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IN THE SUPREME COURT OF FLORIDA

CLAUSSON P. LEXOW and UNITED STORAGE SYSTEMS, INC., d/b/a THE EXTRA CLOSET OF OCALA, LTD.,

~~Appellants,~~ appellees

vs.

INSURANCE COMPANY OF NORTH AMERICA,

~~Appellee.~~ appellant

/

CASE NO. 78,376

APPELLANT'S INITIAL BRIEF

CERTIFIED QUESTION
ELEVENTH CIRCUIT
COURT OF APPEALS
CASE NO. 90-3331

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INTRODUCTORY STATEMENT

Appellants, CLAUSSON P. LEXOW and UNITED STORAGE SYSTEMS, INC., d/b/a THE EXTRA CLOSET OF OCALA, LTD., shall be collectively referenced as "LEXOW". INSURANCE COMPANY OF NORTH AMERICA shall be referenced as "INA". The United States District Court for the Middle District of Florida, Case No. 88-67-CIV-OC-12, William Terrell Hodges, J., shall be referenced as "district court".

References to the district court record shall be to the docket sheet and shall refer to the volume, court paper number, and page. By way of example, page 3 of the district court opinion denying attorney's fees to LEXOW would be referenced as "R2-90-3". References to the opinion of the United States Court of Appeals, Eleventh Circuit shall be referenced to the court and the page number appearing in the upper left or right hand corner of the opinion, and the court shall be referenced as the Eleventh Circuit.

References to the parties' briefs filed with the Eleventh Circuit shall be referenced by party, brief and page number. By way of example, a reference to Page 6 of INA's Initial Brief as the designated Appellant in the Eleventh Circuit would be referenced as "INA Initial Brief-6".

STATEMENT OF THE CASE

This appeal comes before this Court upon certification from the Eleventh Circuit of the following question arising out of a dispute over a denial of attorney's fees to an insured who obtained a judgment against its insurer:

> DOES THE PHRASE "UNDER A POLICY OR CONTRACT" IN FLORIDA STATUTES, SECTION 627.428 (1) INCLUDE SUBSEQUENT LITIGATION TO DETERMINE WHETHER THE INSURED OR THE SUBROGATED INSURER IS ENTITLED TO FUNDS OBTAINED BY THE INSURED FROM A TORTFEASOR AFTER THE INSURER HAS PAID THE INSURED ITS POLICY LIMITS, ALTHOUGH THESE FUNDS ARE INSUFFICIENT TO COMPENSATE THE INSURED'S LOSS, FOR THE PURPOSE OF AWARDING ATTORNEY'S FEES TO THE INSURED ACQUIRING A JUDGMENT AGAINST THE INSURER FOR THE FUNDS RECEIVED FROM THE TORTFEASOR? (11th Cir.-4575)

INA insured LEXOW for a fire loss to LEXOW's business involving the ownership and operation of a mini warehouse or consumer storage facility in Ocala, Florida. (R2-64-2). During the course of renovation work to LEXOW's business premises an electrical fire totally destroyed the building and its contents on August 1, 1983. (R2-64-2). INA ultimately paid LEXOW $430,571.26 for the fire loss and obtained a subrogation receipt(s) from LEXOW. (R1-1-2 through 3; R2-64-2).

On April 29, 1988, INA filed a Complaint in the district court seeking a declaration of its rights under the subrogation receipt(s) and a declaration as to whether INA or LEXOW was entitled to certain settlement funds, held in escrow, that were paid to LEXOW and INA by the insurer for one of the tortfeasors allegedly responsible for the fire loss. (R1-1-1 through 6).

LEXOW answered the Complaint (R1-3-1 through 3), but also filed a motion to dismiss or abate (R1-12) that was denied. (R2-34). Subsequently, pursuant to court order (R1-15), LEXOW filed a counterclaim against INA seeking attorney's fees under §627.428(1), Fla. Stat. (1987). (R1-20). On July 6, 1989, the Honorable William Terrell Hodges conducted a non-jury trial and on July 12, 1989, issued a memorandum opinion finding that LEXOW was entitled to the $100,000 settlement fund, having suffered damages in excess of monies already received for the fire loss. (R2-64-1 through 9). Judgment was entered on the memorandum opinion on July 12, 1989. (R2-65-1).

Initially, INA filed a notice of appeal from the judgment on the merits; however, that appeal was dismissed by INA on November 13, 1989. (R2-73). The July 12, 1989 judgment is not the subject of this appeal.

LEXOW filed a post-trial motion to tax costs and attorney's fees (R2-66-1 through 3) supported by a memorandum of law contending that case law supported an award of attorney's fees under § 627.428(1). (R2-67-1 through 7). INA filed a memorandum in opposition suggesting the district court was without jurisdiction and the action was in rem, not involving a coverage dispute. (R2-70- 1 through 7).

On March 14, 1990, the district court entered an order without oral argument denying LEXOW's motion for attorney's fees, but granting LEXOW's motion for pre-judgment interest. (R2-90-1 through 7).

LEXOW filed a timely notice of appeal from the district

court order denying an award of attorney's fees. (R2-93). INA then timely filed a notice of cross-appeal, appealing the district court's order and judgment awarding pre-judgment interest to LEXOW. (R2-94). Under Federal Rules of Appellate Procedure, INA became the appellant before the Eleventh Circuit.

On August 1, 1991, the Eleventh Circuit affirmed the award of prejudgment interest, concluded that conflicting case law in Florida provided no clear precedent to guide its determination of the attorney's fee issue, and certified the question arising out of the facts of this case as to awarding attorney's fees when an insured must litigate with its subrogated insurer over entitlement to settlement proceeds obtained from a responsible tortfeasor's insurer. (11th Cir.-4575).

By agreement of the parties, LEXOW is designated as the Appellant herein for the purpose of briefing the attorney's fee issue to this Court.

STATEMENT OF THE FACTS

After a fire destroyed LEXOW's business in 1983, LEXOW's insurer, INA, initially paid LEXOW the sum of $418,585.26, and eventually paid LEXOW the total amount of $430,571.26 for losses suffered by LEXOW due to the fire. (R1-1-2; R2-64-2). INA obtained a subrogation receipt(s) for the payment(s). (R1-1-6). Suit was then filed jointly by INA and LEXOW in the Circuit Court of the Fifth Judicial Circuit in and for Marion County, Florida, against two tortfeasors responsible for the fire loss. (R2-64-2;

R1-13-21). One tortfeasor was insured by an insurance company that was placed into receivership, precluding INA from pursuing an insolvent insurer; however, LEXOW obtained $99,900 from the insolvent insurer's receiver. (R2-64-3). Consequently, LEXOW collected the total sum of $530,471.26 from INA and one tortfeasor for damages due to the fire.

During the pendency of the circuit court action the insurer for the other tortfeasor tendered the amount of $100,000 to INA and LEXOW, with the money held in an interest bearing account by counsel for INA, pending agreement by the parties as to disbursement. (R2-64-3). INA and LEXOW could not agree upon who was entitled to the funds. (R1-13-32 through 34). LEXOW's attorney, therefore, requested and obtained a trial date in the state court proceeding to determine distribution of the settlement proceeds. (R1-13-21). INA then filed a notice of voluntary dismissal without prejudice of its claims against the two tortfeasors on April 20, 1988, one day before the state court trial (R1-13-24), contending it had resolved its claims against the two tortfeasors. INA commenced its declaratory relief action in the district court on April 29, 1988, (R1-1-1 through 6). Despite INA's dismissal in the state court, it heard the matter on April 21, 1988, and awarded the settlement proceeds to LEXOW, reasoning that LEXOW had not been fully compensated for the fire loss so INA was not entitled to exercise its right of subrogation. (R1-13-24 through 26). INA filed a petition for certiorari and a notice of appeal with the District Court of Appeal, Fifth District of Florida, arguing, inter alia, that the

circuit court lacked jurisdiction over INA. (R1-13-36 through 57; R1-13-58). The Fifth District Court of Appeal held that the circuit court lacked jurisdiction over INA, noting there was an action then pending in federal court to determine the entitlement to the settlement proceeds. CIGNA v. United Storage Systems, Inc., 537 So.2d 129 (Fla. 5th DCA 1988).

In the district court, INA contended that the subrogation receipt(s) signed by LEXOW entitled INA to receive the $100,000 (R1-1-1 through 4; R2-47-1 through 3). LEXOW responded that INA was not entitled to the $100,000 because LEXOW had not been fully compensated for the fire loss despite having received $530,471.26. (R2-64-3).

In the district court's memorandum opinion on the merits the district court followed applicable Florida law, cited by the state court when it had awarded LEXOW the settlement proceeds, that a subrogated insurer is not entitled to reimbursement for payments made to its insured until its insured has been fully compensated for the loss. (R1-13-25; R2-64-6). The district court found that under any theory of damages, LEXOW had not been fully compensated for the fire loss although receiving $530,471.26 as partial compensation/reimbursement, thereby entitling LEXOW to the $100,000. (R2-64-9).

Post-trial, LEXOW requested an award of attorney's fees as demanded by its counterclaim, (R2-66), pursuant to §627.428(1), Fla. Stat. (1987), which reads in pertinent part:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor or any named or omnibus

> insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary, a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

INA opposed an award of attorney's fees contending, inter alia, that it had paid LEXOW full policy benefits, its dispute with LEXOW over the $100,000 pertained to a matter outside its insurance contract with LEXOW, and the action was in rem against the $100,000; accordingly, INA argued attorney's fees were not authorized under §627.428(1). (R2-70).

The district court denied LEXOW attorney's fees, deciding that INA discharged its duties under its contract of insurance by paying LEXOW a substantial sum for the fire loss and specifically found that:

> This litigation is not within the scope of §627.428, because it is not an action for benefits and does not arise under the insurance policy or other contract between the parties. (R2-90-3).

The district court relied upon Forsyth v. Southern Bell Telephone and Telegraph Co., 162 So.2d 916 (Fla. 1st DCA 1964) to support its decision.

Also, the district court found alternatively that an award of attorney's fees would not be appropriate even if §627.428(1), otherwise applied because INA's dispute with LEXOW was over a type of claim which "could reasonably be expected to be resolved

by a court". (R2-90-4).

Before the Eleventh Circuit, LEXOW stated that case law, including Molyett v. Society National Life Insurance Co., 452 So.2d 1114 (Fla. 2d DCA 1984), supported LEXOW's demand for attorney's fees. (LEXOW's Answer Brief). Although INA argued that the district court correctly applied the rule of Forsyth v. Southern Bell Telephone and Telegraph Co., supra, claiming Forsyth was supported by other case law from the First District Court of Appeal, INA concedes that an insured who prevails against its insurer is entitled to an award of attorney's fees under §627.428(1) if the parties' dispute involves a denial of a material obligation by an insurer under its policy. (INA Answer Brief - 21, 25, 26).

The Eleventh Circuit indicated in its opinion that a literal reading of §627.428(1) appeared to entitle LEXOW to an award of appellate attorney's fees, but the case law from the First District Court of Appeal and the Second District Court of Appeal was conflicting without such conflict having been resolved by this Court. (11th Cir.-4575). The Eleventh Circuit, therefore, certified its question to this Court.

SUMMARY OF ARGUMENT

Florida's public policy, underpinning §627.428(1), Fla. Stat., (1987), and in existence since 1893, mandates that a litigious insurer pay an insured's attorney's fees when an insured is forced to litigate in order to obtain an insurer's performance of a material obligation due the insured under its insurance contract or to protect the benefits received from an insurer's performance of its policy obligations.

INA's claimed right of subrogation arises by reason of having paid LEXOW under its insurance contract. Subrogation is an incident of a casualty insurance policy and precludes a double recovery by an insured collecting for the same damages from its insurer and a tortfeasor. Because an insurer is entitled only to reimbursement of the amount representing any excess recovery, an insurer's wrongful demand for subrogation contests the insured's policy right to full compensation and constitutes a denial of a material obligation of the policy. It is no less a denial of INA's obligation to pay policy limits by INA paying LEXOW and then seeking reimbursement from the tortfeasor's recovery because such reimbursement would effectively result in INA paying less than it must without LEXOW having been fully compensated by INA or the tortfeasors. Consequently, the disputed issue here involves INA's policy obligation(s) to LEXOW and is not just a dispute over the settlement proceeds.

At least four Florida appellate cases involving subrogated insurers support an award of attorney's fees to LEXOW. Cases

relied upon by INA, where attorney's fees have been denied an insured involved in a dispute with a subrogated insurer, are completely distinguishable and do not involve a denial of a material policy obligation of the insurer.

The Florida legislature has authorized attorney's fees in subrogation type disputes involving PIP benefits, evidencing an intent that Florida's public policy in awarding attorney's fees to an insured applies to subrogation disputes. No Florida statute prohibits a fee award under the facts of LEXOW's case, although the Florida legislature has placed limitations on attorney's fees awards in other insurance contexts.

INA precipitated the litigation with LEXOW and its conduct amounted to a denial of LEXOW's rights under the policy to be fully compensated, or at least have INA bear the burden of paying full policy limits, unless LEXOW had received a windfall by collecting full damages from the tortfeasors. INA unsuccessfully, and wrongfully, challenged LEXOW's entitlement to the settlement proceeds, and now should pay LEXOW's attorney's fees in order for LEXOW to retain the full benefit of its policy rights and the tortfeasor's recovery.

ARGUMENT

UPON SUCCESSFULLY DEFENDING LITIGATION BROUGHT BY ITS SUBROGATED INSURER OVER ENTITLEMENT TO THE PROCEEDS PAYABLE TO THE INSURED ON BEHALF OF A TORTFEASOR RESPONSIBLE FOR A FIRE LOSS, AN INSURED, WHO HAS NOT BEEN FULLY COMPENSATED FOR A FIRE LOSS BY ITS INSURER PAYING POLICY BENEFITS AND RECEIPT OF THE RECOVERY AGAINST THE TORTFEASOR, SHOULD RECOVER ATTORNEY'S FEES UNDER §627.428(1) FLA. STAT., BECAUSE THE INSURER'S ACTION CONTESTED ITS POLICY OBLIGATION TO INDEMNIFY ITS INSURED AND BEAR THE LOSS UNTIL ITS INSURED HAS BEEN MADE WHOLE.

Since 1893, Florida's public policy, embodied in various attorney's fees statutes, has authorized an"insured" who obtains a judgment against its insurer to recover attorney's fees.[1]

The attorney's fees statute(s) is a vital part of the public policy of Florida to discourage contesting insurers' obligations to their insureds in the state and federal courts of Florida. Feller v. Equitable Life Assurance Society of the United States, 57 So.2d 581 (Fla. 1952); Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1974). The attorney's fees statute(s) protects insureds from unwarranted litigation (including arbitration) precipitated by an insurer's denial of a material obligation due its insured, in derogation of

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1. See for example:
   §4263, Rev. Gen. Stat. (1920);
   §627.0127, Fla. Stat. (1959);
   §627.428(1), Fla. Stat. (1971).

an insured's policy rights. Fewox v. McMerit Construction Co., 556 So.2d 419, 424 (Fla. 2d DCA 1989); Leaf v. State Farm Mutual Automobile Insurance Co., 544 So.2d 1049 (Fla. 4th DCA 1989).

> It is undue hardship upon beneficiaries of policies to be compelled to reduce the amount of their insurance by paying attorney's fees when suits are necessary in order to collect that to which they are entitled. Feller at 586.

The attorney's fees statute's salutary purpose has never been more poignantly demonstrated than recently, when this Court affirmed an attorney's fee award of $253,500 to the insured's attorney, after the insurer decided "to go to the mat", as the Fourth District Court of Appeal said, over payment of a $600 medical bill for thermographic examination. State Farm Fire & Casualty Company v. Palma, 555 So.2d 836 (Fla. 1990).

To recover attorney's fees under §627.428(1), an insured must only meet the conditions imposed by the statute. Travelers Insurance Co. v. Rodriguez, 387 So.2d 341, 343 (Fla. 1980). Florida courts, particularly this Court, reject a narrow or rigid application of §627.428 and its precursors, and seek to apply the statute and its underlying public policy to the facts of a particular case to carry out the legislative intent of protecting insureds. In Feller v. Equitable Life Assurance Society of the United States, supra, this Court had the opportunity to construe the attorney's fees statute so that it was only applicable to insurance contracts issued inside Florida. The Feller Court disapproved such a narrow reading and held that the attorney's

fees statute applied to contracts, made outside Florida but the subject of litigation within Florida, after an insured relocated to Florida. Likewise, a literal reading of the attorney's fees statute which leads to the conclusion that a prevailing insured who does not institute litigation is precluded from recovering attorney's fees has been rejected. Florida Rock and Tank Lines, Inc. v. Continential Insurance Company, 399 So.2d 122 (Fla. 1st DCA 1981). Recently this Court adopted the opinion of the Second District Court of Appeal that an insurer who pays an arbitration award cannot escape liability for attorney's fees under §627.428 simply by settling the matter before entry of judgment. Insurance Company of North America v. Acousti Engineering Company of Florida, 579 So.2d 77 (Fla. 1991). Furthermore, this Court has refused to engraft a condition onto the attorney's fees statute for an insurer's "good faith", holding that an insured obtaining a judgment against its insurer becomes entitled to attorney's fees irrespective of the "good faith" of the insurer. Travelers Insurance Company v. Rodriguez, supra.

The Eleventh Circuit has inquired whether the statutory phrase "under a policy or contract" encompasses the district court litigation for the purpose of awarding attorney's fees under §627.428(1). The district court denied LEXOW an award of attorney's fees by concluding LEXOW had to obtain a judgment under a policy or contract of insurance, which the district court said did not happen. The statutory phrase "under a policy or contract" does not modify, nor refer to, the word "judgment" as used in the statute, but limits the class of persons entitled

under the statute to an award of attorney's fees. See, Industrial Fire and Casualty Insurance Co. v. Prygocki, 422 So.2d 314 (Fla. 1982) for a discussion clarifying that the individuals within the defined statutory class, "named insureds or named beneficiaries under a policy or contract", excludes others who have litigated the issue of insurance coverage on their own behalf, such as "third-party beneficiaries". Thus, attorney's fees awardable under §627.428 upon recovery of a judgment against an insurer can only be recovered by the statutorily-defined class. Here, it is undisputed that LEXOW was a named insured and recovered judgment against INA.

LEXOW submits that the district court litigation effectively contested INA's obligation to indemnify LEXOW and LEXOW prevailed, thereby entitling it to attorney's fees. Insurance is a contract to indemnify or pay a specific sum upon determinable contingencies. §624.02, Fla. Stat. (1991). Nonvalued insurance is purchased to provide true restitution for the loss suffered. DeCespedes v. Prudence Mutual Casualty Co., 193 So.2d 224 (Fla. 3d DCA 1966). Issuance of its policy and acceptance of the premium(s) obligated INA to indemnify LEXOW and provide restitution for the fire loss. Moreover, by INA claiming the $100,000 before LEXOW received total restitution, such action not only effectively contested the amount INA had to bear as the ultimate loss in order to indemnify LEXOW, but leaves LEXOW in the position of being precluded from full restitution through recovery from the tortfeasors. It is a distinction without a difference between INA paying less than policy limits

in the first instance or paying policy limits, then obtaining a set-off against the amount paid by subrogating against the responsible tortfeasor before LEXOW obtains complete restitution. The later situation constitutes INA's attempt at a partial rescission of performance of its policy obligations to LEXOW. Either situation contests INA'S policy obligation to pay policy benefits as compensation for LEXOW's loss and LEXOW's right to indemnity.

The fact that INA paid LEXOW and initially discharged its performance under the policy, a fact material in the district court's decision to deny LEXOW attorney's fees, has been rejected as an unsound basis for denying attorney's fees to an insured forced to litigate a reimbursement demand by its insurer. Florida Rock and Tank Lines, Inc. v. Continental Insurance Company, 399 So.2d 122 (Fla. 1st DCA 1981); Catches v. Government Employees Insurance Company, 318 So.2d 552 (Fla. 1st DCA 1975); Travelers Indemnity Company v. Rosedale Passenger Lines, Inc., 55 F.R.D. 494 (D.Md. 1972). It is no less a challenge, albeit after the fact, to INA's obligation to pay LEXOW policy benefits when INA improperly sought reimbursement after payment of the loss. As stated by Judge Kaufman in Rosedale Passenger Lines, the insured still had "to engage attorneys in order to protect its policy right to have the insurer assume the ultimate burden of paying the amount of the [insured's loss]". Id. at 497. Thus, an insured's entitlement to attorney's fees cannot be defeated by an insurer paying benefits under its policy and then effectively contesting payment by seeking full or partial reimbursement under

the guise of a subsequent declaratory relief action. To hold otherwise condones the very conduct prohibited by the public policy behind the attorney's fees statute.

A variation on INA's argument is that an insurer should be able to litigate payment of policy benefits and avoid liability for the insured's attorney's fees by taking the unilateral action of tendering payment of the claim before entry of a judgment against the insurer. In Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980), the court rejected the insurer's argument that mere avoidance of a judgment by paying the amount of the disputed claim, exclusive of attorney's fees, allows the insurer to escape application of §627.428(1).

An insurer's performance of its policy obligations does not automatically protect the insurer from an award or attorney's fees in any resultant litigation concerning the insurer's performance. Campbell v. Government Employees Insurance Co., supra. After Campbell suffered judgment against him in excess of his policy limits, he sued his insurer for, and won, compensatory and punitive damages for the insurer's failure to settle the injured third party's claim within policy limits. This Court held that the damages recovered by Campbell in the resultant litigation against his insurer "arose out of the contractual duty of the insurer to defend the insured against liability arising from [the third party's lawsuit]", notwithstanding that the insurer had defended the third party's lawsuit. Id. at 532. Consequently, the insured could recover attorney's fees "as incident to the judgment recoveries" obtained against his

insurer. Id. at 532. The insurer's incompetent defense of the third party's claim against Campbell was a denial of a material obligation under its insurance policy requiring litigation by Campbell to collect what the insurer should have voluntarily provided.

INA's claim for subrogation and corresponding demand for the $100,000 arises from the insurance policy under which INA paid LEXOW for the fire loss. Subrogation is a normal incident of a policy of insurance where the primary purpose of the insurance coverage is to allow true restitution for a loss suffered. Aetna Life Insurance Company v. Moses, 287 U.S. 530, 542, 53 S.Ct. 231, 77 L.Ed. 477, 482 (1932); Florida Farm Bureau Insurance Company v. Martin, 377 So.2d 827, 829 (Fla. 1st DCA 1979). In fact, many insurance contracts contain a "subrogation clause" as part of the boilerplate policy language. DeCespedes v. Prudence Mutual Casualty Co., supra. To prevent the insured from obtaining a double recovery by collecting from its insurer as a collateral source and the tortfeasor, an insurer is entitled to reimbursement from the insured for benefits paid under the policy, but only after the insured is fully indemnified for the loss. Martin at 829; DeCespedes at 227. The district court even noted that had INA wished to expand its common law right of subrogation it should have done so in its contract of insurance. (R2-64-6).

The district court's viewpoint in denying attorney's fees incorrectly focused on the object, not the nature, of the parties dispute. It is the nature of the parties' dispute,

however, that entitles LEXOW to attorney's fees under §627.428(1). Case law supports this conclusion.

In disputes between an insured and a subrogated insurer over who keeps the recovery from a tortfeasor, when the insured has won the contest, the insured was awarded attorney's fees, thereby giving effect to the underlying public policy of §627.428(1). Molyett v. Society National Life Insurance Company, 452 So.2d 1114 (Fla. 2d DCA 1984); Lititz Mutual Insurance Company v. Bowdoin, 365 So.2d 173 (Fla. 1st DCA 1978). Catches v. Government Employees Insurance Company, 318 So. 2d 552 (Fla. 1st DCA 1975). Reliance Insurance Co. v. Kilby, 336 So.2d 629 (Fla. 4th DCA 1976).

Molyett involved a subrogated insurer who sued its insured and her minor son for reimbursement of medical payments under a group major medical policy. The insurer demanded reimbursement from the insured's son's recovery from the tortfeasor. On appeal, the court held that the insured and her son, as beneficiary, were entitled to attorney's fees under §627.428(1). In Molyett, the court applied §627.428 without any discussion.

The insured, in Bowdoin, was paid in excess of $14,000 by its insurer for property damage to the insured's building. The insured's suit against the tortfeasor was settled for $45,000. The insurer demanded 100% reimbursement, although the insured alleged that he had failed to obtain full recovery of his entire damages. Recognizing, but refusing to apply, the rule in Forsyth v. Southern Bell Telephone and Telegraph Co., (the action was ostensibly in rem against the proceeds paid by or for the tortfeasor), the Bowdoin court held that the insurer's actions

were in bad faith and constituted "a denial of a material obligation of coverage entitling the [insured] to an attorney's fee award" under its holding in Catches. Id. at 176.

The First District Court of Appeal in Catches, without mentioning Forsyth or §627.736(8), Fla. Stat. (1973), (which mandated application of §627.428) decided that an insured was entitled to attorney's fees under §627.428 when an insured had to litigate with its insurer, after the insurer demanded reimbursement for previously paid personal injury protection (PIP) benefits, reasoning the insurer's conduct amounted to a denial of a material obligation of coverage by its claiming entitlement to recover all sums previously paid its insured and denying that it was subject to equitable apportionment. Id. at 553. Similar to Catches, Kilby was a case involving an insurer who demanded 80% of the PIP benefits paid its insured from the insured's settlement with the tortfeasor. The Kilby court awarded attorney's fees because the insurer acted in bad faith. Id. at 631. Bowdoin, Catches, and Kilby at first blush appear to require finding the insurer guilty of "bad faith", but an insurer's good faith or bad faith is not a factor in awarding fees under §627.428. Travelers Insurance Company v. Rodriguez, supra.

The outcome in Bowdoin, Catches, and Kilby does not, and need not, turn on the insurer's acting in good faith or bad faith. Each of these cases, as well as Molyett, resulted in an attorney's fee award to the insured precisely for the reason the Feller court awarded attorney's fees: insureds should not be

compelled to reduce their insurance benefits by paying attorney's fees to obtain or retain that to which they are entitled.

A review of the two remaining cases, relied upon by INA, involving claims by subrogated insurers, Forsyth v. Southern Bell Telephone and Telegraph Co., supra and Government Employees Insurance Company v. Graff, 327 So.2d 88 (Fla. 1st DCA 1976), shows these cases are factually distinguishable from Molyett, Bowdoin, Catches, and Kilby and not applicable to the facts here.

Both Forsyth and Graff involve circumstances where only the insureds, through their attorneys, pursued the tortfeasors and obtained recoveries which included an amount attributable to the undisputed subrogation claim of the insureds' insurers. In fact, the recovery in Forsyth was paid by the tortfeasor's insurer in two drafts, one of which was in the exact amount of the property damage subrogation claim. Forsyth at 918. Forsyth was not a contest between the insurer and its insured over entitlement to the property damage subrogation claim. Forsyth did not involve any demand by the insured that he allegedly had not received full compensation so he was entitled to the property damage subrogation recovery. The Forsyth court viewed the dispute between the insurer and its insured as litigation determining how much of an attorney's fee should be deducted from the subrogation recovery. The Forsyth court denied attorney's fees because the action was ostensibly in rem. The Forsyth court's statement that the attorney's fee "supplementary proceeding" was not a suit against the insurer "under the

insurance policy issued by it" (Forsyth at 921) means nothing more than the litigation did not involve any contest directly or indirectly over the insured's right to receive and retain payment under the policy. Likewise, in Graff, the court concluded that under the circumstances the insurer's declaratory relief action for reimbursement amounted to a denial of its liability to pay a fee for the services of the insured's attorney who obtained a settlement fund for the benefit of both the insurer and the insured from a tortfeasor. Upon settlement, the insured's attorney offered the insurer (Geico) $8,000 in settlement of its $10,000 subrogation claim. The insured's attorney intended to reimburse his client $2,000 from the subrogation recovery for the attorney's fees incurred. Geico declined the offer and filed suit to recover the full $10,000. The insured denied Geico's entitlement to the reimbursement, but the trial court, affirmed on appeal, awarded Geico $10,000 less Geico's portion of a reasonable attorney's fee for the insured's lawyer in negotiating and collecting the settlement. Graff at 91. The insured was denied attorney's fees under §627.428. Although the court in Graff applied the Forsyth "in rem rule" (the action purportedly was in rem against the settlement fund, not an action under the insurance policy), the insured in Graff was not entitled to an award of attorney's fees under §627.428, because the insured did not prevail and obtain a judgment against Geico. To the contrary, it was the insurer who won the judgment. Importantly, the Graff court noted its facts were different from those cases where an insurer demands reimbursement of benefits

previously paid, thereby effectively contesting liability for payment of such benefits and denying a material obligation under its policy. Graff at 92. In Graff, the First District Court of Appeal took the opportunity to explain the reasoning behind its earlier decision in Forsyth, which was an automobile collision case. In Forsyth it was undisputed that the insurer was entitled to reimbursement for the property damage losses paid to its insured. The insured in Forsyth, however, also suffered personal injuries and brought suit against the tortfeasor to recover not only personal injury damages, but also for the property damage. The insurer had notified the insured's attorney that it would handle the collection of its subrogation claim, and the insured's attorney was not to represent the insurer. Notwithstanding such instruction, the insured's attorney proceeded to recover the subrogated property damage portion of the claim in order to avoid splitting the insured's cause of action because the action for all damages was vested solely in the insured due to the insurer taking a loan receipt. Forsyth at 919. Although not expressly stated in Forsyth, the decision is viewed as a denial of the insurer's liability to pay a fee for the services of the insured's attorney who obtained the settlement fund for the benefit of both parties, instead of a denial of a material obligation of the insurance policy. Graff at 92.

When the First District Court of Appeal, which decided Forsyth and Graff, did decide a case on facts virtually identical to LEXOW's, the court recognized, but refused to apply, the Forsyth "in rem rule" and awarded attorney's fees to the insured

on the basis that the insurer's demand for reimbursement, resulting in litigation, denied a material obligation of coverage. Lititz Mutual Insurance Company v. Bowdoin, supra.

Moreover, the Florida legislature has addressed subrogation type disputes at least in the area of personal injury protection benefits and authorized attorney's fees to an insured engaged in a dispute with its insurer over reimbursement; legislative sanction for awarding attorney's fees may be found in former §627.736(8), Fla. Stat. (1973). Subsequently, effective October 1, 1976, the Florida legislature abolished an insured's right to recover both insurance proceeds as a collateral source and damages from the tortfeasor; therefore, the legislature concurrently abolished the insurer's right of reimbursement, but retained the provision making the attorney's fees statute applicable to any dispute regarding an insurer's reimbursement claim. §627.736(3), Fla. Stat. (1977); §627.736(8), Fla. Stat. (1977). §627.736(8) remains in effect today.

Although §627.736(8), Fla. Stat., which mandates application of §627.428, is not applicable here, this expression of legislative intent on attorney's fees in subrogation type disputes is helpful for two reasons. First, to the extent the legislature has addressed the issue, its intent to apply §627.428(1) to subrogation type disputes is unequivocal. Second, no Florida statute expressly prohibits an insured from recovering attorney's fees under the facts of LEXOW's case. The Florida legislature has placed limitations on attorney's fees awards in other insurance contexts. §627.428(2), Fla. Stat., (1989), for

example, restricts attorney's fees awards for untimely life insurance disputes. Also, with awards of attorney's fees involving uninsured motorist insurance disputes, the Florida legislature has authorized attorney's fees only for coverage disputes. See, §627.727(8), Fla. Stat., (1989). The Florida legislature could have expressly restricted attorney's fees in cases such as LEXOW's, but has not done so.

If LEXOW had sued INA to obtain payment of policy benefits for the fire loss and prevailed, unquestionably LEXOW would be entitled to an award of attorney's fees under §627.428(1). Here LEXOW had to litigate to effectively defend its right to retain the payment made by INA for the fire loss. The same public policy consideration of protecting insureds from litigious insurers applies with equal force to both situations. Without reimbursement for attorney's fees, the insured compromises the amount payable or paid by its insurer. LEXOW is entitled to an award of attorney's fees, including appellate attorney's fees, under §627.428(1).

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2. The Second District Court of Appeal has rejected an insurer's broad interpretation of this legislative limitation and its argument that it was not liable for attorney's fees because it only disputed the amount of coverage, not the existence of coverage. Sanchez v. American Ambassador Casualty Co., 559 So.2d 344 (Fla. 2d DCA 1990).

CONCLUSION

INA demanded, and continued to demand the $100,000 due LEXOW, actually and/or constructively knowing LEXOW had not been completely reimbursed for the fire loss. INA's obvious intent in pursuing the $100,000 was to offset the payment(s) made to LEXOW in order to effectively reduce INA'S loss as measured by the amount paid under its policy. LEXOW, however, paid INA for an insurance policy to indemnify against a fire loss and have INA bear the ultimate loss unless LEXOW recovered all its damages from the responsible tortfeasors. INA's improper subrogation demand contested LEXOW's right to restitution for its loss, by way of indemnity, under its policy with INA. Consequently, INA's action not only denied a material policy obligation due LEXOW, but potentially prevented LEXOW from attaining complete restitution for the fire loss.

Thus, the district court litigation did arise under a policy of insurance within the meaning of §627.428, Fla. Stat., (1987), and LEXOW, as a prevailing insured, is entitled to attorney's fees.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellants' Initial Brief has been furnished by U.S. Mail to: CHARLES M. JOHNSTON, ESQ., of Taylor, Day & Rio, Ten South Newnan Street, Jacksonville, Florida 32202, this 27th day of September, 1991.

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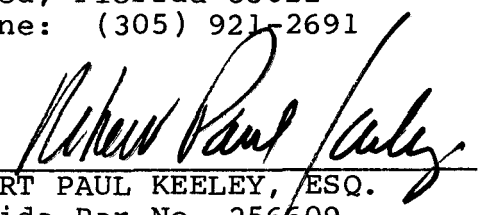
By: 
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