Supreme Court of Florida

ORIGINAL

No. 82,495

FEDERAL DEPOSIT INSURANCE CORPORATION, Appellant,

vs.

VEREX ASSURANCE, INC., Appellee.

[November 17, 1994]

KOGAN, J.

This case began when Federal Deposit Insurance Corporation (FDIC) brought suit in federal district court to recover from Verex Assurance, Inc. (Verex) sums allegedly due and owing under two certificates of insurance issued pursuant to a standard mortgage guaranty insurance policy. Verex took the position that it was entitled to rescind the two certificates of insurance due to material misrepresentations contained in the application packages for the certificates. The district court agreed and entered summary judgment in favor of Verex. Federal Deposit Ins. Corp. v. Verex Assurance, Inc., 795 F. Supp. 404 (S.D. Fla. 1992). FDIC raised three issues on appeal to the

United States Court of Appeals for the Eleventh Circuit. The Circuit Court of Appeals ruled in favor of Verex on two of the issues, which are of no concern here. However, the final issue--whether Verex can rely on section 627.409, Florida Statutes (Supp. 1982),[1] to prevent recovery under the two certificates of insurance--hinges on an unresolved question of Florida law which the Eleventh Circuit certified to this Court for resolution, pursuant to article V, section 3(b)(6) of the Florida Constitution.[2] The question that we are asked to resolve 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?

Federal Deposit Insurance Corporation v. Verex Assurance, Inc., 3 F.3d 391, 399 (11th Cir. 1993).

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[1] Section 627.409, Florida Statutes (Supp. 1982), provides, in pertinent part:

> (1) All statements and descriptions in any application for an insurance policy or annuity contract . . . 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 . . . if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

[2] See also § 25.031, Fla. Stat. (1993); Fla. R. App. P. 9.150.

The Circuit Court provides the following background:

> This case involves two certificates of insurance issued under a master mortgage guaranty insurance policy by Verex in favor of Sunrise Savings & Loan ("Sunrise"). FDIC is the successor-in-interest to the Federal Savings & Loan Insurance Corporation, which was the receiver for Sunrise. Verex is an insurer of mortgage loans on residential real property, insuring lenders against loss when borrowers default on their mortgage loans.
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> Prior to 1983, Verex issued its standard Master Policy of Insurance ("Policy") to Sunrise. Under the terms of this Policy, Sunrise submitted applications to Verex for residential mortgage guaranty insurance with respect to each loan for which it desired coverage under the Policy. Each application package for insurance consisted of the purchase contract for the property, the borrower's residential loan application, credit reports, Sunrise's verification of the borrower's deposits and employment, an appraisal, and various closing documents. The two certificates of insurance involved in this case provided that Verex would pay 20% of any losses suffered by Sunrise on the residential mortgage loans if the borrowers defaulted.
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> On April 29, 1983, Sunrise sent a standard application package to Verex for mortgage guaranty insurance on a $450,000 mortgage loan that Sunrise had made to Frank and Patti Ferrero ("Ferreros"). On May 5, 1983, Verex issued an insurance commitment in connection with this loan; the commitment became a certificate of insurance after the loan was closed and the premium paid. Unknown to Sunrise and Verex, the Ferreros misrepresented the amount of their down payment and paid considerably less out of pocket than the figure stated on their loan application. Sunrise and Verex relied upon this misrepresentation.
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> Sunrise also made a $45,100.00 mortgage loan to Juan and Lisa Bonilla ("Bonillas") around the same time. Like the Ferreros, the Bonillas misrepresented to Sunrise the amount of their down payment, and Sunrise unwittingly submitted this misrepresentation to Verex through the certificate of insurance

> application package. On July 21, 1983, Verex issued an insurance commitment to Sunrise in connection with this mortgage loan and this commitment later ripened into a certificate of insurance.
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> Both the Ferreros and the Bonillas subsequently defaulted on the mortgage loans. Sunrise sought reimbursement from Verex on the mortgage guaranty insurance certificates under the Policy. Verex refused to pay on the certificates, alleging that the material misrepresentations in the certificate applications precluded recovery under the Policy.
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> The district court entered summary judgment in favor of Verex. It held that the certificates of insurance were void because of the material misrepresentations contained within the application packages submitted to Verex by Sunrise. In reaching this decision, the district court concluded that section 627.409 of the Florida Statutes (1991) undisputedly provides that when a borrower misrepresents a material fact in a loan application, which misrepresentation is transmitted as part of an application for insurance, the risk of loss from the loan is placed on the bank rather than the bank's insurer. After noting that the question of whether § 627.409 applied to mortgage guaranty insurance policies prior to October 1, 1983 was unsettled, the district judge concluded that § 627.409 did apply to these two certificates of insurance. FDIC challenges the district court's application of § 627.409 in this appeal.

3 F.3d at 392-93 (footnote omitted).

The Eleventh Circuit explains the issue for our consideration as follows:

> The question remaining in this appeal is whether Fla. Stat. § 627.409 applies to these certificates of insurance. This section protects an insurer from material misrepresentations in an application for insurance, even those innocently made by the insured. Therefore, if § 627.409 applies in this case, Verex can rescind the certificates it issued based on the material

misrepresentations contained in the borrowers' loan documents which we find to be imputed to Sunrise.

The district court decided this question with some reluctance because it correctly identified the issue as an unresolved question of Florida law. The uncertainty arises from the Florida statutory scheme covering insurance. Since 1959, mortgage guaranty insurers, like Verex, have been governed by Florida Statutes Chapter 635, titled Mortgage Guaranty Insurance. Chapter 635 does not include a section, like § 627.409, that protects mortgage guaranty insurers from material misrepresentations made by insureds. Nevertheless, the absence of an analog to § 627.409 had little significance for years because courts extended the protection of § 627.409 to mortgage guaranty insurers. See United Guarantee Residential Ins. Corp. v. American Pioneer Savings Bank, 655 F.Supp. 165 (S.D.Fla.1987); Continental Mortgage Insurance Inc. v. Empire Home Loans, Inc., No. 75-1099-CIV-JLK (S.D.Fla. Nov. 26, 1975).

On October 1, 1983, the landscape of Florida insurance statutes may have shifted. On that day, section 635.091, titled "Provisions of Florida insurance Code applicable to mortgage guaranty insurance," was added to Chapter 635 of the Florida Statutes. It provides as follows:

> 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; s. 627.915; chapter 628; and chapter 631.

Section 635.091 explicitly sets forth those parts of the Insurance Code applicable to mortgage guaranty insurers. Section 627.409 does not appear on the list of provisions expressly incorporated into Chapter 635.

In Home Guaranty Ins. Corp. v. Numerica Financial Services, Inc., 835 F.2d 1354 (11th Cir.1988), this Court held that § 627.409 does not apply to mortgage guaranty insurance contracts formed after October 1, 1983, because § 635.091 did not expressly incorporate § 627.409. The parties agree that had the two insurance certificates been executed after October 1, 1983, Numerica would control and Verex would be required to

> bear the loss associated with the material misrepresentations.
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> The certificates of insurance involved in this case, however, were issued before the effective date of § 635.091 on October 1, 1983. The issue of whether § 627.409 applied to mortgage guaranty insurance before October 1, 1983 has not been directly considered subsequent to our decision in Numerica and the enactment of § 635.091. Therefore, as the district court recognized, we are faced with a question of first impression: Did the Florida legislature enact § 635.091 to clarify that § 627.409 does not apply to mortgage guaranty insurance, or was § 635.091 enacted to repeal, by implication, the application of § 627.409 to mortgage guaranty insurance?

3 F.3d at 396.

The Circuit Court succinctly sets forth the arguments of the parties as follows:

> FDIC argues that the statutory scheme in place at the time § 635.091 became effective indicates that the Florida legislature intended merely to clarify that § 627.409 never applied to mortgage guaranty insurance, rather than work a substantive change through § 635.091. To support its argument, FDIC points out that in 1983, § 624.01 of the Florida Statutes defined the "Florida Insurance Code" as including Title XXXVII, Chapters 624 through 632 and Part I of Chapter 641. FDIC asserts that the absence of Chapter 635 from this list reinforces the fact that since the enactment of Chapter 635 in 1959, mortgage guaranty insurance has been governed exclusively by that chapter. Through the enactment of Chapter 635, FDIC alleges the Florida legislature made a conscious decision that mortgage guaranty insurance would be treated separately and differently from other insurance, except to the extent that the legislature chose to incorporate certain other provisions of the general insurance code.
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> According to FDIC, the Florida legislature effected this incorporation in

§ 635.051 [FN3] and § 635.081 [FN4].

FN3. Fla.Stat. § 635.051 (1981), titled "Licensing of mortgage guaranty insurance agents," provides:

> (1) Agents of mortgage guaranty insurers shall be licensed, and be subject to the same qualifications and requirements, as apply to general lines agents under the laws of this state, except:
> (a) That no particular preliminary specialized education or training shall be required of an applicant for such an agent's license if, as part of the application for license, the insurer guarantees that the applicant will receive the necessary training to enable him properly to hold himself out to the public as a mortgage guaranty insurance agent, and if the department, in its discretion, accepts such guaranty;
> (b) The agent's license shall be a limited license, limited to the handling of mortgage guaranty insurance only; and
> (c) An examination may be required of an applicant for such a license in the discretion of the department.
> (2) Any general lines agent shall qualify to represent a mortgage guaranty insurer without additional examination.
> (3) The department shall charge and collect the same applicable license taxes and fees for or in connection with such application and license as apply to general lines agents. The department shall deposit such license taxes and fees in such funds and for such uses as is provided by laws applicable to like license taxes and like fees in the case of general lines agents.

FN4. Fla.Stat. § 635.081 (1981), titled Administration and Enforcement, states:

> The department shall have the same powers of administration and enforcement of the provisions of this act, and to make rules and regulations for the effectuation of any provisions of this act, as it has with respect to casualty or surety insurers in general under the insurance laws of this state.

FDIC asserts that these sections identified and incorporated those provisions of the Florida Insurance Code which the legislature made applicable to mortgage guaranty insurance, and no other provisions of the Florida Insurance Code were incorporated by reference into Chapter 635. FDIC contends that when the Florida legislature enacted § 635.091, it did so to clarify by detailed statement of chapter and section those provisions of the insurance code previously applicable to mortgage guaranty insurers through subject matter description in sections 635.051 and 635.081.

FDIC also cites the legislative history surrounding the adoption of § 635.091 to support its contention that this section was a technical amendment meant for clarification, not change. Specifically, FDIC relies on Fla.H.R.Comm. on Commerce, (Dec. 21, 1982) ("House Analysis") and Fla. Senate Comm. on Commerce, (Dec. 1982) ("Senate Analysis"). FDIC points to Section 13 of the House Analysis, which discussed the statute codified at § 635.091. FDIC alleges that Section 13 reveals that § 635.091 was only a technical amendment. It provides:

> 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.

House Analysis at p. 3. This language means, according to FDIC, that enacting § 635.091 was not a repeal, implied or otherwise, of the existing scheme, but rather the enactment was a clarification of the law as it existed. FDIC contends the Senate Analysis is consistent with the House Analysis, as reflected by the staff's last statement:

> It is therefore recommended that the legislature reenact Chapter 635, Florida Statutes, with the following modifications; Provide technical corrections and clarifying amendments to improve organization and understanding.

Senate Analysis at p. 42. In sum, FDIC argues that the legislative history supports its position that by enacting § 635.091, no

substantive change occurred in Florida law governing mortgage guaranty insurance policies.

Verex contends that the district court correctly determined that prior to the enactment of § 635.091, § 627.409 applied to mortgage guaranty insurance. Verex identifies several relevant provisions of the Florida Statutes to bolster its assertion. First, Verex notes that mortgage guaranty insurance is defined as a form of casualty and surety insurance in section 635.011, Fla.Stat. (1991), and avers that the scope of protection provided by § 627.409 covers many types of insurance, including casualty and surety insurance. Specifically, section 627.401 [FN5] defines the scope of Chapter 627, Part II, which contains § 627.409, by excluding from its regulations certain types of insurance contracts. Noting the absence of mortgage guaranty insurance from this list of exclusions, Verex argues that finding that § 627.409 did not apply to mortgage guaranty insurance prior to the enactment of § 635.091 would effectively rewrite § 627.401 to create a new exclusion for this type of insurance from the requirements imposed by Chapter 627, Part II.

FN5. Fla.Stat. § 627.401 (1983), titled "Scope of this part," provides:

> No provision of this part of this Chapter applies to:
> (1) Reinsurance.
> (2) Policies or contracts not issued for delivery in this state nor delivered 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 credit disability insurance, except §§ 627.419(5) and 627.428.

Another provision of the Florida Statutes which Verex argues supports its position that mortgage guaranty insurance was subject to parts of the Florida Insurance

Code beyond Chapter 635 is § 627.4145. Enacted in 1982, § 627.4145 required that every insurance policy written in Florida pass a readability test. In 1985, the Florida legislature amended § 627.4145 to exempt mortgage guaranty insurance policies from the readability language requirements of the statute. Fla.Stat. § 627.4145(6)(g) (1985). Verex points out that the Florida legislature must have known that § 627.4148 is not listed among the Insurance Code provisions in § 635.091 which were applicable to mortgage guaranty insurance. Therefore, Verex argues that if mortgage guaranty insurance was governed exclusively by the provisions of Chapter 635 and other specifically incorporated code provisions, the 1985 amendment to § 627.4145 was pointless.

Similarly, Verex calls the Court's attention to § 627.4133, governing notice of cancellation, nonrenewal, or renewal premiums. On October 1, 1990, the Florida legislature amended § 627.4133 to exempt mortgage guaranty insurance from its coverage. Verex asserts that FDIC's position means that § 627.4133 has not applied to mortgage guaranty insurance at least since 1983 when § 635.091 was adopted because § 635.091 does not list § 627.4133. Nevertheless, because the legislature amended § 627.4133 in 1990 specifically to exempt mortgage guaranty insurance, Verex insists that this statute must have applied to mortgage guaranty insurance prior to that time.

Verex maintains that the amendments to sections 627.4145 and 627.4133 indicate that FDIC's interpretation of the purpose and effect of § 635.091 is untenable. If § 635.091 were enacted only to clarify those sections of the Insurance Code applicable to mortgage guaranty insurance, then the amendments would have been without purpose. Thus, Verex argues that FDIC's explanation of § 635.091 is incorrect.

Like FDIC, Verex turns to the legislative history to support its position that mortgage guaranty insurance is governed by provisions of the Florida Insurance Code, as well as by the requirements of Chapter 635. Verex alleges that the Florida

> legislature clearly stated that, by enacting Chapter 635, it 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 at p. 2. Because § 635.011 defines mortgage guaranty insurance as a form of casualty and surety insurance, Verex argues that mortgage guaranty insurance is subject to the requirements of more than just Chapter 635. Verex points to similar language in the Senate Analysis which requires mortgage guaranty insurance companies to comply with provisions of the Insurance Code. This legislative history shows that mortgage guaranty insurance is not governed exclusively by Chapter 635, Verex contends. Thus, Verex argues that the enactment of § 635.091 in 1983 was an implied repeal of the application of § 627.409 to mortgage guaranty insurance, according to this Court's opinion in Numerica, rather than a mere technical clarification of those provisions of the Insurance Code made applicable to mortgage guaranty insurance by incorporation into Chapter 635.
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> In sum, Verex disputes FDIC's contention that mortgage guaranty insurance is governed exclusively by Chapter 635. Instead, Verex argues that 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 applicable to casualty and surety insurers.

3 F.3d at 397-399.

Although we concede that the interplay between the provisions of chapters 635 and 627 prior to October 1, 1983, is less than clear, we find Verex's position the more reasonable. We cannot say that at the time these certificates of insurance were issued the legislature intended mortgage guaranty insurance to be governed exclusively by the provisions of chapter 635. As

noted by Verex, section 635.011, Florida Statutes (1981), defines mortgage guaranty insurance as a form of casualty or surety insurance. Casualty and surety insurance are two of the many types of insurance covered by Chapter 627, Part II, which contains section 627.409. Thus, because neither casualty, surety, nor mortgage guaranty insurance is among the types of insurance that are excluded from the scope of chapter 627, Part II by section 627.401, we can assume that at least until October 1, 1983 the legislature intended section 627.409 to apply to mortgage guaranty insurance.[3]

Accordingly, we answer the certified question in the affirmative and return the cause to the Eleventh Circuit for further proceedings.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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[3] The legislature recently amended section 635.091 to include section 627.409 among the provisions of the Florida Insurance Code that apply to mortgage guaranty insurance. This amendment was effective October 1, 1993. Ch. 93-21, §§ 4, 6, at 143, Laws of Fla.

Certified Question of Law from the United States Court of Appeals for the Eleventh Circuit - Case No. 92-4591

Alan L. Briggs of Squire, Sanders & Dempsey, Miami, Florida,

for Appellant

Gerald B. Wald of Murai, Wald, Biondo & Moreno, P.A., Miami, Florida,

for Appellee