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.

REPLY BRIEF OF PETITIONER ON THE MERITS

REPLY BRIEF OF PETITIONER AIU INSURANCE COMPANY, a foreign corporation

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TABLE OF CITATIONS

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TABLE OF CITATIONS (Continued)

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REPLY ARGUMENT

Under the most recent decision of this Court it is now clearly established that waiver and estoppel may not be used to create insurance coverage. Crown Life Insurance Co. v. McBride, 12 F.L.W. 549 (Fla. Nov. 6, 1987). Therefore, the Third District Court's Opinion below must be reversed, as it held that failure to comply with Florida Statute Section 627.426(2) estops the insurer from denying coverage. Furthermore, the use of 627.426 to create coverage is a constitutional impairment of contracts and the Opinion below must be reversed for this reason also.

It is important to remember that in the Record below it was totally undisputed that the marina operator's legal liability endorsement was voluntarily eliminated by the insured, effective June, 1984. It was equally undisputed that the contract to repair the ship Tigress was not entered into until after the expiration of the endorsement. The Respondents fail to address in any manner the fact that Block voluntarily eliminated the coverage, when the premium was increased, and it was only after the losses incurred to the Tigress that it attempted to resurrect that coverage through the doctrine of estoppel. Block Marina asserted only one basis to obtain coverage in the Summary Judgment below. Block argued only that coverage was created through estoppel by the failure of AIU to meet the requirements of Section 627.426. Therefore, its discussion regarding the other exclusionary provisions in the policy, which it now claims do not apply, is totally irrelevant.

Because this Court has clearly held that coverage may not be

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created through the doctrine of estoppel, the Respondents attempt to avoid a decision on the merits by claiming jurisdictional defects. This Court has properly exercised its jurisdiction to review this case on the merits and all issues briefed are correctly before this Court.

SUPREME COURT EMPOWERED TO REVIEW CASE ON THE MERITS

The Respondents attack this Court's exercise of its jurisdiction based on the certification of the case by the District Court of Appeal. Under Article V, Section IV, of the Florida Constitution and Fla.R.App.P. 9.125, the jurisdiction of the Supreme Court was invoked upon the rendition of the certificate by the District Court of Appeal. Under the committee note to this rule it states that it is clear that certification by the District Court is self-executing. Because of these provisions no briefs are required addressing the exercise of the Supreme Court's jurisdiction, when the case has been certified by the District Court of Appeal. This Court's jurisdiction was invoked when the Third District's Opinion was issued and the case certified to this Court. Judge Ferguson's use of the term "possibly in conflict" was simply a reflection of the majority Opinion below; that United States Fidelity & Guaranty Company v. American Fire & Indemnity Company, 511 So.2d 624 (Fla. 5th DCA 1987) merely held that there is no coverage issue, when there is no insurance policy, as opposed to no coverage endorsement. This Court's jurisdiction was properly invoked and exercised, and the Third District's Opinion must be reviewed on the merits.

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CONSTITUTIONAL IMPAIRMENT PROPERLY BEFORE THIS COURT.

The Respondents also claim that the issue of the constitutional impairment of contracts by the creation of coverage through estoppel, is not properly before this Court. They fail to note that the constitutionality of Florida Statute 627.426 was raised sua sponte by the Third District at oral argument, in recognition of potential constitutional violations. Both the Rules of Appellate Procedure and Florida caselaw hold that the constitutionality of a statute can be raised by the appellate court for the first time, and in fact, can be raised for the first time in the Supreme Court.

This Court has stated that, while prudence dictates that issues such as the constitutionality of a statute's application to specific facts should normally be considered at the trial court level, once the Supreme Court has jurisdiction however, then they consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Trushin v. State, 425 So.2d 1126 (Fla. 1982). This is also the basis of Fla.R.App.P. 9.040(a) which states:

> In all proceedings the court shall have such jurisdiction as may be necessary for a complete determination of the cause.

In addition, matters substantially affecting the public interest, even though not raised in the court below, may be considered for the first time on appeal. Northwest Florida Home Health Agency v. Merrill, 469 So.2d 893 (Fla. 1st DCA 1985). The ability of the appellate court to raise an issue on appeal which

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was a constitutional fundamental error was expressly provided in the former rules of procedure:

> The court in the interest of justice may notice jurisdictional or fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an assignment of error, or of an objection or exception in the court below.

Fla.R.App.P. 3.7(i); Fla.R.Civ.P. 1.510(a); American Home Assurance Co. v. Keller Industries Inc., 347 So.2d 767 (Fla. 3d DCA 1977), overruled on other grounds; Wollard v. Lloyds and Companies of Lloyds, 439 So.2d 217 (Fla. 1983).

Whether the constitutionality of the statute was raised by the appellate court or one of the parties on appeal, it is well established that it can be raised for the first time in the District Court of Appeal. Bigler v. Dept. of Banking & Finance, 394 So.2d 989 (Fla. 1981); Peoples' Bank etc. v. State Dept. of Banking & Finance, 395 So.2d 521 (Fla. 1981); 2829 Corporation v. Division of Alcohol Beverage, etc., 410 So.2d 539 (Fla. 4th DCA 1982). The basis for addressing the unconstitutionality of a statute for the first time on appeal is that the issue involves fundamental error.

Fundamental error is that error going to the foundation of the case or to the merits of the action and which would result in a miscarriage of justice if not considered by the reviewing court. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970), conformed to 239 So.2d 49 (Fla. 3d DCA 1970); American Surety Co. v. Coblentz, 381 F.2d 185 (5th Cir. 1967). This Court has held on numerous

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occasions that the constitutionality of a statute is fundamental error reviewable for the first time on appeal. Parker v. Callahan, 115 Fla. 266, 157 So. 334 (1933); Love v. Hannah, 72 So.2d 39 (Fla. 1934); Clark vs. Osceola Clay & Top Soil Company, 99 So.2d 869 (Fla. 1957); In re Kionka's Estate, 121 So.2d 644 (Fla. 1960); Palm Beach County v. Green, 179 So.2d 356 (Fla. 1965); Sanford v. Rubin, supra; Town of Monticello v. Finlayson, 156 Fla. 568, 23 So.2d 843 (1946)(a fundamental error based on the constitutionality of statute can be raised for the first time in the Supreme Court on appeal); Marinelli v. Weaver, 187 So.2d 690 (Fla. 2d DCA 1966)(error effecting fundamental rights may be raised for the first time on appeal).

There is no question that the Third District Court of Appeal did not abuse its discretion in raising the constitutionality of Section 627.426 for the first time on appeal and it is well established in Florida caselaw that this Court has jurisdiction to review that issue.

The law in effect at the time the insurance contract was entered into was that coverage could not be created by the doctrines of waiver and estoppel. Six L's Pack. Co., Inc. v. Florida Farm Bur. Mut. Ins. Co., 276 So.2d 37 (Fla. 1973); Unijax Inc. v. Factory Insurance Association, 328 So.2d 448 (Fla. 1st DCA 1976); Manacare Corp. v. First State Insurance Company, 374 So.2d 1100 (Fla. 2d DCA 1979); Radoff v. North American Company for Life & Health Insurance, 358 So.2d 1138 (Fla. 3d DCA 1978); Starlight Services Inc. v. Prudential Insurance Company of America, 418 So.2d 305 (5th DCA 1982) petition for rev.

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dismissed, 421 So.2d 518 (Fla. 1982).

The legislature is presumed to know the law in existence at the time it passes statutes. Since the legislature did not expressly state that it was changing the law in Florida, to allow the application of the doctrine of estoppel to create coverage, the law at the time the policy went into effect, and when the statute was enacted, was that coverage could not be created by estoppel. Therefore, the judicial interpretation contrary to the law in effect at the time the contract was entered into constitutes a constitutional impairment of the insurance contract and this issue has been properly presented to this Court.

REVERSAL REQUIRED UNDER CROWN LIFE V. McBRIDE.

It is respectfully submitted that under this Court's most recent decision in Crown Life v. McBride, the Summary Judgment below must be reversed. In Crown Life, this Court held that a form of equitable estoppel known as promissory estoppel may be utilized to create insurance coverages where to refuse to do so would sanction fraud or other injustice and where the insured has established by clear and convincing evidence that he relied to his detriment upon the insurer's promise. Crown Life, 550. In this plurality decision, Chief Justice McDonald and Justices Overton and Erlich concurred only in the result, and strongly reasserted that the theory of equitable estoppel may not be utilized to prevent an insurance company from denying coverage, relying on this Court's decision in Six L's Packing. Crown Life,

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551. In addition, the two concuring opinions also voiced concern that the adoption of the doctrine of estoppel to create coverage facilitates the possibility of fraudulent claims and it is only when the insured, by clear and convincing evidence, shows that he relied to his detriment upon a specific assurance of the carrier that his coverage would be effective, that the doctrine may be applied. Even the opinion of the Court, authored by Justice Shaw, states that estoppel may be applied only to the limited extent based on the facts presented in Crown Life.

In that case, the insured alleged that the Crown Life supervisor and the insurance broker led him to believe that the respondent's child would be covered under its policy. Therefore the insured allowed his conversion option on his prior coverage to lapse and took group coverage out with Crown Life. The respondent then brought suit for recovery of benefits due under the written policy and the jury returned a finding on behalf of the respondent on the theory of estoppel. Crown Life, 549. Justice Shaw noted that an exception to the general rule that coverage may not be created by estoppel is the doctrine of promissory estoppel, which applies to representations relating to a future act of the promissor rather than to an existing fact. Crown Life, 549.

The Court goes on to note that the doctrine only applies where to refuse to enforce the promise relied upon even though not supported by a consideration would virtually sanction the perpetration of a fraud or other injustice. Crown Life, 550. While the plurality opinion in this case states that promissory

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estoppel may be used to create insurance coverage, the Court goes on to find that under the specific facts the insured failed to meet his burden of proving detrimental reliance upon Crown Life's representation, and the Supreme Court quashed the District Court's Opinion, which had upheld the jury's finding in favor of the respondent on the doctrine of estoppel.

It is clear that this Court has stated in the Crown Life opinion that there is only one limited exception to the rule of Florida that coverage may not be created by estoppel. That very narrow exception is the application of promissory estoppel, coupled with clear and convincing evidence of detrimental reliance. As this Court has never held that the doctrine of estoppel may be used to create coverage, with the very limited and narrow exception carved out in Crown Life, the Summary Judgment below must be reversed.

Not only is there no indication in Section 627.426 that the legislature intended to overrule this Court's decision in Six L's Packing and the numerous restatements in law that coverage may not be created through estoppel, but the insured below never established by clear and convincing evidence any detriment. Rather, it argues on appeal that if the legislature intended for the insured to show prejudice or detriment it would have said so in the statute. Once again, the legislature is presumed to know the law in existence at the time it passes the statute. There is no question that the law in existence at the time 627.426 was passed was that the doctrine of estoppel required that the insured must show that its rights were prejudiced by whatever

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delay took place, or that the insurer's conduct induced the insured to rely on the conduct to his detriment. Liberty Mutual Insurance Company v. Jones, 427 So.2d 1177 (Fla. 3d DCA 1983); Crown Life Insurance Company v. McBride, 472 So.2d 870 (Fla. 4th DCA 1985), quashed on other grounds, 12 F.L.W. 549 (Fla. Nov. 6, 1987). Nothing in the statute indicates that the legislature intended to overrule all of the established law that states that the doctrine of estoppel cannot be used to create insurance coverage. Under this Court's most recent decision in Crown Life, it is established that where the doctrine of estoppel is to be applied the insured must meet his burden of proving detrimental reliance with clear and convincing evidence. Crown Life, 550-551.

The Respondents below never alleged any detriment or prejudice. Now on appeal they assert that the committee report to the statute says that failure to meet the time limits eliminates the need of the insured to prove prejudice. Not only is this contrary to all the caselaw in Florida, it is also contrary to the rules of statutory construction. As the Respondents have pointed out Section 627.426 is a remedial statute designed to redress existing grievances in giving the insured a mode of recovery for a wrong for which there was no prior remedy.

The Respondents assert that the failure to comply with 627.426 results in the automatic forfeiture of the insurer's ability to deny coverage. It has been stated that statutes imposing forfeitures by way of punishment are subject to the

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general rules governing the interpretation and construction of penal statutes, which are subject to the rule of strict construction. The statutes will not be construed to include anything beyond their letter even though within their spirit. Connor v. Alderman, 159 So.2d 890, 891 (Fla. 2d DCA 1964). Therefore under the rules of statutory construction, the committee notes may not be considered to establish a presumption of prejudice. There is no caselaw in Florida that allows the application of the doctrine of estoppel, without clear and convincing proof of detrimental reliance or prejudice to the party asserting the doctrine. Furthermore, it is well established that the doctrine of estoppel may be used defensively to prevent a forfeiture of coverage, but not affirmatively to create or extend coverage. Six L's Packing, supra; Crown Life, supra. In the present case, the sole basis for the Summary Judgment below was that coverage was created through the doctrine of estoppel for failure to comply with the statute. It is clear that the Third District's Opinion, allowing the creation of coverage in this case, is contrary to well established law and must be reversed.

The Third District's construction of the legislative intent in the claims administration statute results 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 claims administration 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

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by the insured, and for which the insured paid no premium. Such an application of the claims 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 & Liability Insurance Company v. Grey, 446 So.2d 216 (Fla. 1984).

It is respectfully submitted that the First District's decision in USF&G v. American Fire, supra, is the correct interpretation of the statute. Where there is no coverage in the first place, Section 627.426 does not apply, and the insurer does not assert a "coverage defense" where there is no coverage from the inception. Whether a policy exists at the time or not, the question is whether there is coverage or not. The Respondents admit that Block Marina voluntarily eliminated the marina operator's liability endorsement, which was the only provision which would afford coverage for the losses incurred involving the ship Tigress.

It is submitted that the Fifth District's decision in American Fire is legally correct and 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 below based solely on the creation of coverage by estoppel, for failure to comply with the requirements, must be reversed and a Judgment entered for AIU. This outcome is perfectly consistent with this Court's most recent decision in Crown Life, where it was once again restated that the doctrine of

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estoppel may not be used affirmatively to create insurance coverage.

The Opinion below must be reversed because: (1) Florida law clearly bars estoppel by coverage, Crown Life v. McBride; (2) Section 627.426 does not apply where there is no insurance coverage for the loss claimed, USF&G v. American Fire; (3) to hold AIU strictly liable for insurance coverage for failing to comply with the claims administration statute, thus creating coverage by estoppel, is an unconstitutional impairment of the insurance contract, Metropolitan v. Grey; and (4) at the very least the Summary Judgment in the case must be reversed where the Third District's Opinion states there are disputed issues regarding whether the policy provided coverage for the loss or not. One or all of the above states 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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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 an unconstitutional impairment of contracts and the statute must be held unconstitutional and the Opinion reversed. At the very least genuine issues of material fact exists precluding Summary Judgment and the Opinion below must be reversed.

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