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IN THE SUPREME COURT OF FLORIDA

CASE NOS. 80,194
80,175

INAC CORPORATION,
Petitioner,

v.

BOBBY COOKE, d/b/a
CONTINENTAL TOP SHOP,
Respondent,

and

INSURANCE COMPANY OF
NORTH AMERICA,
Petitioner,

v.

BOBBY COOKE, d/b/a
CONTINENTAL TOP SHOP,
Respondent.

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

INITIAL BRIEF OF PETITIONER INSURANCE COMPANY OF NORTH AMERICA

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STATEMENT OF THE CASE

This is an appeal from the decision of the Second District Court of Appeal wherein the Respondent, Bobby Cooke, d/b/a Continental Top Shop (hereinafter Cooke) was Appellant/Plaintiff below, and the Petitioner, Insurance Company of North America (hereinafter INA) was Appellee/co-defendant below.[1]

This litigation was commenced in the Circuit Court in and for Hillsborough County upon the Complaint of Bobby Cooke, d/b/a Continental Top Shop, as plaintiff (hereinafter referred to as Cooke), against INA (and by subsequent amendment, against INAC, Corp., the premium finance company) seeking payment under certain insurance policies for damages to property resulting from a fire that occurred on November 26, 1988. (R.1-2).

INA denied the allegations of the Complaint (and subsequent Amended Complaints) and affirmatively alleged that the policies had been cancelled prior to the date of the loss at the request of the premium finance company (INAC) in accordance with the provisions of §627.848 Fla. Stat. Ann.

INA and INAC moved for summary judgment on the ground that there was an effective cancellation pursuant to §627.848 Fla. Stat. Ann. Cooke moved for partial summary judgment against INA asserting coverage for the fire loss in part on the basis that the cancellation was not in compliance with §627.848 Fla. Stat. Ann.

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[1]INAC Corp. a premium finance company, separate and distinct from the insurer, INA, was a co-defendant in the Circuit Court proceedings, and has petitioned to join in this appeal.

and was, therefore, ineffective to cancel the insurance contracts. Cooke also moved to strike the computer printout offered by INAC in support of its position that the procedural requirements of §627.848 Fla. Stat. Ann. had been met on the grounds that it violated the best evidence rule and was not admissible to prove either the contents of or the fact of mailing of the notice of intent to cancel required by §627.848(1) Fla. Stat. Ann.

The Trial Court granted INA's motion for summary judgment, finding that INA could rely on the request for cancellation furnished to it by INAC pursuant to §§627.848(2) and (4) Fla. Stat. Ann., regardless of whether INAC had proved its compliance with §627.848(1) Fla. Stat. Ann. The Trial Court denied INAC's motion for summary judgment holding that it is disputed whether INAC mailed a valid notice of intent to cancel, and also denied Cooke's motion to strike and partial summary judgment on the coverage issue.

The Second District Court of Appeal reversed the summary final judgment of the trial court in favor of INA and against Cooke, finding that genuine issues of material fact existed with regard to whether there was compliance with the requirements set forth in §627.848 Fla. Stat. Ann. The District Court also affirmed the trial court's denial of Cooke's motion for partial summary judgment on the same issue, but reversed the trial court's denial of Cooke's motion to strike a computer printout offered by INAC, Corp., the premium finance company, to prove its compliance with §627.848 Fla.

Stat. Ann.[2] The case was remanded for further proceedings consistent with its opinion.

The Second District Court of Appeal acknowledged that its decision in this case directly conflicts with the opinion of the Fourth District Court of Appeal in Bankers Insurance Co. v. Pannunzio, 538 So. 61 (Fla. 4th D.C.A. 1989), and certified to the Supreme Court of Florida the following question:

> WHETHER SECTION 627.848 ALLOWS AN INSURER TO CANCEL AN INSURANCE CONTRACT UPON RECEIPT OF A REQUEST OF CANCELLATION SENT BY THE FINANCE COMPANY WITHOUT CONFIRMING THAT THE NOTICE REQUIREMENTS UNDER SUBSECTION (1) HAVE BEEN MET BY THE FINANCE COMPANY WHEN THERE EXISTS A POWER OF ATTORNEY IN THE FINANCE AGREEMENT?

INA's motion for rehearing and for clarification was denied. INA timely filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida and files this, its initial brief on the merits, pursuant to this Court's order postponing jurisdiction entered on July 23, 1992.

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[2] In its brief to the Second District Court of Appeal, INA challenged Cooke's apparent attempt to appeal the trial Court's non-final orders denying Cooke's Motion for Summary Judgment and denying Cooke's Motion to Strike. The propriety of the District Court's rulings on these issues is the subject of the companion appeal by INAC. INA respectfully requests to adopt INAC's argument regarding these issues and refrains from duplicating them herein.

STATEMENT OF THE FACTS

Cooke applied for premises insurance and garage insurance through Charles M. Harvey of the Harvey, Percy & Jones Insurance Agency. (R. 315). The insurance agent placed the insurance with INA, as insurer, and arranged for Cooke to obtain financing by INAC Corp., a premium financing company as defined by §627.848 Fla. Stat. Ann., to pay the premium for the two policies of insurance issued by INA.

The policies issued by INA contained the following provisions pertinent to cancellation of the policies:

> Common Policy Conditions
>
> A. Cancellation.
>
> 1. The first Named Insured shown in the Declarations may cancel this policy by mailing...to us advance written notice of cancellation.
>
> 2. We may cancel this policy by... etc.
>
> 3. We will mail our notice... etc.
>
> 5. ... If we cancel, the refund will be pro rata. If the first Named insured cancels, the refund may be less than pro rata... (R. 162)

Clearly, the policies by their terms provide for cancellation either by the insured, Cooke, or by the insurer, INA.

On July 12, 1988, Cooke entered into a premium finance agreement with the premium finance company, INAC. INAC agreed to make the premium payments to the insurer, INA. Cooke agreed to make payments to the premium finance company, INAC, according to the "Payment Schedule" contained in the agreement.

It is undisputed that pursuant to the terms of the Financing

Agreement Cooke executed a valid power of attorney to the premium financing company, INAC, in all matters pertaining to the financing or cancellation of the policies. (R. 79-80).

Cooke failed to make the first payment to the premium finance company, INAC, which was due on August 14, 1988. (R. 188). The premium finance company, INAC, generated a Notice of Intent to Cancel the insurance policies and on August 23, 1988 sent copies to Cooke and his insurance agent, Harvey, Percy & Jones. INAC's Notice of Intent to Cancel Cooke's insurance policies informed Cooke that he had 10 days to cure his default before INAC would cancel his policies.

Cooke failed to make the payment due August 14, 1988, within the time specified by INAC's Notice of Intent to Cancel. Therefore, according to INAC, on September 7, 1988, INAC sent to the insured, Cooke, his insurance agent, Harvey, Percy & Jones, and the insurer, INA, a request for cancellation which requested that Cooke's policies of insurance be cancelled effective September 11, 1988. (R. 188). The insurer, INA, received its copy of the aforementioned request from INAC on September 13, 1988. (R. 197).

On September 14, 1988, Cooke delivered to the premium finance company, INAC, a check for $416.00, representing the payments due in August and September, 1988, under the Agreement. INAC, on September 15, 1988, sent to the insurer, INA a Request for Reinstatement, a copy of which was also furnished to Cooke, wherein INAC requested on Cooke's behalf that the insurer, INA, reinstate the cancelled insurance policies. (R. 189).

The insurer, INA, received the Request for Reinstatement of

Cooke's policies from the premium finance company, INAC, on September 19, 1988. On September 20 and September 28, 1988, respectively, INA reinstated the policies as requested by INAC. (R. 189).

Cooke again failed to make the premium finance payment due on October 14, 1988. The premium finance company, INAC, contends that on November 4, 1988, it sent to Cooke and the insurance agent a Notice of Intent to Cancel. In support of its Motion for Summary Judgment, INAC filed with the trial court the Affidavit of Robert Ballon together with a copy of INAC's Notice of Intent to Cancel Report, that being a computer printout was attached thereto as Exhibit "B." INAC contends that the report confirms that INAC mailed its Notice of its Intent to Cancel to Cooke at the address contained in the Premium Finance Agreement. (R. 189). According to the Affidavit of Bobby Cooke and Lillian Cooke, filed by Cooke either in support of Cooke's Motion for Partial Summary Judgment, or in opposition to the separate and respective motions of INAC and INA for summary judgments, Cooke denied receiving a copy of that notice. (R. 220). In any event, on November 7, 1988, the insurer, INA, received another request for cancellation from the premium finance company, INAC, requesting that Cooke's policies be cancelled because Cooke had failed to meet his payment obligations. A copy of the request received by INA from INAC was presented to the trial court as Exhibit "A" to the Affidavit of Lynn Damewood, filed by INA in support of its Motion for Summary Judgment. (R. 198, 200).

On November 8, 1988, the insurer, INA, as a result of its

receipt of the premium finance company's request for cancellation, sent its own cancellation notices to Cooke, Cooke's insurance agent, Harvey, Percy & Jones, and Cooke's loss payee, Dorothy Keszka. Copies of the cancellation notices, containing cancellation dates of November 21, 1988 for policy number D1 93 48 490, and November 23, 1988, for policy number GAR 44 70 51, together with INA's certificate of mailing and the Post Office's receipt dated November 8, 1988, pertaining to the mailing of the cancellation notices to Cooke and to Cooke's loss payee, were filed with the trial court by INA in support of its Motion for Summary Judgment. (R. 198-204).

On November 16, 1988, Cooke delivered to the premium finance company, INAC, a check in the amount of $416.00, representing payments due from Cooke to INAC in October and November, 1988. (R. 190).

On November 17, 1988, the premium finance company, INAC, sent to the insurer, INA, a request on behalf of Cooke that the insurer reinstate the cancelled policies. (R. 190). INA received the request for reinstatement on November 20, 1988, but because the November, 1988 cancellation represented the second cancellation of the polices, the insurer declined the reinstatement request. (R. 198). Cooke sustained a fire loss on the premises on November 26, 1988.

The premium finance company, INAC, did not produce any evidence or record showing proof of mailing other than Ballon's Affidavit with the computer printout attached thereto as Exhibit "B", in support of its Motion for Summary Judgment. INAC did

retain, and produced as support for its Motion for Summary Judgment, a copy of its November 4, 1988, request for cancellation. (R. 197).

Although Cooke, by his aforementioned Affidavit, (R. 218) denied receiving any document entitled "Notice of Intent to Cancel," there was undisputed evidence before the trial court that Cooke had actual knowledge that his policies had been cancelled by reason of his failure to pay to INAC the required monthly payment when they became due. That undisputed evidence was contained in a copy of the telephone log of the agent Harvey, submitted by Cooke. (R. 252-253). The record was included in papers filed with the trial court by Cooke as an attachment to his "Notice of Filing" (R. 220) on July 19, 1991. The Harvey, Percy records also contain copies of all the requests and notices of cancellation from both INAC and INA from the September and November cancellations.

SUMMARY OF THE ARGUMENT

Cooke himself, via his duly appointed Attorney-in-Fact, requested that INA cancel both insurance contracts in question prior to the fire loss. Section 627.848 Fla. Stat. Ann., which governs cancellation of financed insurance contracts, requires no affirmative action on the part of an insurer vis-a-vis the insured in order for a cancellation requested by a premium finance company to be effective. Even assuming that the premium finance company failed to give Cooke proper notice of the intended cancellation, the finance company, rather than the insurer, properly bears the burden for its failure to comply with §627.848 Fla. Stat. Ann.

ARGUMENT

A.

CANCELLATION OF A POLICY OF INSURANCE BY THE ATTORNEY-IN-FACT FOR THE INSURED IS THE SAME AS CANCELLATION BY THE INSURED HIMSELF.

Pursuant to the terms of the Financing Agreement entered into by the insured, Cooke, and the premium finance company, INAC, Cooke executed a power of attorney which appointed INAC as Cooke's attorney-in-fact. According to the terms of that agreement, the premium finance company, INAC, was empowered to act as Cooke's agent in matters pertaining to the cancellation of the insurance policies, or to request the reinstatement of the policies of insurance issued by the insurer, INA. The term "power of attorney" has taken on a distinctive meaning in legal parlance and refers to an instrument authorizing another to act as one's agent or attorney in fact. Hodges v. Surratt, 366 So.2d 768, 773 (Fla. 2nd DCA 1978). A written power of attorney is a contract to be interpreted as a matter of law. The unambiguous language defining INAC's power to act for its principal, Cooke, leaves no issue of fact as to the agent's authority. St. Gaudens v. Southeast Bank, N.A., 559 So.2d 1259, 1260, 1261 (Fla. 3rd DCA 1990). The primary purpose of a power of attorney is not to define the authority of the agent as between himself and his principal, but to evidence the authority of the agent to third parties with whom the principal deals. 2 Fla.Jur.2d; Agency and Employment; Powers of Attorney, §17, pp. 160-161.

When the premium finance company, INAC, cancelled the insurance policy, that cancellation was, as a matter of law, the act of Cooke because the principal, Cooke, was responsible for the acts of his agent, INAC. Benson v. Seestrom, 409 So.2d 172, 173 (Fla. 2nd DCA 1982). An act done by an agent on behalf of the principal within the scope of the agency is not the act of the agent but of the person by whose direction it is done. Johnson v. Estate of Fraedrich, 472 So.2d 1266, 1268 (Fla. 1st DCA 1985).

In this case, as noted in the opinion of the Second District Court of Appeal in this matter, it is undisputed that:

(a) Cooke executed a valid power of attorney to the premium finance company, INAC, in all matters pertaining to the financing or cancellation of the policies;

(b) On November 4, 1988, the premium finance company, INAC, requested that the insurer, INA, cancel Cooke's policies as of November 8, 1988;

(c) The insurer, INA, upon receipt of the request for cancellation from the premium finance company, INAC, sent notices to Cooke that the premises and garage policies were cancelled effective November 21 and 23, 1988, respectively.

(d) The insurer, INA, denied the request made by the premium finance company, INAC, that the policies be reinstated.

As is clearly set forth in the Common Policy Conditions section of the insurance policy contract between the insured Cooke and the insurer, INA, Cooke had the right to cancel the insurance policies by giving written notice to the insurer. It is clear from the Financing Agreement that Cooke appointed the premium finance

company, INAC, to act as his agent and attorney-in-fact, and on his behalf, in matters concerning cancellation of the policies.

The premium finance company, INAC, as Cooke's agent and attorney-in-fact, cancelled the policies, and gave written notice thereof to the insurer, INA. Therefore, that cancellation was equivalent to a cancellation by the insured himself, at least from the insurer's perspective. Tate v. Hamilton Ins. Co., 466 So.2d 1205, 1206 (Fla. 3rd DCA 1985); §627.848(4) Fla. Stat. Ann.

The insurer, INA, was not required by §627.848 Fla. Stat. Ann., to give notice to Cooke of Cooke's own cancellation of the policies. Section 627.848(4) Fla. Stat. Ann. provides that:

> Upon receipt of a copy of the cancellation notice by the insurer or insurers, the insurance contract shall be cancelled with the same force and effect as if the notice of cancellation had been submitted by the insured himself, without requiring any further notice to the insured or the return of the insurance contract.

Although not required by §627.848(4) Fla. Stat. Ann., to give any further notice to the insured, Cooke, the insurer, INA, sent notice of cancellation to Cooke, Cooke's insurance agent, Harvey, and the loss payee named in the policy, as required by §627.848(5), Fla. Stat. Ann.

The legislative enactment of §627.848 Fla. Stat. Ann., did not change the existing legal principles concerning powers of attorney or the principal/agent relationships created by them. Those legal principles were recognized and applied in the Florida cases upon which the Petitioner, INA, has relied. Those cases are cited with approval in the dissent to the majority opinion of the Second District Court of Appeal, as controlling regarding the

requirements set forth in §627.848 Fla. Stat. Ann.

The majority of the Second District Court has apparently misunderstood the insurer INA's reliance on Tate v. Hamilton Insurance Co., supra, in support of INA's position. INA's position is not that "it may cancel an insurance contract regardless whether the finance company has complied with section 627.848(1)", as stated by the majority's opinion. Rather, INA's position is that upon receipt of a copy of the request for cancellation from the premium finance company, the insurer INA must consider the insurance policy cancelled with the same force and effect as if the notice had been submitted by the insured himself, Cooke.

Section 627.848(4) Fla. Stat. Ann., did not require the insurer, INA, to perform any further act to cancel Cooke's policies. The request for cancellation INA received from the premium finance company advised the insurer that the policy was cancelled by the insured, Cooke. Thereupon, the insurer INA was only required to determine and calculate the effective date of cancellation from the day it received the copy of request for cancellation from the premium finance company, as provided by §627.848(5) Fla. Stat. Ann., and return any unearned premium to the premium finance company to be first applied to the unpaid balance due from Cooke to the premium finance company. Any remaining unearned premium was to be returned to the agent or the insured, for the benefit of the insured, as provided by §627.848(6) Fla. Stat. Ann., and as required by the Common Policy Provisions of the insurance contract.

The Second District Court found that Tate, supra, presented

a situation different from that presented by the instant case for the reason that the Tate court did not review the lower court's judgment in favor of the finance company, and judgment was entered only against the insurer, while in the instant case a summary judgment was entered in favor of the insurer. The Second District Court finds a distinction between Tate and the instant case that makes no meaningful difference.

Tate v. Hamilton Ins. Co., 466 So.2d 1205 (Fla. 3rd DCA 1985) was presented to the Third District Court of Appeal on an appeal by Tate which was treated as a petition for writ of certiorari. The petitioner, Tate, sought review of an opinion by the Circuit Court, sitting in its appellate capacity, which reversed a county court judgment in favor of Tate, (the insured) and Capitol Premium Plan, Inc. (a premium finance company), and against Hamilton Insurance Company, (the insurer).

Tate purchased an insurance policy from the Hamilton Insurance Company (Hamilton). He financed the premium with a premium finance company, Capitol. Tate designated Capitol as his attorney-in-fact and gave Capitol the power to cancel the policy in the event of default. Tate failed to make a required payment to Capitol. Thereupon Capitol sent Tate a notice of its intent to cancel the policy unless a payment was made within ten days. Although Tate's payment crossed in the mail with that notice and was apparently timely, Capitol sent to the insurer, Hamilton, a request that Tate's policy be cancelled effective December 23, 1981. Hamilton received the notice on December 24, and as directed by Tate's attorney-in-fact, Capitol, cancelled the policy effective that

date. Tate was involved in an accident on December 31, 1981; his claim for insurance benefits was denied by Hamilton.

In the county court, Tate, the insured, claimed that the insurer, Hamilton, failed to give him the notice required by §627.728 Fla. Stat. Ann. (1981). The circuit court, by its review of the county court's judgment, noted that §627.728 Fla. Stat. Ann. (1981) defined "policy" so as to exclude the collision and comprehensive loss coverage to which Tate claimed he was entitled. The circuit court reversed the judgment in of favor Tate, holding that the duty to notify an insured to give notice that his policy has been cancelled for failure to pay the premium belongs to the premium finance company. The Third District Court approved that holding. Tate, supra, 1206.

The Third District Court expressed the view that the amended version of §627.728 Fla. Stat. Ann., that being §768.728(3)(c) Fla. Stat. Ann. (1983) would not apply in cases where the premium has been financed and the premium finance company has complied with the notice provisions of §627.848 Fla. Stat. Ann.

After considering the provisions of §627.848 Fla. Stat. Ann., as to the requirements for notice to the insured, the Third District Court of Appeal held that the statute only requires the premium finance company to mail the insured a ten day notice of its intent to cancel upon default, and also to mail the insured a copy of the request for cancellation when it sends the request to the insurer. The burden is thereby placed on the finance company to notify the insured of any cancellation, rather than on the insurer.

The Third District Court of Appeal went on to say:

> As noted in Prudential Property & Casualty Co. v. Safeguard Mutual Insurance Co., 528 F. Supp. 709 (E.D.Pa., 1981),...placing the burden on the finance company to notify the insured is both logical and fair. Where the finance company is named as attorney-in-fact for the insured, a cancellation by the finance company is equivalent to a cancellation by the insured himself, at least from the insurer's perspective. The onus is thus properly placed on the finance company to notify the insured that it has cancelled the policy on his behalf. See also J. Appelman, Insurance Law and Practice §5012 n.1, at 407 (1981).
>
> Tate, supra, at 1206.

In Prudential, supra, an insurance policy was purportedly cancelled by the insured's agent acting under a valid power of attorney obtained from the insured as part of a plan for the financing of premium payments. A Pennsylvania statute provides that if an insurer cancels a policy for non-payment of premiums, fifteen (15) days notice to the insured is required. The question presented was whether that same notice is mandated when the policy is cancelled by the insured's finance company acting for him. The District Judge determined that such notice was not required, and granted summary judgment to the insurer, Safeguard. After discussing Florida law, including §627.848 Fla. Stat. Ann., the District Judge held:

> The case before me simply presents a problem of agency law. Sterling (the premium finance company) acted within the power Parker (the insured) granted it and therefore, Sterling's actions are deemed to be Parker's. Because it was the insured rather than the insurer who initiated the cancellation, the statutory notice provisions relating to cancellation by an insurer are not applicable...

Tate, supra, was cited and followed by the Fourth District

Court of Appeal in Bankers Ins. Co. v. Pannunzio, 538 So.2d 61, 62 (Fla. 4th DCA 1989); rehearing denied March 8, 1989.

Pannunzio purchased PIP coverage through his agent, Wikberg, and made application to a premium finance company to finance the premium. Pannunzio defaulted in his payments, and his policy was cancelled by the premium finance company. Thereafter, Pannunzio had an accident.

Apparently the premium finance company alleged that it had sent Pannunzio a notice of Intent to Cancel to which Pannunzio did not respond. The premium finance company did send a Request for Cancellation to a managing agent of the insurer. The agent had authority to receive requests and cancel policies. Bankers introduced a "United States Postal Service Certificate of Mailing" showing that the "Notice of Intent" was mailed to the insured. The Fourth District held that the "Certificate" prevailed, as a matter of law, over the insured's self-serving denial of receiving it and other mailings.

The Fourth District Court of Appeal held that the alleged failure of the insured to receive a copy of the Request for Cancellation mailed to the insurer by the premium finance company did not affect the validity of the cancellation. The "request" is simply confirmation to the insurer from the finance company that the insured has not reinstated the loan by payment. Thus, the policy is cancelled. Furthermore, the finance company, not the insurer, bears the onus for failing to give the insured notice and the insured may not recover from the insurer for failure of the finance company to comply with the statute. Pannunzio, supra, 62.

The instant case presents a problem of agency law. Cooke desired to purchase insurance from INA. For reasons of his own he applied to the premium finance company, INAC, to finance the payment of his premium to the insurer INA. The premium finance company INAC agreed to pay the entire amount of the premium to the insurer, INA, and did so on behalf of Cooke. Thereafter, the insurer, INA, was not entitled to any further payment from Cooke.

Cooke, by the Common Policy Conditions of the policies issued by the insurer, INA, as the Named Insured, had the right to cancel the policies at any time during the policy period by giving the insurer advance written notice of cancellation. If Cooke cancelled the policy he would be entitled to a refund of unearned premium. According the Premium Finance Agreement between Cooke and the premium finance company, INAC, Cooke appointed INAC as his agent, or attorney-in-fact, and, as security, assigned to INAC all unearned premiums. Cooke agreed to repay the premium finance company according to the schedule contained in the Finance Agreement. The Finance Agreement clearly stated that if Cooke did not meet his obligations as set forth in the Finance Agreement the finance company could then cancel the insurance policies. Cooke did not meet his obligation.

Although the insurer, INA, was not a party to the Finance Agreement between Cooke and the finance company, INAC, the power of attorney set forth in the Finance Agreement was evidence to the insurer, INA, of the authority of the premium finance company, INAC, to act as Cooke's agent. Any act by the finance company as to the cancellation of the insurance policies was, as a matter of

law, the act of Cooke. Therefore, when the insurer INA received written notice from Cooke's agent and attorney-in-fact that the policies were cancelled, the insurer was required to honor that cancellation and refund the unearned premium to Cooke's attorney-in-fact, INAC. The cancellation of the insurance policies by Cooke's attorney-in-fact was cancellation by the insured, Cooke, and not by the insurer, INA.

In this case the Second District Court, in its discussion of the Third District's holding in Tate, the majority opinion stated:

> The third district did not indicate that the insurer was free to cancel an insurance contract without first confirming that compliance with section 627.848(1) has been accomplished by the finance company.

Such observation by the Second District Court is irrelevant in the instant case. In this case the insurer, INA, did not initiate or effect a cancellation of Cooke's insurance policies. The insurer, INA, did receive from the premium finance company the request for cancellation required by §627.848(2) Fla. Stat. Ann. That request, as far as the insurer, INA, was concerned, was a request by the insured himself, Cooke. The insurer, INA, was not required to question whether the premium finance company had complied with §627.848(1) Fla. Stat. Ann. The onus for failing to give notice of the cancellation to Cooke, if indeed it was not given, was on the premium finance company, INAC. The Fourth District Court in Pannunzio and the Third District Court in Tate correctly applied fundamental principles of agency law in reaching decisions on essentially the same facts as those presented in the instant case.

B.

THE SECOND DISTRICT COURT OF APPEALS ERRONEOUSLY DECIDED THAT §627.848 REQUIRES AN INSURER TO HAVE KNOWLEDGE THAT THE PREMIUM FINANCE COMPANY HAS TAKEN EACH STEP REQUIRED BY §627.848(1) BEFORE THE INSURER CAN ACCEPT AND HONOR CANCELLATION OF THE INSURANCE POLICIES BY THE PREMIUM FINANCE COMPANY AS ATTORNEY-IN-FACT FOR THE INSURED

The majority opinion of the Second District Court of Appeal erroneously assumes that the insurer, INA, cancelled the policies, when, as a matter of law, the cancellation of the policies was by Cooke, by and through his attorney-in-fact the premium finance company, INAC.

Judge Lehan, in his dissent from the reversal as to INA, properly concluded that the insured, Cooke, cancelled the policies albeit through the premium finance company pursuant to the power of attorney granted by Cooke. Judge Lehan reached his conclusion after a careful analysis of §627.848 Fla. Stat. Ann.

In analyzing or construing §627.848 Fla. Stat. Ann., it is necessary to consider its purpose. This section is part of the Insurance Code, Part XV, Premium Finance Companies And Agreements, §627.826, et seq., Fla. Stat. Ann. It is readily apparent from a reading of Part XV, that it is concerned only with acts by premium finance companies pursuant to premium finance agreements wherein the insured and the premium finance company are parties to the agreement. Premium financing by means other than by a premium finance company, as by an insurer, and cancellation by an insurer for non-payment of premium in those instances, are considered

elsewhere in the statutes, but not in Part XV of the Insurance Code.

Section 627.848 Fla. Stat. Ann. states that:

> When a premium finance agreement contains a power of attorney or other authority enabling the premium finance company to cancel any insurance contract listed in the agreement, the insurance contract shall not be canceled unless cancellation is in accordance with the following provisions:
>
> > (1) Not less than 10 days written notice shall be mailed to each insured shown on the premium finance agreement of the intent of the premium finance company to cancel his insurance contract unless the defaulted payment is received within 10 days.
> >
> > (2) After the expiration of such period, the premium finance company shall mail to the insurer a request for cancellation, specifying the effective date of cancellation....

The majority opinion of the Second District has found a "plain meaning" of the language in §627.848 Fla. Stat. Ann. that was not apparent to the Fourth District in Pannunzio, supra, or the Third District Court in Tate, supra, or to Judge Lehan in this case. According to the interpretation of §627.848 Fla. Stat. Ann. by the majority opinion, the introductory paragraph to §627.848 Fla. Stat. Ann. should read

> When a premium finance agreement contains a power of attorney or other authority enabling the premium finance company to cancel any insurance contract listed in the agreement, the insurance contract shall not be canceled **(BY THE INSURANCE CARRIER)** unless cancellation is in accordance with the following provisions: (emphasis added)

Such an interpretation makes little sense in the context of

this section which is clearly aimed at regulating finance companies and to protect insureds against finance companies who might unfairly exercise their power to cancel. As is stated by Judge Lehan in his dissent:

> The words **"by the premium finance company"** are plainly intended to follow implicitly after the words 'shall not be cancelled' in that provision inasmuch as earlier in the same sentence the provision refers to the ability of the premium finance company to cancel.... (emphasis added)

The construction given to §627.848 Fla. Stat. Ann. by the majority opinion would require the insurer to disregard any request for cancellation made by an insured through his duly appointed attorney-in-fact unless, by some means not suggested by the Court's opinion, the insurer ascertains for itself that the premium finance company has taken each step required of it by §627.848 Fla. Stat. Ann. Apparently, in the view of the majority of the Court, the insurer can no longer comply with the requirements of §627.848(4) Fla. Stat. Ann. and determine that upon receipt by the insurer of a copy of a cancellation notice mailed to the insurer by the premium finance company, the insurance contract is cancelled as of the date specified by the premium finance company's notice as if the notice of cancellation had been submitted by the insured himself.

According to its interpretation of §627.848 Fla. Stat. Ann., the Second District Court would require that insurers, non-parties to finance agreements between finance companies and insureds, maintain relationships with finance companies such that insurers are able to monitor compliance with the finance contract and

compliance by finance companies with statutory requirements regarding cancellation. Such a construction of §627.848 Fla. Stat. Ann. would likely stifle premium financing thereby making adequate insurance unavailable for many insureds and would raise many difficult questions regarding an insurance carrier's obligations prior to cancellation. For example, before complying with a request for cancellation sent by a premium finance company:

1. Would the insurer be required to inquire of the insured directly regarding to whether or not the insured made his payments to the finance company as required by the finance agreement?

a) If a dispute exists between the insured and the finance company as to whether the payments were made, would the insurer be required to resolve the dispute, and, if so, by what means?

2. Would an insurer be required to keep separate records of payments by the insured to the finance company?

3. Would an insurer be required to make a direct inquiry of the insured to verify or confirm a statement by the finance company that it gave notice of cancellation to the insured?

a) What assumptions, if any, would the insurer be permitted to make if the finance company provides a certificate of mailing a notice to the insured, but the insured denies receiving the notice?

(1) Would the insurer be required to determine that the certificate of mailing is genuine; or

(2) that the notice was sent to the last known address of the insured, or

(3) If an address is represented to be the last address known to the finance company, is the address truly the last known address of the insured, or a misrepresentation by the finance company?

In enacting §627.848 Fla. Stat. Ann. to regulate finance companies who possess the power to cancel insurance on behalf of insureds, the Legislature surely did not intend to place burdensome supervisory requirements upon insurers who do business with finance companies. A fair reading of §627.848 Fla. Stat. Ann. clearly permits insurers to rely upon powers of attorney contained in financing agreements as being valid instruments authorizing premium finance companies to act as agents or attorneys-in-fact for insureds with regard to cancellation for noncompliance with the finance agreement.

CONCLUSION

In response to the question certified by the Second District Court of Appeal, this Court should determine that §627.848 Fla. Stat. Ann., requires an insurer to cancel an insurance contract upon receipt of a request for cancellation sent by a premium finance company when the premium financing agreement with the insured contains a power of attorney, and the insurer should not be required to confirm by means other than by receipt of the request for cancellation or notice of cancellation by the premium finance company, that the premium finance company has met the requirements of §627.848(1) Fla. Stat. Ann. For the foregoing

reasons, INA respectfully requests that this Court reverse the Second District Court of Appeal's decision reversing summary judgment granted in favor of INA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by United States Mail on this the 8th day of September, 1992, to Bruce A. Walkley, Esquire, 202 Moody Avenue S., Tampa, Florida 33609 and Steven L. Brannock, Esquire, Post Office Box 1288, Tampa, Florida 33601.

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