IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,264

AIU INSURANCE COMPANY,
a foreign corporation,

Petitioner,

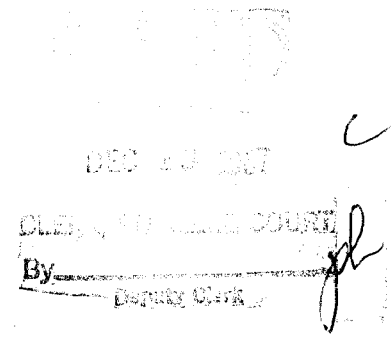
vs.

BLOCK MARINA INVESTMENTS, INC., a Florida corp. d/b/a FLORIDA YACHT BASIN, NORFOLK MARINE COMPANY, a foreign corp. authorized to do business in the State of Florida,

Respondent,

NORFOLK MARINE CO., a foreign corp.,

Intervenor/Respondent.
_____/



ANSWER BRIEF OF RESPONDENT NORFOLK MARINE COMPANY

PAYTON AND RACHLIN, P.A.
1810 New World Tower
100 N. Biscayne Blvd.
Miami, FL 33132
(305) 371-3777

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LAW OFFICES PAYTON & RACHLIN, P.A., SUITE 1810 NEW WORLD TOWER, 100 NORTH BISCAYNE BLVD., MIAMI, FLA. 33132 · TEL. (305) 371-3777

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioner, AIU Insurance Company, was the defendant in the trial court and the appellant in the Third District proceeding. Respondents, Block Marina Investment, Inc. d/b/a Florida Yacht Basin, and Norfolk Marine Company, were plaintiff and intervening plaintiff in the trial court and appellees in the proceeding before the Third District Court of Appeal.

Throughout this brief AIU Insurance Company will be referred to as Petitioner or AIU, interchangeably; Norfolk Marine Company will be referred to as Norfolk or Respondent; and Block Marina Investment, Inc. will be referred to as Block or Respondent.

The symbol "R" will be used to refer to the record on appeal. The symbol "A" will be used to refer to the appendix to the brief, and the symbol "P.B." will be used to refer to petitioner's brief.

SUMMARY OF THE ARGUMENT

There is no direct and express conflict of decisions of District Court of Appeal and therefore no basis to invoke this Court's jurisdiction. Accordingly, this matter is beyond of the scope of this Court's review and the Court should decline to accept jurisdiction.

The Third District properly affirmed the decision of the trial court prohibiting an insurer from denying coverage for its failure to comply with the mandatory requirements of Section 627.426(2), Florida Statutes (1985).

The language and requirements of the statute are clear and unambiguous. AIU undisputedly failed to comply with notice requirements of the statute. AIU failed to notify Block of its refusal to defend within sixty (60) days of its reservation letter as required by the statute. AIU's notification to Block that it was refusing to defend came on March 20, 1986, 205 days after the date of its reservation letter and within two weeks of trial. AIU's blatant failure to comply with the mandatory provisions of Fla. Stat. 627.426 precludes it from denying coverage, as a matter of law. The decisions of the trial and appellate court must be approved.

STATEMENT OF THE CASE AND FACTS

Respondent objects to Petitioner's statement of the case and facts to the extent that it is misleading, incomplete, unsubstantiated and otherwise inaccurate. Accordingly, Respondent submits the following facts as relevant to this Court's determination of: a) whether this Court should accept jurisdiction over this cause and, if so; b) whether the Third District properly affirmed the decision of the trial court prohibiting an insurer from denying coverage for its failure to comply with the mandatory requirements of Section 627.426(2), Florida Statutes (1985).

JURISDICTIONAL FACTS

Petitioner has sought the discretionary jurisdiction of this Court based upon its assertion that the Third District certified its decision to this Court as being in direct conflict with the Fifth District's decision in United States Fidelity and Guarantee Co. v. Amer. Fire and Indem. Co., 511 So.2d 624 (Fla. 5th DCA 1987) (P.B. 8) (A 60)

Pursuant to Fla. R. App. P. 9.030(2), the discretionary jurisdiction of the Supreme Court may be sought to review:

A) decisions of district courts of appeal that:

(vi) are certified to be in direct conflict with decisions of other district courts of appeal; (Emphasis added)

Contrary to Petitioner's contention, the Third District did not expressly certify its decision as being in direct conflict with a decision of another district court of appeal. In fact, the majority opinion only noted in a footnote, that: "We certify the case as possibly in conflict with United States Fidelity and Guaranty Co. v. American Fire and Indemnity Co., 511 So.2d 624" (Emphasis added)

The body of the opinion expressly distinguished the facts and issues of the instant case from the facts, issues and decision of the Fifth District case as follows:

> We agree with the appellees that this case is distinguishable from the fifth district case. Here there was a contract of insurance in effect between the parties and there was also, obviously, a legitimate question as to whether the policy provided coverage for the loss. In United States Fidelity and Guarantee the court held, essentially, that there is no coverage issue where there is no policy. The question in this case is whether the policy covers a specific loss. (Emphasis added) id. at 1119.

Accordingly, there is no direct conflict of decisions; no direct and express certification thereof; and otherwise no basis to invoke this Court's jurisdiction.

This Court may only review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980); Article V,3(b), Fla. Const; Fla. R. App. 9.030(a)(2)(a)(iv). The only facts relevant to the Supreme Court's decision to accept or reject such petitions are those

facts contained within the four corners of the decisions allegedly in conflict. Reaves v. State, 485 So.2d 829, 830 n.3 (Fla. 1986). The facts and finding contained within the four corners of the decisions of the Third and Fifth Districts reflect that there is no express or direct conflict therein. Accordingly, this matter is beyond the scope of this Court's review and the Court should decline to accept jurisdiction.

FACTS

Initially it should be noted that Petitioner has mischaracterized and misstated the facts and findings of the Third District's decision. Petitioner incorrectly states that the Third District..."held that even though there was no coverage available for the loss; AIU was strictly liable for the eliminated coverage because it failed to comply with 627.426" (P.B. 8) A review of the Opinion reflects a contrary finding. The decision specifically states that "here there was a contract of insurance in effect between the parties and there was also, obviously, a legitimate question a to whether the policy provided coverage for the loss." Id. at 1119

Accordingly, Respondent submits the following statement of the case and facts as relevant to this Court's determination. The factual history of this matter reflects that there were no genuine issues of material fact in dispute and that a Summary Judgment was properly entered in favor of Norfolk and Block and against AIU for failure to comply with the mandatory notice requirements of Section 627.426(2) Florida Statutes (1985).

UNDISPUTED FACTS

1. In 1983, AIU issued Block Marina Co., the insured, a comprehensive general liability policy which contained a marina operator's legal liability endorsement. The policy had coverage dates from June 4, 1983 through June 4, 1986. Effective June 4, 1984 the marina operator's legal liability endorsement was eliminated from the policy. However, coverages under the policy that remained in effect through 1986 included: comprehensive general liability, products-completed operations, independent contractors liability and premises-operations.

2. Block purchased the policy from AIU through Robert W. Altemus ("Altemus") of Gulfstream Marine Insurance, Inc. ("Gulfstream"). Gulfstream and Altemus were duly licensed and authorized to represent AIU and to place insurance coverage for AIU as fully set forth in the license and letter agreement hereto. (R-52-54) (A 10-12).

3. In June, 1984, Block contracted with Norfolk Marine to repair Norfolk's ship, the Tigress. Thereafter, a claim arose out of the alleged negligence of Block in the custody and repair of the Tigress.

4. On June 12, 1985, Gulfstream gave written notification under the policy that a claim had been made against Block by Norfolk pertaining to the Tigress (R 55) (A 13).

5. AIU acknowledged receipt of the claim (demand letter) and created a file dated June 18, 1984 for the Norfolk claim under the policy. (R 56) (A 14)

6. In late July, 1985, Norfolk filed suit against Block for

damages to the Tigress.

7. By letter of August 3, 1985, Block notified Gulfstream of the complaint and Gulfstream reported the complaint and forwarded same to AIU (R 57-76) (A 15-35).

8. AIU wrote Block on August 27, 1985 informing Block that AIU would provide a defense in the matter "due to the fact that the count of negligence comes under your insurance policy." (Emphasis added) AIU further advised that the claims of fraud, statutory theft and punitive damages "are not normally covered under insurance policies." Therefore, AIU specifically agreed to provide a full defense for all counts of the complaint while reserving its rights to review the insurance policy to make any determination of coverage issues. AIU noted that it would obtain separate counsel to investigate, evaluate and determine any and all coverage defenses under the policy and "upon their review and determination of their position in this matter, they will advise you accordingly with Florida Statutes." (Emphasis added) (R 78-79) (A 36-37). AIU then retained the law offices of Richard K., Owens to defend Block.

9. On August 21, 1985, the law firm of Richard Owens served an answer to the complaint and defended the lawsuit on behalf of Block for over seven (7) months during which time numerous depositions were taken, discovery exchanged and the matter otherwise prepared for trial.

10. By letter of January 29, 1986 T.V. Heslin of AIU notified Altemus of Gulfstream that it appeared that Block's loss

was not covered by AIU's policy. (R 162-B) (A 41) AIU asserted two reasons for the lack of coverage: first, that the marina operator's legal liability had been eliminated from the coverage effective June 4, 1984; second, that an exclusion under the general liability policy excluded the subject claim from any coverage. The relevant portions of the letter are as follows:

> "...This will confirm my telephone call to you from January 21, 1986 wherein I advised you that I had checked the coverage on the captioned matter. In checking with the underwriting department, I learned that the marina operator's legal liability...had been eliminated from the coverage effective June 4, 1984.
>
> It is apparent that the insured's contract to repair the vessel Tigress" was entered into with the Plaintiff subsequent to this date. Therefore it would appear that this loss is not covered by the insured's policy, AIU-X-426-87-25.
>
> The care, custody and control, exclusion under the general liability policy would eliminate any coverage for this vessel while it was in the marine repair agency of the insured.
>
> We are sending a copy of this letter to our attorney, Owens & Tuter. We will not advise our insured until you have an opportunity to do so. In the event that you wish us to send a letter directly to the insured in the matter, we will direct one from this office. (Emphasis added)

11. By letter of February 14, 1986, Altemus disputed Heslin's denial of coverage (R 162C-162D) (A 42-43). Altemus advised AIU that the claim was covered under the marina operator's legal liability endorsement as well as the remaining policy provisions, including Products/Completed Operations Liability coverage as well as the Broad Form Comprehensive General Liability Endorsement and the Broad Form Property Damage

Liability coverage.

12. Mr. Altemus' letter to AIU states in relevant part:

> I am writing in reply to your letter of January 29, 1986. As I have mentioned to you in our telephone conversations I do not agree with the reasons for which you have denied coverage.
>
> First, the claimant's yacht "Tigress" was delivered to our assured on June 1, 1984 at which time form number IMD 335 (Marine Operator's legal liability) was still part of the policy. This date comes from B&S Marine who performed the initial investigations on your behalf.
>
> Second, we filed the claim for our insured under the Product/Completed Operations Liability coverage parts. Such coverage is part of the policy and I do not see how the assured could perform an operation (maintenance and/or repair) to the yacht without having it in his case, custody, or control.
>
> Third, the policy includes the Board Form Comprehensive General Liability Endorsement (Form number AIU-11(11/79). Under the Broad Form Property Damage Liability coverage (including Completed Operations) part of this endorsement exclusion K of the DGL form AIU-X-306 (4-73) is deleted and replaced with different wording.
>
> Please review these points in view of the fact that there is current litigation against our insured in this matter. I would appreciate your earliest response...

13. On March 13, 1986 the trial court issued its order for pretrial conference and set the trial of the cause for the two-week period commencing April 4, 1986.

14. By letter of March 20, 1986, two (2) weeks before the trial date, AIU notified Block that AIU was denying coverage for the Norfolk claim and advised their attorneys, Owens and Tutor, that they would not pay the continued cost of defense of the litigation between Norfolk and Block. (R 80-81) (A 38-39)

The March 20, 1986 letter states in relevant part:

> The Marina Operators Legal Liability coverage afforded by policy AIU-X-246-87-25 was eliminated on June 4, 1984. This would have been the coverage necessary to insure your liability for alleged negligence in the handling of the property of others in your care.
>
> The allegations in the complaint indicate that your firm and Norfolk Marine did not contract for repairs to the vessel, "Tigress" until subsequent to June 11, 1984.
>
> We, therefore, are going to advise attorneys, Owen & Tuter, that we will not pay the continued cost of defense of the litigation arising from suit #85-30774, Dade County, Florida. We suggest you make arrangements for the continued defense with counsel of your choosing at your own costs. (Emphasis added.)

15. AIU withdrew their defense. Block retained his own counsel, Leesfield and Blackburn, P.A. and a consent final judgment was entered into on July 1, 1986. (R 20-23) (A 1-4).

16. On April 15, 1986 Altemus again demanded coverage and resubmitted a claim for Block under the independent contractors provision of the policy (R 162E-162K) (A 44-50). By letter of April 23, 1986 (R 162L) (A 51) Mr. Heslin again denied the insured's demand for coverage under an exclusion of the existing policy as follows:

> Regardless of the insured's coverage for liability arising from the work of independent contractors, there is no coverage in this instance. The lack of coverage arises from the care, custody and control exclusion in the policy issued to the insured. (Emphasis added)

17. Based upon the foregoing record, Norfolk and Block moved for a summary judgment claiming that AIU failed to timely comply with the mandatory requirements of Section 627.426(2) and

was therefore not permitted to deny coverage.

18. AIU denied coverage on March 20, 1986 based upon "the allegations in the complaint" that allegedly indicated that the acts complained of occurred after the marina operator's legal liability endorsement was eliminated. AIU also raised untimely coverage defenses based upon exclusions under the existing policies. AIU knew or should have known of these coverage defenses when it received the complaint, over seven (7) months earlier on August 5, 1985. Actually, AIU knew or should have known of these coverage defenses including any "eliminated coverages" nine (9) months earlier on June 18, 1984 when AIU created a claim file under the policy for the Norfolk claim. AIU's reservation letter of August 27, 1985 failed to assert these coverage defenses which it knew or should have known of in contravention of Fla.Stat. 627.426(a). Furthermore, even assuming the reservation letter was sufficient, AIU failed to notify Block of its refusal to defend within sixty (60) days of the reservation letter as required by Florida Statute 627.426(2)(b)(1). AIU's notification to Block that it was refusing to defend came of March 20, 1985, two hundred & five (205) days after the date of its reservation letter and two weeks before trial. Accordingly, AIU's blatant failure to comply with the provisions of Florida Statute 627.426 precludes it from denying coverage, as a matter of law. The trial court properly entered Summary Judgment and the Third District properly affirmed same.

ARGUMENT

THE THIRD DISTRICT PROPERLY AFFIRMED THE JUDGMENT OF THE TRIAL COURT PROHIBITING AN INSURER FROM DENYING COVERAGE FOR ITS FAILURE TO COMPLY WITH THE MANDATORY REQUIREMENTS OF SECTION 627.426(2) FLORIDA STATUTES (1985).

The sole issue on this appeal is whether the trial and appellate court were correct in determining that AIU failed to comply with the mandatory provisions of Section 627.426(2).

Section 627.426(2) provides:

> (2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:
>
> (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery; and
>
> (b) Within 60 days of compliance with Paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30 days before trial, the insurer:
>
> (1) Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured;
>
> (2) Obtains from the insured a non-waiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations and liabilities of the insured during and following the pendency of the subject litigation; or
>
> (3) retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, it shall be set by the court.

In 1983, Block purchased a comprehensive insurance policy from AIU to insure his property and business operations. AIU

issued its contract to Block. Policy No. AIU-X-246-87-25 effective June 4, 1983 through June 4, 1986 (the "Policy"). The Marina Operator's Legal Liability endorsement was eliminated on June 4, 1984. However, coverages under the policy that remained in effect through 1986 included: Comprehensive General Liability, Products - Completed Operations, Independent Contractors Liability and Premises - Operations.

On June 12, 1985 AIU was notified that a claim had been made against Block by Norfolk pertaining to the sailing vessel "Tigress." (R 55) (A 13) AIU acknowledged receipt of the claim and created a file dated June 18, 1985 for Norfolk's claim under the policy. (R 56) (A 14)

In August, 1985, Block was named a defendant in an action brought by Norfolk for damages to the Tigress. (R 62-69) (A 20-27) By letter of August 27, 1985 AIU advised Block it was providing a full defense to the complaint while reviewing the coverage question. (R 78-79) (A 36-37)

According to Fla. Stat. Section 627.426(2)(b) AIU was required to choose one of three alternatives by October 27, 1985 which was sixty (60) days after the issuance of the letter to Block declaring that AIU was reserving its right to assert a coverage defense. By October 27, 1985 AIU had not chosen any of the three alternatives. To the contrary, AIU through the law firm of Richard Owens, defended the suit on behalf of Block for over seven (7) months during which time numerous depositions were taken, discovery exchanged and the matter otherwise prepared for

trial. On March 13, 1986 the trial court issued its order for pretrial conference and set the trial of the cause for the two-week period commencing April 4, 1986.

By letter of March 20, 1986, two (2) weeks before the trial date, AIU notified Block that AIU was denying coverage for the Norfolk claim and advised their attorneys, Owens and Tutor, that they would not pay the continued cost of defense of the litigation between Norfolk and Block. (R 80-81) (A 38-39)

The March 20, 1986 letter states in relevant part:

> The Marina Operators Legal Liability coverage afforded by policy AIU-X-246-87-25 was eliminated on June 4, 1984. This would have been the coverage necessary to insure your liability for alleged negligence in the handling of the property of others in your care.
>
> The allegations in the complaint indicate that your firm and Norfolk Marine did not contract for repairs to the vessel, "Tigress" until subsequent to June 11, 1984.
>
> We, therefore, are going to advise attorneys, Owen & Tuter, that we will not pay the continued cost of defense of the litigation arising from suit #85-30774, Dade County, Florida. We suggest you make arrangements for the continued defense with counsel of your choosing at your own costs. (Emphasis added.)

AIU's letter denying coverage was predicated only upon the elimination of the Marina Operators Legal Liability endorsement AIU did not address its responsibility under the remaining policy provisions which, undisputedly, remained in effect.

AIU's agent, Robert W. Altemus of Gulfstream Marine contested AIU's denial of coverage. Altemus advised AIU that Block's claim was not only covered under the Marina operator's legal liability endorsement but also under the remaining policy

provisions, including Products/Completed Operations Liability coverage as well as the Broad Form Comprehensive General Liability Endorsement and the Broad Form Property Damage Liability coverage. Mr. Altemus' letter to AIU states in relevant part:

> I am writing in reply to your letter of January 29, 1986. As I have mentioned to you in our telephone conversations I do not agree with the reasons for which you have denied coverage.
>
> First, the claimant's yacht "Tigress" was delivered to our assured on June 1, 1984 at which time form number IMD 335 (Marine Operator's legal liability) was still part of the policy. This date comes from B&S Marine who performed the initial investigations on your behalf.
>
> Second, we filed the claim for our insured under the Product/Completed Operations Liability coverage parts. Such coverage is part of the policy and I do not see how the assured could perform an operation (maintenance and/or repair) to the yacht without having it in his case, custody, or control.
>
> Third, the policy includes the Board Form Comprehensive General Liability Endorsement (Form number AIU-11(11/79). Under the Broad Form Property Damage Liability coverage (including Completed Operations) part of this endorsement exclusion K of the DGL form AIU-X-306 (4-73) is deleted and replaced with different wording.
>
> Please review these points in view of the fact that there is current litigation against our insured in this matter. I would appreciate your earliest response.

On April 15, 1986, Mr. Altemus again notified AIU that the claim should be covered under the Independent Contractors Liability coverage and re-submitted Block's claim to AIU.

AIU responded to all the aforementioned demands for coverage by stating that exclusions under these existing policies and

endorsements precluded coverage.

AIU's conduct is in blatant violation of the statute. What is most reprehensible is that AIU's refusal to defend was based upon the allegations of the complaint, which complaint AIU had in its possession for the preceding seven (7) months. AIU notified the insured of its refusal to defend more than sixty (60) days after its reservation letter and within thirty (30) days of trial. Florida Statute Section 627.426 requires strict compliance. Auto Owners Ins. Co. v. Salvia, 472 So.2d 486 (Fla. 5th DCA 1985). AIU failed to choose one of the three alternatives within the designated time period and, therefore is not permitted to deny coverage. The trial court's order granting summary judgment for AIU's failure to comply with the statute was properly affirmed by the Third District.

AIU erroneously argues that the statute has no application to the instant case. AIU asserts that "The language of the statute clearly contemplates the fact that coverage exists and it is being forfeited for some reason." (Emphasis added) (PB 27) AIU argues that the marina operator's legal liability policy was eliminated prior to the loss in issue and therefore, there was no coverage from the onset and no need to assert a "coverage defense." AIU defines a "coverage defense" as coming into existence upon a breach of the insurance policy by the insured resulting in a forfeiture of the policy. (PB 26) Petitioner theorizes that the application of the statute requires a threshold determination of whether the issue involved is one of

coverage or forfeiture. Petitioner erroneously contends that those two issues are treated differently by the statute.

AIU's reasoning is flawed. Initially it should be noted that the langauge of the statute does not "clearly contemplate the fact that coverage exists..." AIU's reasoning, as well as the majority Opinion in United States Fidelity and Guaranty Co. finds no support in the language of the statute or in its legislative history. To the contrary, a plain reading of the statute reflects that the term "coverage defense" has no conditions or limitations as asserted by AIU. Accordingly, a coverage defense may be predicated upon a lack of coverage from the onset as well as any other defense to coverage including an insured's breach of a condition of the contract, exclusions in the policy, or any other defense relied upon by the insurer in denying coverage. As noted by the well reasoned and legally substantiated dissenting opinion in United Sates Fidelity and Guaranty Co.:

> Section 627.426(2) uses broad language to impose a duty on an insurer to respond to its insured within set time limits:
>
> A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:...
>
> As noted above, "coverage" is an all-encompassing word in insurance law. There is no indication in the statute that it only refers to defenses based on breach of conditions leading to forfeiture, or operation of an exclusion. The staff report to section 627.426(2) explained that "this section treats waiver of forfeiture and coverage defense the same and established time limits in lieu of the insured having to prove prejudice. The statute, in essence, provides that the failure to meet the established time limits is

sufficient in itself to prohibit denial of coverage." (Emphasis added.)

> Questions of "coverage" encompass the full panoply of possible reasons why an issued policy does not encompass a particular loss. If the Legislature intended a less onerous interpretation, it is for them to define a more limited meaning of "a particular coverage defense." Id. at 628

Quite simply, a reading of the statute reveals that there is no support or basis for AIU's definition of a "coverage defense". Therefore, AIU goes beyond the plain language of the statute to create a definition of "coverage defense" by bootstrapping principles of law cited in cases which predate the subject statute. These cases, which do not apply to the statute, hold that the doctrines of waiver and estoppel apply only to the grounds of forfeiture of an insurance policy and not to matters of coverage. Accordingly, AIU disregards the plain language of the statute and contends that this case law must supersede the statute.

Petitioner theorizes that "current case law in Florida clearly prohibits coverage by estoppel and therefore the statute cannot be interpreted to eliminate the well established law in existence at the time the statute was passed"[1] (P.B. 17) This

---

[1]Contrary to Petitioner's contention, this Court has recognized that under common law principles the theory of "estoppel [may] be utilized to prevent an insurance company from denying coverage." Crown Life Ins. Co. v. McBride, 12 F.L.W. 549 (Fla. Nov. 5, 1987). That case did not review the statute in question which specifically provides that non compliance with its mandatory provisions shall prevent an insurance company from denying coverage.

contention is notably unsupported by any precedent. In response, the Third District's opinion correctly noted:

> Where the statute's notice provisions are not followed the insurer is not permitted "to deny coverage based on a particular coverage defense." The langauge is unambiguous. There is no compelling reason to wholly preserve the judicially-created prohibition against coverage by estoppel, see, e.g., Six L's Packing Co. v. Florida Farm Bureau Mut. Ins. Co., 276 So.2d 37 (Fla. 1973), by attributing ambiguity to a facially clear legislative pronouncement. It is not the court's function or perogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court. Holly v. Auld, 450 So.2d 217 (Fla. 1984). (Emphasis added) id. at 1119-20

AIU's argument is an attempt to rewrite the statute by modifying and limiting its express terms without any predicate for so doing. The language of the statue is clear and unambiguous and therefore it must be given its plain and obvious meaning. Holly v. Auld, 450 So.2d 217 (Fla. 1984). The legislative intent must be derived form the words used without involving incidental rules of construction or engaging in speculation. The courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960). If the legislature had intended to create a distinction between issues of coverage and forfeiture and impose a threshold determination pertaining to same, the legislature would have said so. Likewise, if the legislature intended that the statute become operative only if the insured proved prejudice, the legislature would have said so. Pfeiffer v. City of Tampa, 470 So.2d 10 (Fla. 2d DCA 1985).

However, the legislature did not. Accordingly, there is no predicate to go beyond the plain language of the statute in order to create a modified and limited interpretation of the plain language, as proposed by AIU. The courts are without power to construe the statute in a way which would modify or limit its expressed terms or its reasonable and obvious implications. Holly, supra. The court, in construing the statute, cannot and will not attribute to the legislature an intent beyond that expressed. Bill Smith, Inc. v. Cox, 166 So.2d 497 (Fla. 2d DCA 1964); American Bankers Life Assurance Co. of Fla. v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968).

Even assuming, arguendo, that the term "coverage defense" is subject to reasonable differences in interpretation thereby affecting the meaning or application of the statute, then the legislative intent must be the polestar of judicial construction. Lowry v. Parol and Probation Com'n, 473 So.2d 1248 (Fla. 1985). When the langauge of the statue is capable of two constructions, the court's may resort to the history of its passage through the legislature to ascertain the legislative intent. State v. Amos, 67 Fla. 26, 79 So. 433 (Fla. 1918). Smith v. Ryan, 39 So.2d 281 (Fla. 1949). The legislative intent regarding the purpose and effect of this statute is fully set forth in the committee reports and records hereto. (A 55). A review of same reflects that Petitioner's entire arguments that the legislature intended (a) a distinction between coverage and forfeiture, and (b) that the statute become operative only upon a showing by the insured

"that his rights were prejudiced by whatever delay took place" (P.B. 18) are wholly unfounded!!

The relevant portion of the committee report provides as follows:

> This section treats waiver of forfeiture and coverage defenses the same and establishes time limits in lieu of the insured having to prove prejudice. The statute, in essence, provides that the failure to meet the established time limits is sufficient in itself to prohibit denial of coverage. (Emphasis added.)

The statue is remedial in nature and means what is says. A "remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." It is also defined as "(a) statute giving a party a mode of remedy for a wrong, where he had none, or a different one before." Adams v. Wright, 403 So.2d 391 (Fla. 1981). This statute was designed and enacted for all the foregoing purposes. The legislature in passing this statute sought to "develop a system of effective regulation, which adequately protects the public interest and preserves the many benefits of private insurance..." (Bill Analysis, House Committee on Insurance (A 52) The legislative history reveals that the legislature passed this statute specifically to address and prevent the type of situation that developed in the instant case. The Committee report (A 55) reads as follows:

> Subsection (2) is a recognition by the Legislature of the difficulties presented to all parties (insureds, insurers, and defense counsel) when the question of coverage defense arises. The insured wants the coverage, the company doesn't, and the insurance defense attorney is thrust in the middle. The problem

> is particularly acute when the complaint contains multiple counts, some covered by the coverage, and others not covered..."
>
> ...The actions the insurer may take are governed by subparagraphs (2)(b)(1.-3.). The insurer's duties are clear: it can walk away from the case by refusing to defend; it can obtain a nonwaiver agreement after full disclosure; or it can retain independent counsel which is mutually agreeable...
>
> This section treats waiver of forfeiture and coverage defenses the same and establishes time limits in lieu of the insured having to prove prejudice. The statute, in essence, provides that the failure to meet the established time limits is sufficient in itself to prohibit denial of coverage. (Emphasis added.)

The procedures enumerated in Fla. Stat. Section 627.426 are mandatory requirements. Drury v. Harding, 461 So.2d 104 (Fla. 1984) ("Shall" connotes mandatory requirement). "The insured shall not be permitted to deny coverage based on a coverage defense if it does not follow the statutory requisites." Fla.Stat. Section 627.426. It is without question that AIU failed to follow the statutory requisites. The lower court properly determined that AIU was not permitted to deny coverage.

Further, AIU's own argument when applied to the facts of this case establishes that AIU's conduct violated the statute. Petitioner first contends that the statute has no application because the marina operator's legal liability policy was eliminated prior to the loss in issue and therefore, there was no coverage from the onset and no need to assert a "coverage defense." However, Petitioner fails to acknowledge that the general liability policy remained in effect. The coverages in effect included Comprehensive General Liability, Products-

Completed Operations, Independent Contractors Liability and Premises - Operations. Petitioner relied upon alleged exclusions in these policies to raise a "coverage defense." AIU's letter of January 29, 1986 (R 162B) (A 41) states in relevant part:

> The care, custody and control exclusion under the general liability policy would eliminate any coverage for this vessel while it was in the repair agency o the insured. (e.a.)

AIU's letter of April 23, 1986 states in relevant part:

> Regardless of the insured's coverage for liability arising from the work of independent contractors, there is no coverage in this instance. The lack of coverage arises from the care, custody and control exclusion in the policy issued to the insured. (Emphasis added.)

Therefore, contrary to Petitioner's argument, there was insurance in effect, making this case clearly distinguishable from the fifth district case. As correctly noted by the Third District:

> AIU's defense here in an untimely "no coverage" defense. We agree with the appellees that this case is distinguishable from the fifth district case. Here there was a contract of insurance in effect between the parties and there was also, obviously, a legitimate question as to whether the policy provided coverage for the loss.**3 In United States Fidelity and Guarantee, the court held, essentially, that there is no coverage issue where there is no policy. The question in this case is whether the policy covers a specific loss.

Petitioner has relied upon both the elimination of an endorsement as well as exclusions in the existing policies as a "coverage defense" and accordingly, should have done so timely as mandated by Fla.Stat. Section 627.426.

Petitioner further claims that there are additional issues

of fact in dispute. These are mere paper issues. Petitioner claims that there remains an issue as to whether the reservation of rights letter was sufficient to reserve all of AIU's rights and whether AIU knew or should have known there was insurance coverage within thirty (30) days of receipt of the complaint. The court need not delve into this matter because even assuming, arguendo, that the reservation of rights letter was timely and sufficient, AIU still failed to comply with the statute by not electing to deny coverage, or take one of the other alternatives provided by the statute, within sixty (60) days of said letter.

Petitioner's reliance upon the affidavit of Carlton Dunn is likewise misplaced and creates no issues of fact. The affiant's opinion that there is no coverage under the policy has no relevance to AIU's failure to timely comply with the mandatory provisions of the statute. The affiant's opinion as to the construction of the statute is also irrelevant. The construction of statutes is a question of law to be determined by the court. It would be error to rely on expert testimony to determine this question of law that must be decided by the Court. Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976).

Petitioner's argument that the statute is unconstitutional is likewise unfounded. Initially, it should be noted that Petitioner is improperly raising this issue for the first time. The record shows that at no time did Petitioner raise a constitutional question. This Court has held that it is "improper for a court pass upon the constitutionality of an act,

the constitutionality of which is not challenged; that courts are not to consider a question of constitutionality which has not been raised by the pleadings..." State v. Turner, 224 So.2d 290, 291 (Fla. 1969).

Petitioner argues that the Third District's application of the statute imposes "new obligations...upon AIU which did not exist under the contract and this impairment of the contract is unconstitutional." (P.B. 31) Petitioner's argument is baseless.

The constitution and laws of Florida are part of every contract. Board of Public Instruction v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955). The laws subsisting at the time and place of making a contract enter into and become a part of the contract, as if they were expressly referred to and incorporated therein, including those laws which affect its construction, validity, enforcement or discharge. Humphreys v. State, (1933) 108 Fla. 92, 145 So. 858. AIU's insurance policy became effective in June, 1983, subsequent to the enactment of Fla. Stat. 627.426(2) Florida Statutes (1985) (effective 1982). It cannot be claimed that the statute abrogates the contract, where the contract was entered into subsequent to the enactment of the statute. Grand Lodge, Knights of Pythias v. Moore, (1935) 120 Fla. 761, 163 So. 108.

Further, Petitioner is operating in a heavily regulated industry. See, Florida Insurance Code, Chapters 624-632, Florida Statutes (1981). This Court has recognized with approval that "for years the legislature has regulated the contents of

insurance policies and has authorized the department to approve or disapprove insurance policy forms." U.S. Fidelity and Guar. Co. v. Dept. of Ins., 453 So.2d 1355, 1361 (Fla. 1984). Since 627.426(2) was in existence at the time AIU entered into the contract with Block, the statute does not and cannot operate as a substantial impairment of a contractual relationship. See, U.S. Fidelity and Guar. Co., supra.

Additionally, the terms of AIU's own insurance contract undermines AIU's fallacious claim of contract impairment. The policy provides in relevant part:

> PROVISIONS APPLYING TO ALL SECTIONS OF THIS POLICY
>
> F. CONFORMITY WITH STATUTE: The terms of this policy and forms attached hereto which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes. (Emphasis added.) (A 59)

Accordingly, Petitioners claim that the statute conflicts with the obligations under its policy is wholly unfounded.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court decline to accept jurisdiction over the matter and, alternatively, that the opinion of the Third District Court affirming the final summary judgment in favor of Norfolk and Block be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the following counsel this 15 day of December, 1987.

Richard A. Sherman, Esq.
Suite 102 N. Justice Bldg.
524 South Andrews Avenue
Ft. Lauderdale, FL 33301

Michael D. Sikes, Esq.
Merritt, Sikes & Craig, P.A.
Third Floor, McCormick Bldg.
111 S. W. Third Street
Miami, FL 33130-3989

Terry L. Redford, Esq.
David I. Katzman, Esq.
Thorton, David & Murray, P.A.
Suite 100
2950 S. W. 27 Avenue
Miami, Fl 33133

PAYTON AND RACHLIN, P.A.
Attorneys for Norfolk
Marine Co.
1810 New World Tower
100 N. Biscayne Blvd.
Miami, FL 33132
(305) 371-3777

By: _____
Richard S. Rachlin

By: _____
Kenneth J. Carusello