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SUPREME COURT OF FLORIDA

Case No. 79,398

JAMES GRANT and
LINDO'S RENT-A-CAR, INC.,

Petitioners,

vs.

NEW HAMPSHIRE INSURANCE CO.,

Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

ANSWER BRIEF OF RESPONDENT, NEW HAMPSHIRE INSURANCE CO.

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INTRODUCTION

The instant controvery arrives at this Court as the result of a certification by the United States Eleventh Circuit Court of Appeals of several questions relating to Florida substantive law. Jurisdiction in this Court is based upon Article V, Section 3(b)(6) of the Florida Constitution. The legal dispute at issue arises out of an accident which occurred in April of 1988 when the Petitioner, JAMES GRANT ("Grant"), a resident of the United Kingdom, was involved in an accident in Palm Beach County, Florida while operating a vehicle he had earlier rented from Petitioner, LINDO'S RENT-A-CAR, INC. ("Lindo's").

The operator of the other vehicle involved in the accident subsequently filed a civil action for damages in Palm Beach County Circuit Court naming Grant, Lindo's and H. R. BENTLEY (the title owner of the rental vehicle) as defendants (the "underlying litigation"). The underlying litigation generated a dispute between Lindo'S, Lindo'S liability insurer, and Grant on the one side, and the Respondent, NEW HAMPSHIRE INSURANCE COMPANY ("New Hampshire"), on the other over who was primarily obligated to defend Grant in the underlying litigation and what were the respective priorities of coverage. When that dispute could not be amicably resolved, Lindo's and Grant filed a two-count complaint against New Hampshire in Federal District Court for the Southern District of Florida seeking a declaratory judgment in one count and an award of damages for breach of contract in the other. Lindo's and Grant's federal diversity action was ultimately dismissed by the District Court Judge, the Honorable Federico Moreno.

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Lindo's and Grant thereafter pursued a timely appeal to the Eleventh Circuit. After briefing and oral argument by the parties, the Eleventh Circuit issued the February 10, 1992 order/opinion which temporarily redirected the parties to this court for guidance in resolving their dispute.[1]

[1]References to the record on appeal will utilize the same format as was used in the Eleventh Circuit. All emphasis has beeen added by counsel unless indicated otherwise.

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STATEMENT OF THE CASE AND OF THE FACTS

In their amended complaint for declaratory relief and breach of contract NR. 13), Grant and Lindo's contended that they were entitled to be provided with a defense and primary insurance coverage under an umbrella policy issued to Grant by New Hampshire. (A copy of the New Hampshire policy, titled "USA Travel Excess Non-Owner Policy", was attached to Grant and Lindo's amended complaint as Exhibit "A.") While that excess umbrella policy, which provided coverage for Grant for liabilities in excess of $100,000.00, was in force and effect, Grant entered into a rental car contract with Lindo's dated April 27, 1988. (A copy of the front and reverse sides of the rental car contract were also attached to grant and Lindo's amended complaint as Exhibit "B"). In their federal action, Grant and Lindo's contended that they were entitled to be provided with a defense and coverage under the New Hampshire policy on the basis of a provision on the front side of the rental car contract, which provision Lindo's contended "shifted" from it and its insurer to New Hampshire the primary insurance coverage and defense obligation with respect to the underlying action by virtue of 5627.7263, Florida Statutes.[2] Lindo's and Grant made demand upon New Hampshire to "come into the lawsuit and defend and indemnify [them] up to the limits of [New Hampshire's] coverage," which demand New Hampshire refused.

On the basis of these pertinent operative facts, Grant and Lindo's requested the district court to declare: (1) that New

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[2]Section 627.7263, Florida Statutes (1977), provides that:

Hampshire was obligated to defend both of them in the underlying litigation; (2) that New Hampshire was obligated to provide "primary insurance coverage" with respect to the underlying lawsuit; (3) that they were entitled to recover from New Hampshire the costs and attorneys' fees incurred by them during the course of their defense of tho underlying litigation; and (4) that they were entitled to recover the reasonable attorneys' fees and costs incurred in bringing the instant action against New Hampshire.

In response to Grant and Lindo's amended complaint, New Hampshire moved to dismiss on several grounds, including: (1) that the allegations of the amended complaint, as supplemented or contradicted by the documents attached thereto as exhibits, were insufficient to state a cause of action in favor of either Grant or Lindo's entitling them to a defense or coverage with respect

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(1) The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.

(2) Each rental or lease agreement between the lessee and the lessor shall contain a provision on the face of the agreement, stated in bold type, informing the lessee of the provisions of subsection (1) and shall provide a space for the name of the lessee's insurance company if the lessor's insurance is not to be primary.

to the underlying litigation; and (2) that the allegations of the amended complaint were insufficient to establish that Lindo's individually was entitled to any rights under the subject New Hampshire umbrella policy in that Lindo's was not "an insured" who was entitled to coverage or any defense under the policy (NR. 15, 16, 21).

Based upon its consideration of the rental car contract, the New Hampshire umbrella policy, and the applicable Florida statutory and decisional law, the district court agreed with New Hampshire's position, setting forth its reasoning in a five-page opinion and order (NR. 23). With respect to the applicability and effect of 5627.7263, the trial court recognized that under said statute the lessor's insurance coverage would be primary unless otherwise stated in bold type on the face of the rental or lease agreement. The trial court additionally recognized that the permissible "shifting" of the obligation to provide primary coverage from the lessor's carrier to the lessee's, would occur "only if the lessee had a primary carrier." The trial court concluded that such a situation did not exist in the case before it, stating:

> [The] New Hampshire Insurance policy is not Grant's primary insurance carrier. It is a limited policy designed to cover Grant for only "excess" coverage referred to as "umbrella" coverage. Umbrella policies take effect only after all underlying primary coverage have been exhausted because "umbrella coverage ... are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses." Allstate Ins. Co. v. Executive Car & Truck Leasing, Inc., 494 So.2d 487, 489 (Fla. 1986), quoting Appleman, Insurance Law and Practice 54909.85 (1981). (NR. 23 at pp. 2-3).

The trial court classified the New Hampshire policy as a true "umbrella coverage" policy, and therefore recognized that the plaintiffs were in essence asking it "to ignore the specific provisions of the New Hampshire policy by entering a declaratory judgment holding that the New Hampshire policy 'drops down' to become a primary personal automobile policy, by virtue of the car rental agreement."

In rejecting Grant and Lindo's request, the trial court applied the rule stated by the Florida Supreme Court in SOUTHEASTERN FIDELITY INS. CO. v. COLE, 493 So.2d 445 (Fla. 1986), that "a rental agreement provision cannot be relied upon to establish the provisions of the insurance policy." Accordingly, the trial court ruled that "Grant may not convert the provisions of the New Hampshire excess coverage policy by merely signing the car rental agreement to unilaterally alter it into a primary policy."

In seeking reversal of the trial court's dismissal, Grant and Lindo's essentially argued to the Eleventh Circuit that §627.7263 "permits a lessee in entering into a lease agreement to unilaterally obligate his insurance carrier to provide primary coverage," notwithstanding the existence of clear and unambiguous provisions contained in the policy of insurance to the contrary. (Initial Brief in Eleventh Circuit at 19-20). Lindo's additionally argued that §324.022, Florida Statutes, imposed a compulsory liability insurance requirement on vehicle operators in this state, which requirement activated the so-called "conformity clause" in New Hampshire's policy, thus transforming that policy

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from a true umbrella policy into a primary liability insurance policy with respect to the accident involved in the underlying litigation. The Eleventh Circuit felt that "the issues raised by Grant and Lindo's in this appeal are appropriate for resolution by the highest court in Florida" and therefore certified the following questions:

> (1) DOES THE CONFORMITY CLAUSE IN NEW HAMPSHIRE'S EXCESS INSURANCE POLICY SERVE TO EXTEND THE COVERAGE PROVIDED BY THAT POLICY TO MEET THE REQUIREMENTS OF FLORIDA'S FINANCIAL RESPONSIBILITY LAW, NOTWITHSTANDING THAT THE LAW ON ITS FACE DOES NOT REQUIRE AN OWNER/OPERATOR OF A FLORIDA-REGISTERED VEHICLE TO MAINTAIN INSURANCE UNTIL AFTER HE HAS BEEN INVOLVED IN ONE ACCIDENT RESULTING IN INJURIES FOR WHICH HE IS LIABLE?
>
> (2) DOES AN EXCESS INSURER, IN THE ABSENCE OF ANY PRIMARY INSURANCE, OWE A PRIMARY DUTY OF DEFENSE AND INDEMNIFICATION TO ITS INSURED UNDER FLA. STATUTES SEC. 627.7263, WHERE THAT STATUTORY SECTION HAS BEEN PROPERLY INVOKED BY THE LESSOR OF A FLORIDA-REGISTERED VEHICLE?
>
> (3) ASSUMING THAT NEW HAMPSHIRE OWES A DUTY OF DEFENSE AND INDEMNIFICATION TO ITS INSURED, GRANT, DOES NEW HAMPSHIRE OWE LINDO'S, A NON-INSURED UNDER THE POLICY, ANY DUTY OF DEFENSE AND/OR INDEMNIFICATION?

In its February 10th order, the Eleventh Circuit pointed out that it did not intend the particular phrasing of the certified questions "to limit the Supreme Court of Florida in its consideration of [the] problems imposed by the entire case." Since we believe that the first certified question, because of its particular phrasing, is essentially a rhetorical question and because we believe that the second and third questions proceed upon the basis of erroneous factual assumptions, we submit the following as our rephrasing of the questions presented by this appeal:

(1) CAN A MOTOR VEHICLE LESSOR, WHO HAS STATED IN THE RENTAL CONTRACT THAT "[R]ENTER SHALL BE INSURED UNDER LESSOR'S AUTOMOBILE LIABILITY INSURANCE POLICY ... IF RENTER HAS NO OTHER AUTOMOBILE LIABILITY INSURANCE AVAILABLE" BUT WHO HAS ALSO STATED IN THE SAME CONTRACT THAT PURSUANT TO SECTION 627.7263 THE RENTER'S "PERSONAL AUTOMOBILE COVERAGE" WILL BE PRIMARY, VALIDLY SHIFT SUCH PRIMARY OBLIGATION OF DEFENSE AND INDEMNIFICATION TO AN INSURANCE COMPANY WHO HAS ISSUED TO THE RENTER A NON-OWNED AUTO UMBRELLA POLICY WHICH BY ITS TERMS ONLY COVERS LIABILITIES OF THE RENTER IN EXCESS OF $100,000.00?

(2) DOES FLORIDA'S FINANCIAL RESPONSIBILITY LAW [CHAPTER 324] REQUIRE THAT AN INDIVIDUAL (WHETHER A RESIDENT OR NON-RESIDENT), WHO HAS NOT BEEN INVOLVED IN ANY PRIOR ACCIDENT, HAVE IN FORCE AN AUTOMOBILE LIABILITY INSURANCE POLICY AS A CONDITION PRECEDENT TO HIS/HER RENTING AND OPERATING A MOTOR VEHICLE IN THIS STATE?

(3) CAN ONE WHO IS NOT A NAMED OR ADDITIONAL INSURED UNDER AN INSURANCE POLICY VALIDLY SUE THE COMPANY ISSUING THE POLICY FOR A DECLARATORY JUDGMENT AS TO THE OBLIGATIONS OWED BY THE INSURER UNDER THAT POLICY?

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SUMMARY OF THE ARGUMENT

Based upon the undisputed facts presented and the applicable Florida substantive law, the trial court below was entirely correct when it dismissed Grant and Lindo's action on the basis that it failed to state a claim upon which relief could be granted. The trial court held that although under 5627.7263 a Florida car rental agency, as the owner and lessor of a rental vehicle, may in a proper case shift from its liability carrier to the lessee's the responsibility for providing primary liability insurance coverage, that statute nevertheless does not permit a lessee (whether resident or non-resident) "to unilaterally obligate" his "umbrella" insurance carrier to provide "primary" coverage because of the lessee's mere signing of a rental contract.

The provision in the rental agreement upon which Lindo's is pursuing New Hampshire stated nothing more than that Lindo's was "electing ... to make [Grant's] personal automobile insurance carrier primarily responsible for any and all claims arising out of [his] use and operation of [the] rental vehicle." New Hampshire was not Grant's "personal automobile insurance carrier." Instead, New Hampshire was an "umbrella" insurance carrier providing non-owned vehicle coverage only for that portion of a claim exceeding the sum of $100,000.00. Thus, the New Hampshire policy was not subject to the clause contained in Lindo's rental car contract.

As the Eleventh Circuit noted, the instant litigation presents a case of first impression in this state, one involving a

situation where a lessee like Grant apparently agreed in a rental car contract that his "personal automobile insurance carrier" would be primary and the rental agency's (or owner's) insurance would be excess, yet the lessee after the fact appears to have had no "personal automobile coverage" which could be deemed "primary." In such a situation, existing case law and public policy indicate that the owner/rental agency's liability carrier must then step forward to be primary and defend the lessee/permissive user. Indeed, this is precisely what Lindo's agreed to do in paragraph 7 on the reverse side of its rental car contract, wherein it is stated:

> Renter shall be insured under lessor's automobile liability insurance policy only if renter has no other automobile liability insurance available to renter with respect to renter's use of the vehicle ....

Review of New Hampshire's policy in light of existing Florida case law demonstrates that New Hampshire could not be considered Grant's "personal automobile insurance carrier" who ordinarily would be required to provide primary coverage and a defense to him by virtue of his signing Lindo's rental car contract containing the $627.7263 clause. Thus, the umbrella nature of New Hampshire's policy distinguishes this case from all of the previous Florida decisions dealing with disputes over coverage in rental car scenarios, since in those cases the disputes were between what could be characterized as true "personal", "primary", or "regular" automobile liability carriers issuing policies containing "excess", "other insurance", or "escape" clauses. "Umbrella" policies, such as the one involved here, only take

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effect after all underlying primary coverages, such as Lindo's, or the vehicle owner Bentley's, have been exhausted because umbrella coverages are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner or escape clauses. The record clearly establishes that there simply is no coverage under New Hampshire's policy for the first $100,000 in bodily injury damages.

In essence then, Lindo's is here asking this Court to ignore the specific provisions of the New Hampshire policy and to declare that the New Hampshire policy "drops down" to become a primary "personal automobile policy" simply because Grant signed its rental car contract which contained the §627.7263 clause. Lindo's attempt to have this Court effectively rewrite the New Hampshire policy by declaring that it drops down to become a primary policy finds no support in existing Florida law. To the contrary, Florida courts have specifically held that the Financial Responsibility Law and the provisions of the applicable insurance policies govern coverage disputes, not any contrary provision contained in a rental car contract.

Lindo's reliance upon a so-called "conformity clause" found in the New Hampshire policy to support its "drop down" theory is not legally supportable. Throughout these proceedings Lindo's has been unable to identify any provision of Florida's Financial Responsibility Law which, when properly read, requires a mere lessee or operator of a rental vehicle (such as Grant) to personally "maintain certain liability insurance" in order to rent

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and operate a vehicle which is registered in Florida and is covered by liability insurance obtained by the vehicle owner or lessor (such as Lindo's or Bentley). While Florida's Financial Responsibility Law may, depending upon the circumstances, impose an obligation upon Lindo's, as the owner, lessor, or registrant of rental vehicles, to maintain a certain level of financial security with respect to its fleet, those financial security obligations are not independently imposed upon Grant by the Financial Responsibility Law so as to require him to maintain any liability insurance coverage in order to rent and operate Lindo's vehicle.

Florida's Financial Responsibility Law, like that of many other states, does not provide for compulsory liability insurance as a condition precedent to operating a motor vehicle. The sanctions and compulsions of the Financial Responsibility Law are not invoked unless and until the operator is involved in an accident, and until that occurs, he is at liberty to operate a motor vehicle without any insurance coverage whatsoever. It necessarily follows that since there existed no mandatory liability insurance obligation imposed upon Grant by Florida's insurance or motor vehicle laws, the conformity clause upon which Lindo's relies is never triggered.

We would additionally argue that insofar as Lindo's itself has joined in this suit as a party seeking a declaration that it is entitled to a defense and coverage under the New Hampshire policy, Lindo's individual action was subject to dismissal by virtue of the undisputed fact that Lindo's was not "an insured"

to whom a defense and coverage is owed under the policy. In Florida, an insurer's obligation to defend and provide coverage is determined by the provisions of its policy, and where, as here, it is demonstrated that a party seeking a defense and coverage under the policy is not, in fact, an "insured" thereunder, no viable claim upon which relief can be granted exists.

Finally, with respect to Grant and Lindo's claim of entitlement to attorneys' fees and litigation costs, Florida law provides that the duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer. Therefore, contribution is not allowed between insurers for expenses incurred in the defense of a mutual insured, unless, unlike here, a "secondary" carrier has incurred expenses in defending a mutual insured after the "primary" carrier has refused to defend. Since New Hampshire's policy was an "umbrella" policy with respect to the subject occurrence, New Hampshire is only secondarily liable and owes no contractual obligation to Lindo's, as a self-insurer, or to Lindo's primary carrier with respect to the defense costs incurred by it in fulfilling its primary duty to defend Grant in the underlying litigation.

ARGUMENT

I.

***CAN* A MOTOR VEHICLE LESSOR, WHO HAS STATED IN THE RENTAL CONTRACT THAT "[R]ENTER SHALL BE INSURED UNDER LESSOR'S AUTOMOBILE LIABILITY INSURANCE POLICY ... IF RENTER HAS NO OTHER AUTOMOBILE LIABILITY INSURANCE AVAILABLE" BUT WHO HAS ALSO STATED IN THE SAME CONTRACT THAT PURSUANT TO SECTION 627.7263 THE RENTER'S "PERSONAL AUTOMOBILE COVERAGE" WILL BE PRIMARY, VALIDLY SHIFT SUCH PRIMARY OBLIGATION OF DEFENSE AND INDEMNIFICATION TO *AN* INSURANCE COMPANY WHO HAS ISSUED TO THE RENTER A NON-OWNED AUTO UMBRELLA POLICY WHICH BY ITS TERMS ONLY COVERS LIABILITIES OF THE RENTER IN EXCESS OF $100,000.00?**

Reduced to its essentials, the argument presented by Grant and Lindo's is that **5627.7263** "permits a lessee in entering into a lease agreement to unilaterally obligate his insurance carrier to provide primary insurance coverage" and that the "insured in entering into a lease agreement in Florida, pursuant to [the statute] is permitted to bind his carrier to provide the primary coverage notwithstanding policy language making the same carrier excess." (Initial Brief to 11th Circuit). The trial court properly determined that the law in Florida permits no such result, correctly concluding that although under §627.7263 a Florida car rental agency may in a proper case shift from its liability insurance carrier to the renter's primary insurance carrier the obligation to provide primary liability coverage, that statute nevertheless does not authorize the renter (whether a resident or non-resident) to "unilaterally obligate" an insurance company issuing only a true "umbrella" policy for the renter to provide primary insurance coverage merely by virtue of the renter signing a lease agreement containing the 5627.7263 clause.

We will begin our analysis by directing this Court's attention to paragraph 11 of the amended complaint, which sets forth Grant and Lindo's theory seeking to impose an obligation upon New Hampshire to defend and indemnify them with respect to the underlying litigation. Specifically, paragraph 11 states that "[u]nder the rental car contract, the Plaintiff Lindo's transferred the primary insurance coverage and defense of the cause to Co-Plaintiff Grant's liability insurance carrier, New Hampshire Insurance Company." That portion of the rental car contract relied upon is set forth in the following provision (apparently non-negotiable), which appears in bold print on the face of Lindo's rental car contract:

> NOTICE: SECTION 627.7263 OF THE FLORIDA STATUTES (1979) PROVIDES LIABILITY INSURANCE OR PERSONAL INJURY PROTECTION INSURANCE PROVIDING COVERAGE FOR THE LESSOR OF A MOTOR VEHICLE FOR RENT OR LEASE SHALL BE PRIMARY UNLESS OTHERWISE STATED IN BOLD TYPE ON THE FACE OF THE RENTAL OR LEASE AGREEMENT. ACCORDINGLY, YOU ARE HEREBY NOTIFIED THAT LESSOR IS ELECTING, IN ACCORDANCE WITH THE AFORESAID STATUTE, TO MAKE YOUR PERSONAL AUTOMOBILE INSURANCE CARRIER PRIMARILY RESPONSIBLE FOR ANY AND ALL CLAIMS ARISING OUT OF YOUR USE AND OPERATION OF THIS RENTAL VEHICLE. THEREFORE, PLEASE ENTER THE NAME OF YOUR PERSONAL AUTOMOBILE INSURANCE COMPANY ON THE LINE PROVIDED BELOW:
>
> Ins. Co. * Pol. # *
>
> I HEREBY CERTIFY that I have read, understand and accept the foregoing Agreement and all terms on the reverse side prior to affixing my signature hereon:
>
> *Note: No insurance company name or policy number were written in the blanks, as §627.7263(2) requires.

The quoted provision in Lindo's rental car contract is permitted by and arguably complies with Section 627.7263, Florida Statutes. However, this circumstance does not, standing alone,

determine the obligations of New Hampshire under its "Travel Excess Non-Owner Policy." First, the provision in Lindo's rental car contract states that Lindo's is only electing "to make your [Grant's] personal automobile Insurance carrier primarily responsible." In this regard, it should be noted that New Hampshire is not Mr. Grant's "personal automobile insurance carrier." Instead, the subject New Hampshire policy is a limited policy specifically designed to cover Mr. Grant for a limited risk, i.e. - to provide him only true "excess" or "umbrella" coverage while in the united States of America driving automobiles that he does not own. Thus, as a first point, the "shifting" effect, if any, which arises by virtue of the provision in Lindo's rental car contract would only be germane to a coverage dispute involving Grant's "personal automobile insurance carrier", not a carrier like New Hampshire, which merely issued an umbrella non-owner policy covering a limited and distinctly different risk from that assumed by a primary carrier.

The instant situation involves, as best we can determine, a case of first impression. Our research failed to uncover a single decision in Florida or elsewhere involving a situation where a lessee, like Grant, had apparently agreed in a rental car contract that his ''personal automobile insurance carrier" would be primary and that the rental agency's insurance would be excess, yet the lessee after the fact appears to have had no automobile coverage which could be deemed "primary." In such a situation, existing law, public policy, and Lindo's rental car contract itself dictate that the lessor Lindo's liability carrier

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remains primary and must defend the lessee/permissive user. Indeed, this is precisely what Lindo's agreed to do in paragraph 7 on the reverse side of its rental car contract.

Furthermore, analysis of the operative provisions of the New Hampshire policy in light of existing Florida case law demonstrates that New Hampshire could not be considered Grant's "personal automobile insurance carrier", who ordinarily would be required to provide primary coverage and a defense to him as a result of his signing Lindo's rental car contract which contained the §627.7263 clause. In this regard, it is important to keep in mind that all existing Florida decisions dealing with the question of priorities of coverage in rental car scenarios involved what can only be characterized as true "primary", "personal", or "regular" automobile liability policies, not the distinctly different category into which the New Hampshire policy falls, those in the nature of true "excess" or "umbrella" policies. The provisions in the New Hampshire policy demonstrate that it is an "umbrella" or a true "excess" policy which requires the maintenance and exhaustion of a specifically stated underlying primary limit of coverage -- $100,000.

"Umbrella" policies only take effect after all underlying primary coverages, such as Lindo's or Bentley's, have been exhausted because "umbrella coverages . . . are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses." ALLSTATE INSURANCE CO. v. EXECUTIVE CAR AND TRUCK LEASING, INC., 494 So.2d 487, 489 (Fla. 1986), quoting Appleman,

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Insurance Law and Practice 54909.85 (1981); TOWNE REALTY, INC. v. SAFECO INS. CO., 854 F.2d 1264, 1269 (11th Cir. 1988) (applying Florida law); OCCIDENTAL FIRE & CAS. CO. v. BROCIOUS, 772 F.2d 47, 53 (3d Cir. 1985). Review of the New Hampshire policy clearly establishes that there simply is no coverage provided far the first $100,000 in damages, and therefore New Hampshire should not be compelled to defend any action or contribute towards any amounts unless or until that underlying primary limit has been exhausted. See, AUGUST A. BUSCH & CO. v. LIBERTY MUTUAL INSURANCE CO., 158 N.E.2d 351 (Mass. 1959). Cf., SHAPIRO v. ASSOCIATED INTERNATIONAL INS. CO., 899 F.2d 1116 (11th Cir. 1990) (under Florida law, insurer providing excess coverage is not obligated to "drop down" to provide primary coverage where insurer providing primary coverage became insolvent); HUDSON INS. CO. v. GELMAN SCIENCES, INC., 921 F.2d 921 (7th Cir. 1990) (same, applying Illinois law); ALLSTATE INS. CO. v. AMERICAN HARDWARE MUT. INS. CO., 865 F.2d 592 (4th Cir. 1989) (applying W. Virginia law, all policies which can be deemed "primary", even though containing an "other insurance" or an "escape" clause, must be exhausted before "umbrella" policy comes into play); TOWNE REALTY, INC. v. SAFECO INS. CO., 854 F.2d 1264 (11th Cir. 1988) (same, applying Florida law); GARMANY v. MISSION INS. CO., 785 F.2d 941 (11th Cir. 1986) (same, applying Georgia law); OCCIDENTAL FIRE & CAS. CO. v. BROCIOUS, 772 F.2d 47 (3d Cir. 1985) (same, applying Pennsylvania law).

The New Hampshire policy at issue is a "U.S.A. Travel Excess Non-Owner Policy", which provides the insured (Grant) with cer-

tain true excess or umbrella liability coverage with respect to his operation of non-owned or rental vehicles in the United States of America. In setting forth the limits of liability under the New Hampshire excess non-owner policy, it is provided in Paragraph 3 of the "Conditions" section of the policy that:

> 3. LIMITS OF LIABILITY - COVERAGE A: Irrespective of the number of named insureds, claims made or vehicles involved in an accident, the total limit of the company's liability for all damages, including damages for care and loss of service, arising out of bodily injury, including death at any time resulting therefrom, and injury to or destruction of all property, shall be only for the ultimate net loss in excess of the amount recoverable under the underlying insurance as set out in the rental or leasing contract, but in no event shall the company be held liable for amounts less than $100,000 per person, $300,000 per accident for Bodily Injury Liability and $25,000 per accident for Property Damage Liability.

Thus, the New Hampshire policy clearly expressed the contracting parties' intent that the insured (Grant) would obtain underlying primary coverage with limits of at least $100,000 either from the rental car company or from the rental vehicle's owner or by himself personally in some other fashion. The insurance provided under New Hampshire's policy did ~~not~~ contemplate any obligation on its part to provide a primary defense for Mr. Grant in actions brought against him as a result of his negligent operation of rental vehicles unless and until the underlying primary liability carrier(s) had fulfilled and extinguished their primary duty to defend by exhaustion of the underlying $100,000.00 limits.

In essence then, Lindo's is simply asking this Court to ignore the specific provisions of the New Hampshire policy by

declaring that the New Hampshire policy "drops down" to become a "primary personal automobile policy" solely by virtue of the alleged operation of Section 627.7263. Lindo's attempt to have this Court effectively rewrite the New Hampshire policy finds no support in existing Florida law. To the contrary, Florida courts have specifically held that the Financial Responsibility Law and the applicable provisions of the insurance policies govern coverage disputes, not any contrary provision contained in a rental car contract. See, SOUTHEASTERN FIDELITY INS. CO. v. COLE, 493 So.2d at 447; SNIDER v. CONTINENTAL INSURANCE CO., 519 So.2d at 13. Accord, AVILES v. BURGOS, 783 F.2d 270, 278 (1st Cir. 1986); 783 F.2d at 278; OCCIDENTAL FIRE & CAS. CO., 772 F.2d at 52-3.

The only authority to which Lindo's points as support for its proposition that an insured such as Mr. Grant can unilaterally alter the provisions of an insurance policy to which he is a party merely by virtue of signing some collateral agreement such as the rental contract involved in this case is COMMERCE INS. CO. v. ATLAS RENT-A-CAR, INC., 585 So.2d 1084 (Fla. 3d DCA 1991), pet. rev. den. 1992 Fla. LEXIS 480 (1992). The situation and type of insurance policy involved in the COMMERCE case was distinctly different from that involved here. Specifically, in COMMERCE, unlike here, the non-resident lessee had a "primary", "personal", or "regular" automobile liability policy as to which the rental agreement and §627.7263 could effect a valid "shift" in the insurer owing primary coverage for the lessee. The court in COMMERCE simply rejected the argument of the lessee's personal

automobile insurer that its policy should be considered an "excess" primary policy because the lessee/insured was using a "non-owned vehicle", as to which the lessee's policy provided that "the owner's auto insurance must pay its limits before we pay" (i.e. - an "escape clause"). The court in COMMERCE also rejected the broader argument of the lessee's insurer (which argument New Hampshire has not urged in this case) that 5627.7263 could not be validly applied to its primary personal automobile policy covering the lessee because that policy was issued by a non-resident insurer to a non-resident insured to cover a risk (an automobile) located outside of the State of Florida. Thus, the COMMERCE decision does not support Lindo's argument here that Mr. Grant had the power to convert the New Hampshire umbrella policy into a primary personal automobile liability policy merely by virtue of hls signing Lindo's rental car agreement.

II.

DOES FLORIDA'S FINANCIAL RESPONSIBILITY LAW [CHAPTER 324] REQUIRE THAT *AN* INDIVIDUAL (WHETHER A RESIDENT OR NON-RESIDENT), WHO HAS NOT BEEN INVOLVED IN ANY PRIOR ACCIDENT, HAVE IN FORCE *AN* AUTOMOBILE LIABILITY INSURANCE POLICY AS A CONDITION PRECEDENT TO HIS/HER RENTING AND OPERATING A MOTOR VEHICLE IN THIS STATE?

At no point in these proceedings have Grant or Lindo's disputed the fact that the New Hampshire policy is clearly and unambiguously an umbrella policy only covering liabilities of the insured in excess of a stated sum of $100,000.00. Nevertheless, both here and in the federal courts, Grant and Lindo's seek to

avoid the consequences of this conceded fact by arguing that the New Hampshire policy should nevertheless be declared to be a primary automobile policy because of its inclusion of a so-called "conformity clause." However, under the facts of this case, the mere presence of a so-called "conformity clause" in the New Hampshire policy does not convert that umbrella policy into a primary liability policy since Florida's Financial Responsibility Law [Chapter 324] does not require that an individual (whether a resident or non-resident), who has not been involved in any prior accident, have in force an automobile liability insurance policy as a condition precedent to his/her renting and operating a motor vehicle in this state.

With respect to the "conformity clause," we would first note, as the trial court did, Grant and Lindo's failure to cite any authority supporting their assertion that the mere presence of such a clause in the New Hampshire policy provides a valid legal basis upon which to ignore the admitted umbrella nature of that policy. Grant and Lindo's complaint itself did not allege the necessary prerequisites for activation of the clause. They have been unable to identify any provisions of Florida's Financial Responsibility Law which, when properly read, imposed any compulsory liability insurance obligation on Grant under the facts of this case.

The conformity clause upon which Lindo's relies is found in paragraph 13 of the "Conditions" section of the New Hampshire policy. It provides:

> 13. TERMS OF POLICY CONFORMED TO STATUTE: If under the provisions of the motor vehicle financial responsibility law, compulsory insurance law, "no-fault" law,

> or any similar law of any governmental jurisdiction within the territorial limits of this policy, **a non-resident is required to maintain certain insurance** and such insurance requirements are greater than the insurance provided by this policy, the limits of the company's liability and the kinds of coverages afforded by this policy shall be as set forth in such law in lieu of the insurance otherwise provided by this policy, **but only to the extent required by such law,** and only with respect to the operation or use of a motor vehicle in such jurisdiction; provided, that the insurance under this provision shall be reduced to the extent that there is other valid and collectible insurance under this or any other vehicle liability insurance policy.

Under the express terms of this conformity clause, **it** is clear that it is only applicable to and has an affect in situations where "under the provisions of the motor vehicle financial responsibility law, ..., a non-resident is required to maintain certain insurance and such insurance requirements are greater than the insurance provided by" the New Hampshire policy. In such situations, the New Hampshire policy is conformed to "such law **...** but only to the extent required by such law **....**" As will be demonstrated, the conformity clause has no applicability or effect in the instant case.

In arguing otherwise, Lindo's has relied upon a **virtual** smorgasbord of statutory provisions found in **both Chapter** 324, (Florida's Financial Responsibility Law) and Chapter 627, (Florida's Motor Vehicle "No-Fault Law").[3] Before proceeding to

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[3]Specifically, Lindo's cites this Court to the following statutes: (1) §627.733(1),(2), and (3), Fla. Stat.; (2) 5627.7263, Fla. Stat.; (3) §324.021(7)(a), Fla. Stat.; (4) §324.151(1)(a), Fla. Stat.; and (5) §324.022, Fla. Stat. In contrast, Lindo's relied in the trial court upon Section 627.733 and Section 324.011, Florida Statutes. (N.R. 20, 23). The section Lindo's relied upon in the 11th Circuit [§324.022] deals with "property damage," which is not at issue in the case.

demonstrate that the various statutory provisions relied upon by Lindo's, neither individually, nor collectively, support its proposition that Florida law compelled Grant to have liability insurance before getting behind the wheel of Lindo's vehicle, we will first direct our attention to the manner in which a conformity clause interacts with Florida's Financial Resonsibility Law.

Analysis of the manner in which a conformity clause interacts with Florida's motor vehicle insurance laws must begin with the decision of the Florida Supreme Court in LYNCH-DAVIDSON MOTORS v. GRIFFIN, 182 So.2d 7 (Fla. 1966). The question facing the court there was whether the mere presence of a conformity clause in a motor vehicle liability insurance policy caused the policy to be automatically amended by operation of law so as to comply with certain provisions set out in Florida's Financial Responsibility Law (Ch. 324). The Florida Supreme Court there held that since the Financial Responsibility Law did not, under the facts alleged, impose any obligation upon the subject insured to maintain any particular liability coverage, the conformity clause was without applicability or effect and could not be relied upon to broaden the coverage granted under the terms of the policy itself.

With respect to Florida's Financial Responsibility Law and the nature of the obligations imposed by it upon owners and operators to provide liability insurance coverage, the Supreme Court in LYNCH-DAVIDSON MOTORS ruled that:

> The decisions and the cited cases were handed down in recognition of the fact --which cannot be questioned -- that our Financial Responsibility Law, like that of many other states, does not provide for compulsory liabi-

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> lity insurance as a condition precedent to owning or operating a motor vehicle. Every owner or operator of a motor vehicle is allowed one "free" accident (that is, one uninsured accident -- although he must, of course, respond in damages, from what assets he owns, for injuries to persons or property for which he is legally liable). The sanctions or compulsions of the Financial Responsibility Law are not invoked unless and until the owner or operator is involved in an accident; until that occurs, he is at liberty to own or operate a motor vehicle without any insurance coverage whatsoever, or with as little coverage as desired. That this is the legislative intent is abundantly clear from the stated purpose of the Act -- to require an owner or operator of a motor vehicle involved in an accident to "show proof of financial ability to respond for damages in future accidents as a privilege to his future exercise of such privileges."

182 So.2d at 8-9. See also, BANKERS & SHIPPERS INS. CO. v. PHOENIX ASSURANCE CO., 210 So.2d 715 (Fla. 1968); AMERICAN FIDELITY FIRE INS. CO. v. HARTMAN, 185 So.2d 696 (Fla. 1966), quashing, HARTMAN v. AMERICAN FIDELITY FIRE INS. CO., 177 So.2d 376 (Fla. 3d DCA 1965); SAFECO INS. CO. OF AMERICA v. HAWKEYE SECURITY INS. CO., 218 So.2d 759 (Fla. 1st DCA 1969).

Simply stated, unless the Insurance policy under consideration has been certified by the insured as proof of financial responsibility for the future under the terms and provisions of Florida's Financial Responsibility Law, a mere vehicle operator and his/her insurer are free to contract with each other as to the content and extent of coverage to be made available under the policy, which is deemed a "voluntary policy." ***See***, HARTMAN v. AMERICAN FIDELITY FIRE INS. CO., 177 So.2d at 378-79 (Fla. 3d DCA 1965) (Swann J. dissenting); YAKELWICZ v. BARNES, 330 So.2d

810 (Fla. 3d DCA 1976); ENNIS v. CHARTER, 290 So.2d 96 (Fla. 1st DCA 1974); UNITED STATES FID. & G. CO. v. NATIONAL INDEMNITY CO., 258 F.Supp. 444 (S.D. Fla. 1966). Such is the case here. Cf., ANDRIAKOS v. CAVANAUGH, 350 So.2d 561, 563 (Fla. 2d DCA 1977) (recognizing that Florida's Financial Responsibility Law "has never required an automobile driver to procure automobile liability insurance or other security to operate an automobile until he has one accident.").

In its February 10th order/opinion, the Eleventh Circuit certified the following question relating to the topic under discussion:

> DOES THE CONFORMITY CLAUSE IN NEW HAMPSHIRE'S EXCESS INSURANCE POLICY SERVE TO EXTEND THE COVERAGE PROVIDED BY THAT POLICY TO MEET THE REQUIREMENTS OF FLORIDA'S FINANCIAL RESPONSIBILITY LAW, NOTWITHSTANDING THAT THE LAW ON ITS FACE DOES NOT REQUIRE AN OWNER/OPERATOR OF A FLORIDA REGISTERED VEHICLE TO MAINTAIN INSURANCE UNTIL AFTER HE HAS BEEN INVOLVED IN ONE ACCIDENT RESULTING IN INJURIES FOR WHICH HE IS LIABLE?

In our opinion, this amounts to nothing more than a rhetorical question. As we have already demonstrated, Florida's Financial Responsibility Law on its face and as interpreted by the Florida courts does not require a mere operator of a vehicle in Florida to maintain liability insurance coverage until after he has been involved in one accident resulting in injuries for which he is liable. Accordingly, there are no "requirements of Florida's Financial Responsibility Law" applicable to the insured Mr. Grant, and therefore no liability insurance requirement imposed upon Grant as to which New Hampshire's umbrella policy

would be caused to conform. The provisions of Florida's Financial Responsibility Law are clear on this point.

While §324.151(1)(b) does provide that "[a]n operator's motor vehicle liability policy of insurance shall insure the person named therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, with the same territorial limits and subject to the same limits of liability as referred to above with respect to an owner's policy of liability insurance," §324.151 goes on to specifically state that:

> The provisions of this section shall not be applicable to any automobile liability policy unless and until it is furnished as proof of financial responsibility for the future pursuant to 5324.031, and then only from-and after the date said policy is so furnished. §324.151(2) (added by Laws 1965, c. 65-489, §1).

In the instant case, it is uncontradicted that the New Hampshire umbrella policy was not furnished by Grant as proof of financial responsibility for the future pursuant to 5324.031, and therefore the policy does not come within the purview of Chapter 324. Courts in other jurisdictions having similar financial responsibility laws have reached the same result we are advocating in this case. ***See***, MOORADIAN v. CANAL INS. CO., 130 So.2d 915 (Ala. 1961); HART v. NATIONAL INDEMNITY CO., 422 P.2d 1015 (Alaska 1967); AETNA CASUALTY & SURETY CO. v. SIMPSON, 306 S.W.2d 117 (Ark. 1957); McCANN v. CONTINENTAL CASUALTY CO., 124 N.E.2d 302 (Ill. 1956); GRIMES v. GOVERNMENT EMPLOYEES INS. CO., 402 N.E.2d 50 (Ind. App. 1980); TRAVELERS INC. CO. v.

BOYD, 228 S.W.2d 421 (Ky. App. 1949); JOHNSON v. UNIVERSAL AUTOMOBILE INS. ASSOC., 124 So.2d 580 (La. App. 1960); UNITED STATES FIDELITY & GUARANTY CO. v. WALKER, 329 P.2d 852 (Okla. 1958).

The Eleventh Circuit's apparent confusion with respect to Florida law on this subject arises by virtue of its belief that HOWARD v. AMERICAN SERVICE MUT. INS. CO., 151 So.2d 682 (Fla. 3d DCA 1963) suggests that a conformity clause "may be read to provide indemnification for liability arising out of a first accident." (Eleventh Circuit opinion at 8). The facts involved in HOWARD are materially different than those involved here and justified the conclusion reached. First, the conformity clause contained in the policy in HOWARD was not, as the Eleventh Circuit apparently believed, "similar to the one at issue in this case." The conformity clause at issue in HOWARD was directed to an insurance policy insuring a Florida vehicle (i.e. - an owner's policy). Specifically, the conformity clause at issue in HOWARD stated that: "[s]uch insurance as is afforded by this policy ... shall comply with the provisions of the Motor Vehicle Financial Responsibility law of any state ... with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period." In addition, the conformity clause in HOWARD did not further state that the policy would conform "only to the extent required by such law."

In contrast, the conformity clause contained in New Hampshire's umbrella policy is directed to and insures a person, Grant, not a Florida vehicle. Specifically, the New Hampshire

policy provides that "[i]f under the provisions of the motor vehicle financial responsibility law ... a non-resident is required to maintain certain insurance and such insurance requirements are greater than the insurance provided by this policy, the limits of the company's liability and the kinds of coverages afforded by this policy shall be as set forth in such law ... but only to the extent required by such law...." Thus, because of the distinction between the type of conformity clause contained in HOWARD and the type of conformity clause contained in the New Hampshire policy, resolution of the instant dispute only requires analysis of whether Mr. Grant had to maintain mandatory liability insurance coverage under Florida law when operating Lindo's vehicle. See, GRIMES v. GOVERNMENT EMPLOYEES INS. CO., 402 N.E.2d 50 (Ind. App. 1980). As already demonstrated, Chapter 324 did not require Grant to maintain liability insurance as a condition precedent to his rental and use of Lindo's vehicle. Lindo's reliance upon 5627.733, Florida Statutes (1988) (the "No Fault Law") is misplaced. As can be seen from the text of Section 627.733 itself, it is only applicable to an "owner or registrant of a motor vehicle ... required to be registered and licensed in this state," a status which Mr. Grant clearly did not occupy. See, SECURITY INS. CO. v. HOWGATE, 343 So.2d 641 (Fla. 3d DCA 1977).[4] Moreover, the Florida No-Fault Law, of which Section 627.733 is a part, has been interpreted by the Florida Supreme Court to be no broader in

[4]Under Florida's No Fault Law, the owner or registrant of a motor vehicle regularly operated in the state is obligated to pay certain minimal PIP benefits to parties injured in accidents (in exchange for which a limited tort immunity is extended). As to non-resident owners, however, the Act is expressly stated to be

scope and to impose no obligations on vehicle operators over and above those imposed by the Florida Financial Responsibility Law, Chapter 324. See, REED v. STATE FARM FIRE & CASUALTY CO., 352 So.2d 1172 (Fla. 1978).

It is thus clear that there was no mandatory liability insurance obligation imposed upon a mere vehicle operator like Grant under Florida's Financial Responsibility Law or Florida's No-Fault Law under the circumstances of the accident at issue. It necessarily follows that since there existed no mandatory liability insurance obligation imposed upon Grant by Florida's vehicle and insurance laws, the conformity clause upon which Lindo's exclusively relies is never triggered. As noted in SAFECO INS. CO. OF AMERICA v. HAWKEYE SECURITY INS. CO., 218 So.2d at 761, the burden rested upon Lindo's to allege and prove that New Hampshire's policy was issued in response to the mandate of, or some obligation imposed upon Grant by Florida's statutes. *See*, §324.151(2). This burden Lindo's has not, and cannot, carry. Accordingly, the New Hampshire policy must be construed and applied by this Court in accordance with its own terms and without any variance.

The New Hampshire policy has been conceded by Lindo's to be an "umbrella" policy which is not activated until a minimum underlying primary layer of coverage of $100,000 has been

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inapplicable unless the non-resident's vehicle has been physically present in Florida for more than 90 days during the preceding year. 56627.733(2), Fla. Stat. (1988). See, EPPERSON v. DIXIE INS. CO., 461 So.2d 172 (Fla. 1st DCA (1985).

exhausted. Therefore, the New Hampshire policy cannot be legally declared by this Court to be primary with respect to the subject accident, and absent such primary status, absolutely no primary duty to defend or indemnify was owed by New Hampshire to Mr. Grant.

The trial court's determination in this case was consistent with Florida's common and statutory law, Florida public policy, and the commercial expectations of the parties concerned. First, the trial court's construction of and determination that the New Hampshire policy was an "umbrella" policy is unassailable. Thus, the trial court's determination is consistent with the policy of enforcing insurance contracts as written when the terms are clear and unambiguous. See, HUDSON INS. CO., 921 F.2d at 95. Secondly, consideration of the true function of umbrella policies supports the trial court's resolution of what in actuality is simply a dispute between insurance companies, with the insured and the injured third party being protected regardless of how this Court rules. Umbrella or true excess policies:

> ... [A]re intended to provide low cost coverage for catastrophic losses beyond the bounds of ordinary primary limits, and the insurer must be able to ascertain the point at which its liability will attach in order to gauge the insurable risk and its cost of coverage. "To hold otherwise subjects the insurer to unforeseeable and variable risks depending upon the underlying insurance actually maintained by any one of the potential insureds."

GARMANY v. MISSION INS. CO., 785 F.2d 941, 947 (11th Cir. 1986), quoting from FRIED v. NORTH RIVER INS. CO., 710 F.2d 1022, 1026-27 (4th Cir. 1983). See also, HUDSON INS. CO. v.

GELMAN SCIENCES, INC., 921 F.2d 92 (7th Cir. 1990); SHAPIRO v. ASSOCIATED INT'L INS. CO., 899 F.2d 1116 (11th Cir. 1990); ALLSTATE INS. CO. v. AMERICAN HARDWARE MUT. INS. CO., 865 F.2d 592 (4th Cir. 1989); TOWNE REALTY, INC. v. SAFECO INS. CO., 854 F.2d 1264 (11th Cir. 1988); AVILES v. BURGOS, 783 F.2d 270 (1st Cir. 1986); OCCIDENTAL FIRE & CAS. CO. v. BROCIOUS, 772 F.2d 47 (3d Cir. 1985).

Secondly, Lindo's has not presented to this Court any evidence or case law supporting its view that the Florida Legislature, in enacting §672.7263, intended to sanction or compel the rewriting of umbrella insurance policies by the courts so as to make them "primary" insurance policies. Indeed, the result Lindo's is urging is commercially unreasonable and clearly unnecessary. Specifically, any ruling in Lindo's favor requiring a rewriting of New Hampshire's policy so as to require its coverage to "drop down" and provide primary coverage to Grant would result in unnecessary overlapping coverage. Lindo's had already secured primary coverage as to its vehicles and permissive operators (as demonstrated by condition 7 of its rental car contract) and obviously must have paid premiums for this type of coverage. Nevertheless, Lindo's now wants this Court to rewrite New Hampshire's umbrella policy so as to convert it into a policy providing the same level of "primary" coverage even though Grant never paid a premium for such coverage. More significant than the thus-created overlapping indemnity obligations would be the resulting transfer of a substantial economic burden onto New Hampshire which it clearly did not assume under its insurance

contract -- the primary duty to defend Grant. Lindo's position should be rejected by this Court since, if possible, constructions of insurance policies which create a situation with overlapping coverages should be avoided, especially when no premiums are being paid for such duplicity. See, GARMANY, 785 F.2d at 947-48.

111.

CAN ONE WHO IS NOT A NAMED OR ADDITIONAL INSURED UNDER *AN* INSURANCE POLICY VALIDLY SUE THE COMPANY ISSUING THE POLICY FOR A DECLARATORY JUDGMENT AS TO THE OBLIGATIONS OWED BY THE INSURER UNDER THAT POLICY?

This additional argument in support of dismissal of the amended complaint is directed only to Plaintiff Lindo's. Specifically, we respectfully submit that insofar as Lindo's has joined in this suit as a plaintiff seeking a declaration that it is entitled to a defense and coverage under the New Hampshire policy, Lindo's action is subject to dismissal by virtue of the undisputed fact that Lindo's is not "an insured" to whom a defense and coverage is owed under the policy.

In **NATEMAN v. HARTFORD CAS. INS. CO., 544** So.2d 1026 (Fla. 3d DCA 1989), Florida's Third District Court of Appeals held that an insurer's obligation to defend and provide coverage is determined by the provisions of its policy, and that when it is demonstrated that a party seeking a defense and coverage under the policy is not, in fact, an "insured" thereunder, no viable cause of action has been stated. Turning to the facts in the instant case, this Court should first note that at no point in

its amended complaint did Lindo's allege that it was "an insured" under the New Hampshire policy. Instead, Lindo's impliedly contended that it was entitled to coverage and a defense by virtue of Section 627.7263.

Even assuming arguendo that New Hampshire's policy is declared by this Court to provide for the existence of an obligation to defend and indemnify its insured (Mr. Grant), such a holding would not inure to the benefit of Lindo's, especially since Lindo's has never pled a claim for indemnity. There is no provision in Section 627.7263 which requires the "personal automobile insurance carrier" of the lessee to provide a defense and coverage to the lessor. The provisions of Lindo's rental car contract likewise contain no such statement.

Moreover, the New Hampshire policy clearly reflects that under the circumstances Involved in this case, only Grant could be considered "an insured" as to whom the New Hampshire policy would arguably provide for an obligation to defend and indemnify. The New Hampshire policy defines the "insured" in the following fashion:

> With respect to the insurance for bodily injury liability ... the unqualified word "insured" applies to the certificate holder identified herein as the "named insured" [James Grant], and also includes any other operator specifically designated in the certificates of insurance legally responsible for the use of an automobile not owned or hired by such other person or organization.

Thus, it is clear that Lindo's is not an "insured" under the New Hampshire policy as to whom any arguable duty to defend exists. indemnify might exist. Since Lindo's does not qualify

as "an insured" under the New Hampshire policy, it was not owed any defense or coverage by New Hampshire with respect to the underlying litigation, and it had no viable cause of action for declaratory relief under existing Florida law. Dismissal of Lindo's action against New Hampshire therefore must be affirmed in any event.

IV.

WHETHER THE TRIAL COURT CORRECTLY RULED THAT NO VIABLE CAUSE OF ACTION EXISTED IN FAVOR OF LINDO'S AND GRANT TO RECOVER FROM NEW HAMPSHIRE THE ATTORNEYS' FEES AND COSTS INCURRED IN THE DEFENSE OF THE UNDERLYING LITIGATION, WHERE LINDO'S, NOT NEW HAMPSHIRE, WAS OBLIGATED TO PROVIDE PRIMARY LIABILITY COVERAGE TO GRANT UNDER ITS RENTAL CONTRACT?

Lindo's entire argument relating to that part of its claim seeking recovery of costs and attorneys' fees incurred in its defense of Grant in the underlying litigation proceeds on the basis of two assumptions: (1) that "New Hampshire stands alone as the exclusive carrier providing coverage to Grant"; and (2) that New Hampshire "is the only entity required by law or contract to defend Grant." These assertions are both factually and legally incorrect.

In the trial court, Lindo's asserted that it was "self-insured." This fact alone belies the assertion here that "Mr. Grant was an insured of only one party herein - New Hampshire," since a self-insurer who qualifies under Section 324.171, Florida Statutes, is subject to all the obligations of an actual insurance company. See, Section 324.031(4); Section 324.171(2). Cf., **DIXIE FARMS, INC.** v. HERTZ CORP., 343 So.2d

633, 635-36 (Fla. 3d DCA 1977) (stating that "a self-insurer who qualifies under Section 324.171, Florida Statutes (1975) is subject to all the rights and obligations of an insurer"). Any self-insurance certificate which Lindo's may have filed pursuant to obligations imposed upon it by Florida's Financial Responsibility Law would have to include Grant as an additional insured thereunder when operating the insured vehicle with its express or implied permission. See, 324.151(1)(a) ("an owner's liability insurance policy ... shall insure the owner named therein and any other person as operator using such motor vehicle or motor vehicles with the express or implied permission of such owner...."). Thus, contrary to Lindo's suggestion, Grant must by statute be insured by Lindo's in its capacity as a purported self-insurer.

The assertion that Grant was only insured under the New Hampshire policy also flies directly in the face of paragraph 7 of the conditions section on the reverse side of Lindo's rental agreement, which states in pertinent part that "[r]enter shall be insured under lessor's automobile liability insurance policy only if renter has no other automobile liability insurance available to renter with respect to renter's use of the vehicle ...." It can reasonably be assumed that Lindo's secured this separate liability insurance policy referred to in the rental agreement to cover precisely the type of situation with which it is presently faced -- a situation where it believes that it has shifted primary coverage to the renter, but where it turns out the renter unfortunately "has no other automobile liability

insurance available to [him] with respect to [his] use of the vehicle." In the last analysis, Lindo's must be held to its agreement to provide Grant, as a renter and operator of its vehicle, with primary coverage since the renter Grant apparently had no other primary automobile liability insurance available to him.[5]

With respect to Lindo's and Grant's claim for the attorneys' fees and litigation costs incurred in the defense of the underlying action, Florida law indicates that resolution of the issues raised depends upon determination of the ultimate coverage issue. The "duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer," **ARGONAUT** INS. CO. v. **MARYLAND CAS.** CO., **372** So.2d **960,** 963 (Fla. **3d DCA 1979).** Therefore, contribution is "not allowed between insurers for expenses incurred in defense of a mutual insured," ARGONAUT, 372 So.2d at 963. See also, **AETNA** CAS. & **SURETY CO.** v. MARKET INS. CO., **296 So.2d 555, 558** (Fla. 3d DCA **1974);** CUNNINGHAM v. AUSTIN FORD, **INC.,** 189 **So.2d 661, 666** (Fla. **3d** DCA **1966).** The only exception which the Florida courts have carved out of this general rule involves a situation, unlike here, where an "excess" or "secondary" insurer has incurred expenses in defending a mutual insured after the "primary" carrier has refused to defend the mutual insured. **See,** F & **R** BUILDERS, INC. **v. U.S.F.& G., 490 So.2d 1022** (Fla. **1986);** AMERICAN & FOREIGN INS. CO. v. **AVIS RENT-A-CAR** SYSTEM, INC., **401** So.2d 855 (Fla. **1st** DCA **1981).**

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[5]In view of the fact that Grant was an insured under both the Lindo's self-insurance certificate and the liability insurance policy referred to in the rental agreement, it necessarily

Accordingly, since New Hampshire's U.S.A. Travel Excess Non-Owner Policy is a true "excess" or "umbrella" policy with respect to the subject occurrence, New Hampshire is therefore only secondarily liable and is not obligated to indemnify or reimburse Grant and Lindo's with respect to the defense costs incurred in the underlying litigation. Lindo's (and the carrier it obtained to insure its rental fleet) were simply discharging the defense obligation owed to Grant by virtue of the express provision on the reverse side of the rental car contract. Thus, since Lindo's insurance is primarily liable and New Hampshire under its policy is only secondarily liable, no viable cause of action exists in favor of Lindo's and Grant to recover the attorneys' fees and costs incurred in the defense of the underlying litigation. See, ARGONAUT INS. CO. v. MARYLAND CAS. co.; CUNNINGHAM v. AUSTIN FORD, INC.; AETNA CAS. & SURETY CO. v. MARKET INS. CO.

CONCLUSION

Based upon the undisputed facts of record, including the contents of the New Hampshire insurance policy and Lindo's rental car agreement, as well as the reasoning and citations of authority set forth above, it is respectfully submitted that the

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follows that neither Lindo's nor its liability insurance carrier would be entitled to seek indemnity from Grant, nor would those separate coverages be entitled to automatically follow or be deemed secondary to the limited umbrella coverage extended to Grant by New Hampshire. See, ALLSTATE INS. CO. v. FOWLER, 480 So.2d 1287 (Fla. 1985); SNIDER v. CONTINENTAL INS. CO., 519 So.2d 12 (Fla. 5th DCA 1987).

trial court properly determined that Lindo's and Grant had no viable cause of action against New Hampshire. The rephrased certified questions should all be answered in New Hampshire's favor, and this Court should advise the Eleventh Circuit that the final order of dismissal brought up for review should be affirmed in all respects.

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 24th day of April, 1992 to David J. Beasley, Esq. and Joseph W. Ligman, Esq., Ligman Martin & Evans, Attorneys for Appellants, 230 Catalonia Avenue, Coral Gables, FL 33134.

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