No. 22-500

IN THE

Supreme Court of the United States

GREAT LAKES INSURANCE SE,

Petitioner,

---v.---

RAIDERS RETREAT REALTY CO., LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Under federal admiralty law, can a choice-of-law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the "strong public policy" of the State whose law is displaced?

CORPORATE DISCLOSURE STATEMENT

United Policyholders is a 501(c)(3) not for profit corporation, has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

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

UP assists businesses and residents through three programs: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

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[1] Pursuant to Rule 37.6, United Policyholders affirms that no counsel for a party authored this brief in whole or in part and that no one other than United Policyholders, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

Public officials, state insurance regulators, academics and journalists routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy sales, claims, and consumer rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and the Treasury Department.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholders' rights in the courts for decades. For instance, UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

UP seeks to fulfill the classic role of *amicus* curiae by supplementing the efforts of counsel and drawing the Court's attention to law or circumstances that may have escaped consideration. As commentators have stressed, an *amicus* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting *Ennis, Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

SUMMARY OF ARGUMENT

United Policyholders submits this *amicus* brief in support of the merit brief of Respondent Raiders Retreat Realty Co., LLC ("Respondent") because the

question on appeal (which is limited by the Court to Question 2 of the petition) presents legal issues that can adversely affect insureds (referred to herein as "policyholders") throughout the United States.[2]

The issue on appeal is whether "[u]nder federal admiralty law, can a choice-of-law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the 'strong public policy' of the state whose law is displaced?"[3] The answer should be "Yes", with an affirmance of the Third Circuit's decision. The Third Circuit's decision is true to this Court's precedent in both *The Bremen* and *Wilburn Boat* because the decision recognizes the primacy of federal admiralty law while recognizing the role state law plays in contractual disputes that implicate state law considerations.

Specifically, the Third Circuit's ruling correctly recognizes that while federal admiralty law is extensive, it is by no means comprehensive as to all possible legal disputes of all maritime litigants. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955) (rejecting view "that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts, … the National Government has left much regulatory power in the States."). Here, the Third Circuit properly found that a choice-of-law clause in a marine insurance policy calling for application of New York state law, while

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[2] *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC.*, 215 L. Ed. 2d 137, 143 S.Ct. 999 (2023).

[3] Petition for the writ of certiorari link: https://www.supremecourt.gov/DocketPDF/22/22-500/247383/20221123124025212_Great%20Lakes%20Insurance%20SE_PETITION%20FOR%20A%20WRIT%20OR%20CERTIORARI.pdf.

presumptively valid under this Court's precedent, could be rendered unenforceable when the clause violates "strong public policy" of the forum state in which the lawsuit is brought when state law of the forum is implicated by an issue in which there is no established federal admiralty rule of law.

In urging for application of a "federal policy" to measure enforceability, Petitioner concedes that choice-of-law clauses may be unenforceable when they are shown to be unreasonable or unjust. This is a hollow concession, given Petitioner does not actually advise the Court what "federal policy" factors nullify such a clause. Pet. Br. at 26.

The likely reason for this omission is that such factors may include the "evil" of insurance forfeiture referenced by the Court in *Wilburn Boat*. 348 U.S. at 374. Indeed, *Wilburn Boat* is unmistakable for its deference to state law when it comes to permitting policyholders potential relief from forfeiture arguments proffered by insurance companies.

Given that the law abhors forfeiture, a federal policy of analyzing the propriety of a contractual provision that fosters forfeiture would necessarily implicate consideration of state laws that restrict forfeiture outcomes under *Wilburn Boat*. The Third Circuit's decision gives concrete effect to the "unreasonable and unjust" standard this Court articulated in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), whereas Petitioner's construct permits circumvention of the state law concerns emphasized in *Wilburn Boat*.

Accordingly, Petitioner's arguments should be rejected because:

1. The Third Circuit correctly applied this Court's precedent in *The Bremen* to assess whether a choice-of-law clause is enforceable;
2. It is Petitioner's own choice-of-law clause that expressly imposes analysis of state law—thus Petitioner's call for automatic application of an absolute "federal policy" for state law matters makes little sense; and
3. Under this Court's well-entrenched precedent in *Wilburn Boat*, maritime contracts routinely must be resolved in whole or in part under state law principles. Indeed, the very terms of Petitioner's own choice-of-law clause, which it drafted and imposed on Respondent, recognize this reality, and Petitioner should not be permitted to contract out of *Wilburn Boat*—especially when it comes to forfeiture efforts by marine insurance companies.

As set forth below, United Policyholders respectfully submits that the Court should affirm the Third Circuit's decision and remand the case to the District Court for further proceedings consistent with its decision.

STATEMENT OF THE FACTS

United Policyholders adopts the Statement of the Facts contained in the brief of Respondent.

ARGUMENT

The Third Circuit's ruling should be upheld on the following principles set forth below.

I. The Third Circuit's Decision Re-affirms the Court's Application of Federal Admiralty Law to Maritime Contracts and Application of State Law Principles When No Established Federal Admiralty Law Exists

It is well-established precedent that when a maritime contractual issue is left unaddressed by an established rule of federal admiralty law, state law applies to the contractual dispute. *See Royal Ins. Co. of Am. v. KSI Trading Corp.*, 563 F.3d 68, 73 (3d Cir. 2009) (establishing that "maritime contracts are governed by federal admiralty law when there is an established federal rule, but absent such a rule, state law applies") (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)). Pursuant to the precedent of this Court, state law governs disputes over the propriety of an insurance company seeking forfeiture of coverage based on a warranty breach that in no way caused the claimed insurance loss. *Wilburn Boat*, 348 U.S. at 316 ("[T]he scope and validity of the policy provisions here involved and the consequences of breaching them can only be determined by state law . . . ."). Petitioner's own insurance policy form acknowledges as much, providing:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice[,] but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

Pet. App. 4a.

Petitioner advocates for the application of New York law that provides it a consequence-free landscape for seeking forfeiture of Respondent's insurance coverage on a technical breach of the policy that in no way contributed to the yacht damage. Conversely, the policyholder advocates to invoke Pennsylvania law (at least in part) to assert that Petitioner's claim position and actions amount to breach of Petitioner's fiduciary duty and violation of state Unfair Trade Practices under Pennsylvania law.

Here, the Third Circuit properly found that a choice-of-law clause in a marine insurance contract calling for application of state law of New York, while presumptively valid under federal Court precedent, could be rendered unenforceable based on state public policy concerns when there is no established federal admiralty law. The Third Circuit's holding is a natural application of this Court's ruling in *The Bremen* and does not impede uniform federal admiralty law, given that the ultimate issue here is the proper application of state law. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004) ("A maritime contract's interpretation may so implicate local interests as to beckon interpretation by state law."); *see also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope").

In *Romero*, the Court examined the interplay between federal law and state law in maritime matters. The Court recognized the application and controlling nature of state law to issues involving, among other things, insurance company defenses to coverage based upon a breach of warranty:

> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, *state laws regulating the effect of a breach of warranty under contracts of maritime insurance* -- all these laws and others have been accepted as rules of decision in admiralty cases, even at times, when they conflicted with a rule of maritime law which did not require uniformity.

Romero, 358 U.S. at 373-374 (emphasis added) (footnotes omitted). The Third Circuit's decision aligns with the teachings of *Romero*.

So, too, does it align with the Court's precedent set forth in *Wilburn Boat*, which deferred to state law to determine the validity of an insurance company's effort to forfeit the policyholder's insurance coverage on the basis of a technical violation of a warranty clause that did not cause nor contribute to the loss. Indeed, the Court in *Wilburn Boat* cautioned against expanding federal admiralty rules to areas of law that were traditionally functions of the states:

> The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the States came into being.

348 U.S. at 316.

Despite Petitioner's arguments to the contrary, the Third Circuit properly gave effect to the rule that choice-of-law clauses are presumptively enforceable. As the Third Circuit detailed, the presumption of enforceability is rebuttable, however, when a litigant can satisfactorily show that enforcement would be unreasonable or unjust. *See Great Lakes Reins. (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 242-44 (5th Cir. 2009) (assessing whether enforcement of choice-of-law clause in maritime insurance policy "would be unreasonable or unjust").

In accordance with this Court's teachings, as detailed in *Wilburn Boat* and *Romero*, the test of what is "unreasonable or unjust" should take into account public policy considerations of the forum state (which often will be the location of the policyholder's business operations or in the vicinity of the harm or damage), not federal public policy. This is especially important given the Court's clear precedent holding that state law governs the sought-after remedy (*i.e.,* forfeiture) for a claimed breach of warranty when the breach does not bring about the insured loss.

Petitioner also argues that state public policy must be ignored, and that "federal" public policy is the sole consideration to gauge enforceability. Petitioner's

argument, however, contravenes exactly the approach the Court sought to avoid in *Wilburn Boat*. Like in this insurance dispute, the marine insurance company in *Wilburn Boat* sought a forfeiture of insurance coverage for a houseboat based upon a technical breach that was inconsequential to the loss. In ruling that the issue of the propriety of the defense to coverage was governed by state law, this Court ruled that state law efforts to protect policyholders should be applied to the insurance policy:

> In this very case, should we attempt to fashion an admiralty rule governing policy provisions, we would at once be faced with the difficulty of determining what should be the consequences of breaches. We could adopt the old common law doctrine of forfeiting all right of recovery in the absence of strict and literal performance of warranties, but that is a harsh rule. *Most States, deeming the old rule a breeder of wrong and injustice, have abandoned it in whole or in part.* But that has left open the question of what kind of new rule could be substituted that would be fair both to insurance companies and policyholders. Out of their abundant broad experience in regulating the insurance business, some state legislatures have adopted one kind of new rule, and some another. Some States, for example, have denied companies the right to forfeit policies in the absence of an insured's bad faith or fraud. Other States have thought this kind of rule inadequate to stamp out forfeiture practices deemed evil. The result, as this Court has pointed out, has been state statutes like that of Texas

> which "go to the root of the evil," and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured against . . . .
>
> Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance, where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the States.

348 U.S. at 319-21 (emphasis added) (citations omitted).

Applying the choice-of-law clause that Petitioner drafted would ignore the considerations detailed in *Wilburn Boat* and avoid the scrutiny of states that found such claims handling decisions "harsh", "evil" and otherwise unenforceable. Furthermore, if any "federal policy" can be divined in this area, it is that the Court in *Wilburn Boat* was mindful of allowing state law to "'go to the root of the evil,' and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured against". *Id.* at 320.

Accordingly, the Third Circuit's ruling is well reasoned and comports with both the analysis and rulings of *The Bremen* and *Wilburn Boat*.

II. The Third Circuit Follows this Court's Precedent by Holding that Maritime Contract Clauses are Presumptively Enforceable, But Recognizing that Public Policy Considerations of the Forum State Can Overcome the Presumption of Validity and Render Choice-of-Law Provisions "Unjust or Unreasonable"

Petitioner's argument here appears to be that under federal admiralty law, a choice-of-law clause is somehow beyond any judicial reproach—that is, "federal policy" automatically enforces it. Petitioner pays lip service to the possibility that "federal policy" might invalidate it as unjust or unreasonable yet provides no indication which factors under such a "federal policy" might achieve such a result other than pure illegality. No matter, Petitioner's interpretation of this Court's precedent is erroneous.

Nothing in *The Bremen* rejects consideration of a state's "strong public policy" to determine if a marine contract clause is "unjust or unreasonable." In *The Bremen*, the Court addressed an international contract—not one involving state law versus federal admiralty law. As such, *The Bremen* did not require the Court to limit (nor did the Court limit) the decision to purely federal versus foreign law considerations to assess whether a clause was unreasonable or unjust.

In this case, the Third Circuit correctly considered Pennsylvania's strong public policy interest in regulating against an insurance company's harsh claims position seeking to effect a forfeiture of insurance coverage. Such a ruling is entirely consistent with the Court's precedent under *Wilburn Boat* while still recognizing the rule that choice-of-

law clauses are presumptively valid. *The Bremen* was concerned about undertaking an analysis of the marine contract clause to ensure it was neither unjust nor unreasonable. It would make little sense to self-impose artificial limitations on what factors a court could consider in assessing the propriety of the clause.

III. New York Law Is Fully Consistent with Measuring the Validity of a Choice-of-Law Clause in Light of Public Policy Concerns

In drafting the Policy, Petitioner specifically provided that the substantive law of the state of New York law should fill in the gaps left by federal admiralty law. And, as with federal law and the law of many other states, New York law instructs that choice-of-law clauses are enforceable, but will be reviewed if the challenging party can demonstrate that they contravene some public policy.

In *Welsbach Electric Corp., v. MasTec North America, Inc.*, 7 N.Y.3d 624 (2006), for example, the New York Court of Appeals reviewed a choice-of-law clause calling for application of Florida law. While it found the clause enforceable, the court also noted the limitations on the enforcement of all contractual provisions. Specifically, the court held under New York law,

> [t]he freedom to contract, however, has limits. Courts will not, for example, enforce agreements that are illegal or where the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal. If . . . the foreign law does not entail any such violation . . . full effect should be given to the law of

> our sister State. Crucially, however, we have reserved the public policy exception for those foreign laws that are truly obnoxious.

Id. at 629 (citations and quotations omitted).

The Third Circuit's decision is thus fully in accord with New York law, which favors enforcement, but still considers whether a choice-of-law clause is unjust.

Additionally, if a contracting party wishes to extinguish bad faith or extra-contractual liability for its claims handling conduct in the forum state, then such exculpatory clauses should be drafted explicitly and not cloaked in out-of-state choice-of-law provisions—the implications of which the average policyholder will virtually never grasp. As discussed more fully below, most policyholders and insurance brokers are ill-equipped to conduct a sophisticated choice-of-law analysis for a virtually infinite array of claim scenarios in a field as esoteric as admiralty.

IV. Application of State Public Policy Considerations Protects Policyholders Against Improper Claims Practices Under Contracts of Adhesion

States have a strong public interest in protecting purchasers of insurance policies from sharp and unfair claims practices as well as onerous insurance policy provisions. This Court explained in *Wilburn Boat*:

> Out of their abundant broad experience in regulating the insurance business, some state legislatures have adopted one kind of new rule and some another. Some States for example have denied companies the right to forfeit policies in the absence of an insured's

> bad faith or fraud. Other States have thought this kind of rule inadequate to stamp out forfeiture practices deemed evil. The result, as this Court has pointed out, has been state statutes like that of Texas which "go to the root of the evil," and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured against.

Wilburn Boat, 348 U.S. at 320. Most policyholders have little to no bargaining power and most commercial insurance is sold on a take-it or leave-it basis. *See* David J. Seno, Comment, *The Doctrine of Reasonable Expectations in Insurance Law: What to Expect in Wisconsin*, 85 Marq. L. Rev. 859, 860 (2002) (observing that Professor Keeton, an early proponent of the "reasonable expectations" doctrine, supported the principle underlying the doctrine "by relying on the adhesive nature of insurance contracts and the courts willingness to look at the purchasers' expectations and assumptions regarding coverage").

Even those fortunate enough to own a yacht are not on an equal playing field with insurance companies that draft the insurance policy forms, are repeat litigants, have lobbyists that are legion, and have numerous insurance industry trade groups prioritizing their interests often above all other stakeholders. *See Prudential Ins. Co. v. Lamme*, 425 P.2d 346, 347 (Nev. 1967) ("[A]n insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured . . . . The parties are not similarly situated.").

In *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W.2d 169 (Iowa 1975), the Supreme Court

of Iowa recognized the commercial realities of insurance policy purchase and "negotiation":

> With respect to those interested in buying insurance, it has been observed that:
>
> His chances of successfully negotiating with the company for any substantial change in the proposed contract are just about zero. The insurance company tenders the insurance upon a 'take it or leave it' basis.
>
> Few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract. They are clear upon two or three points which the agent promises to protect, and for everything else they must sign ready-made applications and accept ready-made policies carefully concocted to conserve the interests of the company. The subject, therefore, is *sui generis*, and the rules of a legal system devised to govern the formation of ordinary contracts between man and man cannot be mechanically applied to it.

227 N.W.2d at 173-74 (internal citations omitted).

Indeed, many insurance companies, including Petitioner,[4] are institutional litigants when it comes to litigating coverage disputes with their policyholders. *See Wilburn Boat*, 348 U.S. at 317 (noting that even as of 1955, there was a "vast amount of insurance litigation in state courts

[4] Petitioner's Table of Authorities in its Brief demonstrates that it has been a repeat litigant in numerous insurance related cases.

throughout our history [and], until recently, state legislatures and state courts have treated marine insurance as controlled by state law to the same extent as all other insurance.").

The average policyholder would not expect that an insurance company, such as Petitioner, would void coverage for a claim based upon the technical violation of a policy warranty or condition that in no way caused the loss. As one treatise explained:

> Some courts, recognizing that very few insureds even try to read and understand the policy or application, have declared that the insured is justified in assuming that the policy which is delivered to him has been faithfully prepared by the company to provide the protection against the risk which he had asked for. * * * Obviously this judicial attitude is a far cry from the old motto "caveat emptor."

16 Williston on Contracts § 49:21 (4th ed. 2023). Indeed, few policyholders would envision that a court would fashion a rule of law that would permit a forfeiture of coverage given how draconian the insurance company's claims position is under such circumstances. *See C & J Fertilizer*, 227 N.W.2d at 177 (finding property coverage for the policyholder despite contractual terms that would bar coverage and ruling "there was nothing relating to the negotiations with [insurer's] agent which would have led [insured] to reasonably anticipate [insurer] would bury within the definition of 'burglary' another exclusion denying coverage when, no matter how extensive the proof of a third-party burglary, no marks were left on the exterior of the premises.").

As such, the Third Circuit's ruling preserves a State's ability to protect its policyholders against

insurance policy clauses that run afoul of a strong public policy of the forum state.

V. Bad Faith Laws and Extra Contractual Remedies Are Strong Public Policies of Pennsylvania to Provide Redress Against the Imbalance Between Insurance Companies and Policyholders

Petitioner has clear economic reasons to avoid application of Pennsylvania public policy to this coverage dispute. Pennsylvania has a strong interest in protecting a Pennsylvania-based policyholder against unfair claims practices. And here, Petitioner wishes to shield its choice-of-law clause and claims handling conduct from any manner of scrutiny to escape Pennsylvania public policy that likely would protect a policyholder from forfeiting its coverage because an insurance company points to an inconsequential technical violation of a policy clause—such as a violation of a warranty that in no way played a part in the damage to the vessel. Conversely, this is likely the underlying rationale of Respondent in invoking Pennsylvania statutory protections to combat alleged bad faith claims misconduct of Petitioner under 42 Pa. C.S. § 8371.

As the Pennsylvania Supreme Court described in *Ash v. Continental Insurance Co.*, 932 A.2d 877 (Pa. 2007), "the legislature apparently determined the protections afforded by the Unfair Insurance Practices Act were insufficient to curtail certain bad faith acts by insurers and that it was in the public interest to enact § 8371 as an additional protection." *Id.* at 885. The court explained that "it is for the Legislature to announce and implement the Commonwealth's public policy governing the regulation of insurance carriers." *Id.* (quoting

D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 431 A.2d 966, 970 (Pa. 1981)). The court found that the legislature implemented just such a public policy in enacting section 8371:

> The legislature did precisely this when it enacted § 8371, thereby formally imposing a duty of good faith on insurers based on its apparent determination that such a provision was necessary to deter bad faith. Therefore, the duty under § 8371 is one imposed by law as a matter of social policy, rather than one imposed by mutual consensus . . . .

Id.

The Delaware Supreme Court has also noted the importance of remedies to level the playing field for policyholders given the prospect of sharp claims handling practices. According to the court:

> Insurance is different. Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a "hard-ball" approach. Insurance contracts are also unique in another respect . . . . In a typical contract, the non-breaching party can replace the performance of the breaching party by paying the then-prevailing market price for the counter-performance. With insurance this is simply not possible. This feature of insurance contracts distinguishes them from other contracts and justifies the availability of punitive damages for breach in limited circumstances.

E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 447 (Del. 1996).

The implications for reversing the Third Circuit's decision have serious and unwelcome consequences for policyholders. Reversal of the Third Circuit's decision would exacerbate the imbalance policyholders already endure and would undermine this Court's ruling in *Wilborn Boat* expressing the majority's concern with the "harsh" consequences of strict adherence to breach of warranty defenses that play no part in the insured loss.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Third Circuit and remand the case to the District Court for further proceedings consistent with that decision.

Dated: August 4, 2023

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