SUPREME COURT OF FLORIDA

FEDERAL DEPOSIT INSURANCE CORP.,

Appellant,

v.

VEREX ASSURANCE, INC.,

Appellee.
_____/

Case No. 82,495

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

AMENDED APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

1. Statement of the Proceedings Below.

The Federal Savings & Loan Insurance Corporation ("FSLIC") as Receiver for Sunrise Savings and Loan Association, a Federal Savings and Loan Association filed this action in July 1988 in United States District Court for the Southern District of Florida seeking to recover moneys it claimed were due and owing under two Certificates of Insurance issued by the Defendant Verex Assurance, Inc. ("Verex") under a Master Policy of Mortgage Guaranty Insurance for loans made by Sunrise Savings and Loan Association to Frank and Patty Ferrero, and Juan and Lisa Bonilla (R1-1-1). Verex answered and filed a counterclaim seeking rescission of the Certificates of Insurance (R1-8-1).[1]

On May 15, 1990, the FDIC and Verex filed a stipulation of facts (R1-37-1). After the stipulation, both parties filed independent motions for summary judgment (R1-40-1, R1-71-1). On January 31, 1991, the District Court entered an order denying the motions for summary judgment (R2-82-1). The parties engaged in further discovery to clarify the remaining factual issues, and on February 24, 1992, the parties filed renewed cross motions for summary judgment with an additional stipulation of facts (R2-90, 91,93-1).

On May 7, 1992, argument was held on the cross motions for summary judgment (R2-98-1). On May 28, 1992, the Court entered an order granting Verex's motion for summary judgment and denying FDIC's motion for summary judgment, and entering final judgment in

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[1]While this case was pending, the Federal Deposit Insurance Corporation ("FDIC") was substituted as plaintiff due to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183, 354 § 401(a) P.L. 101-73, August 9, 1989. See Twin Constr., Inc. v. Boca Raton, Inc., 925 F.2d 378, 380 n.1 (11th Cir. 1991). The FDIC is the successor by operation of law to the FSLIC, as Receiver for Sunrise Savings and Loan Association (R2-93-2).

favor of Verex (R2-100-1). The decision is reported at 795 F.Supp.404 (S.D. Fla. 1992). The FDIC appealed to the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") (R2-101-1).

On October 1, 1993, the Eleventh Circuit affirmed the decision of the district court except for the question of Florida law at issue here which it certified to the Supreme Court of Florida for review and decision.

2. Statement of the Facts.

The facts below were stipulated by the parties and are not in dispute.

Sunrise Savings and Loan Association of Florida ("Sunrise") was a Florida chartered stock savings and loan association, engaged in the business inter alia of making residential home mortgage loans (R2-93-1). On July 18, 1985, the Federal Home Loan Bank Board ("FHLBB"), pursuant to Resolution No. 85-582 appointed the FSLIC as receiver for Sunrise (R1-1-2), (R2-93-2). On that same day, FSLIC, as receiver, succeeded by operation of law to all of the rights, titles, powers and privileges of Sunrise, pursuant to 12 U.S.C. §1729(c) (repealed) and transferred the assets of Sunrise, including the rights asserted in this proceeding to Sunrise Savings and Loan Association, a Federal Savings and Loan Association ("New Sunrise"), a newly-chartered federal mutual savings and loan association (R2-93-2).

On September 12, 1986, FHLBB appointed FSLIC as receiver for New Sunrise pursuant to FHLBB Resolution No. 86-982 (R1-1-3), (R1-22-3). FSLIC, as receiver, succeeded by operation of law to all of the rights, titles, powers and privileges of New Sunrise, pursuant to 12 U.S.C. §1729(c) (repealed).

Prior to 1983 Sunrise entered into a form Master Policy[2] of Mortgage Guaranty Insurance with Verex Assurance, Inc. ("Verex"), a Wisconsin based insurer engaged in the business of providing protection to residential lenders against losses resulting from non-payment of mortgage loans by borrowers (R1-22-3), (R2-93-1). Sunrise would apply for Certificates of Insurance ("Certificates") from Verex for residential loans (R2-93-2). The Certificates, when issued, provided that should the borrowers fail to make their mortgage payments, Verex would pay to Sunrise a specified percentage of the outstanding debt, thereby reducing Sunrise's losses (R2-93-2, 8). To obtain Certificates from Verex, Sunrise would forward certain documents to Verex in an application package (R2-93-2). The package included a one page application form, along with copies of the purchase and sale contract, the borrower's residential loan application, the appraisal, credit reports, and verifications of income, deposits and employment verification (Id.). Verex would review the documentation provided, and if the loan met its underwriting guidelines Verex would issue a Commitment for Insurance ("Commitment") prior to closing, which would ripen into a Certificate after the closing occurred. (Id.) An appropriate premium was paid to Verex (Id.). After closing, Sunrise would furnish copies of certain of the closing documents to Verex for its files.

Two of the mortgage loans made by Sunrise are at issue here. One was a $450,000 loan to Frank and Patty Ferrero ("Ferreros") for the purchase of a single family residence in Coconut Grove, Florida (R2-93-2). The other was a $45,100 loan to Juan and Lisa Bonilla ("Bonillas") for the purchase of a condominium unit in Broward County, Florida (R2-93-5).[3]

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[2]The Master Policy applicable in this action is form FH01 (1/79) (R1-49-1), not Form FL25 as originally attached to Verex's Counterclaim (R1-45-1).

[3]When the Ferreros and Bonillas are discussed jointly, they will be referred to as the "Borrowers".

On April 29, 1983, Sunrise applied for a Certificate for the Ferrero loan and submitted the appropriate application package (R2-93-2). On May 5, 1983, Verex issued to Sunrise a Commitment for the Ferrero Loan, which ripened into a Certificate once the loan closed and the premium was paid (R2-93-2). The Certificate provided for payment of 20% of any losses suffered by Sunrise (R2-93-10). Unknown to either Sunrise or Verex at the time the loans closed, the Ferreros misrepresented the facts of their purchase transaction (R2-93-4). The sellers of the Ferreros' property, Paul and Elizabeth Uber, were in fact the Ferreros' in-laws (Id.). The Ferreros misrepresented in the application for their residential mortgage loan that they would invest $125,000 of their own money to purchase their home (Id.). In fact, they only paid $25,000 of their own money to the sellers. The remaining money consisted of two $50,000 promissory notes given to the sellers (R2-93-4). The Ferreros hid this from Sunrise and Verex by inter alia tendering a personal check to the sellers at closing which was subsequently returned to the Ferreros (Id.). When Sunrise forwarded to Verex the copies of the loan documentation for this loan, it unwittingly passed on the documents containing the Ferrero's misrepresentations (Id.). Both Sunrise and Verex relied upon the misrepresented facts in their underwriting processes (Id.). The Ferrero Loan was closed on May 25, 1983 (Id.). The Ferreros defaulted on their loan on July 1, 1985 (R1-21-3), (R1-1-2).

On July 15, 1983, Sunrise applied for a Commitment for the Bonilla loan (R1-21-14). Verex issued a Commitment on July 21, 1983 which also ripened into a Certificate to pay 20% of Sunrise's losses after the loan closed and the fee was paid (R2-93-5). However, in their Residential Loan Application, the Bonillas misrepresented the amount of their downpayment (R2-93-6). This information was again unwittingly forwarded to Verex in the form of copies of the residential loan application (Id.). The Bonilla Loan was closed on or about July 21, 1983

(R1-1-9). The Bonillas defaulted on their loan on or about November 1, 1983 (R1-21-3). (R1-1-4).

Due to the defaults, Sunrise sought to recover from Verex the Mortgage Guaranty Insurance proceeds for the loans under the Certificates (R2-93-7). Verex refused to pay the claims, asserting that the Borrowers' material misrepresentations in their applications had become the representations of Sunrise when it forwarded this information to Verex, and that the misrepresentations precluded recovery under the insurance policy and Certificates (Id.).

This lawsuit was filed by the FSLIC to recover under the Certificates. Verex counterclaimed seeking a determination that the Certificates were void. It is undisputed that if Verex may not void the Certificates of Insurance, FDIC would be entitled to recover the insurance proceeds (Id.). In the summary judgment litigation, the key legal issues were whether Florida Statutes § 627.409, a part of the Florida Insurance Code, applied to mortgage guaranty insurance at the time these Certificates were issued and who would bear the risk of misrepresentations by the Ferreros and Bonillas--the FDIC or Verex (Id.). Verex argued that the Certificates at issue in this case should be rescinded under Florida Statute §627.409, which provides that insurers may rescind coverage because of misrepresentations on the insured's application if the statements or omissions are fraudulent, material or alter the insurer's good faith decision to issue the policy (R2-90-4). The FDIC argued that the Certificates could not be rescinded, as Florida Statutes §627.409 never applied to mortgage guaranty insurance (R2-92-4), relying on the decision in Home Guar. Ins. Corp. v. Numerica Fin. Serv., Inc., 835 F.2d 1354 (11th Cir. 1988) ("Numerica"). In addition, the FDIC asserted that the district court should look to Florida Statutes §635.091, which defines which provisions of the Florida Insurance Code apply to mortgage guaranty insurance (R2-92-7). Verex contended that §635.091 was

inapplicable because the Certificates at issue predated October 1, 1983, the effective date of that statute, and that until §635.091 was enacted mortgage guaranty insurance was subject to the provisions of Florida Statutes §627.409 (R2-90-4).

The district court disagreed with the FDIC's interpretation (Order Entering Summary Final Judgment For Verex Assurance, Inc. And Denying Summary Final Judgment for FDIC ("Order"); (R2-100-9). See FDIC v. Verex Assurance, Inc., 795 F. Supp. 404 (S.D. Fla. 1992). The district court stated:

> In so deciding, we necessarily hold that the enactment of section 635.091 constituted an implied repeal of section 627.409 *as it applies to mortgage guaranty insurance.* This holding is unavoidable under the circumstances, and regrettable in that such decisions are best left in the hands of either the Florida Supreme Court or the Florida legislature.
>
> [795 F.Supp. at 407]

In a footnote, the district court noted it did not have the power to certify the question of Florida law to the Florida Supreme Court. (Id. at f.n. 3).

The Eleventh Circuit Court affirmed the decision of the district court that the misrepresentations of the Borrowers could be imputed to the FDIC but noted that the controlling question of "whether § 627.409 applied to mortgage guaranty insurance at the time those certificates were issued is an unresolved question of Florida law." It therefore certified the question to the Florida Supreme Court pursuant to Article 5, Section 3(b)(6) of the Florida Constitution. The precise question it certified is:

> Did Fla. Stat. §627.409 apply to applications for and contracts of mortgage guaranty insurance prior to the enactment of Fla. Stat. §635.091 on October 1, 1983?

SUMMARY OF ARGUMENT

This case involves the interpretation of Florida law regarding mortgage guaranty insurance, certified by the United States Court of Appeals for the Eleventh Circuit to this Court. The precise question certified to this Court from the Eleventh Circuit is:

> Did Fla. Stat. §627.409 apply to applications for and contracts of mortgage guaranty insurance prior to the enactment of Fla. Stat. §635.091 on October 1, 1983?

The Florida legislature has adopted a specific chapter of Florida law entitled "Mortgage Guaranty Insurance." Additionally, the Florida legislature has enacted the "Florida Insurance Code" dealing with general insurance issues and incorporating certain specific kinds of insurance. Section 627.409 is part of the Florida Insurance Code. Chapter 635 is the chapter of Florida law entitled "Mortgage Guaranty Insurance." Mortgage Guaranty Insurance was not included as part of the Florida Insurance Code.

Resolution of the certified question essentially comes down to one issue. In determining what the Florida law is regarding mortgage guaranty insurance, do you look to the specific chapter of Florida law entitled "Mortgage Guaranty Insurance" or do you look to the Florida Insurance Code?

The answer is, you look to the chapter of Florida law entitled "Mortgage Guaranty Insurance."

The argument herein details why this answer is clear. Attention is first invited to Home Guar. Ins. Corp. v. Numerica Fin. Serv., Inc., 835 F.2d 1354 (11th Cir. 1988), holding that §627.409 does not apply to mortgage guaranty insurance. Next, fundamental procedures for interpreting a statute are applied: (1) Read the statutes and see if they are clear; (2) Apply the well developed rules of statutory construction; and (3) Review the legislative history. When

these procedures are followed, it is apparent that §627.409 does not and was never was intended to apply to mortgage guaranty insurance and the certified question should be answered, "No."

ARGUMENT

I. Florida Statute §627.409 Did Not Apply to Application For and Contracts of Mortgage Guaranty Insurance Prior to the Enactment of Florida Statute §635.091 on October 1, 1983.

A. The Holding, Reasoning and Analysis of the United States Circuit Court of Appeals for the Eleventh Circuit in Numerica Applies to the Facts in this Case and Makes Clear that §627.409 does not Apply to Mortgage Guaranty Insurance

The starting point for an analysis of this issue is the decision of the Eleventh Circuit in Numerica (copy attached hereto). The issues in Numerica are the same as the issues in this case except the certificates were issued after October 1, 1983 which was the effective date of §635.091 enacted by the Florida legislature; it provides:

> §635.091 **Provisions of Florida Insurance Code applicable to mortgage guaranty insurance**.--The following provisions of the Florida Insurance Code apply to mortgage guaranty insurers: chapter 624; chapter 625; parts I, II, VI, and VII of chapter 626; s.627.915; chapter 628; and chapter 631.

The statute makes it clear that the specifically enumerated provisions of the Florida Insurance Code apply to mortgage guaranty insurers effective October 1, 1983. As §627.409 is not one of the statutory provisions specifically listed it is equally clear that §627.409 does not apply to mortgage guaranty insurance.

Despite what appears to be clear, Home Guaranty Insurance Corporation ("Home") sought a declaration, based on §627.409, that certain mortgage guaranty certificates of insurance it issued to Numerica Financial Services, Inc. were void due to material representations in the application for insurance. The district court in Numerica found that §627.409 did not apply to

mortgage guaranty insurance. Home appealed to the Eleventh Circuit. The decision in Numerica is significant 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 this present case.

In Numerica, the court rejected Home Guaranty's argument that §627.409 applied to mortgage guaranty insurance, pointing out that the Florida legislature did not treat mortgage guaranty insurance like other casualty insurance. The court focused on the key issue--the Florida legislature enacted the Florida Insurance Code--Chapters 624-632 of the Florida Statutes. Those chapters do not include mortgage guaranty insurance. The Florida legislature enacted a specific chapter, Chapter 635, to deal with mortgage guaranty insurance.

> By drafting a separate chapter of the Florida Insurance Code to govern mortgage guaranty insurance, the Florida legislature made a conscious choice not to have the general provisions of the Code apply to mortgage guaranty insurance.
>
> [835 F.2d at 1356]

Where "mortgage guaranty insurance is like casualty or surety insurance and should be treated as such, sections of Chapter 635 expressly mention this fact." Id. at 1358. (Original emphasis).

Additionally, the court identified the critical distinction between §627.409 and Chapter 635, the general mortgage guaranty insurance statute. Chapter 627 promotes public welfare and protects both policy holders and the public. "Section 627.409 protects consumers by making it harder for unscrupulous insurers to declare insurance contracts void based on technicalities." Id. (Citations omitted). The statute also protects insurance companies by enabling them to void policies where the insured made material misrepresentations. Id. The court found that this protection was not needed with mortgage guaranty insurance. Mortgage guaranty insurance applications include virtually the entire loan application package, thus the

mortgage guaranty insurance company can make its own independent determination about the borrower. The application also permits the insurer to seek additional information and to verify the submitted information. Id. at 1358-59. Therefore, the court concluded that "[b]ecause of their unique ability to evaluate the documentation, mortgage guaranty insurance companies are on a more equal footing with mortgage lenders and need not rely on Section 627.409 for protection." Id. at 1359. However, it should be noted that the court did not address whether §627.409 applied to mortgage guaranty insurance prior to October 1, 1983.

In sum, mortgage guaranty insurers are sophisticated business entities that are on equal footing with mortgage lenders and therefore do not need the protections afforded by Section 627.409. The mortgage insurers receive the same information and documentation as the lender concerning the borrower, thus enabling the mortgage insurer to make its own independent determinations whether to seek further information, verify information and issue the insurance. See Numerica, 835 F.2d at 1358-59.

The only difference between Numerica and the present case is Numerica involved insurance certificates issued after October 1, 1983, the effective date of §635.091. The reasoning in Numerica although not binding on this court, is essentially dispositive of the issues in this case. While Numerica can arguably be limited to policies issued after October 1, 1983, it is respectfully asserted that the policy reasoning and analysis are equally applicable here.[4]

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[4]There is no authority to the contrary. Verex has previously relied on Continental Mortgage Ins., Inc. v. Empire Home Loans, Inc., No. 75-109-CIV-JLK (S.D. Fla. Nov. 26, 1975) and United Guarantee Residential Ins. Corp. v. American Pioneer Sav. Bank, 655 F.Supp. 165 (S.D. Fla. 1987). Neither of these cases support Verex's position.

In United Guarantee, the court improperly viewed the issue as whether Section 635.091 applying to mortgage guaranty insurance repealed or excluded Section 627.409, which it treated as a previously applicable statute; it did not address whether Section 627.409 ever applied in the (continued...)

B. A Reading of the Mortgage Guaranty Insurance Laws Makes it Clear that §627.409 should not be read into and made a part of Chapter 635.

The starting point for interpreting any statute is to read the statute. The Florida Statues are arranged in logical or topical groupings. The statutes are divided first into titles, then chapters, then parts, then sections, with each successive division being a smaller, more limited increment. In 1983 insurance was found under Title XXXVII. Title XXXVII is divided into two parts: (1) the Florida Insurance Code[5] and (2) specialty types of insurance.

Title XXXVII

The Florida Insurance Code	Other Types of Insurance Not Within the Florida Insurance Code
Chapter 624 - Administration and General Provisions	Chapter 633 - Fire Prevention and Control
Chapter 625 - Accounting, Investments and Deposits	Chapter 634 - Warranty Association
Chapter 626 - Field Representation and Operation	Chapter 635 - Mortgage Guaranty Insurance
Chapter 627 - Rates and Contracts including	Chapter 637 - Professional Service Plans

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[4](...continued)
first place. The decision does not discuss the legislative history of Chapter 635 generally or Section 635.091. Specifically the latter of which demonstrates that Section 627.409 was never applicable to mortgage guaranty insurance. (See p. 14-15, infra) Additionally, the court did not address the policy concerns that drive Section 627.409 and are not present in mortgage guaranty insurance.

Finally Continental Mortgage is clearly inapposite as it does not address the applicability of Section 627.409.

[5]The Chapters of Title XXXVII which are defined to be the Florida Insurance Code is set forth in §624.01. From 1959 to 1990 Florida Insurance Code did not include Chapter 635. After 1991 it did.

Chapter 628 - Stock and Mutual Insurance

Chapter 629 - Reciprocal Insurers

Chapter 630 - Alien Insurers

Chapter 631 - Insurer Insolvency

Chapter 632 - Fraternal Benefit Societies

Chapter 638 - Ambulance Service Contracts

Chapter 639 - Burial Insurance and Contracts

Chapter 641 - Health Care Service Programs

Chapter 642 - Legal Expense Insurance

Chapter 648 - Bailbondsmen and Runners

Chapter 649 - Automobile Clubs

Chapter 650 - Social Security for Public Employees

Chapter 651 - Life Care Contracts

The basic issue in this case is when interpreting Chapter 635, which is not part of the Florida Insurance Code, can selected provisions of the Florida Insurance Code apply to Chapter 635. Specifically, in this case Verex wants the Court to take §627.409 from the Florida Insurance Code and apply it to Chapter 635. This construction is inconsistent with basic principles of statutory construction.

Since the enactment of Chapter 635 in 1959, mortgage guaranty insurance in Florida has been governed exclusively by that chapter. Through the enactment of Chapter 635, the Florida legislature made a conscious decision that mortgage guaranty insurance would be treated separately and differently from general insurance matters covered by the Florida Insurance Code, except to the extent that the legislature chose to incorporate certain other provisions of the Florida Insurance Code. From the enactment of Chapter 635 in 1959 through the enactment of Section 635.091 on October 1, 1983, Chapter 635 identified the sections of the Florida Insurance Code applicable to mortgage guaranty insurance. To the extent that provisions of the Florida Insurance Code were intended to apply to mortgage guaranty insurance, they were expressly incorporated by reference. Specifically, Section 635.051 and Section 635.081 identified and

incorporated those provisions of the Florida Insurance Code which the legislature made applicable to mortgage guaranty insurance. Section 635.081 incorporated provisions dealing with licensing (subject to certain enumerated exceptions) and §635.081 incorporated provisions governing rule-making and regulatory authority vested in the Department of Insurance. No other provisions of the Florida Insurance Code were incorporated by reference into Chapter 635. See Numerica, 835 F.2d at 1357-58. Therefore, since its promulgation, Chapter 635 exclusively governed issues arising from mortgage guaranty insurance contracts.

It is equally important that when the legislature wanted to include some specialty type of insurance within the Florida Insurance Code, it did so. Specifically included within the Florida Insurance Code in Chapter 627 are:

> Rates and rating organizations, part I
> The insurance contract, part II
> Life insurance policies and annuity contracts, part III
> Industrial life insurance policies, part IV
> Group life insurance, part V
> Disability insurance policies, part VI
> Group, blanket, and franchise disability insurance, part VII
> Medicare supplement policies, part VIII
> Credit life and disability insurance, part IX
> Property insurance contracts, part X
> Casualty insurance contracts, part XI
> Surety insurance contracts, part XII
> Title insurance contracts, part XIII
> Variable contracts, part XIV
> Premium finance companies, part XV
> Premium financing, part XVI
>
> [Table of Contents, Volume 4, Florida Statutes].

If the legislature had wanted to include mortgage guaranty insurance it would have. It did not. While mortgage guaranty insurance is defined as a form of casualty or surety insurance, §635.011(1), it was not included in the definition of casualty or surety insurance in the Florida Insurance Code. §§624.605-606. The legislature could have easily included mortgage guaranty

insurance within the definition of casualty or surety insurance. Rather the legislature chose to create an entirely different chapter outside of the Florida Insurance Code. Presumably the legislature did this for a reason.

Accordingly, just a simple, straightforward reading of Title XXXVII of the Florida Statutes makes clear that §627.409 was never engrafted onto Chapter 635.

C. Application of the Rules of Statutory Construction Also Demonstrate that §627.409 Should Not be Read into Chapter 635.

The foregoing conclusion is further supported by canons of statutory construction. Under the standard canon of statutory construction, expressio unius est exclusio alterius, the expression of one is the exclusion of others, the legislature's selective incorporation of sections of the Insurance Code into Chapter 635 means that only the identified sections of the Insurance Code apply to Chapter 635 and all other sections of the Insurance Code do not apply. Section 627.409 was not included as one of the parts of the Florida Insurance Code applicable to mortgage guaranty insurance. In Thayer v. State, 335 So.2d 815, 817 (Fla. 1976), the Florida Supreme Court stated "where, a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." (citation omitted). Associates Commercial Corp. v. Sel-O-Rak Corp., 746 F.2d 1441, 1444 (11th Cir. 1984) (per curiam) (applying Thayer); Sutherland Statutory Construction Section 47.23 (5th ed. 1992) ("when legislature expresses things through a list, the court assumes that what is not on the list is excluded." [footnote omitted].) See also Guaranty Fin. Serv., Inc. v. Ryan, 928 F.2d 994, 1002 (11th Cir. 1991) ("We have on occasion taken heed of this rule of construction...") (citations omitted). But see U.S. v. Castro, 837 F.2d 441, 442-43 (11th Cir. 1988) (principle does not apply "when . . . the legislative history and context are contrary to such a reading of the statute.") (footnote and citations omitted). Accordingly, under

long standing principles of statutory construction, §627.409 never applied to mortgage guaranty insurance.

D. The Legislative History of §635.091 Makes it Clear that §627.409 was Never Intended to Apply to Mortgage Guaranty Insurance.

Additionally, the legislative history of §635.091 persuasively supports the conclusion that §627.409 was never intended to apply to mortgage guaranty insurance. The Florida courts rely on legislative history, including staff analyses, to understand statutes and subsequent amendments. Ivey v. Chicago Ins. Co., 410 So.2d 494, 497 (Fla. 1982). In Ivey, the Florida Supreme Court construed a section of the Florida Insurance Code defining uninsured motor vehicles which had been amended after the accident which gave rise to the litigation. This Court applied the section, as amended, finding that the senate staff's analysis of the amendment stated that the amendment was to clarify existing law. Id. at 497. Therefore, this Court determined that the amendment and its legislative history clarified the earlier statute and did not change substantive law. Accord, Palma Del Mar Condominium Ass'n No. 5 of St. Petersburg, Inc. v. Commercial Laundries of West Florida, Inc., 586 So.2d 315, 316-17 (Fla. 1991). (Court relied on clarifying amendment to interpret statute after lower court found predecessor statute had a different meaning that intended by legislature.) Similarly, in U.S. Fire Ins. Co. v. Roberts, 541 So.2d 1297 (Fla. 1st Dist. Ct. App. 1989) (per curiam), the court reviewed the legislative staff analysis prepared with the bill and the insurance industry's analysis of the statute and concluded that the amendment clarified the existing law and could be applied to void a coinsurance policy. Id. at 1299-1300. See also Asphalt Pavers, Inc. v. Department of Revenue, 584 So.2d 55, 57-58 (Fla. 1st Dist. Ct. App. 1991) (Court utilized staff analysis to find amendment clarified existing statute.)

Here, the legislative history[6] expressly states that the statute was formulated "to clarify what provisions of the Insurance Code are applicable to mortgage guaranty insurance." (Emphasis supplied). Insurance Commissioner's Recommendations to the House Insurance Committee relating to Chapter 635 (R2-92-2). The Insurance Commissioner's recommended legislation reads: "635.091 provisions of general insurance law applicable to mortgage guaranty insurance--the following provisions of insurance laws of this state shall apply to mortgage guaranty insurers: Chapter 624; Chapter 625; Parts VI and VII of Chapter 626; Chapter 628 and §627.931, Florida Statutes (R2-92-2). Similarly, the staff of the Florida Senate Committee on Commerce commented on §635.091: "Section 13. A new section would clarify that certain provisions of the Insurance Code apply to mortgage guaranty insurers. This should be considered a technical amendment because casualty and surety insurers are currently subject to these parts of the code." (Emphasis supplied) (R2-94-Exh. D, page 4). These comments are persuasive authority that Section 635.091 was a technical amendment which was designed to clarify the existing law--that mortgage guaranty insurance was not governed by Section 627.409. Clearly, mortgage guaranty insurance contracts have been subject to only those limited aspects of the Florida Insurance Code which were expressly identified by the legislature. Therefore, the district court erred when it concluded that §627.409 could be utilized to rescind the Certificates since §627.409 never applied to mortgage guaranty insurance.

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[6]Both the FDIC and Verex presented the applicable legislative history to the district court (R2-92-1), (R2-94-1). Moreover, the legislative history was attached as addenda to the briefs to the Eleventh Circuit.

CONCLUSION

In conclusion this Court should answer the certified question in the negative:

Question: Did Fla. Stat. §627.409 apply to applications for and contracts of mortgage guaranty insurance prior to the enactment of Fla. Stat. §635.091 on October 1, 1983?

Answer: No.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Amended Appellant's Initial Brief was, on this 10th day of November, 1993, furnished by U.S. Mail to: Gerald B. Wald, Esquire and Marianne A. Vos, Esquire, MURAI, WALD, BIONDO & MORENO, P.A., Counsel for Appellee, 900 Ingraham Building, 25 Southeast Second Avenue, Miami, Florida, 33131.

ALAN L. BRIGGS

HOME GUARANTY INSURANCE CORPORATION, a Virginia corporation, Plaintiff-Appellant,

v.

NUMERICA FINANCIAL SERVICES, INC., a Florida corporation, Berkeley Federal Savings and Loan Association, Defendants-Appellees,

Federal National Mortgage Association, et al., Defendants.

No. 87-3144.

United States Court of Appeals, Eleventh Circuit.

Jan. 19, 1988.

Mortgage guaranty insurer brought action seeking declaration that certificates of insurance issued to mortgage lender were void due to material misrepresentations in applications for insurance. The United States District Court for the Middle District of Florida, No. 85-726-Civ-T-17, Elizabeth A. Kovachevich, J., found that statute under which insurer proceeded did not apply to mortgage guaranty insurance, and insurer appealed. The Court of Appeals, Fay, Circuit Judge, held that Florida statute allowing insurance company to avoid its obligations under policy whenever holder of policy makes material misrepresentations in acquiring policy does not apply to mortgage guaranty insurance.

Affirmed.

Insurance ⇐253

Florida statute allowing insurer to avoid its obligations under policy whenever holder of policy makes material misrepresentations in acquiring policy does not apply to mortgage guaranty insurance. West's F.S.A. §§ 627.409, 627.409(1).

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Appeal from the United States District Court for the Middle District of Florida.

Before FAY and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

FAY, Circuit Judge:

This is an interlocutory appeal from a case being considered by the federal district court for the Middle District of Florida. Home Guaranty Insurance Company ("HGIC") sought a declaration that certain certificates of insurance it issued to Numerica Financial Services, Inc. ("Numerica") are void due to material misrepresentations in the applications for insurance. The district court found that the statute under which HGIC proceeded does not apply to mortgage guaranty insurance. Although this ruling does not constitute a ruling on the merits of the case, it effectively destroys HGIC's action. Thus, HGIC filed this interlocutory appeal to resolve the question of the applicability of the Florida statute to mortgage guaranty insurance. We agree with the district court that the statute does not apply to mortgage guaranty insurance, and, accordingly, affirm the district court's ruling.

BACKGROUND

Mortgage guaranty insurance is "a form of casualty or surety insurance" that protects lenders against losses they may incur due to borrower defaults on mortgage loans. Fla.Stat. § 635.011 (1985). The borrower pays a premium to the mortgage

insurance company for the benefit of the lender. Although the borrower pays this premium, the principal parties affected by the mortgage guaranty insurance policy are the lender and the insurance company.

HGIC is a mortgage guaranty insurer that insures residential mortgage loans. Numerica's business is loaning money to businesses and to individuals; many of these loans are secured by mortgages. In 1982 the two companies decided to do business together. Pursuant to their agreement, HGIC had to approve or disapprove the insurance applications submitted by Numerica on an individual basis. HGIC made its decisions based on information submitted to it by Numerica.[1] If HGIC approved an application, the terms of the master policy issued by HGIC in 1982 governed.

HGIC and Numerica entered into several insurance contracts pursuant to the 1982 agreement. One such policy involved a loan made by Numerica to Douglas and Andrena Anderson. The Andersons borrowed the money to purchase property in Vernal, Utah. The documents Numerica submitted to HGIC contained the following misrepresentations: (1) that the construction of the property had been completed; and (2) that the Andersons had made a $17,000 cash down payment. In reality, the construction had not been finished, and no down payment had been made.[2]

Numerica made a second loan to John and Mary Harpel for the purchase of residential property in Tampa, Florida. In connection with this loan, Numerica submitted several documents to HGIC. These documents showed that the Harpels had made a $20,200 down payment on the property, but failed to add that a second mortgage financed this down payment.

HGIC, relying on the documents presented by Numerica, issued certificates of insurance for these loans. When, in 1985, HGIC learned about these misrepresentations and misrepresentations existing in the applications for other certificates of insurance, it attempted to rescind its contracts with Numerica. HGIC sent a notice of rescission to Numerica and tendered a refund of all the premiums. Numerica refused to accept the refund or to recognize the rescission. HGIC then brought this diversity action in federal district court, seeking a declaration that the certificates were void due to the misrepresentations.[3]

THE ISSUE

HGIC proceeded under Fla.Stat. § 627.409(1) (1985) ("Section 627.409"), which states:

> (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;

1. *See infra* text at 1358–59.

2. Numerica concedes that there were misrepresentations, but claims that it had made them without knowing that the statements were false. Earlier in the litigation, the parties battled over whether the policyholder needed to be aware of the misrepresentation at the time it was made in order to trigger Fla.Stat. § 627.409(1) (1985) ("Section 627.409"). While the parties were still debating, the Florida Supreme Court issued an opinion that resolved the issue. The court declared that even an innocent misrepresentation is sufficient to trigger Section 627.409. *Continental Assurance Co. v. Carroll*, 485 So.2d 406 (1986).

3. Initially, HGIC raised several counts in addition to the two discussed in this opinion. HGIC named Numerica, Berkeley Federal Savings and Loan Association ("Berkeley"), Federal National Mortgage Association, Numerica Savings Bank, and Mid-America Federal Savings and Loan Association ("Mid-America") as defendants. Subsequently, the parties agreed to dismiss Mid-America as a defendant and to withdraw their claims and counterclaims regarding all counts besides those mentioned in this opinion. As a result, only HGIC, Numerica, and Berkeley are still parties to this action.

(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.

This provision allows an insurance company to avoid its obligations under a policy whenever the holder of the policy makes material misrepresentations in acquiring the policy. HGIC, in bringing the action, argued that Numerica made such material misrepresentations.[4] HGIC obviously assumed that Section 627.409 applied to this case.[5]

Numerica argues that Section 627.409 does not apply to mortgage guaranty insurance. Their argument is very straight-forward. Section 627.409 is part of the Florida Insurance Code. The general provisions of the Florida Insurance Code, however, do not govern mortgage guaranty insurance. Mortgage guaranty insurance is instead regulated by Chapter 635 of the Florida statutes. Fla.Stat. § 635.091 (1985) ("Section 635.091") provides that certain other parts of the Insurance Code apply to Chapter 635.[6] In addition, Chapter 635 expressly incorporates some portions of the Insurance Code. *See, e.g.*, Fla.Stat. § 635.051 (1985) (licensing provisions incorporated). Those parts of the Insurance Code not expressly incorporated, Numerica contends, do not apply to mortgage guaranty insurance. Since Chapter 635 makes no mention of Section 627.409, the section cannot be relied on by a mortgage guaranty insurance company such as HGIC.

We agree with Numerica and with the district court. By drafting a separate chapter of the Florida Insurance Code to govern mortgage guaranty insurance, the Florida legislature made a conscious choice not to have the general provisions of the Code apply to mortgage guaranty insurance. To the extent that the legislature wished to incorporate provisions of the Code into Chapter 635, it expressly did so by statute. Because Section 627.409 is not among the provisions incorporated, it is not applicable to mortgage guaranty insurance.

HGIC'S ARGUMENTS

1. *The Plain Meaning of Section 635.091*

HGIC agrees with Numerica that the plain meaning of Section 635.091 should govern this dispute. HGIC, however, disagrees on what the plain meaning of the statute is. The statute purports to set forth those parts of the Insurance Code applicable to mortgage guaranty *insurers*. Fla.Stat. § 635.091 (1985). This, HGIC argues, is very different from stating that those sections govern mortgage guaranty *insurance*. We agree with HGIC that Section 635.091 attempts to regulate mortgage guaranty insurers. However, the meaning of "insurers" under the statute is broad. Section 627.409, if applicable, would have been named in Section 635.091.

Section 635.091 selectively incorporates various portions of the Insurance Code.

4. For the purposes of this interlocutory appeal alone, the materiality of the misrepresentations is not at issue.

5. This assumption was not completely unfounded. Prior to the enactment of Section 635.091, one district court judge had applied Section 627.409 to mortgage guaranty insurance. *See Continental Mortgage Insurance, Inc. v. Empire Home Loans, Inc.*, No. 75-1099-Civ-JLK (S.D. Fla. Nov. 26, 1975). The court in *United Guarantee Residential Insurance Corp. of North Carolina v. American Pioneer Savings Bank*, 655 F.Supp. 165 (S.D.Fla.1987), also applied the statute to a mortgage guarantee insurance contract that existed before Section 635.091's enactment. The court in that case, however, implied that Section 635.091 would "repeal" Section 627.409 in this area of the law in the future. *See id.* at 168 n. 7. The issue of the applicability of Section 627.409 has not been directly addressed since the enactment of Section 635.091.

6. Section 635.091 reads: "The following provisions of the Florida Insurance Code apply to mortgage guaranty insurers: Chapter 624; Chapter 625; parts I, II, VIII, and X of Chapter 626; § 627.915; Chapter 628; and Chapter 631." Fla.Stat. § 635.091 (1985).

See Fla.Stat. ch. 624 (1985 & Supp.1986) (defining terms of art, giving department of insurance authority to regulate and keep records of insurance companies, discussing procedures for authorizing insurers, and describing fees and other charges insurers must pay); Fla.Stat. ch. 625 (1985) (regulating the manner in which insurers may value and manage their assets and liabilities); Fla.Stat. ch. 626, parts I, II, VIII, IX (1985 & Supp.1986) (governing licensing and conduct of insurers); Fla.Stat. § 627.915 (Supp.1986) (setting forth insurer reporting requirements); Fla.Stat. ch. 628 (1985 & Supp.1986) (establishing organization and corporate procedures insurers must follow); Fla.Stat. ch. 631 (1985 & Supp.1986) (discussing insurer insolvency). Taken as a whole, these parts establish a means of regulating mortgage guaranty insurers. Because of the scope of the statute, we must read "mortgage guaranty insurers" broadly. The statute has basically the same purpose it would have had if the legislature had used the term "insurance" instead of "insurers." Section 627.409, which sets forth those circumstances in which insurance companies can avoid their contractual obligations, clearly falls within the purview of the statute and would have been listed if the legislature had wanted to confer this right on mortgage guaranty insurers.

2. *Implied Repeal*

Next, HGIC asserts that in Florida there is a presumption against implied repeal of a statute, and that the district court ignored that presumption. We disagree. First, it is unclear that Section 627.409 ever applied to mortgage guaranty insurance. Prior to the enactment of Section 635.091, only one court had relied on Section 627.409 to hold that a mortgage guaranty insurance contract was void. *See Continental Mortgage Insurance, Inc. v. Empire Home Loans, Inc.*, No. 75–1099–Civ–JLK (S.D.Fla. Nov. 16, 1975). Although Section 627.409's applicability was not a contested issue, the case plainly suggested that Section 627.409 did apply to mortgage guaranty insurance. It is possible that the legislature has expressly incorporated various parts of the Insurance Code partly in order to clarify that many other parts of the Insurance Code, including Section 627.409, do not govern mortgage guaranty insurance law. If the legislature never intended for Section 627.409 to apply to mortgage guaranty insurance, then Section 635.091 did not constitute a repeal of Section 627.409 as it applied to mortgage guaranty insurance.

Second, even if the legislature had originally intended Section 627.409 to apply to mortgage guaranty insurance, Section 635.091 changes this. Although, as HGIC correctly notes, implied repeal is disfavored in Florida, *see e.g., State v. Dunmann*, 427 So.2d 166, 168 (Fla.1983), it is permissible. The courts have recognized the implied repeal of legislation when either: (1) there is evidence that the legislature intended to repeal the earlier statute, or (2) the old statute cannot be reconciled with the new one. *Estate of Flanigan v. Commissioner*, 743 F.2d 1526, 1532 (11th Cir.1984); *Dunmann*, 427 So.2d at 168. Throughout Chapter 635, there are provisions that list the statutes applicable to Chapter 635; by this system, the chapter implicitly excludes those statutes not mentioned. *See State ex rel. Shevin v. Indico Corp.*, 319 So.2d 173, 175 (Fla. DCA 1975), *cert. dismissed*, 339 So.2d 1169 (Fla.1976). Any reading of Section 627.409 that applies it to mortgage guaranty insurance is clearly inconsistent with the more recently enacted Section 635.091. 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.

3. *Policy*

Finally, HGIC declares that a ruling that Section 627.409 does not apply to mortgage guaranty insurance conflicts with established policy. It points to Fla.Stat. § 635.011(1) (1985), which defines mortgage guaranty insurance as "a form of casualty or surety insurance," and suggests that this exhibits a legislative intent to treat mortgage guaranty insurance the same as it treats casualty and surety insurance. We disagree. Casualty and surety insurance are completely regulated in the

general provisions of the Florida Insurance Code. If the legislature wanted mortgage guaranty insurance to be treated exactly the same as these other types of insurance, it could easily have achieved its goal by defining casualty and surety insurance to include mortgage guaranty insurance. Then, those provisions of the Florida Insurance Code regulating casualty and surety insurance would automatically, unambiguously regulate mortgage guaranty insurance. Instead, the legislature created a separate chapter to provide for mortgage guaranty insurance. To the extent that mortgage guaranty insurance *is* like casualty or surety insurance and should be treated as such, sections of Chapter 635 expressly mention this fact. Many provisions of the Insurance Code do apply to Chapter 635, and regulate the business fairly thoroughly. In addition to those provisions incorporated under Section 635.091, Fla.Stat. § 635.051 (1985) incorporates most of the general licensing laws into the chapter; Fla.Stat. § 635.071 (1985) dictates that the insurance department must approve policy forms and related forms, and that insurers must file information regarding their rates and premiums with the department; and, Fla.Stat. § 635.081 (1985) gives the insurance department the power to adopt any rules necessary to enable it to administer and enforce the chapter. These rules supplement Chapter 635 itself, which defines and regulates mortgage guaranty insurance companies.

Chapter 635 and the supplemental provisions still fail to provide the extent of regulation and protection provided by the Florida Insurance Code. We believe that this stems from the legislature's determination that mortgage guaranty insurance is distinguishable from other types of insurance. The average holders of most types of insurance policies are individuals; much of the statutory regulation has emerged to protect consumers in their dealings with large insurance companies. Chapter 627, which contains Section 627.409, expressly recognizes this, stating that the chapter's purpose is to "promote the public welfare" and "protect policyholders and the public." Fla.Stat. § 627.031 (1985). Section 627.409 in particular clearly exists for this purpose. Prior to its enactment, insurers could much more easily avoid their obligations to innocent policyholders.[7] Section 627.409 protects consumers by making it harder for unscrupulous insurers to declare insurance contracts void based on technicalities. *See* Case Note, *Aviation Law—Florida's "Antitechnical" Statute: Should Insurance Exclusions Be Included?*, 10 Fla.St.U.L. Rev. 737, 739–40 (1983). The legislature apparently thought that Section 627.409 and other parts of the Insurance Code were not necessary in the context of commercial insurance policies that are invariably sold to companies engaged in mortgage lending.

In addition, mortgage guaranty insurance companies *also* do not require the protection provided by Section 627.409. Section 627.409 lets insurance companies void policies when material misrepresentations have been made. This protects insurers who reasonably relied on misrepresentations made in application for insurance.

This provision need not extend to Chapter 635 because mortgage guaranty insurance applications are different from applications for other types of insurance. In their brief, amicus curiae Mortgage Bankers Associations of Florida and Alliance Mortgage Company explain:

> For most types of insurance coverage, the application for insurance is a discrete document which contains all of the information which the insurance company be-

7. Under the common law, a warranty was any term made a part of the policy itself. A representation was a collateral statement made by the policyholder which the insurer considered in deciding whether to insure the party and what rate to charge. While only material misrepresentations were grounds for avoiding a policy, "noncompliance with a provision construed as a 'warranty' was a complete defense for the insurer regardless of materiality of the 'breach.'" Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 Harv.L.Rev. 1281, 1281 (1970). The statutory law of most states has changed the harsh effects of the common law rule by declaring that all statements made by the policyholder shall be treated as representations. *See* Keeton, *supra;* Comment, *Misrepresentations and Nondisclosures in the Insurance Application*, 13 Ga.L.Rev. 876 (1979).

lieves is relevant to the assessment of the risk. . . . In this context, the party making the application is clearly in the best position to know whether the statements made in the application are correct and the extent to which these statements provide a complete picture of all relevant facts.

In contrast, mortgage insurance has no comprehensive "application form." Mortgage companies generally submit an "application for insurance", a form with certain basic information such as the name of the borrower, location of the property and the amount of the loan. Submitted with that form is a package of material consisting of virtually all the documents needed to obtain a mortgage loan, including:

a) an appraisal of the property performed by an independent appraiser;

b) a sales contract executed by the seller and the purchaser;

c) an application for the mortgage prepared by the borrower;

d) verification of employment prepared by the borrower's employer;

e) verification of deposit prepared by the borrower's banking institutions;

f) a credit report on the borrower, generally prepared by a credit bureau; and

g) tax records prepared by the borrower.

. . . Mortgage insurance companies . . . have the ability to review the documentation that the mortgage company is relying on and verify that information or seek additional information.

Brief of Amicus Curiae Mortgage Bankers Association of Florida and Alliance Mortgage Company at 7-9 (citations omitted). Because of their unique ability to evaluate the documentation, mortgage guaranty insurance companies are on a more equal footing with mortgage lenders and need not rely on Section 627.409 for protection. Thus, we find that the legislature's policy is to exclude Section 627.409 from Chapter 635.[8]

CONCLUSION

For all of the reasons stated in this opinion, we conclude that Section 627.409 of the Florida statutes does not apply to mortgage guaranty insurance.

AFFIRMED.

8. Our discussion of the legislature's policy is in response to HGIC's argument, rather than an evaluation of the legislature. It is really up to the legislature to decide what policy is most effective and fair.

CENTEL CABLE TELEVISION COMPANY OF FLORIDA, Plaintiff-Appellant,

v.

ADMIRAL'S COVE ASSOCIATES, LTD., et al., Defendants-Appellees.

No. 87-5463.

United States Court of Appeals, Eleventh Circuit.

Jan. 19, 1988.

Cable television company brought action for preliminary injunction to allow it to provide cable television to new residential community. The United States District Court for the Southern District of Florida, No. 87-8341-CIV-LCN, Lenore Carrero Nesbitt, J., dismissed and appeal was taken. The Court of Appeals, Fay, Circuit Judge, held that private right of action existed under Cable Communications Policy Act.

Reversed and remanded.

1. Action ⇐3

In determining whether there is implied cause of action under federal statute,