4-30-86

IN THE

SUPREME COURT

OF THE STATE OF FLORIDA

CASE NO. 68,899

NATIONAL CORPORACION VENEZOLANA, S.A.,

Plaintiff/Appellant,

vs.

M/V MANAURE V, etc. et al.

Appellees.

BRIEF OF APPELLANT

CERTIFICATION FROM ELEVENTH CIRCUIT COURT OF APPEALS
CASE NO. 84-3780

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STATEMENT OF THE CASE

Appellant, NATIONAL CORPORACION VENEZOLANA S.A., appealed to the United States Court of Appeals, Eleventh Circuit, from an order of the United States District Court for the Middle District of Florida dated 5 October 1984 granting the Motion of SEGUROS ORINOCO C.A. and THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION [BERMUDA] LTD., to dismiss Appellant's Amended Complaint upon the sole ground that Appellant did not have a direct action against Appellees, marine liability insurers of those alleged to be liable for damages incurred by Appellant to an ocean marine shipment of cargo. The right of action for such cargo damage having accrued subsequent to October 1, 1982, the effective date of Florida Statute 627.7262 and the effective date of the reenactment of Florida Statute Section 627.021(2)(c), the United States Court of Appeals, Eleventh Circuit, pursuant to Florida Rules of Appellate Procedure 9.160 certified the following question to the Supreme Court of Florida:

> "Does Florida law recognize a right of direct action against a marine liability insurer in a cargo damage action accruing after October 1, 1982?"

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On or about January 25, 1983, at the port of Miami, Florida, there was shipped by the shipper Sohenkers International Forwarders Inc. of 1316 N.W. 78th Avenue, Miami, Florida and delivered to the M/V MANAURE V and LINEA MANAURE C.A., five (5) containers containing 1,943 cartons of electronic product and service parts, for which LINEA MANAURE C.A. issued Bill of Lading No. LG-152, all of said shipment being then and there in good order and condition. Thereafter, the said vessel arrived at the port of La Guaira, Venezuela, on or about February 17, 1983, where it and LINEA MANAURE C.A. delivered said shipment in a seriously damaged condition by reason of pilferage, shortage, and other damage (R.69). On February 22, 1983, LINEA MANAURE C.A. filed for bankruptcy in Venezuela (R.90-94).

On the 7th day of October, 1983, Appellant, NATIONAL CORPORACION VENEZOLANA S.A., filed its Complaint in the U. S. District Court against the M/V MANAURE V; LINEA MANAURE C.A.; SEGUROS ORINOCO C.A.; and THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD. (R.1-7). On February 2nd, 1984, Appellant filed its Amended Complaint to add as parties Defendants, NUEVO MUNDO SEGUROS GENERALES S.A. and S.E.L. MADURO (FLORIDA), INC. (R.66-73).

It is alleged in the Amended Complaint that at all times the vessel, M/V MANAURE V, was owned, and/or operated and/or time, demise or voyage chartered by the Defendant, LINEA MANAURE C.A.; and, that at all time the Appellees, THE STEAMSHIP MUTUAL UNDER-

WRITING ASSOCIATION (BERMUDA) LTD., SEGUROS ORINOCO C.A., and NUEVO MUNDO SEGUROS GENERALES S.A., were the insurers of LINEA MANAURE C.A. and the M/V MANAURE V against liability for damage to third parties such as Appellant and that such insurance inured to the benefit of Appellant as a third party beneficiary thereof.

Appellant alleged jurisdiction of the Court in admiralty.

On the 21st day of May, 1984, the Appellees, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD. and SEGUROS ORINOCO C.A., filed their Motion for Dismissal/Summary Judgment moving for dismissal of the Appellant's Complaint, alleging as grounds therefore, that the Complaint failed to state a claim against them for which relief can be granted (R.250-284).

On the 5th day of October, 1984, the trial judge entered the order, herein appealed from, dismissing the Appellant's Complaint as to THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA), LTD. and SEGUROS ORINOCO C.A., on the sole ground that there is no direct action against a maritime insurer (R.483-489).

On October 31, 1984, THE CHIYODA FIRE & MARINE INSURANCE COMPANY, LTD., subrogee of NATIONAL CORPORACION VENEZOLANA S.A., pursuant to Rule 17, Federal Rules of Civil Procedure, filed its Ratification of Commencement of Action and was thereby effectively substituted for the Plaintiff in this action (R.510-511).

On the 6th day of November, 1984, a default was entered against the Defendant, LINEA MANAURE C.A. (R.514).

Appellant has not appealed from paragraphs 3 and 4 of the order of the District Court dated October 5, 1984, granting summary judgment to SEGUROS ORINOCO C.A. for the reason that it was

not an insurer of the vessel or LINEA MANAURE C.A. at the time of the shipment here in operation, and neither the Defendant, NUEVO MUNDO SEGUROS GENERALES, S.A. nor S.E.L. MADURO (FLORIDA) INC. has filed any pleadings in the Court below.

The Appellee, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., admits that it is a protection and indemnity club which was authorized to transact business in the State of Florida at all relevant times and that it insured protection and indemnity risks of LINEA MANAURE C.A. on the M/V MANAURE V pursuant to THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD.'s Rules of Entry but alleges that it is a reinsurer rather than an insurer of such risks (R.130-136).

Throughout the record in this case, the Court will see references to seven other cases which were consolidated with the case of National Corporacion Venezolana S.A. v. M/V MANAURE V, et al. at the trial level and on appeal. For the sake of clarity, it should be pointed out that the cargo shipments in all of those cases were prior to October 1, 1982 and, for that reason, they were considered separately by the United States Court of Appeals, Eleventh Circuit, and reversed and remanded upon the authority of that Court's opinion in Steelmet et al. v. Caribe Towing Corp. et al., 779 F.2d 1485 (11th Cir. 1986).

SUMMARY OF ARGUMENT

The law is well settled that in a cargo damage action, the claimant has a right of direct action in the state and federal courts of Florida, pursuant to the common law rule of Shingleton v. Bussey, infra, against the marine liability insurer of the tortfeasor, vessel and vessel owner, where the claim accrued prior to October 1, 1982. As to such actions accruing after October 1, 1982, such a right of direct action continues to be recognized because Florida Statutes 627.021(2) specifically excludes such actions from the operation of Florida Statute 627.7262 and this Court did not totally recede from the public policy concept adopted in Shingleton, infra, in its opinion in Van Bibber, infra. Nor is there any reason for this Court to so recede since the reenactment of Florida Statute 627.021(2) on October 1, 1982 is just as strong an expression of public policy as the enactment of Florida Statute 627.7262 and the law in general favors the protection of the public from losses occasioned by insolvency of insureds and other inability to collect on insurance paid for and carried by a tortfeasor.

The question certified to this Court by the Eleventh Circuit Court of Appeals should be answered in the affirmative.

ARGUMENT

> Does Florida law recognize a right of direct action against a marine liability insurer in a cargo damage action accruing after October 1, 1982?

In Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), this Court recognized the right of an injured party to sue a motor vehicle liability insurer in a direct action. At page 715, the Court said:

> "[1] We conclude a direct cause of action now inures to a third party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida.---"

In Beta Eta House Corp. Inc. of Tallahassee v. Gregory, 237 So.2d 163 (Fla. 1970), that right was extended to other forms of liability insurance and in Quinones v. Coral Rock, Inc., 258 So.2d 485 (Fla.3d D.C.A. 1972) was applied to a "Protection and Indemnity" maritime insurer.

Regardless of the foregoing, the U. S. District Courts in Florida thereafter refused to recognize the right of direct action on the basis that the Florida law was "procedural" rather than "substantive"[1] until the first opinion in Steelmet et al

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(1) In Matter of Brent Towing Inc., 414 F.Supp. 131 (N.D. Fla. 1976); Lloyd v. Empresa De Navegacao Alianca, S.A., Case No. 83-808-Civ-T-13 (M.D. Fla. 1984); State Establishment for Agriculatural Product Trading v. M/V Wesermunde, Case No. 83-541-Civ-T-15 (M.D. Fla. 1984) and Shivkunar Singh v. Faithful Trawler Co. Inc., Case No. 81-102-Civ-T-H (M.D. Fla. 1982)

v. Caribe Towing Corp, et al, 747 F.2d 689 (11th Cir. 1984) and the opinion on rehearing in that case, 779 F.2d 1485 (11th Cir. 1986). In the latter opinion, the Court said at page 1491:

> "Petitioners urge that Florida's common law rule set out in Singleton and followed in its successors does not embrace a direct action but only permits joinder. But Shingleton itself spoke exclusively in terms of a direct cause of action. Quinones did speak of Shingleton and successor cases as "insurance joinder cases". 258 So.2d at 486. The distinction has no significance in our decision. The argument is advanced as part of a contention that joinder is procedural and that Florida procedure may not override federal substantive admiralty law. But our decision does not turn on characterizations by Florida, in the legislature and in its courts, of substance versus procedure. Instead we look to the interplay between state law and admiralty law, described above. Moreover, no substantive admiralty law or policy has been pointed out to us that the Florida procedure, if it is procedure, would override."

Further, the Steelmet court reviewed the law of Florida at page 1488 and 1489 through Van Bibber v. Hartford Accident, 439 So.2d 880 (Fla. 1983) Randal v. General Insurance Co., 439 So.2d 986 (Fla. D.C.A. 3d 1983) and Osborne v. Elizabeth Massey Investment Corp., 467 So.2d 1097 (Fla. D.C.A. 4th 1985) and affirmed Steelmet's right of direct action since it arose in 1976, prior to the October 1, 1982 effective date of Florida Statute 627.7262. That court found it unnecessary to consider the interplay of Florida

Statute 627.7262 and Florida Statute 627.021(2) with regard to claims for relief accruing after October 1, 1982.

The case at bar is the first case before the Eleventh Circuit which squarely presents the question of whether or not the well settled common law rule of Florida that evolved from Singleton is still applicable in a maritime cargo damage action accruing after October 1, 1982 against a marine liability insurer. Appellant contends that that common law rule is still applicable because (1) Florida Statute Section 627.021(2) specifically excludes the applicability of Florida Statute 627.7262 to insurance of vessels or craft, their cargoes, marine builders risks, marine protection and indemnity, or other risks commonly incurred under marine, as distinguished from inland marine, insurance policies, and (2) that this Court did not recede from the common law rule of Shingleton in the Van Bibber case except as to those matters to which Florida Statute 627.7262 is applicable.

1.

Prior to October 1, 1982, the legislature of the State of Florida enacted three statutes designed to modify the third-party beneficiary concept adopted by this Court in Shingleton, supra. The first 627.7262 was held unconstitutional in Market v. Johnston, 367 So.2d 1003 (Fla. 1978) and the second, 768.045 was held unconstitutional in Cozine v. Tullo, 394 So.2d 115 (Fla. 1981). The last, a new 627.7262, became effective on October 1, 1982 and was held constitutional in Van Bibber, supra.

During the same time, Florida Statute 627.021 derived from laws dating back to 1959, (Laws 1959, c.59-205 Section 413; Laws 1979, c.79-40 Section 92; Laws 1982, c. 82-243 Section 337) was in effect and was continued in full force and effect and not repealed on October 1, 1982, notwithstanding the Regulatory Reform Act. (Laws 1982 c.82-243 Section 357 as amended by Laws 1982, c.82-386.) Florida Statute 627.021(2) states, in part:

> "(2) This chapter does not apply to:
>
> (a) Reinsurance, except joint reinsurance as provided in s. 627.311.
>
> (b) Insurance against loss of or damage to aircraft, their hulls, accessories, or equipment, or against liability, other than workers' compensation and employer's liability, arising out of the ownership, maintenance, or use of aircraft.
>
> (c) Insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies.
>
> (3) For the purposes of this chapter all motor vehicle insurance shall be deemed to be casualty insurance only."

It cannot be argued that Florida Statute 627.7262 is not a part of Chapter 627 of the Florida Statutes and thus it is apparent that the Florida legislature intended to exclude marine liability insurance from its effect. That is a logical exclusion since it has long been held that marine insurance is a maritime

contract within the jurisdiction of the federal admiralty courts. Insurance Co. v. Dunham, 78 U.S. 1 (1870). Wilburn Boat Company v. Fireman's Fund Insurance Co., (1955), 348 U.S. 310 did not change that rule of law, see International Sea Food Ltd. v. M/V CAMPECHE, et al and Foremost Insurance Company, 556 F.2d 482 (5th Cir. 1978) and in Kossick v. United Fruit Co., 365 U.S. 731, 742, 81 S.Ct. 886, referring to Wilburn, Mr. Justice Harlan said at page 894:

> "the application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented."

It is common knowledge within the insurance industry that most "blue water" vessels are insured for liability by foreign P and I Clubs such as THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION [BERMUDA] LTD., Appellee here, insurers who for the most part are beyond the regulatory powers of the insurance laws of the State of Florida except on those rare occasions where they may insure interests in Florida on a surplus lines basis; and, it is logical that the Legislature did not want to consider the general and statutory maritime law (which is supplemented by many binding international conventions) in passing Florida Statute 627.7262. Thus, it specifically excluded marine liability insurance from applicability of the statute and as to marine liability insurance the common law rule of Shingleton still applies.

The opinion of the Court in Osborne v. Elizabeth Massey

Investment Corp., supra, says nothing to change Appellant's assertion with regard to Florida Statute 627.021(2). A review of that opinion shows that that statute was not mentioned anywhere by the court and it is obvious that it was not called to that court's attention by the Appellant.

2.

The basic substantive right of a third party beneficiary to a right of action was recognized by this Court in Shingleton, supra. That right has also been recognized in the general maritime law of the United States. See, Moore's Federal Practice Vol. 7A, page 3301, paragraph .295 et seq. and cases cited therein. A portion of that discertation says:

> . . . the admiralty seems ideally situated to treat third-party contract beneficiaries as suggested by the late Professor Corbin, whose views have been largely incorporated in Tentative Draft No. 3 of the American Law Institute Restatement of the Law of Contracts, Second. It is there provided:
>
> > "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a performance is an intended beneficiary if
> >
> > "(a) the performance of the promise will satisfy a duty of the promisee to the beneficiary; or
> >
> > "(b) The promisee manifests an intention to give the beneficiary the benefit of the promised performance and recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.

> "(2) an incidental beneficiary is a beneficiary who is not an intended beneficiary."
>
> The Draft continues, in a subsequent section, by providing that "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty".
>
> Once it is concluded that a third party is in fact the intended beneficiary of a contract entered into between two or more other parties and is not merely incidentially or unintentionally benefited thereby, it appears necessarily to follow that if the subject matter of the contract is maritime the rights of the third party must be cognizable within the admiralty. And this appears to be the way the maritime law is developing. Any other result would be illogical.

Id. at 3301, 2. Cited at footnote 3, American Law Institute, Restatement of the Law Second, Contracts, Tentative Draft No. 3 (1967) § 133 and at footnote 4, § 135. Moore goes on at pages 3302, 3303, and 3305 to cite as authority for the foregoing the cases of Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423, 79 S.Ct. 445 (1959); Waterman Steamship Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 81 S.Ct. 200 (1960); Drago v. A/S Inger, 305 F.2d 139, 1962 A.M.C. 1377 (2nd Cir. 1962) and Sanderlin v. Old Dominion Stevedoring Corp., 261 F.Supp. 281 (E.D. Va. 1966), rev'd 385 F.2d 79 (4th Cir. 1967).

In Crumady, supra, a case commenced by a stevedore by filing a libel in rem, Justice Douglas said at page 428:

> We think this case is governed by the principle announced in the Ryan case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plain

> ly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, §133.

In Waterman, supra, the Supreme Court said at page 423 and 425:

> In the Ryan and Weyerhaeuser cases considerable emphasis was placed upon the direct contractual relationship between the shipowner and the stevedore. If those decisions stood alone, it might well be thought an open question whether such contractual privity is essential to support the stevedore's duty to indemnify. But the fact is that this bridge was crossed in the Crumady case . . .
>
> We can perceive no difference in principle, so far as the stevedore's duty to indemnify the shipowner is concerned, whether the stevedore is engaged by an operator to whom the owner has chartered the vessel or by the consignee of the cargo. Nor can there be any significant distinction in this respect whether the longshoreman's original claim was asserted in an in rem or an in personam proceeding. . . . The owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service.

In Drago, supra, the Second Circuit said at page 142:

> Although the shipowner was thus not a party to the contract, the trial judge held that it enjoyed the normal warranty of workmanlike service as third-party beneficiary under the clause stating that 'the Contractor will provide all necessary labor and services to discharge, unload and handle paper from ships or barges in a prompt and efficient manner.' (Emphasis added.) We agree that such a clause creates such a warranty . . . and that the warranty runs to the shipowner as third-party beneficiary. . .

In Sanderlin, supra, the court said, "We fully recognize the

expanding scope of the modern law recognizing rights in third party beneficiaries."

Moore concludes at page 3306:

> ". . . If there is today a need for the peculiar remedies, procedures and substantive principles that comprise the law of admiralty, it appears that a non-party to a contract, who was intended to be benefited thereby, should have access to the admiralty. And, happily, the courts agree."

The Shingleton court, citing with approval the Illinois District Court of Appeals in Gothberg v. Nemerovski, (1965) 58 Ill. App. 2d 372, 375, 208 N.E. 2d 12, applied that third party beneficiary concept to liability insurance contracts for the reasons stated therein. The Van Bibber court subsequently said at page 883 of that opinion:

> "The regulation and supervision of insurance is a field in which the legislature has historically been deeply involved. See chs. 624-632, Fla.Stat. While this Court may determine public policy in the absence of a legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement. In Shingleton we found that public policy authorized an action against an insurance company by a thrid-party beneficiary prior to judgment. The legislature has now determined otherwise. Our public policy reason for allowing the simultaneous joinder of liability carrier espoused in Shingleton, therefore, can no longer prevail. Finding that the statute is substantive and that it operates in an area of legitimate legislative concern precludes our finding it unconstitutional. If a statute can be construed to be constitutional it should be. Falco v. State, 407 So.2d 203 (Fla. 1981). We hold that section 627.7262, Florida Statutes (Supp. 1982), is

constitutional."

Based upon that statement, the Appellees in the case at bar are expected to contend that the Shingleton common law rule is dead for all purposes. However, Appellants submit that this Court in the above opinion did not withdraw from its previous declaration of public policy in Shingleton, but simply held that the substantive nature of the Florida Statute 627.7262 overrode the policy of this Court where applicable. If the pronouncement of the legislature in enacting Florida Statute 627.7262 was an expression of the public policy of the State of Florida then it cannot be denied that the pronouncement of the legislature in reenacting Florida Statute 627.021(2) was just as strong an expression of the public policy of the State of Florida. Thus, the holding of this Court in Van Bibber should be limited to those cases in which the statute is specifically applicable.

In further anticipation that the Appellees in argument before this Court will attempt to influence this Court to now recede from its expression of public policy in Shingleton Appellant would further state that a truly comprehensive review of state law would show that nearly every state in the Union has adopted some form of legislation supportative of the rights of injured parties to be protected by the insurance of the tortfeasor. The financial responsibility laws requiring motor vehicle owners to carry minimum amounts of liability insurance are probably the most familiar example. Then there are laws

placing the obligations upon motor carriers to provide liability insurance for the benefit of those whom they might injure and, in at least one state, Georgia, providing for direct action against the insurer. See Gates v. L.G. DeWitt, Inc., 528 F.2d 405 (5th Cir. 1976). There are state laws that provide a right to proceed against the tortfeasors insurer directly after judgment and state laws that give the injured party the right of direct action against the insurer where the tortfeasor is insolvent or bankrupt. Many states have law which establish funds for the payment of unsatisfied property, casualty and liability judgments. Florida Statute 631.511 states the purpose of such a law to be: "to avoid financial loss to claimants or policyholders because of insolvency of an insurer." A number of states have gone further and recognized by statute a substantive concurrent right of direct action.

Appellants submit that the foregoing and numerous court opinions, for example, Shingleton, supra, unequivocally show a sound public policy throughout this nation in favor of direct action against liability insurance carriers; that is, protection of the right of the injured to receive compensation for injuries which compensation has been provided for by the insured tortfeasor at the expense of premiums paid to his insurer. The same public policy protects the insured from financial ruin occasioned by the insurer's unwillingness to pay and many states have taken action to preclude abuses of insurers such as "no action" provisions in their policies.

In view of the foregoing, then, what, if any basis is there for some states continuing to hold as a matter of common law that there is not a direct action against a liability insurer. The only answers Appellants can find are the antiquated concepts of "no privity of contract" and "prejudice before a jury". The latter, it would seem, has been completely outdated by the real party in interest concepts adopted by the courts. It is unquestionable that a subrogated insurer of an injured plaintiff can now be compelled to join as a party plaintiff or at least ratify the action by a pleading. If the insurer of the plaintiff can be made a party to the action, what possible prejudice could there be in making the defendant's insurer a party also. It would seen that a more equitable result would be attained if the court and the jury knew that the action was really between two insurance companies.

As to the privity of contract doctrine, it is pointed out that third-party beneficiary relief is available "Once it is concluded that a third party is in fact the intended beneficiary, etc., etc." That conclusion is one to be made based upon facts and public policy prevailing at the time. The basic fact that the injured claimant is recognized as third party beneficiary of the contract completely nullifies the "no privity" predicate for any common law rule.

Lastly, failure to allow a direct action against a bankrupt's marine liability insurer, as in the instant case, would result in a windfall profit to the insurer. Liman v.

American Steamship Owners Mutual Protection and Indemnity Association, 299 F.Supp. 106 (S.D.N.Y. 1969), aff'd 417 F.2d 627, cert. denied, 397 U.S. 936 (1972).

CONCLUSION

Thus, it appears that the Legislature of the State of Florida has specifically excluded the operation of Florida Statute 627.7262 from marine liability insurers, that this Court has not receded from the common law rule of Shingleton and that there is no basis for it to do so now since public policy continues to support direct action against a liability insurer where statutes do not prevent it. This Court should answer the question certified by the Eleventh Circuit Court of Appeals in the affirmative.

DATED this 5th day of August, 1986.

CULP SULLIVAN & CRAVEN P.A.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to CARL R. NELSON, ESQUIRE, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Post Office Box 1438, Tampa, Florida, 33601, by United States Mail, this 5th day of August, 1986.

_____

ATTORNEY