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144. See FLA. STAT. § 626.854 (11)(a)–(b) (limiting the amount public adjusters can be compensated for their services to ten percent for “events that are the subject of a declaration of a state of emergency by the Governor,” and twenty percent for all other claims); Patrick Russell, *Florida Water Mitigation Claims*, BLOG-MIAMI LAWYER BLOG (Aug. 17, 2011), <http://www.miamilawyer1.com/miami-lawyer-blog/florida-water-mitigation-claims.html> (elaborating on the issue of water mitigation claims). If the water mitigation company is given an assignment of insurance benefits, it stands in a better position as it can recover its attorney's fees under the Florida statutes for any issues that may arise with its payment).

145. See *Branigan v. Jefferson Mut. Fire Ins. Co.*, 102 Mo. App. 70, (Mont. 1903); *Wallace v. Insurance Co.*, 4 La. 289 (La. 1832); see also JOHN ALAN APPLEMAN, APPLEMAN ON INSURANCE § 4001 (2015) (citing *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535 (Ind. 1887)).

146. See discussion *infra* Part IV.a–g.

147. See discussion *infra* Part IV.a.

148. See discussion *infra* Part IV.b.

149. See discussion *infra* Part IV.c.

150. See discussion *infra* Part IV.d.

151. See discussion *infra* Part IV.e.

152. See discussion *infra* Part IV.f.

153. See discussion *infra* Part IV.g.

154. See *Consumers: Residential Property Claims Guide*, CAL. DEP'T OF INS.,

inspection, the insurance company will either deny a claim, or create an estimate of what it thinks the scope of the loss is.<sup>155</sup> At this point, the insurance company should submit a copy of the estimate to the homeowner with the scope of the damages it thinks are caused by the loss, along with a letter exercising its option to repair,<sup>156</sup> which is where the issue arises. The homeowner believes the ceiling, floors, and walls need to be replaced due to damage caused by the loss, while the insurance company disagrees and is only going to repair the ceiling.

What is the homeowner supposed to do in this situation? Allow the insurance company to repair only a third of the damages?<sup>9</sup> In this situation, the homeowner is going to have to pay for the repairmen he needs out of pocket, thus incurring a greater expense that the insurance company will not cover.<sup>157</sup> The insurance company will retain attorneys to represent its interest and try to intimidate the homeowner away from representation by acting like his or her friend.<sup>158</sup> The insurance company fixes part of the problem area in hopes of saving money and having the homeowner forget

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<http://www.insurance.ca.gov/01-consumers/105-type/95-guides/03-res/res-prop-claim.cfm> (last visited Sep. 23, 2015) (stating that under California standards, if there is time, the insurance adjuster will come out to the property and do a thorough inspection to evaluate the damage caused by the loss).

155. *E.g.*, FLA. STAT. § 627.70131(5)(a) (2013) (stating that the insurance company has ninety days to adjust the loss after the claim is reported, or fifteen days “after there are no longer factors beyond the control of the insurer which reasonably [prevent] such payment, whichever is later . . .”).

156. *See* Merlin, *supra* note 130 and accompanying text (stating the “issue of whether the insurer elected to repair was for the jury to determine.”).

157. *See* John Egan, *Will my home insurance cover a hotel room and other ‘additional living expenses’?*, NETQUOTE, <http://www.netquote.com/home-insurance/home-insurance-riders> (last visited Oct. 25, 2015) (explaining that Florida home insurance companies are not required to immediately pay homeowners their additional living expenses, and that homeowners’ reimbursement for expenses is at the discretion of their insurer); *see also* *Homeowners Insurance Claim Settlement Process*, ROCKY MOUNTAIN INSURANCE INFORMATION ASSOCIATION, [http://www.rmiia.org/Homeowners/Walking\\_Through\\_Your\\_Policy/Settlement\\_Process.asp#options](http://www.rmiia.org/Homeowners/Walking_Through_Your_Policy/Settlement_Process.asp#options) (last visited Oct. 25, 2015) (illustrating that the insurance company will reimburse a homeowner for expenses upon admitting coverage). An insurance company has to pay for additional living expenses and for the homeowner’s representation only upon admitting coverage, either by their own admission or by jury verdict. *See id.* However, the payment of the expenses made by the policy holder may not be made for years down the road, which puts the homeowner in a vulnerable position. *See* Egan, *supra*.

158. *See, e.g., Bad Faith and Extra-Contractual Liability*, COLE, SCOTT & KISSANE, P.A., <http://www.csklegal.com/experience/bad-faith-and-extra-contractual-liability> (last visited Oct. 25, 2015) (explaining one of their practice areas is first-party defense litigation); *Practice Areas*, LYDECKER-DIAZ, <http://www.lydeckerdiaz.com/practice-areas> (last visited Oct. 25, 2013) (showing Insurance Coverage and Extra-Contractual Litigation as practices areas).

about his or her damages.<sup>159</sup>

However, this homeowner wants to fight and get all his damages repaired, but what is he to do? He cannot sue the insurance company for damages because the insurance company has already exercised its option to repair.<sup>160</sup> So, the homeowner must sue the insurance company for specific performance.<sup>161</sup> The insurance company is going to argue that there is a new contract that was created by the exercise of the option to repair, and that it is no longer the proper party to be sued.<sup>162</sup> However, there is no new contract. Under Florida law:

In order [for] there [to] be a contract, the parties must have a definite and distinct intention, common to both, and without doubt or difference. Until all understand alike, there can be no assent, and therefore no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms.<sup>163</sup>

The insurance company will state that once an insurance company invokes its option to repair, it is binding on the parties.<sup>164</sup> Moreover, the insurance company will cite to case law proving that once the intent to repair is communicated, a new contract is created.<sup>165</sup> However, the case law is distinguishable because the homeowners in the cases the insurance company cites agree to the insurance company's licensed contractor.<sup>166</sup>

159. See NASDAQ, *supra* note 16. Since some insurance companies are publicly traded, they have a fiduciary duty to make as much profit as possible for their shareholders and therefore, the option to repair could be their ally. See generally *id.*

160. See Merlin, *supra* note 130 (explaining that once the insurance company exercises its option to repair, it creates a new contract with unlimited liability).

161. See FLA. STAT. § 672.716(a)–(b) (2002).

162. See Merlin, *supra* note 130 (illuminating the fact that the insurance company is no longer the party at issue, but rather the contractor is the responsible party).

163. See Webster Lumber Co. v. Lincoln, 94 Fla. 1097, 1113 (Fla. 1927) (holding there was never a meeting of the minds between the parties).

164. See Valorie S. Chavin, *Board of Contributors: Insurance Settlement a Victory for Florida Homeowners*, DAILY BUS. REV. (June 18, 2013), <http://roarmedia.com/wp-content/uploads/2013/06/HLG-DBR-Insurance-settlement-Media-Clip-6.18.131.pdf> (exemplifying the many problems with the option to repair in Florida and how homeowners can recover when the insurance companies misstep).

165. Compare Chavin, *supra* note 164 (proving that homeowners have sued their insurance company for improperly exercising the option to repair, which does not entitle plaintiffs to money damages), with Merlin, *supra* note 130 (stating that the responsible party is the contractor, rather than the insurance company). Although the insurance company under the policy has the right to exercise their option to repair, Florida courts have yet to define the parameters under which their option to repair is exercisable. Cf. Chavin, *supra* note 164.

166. See *Drew v. Mobile USA Ins. Co.*, 920 So. 2d 832, 836 (Fla. 4th DCA 2006) (reversing the trial court's grant of summary judgment in favor of the insurance company); *Travelers Indem. Co. v. Parkman*, 300 So. 2d 284, 285 (Fla. 4th DCA 1974) ("Where . . . insurer elects to repair the

As stated earlier, there must be a meeting of the minds<sup>167</sup> as to all the terms of the contract.<sup>168</sup> Therefore, the homeowner must authorize the insurance company's licensed contractor in order for a new contract to be formed.<sup>169</sup> Therefore, there remain many issues that Florida courts will have to resolve, and, until the time comes when they do resolve those issues, the option to repair will only hurt homeowners because they will have less representation as professionals in the industry and will want to minimize their risk.<sup>170</sup>

## b. REPRESENTATION

Under Florida law, public adjusters are only allowed to be paid out of the proceeds they recover on behalf of the homeowner.<sup>171</sup> Furthermore, attorneys, on behalf of homeowners, recover their reasonable attorney's fees only upon recovering for their homeowner clients.<sup>172</sup> Without the

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damaged [property] rather than pay its reasonable value, the insured may be able to recover damages for any loss of use of the [property] proximately caused by a failure to repair it within a reasonable time."); *Arch Roberts & Co. v. Auto-Owners Ins. Co.*, 305 So. 2d 882, 884 (Fla. 1st DCA 1974) ("Upon making that election[, the insurance company] was then obligated to restore it to substantially the same condition as to function, appearance and value as existed before the accident."). The court in *Drew*, found that the trial court erred in granting summary judgment because there remained genuine issues of material fact such as:

[W]hether Mobile USA and the Drews created a new contract to repair, including who selected the repair company to conduct the mold remediation and whether the additional mold discovered by the Drews' consultant was from certain walls not included in the original repair areas. If a new contract to repair was formed, the issue of whether Mobile USA breached its "new contract"

*Drew*, 920 So. 2d at 836.

167. *Meeting of the Minds*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Actual assent by both parties to the formation of a contract, meaning that they agree on the same terms, conditions, and subject matter.")

168. See, e.g., *Webster Lumber Co.*, 94 Fla. at 1113.

169. See *id.* 1113 (holding that there must be a meeting of the minds by both parties in order for a new contract to be formed); *Drew*, 920 So. 2d at 836 (reversing the trial court's grant of summary judgment in favor of the insurance company to determine if a new contract was created).

170. See MODEL RULES OF PROF'L CONDUCT r. 1.8(e)(1)–(2) (AM. BAR ASS'N 2014) ("[A] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. . . ."). Therefore, since most attorneys in the field work on a contingency basis, they will be less likely to risk their money and time in court costs in an effort to shape the law. See *id.*

171. See FLA. STAT. § 626.854 (11) (a)–(b) (2013) (restricting the maximum amount of money a public adjuster can receive to twenty percent of the amount of insurance claim payments made by the insurer).

172. See FLA. STAT. § 627.428 (1)–(3) (2013) (allowing recovery of attorney's fees and costs upon the rendition of a judgment or decree against any insurance company).

option to repair, the homeowner has liquid proceeds<sup>173</sup> to pay his representatives. However, without the insurance proceeds, a homeowner may not be able to pay money from his or her bank account to ensure representation.<sup>174</sup> In effect, unless the homeowner is financially well-off, the insured will be stuck without any representation prior to filing a lawsuit.<sup>175</sup>

Now, the insurance company may argue that the homeowner has every right to get a public adjuster or an attorney; however, an attorney in pre-suit work is not entitled to statutory attorney's fees.<sup>176</sup> Therefore, attorneys do pre-suit work based on a contingency fee,<sup>177</sup> but when there is no recovery, attorneys will be less likely to represent homeowners.<sup>178</sup>

A foundation of insurance is to provide highly liquid assets to help the policyholder meet large expenses.<sup>179</sup> When a homeowner is required to sue in court for specific performance due to an insurance company's delay, deny, and defend strategy, the homeowner is stripped of his or her best asset, which is the potential recovery from litigation.<sup>180</sup> Therefore, with the option to repair, an insurance company is taking away the homeowner's biggest advantage, which is his or her potential access to cash.<sup>181</sup>

173. Cf. *Liquidity Ratio*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The ratio between person's assets that are held in cash or liquid form and the amount person's or entity's current liabilities, indicating the ability to pay current debts as they come due.").

174. See FLA. STAT. § 626.854 (11) (a)–(b) (2013); Jason B. Wolf, *Think twice before hiring public adjusters*, MIAMI HERALD (Jan. 20, 2013), [http://www.kpwlaw.com/files/my\\_view\\_-\\_miami\\_herald\\_1-21-2013.pdf](http://www.kpwlaw.com/files/my_view_-_miami_herald_1-21-2013.pdf) (stating that public adjusters cannot charge out of pocket expenses to homeowners, and therefore are restricted to recovery of insurance proceeds).

175. See Wolf, *supra* note 174 (advocating that homeowners should not employ public adjusters because they are increasing insurance premiums for all homeowners); see also *supra* note 143 and accompanying text.

176. See FLA. STAT. § 627.428(1)–(3) (2013). Therefore, unless there is a judgment or decree from the court, there is no recovery for attorney's fees. *Id.* Since pre-suit work does not involve the courts, homeowners are not entitled to the statutory protection. See *id.*

177. *Contingent Fee*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A fee charged for a lawyer's service only if the lawsuit is successful or favorably settled out of court.").

178. See FLA. STAT. § 627.428(1)–(3). In order for attorneys to make more money for themselves, they may not be willing to take as much risk, so they will not spend unnecessary money. See *id.*

179. But see Joshua Kennon, *The Importance of Liquidity and Liquid Assets*, ABOUT.COM (last visited Oct. 25, 2015), <http://beginnersinvest.about.com/cs/banking/a/091102a.htm> (stating that insurance is an example of a highly liquid asset).

180. Cf. *id.*

181. See also BRAINY QUOTE, *Money Quotes*, [http://www.brainyquote.com/quotes/topics/topic\\_money.html](http://www.brainyquote.com/quotes/topics/topic_money.html) (last visited Oct. 25, 2015) ("When I was young I thought that money was the most important thing in life; now that I am old I know that it is.") (quoting Oscar Wilde); BRAINY QUOTE, *Mahatma Gandhi Quotes*, <http://www.brainyquote.com/quotes/quotes/m/mahatmagan104952.html> (last visited Oct. 25,

Insurance companies already have a large advantage in the process with their large amount of cash reserves<sup>182</sup> and knowledge of the industry. Therefore, they are able to intimidate homeowners into accepting low settlements.<sup>183</sup> If the insurance companies are able to limit homeowners' access to representation through the use of the option to repair, things will only get worse for homeowners.<sup>184</sup>

### c. FAULTY WORKMANSHIP

Under current Florida Law, if an insurance company properly exercises its option to repair, and the insured agrees, it creates a new contract, which is between the contractor performing the work, and the homeowner.<sup>185</sup> The homeowner may have a contractor whom he or she has been friends with for thirty years, whom he or she trusts, but is restricted from using the contractor to repair his or her home because the insurance company chooses its own contractor.<sup>186</sup> If the contractor does a poor job repairing the policyholder's home, the homeowners is left with no option but to sue the contractor.<sup>187</sup> However, since this will be a contractual issue, the homeowner must now bear his or her own attorney's fees due to the American rule and the new contract.<sup>188</sup> There will be minimal recourse

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2015) (showing the importance of money in our society, as embodied by Mahatma Gandhi's quote stating, "There is a sufficiency in the world for man's need but not for man's greed.").

182. See *Cash Reserves*, THE FREE DICTIONARY BY FARLEX, <http://financial-dictionary.thefreedictionary.com/cash+reserves> (last visited Oct. 25, 2015) ("Investment funds that are held in short-term assets such as Treasury bills and certificates of deposit until more permanent investment opportunities are available.").

183. See American Association for Justice, *Tricks of the Trade: How Insurance Companies Deny, Defend, Confuse and Refuse*, JUSTICE.ORG 6, <https://www.justice.org/sites/default/files/file-uploads/InsuranceTactics.pdf> (last visited Oct. 25, 2015) (showing how insurance companies try to take advantage of their insureds when they are most vulnerable); see also Chavin, *supra* text accompanying note 166.

184. See Wolf, *supra* note 174 (advocating for the insurance company, as one of its representatives, so the insurance company can make more money, and the writer can keep his job and potentially make more money).

185. See *Drew v. Mobile USA Ins. Co.*, 920 So. 2d 832, 832 (Fla. 4th DCA 2006); *Arch Roberts & Co. v. Auto-Owners Ins. Co.*, 305 So. 2d 882, 882 (Fla. 1st DCA 1974); *Travelers Indem. Co. v. Parkman*, 300 So. 2d 284, 284 (Fla. 4th DCA 1974); see also Merlin, *supra* note 130.

186. See Chavin, *supra* note 164 (exemplifying that the insurance company is the party choosing the general contractor to perform the necessary repairs without any regard to what the homeowner wants).

187. See *Drew*, 920 So. 2d at 832 (showing a situation where the only thing the homeowner could do was sue the insurance company).

188. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), *overruled by* Pub. L. No. 94-559, amending 42 U.S.C. § 1988 (2000) (allowing for entitlement to attorney's fees and costs in certain cases as prescribed by statute).

against the insurance company, but only against the contractor hired by the insurance company.<sup>189</sup>

However, if the contractor does work on the policyholder's home and there is faulty workmanship, can the homeowner go after the insurance company? In many cases, the insurance company will fight through litigation.<sup>190</sup> The insurance company is liable for losses caused by unfortunate accidents, not by faulty construction, which is actually an exclusion under most insurance policies.<sup>191</sup> In one situation, People's Trust Insurance Company owns the contractor.<sup>192</sup>

#### d. NEW CONTRACT ISSUES

As stated above, when an insurance company exercises its option to repair, it creates a new contract between the contractor and the homeowner.<sup>193</sup> There is no accountability for the insurance company as to the contractor it chooses.<sup>194</sup> Actually, the insurance company is encouraged to find the cheapest person to repair the damages in order to save on costs and increase profits.<sup>195</sup> If the insurance company can find someone to repair the damages for the cheapest amount of money, it is able to get away

189. See *Drew*, 920 So. 2d at 832 (showing how the insurance company moved for summary judgment on the issue and if there was a new contract created the insurance company is not the liable party); see also *Merlin*, *supra* note 130.

190. See *Arch Roberts & Co.*, 305 So. 2d at 882; *Travelers Indem. Co.*, 300 So. 2d at 284; see also *Merlin*, *supra* note 130; but see *Drew*, 920 So. 2d at 832 (leaving open the possibility that the homeowner can sue the insurance company for multiple reasons); *Chavin*, *supra* note 164 (giving an example of when homeowners have recovered against the insurance company, despite their exercising of their option to repair).

191. See *U.S. Fire Ins. Co. v. J.S.U.B. Inc.*, 979 So. 2d 871, 876 (Fla. 2007) (holding that under many homeowners insurance policies, faulty workmanship or construction is an exclusion entitling the insurance company to avoid paying insurance proceeds); see also *Merlin*, *supra* note 130 (explaining that once the insurance company exercises its option to repair, it creates a new contract with unlimited liability).

192. See PEOPLE'S TR. INS. CO., *How to File a Claim*, <http://www.peoplestrustinsurance.com/content/customerService/RRT.cshtml> (last visited Oct. 25, 2015) (illuminating that People's Trust Insurance Company is affiliated with its "preferred contractor," Rapid Response Team, as they have the same principle address).

193. See *Arch Roberts & Co.*, 305 So. 2d at 882; *Travelers Indem. Co.*, 300 So. 2d at 284; *Merlin*, *supra* note 130.

194. See *Chavin*, *supra* note 164 (noting the insurance company chooses a contractor not on his merits, but on who the cheapest contractor is without regard to his professional qualifications).

195. See *id.*; see also *Chavin*, *supra* note 164; cf. *NASDAQ*, *supra* note 16. Insurance companies want to save money to make more money for their shareholders. See *Chavin*, *supra* note 164; see also *NASDAQ*, *supra* note 16. Insurance companies are encouraged to find the cheapest contractors they can find because of their ability to escape liability for any faulty workmanship at issue in present lawsuits, as well as in future lawsuits resulting from further property damage. *Id.*

from all liability by paying for a cheap service, and, once again, taking advantage of the homeowner by having the insured sign a contract allowing the construction company to assume all liability.<sup>196</sup>

#### e. TIME PERIOD TO INVOKE THE OPTION

Another problem is the time period before the insurance company has to invoke its option to repair.<sup>197</sup> Under many insurance policies containing the option to repair, the policy does not contain a time period for the insurance company to invoke the option to repair.<sup>198</sup> Neither the Preferred Contractor Endorsement,<sup>199</sup> nor the remaining sections of the People's Trust Insurance Company's policy fixes a time necessary for the insurance company to exercise its option to repair, and is thus subject to interpretation by the courts. A common standard in Florida is that "interpretation of an insurance contract is a question of law."<sup>200</sup> When the relevant policy language is susceptible to more than one reasonable interpretation (one providing coverage, and another limiting coverage), the insurance policy is considered ambiguous.<sup>201</sup> Furthermore, the Supreme Court of Florida stated:

[W]here policy language is susceptible to differing interpretations, it should be construed in favor of the insured. Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy. *See CTC Dev. Corp.*, 720 So. 2d at 1076; *Swindal*, 622 So. 2d at 470. Likewise, ambiguous insurance policy exclusions are construed against the drafter and in favor of the insured. *See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998). In fact, exclusionary clauses are construed even more strictly against the insurer than coverage clauses.<sup>202</sup>

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196. *See Chavin, supra* note 164; *see generally* NASDAQ, *supra* note 16 (showing insurance companies want to make money for their shareholders).

197. *See Drew v. Mobile USA Ins. Co.*, 920 So. 2d 832, 833 (Fla. 4th DCA 2006) (stating that the insurance policy at issue requires the insurance company to exercise its option to repair within thirty days of receipt of the sworn proof of loss statement); *see also* APPLEMAN, *supra* note 145, at 6F-171F § 4005 (2013); Merlin, *supra* note 130.

198. *See* APPLEMAN, *supra* note 145, at 6F-171F § 4005.

199. PEOPLE'S TR. INS. CO., SIMPLY A BETTER WAY 4-5 (2015).

200. *Kattoum v. New Hampshire Indem. Co.*, 968 So. 2d 602, 604 (Fla. 2d DCA 2007).

201. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000).

202. *Id.* (citations omitted).



Since Florida law has not addressed the time an insurance company has to exercise its option to repair, we must look to other sources. One source is Appleman on Insurance,<sup>203</sup> who states:

Where no time is fixed by the policy in which the option to repair must be exercised, the insurer must give notice of its election within a reasonable time. The question of what constitutes a reasonable time within which the insurer is entitled to decide to repair or replace the automobile has been held to depend upon the circumstances.<sup>204</sup>

Moreover, in Illinois, the courts have developed a five-part test that:

[M]ake[s] the notice of an insurer's election to exercise its option to repair effective [because]: (1) it must be made within a reasonable time after the damage or loss has occurred to the Insured; (2) it must be clear, positive, distinct, and unambiguous; (3) the repairs or replacements must be made within a reasonable time; (4) it cannot be coupled with an offer of compromise or be made for the purpose of forcing a compromise, but it must be an election made with no alternative; and (5) when the election is made, the repair or replacement must be suitable and adequate.<sup>205</sup>

Therefore, many other jurisdictions have recognized that there should be a form of reasonableness interpreted in the time the insurance company has to invoke its option to repair.<sup>206</sup>

Furthermore, Florida Statute section 627.70131(5)(a) (2012), gives us guidance as to what is reasonable.<sup>207</sup> The statute states, in pertinent part:

Within 90 days after an insurer receives notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment.<sup>208</sup>

Therefore, if the salient policy<sup>209</sup> is silent, we should follow the

203. APPLEMAN, *supra* note 145, at 6F-171F § 4005

204. *Id.* (citing *Resolute Ins. Co. v. Mize*, 255 S.W.3d 682, 686 (Ark. 1953); *Smith v. Farm Bureau, etc., Ins. Co. of Concord*, 101 A.2d 778, 780 (N.H. 1953); *Lincoln v. Gen. Cas. Co. of Wis.*, 55 N.W.2d 321, 323 (Iowa 1952); *Dosland v. Preferred Risk Mut. Ins. Co.*, 49 N.W.2d 823, 827 (Iowa 1951); *Cohen v. Ft. Dearborn Cas. Underwriters*, 285 S.W. 1024, 1027 (Mo. Ct. App. 1926)).

205. *Gaston v. Founders Ins. Co.*, 847 N.E.2d 523, 531–32 (2006) (citing *Howard v. Reserve Ins. Co.*, 254 N.E.2d 631, 635–36 (1969)).

206. *See Resolute Ins. Co.*, 255 S.W.3d at 711; *Smith*, 101 A.2d at 780; *Lincoln*, 55 N.W.2d at 323; *Dosland*, 49 N.W.2d at 827; *Cohen*, 285 S.W. at 1027.

207. *See generally* FLA. STAT. § 627.70131(5)(a) (2013).

208. *Id.*

209. *Policy*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A document containing a contract of insurance.").

above-referenced authority and impose a form of reasonable time within which the insurance company must exercise its option to repair.

f. DOES THE INSURED HAVE TO PAY THE DEDUCTIBLE UP FRONT, OR CAN THEY FORGO THE WORK COVERED UNDER THE DEDUCTIBLE AND NOT CLAIM IT AGAIN?

Another glaring problem with the option to repair is how the deductible is paid.<sup>210</sup> As discussed earlier, the homeowners are in an extremely vulnerable position as they are living in a home with a glaring problem and thousands of dollars in damages.<sup>211</sup> Now, the insurance company says that on top of the premiums the homeowners pay every year, and the fact that the homeowners' damages are not repaired yet, they want the insureds to pay their deductible out of pocket before the work even begins.<sup>212</sup> How is this fair? The insurance company wants more money, on top of the thousands of dollars in premiums the homeowners pay every year, before they even begin the work.<sup>213</sup> What if the homeowners do not have the money to pay their deductibles up front? Now, the homeowners cannot get their work done because they cannot pay their deductible?

Generally, the insurance policy states that the insured will be responsible for the deductible.<sup>214</sup> However, instead of making the homeowner responsible, the insurance company is forcing the homeowner to pay the deductible upfront, which makes the insurance company more money so it can provide for its shareholders.<sup>215</sup>

g. HOW LONG WILL IT TAKE FOR THE WORK TO GET DONE

In 2004, the average time a policyholder waited to receive an insurance settlement was 306 days.<sup>216</sup> Because of the advent of the option to repair in Florida's insurance policies, an extensive amount of common law is going to have to develop before insurance companies will issue

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210. See Chavin, *supra* note 164.

211. See ROCKY MTN. INS. INFO. ASS'N, *supra* note 157; American Association for Justice, *supra* note 183, at 6.

212. See Chavin, *supra* note 164.

213. See *id.*

214. See *id.*

215. See *id.*; see also NASDAQ, *supra* note 16.

216. See OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT, PUBLIC ADJUSTER REPRESENTATION IN CITIZENS PROPERTY INSURANCE CORPORATION CLAIMS EXTENDS THE TIME TO REACH A SETTLEMENT AND ALSO INCREASES PAYMENTS TO CITIZENS' POLICYHOLDERS, S. 10-06, at 6-7 (2010), <http://www.opaga.state.fl.us/MonitorDocs/Reports/pdf/1006rpt.pdf>.

insurance proceeds.<sup>217</sup> However, with this new added provision, insurance companies will try to create new law to give them the upper hand in the fight for insurance premiums, and ultimately profits.<sup>218</sup>

### i. INSURANCE COMPANY'S ARGUMENT

As previously stated, the insurance company believes everything in an insurance policy is conscionable because of the freedom of contract doctrine.<sup>219</sup> The insurance company will argue that it is putting the homeowner back in a position the homeowner was in prior to the loss.<sup>220</sup> Moreover, the insurance company will say that it will ensure all homeowners will be made full if the policy provides coverage for the loss.<sup>221</sup> The insurance company will be preventing windfalls<sup>222</sup> to the homeowner, while keeping the profits for any catastrophe.<sup>223</sup>

#### i.i. INSURED'S ARGUMENT

The homeowner will be put at a disadvantage when he or she has to sit down for an Examination Under Oath.<sup>224</sup> The homeowner will be paying the same amount of premiums, while the insurance company would probably increase profits, and ensure its longevity.<sup>225</sup> Insurance companies will force homeowners to file lawsuits for specific performance, and

217. See also Answer Brief of Appellee at 21, *Lopez v. People's Trust Ins. Co.*, 109 So. 3d 1167 (Fla. 3d DCA 2013) (No. 3D12-1711).

218. See, e.g., Julie Patel, *Need Repairs? How to Decide Whether to go With Your Insurer's Preferred Contractor*, SUN SENTINEL (Aug. 5, 2011), [http://articles.sun-sentinel.com/2011-08-05/business/fl-insurance-preferred-contractors-20110805\\_1\\_contractors-repair-estimates-price-guidelines/2](http://articles.sun-sentinel.com/2011-08-05/business/fl-insurance-preferred-contractors-20110805_1_contractors-repair-estimates-price-guidelines/2) (showing an example of how the insurance company will use its preferred contractor to ultimately save money and increase its profits).

219. Cf. Kessler, *supra* note 120, at 630–31 and accompany text.

220. See Answer Brief of Appellee, *supra* note 217, at 21.

221. See PEOPLE'S TR. INS. CO., <http://www.peoplestrustinsurance.com/content/whyDifferent/vipGOLD.cshtml> (last visited Oct. 25, 2015) (guaranteeing the work of their subsidiary Rapid Response Team for three years).

222. See *Windfall Profits*, INVESTOPEDIA, <http://www.investopedia.com/terms/w/windfall-profits.asp> (last visited Oct. 3, 2015).

223. Cf. Patel, *supra* note 218 and accompanying text (asserting that insurance companies are trying to minimize contractor price gouging).

224. See generally SCOTT AND FENDERSON, *Examination Under Oath, What is an Examination Under Oath (EUO)?*, <http://www.scottandfenderson.com/index.php/client-services/examination-under-oath> (last visited Sept. 22, 2015) (describing Examinations Under Oath as an adversarial process whereby an insured is peppered with questions about the loss by the insurer's attorneys).

225. See generally Patel, *supra* note 218 (describing the way in which insurance companies can maximize their profits by eliminating price gouging by repair companies).

homeowners have little representation to fight for their rights.<sup>226</sup> Lastly, an insured may be stuck with faulty workmanship, and the only way he can receive higher quality work is to pay more money, on top of his insurance premiums.<sup>227</sup>

## V. CONCLUSION

Ultimately, the insurance industry in Florida is highly regulated.<sup>228</sup> Insurance regulators have to approve all provisions in insurance policies prior to homeowners purchasing them.<sup>229</sup> Insurance regulators are in power to ensure the safety of the public by ensuring that big companies do not take advantage of Florida's citizens.<sup>230</sup> Therefore, it is not out of the realm of possibilities that insurance regulators will prohibit the option to repair in Florida's insurance policies.

As shown by the problems above, the option to repair would be catastrophic to the Florida insurance industry if it were introduced.<sup>231</sup> If the insurance regulators overlook prohibiting the option to repair, then the Florida courts should find the provision unconscionable as against public policy.<sup>232</sup>

Due to the problems discussed above, insurance regulators and Florida courts should be weary that if the option to repair becomes prevalent among Florida homeowners, it will only lead to turmoil and public outcry.<sup>233</sup> The best course of action for the state of Florida is to ensure the option to repair is prohibited, and that insurance companies are

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226. See FLA. STAT. § 672.716 (2013); see also Merlin, *supra* note 130 (noting that because an insurer undertakes a separate contractual obligation when it elects to repair its insured's damaged property directly, an insurer will instead indirectly steer the insured to contract with the insurer's preferred vendor to repair the damaged property).

227. See Patel, *supra* note 218.

228. See also Welcome, FLA. OFF. OF INS. REG., <http://www.flair.com> (last visited Oct. 25, 2015).

229. See, e.g., Shaun Bevan, *Two South Florida Companies Take Over Citizens Policies*, SOUTH FLA. BUS. J., <http://www.bizjournals.com/southflorida/blog/morning-edition/2013/09/two-south-florida-companies-could-take.html> (last visited Oct. 25, 2015) (explaining how two Florida insurance companies first needed approval by the Florida Office of Insurance Regulation before they could assume the insurance policies of another insurance company).

230. See *id.*

231. See discussion *supra* Part IV.a–g.

232. See David J. Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, THE FLA. BAR J. (July/Aug. 2000), <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/9DAC8A411769C68885256ADB005D6318>.

233. See discussion *supra* Part IV.a–g.

privatized so their priorities are to their homeowners, and not to their stockholders.<sup>234</sup> “With great power there must also come—great responsibility,”<sup>235</sup> and insurance companies have proven they have too much power when they abuse their responsibilities.

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234. *See id.*

235. Stan Lee & Steve Ditko, *Spider-Man!*, AMAZING FANTASY 15, at 12 (Marvel Aug. 1962).