IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,264

Florida Bar No: 184170

AIU INSURANCE COMPANY, a foreign corporation,

Petitioner,

vs.

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

Respondent,

NORFOLK MARINE CO., a foreign corporation,

Intervenor/Respondent.

BRIEF OF PETITIONER ON THE MERITS

BRIEF OF PETITIONER AIU INSURANCE COMPANY a foreign corporation

(With Appendix)

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INTRODUCTION

The Appellant AIU Insurance Company will be referred to as a AIU or Petitioner.

The Respondent Block Marina Investments d/b/a Florida Yacht Basin will be referred to as Block or Appellee.

The Intervenor Norfolk Marine Company will be referred to as Norfolk.

The Record on Appeal will be designated by the letter "R".

All emphasis in the Brief is that of the writer unless otherwise indicated.

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STATEMENT OF THE FACTS AND THE CASE

The Third District Opinion below has erroneously held that the legislature intended by Section 627.426(2) to create coverage under a liability insurance policy that did not provide that coverage. In the present case the insured initially had the coverage, but had cancelled it because the premium was too high. It is respectfully submitted that the Fifth District Court of Appeal has correctly interpreted the legislative intent in USF&G v. American Fire, infra and the Opinion below which is in conflict with the American Fire case must be reversed.

It is undisputed that prior to the adoption of Section 627.426(2) insurance coverage could not be created under the principles of waiver and estoppel and there is no indication whatsoever that the legislature intended to overrule this well established principle. To apply the statute, as construed by the Third District, would result in a constitutional impairment of contracts since the Third District's interpretation of the statute has changed the basic substantive rights of the parties to the insurance contract, which is impermissible. As the Fifth District has correctly stated, an insurer does not assert a "coverage defense" when there is no coverage in the first place and the Third District's Opinion, holding AIU strictly liable for coverage, must be reversed and a Summary Judgment entered for AIU.

Even if this Court should agree with the Third District's interpretation of the statute and its application in this case, the Opinion below states that there is a disputed issue as to

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whether the policy provided coverage for the loss. Therefore the Summary Judgment in favor of Block Marina must be reversed for a fact finding.

Block Marina obtained a comprehensive liability policy with a marina operators legal liability endorsement, which provided bailment insurance. The comprehensive general liability insurance policy in force explicitly exempted bailment losses from coverage:

Exclusions

> This insurance does not apply: ... (K) to property damage to ... (3) property in the care, custody, or control of the insured or as to which the insured is for any purpose exercising physical control...

The effective date of the insurance policy was from June 1983 through June 4, 1986. However in 1984 the marina operators legal liability endorsement was voluntarily eliminated from the policy by Block Marina effective June 4, 1984, when there was a premium increase for the coverage.

Because of the exclusionary provision in the general comprehensive liability policy, in order to obtain coverage for damages to a vessel under the care, custody and control of Block Marina, it was necessary for Block to obtain separate marine operator's insurance. Up until 1984 Block Marina had done this and then at the time of the premium increase the coverage was voluntarily eliminated by Block (R 162 B). The marina operators endorsement to the policy provided bailment insurance and was designed to pay, on behalf of the insured, the amount the insured was legally liable to pay for loss or damage to a ship that was

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in its care and control for repairs. The endorsement had provided for $150,000 worth of coverage for commercial vessels. Disputed evidence was that the endorsement was voluntarily eliminated by Block and was not in effect at the time a loss occurred in this case (R 162 B).

The facts leading up to the coverage dispute were that Norfolk bought a ship called the Tigress, which needed repairs to make it sea worthy (R 62). Norfolk brought the ship to Block Marina to obtain an estimate for the cost of repairs and in mid June 1984 entered into a verbal contract with Block to make these repairs (R 63). Norfolk put down a deposit of approximately $25,000 towards the satisfaction of the contract and Block Marina agreed to have the work completed within 89 days (R 63). However the ship was allegedly not properly or completely repaired by Block Marina and it was asserted that the work was performed in a defective manner and with substandard quality (R 64-65). In addition the vessel was not protected from thieves and apparently some items were stolen from the ship while in the custody of the Marina and the money deposited by Norfolk was used by Block for something other than repairs to the Tigress (R 63). In February 1985 Norfolk took control of the Tigress and removed it from Block Marina and subsequently the repairs were completed (R 64).

Norfolk then sued Block Marina for breach of contract, fraud, theft and negligence for failing to properly repair the ship (R 1-4). In August 1985 AIU was notified that Norfolk had a claim against Block relating to the damages done to the Tigress

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(R 78-79). At this point the insurance company informed Block Marina, that under the comprehensive general insurance policy, the counts of fraud, statutory theft and the demand for punitive damages were not normally covered (R 78). In this letter AIU specifically stated that it was providing a full defense for all the allegations in the law suit, while simultaneously reserving the right to review their insurance policy and to make any determinations of coverage issues (R 78-79). The letter also notes that a defense was being provided to Block Marina under the negligence count which would be covered by the standard insurance policy (R 78).

In January 1987 AIU notified Gulfstream Marine Insurance (the agent who obtained coverage for Block Marina), that upon reviewing that damages and the coverage for the Norfolk claim, AIU determined that the marina operators Legal liability endorsement had been eliminated by Block Marina effective June 4, 1984 (R 162B). Therefore there was no coverage for any damages to the Tigress. Gulfstream responded to this letter by disagreeing with AIU as to the existence of coverage for the loss to the Tigress, alleging that the ship was delivered to Block Marina on June 1, which was prior to the effective date of the elimination of the bailment coverage on June 4, 1984 (R 162 C). AIU wrote Block Marina on March 20, 1986 informing it that the liability endorsement was eliminated on June 4, 1984 and therefore there was no coverage for the alleged negligence in the repairs, which repairs were not contracted for until subsequent to June 11, 1984 (R 72; 80).

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On April 15, 1986 Gulfstream then filed a claim on behalf of Block Marina under a different coverage portion of the comprehensive general liability policy (R 162 E-K). This time it was seeking coverage for the damages under the independent contractor's liability portion of the policy.

AIU responded to the re-filed claim by again noting that there was no coverage, as the comprehensive general liability policy contained a care custody and control exclusion and that in order to have coverage for the property of others in the care of Block Marina, Block would have had to have maintained its marina operators legal liability endorsement, which it voluntarily eliminated effective June 4, 1984 (R 162 L). AIU's attorneys then withdrew as counsel of record for Block and Block Marina retained independent counsel (R 49). Block then entered into a consent Final Judgment with Norfolk Marine for $125,000; which was the result of a settlement agreement between the parties, in which Block Marina assigned its rights against its insurer AIU to Norfolk Marine, in exchange for an agreement never to enforce the consent judgment against Block Marina.

A Declaratory Judgment action was brought by Block Marina and Norfolk, as Intervenor/Plaintiff, against AIU to enforce coverage and satisfaction of the settlement amount plus punitive damages, interest and attorneys' fees (R 1-4; 13-14). Norfolk Marine then moved for a Summary Judgment based solely on the allegation that AIU failed to comply with the provisions of Florida Law Statute Sections 627.426(2) (1985) (R 47-81). The allegation was based on the fact that when AIU sent out its

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reservation of rights letter in August of 1985, Norfolk claimed that AIU should have, at that time, asserted the fact that there was no coverage (R 50). Notice was sent to Block Marina on March 20, 1986 that there was no coverage and no duty to defend. Norfolk in its Motion for Summary Judgment alleged that this notice should have been sent within the 60 days statutory period and since it was not AIU was estopped from denying coverage as a matter of law (R 50).

In response to the Motion For Summary Judgment AIU filed the Affidavit of Carlton Dunn, an insurance expert, who had reviewed the contract and the entire investigative file of AIU and determined that the Block Marina policy afforded no coverage for the loss or damage complained of by Norfolk Marine (R 100-162). In addition it was the expert opinion of Mr. Dunn that since Block Marina had not breached any of the terms of its insurance policy there was no reason for AIU to assert a "coverage defense" as contemplated by Section 627.426 (R 101). In other words since there was never any coverage for the claim brought by Norfolk Marine there was no obligation to comply with the statutory requirements.

AIU asserted that there were fact questions precluding Summary Judgment, such as exactly when the Marina took care, custody and control of the Tigress and the fact that there were numerous opinions as to whether or not there was coverage under the policy. The trial court entered Summary Judgment against AIU, but did not set forth any findings of fact, as to why AIU was responsible for the consent Final Judgment entered into

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between Norfolk Marina and Block Marine. However the only basis asserted by Norfolk in its Summary Judgment Motion was that AIU was estopped to deny coverage because of its failure to comply with 627.426.

AIU filed its Notice of Appeal, since it is well established in Florida law that coverage by estoppel is barred in this state and compliance with Florida Statute section 627.426 is not required when there was never any coverage in the inceptions. In a 2-1 decision the Third District affirmed the Summary Judgment in favor of Norfolk; stating that there was no compelling reason to preserve the decisional law against coverage by estoppel and 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. Recognizing that this holding was in direct conflict with the Fifth District's decision in USF&G v. American Fire the case was certified to the this Court for resolution. It is respectfully submitted that the Fifth District's interpretation of the statute, and the rationale put forth in the dissent in the Opinion below, are legally correct and that the Summary Judgment for Norfolk must be reversed and entered for AIU.

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SUMMARY OF ARGUMENT

The Third District's majority Opinion below has erroneously held that the legislature intended in Section 627.426(2), to create insurance coverage by estoppel, under a liability policy that did not provide such coverage. It is respectfully submitted that the Fifth District has correctly interpreted the legislative intent of that statute, in USF&G v. American Fire, infra. The Opinion below, which is in direct conflict with American Fire, must be reversed. It is undisputed that prior to the adoption of Section 627.426(2), insurance coverage could not be created under the principles of waiver and estoppel and there is no indication whatsoever that the legislature intended to overrule this well established principle. However in contrast to the legislative intent, as construed by the Fifth District Court of Appeal, the Third District has stated that the clear and unambiguous language of the statute imposes strict liability upon AIU to provide insurance coverage because of its failure to comply with the claim administration statute's requirements. Furthermore, the Third District has found no compelling reason to preserve the whole body of law which prohibits the creation of coverage by estoppel.

To apply this statute as construed by the Third District, results in a constitutional impairment of contracts, since the court's interpretation of the statute has changed the substantive rights of the parties to the insurance contract, which is impermissible. In this case it was undisputed that Block Marina voluntarily eliminated the bailment insurance coverage prior to the

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time that it entered into the contract with Norfolk Marine to repair the ship. Therefore at the time of the loss no coverage existed. As the Fifth District has correctly stated, an insurer does not assert a "coverage defense" when there is no coverage in the first place. The Opinion below holding AIU strictly liable for coverage must be reversed and a Summary Judgment entered for AIU.

The Opinion must be reversed because: (1) Florida law clearly bars estoppel by coverage; (2) Section 627.426 does not apply where there is no insurance coverage for the loss claimed; (3) to hold AIU strictly liable for insurance coverage for failing to comply with the claim administration statute, thus creating coverage by estoppel, is an unconstitutional impairment of the insurance contract; and (4) at the very least the Summary Judgment in the case must be reversed where the Third District Opinion states there are disputed issues regarding whether the policy provided coverage for the loss. One or all of the above stated reasons are sufficient to require reversal of the Summary Judgment and the entry of a Judgment in favor of AIU, or remand of the case for a factual determination of the issues regarding the insurance coverage.

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WHERE AN INSURED VOLUNTARY ELIMINATED COVERAGE IT IS LEGALLY IMPERMISSIBLE TO RESURRECT THAT COVERAGE BY HOLDING THAT THE FAILURE TO COMPLY WITH 627.426 ESTOPS THE INSURER FROM DENYING THE ELIMINATED COVERAGE; AND THE APPLICATION OF STATUTORY ESTOPPEL IN THIS CASE IS AN UNCONSTITUTIONAL IMPAIRMENT OF THE INSURANCE CONTRACT.

The Third District has held AIU strictly liable for insurance coverage which was expressly and voluntarily eliminated by the insured, because AIU failed to comply with the requirements of section 627.426. The Opinion below must be reversed because: (1) Florida law clearly bars estoppel by coverage; (2) Section 627.426 does not apply where there is no insurance coverage for the loss claimed; (3) to hold AIU strictly liable for insurance coverage for failing to comply with 627.426, thus creating coverage by estoppel, is a unconstitutional impairment of insurance contract and (4) at the very least Summary Judgment in this case was clearly improper where the Third District Opinion states that there are disputed issues regarding whether the policy provided coverage for the loss. One or all of the above stated reasons are sufficient to require reversal of the Summary Judgment and the entry of a Summary Judgment in favor of AIU or remand of the case so that a jury may determine the factual issues raised regarding insurance coverage.

1. Coverage by Estoppel Not Permitted in Florida

In this case it was conceded that under the decisional law in effect prior to the adoption of F.S.A. 627.426(2), insurance coverage may not be afforded under general principles of waiver or estoppel. AIU Insurance Company v. Block Marina Investments

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Inc., 12 F.L.W. 2311, 2312 (Fla. 3d DCA September 22, 1987). It is well established in current Florida law that a party cannot create insurance coverage by estoppel because coverage by estoppel is not permitted. Six L's Packing Co. v. Florida Farm Bureau Mutual Insurance Co., 276 So.2d 37 (Fla. 1973); American States Insurance Company v. McGuire, 12 F.L.W. 1972 (Fla. 1st DCA August 13, 1987)(we note that in the onset it is undisputed that, as a general principle, the doctrines of waiver and estoppel are not available to extend the coverage of an insurance policy to create a primary liability); Campbell v. Prudential Insurance Co., 480 So.2d 666 (Fla. 5th DCA 1985); Doyle v. State Farm Mutual Automobile Insurance Co., 464 So.2d 1277 (Fla. 3d DCA 1985); Kramer v. United States Automobile Association, 436 So.2d 935 (Fla. 4th DCA 1983); Starlight Services Inc. v. Prudential Insurance Company of America, 418 So.2d 305 (Fla. 5th DCA), petition for rev. dismissed, 421 So.2d 518 (Fla. 1982).

The reason that a party cannot create coverage by estoppel is that the doctrines of estoppel and waiver are applied only to the grounds of forfeiture of an insurance policy and do not apply to matters of insurance coverage. Six L's Packing, supra; Hayston v. Allstate Insurance Company, 290 So.2d 67 (Fla. 3d DCA 1974); Kaimner v. Franklin Life Insurance Company, 472 F.2d 1073 (5th Cir. 1973).

In Six L's Packing Company, this court adopted the opinion of the Fourth District as its own and found for the insurer on the issue of estoppel. One of the questions in that case was whether the doctrines of waiver and estoppel apply to matters of

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insurance coverage. In finding that estoppel by coverage is not permitted this Court stated:

> The general rule is well established that the doctrine of waiver and estoppel based upon the conduct or actions of the insurer (or his agent) is not applicable to matters of coverage as distinguished from grounds of forfeiture. In other words, while an insurer may be estopped by its conduct from seeking a forfeiture of a policy, the insurers coverage or restrictions on the coverage cannot be extended by the doctrine of waiver and estoppel. (Citations omitted; Court's emphasis)

Six L's, 563.

The rationale for the rule that waiver and estoppel are not applicable to matters of coverage was succinctly restated in Uni-Jax Inc. v. Factory Insurance Association, 328 So.2d 448, 455 (Fla. 1st DCA 1976):

> While waiver and estoppel have been held applicable to nearly every area in which an insurer may deny liability, the courts of most jurisdictions agree that these concepts are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom. The theory underlying this rule seems to be that the company should not be required by waiver and estoppel to pay a loss for which it charged no premium, and the principle has been announced in scores of cases involving almost every conceivable type of policy or coverage provision thereof.

Uni-Jax at 455.

This doctrine barring the application of estoppel clearly applies to facts below where the marine legal liability endorsement would have covered the claims brought by Norfolk Marine, was voluntarily eliminated from the policy by Block Marina effective June 4, 1984. Applying the above rationale it

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is clear that AIU cannot be required by estoppel, to pay for the loss for which there was no coverage, for which it charged no premium, for which Block paid no premium.

The doctrines of waiver and estoppel are not applicable to matters of coverage, as distinguished from grounds for forfeiture under an insurance policy, and this law is so well established in Florida that it has been embraced by every District Court in addition to this Court. Six L's Packing, supra; Uni-Jax, supra; Manicare Corporation v. First State Insurance Company, 374 So.2d 1100 (Fla. 2d DCA 1979); Radoff v. North American Co. For Life & Health Ins., 358 So.2d 1138 (Fla. 3d DCA 1978); Starlight Services, supra. In light of this decisional law, it was conceded below that prior to the adoption of section F.S.A. 627.426(2) (1985) insurance coverage could not be afforded under principles of waiver or estoppel. It was on this basis that the Dissenting Opinion below stated that the legislature is presumed to know not only the law but also that the courts will construe their acts, not only by legal effect, but by language employed to manifest their intention. Based on the language of the statute, Judge Nesbitt stated that it was plain that the legislature did not intend to completely abolish the rule of law that insurance coverage cannot be created by waiver or estoppel. Therefore it was unnecessary to determine what the legislature intended, since the statute was irrelevant. Block, 2312.

Judge Nesbitt found that the law as stated in the Fifth District's Opinion of United States Fidelity & Guaranty Co. v. American Fire and Indemnity Co., 12 F.L.W. 1736 (Fla. 5th DCA

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July 16, 1987) was the correct legislative interpretation and would have reversed the Summary Judgment entered against AIU.

The Opinion below finds that the statutory language "to deny coverage based on a particular coverage defense" to be unambiguous. Block, 2311. The majority then goes on to find no compelling reason to wholly preserve the judicially created prohibition against coverage by estoppel and allows Block Marina to recover for a loss for which it paid no premium and for which it had expressly voluntarily eliminatedy coverage. This finding of course is in direct conflict with the majority in American Fire.

In American Fire the court, based on the exact same language, found no legislative intent to create coverage under a liability insurance policy that never provided that coverage or to resurrect a policy that expired by its own terms or no longer legally existed to cover an accident or event occurring after its termination. American Fire, 1736. Based on this interpretation of the legislative intent behind section 627.426(2) the Fifth District found that the statute did not apply and reversed the Summary Judgment against USF&G.

What basically happened in the American Fire case was that USF&G had issued a "claims made" contractors comprehensive liability insurance policy to a construction company. The policy term was 1972-1973, during which time the contractor had installed some electrical wiring in a project. In 1984 the plaintiff was injured due to the negligent installation of the wiring and the construction company was sued. The company

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notified USF&G which had written the original policy and American Fire which provided the same coverage during the period that the accident occurred. On Motions for Summary Judgment the same allegations were made as in the present case, that the insurer USF&G did not comply with the provision of Section 627.426(2) in raising a "coverage defense" and therefore USF&G was estopped to deny coverage under their policy. In a 2-1 decision the Fifth District reversed the Judgment against USF&G stating that the term 'coverage defense' as used in the statute does not include a complete lack of coverage. "An insured does not assert a "coverage defense" where there was no coverage in the first place." American Fire, 1736.

The decision in American Fire was a 2-1 split decision with Judge Sharp writing a lengthy dissenting opinion. However even in Judge Sharp's dissent she recognized that states addressing this issue find no duty to disclaim under the statute where no coverage exists.

> However where the coverage of the policy does not attach either because no contract of insurance was made with the person and for the vehicles involved, or where the policy had terminated by an act of the insured or cancellation by the insurer there is no duty to disclaim. The rationale for the New York Court's view of their insurer disclaimer statute is a species of waiver or estoppel. Since these doctrines are not a sufficient legal basis to create or extend coverage that neither can the statute create or extend coverage.
>
> To hold otherwise and apply the doctrine of waiver in such circumstances would improperly create coverage where none exists, contrary to well-established law in this State.

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American Fire, 1737, quoting Aetna Casualty and Surety Company v. Mari, 476 N.Y.S. 2d 910, 912, 432 N.E.2d 83 New York 1984.

While the Dissent focuses on the fact that the term coverage as used in the statute should be interpreted as an all encompassing word, the simple facts under both American Fire and Block are that coverage did not exist. Therefore as the majority in American Fire correctly finds, a "coverage defense" is not asserted where there is no coverage in the first place. To interpret the statute to create coverage, which was voluntarily eliminated by the insurer is not supported by the language used in the statute. The language does not indicate in any manner any intent by the legislature to completely abolish current Florida law that insurance coverage cannot be created by waiver or estoppel.

It is undisputed in the Record below, that Block Marina voluntarily eliminated the coverage for the losses suffered by Norfolk Marine. It was equally conceded that the coverage was not in existence at the time of the alleged negligence of Block in repairing the ship Tigress. The sole basis for the Summary Judgment below was that AIU's failure to comply with the claim administration statute created the eliminated coverage by estoppel. The Third District Opinion is erroneous in that the 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.

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2. Section 627.426(2) Does Not Impose Strict Liability Upon Insurers.

Even in cases where waiver and estoppel do apply, they do not require an automatic finding of coverage, rather the insured must show that his rights were prejudiced by whatever delay took place. Liberty Mutual Insurance Company v. Jones, 427 So.2d 1177 (Fla. 3d DCA 1983); Phoenix Assurance Company of New York v. Hendry Corporation, 267 So.2d 92 (Fla. 2d DCA 1972, cert. discharged 277 So.2d 523 (Fla. 1973); Consolidated Mutual Insurance Company v. Ivy Liquors Inc., 185 So.2d 187 (Fla. 3d DCA 1966, cert. denied 189 So.2d 633 (Fla. 1966). In other words Florida courts and those in other jurisdictions have applied waiver and estoppel when the circumstances indicate the insurer's conduct induced the insured to rely on that conduct to his detriment. Crown Life Insurance Company v. McBride, 472 so.2d 870 (Fla. 4th DCA 1985); Penninsula Life Insurance Company v. Wade, 425 So.2d 1181 (Fla. 2d DCA 1983); American States v. McGuire, supra; Kramer v. U.S. Auto Association, supra; Travelers Insurance Company v. Fletcher American National Bank of Indianapolis, 84 Ind. App. 563, 150 N.E. 825 (1926).

The Opinion below has interpreted the legislative intent in 627.426 to hold an insurer strictly liable for failure to comply with the statutory requirements. It imposes no duty on the insured to show that the actions of the insurer resulted in prejudice or detriment to the insured. In other words the Block decision holds AIU strictly liable and creates primary liability by estoppel, in violation or current Florida law.

In Penninsula Life v. Wade, supra, the court recognized the

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general rule regarding no coverage by waiver and estoppel. It also cited numerous authorities in which the insurer was held estopped to deny coverage where the insured was guaranteed coverage and sustained a loss, before learning that the policy actually issued did not provide coverage for the loss in question. That is the typical situation in which estoppel is applied and there are no facts in the case below which require the imposition of that doctrine, even if it were available under the statute; the reason of course being that Block Marina voluntarily eliminated the coverage which it now seeks to reinstate by virtue of the failure of AIU to comply with the claim administration statute. Moreover there is nothing in the Record below, no allegations nor showing of prejudice based on the actions of AIU.

In Liberty Mutual v. Jones, an accident occured in North Carolina and the passenger sued Mr. Jones, who was the driver of the car. Liberty Mutual appeared on behalf of Jones. His employer filed a motion to dismiss and a motion for a more definite statement; which motions were denied, and discovery proceeded. During the course of discovery it became apparent that the coverage question between Liberty Mutual and Jones was developing. Apparently Jones and the passenger in the car were both employees of the same company and were acting within the scope of their employment. Under the cross employee exception in the policy Jones was excluded from coverage. The law firm representing the defendants withdrew from the litigation and Liberty Mutual denied coverage to Jones.

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The passenger then filed an Amended Complaint against Jones which he answered, and he filed a Cross Claim for declaratory relief against Liberty Mutual seeking attorneys' fees on the coverage issue. The trial court granted the summary judgment in favor of Jones and denied Liberty Mutual's motion for summary judgment, which result was reversed and remanded by the Third District.

Jones asserted that Liberty Mutual should be estopped from denying coverage, or that it had waived its right to coverage, because of the delay in finding no coverage for the damages. The Third District found this argument to be without merit because the record was devoid of any evidence to support the estoppel or waiver argument and Jones failed to demonstrate how Liberty Mutual disclaimer had prejudiced him, which was a necessary ingredient to the validity of either of his theories of recovery. Jones, 1118; Consolidated Mutual v. Ivy, supra, 189. For this reason the summary judgment in favor of Jones was reversed and the court remanded with directions to enter summary judgment in favor of the insurer.

Similarly in Ivy Liquors there was a six month delay from the time the complaint was filed and the insurer began defending the lawsuit to the time that the insurance company determined that the claim was not covered by the policy. Once again the Third District found that since the plaintiff had presented no evidence which would indicate that the six month interval, before disclaiming liability, was an unreasonable delay or that the insureds were prejudiced. The appearance by the insurer for the

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plaintiff and the subsequent investigation did not constitute waiver or estoppel of insurance coverage. See also, Hessley v. Travelers Indemnity Insurance Company, 468 So.2d 456 (Fla. 3d DCA 1985).

Under this clearly established Florida law the attempt by Block Marina to create insurance coverage by claiming that AIU is estopped to deny coverage is legally incorrect and could not form the basis for Summary Judgment. Block failed to allege or show any prejudice from the actions of AIU and therefore even if the doctrine of estoppel were to be applied, the issue of prejudice is a factual determination which precludes Summary Judgment against AIU. More importantly it was legally incorrect for the Third District to affirm the Summary Judgment in favor of AIU, which held AIU strictly liable for coverage which had been voluntarily eliminated by the insured. In this case there was no assurance of coverage or any sustained loss before learning that the policy did not provide coverage for the loss in question. Rather Block Marina voluntarily elected to eliminate the bailment coverage at the time that the premium was increased, which was prior to the time it contracted with Norfolk to repair the ship. This was totally undisputed in the record below. To impose strict liability for a failure to comply with section 627.426, relieving the insured from any obligation to show prejudice or detriment from the actions of the insurer, is not only unwarranted under the facts in this case it is legally incorrect. The Third District's Opinion imposition of strict liability upon AIU, for its failure to comply with Sections 627.426, is an

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unconstitutional impairment of contracts and the Decision must be reversed.

3. Section 627.426 Does Not Apply.

The Fifth District in American Fire and the Dissenting Opinion below agree that where there is no coverage in the first place, section 627.426(2) does not apply, as the insurer does not assert a "coverage defense" where there is no coverage from the inception. Since the statute does not apply, Summary Judgment in favor of Block and Norfolk was legally incorrect. The sole basis for the Summary Judgment was the resurrection of coverage based on AIU's failure to comply with statutory requirements.

The distinguishing feature of the application of the doctrines of waiver and estoppel is the fact that waiver and estoppel do not apply to matters of coverage as distinguished from the grounds for forfeiture. This same distinction applies to the requirements of compliance with Florida claims administration statute. The statute sets out a procedure for an insurance company to raise coverage defenses when denying coverage to their insured. The language of the statute clearly contemplates the fact that coverage exists and is being forfeited for some reason. Notice of this forfeiture or "coverage defense" must be given in a timely manner to the insured. In other words within 30 days after the insurer knew or should have known of a coverage defense or forfeiture under the policy, it must send a written notice of reservation of rights asserting this defense. Within 60 days of the notice, it must give written notice to the named insured of its refusal to defend; or obtain from the

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insured a nonwaiver agreement; or retain independent counsel which is mutually agreeable to the parties. See, Auto Owners Insurance Company v. Salvi, 427 So.2d 486 (Fla. 5th DCA 1985)(where the Fifth District affirmed summary judgment against the insurer because of its failure to comply with the statutory requirements, after a dispute arose over legal counsel selected by the company to represent the insured and the issue on appeal was a question of whether the actions taken by the insurance company in retaining counsel to represent the insured was sufficient to comply with the F.S.A. 627.426(2), Subsection 1 or Subsection 3).

It is respectfully submitted that the situation in American States v. McGuire is the classic example of why the claim administration statue exists. The legislature's intent was to estop an insurer from denying coverage when a coverage defense had not been asserted in a timely fashion. On August 12, 1982, Thelma Watkins sued the McGuires and their liability insurer, American States for malicious prosecution and false arrest. The McGuires answered denying liability; American States answered, denying coverage on the grounds that the complaint failed to allege a "bodily injury" within the meaning of the policy. On November 15, 1982, American moved for summary judgment which was granted, finding that the plaintiff's complaint alleged only a personal injury and not a "bodily injury" within the meaning of the policy. The insured appealed the summary judgment in favor of American States. Litigation continued between the parties until November 7, 1984 when the McGuires once again appealed

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entry of the summary judgment in favor of American States, with regard to the insurer's obligation to defend the lawsuit. The First District reversed the final summary judgment finding a genuine issue of material fact regarding the issue of coverage for "bodily injury" within the policy. The court declined to address American States' denial of coverage based on the lack of an "occurrence" since this defense had not been raised before the trial court.

In January 1987 the trial court entered an order directing American States to reimburse the insureds for the expenses incurred in their action brought by the plaintiff. The trial court concluded that the insurer was barred from raising an "occurrence" issue as a defense to the McGuire's claims because this ground had not been asserted prior to the trial of the plaintiff's claim against the insureds. American States appealed the order to reimburse its insureds.

In the second appeal the insureds maintained that throughout the first litigation and appeal American States denied the claim based solely on the "bodily injury" defense. They argued therefore that since they had incurred expenses by acting on the belief that the "bodily injury" defense to coverage was without merit, American States was estopped to now raise an "occurrence" defense. Since the insured demonstrated that they had detrimentally relied on American States' initial denial of coverage the doctrine of estoppel was to apply.

American States did not assert that the claim was not an "occurrence" within the meaning of the American States insurance

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policy until it filed its answer brief in the first appeal. The First District found that this conduct demonstrated by American States was expressly proscribed by section 627.426(2). American States' untimely assertion of an additional coverage defense, for the first time in its appellate answer brief, were actions that estopped it from denying coverage under the statute.

It is submitted that this is the type of action contemplated by the legislature in passing the statute and these facts are clearly distinguishable from the present case where, the insured voluntarily withdrew the very coverage, which it now seeks to create through the doctrine of estoppel. American States v. McGuire is the classic example of the untimely assertion of a coverage defense as contemplated by the statute.

It is submitted that the Fifth District's decision in American Fire is legally correct, that an insurer does not assert a coverage defense where there is no coverage in the first place and therefore the statute does not apply. Since the statute has no application under the facts of the present case the Summary Judgment based solely on the creation of coverage by the estoppel for failure to comply with the statute must be reversed and judgment entered for AIU. Block, 2312. Block Marina voluntarily eliminated its bailment insurance prior to entering into the contract with Norfolk Marine to repair the Tigress. Since coverage never existed form the onset, there was no obligation on the part of the insurance company to notify the insured pursuant the statutory requirements. Where there is no coverage at all, there is no reason to assert a coverage defense pursuant to

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627.426. American Fire, 2311. If a condition of the policy had been breached or there had been other circumstances indicating that a forfeiture was involved, then there is little doubt that AIU would be required to follow the statutory steps set out by the legislature.

It is respectfully submitted, that there is no indication on the part of the legislature that it intended to abolish well established Florida law regarding the doctrine of estoppel and its application and the wealth of caselaw which requires the insured to demonstrate prejudice before the doctrine of estoppel is applied. To hold AIU strictly liable for its failure to comply with the statutory requirements, where no coverage existed, is legally incorrect, contrary to the intent of legislature, and results in an unconstitutional impairment of contracts in contravention of Article I, Section 10, Florida Constitution.

4. Section 627.426(2) Unconstitutional Impairment of Contracts

The Opinion below has stated that the legislature, in unambiguous language, has provided that where the statute's notice provisions are not followed by the insurer, an insurer is not permitted to deny coverage based on a particular coverage defense. Block, 2311. If the legislature in enacting this section intended to provide that statutory notice provisions must be met, or otherwise an insurer is strictly liable for insurance coverage, then there is no question that the statute is unconstitutional, as it impairs the contract rights of the

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parties. In order for a statute to offend the constitutional prohibition against enactment of laws which impair the obligations of contracts, the statute must have the effect of changing the substantive rights of the parties to existing contracts. Hardware Mutual Casualty Company v. Carlton, 151 Fla. 238 9 So.2d 359 (1942); Phillip v. City of West Palm Beach, 70 So.2d 345 (Fla. 1953); Manning v. Travelers Insurance Company, 250 So.2d 872 (Fla. 1971). The Third District has found that the statute clearly states that the notice provisions must be met in the claim administration statute, and if not met coverage exists regardless of the fact that the insured voluntarily eliminated the coverage prior to the loss. If the Third District is found to be correct, that the legislature intended such an effect, then there is no question that the statute has changed the substantive rights of the parties to the insurance contract, which is constitutionally impermissible.

Block Marina voluntarily eliminated the bailment coverage from its insurance policy with AIU, when the premium was increased. The Third District has held that the Florida Legislature intended to resurrect or reinstate the coverage because AIU failed to comply with the claims administration statute. The effect of this holding would be that AIU would now be required to provide bailment insurance to Block Marina for which Block Marina paid no premium. Prior to the Third District's Decision, Block Marina had no right to recover under the policy as it was undisputed that it voluntarily eliminated the coverage as of June 4, 1984 and Block did not enter into the

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contract to repair the Tigress until sometime in mid-June 1984.

The Third District's construction of the legislative intent in the claim administration statute, would result in a constitutional change in the obligation of the insurance company under the existing policy. In other words a substantive right of recovery would be created under the claim administrative statute, which right did not exist at the time the contract was entered into. Furthermore the insurance company would be under the obligation to provide insurance coverage which was voluntarily eliminated by the insured and for which the insured paid no premium. Such an application of claim administration statute violates the constitutional restriction on the impairment of contracts and the Opinion below must be reversed and/or the statute held unconstitutional. Metropolitan Property and Liability Insurance Company v. Gray, 446 So.2d 216 (Fla. 1984).

On numerous occasions the Florida Supreme Court has prevented the application of a statute when it would violate the constitutional restriction of the impairment of contracts. State Farm Mutual Insurance Company v. Gant, 478 So.2d 25 (Fla. 1985) (amendment to the statute permitting stacking of uninsured motorists coverage cannot be applied to preexisting contract without impairing the obligations of that contract in violation of the Florida Constitution); Pompano v. Claridge of Pompano Condominium Inc., 378 So.2d 774 (Fla. 1979)(statute which provides for the deposit of rents into the registry of the courts during litigation under a condominium lease, had no effect on leases entered into prior to its effective date because allowing

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the statute's application would have impaired existing contracts); State Department of Transportation v. Edward M. Chadbourne Inc., 389 So.2d 293 (Fla. 1980)(amendment to section 337.143 could not be applied retroactively since to do so would result in an unconstitutional impairment of contracts).

To impair is defined as "to make worse, to diminish in quantity, value, excellence, or strength or to lessen in power or weaken". Thus the obligations of contracts are impaired in the constitutional sense when the substantive rights of the parties are changed, for example a new and different liability is imposed. Phillips v. West Palm Beach, supra. Any law which materially changes the binding force of a contract necessarily impairs it. 10 Fla. Jur.2d Constitutional Law, Section 308. The application of the claim administration statute in this case imposes a new and different liability upon AIU, in that it must now provide coverage for losses not covered and for which coverage no premium was paid. Block Marina eliminated the coverage voluntarily at the time of the premium increase and it was at this time that the substantive rights of the parties were established. To apply the claims administration statute to create liability upon AIU for the damages suffered by Norfolk Marine due to the alleged negligence of Block impairs the insurance contract between AIU and Block which impairment is a constitutional violation.

In addition, to apply section 627.426 to impose strict liability upon AIU, thus eliminating two well established bodies of law regarding, (1) the bar on creating insurance coverage by

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estoppel and (2) the requirement for the insured to prove prejudice as a result of the insurance companies actions, is a violation of the Florida Constitution and the statute must be held unconstitutional.

In this case where the Fifth District's opinion and the Third District's opinion are diametrically opposed regarding the clear and unambiguous language of the statute, it can be fairly said that it is only the judicial decisions interpreting the statute that lead to a result of unconstitutionality. However it is well established in Florida that judicial interpretation of a statute that constitutes impairment of contracts is impermissible and must be reversed. Humphres v. State, 108 Fla. 902, 145 So. 858 (1933)(where this Court stated, that so strictly is the rule against impairing the obligation of contracts to be enforced that a validly entered into contract cannot be substantially impaired by a later judicial decision altering the settled construction of the state law on which the contract was finally consummated as an agreement); Brown-Crummer Inv. Company v. Town of North Miami, 11 F.Supp. 73 (D.C. Fla. 1935)(state judicial decision can no more impair contract than can legislative act); Morton v. Zuckerman-Vernon, 290 So.2d 141 (Fla. 3d DCA 1974)(while the contract clause in the federal constitution prohibiting the impairment by states of the obligation of contracts has been held to apply to impairment by legislative action, rather than by judicial decision, the complaint in this case furnished no lawful basis to impair and abrogate the obligations of the contract by judicial action); United States

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ex. rel. Vermont Investments Company v. City of Coco, 17 F.Supp. 59 (S.D. Fla. 1936)(spirit of constitutional prohibition against impairment of obligations of contracts should govern the courts as well as the legislative bodies, and the courts should never put their seal of judicial approval on any attempt to impair the obligation of contracts; the State of Florida should not give the impression to the financial and commercial world that the courts of Florida fail to respect and enforce the obligation of contracts).

Therefore whether the statute is applied literally, as suggested by the Third District, or whether the legislative intent as interpreted by the Third District is applied, the result is the same: the substantive rights of the parites have been affected, new obligations have been opposed upon AIU which did not exist under the contract and this impairment of the contract is unconstitutional.

4. Genuine Issue of Material Fact Precluded Summary Judgment in This Case

The Third District's Opinion states that a disputed issue exists as to whether there is coverage for Block's losses and a legitimate question as to whether his policy provided coverage for the loss. Block, 2311. While it was undisputed throughout that Block Marina eliminated the bailment coverage of the marina operators endorsement effective June 4, 1984 and that its contract with Norfolk to repair the Tigress was not entered into sometime after that date, the Third District still determined that there were disputed fact questions. Therefore, at the very

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least, the Summary Judgment entered for Block Marina must be reversed where the Third District Opinion states that there are fact questions regarding coverage which must be resolved.

In addition, fact questions exist involving whether AIU knew or should have known of the lack of insurance coverage within 30 days of the service of the complaint; whether the reservation of rights letter sent on August 27, 1985 required a specific delineation of the particular coverage defense ultimately asserted, when this is not a requirement listed in the statute; and other fact questions surrounding the steps taken relative to section 627.426, precluded entry of Summary Judgment in this case.

Finally the Affidavit of Carlton Dunn, an insurance expert, which was filed in response to the Motion for Summary Judgment, states that in his expert opinion the contract afforded no coverage for the loss or damage complained of by Norfolk Marine. The Affidavit goes on to state that in his expert opinion section 627.426 is not applicable to the circumstances in this case, as there was no forfeiture or breach of policy conditions by Block and therefore AIU never had any reason to pursue a "coverage defense" pursuant to this statute. In the event that this Court should disagree with this expert opinion and find that 627.426 does apply in this case, then there are genuine issues of material fact regarding AIU's compliance with the statute that must be resolved and the Summary Judgment in favor of Block must be reversed.

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CONCLUSION

The doctrine of estoppel may not be used to create insurance coverage under Florida law and the Summary Judgment below must be reversed. The judicial interpretation of Section 627.426 results in unconstitutional impairment of contracts and the statute must be held unconstitutional and the Opinion reversed. At the very least genuine issues of material fact exist precluding Summary Judgment for Block.

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CERTIFICATE OF SERVICE

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