SUPREME COURT OF FLORIDA

CASE NO. 67,385

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

vs.

GEORGE POHLMAN,

Respondent.

ON CERTIFIED CONFLICT FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF OF PETITIONER

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INTRODUCTION

This is a petition for review of a reversal of a summary final judgment based on this Court's conflict jurisdiction. Petitioner, FIREMAN'S FUND INSURANCE COMPANY ("Fireman's Fund"), is contemporaneously submitting an appendix.

Record references contained in this brief are designated "R" followed by a page number reference. References to petitioner's appendix are designated "AA" followed by a page number reference.

All emphasis in this brief is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the entry of a summary final judgment in favor of all defendants in a declaratory judgment action wherein the trial court ruled that no uninsured motorist coverage was available to the respondent as a matter of law (R. 184).

Respondent, GEORGE W. POHLMAN d/b/a GEORGE POHLMAN SHELL SERVICE AND INDUSTRIAL PARK SHELL, was insured with petitioner, Fireman's Fund, pursuant to a Commercial-Gard Portfolio Insurance Policy. The inception date was March 1, 1979 and the expiration date was March 1, 1982 (AA. 1-2). This commercial lines policy included property coverage, general liability coverage, certain optional coverages, and both business auto and garage keepers liability (AA. 1-18).

The respondent, George W. Pohlman, had a separate policy of insurance with another company insuring his motorcycle that was involved in the accident at issue (AA. 19). Mr. Pohlman rejected uninsured motorist coverage on the motorcycle (AA. 19-20). Further, the respondent did not believe he had uninsured motorist coverage on the motorcycle with Fireman's Fund (AA. 21).

Mr. Pohlman had two other motorcycles, each of which were insured with other insurance companies, and each of which had minimum uninsured motorist limits available (AA. 22-23).

On February 13, 1982, respondent was injured in an accident when the motorcycle he was operating collided with an automobile (R. 114). The driver of the automobile was insured for bodily

injury liability with policy limits of $10,000.00/$20,000.00 (R. 114). At the time of the accident, George Pohlman owned three other vehicles which were insured by Fireman's Fund (R. 114). That policy provided $500,000.00/$1,000,000.00 limits of liability for bodily injury and $25,000.00 stated uninsured motorist limits on each vehicle (R. 114).

The respondent and his wife brought this action against Fireman's Fund, et al. seeking determination of availability of uninsured motorist coverage under the Fireman's Fund policy for injuries sustained by George Pohlman in a motor vehicle accident (R. 113-119).

Respondents alleged that they were entitled to stack uninsured motorist coverages on the three vehicles (R. 116).

Alternatively, it was alleged that in the event a knowing rejection of higher limits was made, respondent was at least entitled to stack the $25,000.00 uninsured motorist coverage (R. 116). Petitioner denied respondents were entitled to uninsured motorist coverage at all. Neither the stacking issues nor the knowing rejection issue were resolved by the trial court, because the court ruled that there was no coverage under the Fireman's Fund policy.

It is undisputed that the Fireman's Fund policy was issued on March 1, 1979 for a three year term (R. 51-52). During the policy term, the premium was rerated annually. On February 27, 1981, petitioner notified the respondent that an additional pre-

mium of $3,669.00 would be due for the period of March 1, 1981 to March 1, 1982 (R. 172).

The essence of the trial court's holding was that this was a three year contract, and under Fla.Stat. §627.4132 (1976), respondents had no uninsured motorist coverage under the Fireman's Fund policy for an accident involving an owned motorcycle neither listed nor insured under the Fireman's Fund policy (R. 184). The court further found that the insurance had an inception date of March 1, 1979, and expired on March 1, 1982 (R. 184). The court held that §627.4132 (1976) applied to the case because the statute was in effect at the time the contract was entered into. As a result, the court ruled that the petitioners were entitled to summary final judgment since there was no uninsured motorist coverage applicable to the motor vehicle accident in question (R. 184).

In reversing the summary final judgment, the Third District Court of Appeal held that uninsured motorist coverage was available to respondents under the Fireman's Fund policy. The court reasoned that the exclusion was unenforceable as against public policy, but certified that its decision is in conflict with Metropolitan Property and Liability Insurance Company v. Gray, 446 So.2d 216 (Fla. 5th DCA 1984) (AA. 28-29).

ISSUE PRESENTED FOR REVIEW

WHETHER THE DECISION SOUGHT TO BE REVIEWED, WHICH HAS BEEN CERTIFIED TO BE IN CONFLICT WITH METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY V. GRAY, 446 So.2d 216 (Fla. 5th DCA 1984), SHOULD BE REVERSED ON THE BASIS THAT APPLICATION OF FLORIDA STATUTES §627.4132 (1980) UNCONSTITUTIONALLY IMPAIRS THE CONTRACTUAL OBLIGATIONS BETWEEN THE PARTIES, CONTRACTED FOR PRIOR TO THE ENACTMENT OF THE AMENDED STATUTE, IN VIOLATION OF ARTICLE 1, §10, OF THE FLORIDA CONSTITUTION.

SUMMARY OF ARGUMENT

The Third District Court of Appeal certified that its decision in the instant case is in conflict with a decision by the Fifth District Court of Appeal. These cases involve precisely the same legal issue and virtually identical facts. Therefore, pursuant to Article V, §§3(b)(3) and (4) of the Florida Constitution, this Court has jurisdiction to resolve the conflict.

The insurance policy in question was issued in 1979 and was a three year policy (AA. 1, 2). Although the accident involved in this case post-dated the 1980 amendment to §627.4132, Fla.Stat., the amendment cannot be applied to a contract of insurance entered into prior to the effective date of the amendment of §627.4132, because the Legislature did not manifest the intent that the statute have retroactive effect, and to allow its application to the subject insurance contract would be an unconstitutional impairment of the parties' contractual obligations. Therefore, §627.4132 (1976) controls this litigation and authorizes the insurer to exclude from uninsured motorist coverage injuries sustained as a result of the negligence of an uninsured motorist when the "insured" was operating an owned motorcycle neither listed nor insured under the Fireman's Fund policy.

Like the Gray case, supra, the modifications here did not constitute either the renewal of the policy in question nor were they of such a magnitude as to amount to a new contract. The decision of the Third District turned solely on the application of the 1980 amendment to a pre-existing insurance contract.

The issue of knowing rejection of uninsured motorist limits equal to liability limits was not decided by the trial court.

ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED SHOULD BE REVERSED BECAUSE APPLICATION OF FLORIDA STATUTES §627.4132 (1980) UNCONSTITUTIONALLY IMPAIRS THE CONTRACTUAL OBLIGATIONS BETWEEN THE PARTIES, CONTRACTED FOR PRIOR TO THE ENACTMENT OF THE AMENDED STATUTE, IN VIOLATION OF ARTICLE I, §10 OF THE FLORIDA CONSTITUTION

The Florida Supreme Court "[m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal ..." or where the district court of appeal certifies the decision "... to be in direct conflict with a decision of another district court of appeal." Fla. Const., Art. V, §§3(b)(3) and (4) (amended March 11, 1980). Excelsior-Insurance Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979). In the instant case, the Third District Court of Appeal allowed the retroactive application of a statutory amendment based on State Farm Mutual Automobile Ins. Co. v. Gant, 460 So.2d 912 (Fla. 2d DCA 1984). Since Gant and the Third District's opinion in the present case directly conflict with the Fifth District Court of Appeal's decision in Metropolitan Property and Liability Ins. Co. v. Gray, 446 So.2d 216 (Fla. 5th DCA 1984), this Court has jurisdiction to review the instant decision. Alternatively, this Court has jurisdiction to resolve the conflict because both the Second and

Third District Courts of Appeal have certified their decisions to be in conflict with Gray.

In Gant, supra, a negligent driver's automobile hit two children. At the time of the accident, the children's father carried two automobile insurance policies with the defendant insurance company. One policy clearly provided uninsured motorist coverage, which the defendant insurance company paid pursuant to a settlement agreement. The father sought a declaratory judgment allowing him to stack the second policy on the first, giving additional uninsured motorist coverage. The Gant court applied Fla.Stat. §627.4132 (1980), allowing the insured to stack the uninsured motorist coverage.

The Legislature first enacted §627.4132 in 1976, prohibiting stacking of automobile insurance coverage. In 1980, however, the Legislature amended the statute so that it no longer prohibited stacking of uninsured motorist coverage. The defendant insurance company contended that because the insurance policy was renewed prior to the 1980 amendment, the amended statute could not be retroactively applied to the pre-existing contract without unconstitutionally impairing the obligations of the contract. The court disagreed, holding that this was not retroactive application of the statute, but current application to an existing contract.

Gray, supra, presented a very similar factual situation. Prior to Fla.Stat. §627.4132's 1980 amendment, the plaintiff had

entered into an automobile insurance contract with the defendant insurance company. The contract provided, inter alia, uninsured motorist coverage and contained an "anti-stacking" provision. After the statute's 1980 amendment, but before the policy's renewal date, a passenger covered by the policy was involved in an accident with an underinsured driver. The trial court declared that the amended statute invalidated the policy's anti-stacking provision. The Fifth District Court of Appeal reversed, holding that statutory changes occurring between renewals cannot be incorporated into the policy without unconstitutionally impairing the parties' contract obligations.

The Gant and Gray decisions are based on factual situations virtually indistinguishable from those in the instant case. In each case, the accident occurred after the statute's amendment but prior to the policies' renewal.

The exclusion involved in this case is the following:

> The insurance does not apply to:
>
> 3. Bodily injury sustained by you or any family member while occupying or struck by any vehicle owned by you or any family member which is not a covered auto. (AA. 24).

This limiting clause was made possible by the Legislature in 1976 when it enacted Fla.Stat. §627.4132 (Supp. 1976), which states:

> If an insured or named insured is protected by any type of motor vehicle insurance policy for liability, uninsured motorist, personal injury protection, or any other coverage, the policy shall provide that the insured or named insured is protected only to the extent

> of the coverage he has on the vehicle involved in the accident. However, if none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage. Coverage on any other vehicles shall not be added to or stacked upon that coverage. This section shall not apply to reduce the coverage available by reason of insurance policies insuring different named insureds.

Following the enactment of §627.4132, a conflict arose among the decisions of the District Courts of Appeal interpreting and applying this statute. Allstate Insurance Company v. Alvarez, 414 So.2d 224 (Fla. 3d DCA 1982); Indomenico v. State Farm Mutual Automobile Insurance Co., 388 So.2d 29 (Fla. 3d DCA 1980); State Farm Automobile Insurance Co. v. Wimpee, 376 So.2d 20 (Fla. 2d DCA 1979); cert. denied, 358 So.2d 763 (Fla. 1980); and State Farm Automobile Insurance Co. v. Kuhn, 374 So.2d 1079 (Fla. 3d DCA 1979). The Supreme Court of Florida resolved the conflict in New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983). The issue before the Court in Harbach concerned the validity of an exclusion in an automobile insurance policy which denied uninsured motorist coverage to an insured who was injured while operating his own uninsured motor vehicle. The District Court of Appeal in Harbach held that the uninsured motorist statute in effect at the time the case arose prohibited such an exclusion in an insurance contract. Adopting the reasoning, in Wimpee and in Kuhn, the Supreme Court reversed, holding that Fla.Stat. §627.4132 (Supp. 1976) permitted an exclusion from

uninsured motorist coverage for bodily injuries suffered by an insured while operating a motor vehicle which he or she owned, but which was not insured under the policy on which a claim was made.

The Court concluded that the Legislature, by enacting §627.4132 in 1976, intended to and did change the rule announced by the Supreme Court in Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971), which decision applied Fla.Stat. §627.727 (1971), the then existing applicable uninsured motorist statute. Ultimately, the Supreme Court held that §627.4132 limited the insured to the coverage contained in the policy covering the vehicle involved in the accident and, further, prohibited the stacking of coverages.

In the case at bar, the policy of insurance was written in 1979. At that time, Fla.Stat. §627.4132 (Supp. 1976) was in effect.

As the court noted in Kokay v. South Carolina Insurance Company, 380 So.2d 489 (Fla. 3d DCA 1980):

> "As worded, Section 627.4132 serves as in the Kuhn case, supra, and in State Farm Mutual Automobile Insurance Co. v. Wimpee, 376 So.2d 20 (Fla. 2d DCA 1979), to preclude an insured who has not paid for the coverage on the vehicle in which he is injured from claiming the benefits of another policy."

Effective October 1, 1980, the Legislature amended the statute to expressly exclude uninsured motorist coverage from its ambit. The Legislature specifically deleted the term "uninsured

motorist" in the first sentence of the statute, and added a sentence which reads: "This Section shall not apply to uninsured motorist coverage". On appeal, the respondent contended that it was this amendment which was dispositive in deciding whether he was entitled to uninsured motorist benefits under the Fireman's Fund policy. This position is erroneous.

It is settled law that a statute is presumed to be prospective unless the Legislature clearly manifests a contrary intention. Cove Club Investors Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); Seitz v. Duvan County School Board, 366 So.2d 119 (Fla. 1st DCA 1979); Lewis v. Creative Developers, Ltd., 350 So.2d 828 (Fla. 1st DCA 1977).

When the Legislature amended §627.4132 in 1980, they declared no intent whatsoever that the statute have retroactive effect. Chapter 80-364, §2, Laws of Florida, provides:

"This act shall take effect October 1, 1980."

The format used in enacting the amendment was precisely the same employed when the Legislature first created uninsured motorist coverage in 1961. That provision stated:

"This act shall take effect July 1, 1961."

Chapter 61-176, §2
Laws of Florida.

Because the Insurance Commissioner for the State of Florida did not know whether the new enactment would apply to policies issued

prior to July 1, 1961 which had effective dates of coverage subsequent to that date, he requested an opinion from the Attorney General. 1961 Op. Att'y Gen. Fla. 061-101 (June 19, 1961). The Attorney General stated:

> "It is also well settled that laws are not to be given a retrospective application unless there is clearly a legislative intent that they be so applied. State ex rel. Riverside Bank v. Green, 101 So.2d 805; Larson v. Independent Life & Accident Ins. Co., 29 So.2d 448, 158 Fla. 623; State ex rel. Bayless v. Lee, 23 So.2d 575, 156 Fla. 494."

The settled rules of statutory construction clearly preclude the application of §627.4132, Fla.Stat. (1980) to the Fireman's Fund policy.

In Fleeman v. Case, 342 So.2d 815 (Fla. 1976), this Court held that the courts would not divine legislative intent for an issue as important as the retroactive application of the statute. This Court continued:

> "We can restrict the debate on a legislative 'intent' for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislative under review." 342 So.2d at 817.

As a matter of statutory construction, this Court ruled that the statute was inapplicable to alter the provisions of a pre-existing contract. The principle applies to the instant case to preclude coverage under the Fireman's Fund policy.

The Constitution of the State of Florida, Art. I, §10, provides that "no bill of attainder ex post facto law or law impairing the obligation of contracts shall be passed."

In Gray, supra, the insured entered into a contract for automobile insurance with Metropolitan Property and Liability Insurance Company, prior to the 1980 amendment to §627.4132. The policy was for a period of one year, to expire, or to be renewed, on July 26, 1981. The policy provided uninsured motorist and other coverage on three vehicles and for three named drivers, Richard, Nancy and Kathleen Gray. The policy specifically provided that no more than $100,000 per accident would be paid regardless of the number of persons or cars insured under the policy. After the effective date of the statutory amendment (October 1, 1980) but before the renewal date, an additional driver, James Gray, was added to the policy. Soon thereafter, Nancy Gray was injured in a vehicle covered under the policy and driven by a named insured. The trial court entered declaratory judgment in favor of the Grays entitling them to stack the UM coverage.

The Fifth District Court of Appeal reversed holding that statutory changes occurring between renewals cannot be incorporated into the policy without unconstitutionally impairing the obligations of the parties to the insurance contract. Gray, supra at 218. The court continued:

> But for Article I, Section 10 of the Florida Constitution this issue would be merely one of legislative intent. However, regardless of the intent of the legislature, a statute may not, constitutionally, alter, amend or impair the rights of the parties to an existing contract. Thus, the amendment to Section 627.4132 does not apply in the instant case unless between the effective date of the amendment (October 1, 1980) and the date of the accident (January 30, 1981), a new contract was made between the parties. Id. at 219.

Moreover, the court reasoned that even assuming the addition of James Gray to the policy constituted a separate and severable contract, stacking was still prohibited because the injured party was a named insured on the original policy which incorporated the statute in effect when the policy was issued.

Petitioner submits that Gray espouses the correct position on the issue before this Court. Even assuming the rerating of the subject policy constituted the making of a new policy, because Mr. Pohlman was a named insured on the original policy the anti-stacking statute in effect when the policy was issued controls. Nevertheless, the motorcycle owned by Pohlman was never insured under the policy before this Court. Petitioner contends there is no coverage under the Fireman's Fund policy.

The Second District Court of Appeal's decision in State Farm Mutual Automobile Insurance Co. v. Gant, 460 So.2d 912 (Fla. 2d DCA 1984), upon which the District Court of Appeal based its decision in the instant case, is in direct conflict with Dewberry v. Auto Owners Insurance Co., 363 So.2d 1077 (Fla. 1978), and the

weight of law controlling the issue before this Court. In Gant, the court condoned retroactive application of the uninsured motorist statute to a pre-existing insurance contract reasoning that the case involved "current application of a statute to an existing contract." The argument is merely one of semantics by which the court unconstitutionally attempted to justify the impairment of the obligations of the contract. As the Third District has stated: "It is well settled in Florida that the statute in effect at the time the insurance contract is executed governs any issues arising under that contract." Lumbermen's Mutual Casualty Company v. Ceballos, 440 So.2d 612 (Fla. 3d DCA 1983) at 613. Applying a statute to contracts entered into before the statute was effective would constitute a legislative impairment of contract in violation of Article I, §10 of the Florida Constitution. Ceballos, supra. The Gant case is currently pending before this Court. It is submitted that the Gant decision conflicts with existing law and should be reversed.

In Hausler v. State Farm Mutual Auto Insurance, Co., 374 So.2d 1037 (Fla. 2d DCA 1979), the court held that where a statute is not effective at the time of contracting it cannot be retroactively applied to alter the obligations of an existing contract. These two decisions are irreconcilable. The facts of Hausler are ironically similar to those of the instant case. There, the plaintiff sought uninsured motorist benefits for damages sustained in a hit and run accident under a policy insuring

his automobile. At the time of the accident in question he was riding a motorcycle covered by a liability policy issued by another company (not State Farm) which did not provide uninsured benefits. State Farm refused to honor the claim, asserting that §627.4132 precluded recovery. The court disagreed, stating:

> "We find that it is unnecessary to address this point because Section 627.4132 does not apply to this case. The policy in question was issued and delivered a month before the Governor signed Section 627.4132 into law and four months before it became effective on October 1, 1976. Although the accident which fostered this dispute occurred on March 15, 1977 it is not accident date that controls."
>
> "When Hausler and State Farm negotiated for and entered into the subject contract of insurance, its terms were set in accordance with the law in effect at the time which did not preclude stacking insurance coverage. State Farm Mutual Auto Insurance, Co. v. White, 330 So.2d 858 (Fla. 2d DCA 1976). Neither party was on notice of the limitations soon to be imposed by Section 627.4132. Id. at 1038.

The Hausler court cited as controlling authority the decision in Dewberry, supra, which held that where the effective date of §627.432 followed the renewal of uninsured motorist coverage retroactive application was an unconstitutional impairment of the insurance contract. The rationale of the Supreme Court was that citizens cannot be charged with notice of consequences of impending legislation before the effective date of such legislation and that, generally, a statute speaks from the time it goes into effect. Clearly such reasoning is appropriate to the case at bar and supports the summary final judgment entered by the trial court.

Both the Third and First District Courts of Appeal have rendered decisions which espouse the Dewberry rule. In Carter v. Government Employees Insurance Co., 373 So.2d 242 (Fla. 1st DCA 1979), the First District held that where, under applicable law at the time insurance was entered into, PIP benefits were to be set off against uninsured motorist coverage, such law was controlling with respect to the insurance contract. To decide otherwise, the Court stated, would "substantially change the contractual obligations anticipated by the parties at the time of contracting." Id. at 243. Similarly, in Commodore Plaza v. Cohen, 378 So.2d 307 (Fla. 3d DCA 1980), a noninsurance case, the Third District Court of Appeal ruled that the retrospective application of a statute imposing attorney's fees, where no such obligation was bargained for would materially alter the binding force of a condominium lease agreement and constitute an unconstitutional impairment of contract.

Respondent's argument to the Third District that the re-rating of the policy annually constituted the commencement of a "new contract" is without merit and was implicitly rejected by that court. The duration of an insurance policy when fixed by clear and unambiguous language will not be altered because some incident bearing upon the effectiveness of the policy, such as a premium payment, occurs on a nonconforming date. State Farm Mutual Auto Insurance Company v. Veenschofer, 272 So.2d 201 (Fla. 2d DCA 1973).

Cote v. American Fire and Casualty Company, 433 So.2d 590 (Fla. 2d DCA 1983) is clearly on point. There, the insurance policy provided fleet coverage (here we are likewise dealing with a commercial insurance policy) which contemplated frequent changes in the insured vehicle.

The Second District held that the addition of a new vehicle to a fleet policy is not a material variation of the policy which requires a new rejection of uninsured motorist coverage.

The respondent's contention on appeal to the effect that an additional premium of $3,669. was charged for the period from March 1, 1981 to March 1, 1982 and, that there was the issuance of an endorsement with an effective date of December 1, 1980 to March 1, 1982 likewise do not create material changes in the contract. A simple review of the Defendant's answers to interrogatories clearly shows that the policy was rerated annually and the premium amounts adjusted accordingly. From March 1, 1979 to March 1, 1980 the premium was $4,160. From March 1, 1980 to March 1, 1981 the premium was $4,063. March 1, 1981 to March 1, 1982 the premium was $3,669 (AA. 25).

In 1979 three Ford wreckers were insured. In 1980 two Ford wreckers were insured, one of the Ford wreckers was deleted and a Chevy van added (AA. 26).

Petitioner does not dispute the various endorsements to the policy. This type of policy is written for that purpose and that is why the policy is rerated. The policy premium varied from year to year depending upon the vehicles involved.

No new contract was created. There was no succeeding policy.

CONCLUSION

The decision below under the label "public policy" applied the reasoning of the pre-1976 interpretation of a 1971 statute and a 1980 amendment to a 1976 statute. Neither is legally correct. For the reasons above advanced, the law in effect at the time this contract was entered into controls. Under that law, there is no coverage available to the respondent in this case.

For the foregoing reasons, the Third District's decision should be vacated with direction to reinstate the summary final judgment in favor of petitioner.

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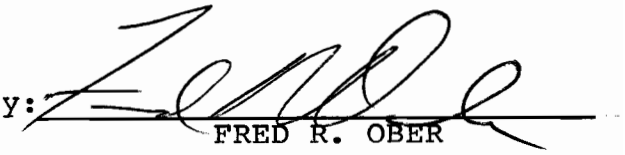
By: 
FRED R. OBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8 day of August, 1985 to: BETSY E. GALLAGHER, ATTORNEY-AT-LAW, Talburt, Kubicki, Bradley & Draper, Attorneys for Appellants, 701 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; JOHN LOWE, ESQUIRE, 1428 Brickell Avenue, Miami, Florida 33131; and to WILLIAM C. MERRITT, ESQUIRE, 111 Southeast Third Street, Miami, Florida 33130.

By: _____
FRED R. OBER