THE SUPREME COURT OF FLORIDA
CASE NO. 72,080

PANTHER AIR BOAT CORPORATION

Plaintiff/Appellant,

vs.

MacMILLAN-BUCHANAN & KELLY INSURANCE AGENCY, INC., a Florida corporation,

Defendant/Appellee.

FIFTH DISTRICT
COURT OF APPEAL
DOCKET NO. 86-724

ANSWER BRIEF OF FLORIDA ASSOCIATION OF INSURANCE AGENTS, AMICUS CURIAE IN SUPPORT OF DEFENDANT/APPELLEE

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TABLE OF CONTENTS

Page(s)

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

Florida's Professional Malpractice Statute of Limitations Extends To Actions Against Insurance Agents. 4

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF CITATIONS

Page(s)

CASES

Bell v. O'Leary, 744 F.2d 1370 (8th Cir. 1984) 12

Brooks v. Anastasia Mosquito Control Dist.
148 So.2d 64 (Fla. 1st DCA 1963) 6

Butler v. Scott, 417 F.2d 471 (10th Cir. 1969) 12

Cristich v. Allen Engineering, Inc.
458 So.2d 76 (Fla. 5th DCA 1984) 15

Cohn v. Dept. of Professional Regulation
477 So.2d 1039 (Fla. 3d DCA 1985) 13

Devco Premium Finance Company v. North River Insurance
450 So.2d 1216 (Fla. 1st DCA)
petition for rev.denied, 458 So.2d 272 (Fla. 1984) 15

Ferraro v. Federal Insurance Company
479 So.2d 159 (Fla. 4th DCA 1985) 15

Fiorentino v. Travelers Insurance Company
448 F.Supp. 1364 (E.D. Pa. 1978) 12

Florida State Racing Commissioner v. McLaughlin
102 So.2d 574 (Fla. 1958) 6

Gumper v. Bach, 474 So.2d 420 (Fla. 3d DCA 1985) 15

Horne v. Burns and Row, 536 F.2d 251 (8th Cir. 1976) 18

Lee v. Gaddy, 183 So. 4, 133 Fla. 749 (1938) 12, 16

Levine v. Knowles, 197 So.2d 329 (Fla. 3d DCA 1967) 15

Libson Contractors v. Miami Dade Water and Sewer Authority
537 F.Supp. 175 (S.D. Fla. 1982) 15

Lincoln Rochester Trust Company v. Freeman
355 N.Y.S.2d 336, 339 (1974) 6

Louis Benito Advertising, Inc. v. Brown
517 So.2d 775 (Fla. 2d DCA 1988) 15

Pierce v. AALL Insurance Company
513 So.2d. 160 (Fla. 5th DCA 1987) 16

CASES Con't Page(s)

Seascape of Hickory Point Condominium Association, Inc. v. Associated Insurance Services, Inc. 443 So.2d 488 (Fla. 2d DCA 1984) 11

Todd v. Malafronte, 3 Conn. App. 16, 484 A.2d 463 (Conn. App. 1984) 11

U.S. v. Laws, 163 U.S. 258 (1896) 13, 16

Watkins Motor Lines v. Imperial Freight 493 So.2d 544 (Fla. 3rd DCA 1986) 11

Woodham v. Moore, 428 So.2d 280 (Fla. 4th DCA 1983) 11

FLORIDA STATUTES

Florida Statutes, § 95.11 5

Florida Statutes, § 95.11(4)(a) 16, 17, 18

Florida Statutes, § 95.11(6) 4

Florida Statutes, § 262.951-.99 10

Florida Statutes, § 626.031-.062, .112 7

Florida Statutes, § 626.041(2)(d) 17

Florida Statutes, § 626.611 . . . . . 8, 9

Florida Statutes, § 626.611, .621, .521, .731 10

Florida Statutes, § 626.621(2-9) 10

Florida Statutes, § 626.731 7

Florida Statutes, § 626.732 7

Florida Statutes, § 627.356 17

OTHER AUTHORITIES

Chapter 74-382, Section 7, Laws of Florida, ... 4

Chapter 86-160, Section 14, Laws of Florida. 17

Rule 4-52.01, Florida Administrative Code 7, 8

OTHER AUTHORITIES, Con't. Page(s)

Rule 4-52.04, Florida Administrative Code 8

Rule 4-52.06, Florida Administratiave Code 8

Rule 4-52.10, Florida Administrative Code 8

Fla. Std. Jury Instr. (Cir.) 4.2(c) 17

STATEMENT OF THE CASE AND FACTS

Florida Association of Insurance Agents ("FAIA") is a voluntary association of more than fourteen hundred (1,400) independent insurance agents licensed by the State of Florida and engaging in insurance activities. On April 21, 1988, this Court granted leave for FAIA to appear in this action as Amicus Curiae in support of Defendant/Appellee. FAIA was not involved in any of the lower court decisions.

SUMMARY OF ARGUMENT

In 1974, the Florida Legislature passed Florida's Professional Malpractice Statute of Limitations requiring that all claims involving professional malpractice be brought within two years. Even though the term "professional malpractice" was not defined by the Legislature, the term does have a well understood common and historical meaning, as the Fifth District below found. Websters Third International and Black's Law Dictionary define "profession" as any field which requires a high level of training proficiency or any occupation requiring special, usually advanced, education and skills.

Without a doubt, insurance today is one of the fields recognized as a profession. Complex and intricate, it requires a high degree of specialized knowledge and training and is such that it is normally beyond the understanding of laymen. The laymen must rely on insurance agents for advice and knowledge.

Moreover, insurance possesses those traits characteristic of a profession: the prerequisite of license prior to admission; extensive learning and training; a standard of conduct above that normally tolerated in the marketplace; and a disciplinary system for those who breach this standard. Consistent with these traits, insurance agents in Florida are held to a professional standard of care and may be held liable should they fail to exercise the required degree of skill and knowledge of the insurance profession.

Therefore, the Fifth District Court of Appeal was eminently

correct in its decision that insurance agents are within Florida's Professional Malpractice Statute of Limitations and this Court should so affirm.

ARGUMENT

Florida's Professional Malpractice Statute of Limitations Extends To Actions Against Insurance Agents.

Prior to 1974, Florida's two year statute of limitations extended only to personal injury actions of a medical, optometric, dental, podiatric, or chiropractic nature. § 95.11(6), Fla.Stat. (1973). In 1974, the Florida Legislature chose to expand that statute's application and enacted Chapter 74-382, Section 7, Laws of Florida, Florida's Professional Malpractice Statute of Limitations. It required that all actions or claims for professional malpractice be brought within two years. The only subsequent change to this statute occurred in 1975 when a separate limitations statute was provided for medical malpractice actions.

For purposes of this action, Section 95.11, Florida Statutes, in part, now provides:

> Actions other than for the recovery of real property shall be commenced as follows:
>
> . . . .
>
> (4) WITHIN TWO YEARS.--
> (a) an action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered, or should have been discovered within the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

§ 95.11, Fla.Stat.

No definition of "professional malpractice" is included within the statute, nor is the term defined anywhere else within the Florida Statutes. The term "professional" does, however, have a common and well-understood meaning. Webster defines "professional" as ". . . one engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency." Webster's Third New International Dictionary 1811 (Fifteenth Edition 1976). Black's Law Dictionary also defines "profession" as:

> A vocation or an occupation requiring special, usually advanced, education and skill; e.g., law or medical professions. Also refers to whole body of such profession.
>
> The labor and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.
>
> The term originally contemplated only theology, law, and medicine, but as applications of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill.

Black's Law Dictionary 1089 (Revised Fifth Edition 1979).

Since the Legislature is presumed to have a working knowledge of the English language, it must be presumed that the Legislature intended the term "professional malpractice" to apply

to any field which requires a high level of training and proficiency. Florida State Racing Commissioner v. McLaughlin, 102 So.2d 574 (Fla. 1958); Brooks v. Anastasia Mosquito Control Dist., 148 So.2d 64 (Fla. 1st DCA 1963).

Today, the field of insurance is one of the fields now recognized as a profession. It is a complex and intricate field, requiring a high degree of specialized knowledge and training. Its skills are predominantly mental or intellectual, rather than physical or manual. Highly regulated, the applicable statutes regulating insurance and insurance agents cover a greater portion of the Florida Statutes than those related to any other activity. It is a field often beyond the understanding of laymen.

In Lincoln Rochester Trust Company v. Freeman, 355 N.Y.S.2d 336, 339 (1974), the court listed factors characteristic of a profession: (1) the requirement of extensive learning and training; (2) a code of ethics imposing standards above those normally tolerated in the market place; (3) a disciplinary system for members who breach this code; (4) a primary emphasis on social responsibility over strictly individual gain, and the corresponding duty of its members to behave as members of a disciplined and honorable profession; and (5) the prerequisite of a license prior to admission to practice.

In Florida, the field of insurance possesses all five factors characteristic of a profession. In Florida, agents are subject to stringent education and licensure requirements, a standard of conduct, disciplinary proceedings for members who

breach that standard, and a judicial standard of professional care in performing their activities.

First, no person may solicit insurance or hold himself out as engaging in the business of analyzing insurance policies or advising persons relative to such policies unless that person is currently licensed by the State of Florida as an insurance agent. See Sections 626.031-.062, .112, supra. The licensure requirements for each of the different types of insurance agents are enumerated in Chapter 626, supra.

This action concerns the actions of a general lines agent, and Sections 626.731-32 require as follows for such agents. The applicant cannot be found to be, inter alia, untrustworthy or incompetent. Section 626.731, supra. The applicant must then have either (1) taught or successfully completed a classroom course in insurance in an approved school or college; or (2) completed an approved correspondence course of insurance regularly offered by an accredited college or university in addition to six months experience in responsible insurance duties as a full time employee of an agent or insurance agency in all lines of insurance; or (3) completed at least one year of responsible insurance duties as a full time employee of an agent or insurance company in most lines of insurance. Section 626.732, supra.

The Florida Administrative Code describes in further detail the education requirements of general lines agents. Rule 4-52.01, Florida Administrative Code, dictates that a general lines

qualification course consists of either 240 hours of classroom instruction in all lines of insurance, or a correspondence course equivalent to six semester hours of classroom instruction in all lines of insurance offered by an accredited institution. A final examination shall be given at the end of the course unless a final examination is given at the end of each major area of instruction. Questions on the examinations are to be essay and problem type. Rule 4-52.04, supra. Instructors for the course shall have at least five years of experience in the area of general lines insurance, or a degree from a four year accredited institution of higher learning with major course work in insurance enough to be certified by the state. Rule 4-52.06, supra. In order to satisfy the educational requirements through an accredited school, the individual must have either a four year college degree with major course work in insurance or completed fifteen semester hours of college credit in property and casualty insurance or have completed a correspondence course equivalent to six hours of classroom instruction in all lines of insurance. Rule 4-52.10, supra.

Next, with regard to a standard of conduct, Florida imposes a strict standard of conduct upon members of the insurance profession. Section 626.611, Florida Statutes, provides that the Department of Insurance shall suspend, revoke, or refuse to renew the license of an agent when it finds that the agent has, among other things, made:

> (5) Willful misrepresentation of any insurance policy or annuity contract or

willful deception with regard to any such policy or contract, done either in person or by any form of dissemination of information or advertising.
(6) If, as an adjuster or claims investigator or agent permitted to adjust claims under this code, he has materially misrepresented to an insured or other interested party the terms and coverage of an insurance contract with intent and for the purpose of effecting settlement of claim for loss or damage or benefit under such contract on less favorable terms than those provided in and contemplated by the contract.
(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
(8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or permit.
(9) Fraudulent or dishonest practices in the conduct of business under the license or permit.
(10) Misappropriation, conversion, or unlawful withholding of moneys belonging to insurers or insureds or beneficiaries or to others and received in conduct of business under the license.

. . . . .

(13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.
(14) Having been found guilty of, or having pleaded guilty or nolo contendere to, a felony in this state or any other state which involves moral turpitude, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.

§ 626.611, Fla.Stat.

Additionally, the Department <u>may</u> revoke or suspend an agent's license for the following:

(2) Violation of any provision of this code or of any other law applicable to the

> business of insurance in the course of dealing under the license or permit.
> (3) Violation of any lawful order or rule of the department.
> (4) Failure or refusal, upon demand, to pay over to any insurer he represents or has represented any money coming into the hands belonging to the insurer.
> (5) Violation of the provision against twisting, as defined in Section 626.9541(1)(l).
> (6) In the conduct of business under the license or permit, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part X of this chapter, or having otherwise shown himself to be a source of injury or loss to the public or detrimental to the public interest.
> (7) Willful overinsurance of any property insurance risk.
> (8) Having been found guilty of, or having pleaded guilty or nolo contendere to, a felony in this state or any other state, without regard to whether a judgment of conviction has been entered by the court having jurisdiction of such cases.
> (9) If a life agent, violation of the code of ethics.

§ 626.621(2-9), Fla.Stat. It is of significance that, similar to lawyers and doctors, insurance agents may be denied a license or have their license suspended or revoked for moral turpitude. See Sections 626.611, .621, .521, .731, Florida Statutes.

Additionally, Florida has an Unfair Insurance Trade Practices Act which prohibits unfair methods of competition and unfair deceptive acts or practices. §§ 262.951-.99, Fla.Stat. The practices prohibited are lengthy and detailed, and like others in a profession, violation of any of these provisions may result in suspension and revocation of license. §§ 626.611, .621, Fla. Stat.

Furthermore, insurance agents in Florida have been held to a professional standard of care in performing their services. In Seascape of Hickory Point Condominium Association, Inc. v. Associated Insurance Services, Inc., 443 So.2d 488 (Fla. 2d DCA 1984), the Second District defined the standard of care an insurance agent owes to his client. The court analogized to the relationship between an attorney and his client and found no material difference between a client seeking advice from an attorney and a client seeking advice from an insurance agent. The court found that the insurance agency and its two employees held themselves out as "professional insurance planners" and thus owed a duty to render professional insurance planning advice by correctly advising a client of the existence and availability of insurance for particular risks.

This is exactly the type of mental or intellectual (versus physical or manual) skill that the term "profession" encompasses. See also, Woodham v. Moore, 428 So.2d 280 (Fla. 4th DCA 1983) (a cause of action stated where insurance agent failed to advise insured of the availability of higher liability insurance limits); Watkins Motor Lines v. Imperial Freight, 493 So.2d 544 (Fla. 3rd DCA 1986) (a cause of action stated for professional negligence where insurance agent failed to procure proper insurance).

A number of other courts have likewise held insurance agents to a professional standard of care. See e.g. Todd v. Malafronte, 3 Conn. App. 16, 484 A.2d 463 (Conn. App. 1984) (suit against

agent for failure to obtain insurance was properly characterized as professional negligence rather than ordinary negligence); Bell v. O'Leary, 744 F.2d 1370 (8th Cir. 1984) (insurance agent would be held to a professional standard of care); Fiorentino v. Travelers Insurance Company, 448 F.Supp. 1364 (E.D. Pa. 1978) (duty owed by insurance agent is that which a reasonably prudent professional insurance agent would have provided under similar circumstances); Butler v. Scott, 417 F.2d 471 (10th Cir. 1969) (insurance agent must exercise skill and diligence fairly expected from one in his profession).

It has been argued that because the term "professional malpractice" is not defined, it applies to only three professions which has been historically associated with the term "profession", i.e., law, medicine, and theology. But while these three fields have become associated with the term "profession", that does not mean that those professions have become a substitute for that term's definition. The term profession means, and has historically meant, those areas requiring advanced knowledge and training. Support for this position exists both in Florida and United States case law.

In Lee v. Gaddy, 183 So. 4, 133 Fla. 749 (1938), the Florida Supreme Court was asked to determine whether a pharmacist was subject to a state professional occupational license tax. While the court found the pharmacists challenging the tax were not subject to the tax, the court did find pharmacy to be a

"profession" within the meaning of the statute.[1] Concurring, Justice Brown stated:

> My thought is that the Legislature, in imposing a tax on every person engaged in the practice of a "profession" intended it to apply only to those persons who profess to have special knowledge in a given field and who serve the public and charge members of the public direct for their expert services, each thereby conducting their respective professions as a definite business enterprise in and of itself. If given the broad meaning contended for by the Appellants [i.e., applying to those in a profession who do not charge for their services], the word 'profession' would, as pointed out by Mr. Justice Buford, embrace ministers of the gospel, school teachers, and many others upon whom the Legislature has never heretofore imposed a license tax. Such could not have been the legislative intent.

Id. at 6-7 (emphasis added).

Similarly, as early as 1896, the United States Supreme Court, recognized that the term "profession" was being applied to fields beyond those historically associated with it. In U.S. v. Laws, 163 U.S. 258 (1896), the United States Supreme Court found

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[1]The statute required that the professionals charge for their services; the challenging pharmacists did not, limiting their practice to the preparing and dispensing of drugs incidental to their retail drug business. Id. at 6. Today, the court might reach a different decision. In Cohn v. Dept. of Professional Regulation, 477 So.2d 1039 (Fla. 3d DCA 1985), the court held a pharmacist to a professional standard of care in the dispensing of drugs even though the pharmacist was only filling prescriptions written by duly licensed physicians.

that a statute exempting members of a "profession" from its application extended to chemists. Although lengthy, the following quote is of importance:

> [The exemption] intended to apply to any person belonging to any recognized profession. We think a chemist would be included in that class. Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession. One definition of a profession is an 'employment, especially an employment requiring a learned education, as those of divinity, law, and physic.' Worcester's Dict.tit. Profession. In the Century Dictionary the definition of the word 'profession' is given, among others, as 'A vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as the professions; but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes.'

> There are professors of chemistry in all of the chief colleges of the country. It is a science the knowledge of which is to be acquired only after patient study and application. The chemist who places his knowledge acquired from a study of the science to the use of others as he may be employed by them, and as a vocation for the purpose of his own maintenance, must certainly be regarded as one engaged in the practice of a profession which is generally recognized in this country.

Id. at 266 (emphasis added).

Because of their required advanced training and knowledge, a number of additional fields are now properly recognized as professions. See e.g., Libson Contractors v. Miami Dade Water and Sewer Authority, 537 F.Supp. 175 (S.D. Fla. 1982) (malpractice action against engineering firm); Devco Premium Finance Company v. North River Insurance, 450 So.2d 1216 (Fla. 1st DCA), petition for rev.denied, 458 So.2d 272 (Fla. 1984) (malpractice action against accountants); Ferraro v. Federal Insurance Company, 479 So.2d 159 (Fla. 4th DCA 1985) (malpractice action against dentist); Louis Benito Advertising, Inc. v. Brown, 517 So.2d 775 (Fla. 2d DCA 1988) (malpractice action against accounting partnership); Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA 1984) (malpractice action against land surveyor); Gumper v. Bach, 474 So.2d 420 (Fla. 3d DCA 1985) (malpractice action against dentist); Levine v. Knowles, 197 So.2d 329 (Fla. 3d DCA 1967) (malpractice action against veterinarian).

Florida's Fifth District Court of Appeal was eminently correct in Pierce v. AALL Insurance Company, 513 So.2d. 160 (Fla. 5th DCA 1987), and in the instant case in finding that Florida's Professional Malpractice Statute of Limitations extends to any field which requires specialized knowledge and training. Of special significance is that in both Lee and Laws, supra, the Florida and U. S. Supreme Courts looked to the nature of the field and the knowledge and training required by it to determine whether the individual was engaged in a profession. These Courts did not, as is urged, simply apply a bright line test to determine whether the individual was a member of the legal or medical profession.

Had the Legislature intended in 1974 to limit the application of Section 95.11(4)(a), Florida Statutes, to only the legal and medical professions, it could have done so by simply including the legal profession with the medical professions already enumerated. By using a broader term, it must be presumed the Legislature intended to include additional fields within its meaning.

This view is strengthened by the fact that in 1975 the Legislature deleted medical malpractice actions from the general malpractice statute and established a separate limitation statute for medical malpractice actions. See 95.11(4)(b), Florida Statutes. It simply makes no sense to state that the Legislature intended §95.11(a) to apply only to the legal profession, but used the generic term to do so. Having specifi-

cally enumerated medical malpractice actions in 1975, it could have done so similarly for legal malpractice actions if it had intended such a restrictive definition.

That the definition of "profession" is not intended to be applied restrictively is further supported by others factors. In December 1985, this Court published jury instructions for professional negligence for non-medical fields. Fla. Std. Jury Instr. (Cir.) 4.2(c). It specifically references the negligence of lawyer, architect, and other professional. Id. Further, Section 626.041(2)(d), Florida Statutes, expressly provides that only a general lines agent and an attorney may advise others as to insurance policies. It makes no sense to subject the advice of one to a different statute of limitations when it is the same advice being given. Finally, in 1986, the Florida Legislature amended Section 627.356, Florida Statutes, to permit insurance agents, along with doctors, lawyers, architects, engineers, and land surveyors, to obtain professional liability self-insurance. See Chapter 86-160, Section 14, Laws of Florida. These confirm Florida's common and historical application of the term "profession."

It has also been argued that if this Court holds Section 95.11(4), Florida Statutes, to apply to insurance agents then the same must be said for other regulated areas such as barbers and embalmers. This argument overlooks an important part of the definition of a profession that being that the practice must be predominantly mental or intellectual, rather than physical or

manual. As the lower court found, this is an action for failure to properly advise based upon superior knowledge and training. A key reason for setting apart certain areas for differing statute of limitations is the complexity of the service. While it is not difficult for the lay person to examine the skill and expertise provided by a barber or embalmer, with the more complicated services such as law, medicine, accounting, engineering, and insurance, a lay person generally is unable to determine the quality of service provided.

Finally, the Petitioner argues that unless the Fifth District's decision is reversed, the statute would be unconstitutionally vague. To date, a number of other states have enacted similar legislation providing for a professional malpractice statute of limitations without any of the statutes being declared unconstitutionally vague. In Horne v. Burns and Row, 536 F.2d 251 (8th Cir. 1976), the court rejected a vagueness challenge to Nebraska's two year Statute of Limitations for professional negligence, finding the term, even though not defined, was clearly directed to the acts of those engaged in occupations applying specialized knowledge and intellectual skills to the performance of their duties and was sufficient to withstand a vagueness challenge. Id. at 255.

Based on the above, it is obvious that the Fifth District was correct in finding that the Legislature knew and intended for the term "professional malpractice" to apply to any individual who, by reason of advanced education and skill, failed to

exercise that degree of skill and learning commonly applied under all circumstances in the community by a member of that profession. Insurance is one of those fields that is now recognized as a profession and to which Section 95.11(4)(a) applies.

CONCLUSION

Insurance agents are members of a highly respected profession dedicated to serving the insurance needs of their community. They hold themselves out, and are held responsible, for rendering professional insurance advice to their customers. They are required to pass stringent educational and licensure requirement and are then held to a high standard of conduct, violation of which can result in suspension or revocation of their license.

In Florida, the common and well understood meaning of the term "profession" has been that it applies to all fields requiring extensive knowledge and training, including those fields not historically associated with the term, such as, insurance agents, accountants, land surveyors, architects and engineers. Based on the above, the Fifth District was eminently correct when it found insurance to be one the fields now properly recognized as a profession. The Fifth District's conclusion that Florida's Professional Malpractice Statute of Limitations applies to insurance agents should be affirmed.

DATED this 28th day of April, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Florida Association of Insurance AGents, Amicus Curiae in Support of Defendant/Appellee has been furnished by U. S. Mail to Lindsey Holland, Esquire, Holland, Starling & Severs, P.A., Post Office Box 459, Melbourne, FL 32902-0459 and to Janet Delaura Harrison, Esquire, Smalbein, Eubank, Johnson, Rosier & Bussey, P.A., Post Office Box 695, Rockledge, FL 32955 this 28th day of April, 1988.

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