IN THE SUPREME COURT OF FLORIDA

CASE NO.: 72,844

CONSOLIDATED AMERICAN
INSURANCE COMPANY, INC.,

Petitioner,

vs.

CHARLES BUCOLO,

Respondent.
_____/

ON PETITION FOR REVIEW
FROM THE DISTRICT COURT
OF APPEAL, THIRD DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for Petitioner
One Biscayne Tower, Suite 2500
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 379-6411

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WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

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WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

ARGUMENT

I. THIS COURT HAS FULLY DETERMINED AFTER DUE CONSIDERATION THAT JURISDICTION EXISTS IN THE INSTANT CASE.

Jurisdictional briefs discuss jurisdiction. Briefs on the merits discuss the merits. It is improper, however, for the Respondent to reargue this Court's jurisdiction where this Court has already fully and completely considered the issue.[1]

It is a prerequisite pursuant to Article V, Section 3, Florida Constitution (1980) and Florida Rule of Appellate Procedure 9.030 that the Florida Supreme Court first consider its jurisdictional basis for cases such as the instant matter. Both sides fully briefed the jurisdictional issue and this Court's full consideration of the matter resulted in the November 7, 1988 order of this Court which accepted jurisdiction of the instant cause.

The Petitioner will not belabor this issue, but it is clear from the Court's order accepting jurisdiction that the matter was fully and completely reviewed by its members. Having now accepted jurisdiction, this Court should not hear

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[1]The issue of this Court's jurisdiction was raised in the Respondent's brief on the merits as its first point and has necessitated the Petitioner to likewise discuss that issue initially. Accordingly, the Petitioner's points as discussed in arguments I, II, and III of the Initial Brief will now be found in arguments II, III and IV, respectively.

the Respondent's repeated complaints about this Court's decision to hear this matter.

Indeed, a review of the remaining arguments on appeal show why the Respondent clings to the hope that this Court will reconsider its previous ruling and conclude that it does not have jurisdiction.[2]

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[2]Substantively, the Petitioner will rest on the bases of jurisdiction set forth in its initial brief, which this Court found sufficiently well settled to accept consideration of this case on the merits.

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

II. THE LOWER COURT ERRED IN CONCLUDING THAT, BECAUSE OF A FAILURE TO COMPLY WITH THE TIME REQUIREMENTS OF FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), AN INSURER MUST BOTH DEFEND AND PROVIDE LIABILITY COVERAGE FOR A PERSON DEMANDING SUCH BENEFITS WHERE THE ACTS GIVING RISE TO THE COVERAGE DEMAND NEVER WERE COVERED IN THE FIRST INSTANCE.

The Respondent does not dispute much of the law discussed by the Petitioner in its initial brief, but instead makes a number of assertions fundamental to its case for affirmance. A review of these propositions, however, demonstrates the erroneous nature of the Respondent's position.

Probably the foremost assertion set forth by the Respondent on the issue of proper interpretation of Section 627.426, Florida Statutes (1982), is that this Court should take a myopic view of the language and conclude that the Florida legislature intended a "perfectly clear, hard and fast rule" on the issue of raising coverage defenses. This argument, however, ignores the fact that the Florida courts have historically rejected the use of waiver or estoppel principles to create coverage. Six L's Packing Co., Inc. v. Florida Farm Bureau Mutual Ins. Co., 268 So.2d 560, 563 (Fla. 4th DCA 1972) adopted 276 So.2d 37 (Fla. 1973). It also ignores the fact that statutes modifying the common law are strictly construed so that the statutory interpretation does not displace the common law further than absolutely necessary. Carlale v. Game & Fresh Water Commission, 354 So.2d 362 (Fla. 1977).

Accordingly, the suggestion that Section 627.426, Florida Statutes, represents a hard and fast rule overlooks these fundamental rules of statutory construction. Where the legislature has not defined "coverage defense", the statute cannot be deemed as "perfectly clear" as the Respondent would like this Court to believe.

In an attempt to support its first assertion that Section 627.426, Florida Statutes, constitutes a clear, hard and fast rule, the Respondent next points to a House Insurance Commission bill analysis to argue that no-coverage cases were also intended to fall within the ambit of Section 627.426, Florida Statutes. The report text, however, also does not define what "coverage defense" means. The entire text of the House's discussion continuously refers to the word "coverage", but does not discuss the meaning intended thereby. In short, the "legislative intent" has described by the Respondent also contributes nothing toward a conclusion that coverage defenses also includes no-coverage situations.

The final point made by the Respondent is that this hard, fast, and inflexible interpretation is the only way to make the statute effective. In particular, the Respondent complains that the judiciary will permit insurers to exploit policy holders in an erosion of the statute by the creation of exceptions. As noted in the Petitioner's initial brief, there exists a rational, sensible construction of the statutory

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

language which does not lead to an unreasonable result. State v. Webb, 398 So.2d 820 (Fla. 1981).

Section 627.426, Florida Statutes, was intended to tighten Florida law on forfeiture rights. The language of the statute clearly contemplates the existence of coverage in the first instance by an insurance company electing to avoid that coverage through forfeiture due to some breach of condition. Under such circumstances, the Florida legislature has placed a time limit for that forfeiture to be raised. Application of the statute is both logical, simple, and fair.

For every hypothetical situation described by the Respondent of potential insurer horrors, it is submitted that instances of potential policyholder abuse can as easily be shown by the "hard and fast" analysis suggested by the Respondent. Indeed, a number of the abuses which could occur under the Respondent's interpretation were discussed in the Petitioner's initial brief. The reason that the Respondent is in error, however, is that an interpretation of the statute's applicability to forfeiture as compared to coverage situations makes use of a substantial body of law already on the books on those issues. As such, the analysis in forfeiture cases changes only from a showing of prejudice to whether proper time frame compliances was had under Section 627.426, Florida Statutes. When so viewed, application of the statute then becomes, as previously noted, reasonable and fair to all involved.

In conclusion, the Petitioner again urges this Court to follow the direction of cases such as United States Fidelity & Guaranty Co. v. American Fire & Indemnity Co., 511 So.2d 624 (Fla. 5th DCA 1987), and Country Manors Association, Inc. v. Master Antenna Systems, Inc., ____ So.2d ____, Case No. 86-0400 (Fla. 4th DCA November 16, 1988) [13 FLW 2522], in interpreting Section 627.426, Florida Statutes. In each case, the Fourth and Fifth District Courts of Appeal plainly acknowledged that an insurer does not assert a "coverage defense" as contemplated by Section 627.426, Florida Statutes, where it raises the fact that there was no coverage in the first place. Indeed, those courts explicitly show some of the circumstances which make the Respondent's analysis improper. Indeed, cases of insurance coverage for matters specifically against public policy would occur under the Respondent's theory.

Simply stated, this Court should conclude that the fairer, more rational analysis of the statutory language leads only to the conclusion that the legislature did not intend a coverage defense to apply in situations where there was no coverage in the first instance. Application of any other interpretation results in absurd results, changes years of common law, and would permit coverage of matters specifically against public policy.

III. THE LOWER COURT ERRED IN APPLYING THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982), TO COVERAGE DEMANDS UNDER A CONTRACT WHICH PREEXISTED WHERE THE STATUTORY APPLICATION BOTH SUBSTANTIVELY AND UNCONSTITUTIONALLY IMPAIRS THE RIGHTS OF THE PARTIES AS SET FORTH IN THEIR AGREEMENT.

The initial assertion of the Respondent that the lawsuit dates govern the issue of retroactive application is plainly wrong. Regardless of when the lawsuit was filed, the facts in this case show that Section 627.426, Florida Statutes, enacted in 1982, was applied to an insurance agreement covering policy periods predating that statute. In particular, the insurance contracts giving rise to the Respondent's claim covered policy periods from May, 1972 to May, 1975 and from May, 1975 to May, 1978. (R. 246). Accordingly, the trial court applied Section 627.426, Florida Statutes, to an insurance agreement which preexisted the statute's enactment. Under such circumstances, there is no question that the statute was applied retroactively.

While the Respondent correctly notes that retroactive application of a statute is prohibited where it creates a new obligation or imposes a new duty, it is nonetheless argued that the Florida Claims Administration Act does not create a new obligation or impose new duty for transactions previously concluded. This argument ignores, however, this statute's requirement of certain thirty (30) and sixty (60) day time frames for reservation of insurer rights. Failure to meet

these time deadlines imposes substantial new penalties. These provisions neither existed in the contracts between the parties nor in the law at that time. The time frames set forth in Section 627.426, Florida Statutes, are more restrictive of insurers' rights and result in penalties which are new. As such, the legislation, if retroactively applied, does create new obligations and impose new penalties on an insurer which did not previously exist. Accordingly, it cannot be applied retroactively.

Indeed, the Respondent would distinguish the cases of Prudential Properties & Casualty Ins. v. Scott, 514 N.E.2d 595 (Ill. App. 4th Dist. 1987) and Weisberg v. Royal Ins. Co. of America, 464 N.E.2d 1170 (Ill. App. 1st Dist. 1984) simply because the statute enacted in those cases directly conflicted with actual insurance contract provisions. The argument which attempts to contrast direct conflict, as in those cases, with the engrafting of additional obligations, as in Section 627.426, Florida Statutes, offers a difference without distinction. In each instance, obligations saddle the insurer which did not previously exist under the contract and the body of law under which that contract was made.

Respondent's portrayal of Section 627.426, Florida Statutes, simply a means of "regulating already existing duties" is also wrong. Prior to the statute, there were no thirty (30) or sixty (60) day requirements for the performance

of certain acts by insurers. These compliance provisions are absolutely new and punitive if a time frame violation occurs.

Citing City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986), and Adams v. Wright, 403 So.2d 391 (Fla. 1981), the Respondent argues that Section 627.426 is remedial and therefore can be applied retroactively even if it infringes upon contract rights. The problem with this argument is neither Desjardins nor Adams dealt with retroactive impairment of a contract right. Indeed, the argument is refuted by this Court's analysis and decisions which have reviewed contractual impairment claims made by insurers. Dewberry v. Auto-Owners Ins. Co., 363 So.2d 1077 (Fla. 1978); State Farm Mutual Automobile Ins. Co. v. Gant, 478 So.2d 25 (Fla. 1985). In each instance, the analysis was on whether substantive rights were changed or new and different liabilities imposed. In the instant case, application of this statute to these facts show such substantive right changes and additional penalties.

In summary, Section 627.426, Florida Statutes, carries admittedly new time compliance requirements and penalties for failure to meet them. In 1975 and 1978, the contracts between the insurer and the insured contained no such prerequisites for protesting the existence of coverage defenses, including the fact that there was no coverage at all. The application by the trial court of Section 627.426, Florida Statutes, on such facts impermissibly infringed on the rights and

obligations of the insurance contract. As such, reversal is necessary.

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

IV. THE TRIAL COURT ERRED IN CONCLUDING THAT THE VIOLATION OF THE FLORIDA CLAIMS ADMINISTRATION ACT, SECTION 627.426, FLORIDA STATUTES (1982) EXISTED AS A MATTER OF LAW OR SUBSTANTIAL, MATERIAL ISSUES OF FACTS ISSUED REGARDING WHEN THE INSURER WAS APPRISED OF THE RESPONDENT'S DEMAND FOR COVERAGE AND WHEN THE INSURER SHOULD HAVE KNOWN OF ANY BASIS FOR PRECLUDING INSURANCE RESPONSIBILITY.

The thrust of the Respondent's argument that summary judgment in this case was proper is based upon the erroneous assumption that an insurer has an obligation to send a coverage rejection prior to any demand for coverage being made upon it. This argument, however, is without merit.

The Respondent clings to the contention that summary judgment was proper where the record showed that ELIZABETH BUCOLO, the Respondent's mother, had made demand upon CONSOLIDATED to defend her and counsel had been appointed on her behalf. The Petitioner must reiterate, however, that these events do not in any way relate to when CONSOLIDATED knew or should have known of coverage demands made by or for CHARLES BUCOLO.

The Respondent would place some affirmative obligation on the part of the insurer to simply inject itself into a situation which it had not been called on to defend. Contrary to Respondent's argument, Section 627.426 cannot be deemed to require this result.

CHARLES BUCOLO was not the primary insured and was only entitled to coverage in the event that he qualified as a resident relative. The record is devoid of any evidence which supports the conclusion that CONSOLIDATED knew or should have known of a claim made by CHARLES BUCOLO for coverage.

Viewing the evidence in a light most favorable to the Petitioner as required by Florida law, Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985), it is clear that the summary judgment cannot stand. Because it is the notification and demand for insurance coverage by a potential insured upon the insurer which triggers the insurer's obligations under an insurance contract, Hartford Accident & Indemnity Co. v. Mills, 171 So.2d 190 (Fla. 1st DCA 1965), the failure of any such evidence to be found in the record is fatal. As a matter of law, Section 627.426, Florida Statutes, and the obligations set forth therein, cannot apply to an insurer who has received no claim from the person demanding coverage.

In the instant case, the record is devoid of any evidence that CHARLES BUCOLO made demand for coverage prior to August 30, 1985. Further, no demand for his defense was made by CHARLES' mother, the primary insured. As such, the record is devoid of any evidence indicating when CONSOLIDATED either knew or should have known of a coverage defense as to CHARLES BUCOLO. Indeed, the mere fact that the complaint existed against CHARLES BUCOLO means nothing without CHARLES BUCOLO or his agent making some kind of claim for the coverage benefits.

Reversal is warranted. Gonzalez v. U.S. Fidelity & Guaranty Co., 441 So.2d 681 (Fla. 3d DCA 1983); Sims v. American Hartford Ins. Co., 429 So.2d 21 (Fla. 2nd DCA 1982); Ideal Mutual Ins. Co. v. Walderp, 400 So.2d 782 (Fla. 3d DCA 1981).

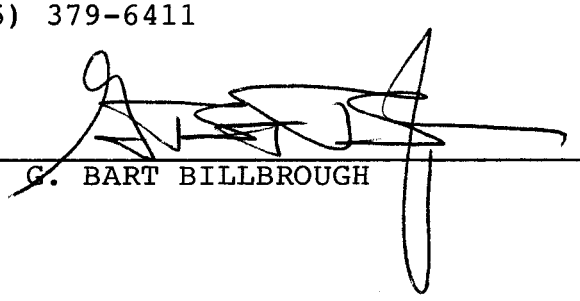
WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411

CONCLUSION

Based upon the foregoing rationale and authority, the Petitioner respectfully requests this Honorable Court to reverse the summary final judgment entered below.

Respectfully submitted,

WALTON LANTAFF SCHROEDER & CARSON
Attorney for Petitioner
One Biscayne Tower, Suite 2500
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 379-6411

By: 
C. BART BILLBROUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of January, 1989 to: CARON BALKANY, ESQ., 850 San Pedro, Coral Gables, Florida 33156; and ELIZABETH KOEBEL CLARKE, Suite 2400, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132-2513.

By: _____
G. BART BILLBROUGH

GBB211/mkm

WALTON LANTAFF SCHROEDER & CARSON
SUITE 2500, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FL 33131 • TEL. (305) 379-6411