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OCT 15 1992
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

v. CASE NO. 80,175

BOBBY COOKE d/b/a CONTINENTAL TOP SHOP,

Respondent.

AMENDED ANSWER BRIEF OF RESPONDENT, BOBBY COOKE, d/b/a CONTINENTAL TOP SHOP

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

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STATEMENT OF THE CASE

Respondent, Bobby Cooke doing business as Continental Top Shop (hereinafter "Cooke") adopts the Statement of the Case as set forth by Insurance Company of North American (hereinafter "INA"). Cooke notes that a companion appeal has been filed under Case No. 80,194 by INAC Corporation (hereinafter "INAC") seeking review of an interlocutory evidentiary ruling in the opinion of the Second District Court of Appeal below. INAC moved to intervene in the Second District following issuance of their opinion and that motion was denied. INAC has moved to consolidate its appeal with this appeal or alternatively to be permitted to intervene in this appeal. As of the time of writing this brief, the Court has not ruled on INAC's motion to consolidate or intervene.

STATEMENT OF THE FACTS

With the following exceptions, Cooke adopts the Statement of the Facts set forth by INA.

On page 5 of its brief, INA asserts that INAC generated a notice of intent to cancel Cooke's insurance policies on August 23, 1988 and sent copies to Cooke and the insurance agent. This is untrue. According to the record, there is no copy of any notice of intent to cancel generated by INAC at any time, and certainly not in the insurance agent's file (R 189, 203; R 221-307).

On page 6 of its brief, INA asserts that the second notice of intent to cancel was sent by INAC on November 4, 1988. This is inaccurate. The contention of INAC in the trial court was that a computer printout dated October 19, 1988, constitutes proof that the notice of intent to cancel was mailed on that date (R 189, 203).

INAC's amicus brief contains the same inaccuracies regarding the existence of a notice of intent to cancel from either August or October, 1988.

However, for purposes of this appeal, these facts are irrelevant. The Second District Court of Appeal below affirmed the ruling of the trial court that there is a dispute whether INAC complied with the ten day notice of intent requirement. Since neither Petitioner or Respondent herein are challenging that ruling, the posture of this case in this court is that it is a disputed issue of fact whether INAC complied with the ten day notice of intent to cancel requirement.

POINTS ON APPEAL

POINT I

IN ITS OPINION BELOW THE SECOND DISTRICT COURT OF APPEAL CORRECTLY CONSTRUED SECTION 627.848.

POINT II

THE SECOND DISTRICT CORRECTLY REVERSED THE DENIAL BY THE TRIAL COURT OF COOKE'S MOTION TO STRIKE.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal in the opinion below correctly construed §627.848 to require that the insurer cannot validly cancel an insurance policy unless it is demonstrated that the finance company complied with the material requirements of that statute. Section 627.848 on its face states that a policy "shall not be cancelled" unless the finance company complies with the provisions of the statute. It is also clear from the language of the statute that only the insurance carrier can "cancel" the insurance contract. Therefore, applying the plain meaning of the statute, an insurance policy cannot be cancelled by the insurance carrier without demonstrating compliance by the finance company with the material requirements of the statute.

The courts of other states in construing substantively identical statutes have reached the same conclusion as that reached by the Second District Court of Appeal in this case.

Furthermore, the fact that the cancellation is effected by the finance company by a power of attorney does not impute the derelictions of the finance company to the insured, nor does it render valid a cancellation which is in violation of the material requirements of the statute.

Finally, there are strong public policy considerations favoring the construction of the statute by the Second District Court of Appeal below. The insurance carrier, who has already been paid the full premium on the policy, is in the best position to ensure that the premium finance companies comply with the requirements of the statute. If an insurance carrier can cancel

with impunity an insurance policy by receipt of the request for cancellation by a premium finance company, the only redress available to the insured or a potential injured party is an action against the finance company. Since it is the insurance industry which utilizes finance agreements to market its products, as a matter of public policy, the burden should be on the insurance industry to ensure that the finance companies comply with the requirements of the statute.

On the issue raised by INAC, the Second District correctly applied the best evidence rule to the computer printout since that document is not in any sense a duplicate of the notice of intent to cancel, nor is it competent evidence to prove that such a notice was in fact mailed on October 19, 1988. INAC's contention that the Second District lacked jurisdiction to review the issue is also without merit because the evidentiary issue was raised both by INA in support of its Motion for Summary Judgment and was essential to determine the denial of Cooke's Motion for Partial Summary Judgment against INA.

ARGUMENT

POINT I

IN ITS OPINION BELOW THE SECOND DISTRICT COURT OF APPEAL CORRECTLY CONSTRUED SECTION 627.848.

The principle issue in this case is whether the Second District Court of Appeal below correctly construed §627.848, Fla. Stat. (1987), the Florida Premium Finance Cancellation Statute.

In the opinion below, the Second District Court of Appeal held that the insurer cannot cancel the insurance policy unless it is demonstrated that the finance company complied with the provisions of the statute. The Second District certified direct conflict with Bankers Insurance Company v. Pannunzio, 538 So.2d 61 (Fla. 4th DCA 1989). INA also asserts conflict with Tate v. Hamilton Insurance Company, 466 So.2d 1205 (Fla. 3d DCA 1985).

Section 627.848 (a copy is attached for the convenience of the Court in pages 1-2 in a separate appendix to this brief) governs cancellation of finance insurance policies in the event of a default in payment by the insured. The introductory paragraph of the statute states that ". . . the insurance contract shall not be cancelled unless cancellation is in accordance with the following provisions:" and then proceeds to list those provisions in six enumerated subsections. The statute requires that the finance company provide ten days written notice of intent to cancel (notice of intent to cancel), and thereafter, pursuant to §627.848(2), the finance company mails to the insurer a "request for cancellation" in the event that the insured has not cured the default.

The position urged by Petitioner INA in this case, and the interpretation accorded by the courts in Pannunzio and Tate, is that an insurance policy can in fact be cancelled by the insurer upon receipt of a request for cancellation regardless of whether there has been compliance with the statute by the finance company. It is the position of Cooke that the Pannunzio/Tate interpretation of the statute renders meaningless the introductory provision which states that the insurance contract "shall not be cancelled" without compliance by the finance company with the substantive provisions of the statute. Applying the "plain meaning" doctrine of statutory construction, the Second District held that the statute clearly requires compliance by the finance company with the requirements of the statute before an insurer can validly cancel the policy citing Shelby Mutual Insurance Co. v. Smith, 556 So.2d 393 (Fla. 1990).

INA, and the dissent below, attempts to avoid this construction of the statute by stating that implicitedly the phrase "the insurance contract shall not be cancelled" in the introductory language should be followed by a clause which reads "by the finance company." This interpretation, however, is inconsistent with the language set forth in §627.848(2) which states that the finance company can only "request" the cancellation of a policy. In short, the finance company cannot itself "cancel" the insurance policy: only the insurer can actually effect the cancellation of the insurance contract.

The majority opinion below considered the statute and concluded that it means precisely what it says. It is INA and the dissent which requires the inclusion of hypothetical language to the statutory scheme in order to reach their desired conclusion. The language "shall" is clearly mandatory and unambiguous and can lead only to the conclusion that the contract of insurance cannot be cancelled unless the statutory requirements are met by the finance company. The construction urged by INA leads to the absurd result that the policy can in fact be cancelled with impunity -- regardless of whether there is compliance with the provisions of the statute by the finance company.

INA argues that this case is simply a matter of applying the principles of agency law by virtue of the fact that the premium finance agreement contains a power of attorney. The distinction is, of course, that the relationships between the insured, the finance company, and the insurer are governed by the statute, and statutes governing the cancellation of insurance policies are strictly construed against the insurer. See, J. Appelman, Insurance Law and Practice §§ 5012, 5013 (1981). See also, Country Wide Insurance Company v. Allstate Insurance Company, 63 A.D.2d 951, 406 N.Y.S.2d 313 (N.Y. App. 1978). If it is true, as asserted by INA, that this case is simply a question of agency law, then there would be no point, for example, in requiring a ten day notice of intent to cancel since, at least as to third parties, the actions and knowledge of the agent (the finance company) are

imputed as a matter of law to the principal (the insured). Hence, INA's argument is misplaced. The respective rights and liabilities of the parties are governed strictly by the statute and the interpretation placed on the statutory scheme by the courts.

Petitioner's brief implies that the construction of §627.848 by the Second District Court of Appeal is somehow unusual or without precedent citing Pannunzio, Tate, and Judge Lehan's dissent below. To the contrary, one previous Florida decision as well as the decisions of courts in other jurisdictions have reached identical conclusions to the Second District below in construing the same or similar statutes.

In Hall v. T.C. Saffold Paving Surfaces, 397 So.2d 725 (Fla. 1st DCA 1981), the First District specifically held that an insurer could not simply rely on a request for cancellation by a finance company, and was required to prove compliance by the finance company with §627.848 in order to prevail on a cancellation defense. Hall involved an appeal from the holding of a deputy commissioner in a workers' compensation case that the insurer, American Casualty, provided coverage for an injury on the basis that American Casualty failed to prove the finance company had complied with §627.848 in requesting cancellation of the policy. The Court noted that it was the burden of the insurer asserting the defense of cancellation to prove that the finance company, in that case INAC, had complied with the premium finance cancellation statute. The Court upheld the finding of coverage because there

was no proof that INAC had complied with §627.848 or that it had a valid power of attorney from the insured. Hall directly contravenes the holding of Pannunzio as well as the construction of §627.848 urged by INA.

Other states likewise have reached the same result as the Second District below and the Court in Hall in analyzing substantively identical premium finance cancellation statutes. For example, New York has enacted a premium finance cancellation statute that is obviously derived from the same source as Florida's §627.848. See, McKinney's Laws of N.Y. Anno., Banking Law §576. (A copy of this entire statute is contained in the Appendix at pages 3-6). The preliminary paragraph of the New York statute is essentially identical to Florida's and contains the same language regarding power of attorney and that the "contract shall not be cancelled" unless the cancellation is in compliance with the statute. Both statutes contain the same ten day period for the notice of intent to cancel, and both §627.848(4) and Banking Law §576, subd. 1(d) are substantively identical in that they allow the finance company to request cancellation of the policy as if the request were submitted by the insured without further notice to the insured by the insurance carrier.

In construing the New York premium finance cancellation statute, the New York courts have consistently held that any failure by the finance company to comply with the statutory requirements renders any cancellation by the insurance carrier a nullity. In Country Wide Insurance Company v. Allstate Insurance Company, 63 A.D.2d 951, 406 N.Y.S.2d 313 (N.Y. App. 1978), the

court held that the statute was to be strictly construed and that a cancellation notice which was in smaller print than that required by the statute as well as the finance company's failure to timely serve a notice of intent to cancel rendered the subsequent cancellation of the insurance contract by the insurer a nullity. (A copy of this case is contained in the Appendix at pages 7-8). See, also, Thomas v. Government Employees Insurance Company, 61 A.D.2d 1044, 403 N.Y.S.2d 121 (N.Y. App. 1978).

Another case directly on this point which is both well-reasoned and persuasive is Grant v. State Farm Mutual Automobile Insurance Company, 159 S.E.2d 368, 1 N.C.App. 76 (1968). Grant construes a statute which is virtually identical to Florida's §627.848[1] Likewise, as in this case, the finance company did not provide the insured with the ten day notice of intent to cancel. The Court in Grant held that the burden was on the carrier to prove compliance by the finance company and that in the absence of such proof the cancellation was ineffective. The Court stated in pertinent part as follows:

> At any rate, and we so hold, the burden is upon the insurance company to show that all statutory requirements have been complied with, including the ten days written notice by the premium finance company to the insured together with said notice to the insurance agent, prior to the premium finance company requesting cancellation of the policy. We do not think this unduly burdens the insurance

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[1] The entire text of the North Carolina statute is set forth in the opinion. The only difference in the North Carolina statute is that the notice of intent must also be mailed to the insurance agent. As a practical matter, there is no difference at all since, according to the record, the insurance agents are supposed to be copied with all notices of intent and requests for cancellation. A copy of the Grant opinion is contained in the Appendix at pages 9-13.

company, for that the insurance company has received and has on hand the full premium and before making cancellation and returning any portion of the unearned premium, the insurance company can require the premium finance company to satisfy fully the insurance company that all statutory notices have been given, otherwise, the insurance company will not return any of the premium. With this ability on the part of the insurance company to use a "money talks" approach, we think the primary purpose of the law will be more fully complied with and innocent victims more adequately protected. (citations omitted). Furthermore, if the premium finance company misleads the insurance company wrongfully by requesting cancellation of the policy, the insurance company can seek redress from the premium finance company. 159 S.E.2d at 371.

Thus both the courts of North Carolina and New York have reached precisely the same conclusion as the Second District Court of Appeal below when addressing the issue presented in this case under substantively identical statutory schemes. In opposition, INA cites one United States District Court opinion from the eastern district of Pennsylvania. Thus, contrary to INA's assertions, the construction of §627.848 by the Second District Court of Appeal below is consistent of the weight of authority from other jurisdictions.[2]

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[2] Respondent has not performed a state-by-state analysis to determine what states have enacted similar premium finance statutes and, if so, whether their courts have addressed the issue presented here. The structure and language of the Florida, New York and North Carolina statutes as well as the dates of enactment (New York in 1960, Florida in 1963) suggests that the statutes are derived from some type of model legislation. From a close reading of the Appelman Treatise, 1981 Edition, cited in the text supra, it appears that a strict compliance test, i.e., the same result reached by the New York and North Carolina courts, has been applied by the courts in Massachusetts, Michigan, Georgia, Virginia, Arizona, Iowa and Louisiana.

As pointed out by the court in Grant v. State Farm, there are strong public policy considerations which should lead to the rejection of the interpretation -- and the consequences -- of the construction of §627.848 by the Pannunzio court. For example, under Pannunzio, a finance company could erroneously generate a request for cancellation on a fully paid policy without notice to the insured. The insurer could then cancel the policy without liability to -- or even the knowledge of the insured -- leaving the insured, or in the event of liability coverage, an injured third person with no recourse but to reduce the claim against the insured to judgment and then pursue an action against the finance company. Indeed, the notion that the insurer can cancel the policy regardless of the derelictions of the finance company -- aside from the fact that this flies in the face of the statutory language that "the policy shall not be cancelled" -- violates the strong public policy considerations by the courts that insurance statutes should be strictly construed in order to protect the public at large.

INA asserts that the burden placed on the insurance industry by the opinion of the Second District Court of Appeal below is somehow unfair. Cooke submits that it is both more fair and more rational to place the burden on the insurance industry as opposed to the insurance consumer or injured third parties. Again, as pointed out in Grant v. State Farm, supra, the insurance carriers have the greater economic power and are in the better posture to require a demonstration of compliance before remitting the unearned premium both to ensure compliance with the cancellation statute as well as to more adequately protect the public. It is, after all,

the insurance industry which utilizes premium finance agreements as an important vehicle to market its products, and it only seems fair that the insurance industry should bear the burden of derelictions in compliance with the statute by the finance companies. As noted by the court in Grant, the insurance carrier is not without redress and can seek recovery directly against the finance company for any losses sustained by the failure of the finance company to comply with the statute. It makes more sense to require the insurance industry to bear the burden of such litigation than to require the insured or the injured victim to seek redress solely from a finance company.

INA suggests that the Second District Court of Appeal below erred in holding that the insurance carriers have the "responsibility" for insuring compliance by the finance company with the provisions of §627.848. INA misses the point: under the Second District's opinion below, the insurance carriers are quite free to continue to disregard whether the finance companies are complying with the statute; the import of the decision is that the insurance carriers simply do so at their own peril.

Finally, INA concludes its brief by asking a number of rhetorical questions suggesting that the ruling of the Second District Court of Appeal below will unduly burden the insurance industry. INA's rhetoric is specious. All that is required is that the finance company forward, along with the request for cancellation, a copy and proof of mailing of the ten day notice of intent to cancel. This is hardly burdensome. The finance company, in any event, already mails the request for cancellation to the

carrier and it does not seem any great burden to ask them to place two more pieces of paper in the envelope. It is obvious that this is the procedure followed by prudent insurance carriers in those states which require strict compliance by the finance companies as a condition precedent to an effective cancellation of the insurance policy. INA's complaints of undue burden are without merit.

POINT II

THE SECOND DISTRICT CORRECTLY REVERSED THE DENIAL BY THE TRIAL COURT OF COOKE'S MOTION TO STRIKE.

In its amicus brief, INAC asserts that the Second District Court of Appeal committed error in reversing the denial by the trial court of Cooke's Motion to Strike a computer printout by INAC in the trial court to demonstrate its compliance with the provisions of §627.848, Fla. Stat.[3] INAC asserts that the Second District Court of Appeal erred both substantively and by exercising jurisdiction over the evidentiary issue. For the convenience of this Court, a copy of the computer printout is contained in Cooke's Appendix at page 10.

INAC's Initial Brief is replete with misstatements and inaccuracies. INAC asserts that the opinion of the Second District Court of Appeal below holds that INAC can only prove the contents and the mailing of the notice of intent to cancel by producing a copy of the notice of intent and U.S. Postal return receipts or certificates of mailing. The opinion of the Second District below does not say any such thing. It does not preclude INAC from introducing oral testimony regarding office customs or procedures; the opinion does not even address that issue. In fact, it was Mr. Ballon's affidavit testimony that the notice of intent was mailed on which the Second District upheld the denial of Cooke's Motion for Partial Summary Judgment. The Second District only noted that

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[3] It is questionable whether INA has raised this evidentiary issue in its brief. INA refers to the issue but simply adopts the brief filed by INAC in the "companion" petition for discretionary review.

it was an "odd commercial practice" that INAC did not maintain any U.S. Postal certificates of mailing, which is fair commentary in light of the fact that INA maintains such records, and in light of other cancellation statutes and prior case authorities which require such proof in order to effectuate a cancellation. See, e.g., Bankers Insurance Company v. Pannunzio, 538 So.2d 61 (Fla. 4th DCA 1989).

The Second District Court of Appeal did not err in striking the computer printout. The computer printout itself is meaningless on its face. It simply notes a date, a list of insureds, and the caption "Notices of Intent to Cancel." It is not competent and substantial evidence either as to the contents of the purported notice of intent to cancel or that the notice was mailed on the 19th day of October, 1988. Nevertheless, INAC argued in the trial court that the computer printout is a substitute -- that is, that the document itself proves the contents of and mailing of the notice -- for a copy of the contents of the notice of intent to cancel as well as proof of mailing of that document (R 358,376). The computer printout is not a duplicate of a notice of intent to cancel, and the Second District properly applied the best evidence rule to exclude the introduction of the computer printout as documentary evidence.

INAC cites a number of cases dealing generally with proof of mailing by reference to office custom or practices or the substitution of secondary duplicates for original documents. See, e.g., Boman v. State Farm Mutual Automobile Insurance Company, 505 So.2d 445 (Fla. 1st DCA 1987)(proof of office custom with respect

to computer-generated notices insufficient to sustain summary judgment for insurer); Pennsylvania National Mutual Casualty Insurance Company v. Burns, 375 So.2d 302 (Fla. 2d DCA 1979)(unsigned carbon copy is admissible in absence of original document). INAC also cites Allstate Insurance Company v. Eckert, 472 So.2d 807 (Fla. 4th DCA 1985) and Progressive American Insurance Company v. Kurtz, 518 So.2d 1339 (Fla. 5th DCA 1987), support of the proposition that it was error for the Second District to strike the computer printout. These cases address circumstances where the insured returned a renewal notice which was a tear-off of the portion of the same form advising the insured as to his rights regarding election of uninsured motorist benefits. None of these cases address the issue presented in this appeal, nor are they authority that the Second District committed error below.

INAC also complains that the Second District Court of Appeal lacked jurisdiction to review the denial of the Motion to Strike the computer printout. This contention is without merit. First, INA relied, in part, on the computer printout in support of its Motion for Summary Judgment both in the trial court and in the Second District Court of Appeal (see, R 314; Answer Brief of INA at 3). Cooke also sought review of the denial of his Motion for Partial Summary Judgment in the Second District Court of Appeal arguing that in the absence of the computer printout, there was no competent evidence to show compliance with the statute. Under both these issues, it was proper -- indeed necessary -- to review the

denial of the Motion to Strike since that issue was inextricably bound with the review of the cross-motions for summary judgment filed by INA and Cooke. Fla. R. App. P. 9.110(h); Saul v. Basse, 399 So.2d 130 (Fla. 2d DCA 1981).

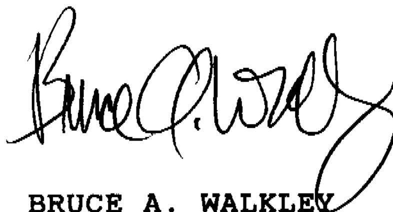
Finally, INAC was served with Cooke's Initial Brief on October 25, 1991 and has known since that time that Cooke was challenging the denial of the Motion to Strike the computer printout. INAC accordingly had ample opportunity to intervene in the proceedings before the Second District Court of Appeal, and to now imply surprise or unfair opportunity to address the issue is simply not warranted by the record.

For the foregoing reasons, the issues raised by the amicus brief of INAC are without merit and the reversal of the trial court's denial of the Motion to Strike by the Second District Court of Appeal should be affirmed.

CONCLUSION

In conclusion, the opinion of the Second District Court of Appeal below is correct both as a matter of statutory construction and as a matter of public policy. The Second District Court of Appeal correctly overturned the denial by the trial court of Cooke's Motion to Strike the computer printout. The opinion by the Second District Court of Appeal under review should be affirmed.

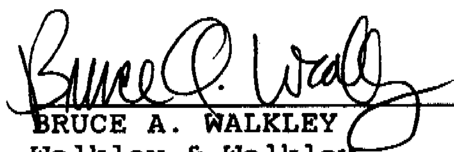
Respectfully submitted,



BRUCE A. WALKLEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to J.A. Setchel, Esquire, 201 E. Kennedy, Suite 1416, Tampa, Florida 33602-5828 and to Steven L. Brannock, Esquire, Post Office Box 1288, Tampa, Florida 33601 this 13th day of October, 1992.



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