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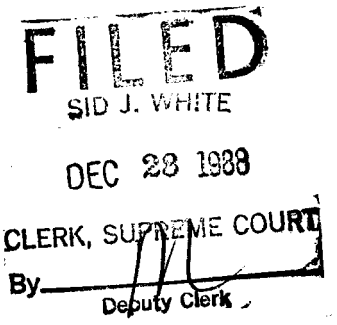
IN THE SUPREME COURT

OF FLORIDA



CASE NO. 72844

CONSOLIDATED AMERICAN INSURANCE COMPANY, INC.,

Petitioner,

vs.

CHARLES BUCOLO AND [redacted]

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

CARON BALKANY, P.A.
850 San Pedro Avenue
Coral Gables, Florida 33156

-and-

DANIELS & HICKS, P.A.
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Miami, Florida 33132

Attorneys for Respondents

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OTHER AUTHORITIES CITED

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STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is for the most part accurate, subject to the following corrections and additions.[1/]

At all times relevant to the complaint, from 1971-1978, Charles Bucolo resided with his mother, Elizabeth Bucolo. (R. 120-122).

On August 21, 1985, two days after Michael Jenks, the attorney hired by Petitioner to represent Elizabeth Bucolo entered his appearance, he filed a motion to dismiss. (R. 6). Paragraph 2 of that motion contends in pertinent part, that the complaint should be dismissed because a parent is not liable for the intentional misconduct of her child. (R. 6).

On August 28, 1985, Mr. Davis wrote a letter to counsel for the Plaintiff stating that he had just been retained as co-counsel for Charles Bucolo, a conformed copy of which was sent to Mr. Charles Kessler. (R. 10). Thus, contrary to Petitioner's

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1/ Plaintiff [redacted] and Consolidated Insurance Company (Petitioner herein) have entered into a settlement of the entire case - negligence and intentional tort claims - pending resolution of certain matters, including the outcome of this appeal. Under the settlement, both Bucolos' rights under Consolidated's policy were assigned to Plaintiff and she therefore participates in this review proceeding under assignment of rights, and stands in Charles Bucolo's shoes as respondent.

Throughout this brief, references to the Record on Appeal will be as follows: (R.___.) (S.R.A.____) refers to the supplemental record and (A.____) refers to the Appendix hereto. Unless otherwise indicated, all emphasis has been supplied by counsel.

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assertions, the record shows that Mr. Kessler was hired by the insurance company to represent Charles Bucolo on or before August 28, 1985. (R. 10).

On September 23, 1985, Petitioner mailed written notice of reservation of rights to Charles Bucolo and Mrs. Bucolo. (R. 83, 141, 247). In cross-caliming against its insureds, Petitioner disputed coverage solely on the basis of the 'intentional injury' exclusion in the policies it issued. (R. 33).

SUMMARY OF ARGUMENT

I

There is no basis for exercise of this Court's jurisdiction in this case. A per curiam decision is subject to conflict review only if it cites - and identifies as controlling authority - a case which has been either reversed or is pending review by this Court. The Third District did not identify a controlling authority in its per curiam affirmance and therefore no basis for conflict jurisdiction exists. Furthermore, the potential conflict decision differs factually from the instant case so jurisdiction - even if properly accepted initially - should be discharged.

The case is also not subject to review pursuant to Article V, Section 3(b)3 of the Florida Constitution because the Third District decision, did not expressly validate or invalidate a state statute or a provision of the state or federal constitution.

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II

Section 627.426(2), Florida Statutes (1982) is a straightforward and unequivocal rule enacted by the legislature which requires insurance companies to raise any coverage defenses within set time parameters. The term 'coverage defense' is not qualified in any way, and the courts have no occasion to graft any qualifications or exceptions onto the statutory language, as the insurance companies - like Petitioner here - are urging them to do. The language of the statute and legislative history indicate that the statute means what it says: any coverage defense must be raised within the statutory time limits or it is barred.

III

Section 627.426(2), Florida Statutes (1982) has no constitutional infirmities and certainly not as applied here. The section merely codifies the procedures by which the insurance company may raise a defense to its pre-existing duty. Moreover, the statute is both remedial and procedural in nature. The legislature passed this section to remedy the difficulties which occur when the question of a coverage defense arises. To remedy the situation, the section creates a time limit within which the insurance company may raise a coverage defense. The time limitation is merely a procedural remedy used to set a reasonable amount of time for an insurance company to raise a coverage defense so as not to prejudice the rights of the insured.

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IV

The trial court properly entered an order granting final summary judgment against Petitioner where Petitioner failed to raise a timely defense to coverage. Petitioner's pleadings admit that the allegations of the complaint form the basis for its asserted coverage defense. Petitioner received a copy of the complaint soon after July 23, 1985, and the trial court found that Petitioner had actual or constructive knowledge of its coverage defense at the latest by August 21, 1985. Petitioner sent no reservation of rights letter to the insured until September 23, 1985, beyond the statutory 30 day limit. Since Petitioner did not comply with the statute, the trial court correctly entered summary judgment for the insured on the coverage defense raised in Petitioner's crossclaim.

ARGUMENT

I

THERE IS NO BASIS FOR JURISDICTION

A. NO CONFLICT JURISDICTION EXISTS

1. No authority was referenced as controlling in the Third District's per curiam decision

The decision before this Court, Consolidated American Ins. Co., Inc. v. Bucolo, 526 So.2d 147 (Fla. 3d DCA 1988), reads:

> PER CURIAM.
>
> Affirmed. AIU Insurance Co. v. Block Marina Inv., Inc., 512 So.2d 1118 (Fla. 3d DCA 1987); §627.426(2)(a), Fla. Stat. (1985).

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This Court does not have conflict jurisdiction because a per curiam decision is not reviewable[2/] unless it "cites as controlling authority a decision that is either pending review in or has been reversed by this Court." Jollie v. State, 405 So.2d 418, 420 (Fla. 1981).

The decision before this Court does not cite a controlling authority. A controlling authority is a single (lead) case used by district courts of appeal to dispose of multiple cases involving a common legal issue without disparately affecting the various litigants. Jollie, 405 So.2d at 420. The district courts, as a labor-saving device, author one opinion and that lead opinion is referenced in other cases. 405 So.2d at 420.[3/]

In this case, the Third District referenced more than one authority; an opinion and a statute. The Third District did not declare which authority was the lead authority or whether the two authorities were cited cumulatively or disjunctively. This Court cannot determine the significance of the citation of two separate authorities without delving into the record underlying the per curiam decision. But, in the context of considering possible conflict jurisdiction, review of the record below is

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[2/] Jenkins v. State, 385 So.2d 1356 (Fla. 1980)(holding that the Supreme Court of Florida does not have jurisdiction to review for conflict purposes per curiam decisions of the district courts of appeal rendered without opinion, regardless of the existence of a concurring or dissenting opinion).

[3/] In Jollie, the Fifth District disposed of three cases by stating "Affirmed. See Murray v. State [citation]", while the Murray case was pending review in this Court.

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impermissible; it is the very act which precludes Supreme Court review of per curiam decisions. As noted in Jollie:

> Justice Thomas, the father of Florida's district courts of appeal and the strongest advocate that the district court "were meant to be courts of final appellate jurisdiction," said this Court had no authority to "dig into a record to determine whether or not a per curiam affirmance by a district court of appeal conflicts."

405 So.2d at 420, citing, Lake v. Lake, 103 So.2d 639, 643-643 (Fla. 1958).

This Court in Jollie further clarified which cases are to be considered "controlling authorities" in by suggesting that district courts of appeal devise methods of distinguishing cases cited as controlling from mere counsel notification cases. 405 So.2d 420-421. The Third District has followed this Court's suggestion and devised several methods of designating the cases which it considers to be controlling authorities. See, e.g., Desvergundt v. Koppers, 506 So.2d 60 (Fla. 3d DCA 1987)("We affirm the summary judgment under review upon the authority of...."); Pinero v. Sears, Roebuck & Co., 515 So.2d 422 (Fla. 3d DCA 1987)("On the authority of this Court's decision in Henley v. J.I. Case Co., 510 So.2d 342 (Fla. 3d DCA 1987), we reverse...."); Shaw v. General Motors Corp., 503 So.2d 362 (Fla. 3d DCA 1987)("[T]his case presents questions of great public importance; we therefore certify, as did the Fifth District in Pait, the following questions to the Supreme Court of Florida...."). The Third District did not employ any of its designation procedures in the instant case.

Moreover, this Court suggested in Jollie that "district

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courts add an additional sentence in each citation per curiam affirmed which references a controlling contemporaneous or companion case, stating that the mandate Dill be withheld pending final disposition of the petition for review." 405 So.2d at 420. The Third District certified AIU Insurance Co. v. Block Marina Inv., Inc., 512 So.2d 1118 (Fla. 3d DCA 1987) as being in potential conflict with United States Fidelity and Guarantee Co. v. American Fire and Indemnity, 511 So.2d 624 (Fla. 5th DCA 1987). See 512 So.2d 1118, n.4. However, the Third District did not certify or make any notation regarding the disposition of this case pending review of AIU. The fact that the Third District did not certify the instant case to this Court is directly indicative that AIU was not being cited by the Third District as a controlling authority in the Jollie sense.

2. The case differs factually from the potential conflict decision

This Court also does not have conflict jurisdiction to review the present case because the facts differ materially from the facts in the potential conflict decision - U.S.F.&G. Where this Court accepts jurisdiction over a case based upon conflict jurisdiction, and it emerges that the potential conflict case is factually and analytically distinguishable, then this Court should discharge jurisdiction. Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

This case and U.S.F.&G. differ factually and analytically. The present case involves an action against a homeowner

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and her son for negligence and for intentional assault. The two defendants are undisputedly covered by comprehensive homeowner's policies, which were also undisputedly in effect at the pertinent times. The question is whether the insurance company could invoke a specific exclusion; not whether there were insurance policies in existence at all.

U.S.F.&G., however, involved an action by an insured against the insurance company on a policy which had lapsed some ten years before the claim was presented. The policy was a "claims-made" policy, which provided coverage only "if the negligent or omitted act is discovered or brought to the attention of the insurer within the policy term." 511 So.2d at 624. The Fifth District held that where the policy term had expired and the liability coverage had terminated ten years before any claim was made on the policy, there was 'no coverage to begin with' and that the statute did not apply to create coverage where none existed.[5/] As set forth in the next section, Respondent disagrees with the U.S.F.&G. court's reasoning and holding. But, for purposes of this discussion of conflict jurisdiction, there is a crucial distinction between the lapsed policy in U.S.F.&G. and the concededly existing and applicable policies here under which Petitioner seeks to invoke a particular exclusion.

5/ The Fifth District opined that "[T]he term 'coverage defense' does not include a complete lack of coverage such as in this case, where the policy term had expired and the liability coverage terminated ten years before any claim was made on the policy." 511 So.2d at 625.

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As the differing facts of these cases engender entirely distinct analyses under §627.426, no true conflict exists and jurisdiction should be discharged.

B. THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)3, FLORIDA CONSTITUTION (1980)

This Court also has no jurisdiction to review this case by virtue of Article V, Section 3(b) of the Florida Constitution. Pursuant to the Constitution, this Court may review any decision of a district court of appeal that expressly declares valid a state statute or that expressly construes a provision of the state or federal constitution. However, the Third District decision here does not (i) expressly declare valid a state statute or (ii) expressly construe a provision of the state or federal constitution. In Jenkins v. State, 385 So.2d 1356 (Fla. 1980), this Court defined the word "expressly" to mean: "in an express manner," "to represent in words", or "to give expression to." 385 So.2d at 1359. The Third District's per curiam decision in the instant case self-evidently does not expressly declare anything and is not a basis for exercise of jurisdiction under Article V, Section 3(b)3, Florida Constitution (1980).

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II.

THE THIRD DISTRICT CORRECTLY AFFIRMED THE TRIAL COURT'S RULING THAT CONSOLIDATED'S FAILURE TO COMPLY WITH THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982) PROHIBITED IT FROM DENYING COVERAGE BASED ON A PARTICULAR COVERAGE DEFENSE

Section 627.426(2), Fla.Stat. (1982) of the Claims Administration Act is a perfectly clear, hard and fast rule promulgated by the legislature requiring insurance companies to raise any coverage defenses within set time parameters. The pertinent statutory provision reads:

> A liability insurer shall not be permitted to deny coverage based upon a particular coverage defense unless:
>
> (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand-delivery[.]

Fla.Stat. 627.426(2)(a) (1982).

The words of this statutory provision are clear and unambiguous, as the Third District noted in AIU Insurance Co. v. Block Marina Investment, 512 So.2d 1118 (Fla. 3d DCA 1987). In simple and direct language, the statute requires an insurance company to assert any coverage defense within 30 days of when it knew or should have known of that particular defense by sending written notice of its reservation of rights to the insured.

Petitioner and the courts in United States Fidelity and Guaranty Co. v. American Fire and Indemnity 511 So.2d 624 (Fla.

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5th DCA 1987)("U.S.F.&G") and International Insurance Co. v. Country Manor Asso., Inc.,, Case No. 86-0400, 13 FLW 2522 (Fla. 4th DCA November 16, 1988) ("Country Manors") have attempted to subdivide the statutory phrase 'coverage defense' into different types of coverage defenses - concluding that some are meant to be covered by the statute and some are not. For example, Petitioner argues that the term 'coverage defense' applies to forfeiture defenses but not to exclusions.[6/] The U.S.F.&G. court held - in the case involving a lapsed claims-made policy - that: "An insurer does not assert a 'coverage defense' where there was no coverage in the first place." 511 So.2d at 625. The Country Manors court narrowed the term as follows: "[W]e construe coverage defense to mean a defense that otherwise exists or could exist under the law." 13 FLW at 2526.

These attempts to qualify, subdivide, and whittle away

6/ Petitioner also argues that the statute in effect creates coverage by estoppel or waiver and that such coverage is not permitted under the common law. Six L's Packing Co. v. Florida Farm Bureau Mill Ins. Co., 268 So.2d 560 (Fla. 4th DCA 1972), adopted, 276 So.2d 37 (Fla. 1973). See also pp. 11-12 of Petitioners Brief. Without discussing Petitioner's backwards approach to statutory construction, this argument is deficient because the common law provided for coverage by waiver or estoppel if the insured could show prejudice. See, Centennial Ins. Co. v. Tom Gustafson, Inc., 401 So.2d 1143 (Fla. 4th DCA) pet. for rev. den. 412 So.2d 471 (1983); Kramer v. U.S. Auto Asso., 436 So.2d 935 (Fla. 4th DCA 1983); Liberty Mutual Ins. Co. v. Jones, 427 So.2d 1117 (Fla. 3d DCA 1983). See also, the legislative history underlying § 627.426(2) specifically referring to the statutory presumption of prejudice. (A. 10). The statute, therefore, does not conflict with the common law; it merely creates a statutory presumption of prejudice.

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at the term 'coverage defense' are impermissible as the statutory language is perfectly clear and unambiguous. See, e.g., State v. Eson, 287 So.2d 1 (Fla. 1971). Interestingly, neither Petitioner nor the U.S.F.&G. and Country Manor courts contend otherwise. Instead, they take a "legislative intent" tactic, opining that the legislature could not have intended 'coverage defense' to mean whatever the particular defense is that they don't want it to mean. This approach is in error in view of the unambiguous statutory language, and furthermore runs afoul of the legislative history itself.

House Bill 4-F from the House Insurance Commission Bill Analysis (June 3, 1982) (attached hereto as an appendix) states with respect to § 627.426:

> Subsection (2) is a recognition by the legislature of the difficulties presented to all parties (insureds, insurers, and defense counsel) when the question of a coverage defense arises. The insured wants the coverage, the company doesn't and the insurance defense attorney is thrust in the middle. The problem is particularly acute when the complaint contains multiple counts, some covered by the coverage, others not covered.
>
> * * *
>
> Subsection (2) specifies how an insurer may treat a coverage defense. Paragraph (a) provides thirty (30) days written notice of reservation of rights...Paragraph (b) provides clear instructions to insurers as to their options should an insurer choose for whatever reason to assert any coverage defense.
>
> * * *
>
> This section treats waiver of forfeiture and coverage defenses the same and establishes time limits in lieu of the insured having to prove prejudice. The statute, in essence,

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> provides that the failure to meet the established time limits is sufficient in itself to prohibit denial of coverage.

Bill Analysis, (H.B. 4-F) p. 67, (A. 10). Thus, contrary to Petitioner's contention and to the holdings in U.S.F.&G and Country Manors, the legislature intended "coverage defense" to include any defense to coverage an insurer might have, whether it be that no policy ever existed, that a policy had lapsed, that there was an applicable exclusion, that the insured's actions forfeited coverage, or any of the other myriad items insurance companies raise as defenses to their insureds' claims for coverage. The statute simply establishes time limits within which an insurance company must assert any defense or waive it.

Not only do the plain language and legislative history of the statute set out a hard and fast rule, but inflexible application of the rule is the only way to make it effective. As worded, the statute simply requires an insurer to raise any coverage defense within 30 days. The triggering provisions are eminently reasonable and impose no undue burdens on the insurers since the 30 days does not begin to run until the insurer knew or should have known about the particular coverage defense. The better the coverage defense - such as e.g., (1) there was never any policy to begin with, or (2) the policy lapsed 10 years ago, or (3) the policy does not cover punitive damages - the easier it is to identify and advise the insured.

If an erosion process of judicially created exceptions is allowed to continue, insurers will exploit the process by

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making an issue in every case as to whether the coverage problem they wish to raise is really a 'coverage defense' situation or a situation 'where coverage never existed'. The cases thus far illustrate the potential for litigation spawning. In U.S.F.&G., the policy had lapsed 10 years previously - a situation the court characterized as "no coverage in the first place" and therefore not subject to the statutory time limits. Here, although there are admittedly existing and applicable policies, Petitioner seeks to argue that an exclusion in the policies means there was 'never coverage in the first place', and that therefore the statute should not apply. The Manor House court likened treble damages to punitive damages, said the insurance does not cover such damages as a matter of public policy, and concluded that therefore there was no coverage to begin with.

It takes no crystal ball to anticipate the arguments in every imaginable coverage situation: "the insured's son lived in Georgia and not with the insured in Florida and therefore was not a resident relative and therefore there was no coverage to begin with, so the statute should not apply". "The policy excluded liability assumed by contract and therefore there was 'no coverage to begin with', so the statute should not apply." "The insured made a material misrepresentation in his application, and therefore there was 'no coverage to begin with', so the statute should not apply."

Instead of permitting the courts of this state to be clogged up with all of the insurers 'arguments about how their

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coverage defenses are really 'no coverage to begin with' situations, the self-evidently better course - and the proper one as a matter of law - is simply to apply the statute as written. After all, it is not difficult for the insurers send out simple reservation of rights letter, saying: "Your policy lapsed 10 years ago" or "We have just determined that your application contains a material misrepresentation" or "We never issued any policy to you" or "Your policy excludes coverage for intentional acts" or "There is no coverage for punitive damages." Again, there is nothing in the least burdensome about the requirement of sending the letter since the insurer does not have to do it until the insurer has actual or constructive knowledge of the particular coverage defense. Once an insurer has such knowledge, reducing it to a letter within 30 days is the simplest of tasks.

Strictly enforced rules beget compliance. There are very few cases involving late notices of appeal anymore in Florida since the 30 day rule is applied without exception. Here, the legislature has enacted an unequivocal rule and there is no place for judicial equivocating. Once the insurers get the message that they are absolutely required to notify their insureds of any coverage defenses within 30 days, they will comply - just as the legislature intended they should.

Petitioner here failed to meet the 30 day statutory deadline for raising its coverage defense of 'intentional injury' exclusion. The trial court properly ruled that that particular defense was waived under §627.426, and the Third District

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properly affirmed. The decision should stand.

III

THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982) IMPAIRS NO CONTRACTUAL RIGHTS

The application of section 627.426 to this cause of action is not contrary to Article I, Section 10 of the Florida Constitution because it impairs no contractual rights. Furthermore, it is a remedial and procedural statue.

In the first place, the trial court did not apply section 627.426(2), Fla.Stat. (1982) retroactively. Plaintiff filed her complaint in 1985. The trial court applied a 1982 statute to the 1985 cause of action. The 1982 statute merely required insurance companies - like Petitioner here - to notify insureds of coverage defenses within 30 days. Petitioner was simply required by the statute to notify its insured of any coverage defenses to the claims presented in 1985 within 30 days. No issue of retroactivity even arises factually in this case.

Furthermore, a law is retroactive or retrospective only to the extent that it takes away or impairs a vested right acquired under existing laws, creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already past. Herbele v. P.R.O Liquidating Co., 186 So.2d 280, 282 (Fla. 1st DCA 1966). The application of the Claims Administration Statute in the instant

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case does not take away any vested rights belonging to Petitioner. Petitioner points to no contractual provision stipulating that Petitioner would have no time limits for asserting coverage defenses. Therefore, section 627.426(2) does not abridge any vested right.[7/]

Petitioner implies that the statute creates a duty to pay and defend for the insurance company. In reality, however, the statute only sets procedures for an insurer to assert defenses to its existing contractual duties to pay and defend. Those duties were already agreed to by the insurance company; the statute encompasses the legislative recognition of the difficulties presented to insureds and insurers when the question of a coverage defense arises and sets out procedures for minimizing those difficulties. See Bill Analysis (HB 4-F), p.67. Section 627.426 is an attempt by the "government to develop a system of effective regulation which adequately protects the public interest and preserves the many benefits of private insurance." Bill Analysis (HB 4-F), p. 2. In short, Section 627.426 does creates no new duties or obligations; it merely regulates already existing duties.

7/ Petitioner cites Prudential Property & Cas. Ins. v. Scott, 514 N.E.2d 595 (Ill.App. 4th Dist. 1987) to support its proposition that this statutory section is an unconstitutional impairment of rights. However, in Prudential, the contract contained a specific provision in direct conflict with the Illinois statute in question. The other case cited by Consolidated, Weisberg v. Royal Ins. Co. of America, 464 N.E. 2d 1170 (Ill.App. 1st Dist. 1984) is distinguishable for the same reason.

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Regardless of whether this Court construes this statute to be retroactive in effect,[8/] the application of this statutory section is not unconstitutional as applied to the facts of this case because the section is both remedial and procedural in nature. If a statute is found to be remedial in nature, it must be applied retroactively as well as prospectively in order to serve its intended purpose. City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986).

A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. Adams v. Wright, 403 So.2d 391, 394 (Fla. 1981). Section 627.426 is remedial in nature. The intent of the legislature, as noted above, was to develop a system of effective regulation to minimize the problems attendant upon liability coverage disputes, i.e. the problems engendered in liability insurance coverage situations where insured and insurer are defending against a claim and a potential coverage dispute puts them in a conflict position interse. As indicated in the legislative history (A. 10), section 627.426(2) was intended to implement early communication of coverage problems to insureds so

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8/ Petitioner claims that the text of 627.426 does not contain any indication that the legislature intended the statute to be applied retroactively. Petitioner overlooks section 81 of Ch. 82-243 which states, "This act shall take effect October 1, 1982,..." According to the reasoning of Dewberry v. Auto-Owner's Insurance Co., 363 So.2d 1077 (Fla. 1978), the quoted language creates a presumption that the legislature intended a retroactive application of the statute. 363 So.2d at 1079.

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that insureds, insurers and defense counsel could all take appropriate steps to protect the insured's interests in the underlying liability litigation.

Moreover, section 627.426 is procedural in nature because it merely sets procedures and reasonable time limits for raising coverage defenses. Section 627.426 creates a 30 day time limitation for the insurer to notify the insured of any possible coverage defenses. The legislative history reviews the procedures which the insurance company must follow:

> Subsection (2) specifies how an insurer may treat a coverage defense. Paragraph (a) provides thirty (30) days written notice of reservation of rights by registered or certified mail or by hand delivery. Paragraph (b) provides clear instructions to insurers as to their options should an insurer choose for whatever reason to assert any coverage defense.

Bill Analysis (HB. 4-F) p. 67. (A. 10). This Court has specifically held that a state, by legislative enactment, may modify existing remedies, including a statute of limitations, without impairing the obligation of contracts as long as another sufficient remedy is provided. Ruhl v. Perry, 390 So.2d 353, 355 (Fla. 1980). In Ruhl this Court noted:

> [T]he legislature clearly has the authority to change a statutory limitation period previously established by law and to make them applicable to existing causes of action as long as a reasonable time is permitted to allow commencement of the action before it is barred.

390 So.2d at 353.

In sum, section 627.426(2), Fla.Stat. (1982) is not an unconstitutional impairment of parties' rights to contract; nor,

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as applied to this case, does it impair any vested contractual rights of Petitioner. This remedial and procedural statute sets forth reasonable time prescriptions within which an insurance company must assert coverage defenses or else suffer a statutory presumption of prejudice to the insured. The statute merely remedies the perennial problems caused by belated assertions of coverage defenses after the insured is already heavily involved in litigation.

IV.
THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT AGAINST CONSOLIDATED UNDER SECTION 627.426(2) WHERE THE RECORD CONCLUSIVELY ESTABLISHED THAT THE INSURER KNEW OR SHOULD HAVE KNOWN OF THE ONLY COVERAGE DEFENSE RAISED MORE THAN THIRTY DAYS BEFORE IT MAILED ITS RESERVATION OF RIGHTS LETTER TO ITS INSUREDS.

As set forth above, under §627.426(2)(a), a liability insurer is not permitted to deny coverage based upon a particular coverage defense if it does not assert that defense or provide the insured with written notice of reservation of rights within thirty (30) days after the liability insurer knew or should have known of the coverage defense.[9/] The issue presented at the trial court was whether Petitioner knew or should have known of its asserted coverage defense thirty (30) days prior to mailing

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9/ The words "should have known" denote the fact that "a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact question in the performance of his duty to another or would govern his conduct upon the assumption that such fact exists." Restatement (Second) of Torts, §12(2).

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its reservation of rights to defendants Elizabeth Bucolo and Charles Bucolo. The trial court specifically found that:

> CONSOLIDATED AMERICAN INSURANCE COMPANY, INC. knew or should have known of that certain coverage defense asserted in its crossclaim, and any other coverage defenses, prior to August 19, 1985 when Michael R. Jenks, Esq. filed a Notice of Appearance on behalf of the Cross-Defendant, ELIZABETH BUCOLO, or alternatively, before, August 21, 1985 when said counsel filed a Motion to Dismiss.

(R. 197). The trial court accordingly entered summary judgment in favor of the insured on the issue of the coverage defense the insurer had belatedly attempted to raise.

Petitioner contends that the trial court improperly entered summary judgment in favor of the insured because when an insurer "knew or should have known" of the coverage is a question of fact. This argument has no application here because the record is replete with evidence that Petitioner knew or had constructive knowledge of the alleged coverage defense based on the policies' intentional acts exclusion. The following facts are undisputed:

> (1) The complaint was served on Mrs. Bucolo on July 23, 1985 and was forwarded to the insurance company shortly thereafter;
>
> (2) The complaint named Charles and Mrs. Bucolo as defendants, charged Mrs. Bucolo with negligence and Charles with both negligence and assault, and alleged that several of the sexual assaults perpetrated by Charles occurred at Mrs. Bucolo's home during the time that he resided there;
>
> (3) On August 19, 1985, Mr. Jenks, Esq. filed his appearance as counsel hired by

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Consolidated for Mrs. Bucolo;

(4) On August 21, 1985, Mr. Michael Jenks filed a motion to dismiss the complaint specifically referring to Charles' Bucolo's intentional conduct, irrefutably establishing actual knowledge by Consolidated that intentional conduct was involved in the case;

(5) Consolidated waited until September 23, 1985 to attempt to reserve its right to assert the coverage defense of intentional conduct against[10] both Mrs. Bucolo and Charles Bucolo.

Moreover, Petitioner itself admitted that the allegations of the complaint apprised it of the coverage defense. Specifically, Consolidated asserted in its crossclaim against Mrs. Bucolo and Charles Bucolo that it was denying coverage because "the conduct alleged in the...complaint constitutes intentional criminal acts [which are] excluded from...coverage as a matter of law." (R. 33). Further, the motion to dismiss filed by Petitioner on behalf of Mrs. Bucolo asserted as a defense that "a parent is not liable for the intentional or negligent misconduct of his child by reason of parentage." (R. 6). Therefore, the trial court correctly held as a matter of law that Petitioner knew or should have known of the coverage defense by either August 19, 1985 or August 21, 1985: when the lawyer Petitioner hired to represent Mrs. Bucolo entered his appearance or filed the motion to dismiss.

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[10] Mrs. Bucolo also moved for summary judgment against Consolidated for failing to comply with section 627.426(2)(a), Fla.Stat. (R. 129-134). However, Consolidated conceded coverage as to Mrs. Bucolo the day of the summary judgment hearing, thus mooting the issue.

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Petitioner claims that the above facts are not conclusive because no evidence exists in the record of a formal demand by Charles Bucolo for coverage against Consolidated. Contrary to Petitioner's argument, the statute does not require that the insured place a formal demand upon the insurance company before the statute becomes effective. The statute begins to run when the insurer "knew or should have known of the coverage defense." Fla.Stat. 627.426(2)(a).

Petitioner claims that five issues of fact still remain in this case and therefore summary judgment was improperly granted. However, the five issues of fact that Consolidated claims to exist are merely excuses for its noncompliance with the statute. The facts pertaining to the issue of the timeliness of the asserted defense are not in dispute and therefore, summary judgment was properly granted.

Consolidated initially contends that the coverage issues differed between Mrs. Bucolo and Charles Bucolo because Charles was only an insured when he was a resident relative. However, the record conclusively shows that Charles resided continuously with his mother throughout the relevant time period and is an insured under the policy. (R. 120-122). This contention therefore does not present a triable issue of fact.

Consolidated also contends that triable issues of fact exist because it allegedly did not know the whereabouts of Charles Bucolo to send him a reservation of rights letter or discover that he had been served until sometime after August 21,

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1985.[11] However, the dates on which Consolidated learned these facts is irrelevant under 627.426(2). The statute plainly states that the thirty days begin to run when the insurer receives actual or constructive knowledge of a particular coverage defense: service of a complaint is not necessary to trigger the company's knowledge or constructive knowledge. Moreover, the statute specifically provides that written notice of reservation of rights can be given to the named insured at his last known address, so that insurers cannot defeat the purpose of the statute by claiming lack of knowledge of their insured's whereabouts.

Finally, Petitioner's contention that summary judgment was improperly granted because Charles allegedly[12] asserted his Fifth Amendment privilege or because it needed time to investigate is also flawed. In its crossclaim, Consolidated did not attempt to deny coverage on the grounds that Charles was not

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[11] August 21, 1985 was the date on which the plaintiff filed the summons and complaint in the trial court. That is not the date on which Consolidated knew or should have of Charles' address.

[12] Consolidated states in its brief that:

> "Charles Bucolo had asserted his Fifth Amendment privilege against self-incrimination and was not providing any information to Consolidated...so that Consolidated had no way of determining" from either Charles or Mrs. Bucolo whether a coverage defense existed." (Brief of Petitioner, at 36).

The only record evidence to support this blanket statement, however, is Charles' refusal to answer certain questions during a deposition taken 17 months after Consolidated mailed its reservation of rights letter. (R. 253-273).

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cooperating in his defense or that he was not an insured under the policy. Consolidated cannot bring forth this new defense for the first time on appeal. American States Insurance Co. v. McGuire, 510 So.2d 1227 (Fla. 1st DCA 1987), rev. denied, 518 So.2d 1273 (Fla. 1987).

In the instant case, Petitioner only raised the coverage defense of the "intentional injury" exclusion. As noted earlier, Petitioner derived this defense from the allegations of the complaint. Charles' alleged lack of cooperation and Consolidated's alleged need to investigate cannot now be raised as defenses where they were not raised before. Moreover, none of these so-called issues of fact bear any relevance to the issue before the trial court: whether Petitioner complied with the statute's notice provisions so as to preserve the particular coverage defense asserted as the basis for denial of coverage.

Section 627.426(2)(a) requires only that the insurer reserve its rights within 30 days after it knew or should have known of the "particular coverage defense." In this case, Petitioner had 30 days in which to raise its "intentional injury" exclusion. Petitioner did not raise this exclusion or give the insured notice of its reservation of rights within 30 days of when it knew or should have known of the defense. The trial court properly ruled that this intentional injury exclusion was untimely raised, and properly granted summary judgment against Petitioner as to that coverage defense.

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CONCLUSION

Based upon the foregoing facts and authorities, Respondent respectfully requests this Court either to discharge jurisdiction or affirm the Third District's decision.

Respectfully Submitted,

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-and-

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By: Elizabeth Koebel Clarke
ELIZABETH KOEBEL CLARKE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 27th day of December 1988 to: WILLIAM C. MERRITT, ESQ., Merritt, Sikes & Craig, P.A., 111 S.W. Third Street, Third Floor, McCormick Building, Miami, Florida 33130 and G. BART BILLBROUGH, ESQ., Walton Lantaff Schroeder & Carson, One Biscayne Tower, Suite 2500, 2 South Biscayne Boulevard, Miami, Florida 33131.

Elizabeth Koebel Clarke
ELIZABETH KOEBEL CLARKE