CAUSE NO. 11-60458

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FAITH JAMES — PLAINTIFF/APPELLANT

VS.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — DEFENDANT/APPELLEE

On appeal from the United States District Court
for the Southern District of Mississippi
(4:07-CV-00137-HTW-LRA)

AMICI CURIAE PETITION IN SUPPORT OF STATE FARM'S PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

COME NOW, the Amici Curiae, Property Casualty Insurers Association of America ("PCI") and Republic Underwriters Insurance Company ("Republic), by and through the undersigned counsel, and, pursuant to Fed. R. App. P. 26.1 represents as follows:

1. PCI is a non-profit corporation and no parent company or other publicly traded entity owns any interest in PCIAA.

2. Republic Underwriters Insurance Company is a corporation organized pursuant to the laws of Texas and is a wholly owned subsidiary of Republic Companies, Inc., a non-public Delaware corporation. Republic Companies, Inc. is a wholly owned subsidiary of Delek Finance US, Inc., a non-public Delaware

corporation. No publically traded entity owns more than 10% of Republic Underwriters Insurance Company stock.

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I. STATEMENT OF INTEREST

Property Casualty Insurers Association of America ("PCI"), is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for $195 billion in direct written premiums, approximately 39% of the nation's property casualty insurance. PCI member carriers account for 52% of all personal auto premiums written in the United States and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. PCI has the broadest cross-section of insurers of any national property casualty trade association. In 2013, PCI members accounted for 38% of the homeowners' insurance premiums in Mississippi, 48.8% of the personal automobile insurance policies issued in Mississippi and 44.8% of the state's total personal lines. 51.3% of Mississippi's commercial premiums and 36.2% of Mississippi's commercial property premiums are written by PCI members. In light of its involvement in Mississippi, PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

Republic Underwriters Insurance Company ("Republic") is an insurance company organized pursuant to the State of Texas and it and its affiliates do business in Mississippi selling a diversity of insurance products, including but not limited to automobile and property insurance. As a result, Republic handles claims in Mississippi and is interested in the outcome of this case as it will have a definite impact on Republic's business.

II. RULE 29(c)(5) STATEMENT

As required by Federal Rule of Appellate Procedure 29(c)(5), Amici state that: (A) no party's counsel has authored any portion of this Petition, in whole or in part and that the Undersigned counsel for Amici wholly authored this Petition; (B) no party or party's counsel contributed any funds toward the preparation or submission of this Petition; and (C) no person, other than Amici and/or their counsel, has contributed funds toward the preparation or submission of this Petition.

III. ARGUMENT

A. INTRODUCTION

The opinion rendered by the panel majority on June 21, 2013 impermissibly crafts a standard for assessing claims alleging bad faith handling which is not only a

departure from Mississippi law but violates State Farm's and insurers' constitutional rights to due process in that it is void for vagueness. Employing a heretofore unknown segmented, or random interval, analysis of the claims handling process, the majority opinion determined, as a matter of law, that State Farm, for three periods of time over a two year period, "lacked an arguable or legitimate reason for its delay", despite finding that: 1) State Farm had not breached the contract and 2) State Farm had a legitimate and arguable reason for the remainder of the claims handling period. Because the Court parsed through the actions of State Farm, period by period, accepting some activity as reasonable, while rejecting or ignoring other activity, the opinion leaves carriers completely in the dark with regard to how an investigation should be handled, or when claims should be paid. In addition, by not defining the method employed, or to be employed going forward, the panel has left it to the unguided discretion of judges and juries, and the attorneys seeking to persuade them, to determine how segments, or interval time periods, should be defined and which actions within those segments are to be considered for purposes of the analyzing bad faith claim handling allegation. The lack of any definitive standard violates the rule against vagueness and, therefore, violates State Farm's and insurers' Due Process rights.

In addition, by creating a standard for reviewing claims handling which lacks any definable criteria, the majority opinion will certainly have far reaching effects on the insurance industry and public as a whole. The lack of any predictability regarding claims handling, in the event the opinion is not withdrawn, could result in increased costs for doing business in Mississippi which may lead to upward pressure on the pricing and availability of insurance products in the state. It will surely also result in overburdened claim handling. Further, the opinion implicates claims handling in all cases where an insurer is investigating any aspect of a claim. The result of the majority panel's adoption of a "standard-less standard" is unpredictability. As such, public policy dictates that the majority panel's opinion be withdrawn and the district court's decision be affirmed.

B. THE SEGMENTED ANALYSIS CREATED BY THE MAJORITY IS VOID FOR VAGUENESS

As noted by Judge Garza in his dissent, there is no support in Mississippi law for the period-by-period examination employed by the panel majority in analyzing State Farm's investigation. (Dissent, p. 26). Rather, Mississippi law dictates that a carrier's investigation be weighed as a whole when determining whether the investigation lacked an arguable or legitimate reason.[1] By departing from

[1] See generally *Pilate v. Am. Federated Ins. Co.*, 865 So. 2d 387, 398 (Miss. Ct. App. 2004) (whether carrier's conduct so egregious to warrant punitive damages determined by examining

established Mississippi law, the panel majority has created[2] a rule which is void for vagueness.[3]

"[N]or shall any state deprive any person of life, liberty or property without due process of law." *U.S. Constitution, Amendment XIV.* The Due Process Clause has long and consistently been held to bar laws that are unduly vague, i.e., that do not give fair notice of the conduct proscribed or that entrust enforcement to the unguided discretion of courts and juries.[4] A rule is said to be unlawfully vague when:

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entire investigation); *Peoples Bank of South v. BancInsure, Inc.,* 753 F.Supp. 2d 649, 658, n. 9 (S.D.Miss. 2010) (where acts involved several different time periods, court looks at entire investigation to determine whether conduct justified punitive damages).

[2] Of course, this Court is bound to avoid creating or modifying state law. *SMI Owen Steel Co. v. Marsh USA, Inc.,* 520 F.3d 432, 442 (5th Cir. 2008).

[3] This Court is *Erie*-bound to follow Mississippi. *SMI Owen Steel Co.,* 520 F.3d at 442. Heretofore, Mississippi law has taken an over-arching view of the claim investigation when determining whether arguable reason exists. *See Pilate* and *Peoples Bank,* fn. 1, *supra.* Because there is no support for the majority panel's segmented analysis in Mississisppi law, vacation and affirmance of Judge Wingate's decision in favor of State Farm would cure the constitutional problems with the majority panel's decision without addressing them, which is the preferred method of appellate review. *Lorilland v. Pons,* 434 U.S. 575, 577, 98 S.Ct. 866, 868 (1978); *U.S. v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 369-70, 91 S.Ct. 1400, 1404-05 (1971).

[4] *Giaccio v. State of Pennsylvania,* 382 U.S. 399, 402-03, 86 S.Ct. 518, 520-21 (1966); *Hill v.Colorado,* 530 U.S. 703, 732. 120 S.Ct. 2480, 2498 (2000)(holding statute is impermissibly vague where it fails to provide people of average intelligence a reasonable opportunity to understand what conduct it prohibits or if it authorizes or even encourages arbitrary and discriminatory conduct); *Chicago v. Morales,* 527 U.S. 41, 58-63, 119 S.Ct. 1849, 1860-62 (1999)(striking down loitering ordinance which was not sufficiently clear to allow public to anticipate proscribed conduct and which gave law enforcement unfettered discretion in

> "it either forbids or requires an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application."[5]

The panel majority, clearly, departed from Mississippi law to employ a segmented analysis of State Farm's claim handling and, in doing so, arbitrarily defined the "segments", or periods of time, during which it would analyze State Farm's investigation. The panel did not explain how it selected or defined the periods within which the claims investigation would be analyzed for delay. Nor did the panel define the characteristics, going forward, to be considered when looking at a claims investigation. Clearly, by failing to articulate any reasoning for its decision to segment the claims handling as it did and by failing to give any guidance on how investigations are to be examined going forward or how it sliced the investigation, the panel majority has made it impossible for insurers to avoid the conduct being proscribed.

In addition, the majority accepted some actions during a chosen segment while rejecting or not considering others during the same segment, all without providing any explanation as to why certain actions during a given period were not

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enforcement).

[5] *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926).

considered.[6] The result is a standard which is so vague that no one can predict what actions will be sufficient or how an investigation might be segmented.

Finally, the analysis employed by the panel majority leaves to the discretion of judges and juries, with no guidance on the standard, to determine when and how to segment a claims investigation and to determine which actions within an investigation will be sufficient to pass scrutiny. The end result will certainly be a chaotic mess. Attorneys will seek to "cherry-pick" certain time intervals and actions within each investigation that allegedly demonstrate bad faith delay and judges will certainly differ widely as to the evidence they will allow a jury to consider. Because the standard employed by the majority panel, namely the "segmented" analysis of the claims handling process, lacks sufficient clarity as to avoid being unconstitutionally vague, the rule is in violation of the Due Process Clause's prohibition against vagueness and must be vacated.

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[6] Specifically, as noted by Judge Garza, the majority seemingly ignored several communications between State Farm's adjuster and Ms. James during the period July 20, 2006 until October 4, 2006, ignored the outstanding medical record requests during this time, the follow up regarding those requests and the overall nature of the inquiry, i.e., whether the injuries were the result of the accident. (Dissent, pp. 22-23). The panel majority also chose to overlook the communication between State Farm and Ms. James attorney during the period January 17, 2007 through July 11, 2007 stating that State Farm had not "specifically" told her attorney about why it needed the medial records, despite previous communication regarding State Farm's concern about pre-existing injuries and additional communication during the specific segment. (Dissent, pp. 23-25).

C. PUBLIC POLICY CONSIDERATIONS

"Chaos is a name for any order that produces confusion in our minds."[7]

The segmented analysis employed by the panel majority in determining that State Farm had an arguable and legitimate reason for delay during certain periods of time but lacked an arguable reason for delay during other periods of time, because it is completely without standards. This yields a dangerous unpredictability which, in addition to being unconstitutional, could have far-reaching negative impacts on the insurance industry and public. The division of State Farm's claims investigation into arbitrary intervals, without any objective guidance as to how those intervals were selected will certainly lead to unpredictability throughout the insurance industry. For instance, when an insured fails to respond to a request for a personal property form in a fire investigation and the insurer cannot adjust the claim without that information, how many times, how often and using what method must the carrier follow up with the insured to obtain the form before intervals of time will be deemed as periods of delay without an arguable or legitimate reason? When a carrier has credible evidence that leads to an insured being investigated for fraud, must the carrier pay the claim if the external fraud investigation results in a time

[7] George Santayana, *Dominations and Powers: Reflections on Liberty, Society and Government*, bk. 1, pt. 1, ch. 1 (1951).

interval during which the carrier is waiting for information specifically requested from the insured? Must an insurer make contact every day with an insured during the course of an investigation? Will an insurer be charged with an insured's failure to sit for an examination under oath? Will an insurer be charged with responsibility for delays caused by the insured's attorney or public adjuster?[8] The only thing predictable about the majority panel's analysis is its unpredictability.

In addition, the practical effect of the panel's decision is to over-burden the claims handler, who now must wonder whether her actions are sufficient to avoid judicial scrutiny? Because there is no guidance as to how investigatory time periods will be divided for purposes of analyzing bad faith investigation claim, selection of segments, in the future, will certainly be arbitrary. How far will it go? Without any guidance, insureds and attorneys representing them might argue that a carrier lacked an arguable reason for delay on a day to day basis. The only way to conclusively avoid the proscribed "unreasonable" delay is to "over-handle" the claim by taking

[8] Mississippi law holds that there is no fiduciary duty between an insurer and its insured in a first party contract setting. *Szumigala v. Nationwide Ins. Co.*, 853 F.2d 274, 280 (5th Cir. 1988). By making State Farm responsible, seemingly, for Ms. James' failure to provide information through her attorney and the attorney's delay, the majority panel is setting Mississippi insurance law on its ear. *See e.g Liberty Mut. Ins. Co. v. McKneely*, 862 So.2d 530, 534-35 (Miss. 2003)(holding carrier is not required to disprove any possibility that claimant continued to suffer a workplace injury; carrier only obligated to perform prompt and adequate investigation of the claim and deal with claimant in good faith; claimant bears burden of proving the compensability of her injury; finding medical questions as to causation of condition arguable reason)

documented action every day, making contact with the insured every day, seeking to obtain information every day, whether necessary or not. Given the number of claims made and handled in this state, much less across the nation, working a claim file each day is not only impractical and unnecessary but impossible. Not to mention that such a result would be cost prohibitive.

The bottom line is that the opinion in its current form which arbitrarily and unpredictably segments State Farm's claims handling into various, undefined periods of time and which finds State Farm acted reasonably during some periods and without an arguable reason during other periods leads to an uncertainty which could then lead to upward pressure on pricing and the availability of insurance products in this state. Further, this would almost certainly lead to an explosion of new litigation. Under this "new", unprecedented and unpredictable standard, plaintiffs can allege unreasonable claim handling in every case and have some chance of success in every case, as every investigation takes time. Regardless of how well the claim is handled, insurers would face unfair pressure to pay the plaintiffs' demands rather than face a trial or appeal in which liability would be based on vague and unpredictable standards about the reasonableness of their claim handling during arbitrarily selected segments of the claim process. The general public could suffer, facing higher prices for insurance and fewer products available

for purchase as insurers address spiraling costs arising from dealing with the unpredictability of this standard.

Because the panel majority's opinion employs what can only be described as a "standard-less" standard, the resulting dearth of any defined parameters for handling an ongoing claims investigation will certainly have far reaching negative effects on the industry and the public alike as well as claims handling specifically. Pandora's box hasn't been completely opened, however, and vacation of the panel majority's decision in favor of reliance on existing Mississippi law would shut same before the damage is done.

IV. CONCLUSION

In short, the panel majority's novel use of a segmented analysis to determine whether State Farm's claims investigation was proper is not only a departure from established Mississippi law but is in violation of State Farm's and insurers' Due Process rights. Standards, rules and statutes all must be sufficiently clear so as to allow persons of ordinary intelligence to predict and avoid the proscribed conduct. What results from the majority's decision is complete unpredictability as there are no guidelines for how segments will be defined, no limits on what periods are to be considered and no rationale for what actions will be considered.

In addition, unintended consequences will certainly result from the imposition of an arbitrary and "standard-less" standard is will negatively impact the insurance industry and public as a whole. Claims handlers will be at a loss to define acceptable contact and how often they take specific action on a claim. Carriers will be unable to predict how many claims handlers will be required to avoid any the passage of time periods that may later be alleged to constitute delay without arguable or legitimate reason. Litigation concerning these issues will vastly increase. The public may be harmed by an negative impacts on pricing and insurance product availability caused by the "standard-less" standard. Accordingly, the panel majority's opinion should be reheard and vacated and the district court's decision to grant State Farm summary judgment, in accordance with Mississippi law, should be affirmed.

RESPECTFULLY SUBMITTED, this the 26th day of July, 2013.

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Property Casualty Insurers Association of America and Republic Underwriters Insurance Company certify that on July 26, 2013, I served two true and correct copies of the foregoing Amici Curiae Petition in Support of State Farm's Petition for Rehearing and Petition for Rehearing *En Banc,* one by United States mail, postage prepaid, and one by email upon the following:

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I further certify that on the same date, I filed the foregoing Amici Curiae Petition in Support of State Farm's Petition for Rehearing and Petition for Rehearing *En Banc*, electronically with the Clerk of the United States Court of Appeals for the

Fifth Circuit, using the Court's CM/ECF electronic filing system.

THIS the 26th day of July, 2013.

BY: /s/ *B. Wayne Williams*
B. WAYNE WILLIAMS (MB#7051)

CERTIFICATE OF COMPLIANCE

1. This Petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 29, and 32(c)(2), excluding the portions of the Petition exempted by Federal Rule of Appellate Procedure 32.

2. This Petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word 2013 in 14-point Times New Roman font for text and 12-point Times New Roman font for footnotes.

This the 26th day of July, 2013.

BY: /s/ *B. Wayne Williams*
B. WAYNE WILLIAMS (MB#7051)