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SUPREME COURT OF FLORIDA

FEDERAL DEPOSIT INSURANCE  
CORP.,

Case No. 82,495

Appellant,

Certified by the United States Court  
of Appeals for the Eleventh Circuit

vs.

VEREX ASSURANCE, INC.

Appellee.

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**APPELLEE'S ANSWER BRIEF**

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**STATEMENT OF THE CASE**

1. Statement Of The Case

Verex Assurance, Inc. ("Verex") accepts appellant's statement of the proceedings below, as well as appellant's statement of the facts, which were stipulated to by the parties below.

## SUMMARY OF ARGUMENT

In what it characterized as a case between two "innocent" parties, the United States District Court for the Southern District of Florida ("District Court") held that under Florida law, prior to October 1, 1983, the mortgagee, rather than the mortgagee's insurer, had to bear the loss from defaults by mortgagors who made material misrepresentations in loan applications. The District Court applied § 627.409, Fla. Stat., which protects an insurer from material misrepresentations in an application for insurance, even those innocently made by an insured. In so ruling, the District Court determined that prior to the enactment of § 635.091, Fla. Stat., effective October 1, 1983, § 627.409 applied to mortgage guaranty insurance. On appeal, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") noted that the controlling question of whether § 627.409 applied to mortgage guaranty insurance prior to the enactment of § 635.091 was an unresolved question of Florida law and certified the question to the Florida Supreme Court.

The District Court correctly held that § 627.409 applied to mortgage guaranty insurance prior to the enactment of § 635.091, based upon the statutory scheme of Florida's Insurance Code and the legislative history of § 635.091. The FDIC's argument that the enactment of § 635.091 merely clarified all of the Insurance Code provisions which already applied to mortgage guaranty insurance through § 635.051 and § 635.081 cannot be reconciled with the statutory scheme of Florida's Insurance Code or the legislative history of § 635.091.

The statutory scheme of Florida's Insurance Code supports the District Court's conclusion that § 627.409 applied to mortgage guaranty insurance contracts prior to the enactment of § 635.091. Section 627.401, titled "Scope of this part," lists the types of insurance which are not covered by Chapter 627, Part II. Mortgage guaranty insurance is not listed among the types

of insurance not covered by Chapter 627, Part II. As the District Court noted, under the rule of expressio unis est exclusio alterius, mortgage guaranty insurance would appear to be covered by Chapter 627, and hence § 627.409. Also, if § 635.091 merely clarified those provisions of the Florida Insurance Code which already applied to mortgage guaranty insurance, as the FDIC argues, it was unnecessary for the legislature to amend certain statutory provisions not listed in § 635.091 to specifically exempt mortgage guaranty insurers from their scope years after the enactment of § 635.091. Since it is never presumed that the legislature intends to enact purposeless or useless legislation, these statutory provisions not listed in § 635.091 must have applied to mortgage guaranty insurance prior to their amendments, thus serving to refute the FDIC's argument.

The legislative history of § 635.091, as revealed by the reports of both the Florida House and Senate Committees on Commerce, also demonstrates that by enacting Chapter 635 the Florida Legislature only intended to impose "additional limitations" on mortgage guaranty insurers in addition to the provisions of the Insurance Code applicable to casualty and surety insurers. This is demonstrated by references in the legislative history to numerous provisions of the Insurance Code, not enumerated in § 635.091, with which mortgage guaranty insurers must comply.

Finally, the FDIC's argument that the holding, reasoning and analysis in Home Guaranty Insurance Corp. v. Numerica Financial Services, Inc., 835 F.2d 1354 (11th Cir. 1988), apply to the facts in the present case is without foundation. Numerica never reached the issue presented to this Court, which is why the Eleventh Circuit has certified the question in this case to the Florida Supreme Court.



## ARGUMENT

I. PRIOR TO THE ENACTMENT OF FLORIDA STATUTE § 635.091, EFFECTIVE OCTOBER 1, 1983, FLORIDA STATUTE § 627.409 APPLIED TO MORTGAGE GUARANTY INSURANCE.

Mortgage guaranty insurance is defined as a form of casualty or surety insurance insuring lenders against financial loss due to nonpayment of an indebtedness which is secured by a mortgage, deed of trust, or other lien on real estate. § 635.011(1)(a), Fla. Stat. (1985). Since 1959, mortgage guaranty insurers have been governed by a separate chapter of the Florida Statutes, Chapter 635, titled Mortgage Guaranty Insurance.<sup>1</sup> Chapter 635 provides the definitions and operational guidelines for mortgage guaranty insurers and their agents and imposes limitations on mortgage guaranty insurance "in addition to the provisions of the Insurance Code generally applicable to casualty and surety insurers." Staff Summary and Analysis of Chapter 635, Fla. H.R. Comm. on Commerce, p. 2 (Dec. 21, 1982) ("House Analysis").<sup>2</sup>

In Florida, insurers are protected by statute from material misrepresentations made by an insured in an application for insurance. Under such circumstances, recovery under the

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<sup>1</sup> Chapters 624 through 632, 634, 635, 637, 639, 641, 642, 648, and 651 presently constitute the Florida Insurance Code. § 624.01, Fla. Stat. (1991). Prior to 1991, Chapter 635 was not among the chapters enumerated in § 624.01.

<sup>2</sup> A copy of the House Analysis is included in the accompanying Appendix as Exhibit "A".

policy is precluded. § 627.409, Fla. Stat. (1991).<sup>3</sup> The scope of protection provided by § 627.409 covers many types of insurance, including casualty and surety insurance. Although mortgage guaranty insurance is defined as a form of casualty or surety insurance, Chapter 635 does not contain a provision like § 627.409, to expressly protect mortgage guaranty insurers from material misstatements made by an insured. For many years, this proved to be of little consequence since the courts that addressed the issue held that § 627.409 applied to mortgage guaranty insurers. See United Guarantee Residential Ins. Corp. v. American Pioneer Sav. Bank, 655 F. Supp. 165 (S.D. Fla. 1987); Continental Mortgage Ins. Inc. v. Empire Home Loans, Inc., No. 75-1099-CIV-JLK (S.D. Fla. Nov. 26, 1975).

Effective October 1, 1983, § 635.091 was added to chapter 635, providing as follows:

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<sup>3</sup> Section 627.409, Fla. Stat. (1991) provides in pertinent part as follows:

(1) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:

(a) They are fraudulent;

(b) They are material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(c) The insurer in good faith would either not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

The following provisions of the Florida Insurance Code apply to mortgage guaranty insurers: Chapter 624; Chapter 625; s. 627.915; Chapter 628; and Chapter 631.

In Home Guaranty Insurance Corp. v. Numerica Financial Services, Inc., 835 F.2d 1354 (11th Cir. 1988) ("Numerica"), the Eleventh Circuit held that § 627.409 does not apply to mortgage guaranty insurance contracts entered into after October 1, 1983, because § 627.409 is not expressly incorporated into § 635.091. Numerica did not reach the issue of whether § 627.409 applied to mortgage guaranty insurance issued prior to the enactment of § 635.091.

The issue of whether § 627.409 applied to mortgage guaranty insurance issued prior to the enactment of § 635.091, effective October 1, 1983, was addressed by the District Court below in FDIC v. Verex Assurance Inc., 795 F. Supp. 404 (S.D. Fla. 1992). In granting summary judgment in favor of Verex, the District Court held that prior to October 1, 1983 § 627.409 did apply to mortgage guaranty insurance and that "the enactment of Section 635.091 constituted an implied repeal of Section 627.409, as it applies to mortgage guaranty insurance." Id. at 407. On appeal, the Eleventh Circuit certified to the Florida Supreme Court the controlling question of whether Fla. Stat. §627.409 applied to mortgage guaranty insurance prior to the enactment of Fla. Stat. § 635.091 on October 1, 1983. The District Court's decision finding that § 627.409 did apply to mortgage guaranty insurance prior to the enactment of § 635.091 is fully supported by the statutory scheme of the Florida Insurance Code and the legislative history of § 635.091.

A. The Statutory Scheme Of Florida's Insurance Code Demonstrates That § 627.409 Applied To Mortgage Guaranty Insurance Prior To The Enactment of § 635.091.

Like all statutes, § 635.091 cannot be read in isolation. It must be read and construed as a part of Florida's statutory scheme regulating insurance. City of Boca Raton v.

Gidman, 440 So. 2d 1277 (Fla. 1983); FTC v. Manager, Retail Credit Co., 515 F.2d 988 (D.C. Cir. 1975); Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So. 2d 522 (Fla. 1973). Consistency and harmony are of prime importance in construing statutes, and § 635.091 should not be construed in a way which creates conflict with other provisions of Florida's Insurance Code. Gidman, 440 So. 2d at 1282. City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422 (Fla. 4th DCA 1972). The statutory scheme of Florida's Insurance Code thus demonstrates that § 627.409 applied to mortgage guaranty insurance prior to the enactment of § 635.091, effective October 1, 1983.

Chapter 627, Part II contains all requirements and regulations governing insurance contracts in Florida. Section 627.401, which defines the scope of Chapter 627, Part II wherein § 627.409 is found, expressly excludes from its regulations only certain types of insurance contracts.<sup>4</sup> Neither mortgage guaranty insurance, casualty insurance, nor surety insurance is listed as types of insurance contracts excluded from Chapter 627, Part II by § 627.401. The District Court found that the failure to include mortgage guaranty insurance among those types of insurance not covered by Chapter 627, Part II "supported" its conclusion that § 627.409 applied to mortgage guaranty insurance contracts issued prior to the enactment of § 635.091. Verex, 795

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<sup>4</sup> Florida Statute § 627.401 provides as follows:

No provision of this part of this Chapter applies to:

- (1) Reinsurance.
- (2) Policies or contracts not issued for delivery in this state, except as otherwise provided in this code.
- (3) Wet marine and transportation insurance, except §§ 627.409, 627.420, and 627.428.
- (4) Title insurance, except §§ 627.406, 627.416, 627.419, 627.427, and 627.428.
- (5) Credit life or disability insurance, except §§ 627.419(5) and 627.428.

F. Supp. at 407. In reaching its decision on the applicability of § 627.409 to mortgage guaranty insurance, the District Court observed that "mortgage guaranty insurance is not listed among those types of insurance not covered by Chapter 627. Under the rule of 'expressio unius est exclusio alterius,' therefore, mortgage guaranty insurance would appear to be covered by Chapter 627, and hence Section 627.409." Id. at 407. Indeed, finding otherwise would effectively rewrite § 627.401 to create a new exclusion for mortgage guaranty insurance from the requirements imposed by Chapter 627, Part II. Conspicuously absent from the FDIC's brief is any mention, let alone any discussion or analysis of § 627.401. The reason for this absence is that the FDIC's argument simply cannot be reconciled with § 627.401 and other statutory provisions within the Florida Insurance Code.

Further support for the District Court's ruling is demonstrated by the enactment of § 627.4145 in 1982. Section 627.4145 requires that every insurance policy written in Florida pass the Flesch test which evaluates the readability of the policy. This statute was enacted to protect insurance consumers from complex and misleading policy language. Since § 627.4145, like all other provisions of Chapter 627, Part II, applied to all types of insurance (other than those specifically exempted by § 627.401), it also applied to mortgage guaranty insurance policies. Final Staff Summary of HB 822, Fla. H.R. Comm. on Commerce, p. 2 (June 25, 1984) ("H.B. 822 Analysis"); Staff Summary of Chapter 635, Fla. Senate Comm. on Commerce, p. 25 (Dec. 1982) ("Senate Analysis").<sup>5</sup> In fact, the H.B. 822 Analysis expressly states that "Mortgage guaranty insurance . . . is presently subject to the requirements of [627.4145]." H.B. 822

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<sup>5</sup> A copy of the H.B. 822 Analysis is included in the accompanying Appendix as Exhibit "B" and a copy of the Senate Analysis is included in the Appendix as Exhibit "C".

Analysis, p. 2. This was the case until 1985 when the legislature specifically amended § 627.4145 to exempt mortgage guaranty insurance policies from the readability language requirements of the statute. § 627.4145(6)(g), Fla. Stat. (1985).<sup>6</sup>

The legislature always is presumed to have knowledge of prior existing laws. Floyd v. Bentley, 496 So. 2d 862 (Fla. 2d DCA 1986), rev. denied, 504 So. 2d 767 (Fla. 1987); Oldham v. Rooks, 361 So. 2d 140 (Fla. 1978); Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d 14 (Fla. 1977). Thus, when it enacted § 635.091 in 1983, the legislature knew that § 627.4145 (enacted in 1982) applied to mortgage guaranty policies. This knowledge also is apparent from the Senate Analysis which discusses § 627.4145 and its requirement that all language in mortgage insurance policies be readable. Senate Analysis, p. 25. Nonetheless, when later enacting § 635.091, the legislature did not list § 627.4145 among those insurance code provisions which were applicable to mortgage guaranty insurers. Likewise, when the legislature amended § 627.4145 in 1985 to make it inapplicable to mortgage guaranty insurance, it knew that this statute was not among the insurance code provisions listed in § 635.091. If, in fact, § 635.091 merely clarified all of those provisions of the Insurance Code which already applied to mortgage guaranty insurance, as the FDIC contends, the legislature did not need to amend § 627.4145 to exempt mortgage guaranty insurance policies from its requirements, because §

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<sup>6</sup> The language exempting mortgage guaranty policies from § 627.4145 was enacted in 1985, two years after § 635.091 was enacted, effective October 1, 1983.

627.4145 was not listed in § 635.091.<sup>7</sup>

Similarly, on October 1, 1990, § 627.4133, governing notice of cancellation, nonrenewal, or renewal premiums, was amended to exempt mortgage guaranty insurance. Section 627.4133 also is not among the provisions of the Florida Insurance Code enumerated in § 635.091. According to the argument proffered by the FDIC, § 627.4133 never applied to mortgage guaranty insurance, since it is not enumerated in § 635.091, which was enacted in 1983 to clarify all provisions of the Insurance Code applicable to mortgage guaranty insurance. However, since the legislature amended § 627.4133 in 1990 to specifically exempt mortgage guaranty insurance from its requirements, § 627.4133 must have applied to mortgage guaranty insurance prior to the 1990 amendment.

It is never presumed that the legislature intends to enact purposeless or useless legislation. City of N. Miami v. Miami Herald Publishing Co., 468 So. 2d 218 (Fla. 1985);

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<sup>7</sup> The plain language of § 635.091 reveals that it merely contains a list of the various provisions of the Insurance Code which apply to mortgage guaranty "insurers," rather than an exhaustive list of insurance provisions which apply mortgage guaranty "insurance:"

Chapter 624: Insurance Code Administrative and General Provisions.

Chapter 625: Accounting, Investments and Deposits by Insurers.

Parts I, II, VIII, and X of Chapter 626: Insurance Field Representatives and Operations.

§ 627.915: Insurer Experience Reporting.

Chapter 628: Stock and Mutual Insurers Holding Companies.

Except for Chapter 624, which is strictly definitional, the remaining provisions listed in § 635.091 expressly apply only to insurers. Thus, it would appear that there was no need to include § 627.409 in § 635.091. Section 627.409 is not a provision which pertains to "insurers," but rather is part of Chapter 627, Part II, Fla. Stat., which regulates "insurance contracts."

Sharer v. Hotel Corp. of America, 144 So. 2d 813 (Fla. 1962). Yet, to accept the FDIC's interpretation of § 635.091 would necessarily lead to the conclusion that the amendments to § 627.4145 and § 627.4133 were, indeed, without purpose. Surely, it would be illogical for the legislature to amend § 627.4145 and § 627.4133 to create an exception for mortgage guaranty insurance from their requirements if these statutes never applied to mortgage guaranty insurance in the first place.

The only logical conclusion that can be drawn from an analysis of § 627.401 and the amendments to § 627.4145 and § 627.4133 is that the FDIC's interpretation of the purpose and effect of § 635.091 is incorrect. The FDIC does not address the foregoing statutory construction arguments in its brief because its arguments cannot be reconciled with the statutory scheme of Florida's Insurance Code. Recognizing that the FDIC's arguments place § 635.091 in conflict with various other provisions of the Florida Insurance Code, the District Court properly rejected the FDIC's arguments and entered summary judgment in favor of Verex.

B. The Legislative History Of § 635.091 Further Demonstrates That § 627.409 Applied To Mortgage Guaranty Insurance Prior To The Enactment Of § 635.091.

The FDIC contends that prior to the enactment of § 635.091 in 1983, § 635.051 (dealing with licensing) and § 635.081 (dealing with rule making and regulatory authority of the Department of Insurance) incorporated into Chapter 635 the only provisions of the Florida Insurance Code which were applicable to mortgage guaranty insurance. Appellant's Brief, pp. 12-13. The FDIC further argues that § 635.091, enacted effective October 1, 1983, merely clarified all of those provisions of the Insurance Code which already applied to mortgage guaranty insurance generally through § 635.051 and § 635.081 and which were now specifically identified by statute number in § 635.091. Appellant's Brief, p. 16. The only support the FDIC



can muster for its shallow argument are a few lines, quoted out of context, from what it contends to be legislative history.<sup>8</sup> However, more comprehensive analysis of the legislative history of Chapter 635 demonstrates that the legislative history does not support the FDIC's position.

The legislative history makes clear that, by enacting Chapter 635, the Florida Legislature only intended to impose "additional limitations on companies writing mortgage guaranty insurance in addition to the provisions of the Insurance Code generally applicable to casualty and surety insurers." House Analysis, p. 2 (emphasis added). As previously noted, mortgage guaranty insurance is statutorily defined as "a form of casualty or surety insurance." § 635.011, Fla. Stat. Accordingly, those provisions of the Insurance Code generally applicable to casualty and surety insurers also are applicable to mortgage guaranty insurers. Section 627.409 is a provision of the Insurance Code which is generally applicable to both casualty and surety insurers. This is a fact not in dispute.

In addition, the Senate Analysis of § 635.091 refers to numerous provisions of the Insurance Code not listed in § 635.091, but which are applicable to mortgage guaranty insurance. Senate Analysis, pp. 11-20, 24-26, 32-33. Significantly, one of the provisions which the Senate Analysis explicitly refers to as applicable to mortgage guaranty insurance is "Chapter 627, Part II, Florida Statutes." Id. at 15. Chapter 627, Part II is the very section of the Insurance Code where § 627.409 is located.

Finally, the FDIC's "clarification" argument also ignores § 635.071 of Chapter 635, entitled "Filings, approval of forms; rate filings." Section 635.071 provides that no policy or

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<sup>8</sup> A copy of the Insurance Commissioner's recommendations to the House Insurance Committee relating to Chapter 635, relied upon by the FDIC, is included in the accompanying Appendix as Exhibit "D". It is unclear that the Insurance Commissioner's recommendations are even part of the legislative history of Chapter 635.

related form may be issued for mortgage guaranty insurance unless it has been filed with and approved by the Department of Insurance "as provided by the laws applicable to casualty or surety insurance." § 635.071(1). The legislative history makes clear that § 627.410, entitled "Filing, approval of forms," and § 627.411, entitled "Grounds for disapproval," are the laws applicable to casualty or surety insurance with which mortgage guaranty insurance contracts must comply. Senate Analysis, pp. 24-25. Moreover, § 627.413 requires all policies, other than group policies, to specify the names of the parties to the contract, the subject of the insurance, the risks insured against, the period of coverage, the premium and the conditions pertaining to the insurance. The legislative history also makes clear that mortgage guaranty insurance policies must comply with § 627.413. Senate Analysis, p. 26. Thus, despite the fact that mortgage guaranty insurance policies must comply with § 627.410, § 627.411 and § 627.413, these statutory provisions are not enumerated in § 635.091, further scuttling the FDIC's "clarification" argument.<sup>9</sup> Again, the FDIC fails to address in its brief any of the foregoing arguments.

C. The Holding, Reasoning And Analysis In *Numerica* Do Not Reach The Issue Of Whether § 627.409 Applied To Mortgage Guaranty Insurance Prior To The Enactment Of § 635.091.

The FDIC contends that the holding, reasoning and analysis in *Numerica* apply to the issue of whether § 627.409 applied to mortgage guaranty insurance prior to the enactment of § 635.091, "because the Eleventh Circuit Court of Appeals carefully analyzed each of the arguments which were made, and they are essentially the same arguments as in the present case." (Appellant's Brief, p. 9) (emphasis added). This contention is inaccurate.

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<sup>9</sup> § 627.410, § 627.411 and § 627.413 are all located within § 627.409 in Chapter 627, Part II, which the Senate Analysis refers to as applicable to mortgage guaranty insurance. Senate Analysis, p. 15.

In Numerica, the Eleventh Circuit held that § 627.409 did not apply to mortgage guaranty insurance contracts entered into after October 1, 1983, because § 627.409 is not expressly incorporated into § 635.091. Numerica did not reach the issue of whether § 627.409 applied to mortgage guaranty insurance issued prior to the enactment of § 635.091. In obiter dictum, the Court in Numerica merely posited that it was unclear whether § 627.409 ever applied to Chapter 635 and went on to state:

To the extent that Section 627.409 may have applied to mortgage guaranty insurance, then, we find that it has been repealed by Section 635.091.

835 F.2d at 1357.

As made clear by both the District Court and the Eleventh Circuit, the issue of whether § 627.409 applied to mortgage guaranty insurance before October 1, 1983 was left open by Numerica. Therefore, the FDIC's insistence that this Court give precedential value to Numerica in deciding the issue of first impression now before it is misplaced. It is respectfully submitted that this Court should decide the issue by analyzing the statutory arguments set forth in Point A, supra, and the legislative history arguments set forth in Point B, supra.<sup>10</sup>

Had the Eleventh Circuit Court in Numerica previously analyzed the arguments made by Verex in the present case, as the FDIC contends, that same court simply would have applied Numerica, rather than certified the case to the Florida Supreme Court as an unresolved question of Florida law. Accordingly, the FDIC's attempt to apply Numerica to the facts in the present case should be rejected.

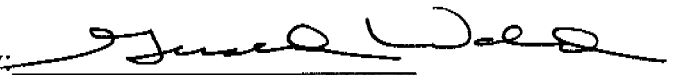
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<sup>10</sup> It is equally clear from a reading of Numerica that the Eleventh Circuit did not address the arguments set forth in Point A, and Point B, supra. In fact, Numerica was decided in 1988, approximately two years before § 627.4133 was amended on October 1, 1990 to exempt mortgage guaranty insurance.

**CONCLUSION**

Verex respectfully requests that this Court answer the question certified by the Eleventh Circuit in the affirmative and find that Fla. Stat. § 627.409 did apply to applications for and contracts of mortgage guaranty insurance prior to the enactment of Fla. Stat. § 635.091, effective October 1, 1983.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a correct copy of the foregoing was mailed on this 16<sup>th</sup> day of December, 1993 to: Alan L. Briggs, Esq., Squire, Sanders & Dempsey, 201 South Biscayne Boulevard, Suite 3000, Miami, Florida 33131; and Gregory Gore, Ann S. DuRoss, Robert D. McGillicuddy, Federal Deposit, Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

MURAI, WALD, BIONDO  
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