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SUPREME COURT OF FLORIDA

GEORGIA INSURERS INSOLVENCY POOL,

Petitioner,

v.

RICHARD BREWER, et al.,

Respondent.

Case No. 78,415

District Court of Appeal,
1st District - No. 90-2867

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, Georgia Insurers Insolvency Pool, shall be referred to by proper name or as "GIIP." The Appellees, Johnny L. Bentley, et al., will be referred to by proper names or as the "Respondents." References to the Answer Brief will be designated as (AB.__).

ARGUMENT

THE CONDUCT OF AN INSOLVENT INSURER WHICH HAD DONE BUSINESS IN FLORIDA MAY NOT BE SHIFTED TO THE GEORGIA INSURERS' INSOLVENCY POOL AND DOES NOT SATISFY THE DUE PROCESS REQUIREMENT THAT THE POOL HAVE MINIMUM CONTACTS WITH THIS STATE SO AS TO VEST JURISDICTION BY FLORIDA COURTS UNDER SECTION 48.193, FLORIDA STATUTES.

The respondents contended in their Answer Brief that due process is irrelevant when a Florida court seeks to exercise in personam jurisdiction over a statutory entity created under the laws of a sister state. The respondents asserted that the Georgia Insurers' Insolvency Pool's relationship with the insolvent insurance carrier, Allied Fidelity Insurance Company, was sufficient to satisfy due process requirements for the exercise of in personam jurisdiction by the courts of this state over GIIP. The respondents argued that it was not necessary for GIIP to have had minimum contacts with the State of Florida so long as Allied Fidelity had those contacts. The respondents perceived that the Georgia Code created an agency relationship between GIIP and its member insurers and that that relationship enabled Florida courts to exercise personal jurisdiction over GIIP. Their arguments were insubstantial and unsupported.

The respondents' argument failed to recognize that GIIP was created by the Georgia General Assembly to protect Georgia residents, whether they are claimants, insureds, or the owners

of property situated in Georgia, from the effects of insurer insolvencies. The GIIP was not created to provide protection in cases where none of the interested parties had any ties to the State of Georgia. Its powers, duties, and obligations are defined and limited by the Georgia Code.

Respondents argued that Georgia Code Section 33-36-13 provides that each insurer doing business in Georgia is deemed to have appointed the GIIP as its agent for the investigation, adjustment, compromise, and settlement of covered claims. Respondents do not explain how that appointment subjects the GIIP to the jurisdiction of courts in other states simply because the insurer also happened to have done business in those other states. Perhaps the most glaring omission in respondents' argument is their failure to explain why a foreign court should exercise jurisdiction over the GIIP for the purpose of construing provisions of the Georgia Code and determining the extent of the GIIP's statutory liabilities. Surely such issues should be left to courts in the state which enacted the legislation by which the GIIP was created.

The respondents cited International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 56 S.Ct. 154 (1945), for the proposition that "with business entities, activities sufficient to satisfy the demands of due process must be carried on by persons who are authorized to act for the entity." (AB. 1) Respondents argued that the requirements of International Shoe were met in the instant case. That argument is fallacious.

The issue in International Shoe was whether a Delaware corporation had by its activities in the State of Washington rendered itself subject to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund. In its analysis, the United States Supreme Court observed that, since a corporation was a legal fiction, its "presence" within a state could only be manifested by activities of persons who were authorized to act for it. 326 U.S. at 316. The quality and nature of those activities must be examined in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure to determine if the exercise of personal jurisdiction by the foreign state was justified. 326 U.S. at 319.

Respondents offered no logical explanation of how the quality and nature of Allied Fidelity's activities in Florida would serve the fair and orderly administration of law so as to justify the exercise of personal jurisdiction by a Florida court over the GIIP. Respondents simply concluded that the requirements of International Shoe were satisfied because Georgia Code Section 33-36-13 provides that all property and casualty policies issued in Georgia are deemed to provide that the GIIP is the insurer's appointed agent "with respect to investigation, adjustment, compromise, and settlement of covered claims." (AB. 2) Respondents did not suggest how activities in Florida by Allied as the principal could possibly

satisfy due process requirements for the exercise of jurisdiction over the GIIP as its purported agent. Respondents ignored the contrary decision in Kennedy v. Reed, 533 So.2d 1200 (Fla. 2d DCA 1988), cited in Petitioner's Initial Brief. In Kennedy, the Second District squarely held that jurisdiction over a principal does not confer jurisdiction over its agent.

Kennedy and the other cases cited at pages 11-12 of the Initial Brief established that due process requirements must be met as to each particular entity over which a court seeks to exercise in personam jurisdiction. The respondents suggest that those cases should be disregarded. Because the GIIP is a statutory creature, the respondents asserted that it does not enjoy the same due process rights as other entities. The respondents ignored the potential intrusion into concepts of sovereignty and comity which would occur by the indiscriminate exercise of personal jurisdiction over entities created by the laws of our sister states.

Asserting that common law concepts of due process have little or no relevance in this case, the respondents urged this Court to look to the statutes which created the GIIP to determine whether a member insurer's business transactions within Florida were sufficient to subject the GIIP to in personam jurisdiction in this state. Under respondents' expansive interpretation of the Georgia Code, the GIIP is purportedly the "statutory guarantor or insurer of its member

insurers' contracts." Even if this reading were correct, which the GIIP vehemently denies, it would not subject the GIIP to personal jurisdiction in this state.

Nowhere in the Georgia Code is it suggested that the GIIP is a guarantor or insurer of its member insurers' contracts. To the contrary, the GIIP was created to provide a remedy only for "covered claims" when property and casualty insurers become insolvent. Georgia Code Section 33-36-2. To accomplish that purpose, the GIIP is authorized to conduct specific activities: to investigate, adjust, compromise, settle, and pay covered claims; to investigate, handle, and deny non-covered claims; and to manage and invest funds administered by the pool. Georgia Code Section 33-36-2.

"Covered claims" do not include all contractual obligations of insolvent insurers and do not necessarily involve every claim arising out of a property or casualty policy issued by insurers authorized to do business in Georgia. For a claim to be a "covered claim," there must be additional ties to the State of Georgia. Either the claimant or the insured must have been a Georgia resident, or the claim must relate to property permanently situated in Georgia. Georgia Code Section 33-36-3. Moreover, certain obligations of the insolvent insurer are specifically excluded as "covered claims."

"Covered claims" do not include claims of less than $25.00. Georgia Code Section 33-36-3(2)(C). Claims in excess

of the applicable policy limits or $100,000.00, whichever is less, are not "covered claims." Georgia Code Section 33-36-3(2)(D)(E). "Covered claims" do not include any obligations to persons or entities having a net worth greater than $3 million at the time of the insured event. Georgia Code Section 33-36-3(2)(F). Claims and judgments for punitive damages and attorney's fees and certain worker's compensation benefits are not "covered claims." Georgia Code Section 33-36-3(2)(G)(H).

Clearly, the GIIP does not assume all the contractual obligations of insolvent insurers who have done business in Georgia. Even when those insurers provided coverage for insureds or claimants who resided in Georgia or for property that was permanently situated in Georgia, a claim may not be a "covered claim" for which GIIP may be liable. The respondents nevertheless urge this court to approve the exercise of jurisdiction over the GIIP in this case arising out of an accident which occurred in Florida involving only Florida residents in which the Georgia insured was not in any way responsible for the accident.

Even if the GIIP was a guarantor of Allied's contractual obligations, that relationship would not be sufficient for Florida courts to exercise in personam jurisdiction over the GIIP in this case. A similar issue was addressed in Edwards v. Geosource, Inc. 473 So.2d 36 (Fla. 1st DCA 1985). In that case

Texas residents signed promissory notes as guarantors of an obligation of a Florida corporation. One of the guarantors was also a stockholder of the Florida corporation. The First District determined that these acts did not constitute sufficient minimum contacts with the State of Florida to give the Texas defendants reasonable notice that they might be haled into court in Florida and to meet the International Shoe due process test.

The First District followed Edwards in Renda v. People's Federal Savings & Loan Assoc., 538 So.2d 860 (Fla. 1st DCA), rev. denied, 542 So.2d 1334 (Fla. 1989). The complaint in that case alleged that the non-resident defendants agreed in Georgia to guarantee payment of a loan to a Georgia limited partnership from a Tennessee financial institution. The loan was secured by a mortgage on real property owned by the partnership in Florida. The partnership defaulted on the loan, and the bank sued to foreclose the mortgage and to enforce the guaranty agreements. The trial court denied motions to dismiss, finding each of the non-resident defendants to be subject to long arm jurisdiction by virtue of having engaged in a business or business venture in Florida and because the action arose from the limited partnership's ownership and use of property in Florida.

Holding that the complaint failed to allege sufficient ultimate facts to establish any basis for long arm jurisdiction, the First District reversed judgments against the

non-resident defendants. The allegations of the complaint did not establish that the defendants engaged in a business venture in Florida, since the guaranty agreements did not require the performance of any acts within the State of Florida. 538 So.2d 863-64. Additionally, the allegations did not connect the non-resident defendants' alleged breach of the guaranty agreements to the partnership's ownership and use of property in Florida. Id. at 863.

The instant case is similarly devoid of any facts which would connect activities of either the GIIP or Allied to the pertinent issues in this case. The GIIP's defense of J. D. Ray in the underlying action was not an act by the GIIP creating the minimum contact necessary to support jurisdiction in Florida. See South Carolina Insurance Guaranty Assn. v. Underwood, 527 So.2d 931, 935 (Fla. 5th DCA 1988). Allied's policy did not require the performance in Florida of any acts which are relevant to the issues herein.

The respondents sought to establish tht the GIIP is subject to jurisdiction in Florida by reference to Allied's activities which lacked any connection whatsoever to the issues in the instant case. The respondents argued that the GIIP's amenability to jurisdiction was coextensive with that of its member insurers because it is only the members' ability to contract that gives rise to the GIIP's statutory obligations. Therefore, the respondents concluded that member insurers were

"authorized to act for" the GIIP so as to satisfy the minimum contacts requirement of International Shoe.

Respondents' argument is not only absurd, because the GIIP is not authorized to contract for insurance, but also ignores the real issue in this case. Despite respondents' assertion that they are "seeking only to enforce the contractual provisions of the Allied Fidelity policy" (AB. 4), they are not seeking a judicial construction of Allied's insurance policy. The purpose of respondents' action against the GIIP is to determine the extent of its statutory obligation to pay "covered claims" as defined in the Georgia Code. To the extent there is any conflict between the two, the contractual provisions of the policy must give way to the provisions of the code relating to covered claims. Allied's activity related to issuance of the policy has no connection whatsoever with construction of the Georgia Code provisions relating to "covered claims."

The respondents misconstrued the purpose for which the GIIP relied on Williams v. Florida Insurance Guaranty Association, Inc., 549 So.2d 253 (Fla. 5th DCA 1989). That case was not cited for the proposition argued by respondents. Williams held that FIGA's liability was limited to covered claims as defined by statute and that it was not a successor in all regards to an insolvent insurer's obligations and liabilities. That same rationale should apply to the GIIP as FIGA's counterpart in Georgia.

The respondents' references to O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9 (Fla. 1971), and Fernandez v. Florida Insurance Guaranty Association, 383 So.2d 974 (Fla. 3d DCA 1980), rev. denied, 389 So.2d 1109 (Fla. 1980), are similarly inappropriate. Those cases do not demonstrate that "covered claims" arise out of and are specifically limited by the contract of insurance issued by the insolvent insurer, as the respondents contended on page five of their brief. O'Malley and Fernandez hold that FIGA, the GIIP's counterpart in Florida, is designed solely to serve as a mechanism for paying "covered claims" as defined by statute, and that the Florida Legislature was careful to restrict FIGA's liability as to both its vicarious responsibility for the acts of companies it succeeds as well as its own allegedly wrongful activities. "Covered claims" are not limited by the contract of insurance issued by the insolvent carrier but by statute.

Ignoring these decisions and the virtually identical provisions of the Georgia Code and Florida Statutes pertaining to GIIP and FIGA, the respondents attempted to convert the issue in this case from one of statutory construction to one of coverage under Allied's policy. Coverage under the policy is not at issue in this case. Respondents' illusory arguments are nothing more than obvious attempts to cloud the real issues in this case.

In their efforts to muddy the issue, the respondents contended that the Georgia Code does not place any geographical limits on the GIIP's obligations or liabilities with respect to "covered claims." This assertion is blatantly untrue. By definition, a "covered claim" must involve a policy issued by an insurance company authorized to do business in Georgia and must also involve an insured or a claimant who resides in Georgia or property permanently situated in Georgia. Georgia Code Section 33-36-3.

Respondents' emphasis on the insurer's doing business in Georgia and in Florida as the operative fact for jurisdictional purposes is totally misplaced. Obviously, if a foreign insurer doing business in both Georgia and Florida issued a policy to an insured in Florida and the insured was thereafter involved in an accident with a Florida resident in Florida, no "covered claim" would arise for which the GIIP would be liable upon the insurer's insolvency. The GIIP's liability is not coextensive with that of its member insurers simply because those companies do business in Georgia as well as in other states, and it is not proper to look to the insurers' contacts with other states to determine whether those other states may properly exercise jurisdiction over GIIP.

Respondents attempted to distinguish South Carolina Insurance Guaranty Association v. Underwood, 527 So.2d 931 (Fla. 5th DCA 1988), on grounds that the insurer in Underwood

did not do business in Florida, as did Allied in the instant case. Additionally, respondents argued the insured in Underwood was not engaged in the trucking business, as was J. D. Ray Company in the instant case. However, neither of those facts were relevant to the issue of whether the insurance guaranty association purposefully availed itself of the privilege of conducting activities in Florida.

Acknowledging the due process requirement that a defendant must have "purposefully directed" its activities at the foreign state, the respondents did not name a single act which GIIP purposefully directed in the State of Florida. Instead respondents argued that due process requirements for the exercise of personal jurisdiction over GIIP were satisfied by the Florida-related activities of Allied and/or J. D. Ray Company. However, the GIIP did not participate in any way whatsoever in issuing the Allied policy, nor did it in any way control or direct the activities of J. D. Ray Company.

This court in Meyer v. Auto Club Insurance Association,, 492 So.2d 1314 (Fla. 1986), which was relied upon by the Fifth District in Underwood, held that an insured's unilateral acts which would subject him to jurisdiction in Florida could not provide the requisite minimum contacts mandated by the fourteenth amendment to subject his insurance company to jurisdiction in Florida. Thus, assuming J. D. Ray Company was subject to in personam jurisdiction in Florida, its unilateral

contacts with this state would not have been sufficient for Florida courts to have exercised jurisdiction even over Allied, much less GIIP.

As argued in the Initial Brief, minimum contacts to satisfy due process must be met as to each defendant over which courts in the forum state exercise their jurisdiction. In the instant case, while both J. D. Ray Company and Allied may have had the requisite minimum contacts, those contacts do not translate into activities which can form the basis for the exercise of personal jurisdiction over the GIIP. The GIIP itself had no contacts with Florida to satisfy due process requirements.

GIIP's statutory obligations do not envision any purposeful availment by GIIP of the privilege of conducting activities in any other state, including Florida. GIIP's statutory obligations are not triggered by any purposeful activity on the part of GIIP, but by fortuitous circumstances relating to the occurrence of an accident and the insolvency of insurance carriers doing business in Georgia. By looking to Allied's contacts, both the respondents and the First District impliedly conceded that the GIIP had no contacts of its own on which jurisdiction could be based.

The First District's opinion subjects a statutory entity created under the laws of a sister state to personal jurisdiction of the courts in this state when there is no indication that Georgia intended or expected its insolvency

pool to be called into court in Florida. The opinion subjects the GIIP to jurisdiction of the courts of this state without any guaranties of due process.

This case involves a question of great public importance. The First District's certified question should be answered in the negative, its decision quashed, and the order of the trial court reversed.

CONCLUSION

Because there is no constitutional, statutory, or judicial precedent supporting the First District's opinion subjecting the statutory creature of a sister state to jurisdiction of the courts of this state, and GIIP did not purposefully avail itself of the privilege of conducting activities in Florida, the certified question should be answered in the negative. The decision of the First District should be quashed and the order of the trial court reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing has been mailed this 18th day of October 1991 to David C. Glicken, Esquire, 120 East Robinson Street, Orlando, FL 32801; J. Cheney Mason, Esquire, One DuPont Centre, 390 North Orange Avenue, Suite 2100, Orlando, FL 32801; Douglass E. Myers, Esquire, P. O. Box 41222, Jacksonville, FL 32203; and Roland A. Sutcliffe, Jr., Esquire, P. O. Box 3000, Orlando, FL 32802.

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