Sawgrass Mutual's Prohibition on Retaining Public Adjusters: Public Adjustment Faces a New (But Surmountable) Hurdle in the Sunshine State

I. INTRODUCTION

The world is facing an increasing frequency and intensity of disasters—natural and man-made—that have had devastating impacts across the globe.[1] The United States has not been immune to these catastrophes, and Florida, in particular, has experienced more than its fair share of devastation from hurricanes,[2] winter storms,[3] tornadoes, wildfires, floods, [4] and most recently, a massive oil spill in the Gulf of Mexico.[5] Such catastrophic events cause considerable property damage, with one of the many consequences being a surge in property and homeowners insurance claims. Navigating the claims process can be a daunting task for a policyholder because modern insurance policies are lengthy, complicated documents.[6] Moreover, many insurance companies "low-ball" claims settlement figures in the hopes that desperate policyholders will accept small sums in exchange for quick payouts.[7] Public adjusters are one resource available to the beleaguered policyholder. Experts on property loss adjustment, public

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[1] *See e.g.*, U.N. ENV'T PROGRAMME, Environmental Management and Disaster Reduction, 2 (2005), *available at* http://www.unep.or.jp/ietc/wcdr/unep-bg-paper.pdf.

[2] *See Hurricane History*, NOAA, http://www.nhc.noaa.gov/HAW2/english/history.shtml (last visited Apr. 26, 2011). The state was struck by eight major hurricanes in 2004 and 2005, causing widespread property damage. *Public Adjuster Representation in Citizens Property Insurance Corporation Claims Extends the Time to Reach a Settlement and Also Increases Payments to Citizens' Policyholders (Report 10-06)*, OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, 2 (2010), *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1006rpt.pdf [hereinafter OPPAGA Report].

[3] *See e.g.*, Jeff Casale, *Old Man Winter Puts Squeeze on Florida Orange Growers*, BUS. INS., Jan. 18, 2010.

[4] *See Natural Disaster Guide*, FLA. DEP'T FIN. SERV. (2010), http://www.myfloridacfo.com/consumers/guides/disaster/.

[5] *See e.g.*, Patrik Jonsson, *Gulf Oil Spill: Pensacola Beach Covered in Tar Balls*, CHRISTIAN SCI. MONITOR, Jun. 23, 2010; Tara A. Lewis, *Selling Florida's Gulf Coast Beaches*, NEWSWEEK, Aug. 22, 2010 (noting that while surface oil did little damage to beaches in Florida's Panhandle, pictures of oil-soaked birds and blackened sand fueled misconceptions and kept many visitors away).

[6] *See infra* p. 15.

[7] *See infra* p. 18.

adjusters assist the insured in preparing, filing, and adjusting insurance claims.[8]

Despite the apparent benefits associated with obtaining a public adjuster, Florida-based Sawgrass Mutual Insurance Company (Sawgrass Mutual) recently amended its by-laws to prohibit policyholders from retaining a public adjuster to inspect, evaluate, or adjust any loss covered by a Sawgrass Mutual policy, and the Florida Office of Insurance Regulation (OIR) has denied having the authority to regulate Sawgrass Mutual's action.[9] This paper contends that the OIR has the power—and even the duty—pursuant to Florida's Statutes and Administrative Code, to disapprove Sawgrass Mutual's ban on public adjusters. After providing some background information in Part II, this paper offers three reasons why the OIR should disapprove the amended by-law: first, as Part III.A explains, the amendment violates Florida insurance regulations;[10] second, as Part III.B describes, it violates the Florida Business Corporation Act;[11] and third, as Part IV contends, the amendment is bad public policy.[12] Part V concludes by calling for OIR to disapprove Sawgrass Mutual's actions and offers two ways for adjuster associations to encourage OIR to do so—by filing suit in a state court to challenge OIR's inaction or bringing a test case against Sawgrass Mutual.[13]

II. BACKGROUND

[8] *How Can a Public Adjuster Help Property Owners?*, NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS (2011), http://www.napia.com/ [hereinafter NAPIA].

[9] *See infra* Part II.

[10] *See infra* Part III.A.

[11] *See infra* Part III.B.

[12] *See infra* Part IV.

[13] Adjuster associations have already filed a suit against OIR in the Circuit Court, Leon County. *See infra* Parts II, V.

Sawgrass Mutual Insurance Company (Sawgrass Mutual) is a mutual property and casualty insurer based in Davie, Florida.[14] As a policy-holder owned company, all profits that the company earns are retained for the benefit of the policy-holders.[15] Sawgrass Mutual provides property insurance for residential properties solely in Florida.[16]

In September of 2010, Sawgrass Mutual sent a letter to policyholders inviting them to participate in a Special Meeting of the Members on October 19, 2010 (the Meeting), during which a vote on a proposed amendment to the company's by-laws would take place. The proposed amendment would "prohibit a member from hiring, engaging, retaining, contracting, or otherwise utilizing a Florida-licensed public adjuster to inspect, evaluate or adjust any loss covered by their Sawgrass Mutual insurance policy, thereby benefitting individual members and the membership of the Company as a whole."[17] Sawgrass Mutual named "longer settlement times," "exaggerated claim settlements," and the resulting higher premiums, as reasons why policyholders should support the amendment banning public adjusters.[18] At the Meeting, Sawgrass Mutual policyholders voted to approve the proposed amendment to the by-laws, thus prohibiting members from retaining a public adjuster in any future claims.[19] According to reports, however, only nine percent of Sawgrass Mutual's total members voted at the Meeting.[20]

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[14] *About Us*, SAWGRASS MUTUAL INS. CO., http://www.sawgrassmutual.com/ (last visited Apr. 26, 2011).

[15] *Id.*

[16] *Id.*

[17] *Notice of Special Meeting of the Members*, SAWGRASS MUTUAL INS. CO. (Sept. 2010), *available at* http://www.propertyinsurancecoveragelaw.com/uploads/file/image.pdf [hereinafter SAWGRASS Letter].

[18] *Id.*

[19] *Letter to OIR Commissioner Kevin McCarty*, FLA. ASS'N PUB. INS. ADJUSTERS (Nov. 17, 2010), *available at* http://fapia.net/files/OIRComplaint-Sawgrass-Final.pdf [hereinafter FAPIA Letter].

[20] *Id.*

The amended by-laws were provided to the Florida Department of Insurance and the Insurance Consumer Advocate, who is charged with the duty "to represent consumer interests in regulatory proceedings regarding all insurance activities conducted under jurisdiction of the Department of Financial Services and the Office of Insurance Regulation."[21] When there was no response from the State regarding the amendment to Sawgrass Mutual's by-laws, the Florida Association of Public Insurance Adjusters (FAPIA) called for OIR to disapprove the change; however, OIR took the position that it did not have the authority to regulate Sawgrass Mutual's actions with respect to the amended by-laws.[22] Finally, on March 11, 2011, FAPIA joined the National Association of Public Insurance Adjusters (NAPIA) in filing a suit for a declaratory judgment against the Florida OIR.[23] The complaint alleged that the OIR does not have the authority to permit insurance companies to include a policy provision that prevents an insured from using a Florida licensed public insurance adjuster.[24] The matter is currently pending in the Circuit Court for Leon County, in Tallahassee, Florida.[25]

III. SAWGRASS MUTUAL'S PROHIBITION ON PUBLIC ADJUSTERS VIOLATES FLORIDA LAW

A. *Sawgrass Mutual's Actions Violate Florida Law Regulating Public Insurance Adjusters*

[21] *Vote held by Sawgrass Mutual: Policyholders Elect to Bar Themselves from Using Public Insurance Adjusters, But Were They Informed?*, PROP. INS. LAW BLOG (2010), http://www.propertyinsurancecoveragelaw.com/2010/10/articles/insurance/vote-held-by-sawgrass-mutual-policyholders-elect-to-bar-themselves-from-using-public-insurance-adjusters-but-were-they-informed/

[22] FAPIA Letter, *supra* note 19.

[23] Richard J. Fidei, *Public Adjusters File Suit Against Florida OIR – Update*, PROP. CAS. 360 (2011), http://www.propertycasualty360.com/2011/03/15/public-adjusters-file-suit-against-florida-oir---u.

[24] *Id.* ("According to the associations' lawsuit, the OIR has taken the position that insurers can legally prohibit policyholders from hiring licensed public insurance adjusters as a condition of insurance coverage.")

[25] This is the status as of April 26, 2011.

When Sawgrass Mutual sent the September 2010 letter to its members describing the proposed prohibition on public adjusters, it cast the public adjustment field in a negative light. Three of Sawgrass Mutual's statements in particular are disconcerting. First, Sawgrass Mutual writes that public adjusters charge a fee that is "often a percentage of 20% or more," which "reduces the amount [the policyholder] has to repair . . . damages.[26] Second, the letter says that "claims involving public adjusters frequently take substantially longer to reach a settlement."[27] And third, "because a public adjuster's fee is based upon the claim settlement amount," Sawgrass Mutual alleges that "this can encourage public adjusters to exaggerate damages," which causes higher premiums.[28] Not only do these statements bend the truth, but they also violate several Florida laws pertaining to insurance regulation.

1. Florida Administrative Code Rule 69B-220.201

All three of Sawgrass Mutual's assertions in the September 2010 letter to policyholders violate Rule 69B-220.201 of Florida's Administrative Code, which states: "*No insurer*, independent adjuster, or company adjuster *shall represent or imply to any claimant* that public adjusters are *unscrupulous* or *that engaging a public adjuster will delay* or have *other adverse effect* upon the settlement of a claim."[29] Sawgrass Mutual's statement that public adjusters may exaggerate claims because their fee is based on the claim settlement figure violates Rule 69B-220.201 as it essentially accuses public adjusters of committing insurance fraud. This is in direct contravention with the first provision in Rule 69B-220.201 prohibiting insurers from representing or implying that public adjusters are unscrupulous.

[26] SAWGRASS Letter, *supra* note 17, at 1. Sawgrass Mutual reassured its customers: "We want you to retain 100 percent of the claim settlement amount." *Id.*

[27] *Id.* at 2.

[28] *Id.*

[29] FLA. ADMIN. CODE ANN. r. 69B-220.201 (1996) (emphasis added).

Second, Sawgrass Mutual's statement in its September 2010 letter to policyholders that "claims involving public adjusters frequently take substantially longer to reach a settlement" violates Rule 69B-220.201. Admittedly, hiring a public adjuster may lengthen the claim settlement process,[30] but much of this "delay" is due to the fact that public adjusters engage in a thorough review of claims and damages to obtain the best possible settlement for their clients. Regardless of the veracity of such a statement, however, it violates Florida's Administrative Code. According to Rule 69B-220.201, "No insurer . . . shall represent or imply to any claimant that engaging a public adjuster will delay . . . the settlement of a claim."[31] By stating that claims often take longer, regardless of any truthfulness, Sawgrass has represented to policyholders that engaging a public adjuster causes delay, in contravention of Florida law.

Sawgrass Mutual's statements in the letter also violate the third clause of Rule 69B-220.201, which prohibits insurers from representing to their policyholders that utilizing a public adjuster will have any "other adverse effect upon the settlement of the claim." Asserting that a public adjuster's fee reduces what is available to pay for repairs implies to policyholders that hiring a public adjuster has a negative effect on claims—it will take dollars out of the policyholder's pocket by reducing the settlement figure—and ignores the fact that public adjusters typically win larger and more equitable settlements for policyholders. In fact, *more* money is often available for repairs with the aid of a public adjuster.[32] Therefore, Sawgrass Mutual violated Rule 69B-220.201 when it claimed hiring a public adjuster reduces the amount available for repairs because it implies utilizing a public adjuster will have an adverse effect.

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[30] *See* OPPAGA Report, *supra* note 2, at 6. It is also conceivable, however, that a public adjuster's expertise could expedite the claims process.

[31] FLA. ADMIN. CODE ANN. r. 69B-220.201 (1996).

[32] *See infra* Part IV; OPPAGA Report, *supra* note 2, at 1.

2. Section 626.854(8), Florida Statutes: Unfair and Deceptive Insurance Trade Practices

Sawgrass Mutual's statements in the letter to policyholders also violate Section 626.854 of Florida's Statutes. According to Section 626.854(8):

> It is an *unfair and deceptive insurance trade practice* pursuant to [§] 626.9541 for a public adjuster *or any other person* to circulate or disseminate any advertisement, announcement, or statement containing any assertion, representation, or *statement with respect to the business of insurance* which is *untrue, deceptive or misleading*.[33]

The September 2010 letter, which was circulated to members, contained statements respecting the business of insurance. Moreover, as described above, those statements cast aspersions on the public adjusting profession, and Sawgrass Mutual omitted salient facts, including the benefits associated with retaining a public adjuster.[34] By suggesting that public adjusters exaggerate claims for their own benefit, driving insurance costs up; by stating that enlisting a public adjuster makes the claims process longer (and failing to explain why this is sometimes true); by leaving out any of the benefits associated with obtaining a public adjuster (like higher, more equitable settlements for policyholders); and by failing to mention any of the stringent state licensing requirements to which public adjusters must adhere, Sawgrass Mutual's letter to policyholders was, at minimum, misleading and, quite plausibly, deceptive and untrue. Since the statute only requires one of these three characteristics, it is likely that a court could find the requirements set forth in Section 626.854(8) have been met here.

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[33] FLA. STAT. § 626.854(8) (2009) (emphasis added). Florida's Unfair Insurance Trade Practices Act (UITPA) was a regulatory statute designed to protect the public welfare from unscrupulous insurance practices. FLA. STAT. § 626.9541 (2011). *See also* Buell v. Direct Gen. Ins. Agency Inc, 488 F.Supp.2d 1215, 1217 (M.D. Fla. 2007).

[34] Omission is expressly mentioned in Section 626.9541 of Florida's Statutes ("Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined). FLA. STAT. § 626.9541(1) (2011) ("Unfair methods of competition and unfair or deceptive acts. The following are defined as unfair methods of competition and unfair or deceptive acts or practices: (a) *Misrepresentations and false advertising of insurance policies.* Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison . . .").

3. Requirement to Comply with Applicable Insurance Provisions per Section 624.11, Florida Statutes

Section 624.11(1) provides that "[n]o person[35] shall transact insurance in this state . . . without complying with the applicable provisions of this Code."[36] The Florida Insurance Code regulates public adjusters and expressly provides for the services of licensed public adjusters.[37] With the exception of attorneys, licensed public insurance adjusters are the only group of people who work on behalf of insured policyholders and assist in negotiating claims for damage covered by an insurance policy. Therefore, by allowing an insurance company to include a contractual prohibition against utilizing a public adjuster by an insured, OIR has eliminated a statutorily recognized and defined consumer protection service, which is contrary to Florida law.[38] The amended by-law is thus unenforceable and should be disapproved.

B. *The Sawgrass Mutual Amendment Violates the Florida Business Corporation Act*

Stock insurance companies are not motivated to provide full compensation to policyholders since their chief responsibility is to shareholders.[39] A mutual insurance company differs significantly from a stock insurance company in that the mutual insurance company is owned by its policyholders.[40] The Sawgrass Mutual situation presents a challenge because the company owes a twofold duty to each individual shareholder—as a shareholder *and* as a policyholder.

1. The Problem of the Uninformed Shareholder

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[35] "Person" is defined, in part, to include "insurer." FLA. STAT. § 624.04 (2003).

[36] FLA. STAT. § 624.11 (2003). This is the chief argument of FAPIA in its recently filed complaint in a Florida court. *See* Fidei, *supra* note 23.

[37] FLA. STAT. § 626.854 (2009).

[38] *See* Fidei, *supra* note 23.

[39] OPPAGA Report, *supra* note 2, at 10.

[40] Mutual Ins. Rating Bureau v. Williams, 189 So.2d 389, 392 (Fla. Dist. Ct. App. 1966).

Some have suggested that the public adjuster ban is valid because Sawgrass Mutual policyholders have consented to the amendment by the vote they actually cast or that was cast for them by proxy.[41] This idea lacks merit, however, because so few policyholders actually voted for the change.[42] Moreover, shareholders are notoriously uninformed, [43] a problem that has been compounded here by Sawgrass Mutual's own statements in the September 2010 letter, discussed in Section III.A of this paper, as well as the complexities inherent in the business of insurance.[44] An important additional constraint on shareholder voting is the problem of screening by boards of directors. Before an issue even gets to the shareholders for their approval, it must almost always first pass through the board of directors for approval. In the present case, one can see this problem in the way Sawgrass Mutual crafted the letter to convince shareholders to vote for the

[41] A "proxy" is the grant of authority by shareholder to someone else to vote the former's shares. F.S.A. § 607.0722 (2001); Abbey Properties Co. v. Presidential Ins. Co.,119 So.2d 74, 77 (Fla. Dist. Ct. App. 1960).The relationship created by a proxy is one of principal and agent and is subject to the duties and liabilities of agency in general. *Abbey Properties*,119 So.2d at 78. Consequently, a proxy may not vote in favor of resolutions which benefit himself at the expense of or against the principal's interest. *See* Asher v. Ruppa, 173 F.2d 10 (7th Cir. 1949). Thus if the proxies were improperly voted, or if they exceeded their authority, the proper parties to complain are the stockholders who gave the proxies. *Abbey Properties*, 119 So.2d at 78.

[42] According to reports, only 1134 of the company's 12,000 total policyholders actually participated in the vote. *Florida Public Adjuster: Sawgrass Mutual Insurance Sets Dangerous Precedent*, PR NEWS CHANNEL (2010), http://www.prnewschannel.com/absolutenm/templates/?a=3208 [hereinafter *FL Public Adjuster*] Due to a lack of information on the proxy process in the instant case, I will not delve into a proxy violations argument in this paper; however, it is possible that such a violation exists here, given the low voter turnout and misinformation.

[43] Stephen Bainbridge has summarized the role of shareholders in voting as "so weak that they scarcely qualify as part of corporate governance." *Shareholder Voting Rights*, THE ICAHN REPORT (2009), http://www.icahnreport.com/report/2009/01/shareholder-voting-rights.html. Furthermore, "[t]he list of items about which shareholders have voting rights is remarkably short. Shareholders vote annually on director elections, amendments to the corporate charter, and fundamental corporate changes, such as mergers, dissolution of the corporation, and the sale of all or substantially all of the assets of a corporation." *Id.* Shareholders are only permitted to vote on issues of large magnitude because it is thought that these are the only instances in which shareholders will be able to overcome the rational ignorance and voter apathy problems that plague the decision-making process and make voting uninformed and irrational. *FL Public Adjuster*, *supra* note 42. In the present case, it seems as if voter apathy was still a problem.

[44] "Insurance is far from the market ideals of complete information." E.I. du Pont De Nemours & Co. v. Pressman, 679 A.2d 436 (Del. 1996) (quoting Mark Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31, 54 (1989)). Policyholders do not understand how the insurance industry works; only the insurance companies and some of the state insurance departments have a relatively complete understanding of the industry. John L. Ellison, et al., *Bad faith and Punitive Damages: The Policyholders Guide to Bad Faith Insurance Coverage*, SN 050 A.L.I.-A.B.A. COURSE OF STUDY 149, 156 (2008).

amendment. Since the average policyholder knows little about his insurance policy, and likely even less about the industry as a whole, the only familiarity a policyholder might have with public adjusters may have come from reading Sawgrass Mutual's September 2010 letter—and faced with only one side of the story, a policyholder would have concluded that engaging a public adjuster is contrary to his interests.

2. Sawgrass Mutual Owes a Duty of Good Faith and Fair-Dealing to its Shareholders

The Florida Legislature has determined that the law pertaining to stock corporations is apposite to mutual insurers; thus, any duties owed to shareholders in an ordinary corporation apply to Sawgrass Mutual.[45] In general, corporate directors owe a fiduciary duty to the corporation and to the shareholders; they must act in good faith and in the best interest of the corporation and its shareholders.[46] A director is under an obligation to discharge her duties in good faith, with the care an ordinarily prudent person in a like position would exercise, and in a manner she reasonably believes to be in the best interest of the corporation.[47] The surplus of a mutual insurance company generally belongs to its members or policyholders, and distribution is usually governed by the contract or policy, together with the governing statutes and charter and by-laws of the company.[48] The discretion conferred on directors of a mutual insurance company to accumulate a permanent general surplus is not an absolute one but is "subject to the

[45] FLA. STAT. § 628.041 (2011) ("The applicable statutes of this state relating to the powers and procedures of domestic private corporations formed for profit shall apply to domestic stock insurers and to domestic mutual insurers, except: (1) As to any domestic mutual insurers incorporated pursuant to chapter 617 [not-for-profit corporations], which chapter shall govern such insurers when in conflict with chapter 607; and (2) When in conflict with the express provisions of this code).

[46] FLA. STAT. § 607.0830(1)(a) (2011).

[47] *Id.* § 607.0830(1)(b)–(c).

[48] 44 C.J.S. Insurance § 181 (2011).

requirements of good faith and obedience to law established as generally controlling the decision of directors of corporations in like situations."[49]

Florida courts have held that a corporate officer's failure to disclose material information to the corporation and shareholders may breach the duty of good faith owed.[50] Because the information in Sawgrass Mutual's September 2010 letter was crucial in determining how a policyholder would vote on the proposed amendment, it may be deemed material. By omitting salient facts associated with public adjusting in the September 2010 letter, Sawgrass Mutual's directors misrepresented information to their shareholders and thus breached that duty of good faith and fair dealing. Moreover, because directors are under an obligation to discharge their duties with the care an ordinarily prudent person in a like position would exercise, and in a manner reasonably believed to be in the best interest of the corporation, Sawgrass Mutual arguably violated this obligation as well—failing to provide full and balanced information about public adjusters is neither what the ordinary prudent person would do nor what was in the best interest of the corporation—the corporation should always be honest and forthcoming with shareholders.

3. Sawgrass Mutual Owes a Duty of Good Faith and Fair-Dealing to its Policyholders

An insurance policy is different from other products because of the "special relationship" between the insurance company and the policyholder.[51] The special relationship consists of a several different elements, including:

[49] *Id. See also* White Fuel Corp. v. Liberty Mut. Ins. Co., 46 N.E.2d 548 (Mass. 1943).

[50] Rehabilitation Advisors, Inc. v. Floyd, 601 So.2d 1286, 1288 (Fla. Dist. Ct App.1992).

[51] Ellison, *supra* note 44, at 151.

1. The duty of good faith and fair dealing inherent in every insurance policy and between insurance companies and their policyholders;

2. The fiduciary duties insurance companies owe to their policyholders;

3. The public service nature of insurance;

4. The imbalanced bargaining position between an insurance company and its policyholder;

5. The information imbalance between insurance companies and their policyholders;

6. The present payment of money in exchange for a promise to pay the costs of a future event which may or may not occur; and

7. The financial motivation for the insurance company to delay or deny delivery of its promise.[52]

As a fiduciary—a person or entity "having duties involving good faith, trust, special confidence, and candor towards another"—Sawgrass Mutual owed their shareholder/policyholders the full details relevant to public adjusting.[53] While this duty is owed to individuals in both capacities in the mutual insurance framework, it is more imperative in the context of policyholder rights because the public adjuster ban is more likely to affect the individual as an insured. Moreover, Sawgrass Mutual's shareholders are policyholders first and foremost—the average shareholder signed an insurance contract not as a business investment

[52] *Id.* at 152.

[53] BLACK'S LAW DICTIONARY 625 (6th ed. 1990). Insurance companies themselves have acknowledged, through litigation documents and other court procedures, that they are fiduciaries. For instance, Liberty Mutual reveals that "the cases have readily acknowledged that the insurer-insured relationship gives rise to a fiduciary duty." Memorandum of Law in Support of Plaintiffs Response, at 6, July 13, 1993, Liberty Mut. Ins. Co. v. Paper Mfrs. Co., 753 F. Supp. 156 (E.D. Pa. 1990) (No. 90-3787). St. Paul Fire and Casualty concedes that "St. Paul owes a fiduciary duty to [the plaintiff]. . . . We owe a fiduciary duty to every one of our policyholders." Motion for Summary Judgment Hearing, Transcript, at 24, Jan. 18, 1994, Richland Valley Prods. v. St. Paul Fire & Cas. Co., (Wis. Cir. Ct.) (No. 92CV149), *rev'd*, 548 N.W.2d 127 (Wis. Ct. App. 1996) (No. 94-1837). Insurance companies' advertisements also contribute to the fiduciary relationship between the insurance company and the policyholder: State Farm promises to be there, like "a good neighbor;" Allstate assures policyholders that they are in "good hands;" and Traveler's Insurance reminds its customers that they are "Under the Umbrella."

but as a means of protection—to safeguard's one's investments rather than to augment them.[54] In fact, Sawgrass Mutual states on its website that the company "exists solely to serve the insurance needs of our policyholders, not to provide investment profits to shareholders."[55]

Even if Sawgrass Mutual could successfully argue that the company and its shareholders, as a whole, benefitted from the prohibition on public adjusters, it is unlikely it could convince a court that *policyholders* benefit from the amendment. Moreover, Sawgrass Mutual would be hard-pressed to demonstrate that providing misinformation to its shareholder/policyholders was done in "good faith" and in observance of its duties of trust, special confidence, and candor towards those shareholder/policyholders. Because Sawgrass Mutual breached that duty, the amendment should be disapproved.

4. Sawgrass Mutual's Statements May Amount to Constructive Fraud

In addition, it is possible a court could find that Sawgrass Mutual's actions amount to constructive fraud. According to a Florida court:

> [C]onstructive fraud may exist independently of an intent to defraud. It is a term which is applied to a great variety of transactions that equity regards as wrongful, to which it attributes the same or similar effects of those that follow from actual fraud and for which it gives the same or similar relief. Thus, constructive fraud is deemed to exist where a duty under a confidential or fiduciary relationship has been abused.[56]

Because there is a fiduciary relationship between Sawgrass Mutual and its shareholders/policyholders,[57] the insurer's misleading statements could be held to amount to

[54] It seems highly improbable that anyone would become a policyholder as a means of investing in a property/ casualty insurer in Florida, a state with frequent catastrophes. *See supra* notes 2–5 and accompanying text.

[55] *Home*, SAWGRASS MUTUAL INS. CO., http://www.sawgrassmutual.com/ (last visited Apr. 26, 2011).

[56] Allie v. Ionata, 466 So.2d 1108 (Fla. Dist. Ct. App. 1985) (citing Douglas v. Ogle, 85 So. 243 (Fla. 1920); Harrell v.Branson, 344 So.2d 604 (Fla. Dist. Ct. App.), *review denied*, 353 So.2d 675 (Fla. 1977)).

[57] *See supra* note 53 and accompanying text. *See also* Doe v. Evans, 814 So.2d 370, 374 (Fla. 2002) ("A fiduciary relationship exists when one is under a duty to act, or give advice, for the benefit of another upon matters within the

constructive fraud, which "may be based on a misrepresentation or concealment, or . . . consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party."[58]

IV. THE AMENDMENT IS BAD PUBLIC POLICY

Sawgrass Mutual's by-laws, as amended, run counter to the Florida Supreme Court's holding in *Larson v. Lesser*,[59] a 1958 decision which recognized the value of public adjusters. Concluding that a statute prohibiting public adjusters from soliciting business was unconstitutional, the Court wrote:

> [T]the privilege of engaging in the business of a public adjuster has been recognized as a valid and legitimate occupation by legislative definition. Search as we have done in this record, we fail to find any reasonable basis whatever in the public health, welfare or safety that justifies the imposition of a restriction which, according to this record, would have the practical effect of prohibiting the appellee from actually engaging in the business which the Legislature itself recognizes as being perfectly legitimate.[60]

Public adjusters are defined under Florida law as persons, other than licensed attorneys, who, for compensation, prepare or file an insurance claim form for an insured or third-party claimant in negotiating or settling an insurance claim on behalf of the insured or third party.[61] Public adjusters are frequently veteran insurance company claims adjusters who understand how insurance

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scope of that relation."); Masztal v. City of Miami, 971 So.2d 803, 809 (Fla. Dist. Ct. App. 2007) ("An implied fiduciary relationship will lie when there is a degree of dependency on one side and an undertaking on the other side to protect and/or benefit the dependent party."); Harrell v. Branson, 344 So.2d 604, 607 (Fla. Dist. Ct. App. 1977) ("A fiduciary relation may result from an offer of assistance where the nature of the proposal is one that is naturally calculated to repose confidence and trust in the one making the proposal. The relation and correlative duties need not be legal but may be moral, social, domestic or merely personal.").

[58] Levy v Levy, 862 So.2d 48, 53 (Fla. Dist. Ct. App. 2003). The elements of a cause of action for breach of fiduciary duty are (1) the existence of a duty, (2) breach of that duty, and (3) damages flowing from the breach. Rocco v. Glenn, Rasmussen, Fogarty & Hooker, P.A., 32 So.3d 111, 116 n. 2 (Fla. Dist. Ct. App. 2009).

[59] 106 So.2d 188 (Fla. 1958).

[60] *Id.* at 192.

[61] FLA. STAT § 626.854 (2009).

companies operate and can negotiate property claims to get the most out of a policy.[62]

According to the National Association of Public Insurance Adjusters (NAPIA):

> A typical fire or flood policy contains hundreds of provisions and stipulations, constantly changing forms and endorsements, and many complex details such as inventory appraisals and real estate evaluations that are required in case of a loss. Most policyholders do not know that the burden of proof is theirs. Public Adjusters know the insurance business and are familiar with all procedures so they can work quickly to expedite payments.[63]

As described above, the process of filing and negotiating a claim can be a frustrating one for the average policyholder for several reasons. First, most homeowners have, at best, a vague idea of what their insurance actually covers.[64] Second, once the policyholder files a claim, the insurance company sends an independent adjuster—who, as a representative of the insurance company's interests, is not very "independent"—to evaluate the claim.[65] It is not uncommon for a policyholder to learn that certain claims are not covered due to clauses or omissions in insurance coverage, and, already distressed from their misfortunes, many policyholders do not have the desire (or the resources) to dispute the insurance company's estimate of the loss.[66] So when disaster strikes, it may be beneficial to retain a professional public adjuster to advocate an insurance claim, since these adjusters specialize in combing over the insured's damaged property and policy to ensure that the insurer does not run away from a valid claim.[67]Although there is no guarantee that public adjusters will be able to obtain a higher settlement than the policyholder

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[62] Terri Cullen, *Why Insurance Mediators Help When Disaster Strikes*, WALL ST. J., Dec. 12, 2002.

[63] NAPIA, *supra* note 8.

[64] Cullen, *supra* note 62.

[65] *Id.*

[66] *Id.*

[67] *Id.*

could acting alone, the Florida Office of Insurance Regulation's statistics suggest that is generally the reality.[68] According to the Office of Program Policy Analysis and Government Accountability (OPPAGA) Report, policyholders with public adjuster representation typically received higher settlements than those without public adjusters.[69]

While some have suggested that policyholders should be wary of unlicensed public adjusters, the profession is closely regulated by state departments of insurance. [70] In Florida, there is a comprehensive system of regulations in place to address public adjusting.[71] These laws cover licensing, compensation, and solicitation, including forms of advertising and contract drafting.[72] Florida requires applicants for public adjuster licenses to pass an exam, have experience or training related to adjusting, post a $50,000 surety bond, and submit fingerprints for a criminal history review.[73] Licensed public adjusters must complete twenty-four hours of continuing education every two years, as well as comply with comprehensive ethical

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[68] OPPAGA, *supra* note 2, at 7. *See also* Chip Merlin, *Insurance Company Declares War on Public Adjusters*, PROP. INS. LAW BLOG (2010), http://www.propertyinsurancecoveragelaw.com/2010/10/articles/insurance/insurance-company-declares-war-on-public-adjusters.

[69] OPPAGA, *supra* note 2, at 7 ("Policyholders that filed catastrophe claims in 2008 and 2009 [with the aid of a public adjuster] generally received larger insurance settlements than policyholders that did not hire these persons. The typical payment to a policyholder represented by a public adjuster was $22,266 for claims filed in 2008 and 2009 related to the 2004 hurricanes (see Exhibit 6). In contrast, policyholders who did not use a public adjuster received typical payments of $18,659. The difference in payments was larger for claims related to 2005 hurricanes, with public adjuster claims resulting in payments that were 747% higher.").

[70] Cullen, *supra* note 62 ("But be warned, public adjusters aren't all licensed professionals. In times of tragedy or widespread storm damage, con artists claiming to be public adjusters often canvass neighborhoods hoping to convince homeowners to allow them to 'manage' their insurance claims—only to abscond with the insurance money once the claim is made."). As of January 2011, forty-four states license public adjusters, with another two states presently considering it. *Fall Bulletin*, NAPIA (2010), at 4, *available at* http://www.napia.com/news/documents/Fall2010Bulletin.pdf.

[71] FLA. ADMIN. CODE ANN. r. 69B-220.201 (2006).

[72] FLA. ADMIN. CODE ANN. r. 69B-220.051 (2006).

[73] OPPAGA, *supra* note 2, at 2.

requirements[74] and recently enacted consumer protection provisions.[75] According to the OPPAGA Report, Florida's public adjuster licensing requirements appear to be similar to or more stringent than those of other states; Florida has the highest per capita proportion of public adjusters, and complaints and regulatory actions against Florida's public adjusters are generally low.[76]

Many policyholders need someone working on their behalf to get what is due under the terms of a policy not only because of complicated policy documents but also because "insurance companies routinely underestimate damage amounts and fail to pay for or disclose coverages available under the policy."[77] The book *From Good Hands to Boxing Gloves* describes the profit-boosting business strategy Allstate employed from 1992 until 1997: the insurer would make a low settlement offer after a policyholder filed a claim; if the policyholder accepted, Allstate treated the person with its proverbial "good hands," but if the policyholder protested or hired a lawyer, Allstate fought back with "boxing gloves."[78]

Complaints filed in state insurance departments and civil court cases further illuminate the practice of insurers.[79] According to court records in Florida, California, Illinois, Mississippi, New Hampshire, and Tennessee, property insurers systematically deny and reduce their policyholders' claims and refuse to pay market prices for homes and replacement contents, use computer programs to cut payouts, change policy coverage with no clear explanation, ignore or

[74] FLA. ADMIN. CODE ANN. r. 69B-220.201 (2006).

[75] OPPAGA, *supra* note 2, at 2.

[76] *Id.* at 4–5.

[77] Merlin, *supra* note 68.

[78] *See generally* DAVID BERARDINELLI, FROM GOOD HANDS TO BOXING GLOVES: THE DARK SIDE OF INSURANCE (2007).

[79] David Dietz & Darrell Preston, *The Insurance Hoax*, BLOOMBERG NEWS, Sept. 2007.

alter engineering reports, and sometimes ask their adjusters to lie to customers.[80] As thousands of homeowners have found, insurers make low offers—or refuse to pay at all—and then dare people to fight back.[81] By eliminating policyholders' access to the invaluable assistance of public adjusters, Sawgrass Mutual has taken away the right of policyholders to have someone fight for them when they most need it.[82] Because there is a clear role for public adjusters in the realm of property insurance, Sawgrass Mutual's attempt to limit its members' right to seek professional help in insurance adjusting is against policyholders' best interests and against public policy in the state of Florida.

In addition, the prohibition on public adjusters may be so unconscionable it *violates* the state's public policy. The Florida Supreme Court has held that "an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void."[83] Because the Sawgrass Mutual amendment violates valid Florida statutes, it should be declared invalid.

V. CONCLUSION

An insurance policy is a binding contract between two consenting parties, and in a free market, the policyholders of Sawgrass Mutual theoretically have the option of agreeing or going elsewhere for insurance.[84] But in a system where insurance of any kind is hard to obtain—and

[80] *Id.*

[81] *Id.*

[82] *FL Public Adjuster*, *supra* note 42. Frank Fortson, a licensed and certified public adjuster with Tutwiler and Associates, called the amendment "bad public policy, plain and simple," which "sets a dangerous precedent." *Id.* Fortson also expressed a concern for a slippery slope: "What are they going to vote to eliminate next, the use of attorneys? The right for policyholders to choose their own inspectors?" *Id.*

[83] Local No. 234, United Assoc. of Journeymen & Apprentices of Plumbing & Pipefitting Industry v. Henley & Beckwith, Inc., 66 So.2d 818, 821 (Fla. 1953)

[84] Merlin, *supra* note 68.

property insurance in Florida no less so due to the variety of natural and manmade disasters that plague that state[85]—it is unfair to limit insureds'choices in insurance coverage as Sawgrass Mutual has done. The purpose of having state departments of insurance and consumer protection is to ensure a fair marketplace—and the OIR should make sure this occurs.

Moreover, the actions of Sawgrass Mutual set a dangerous precedent that has already been followed—a bill pending in the Florida Legislature prohibits the use of public adjusters for customers of Citizens Property Insurance, the state-run high risk pool.[86] The three statements in Sawgrass Mutual's September 2010 letter violate a host of state insurance regulations. Because there is no law or regulation which differentiates mutual insurance companies from other insurers or releases them from compliance with the state insurance code, the laws of Florida regarding the business of insurance are binding upon Sawgrass Mutual.[87] Therefore, the Florida OIR has a duty to regulate Sawgrass Mutual's actions, as the latter has violated state law.[88]

Because OIR has yet to acknowledge, by disapproving Sawgrass Mutual's amended by-laws, that public insurers are members of a valid, licensed occupation, and that insurers may not prohibit policyholders from seeking the aid of a properly licensed public adjuster, there are two courses of action that FAPIA and NAPIA may pursue to aid in remedying this situation. First, the adjuster associations could file a petition in a state administrative court to require OIR to

[85] *See supra* notes 2–5 and accompanying text.

[86] S.B. 1714 (Fla. 2011). Citizens Property Insurance is Florida's largest single property insurer with nearly 1.3 million policies. Michael Peltier, *Citizens' Bill to Raise Premiums Clears First Hurdle in Senate*, MIAMI HERALD, Mar. 30, 2011. Citizens Property Insurance Corporation is a governmental entity created under section 627.351(6), Florida Statutes (2004), to provide insurance for residential and commercial property for property owners who are unable to procure insurance through the private insurance marketplace. Citizens Property Ins. Corp. v. Ashe, 50 So.3d 645 (Fla. Dist. Ct. App. 2010).

[87] Merlin, *supra* note 68.

[88] FLA. STAT. § 624.317 (2005) (mandating that, if OIR has reason to believe any person has violated or is violating any provision of the code, or upon the written complaint by any interested party indicating any such violation may exist, OIR *shall* conduct such investigation of the person's accounts, documents, and transactions as OIR deems necessary) (emphasis added).

formally consider Sawgrass Mutual's prohibition on public adjusters.[89] Second, the adjuster associations could enlist a Sawgrass Mutual policyholder to bring a test case.[90] By hiring a public adjuster and, presumably, having the claim rejected for violating the terms of the policy, the same objective might be achieved—OIR would be forced to consider Sawgrass Mutual's amended by-law or the Florida judiciary could determine an equitable resolution.

Given the comprehensive regulations in place for public adjusters, Sawgrass Mutual's wholesale ban is unnecessary. More importantly, the manner in which the amendment passed makes it voidable as a matter of law and public policy. The Florida OIR should disapprove Sawgrass mutual's prohibition on public adjusters, and if it remains unwilling to do so, the Florida courts must intervene.

[89] As noted above, this appears to be the course the adjuster associations have chosen. As of writing this paper, OIR has responded to FAPIA's complaint with a motion to dismiss on the basis that "the Adjuster Associations have yet to exhaust their administrative remedies and because they lack standing to bring the instant complaint for a general declaratory judgment, which essentially requests an advisory opinion as to the general powers of the Office in regulating mutual insurance companies." *See* Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment, 2011-CA-000564 (Fla. Cir. Ct. Mar. 25, 2011), ¶ 3, *available at* http://www.flains.org/index.php?searchword=motion+to+dismiss&ordering=newest&searchphrase=exact&limit=50&Itemid=5&option=com_search.

[90] An interesting question that I was unable to answer through my research was whether and how Sawgrass Mutual has incorporated the public adjuster prohibition into the insurance contract—for if the ban on public adjusters is not in the policy, it is unclear whether the amended by-laws, which address how the company operates, actually bind the policyholder. Unless the insurance contract contains the public adjuster ban, it seems likely Sawgrass Mutual would have difficulty enforcing the prohibition. In addition, how Sawgrass Mutual informs its new policyholders of the prohibition on retaining public adjusters could be crucial in ascertaining the amendment's impact. And finally, if there is a new policy, whether OIR has approved it is another consideration for the adjuster associations to bear in mind going forward.