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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 84,791

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, as subrogee of
COMMONWEALTH FEDERAL SAVINGS
AND LOAN ASSOCIATION

Petitioner,

vs.

FIRST STATE INSURANCE COMPANY,

Respondent

ON APPEAL FROM THE

FLORIDA FOURTH DISTRICT COURT OF APPEAL

WEST PALM BEACH, FLORIDA

ANSWER BRIEF OF RESPONDENT, FIRST STATE INSURANCE COMPANY

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INTRODUCTION

In the Respondent's Answer Brief, the Respondent, FIRST STATE INSURANCE COMPANY, will be referred to as "FIRST STATE." The Petitioner, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, as subrogee of COMMONWEALTH FEDERAL SAVINGS AND LOAN ASSOCIATION, will be referred to as "FIDELITY AND DEPOSIT." COMMONWEALTH FEDERAL SAVINGS AND LOAN ASSOCIATION, the mortgagee, will be referred to as "COMMONWEALTH." FOUNTAINEBLEAU RACQUET CLUB, the named insured, will be referred to as "FOUNTAINEBLEAU."

Reference to the record on appeal will be made using the symbol ("R."). Reference to the documents set forth in FIRST STATE's supplement to the Record will be made using the symbol ("R. Suppl.").

STATEMENT OF THE CASE

FIRST STATE disagrees with the Statement of the Case as set forth in Petitioner's brief inasmuch as it contains argument on page 4 with respect to the impact of the Fourth District Court of Appeal's decision on future case law and the statement that the "Fourth District's ruling is contrary to well-established law in this State."

STATEMENT OF THE FACTS

FIRST STATE disagrees with the Statement of the Facts contained in Petitioner's Brief as it is incomplete, inaccurate and misleading. For example, on Page 8 of the Initial Brief, FIDELITY AND DEPOSIT asserts:

> She [Ms. DiSario] also did not think that a "verbal cancellation" could cancel coverage as the mortgagee's interest (DiSario D67).

However, the transcript of the deposition taken of Ms. DiSario at page 67 indicates the following:

> Q. . . . did you think the coverage had been cancelled as of October 1987?
>
> MR. POMERANTZ: Objection; repetitive.
>
> MR. WILSON: Objection to form, join.
>
> MR. POMERANTZ: You can answer.
>
> THE WITNESS: A verbal cancellation does not - -
>
> BY MR. BUTLER: Q. Ms. Disario, I'm going to ask you . . .

Clearly, Ms. DiSario never finished her sentence and certainly never testified that "[s]he did not think that a "verbal cancellation" could cancel coverage as the mortgagee's interest." The Petitioner has clearly added both a context and a conclusion.

Additionally, on Page 8 of the Initial Brief, Petitioner states:

> Ms. Disario explained that the mortgagee-bank had a procedure to follow once a <u>written</u> notice of cancellation of insurance was received for property on which the bank held a mortgage (Disario D17).

However, the transcript of the deposition taken of Ms. Disario at page 17 indicates as follows:

> Q. I am asking you for the purpose of this hypothetical to assume that you gave yourself 60 days lead time. So if you had an expiration date, in April of say 1988, and assume you gave yourself 60 days lead time before

the expiration of that policy and therefore you put it in the tickler system for some time in February 1988, what would you do, if anything, if you received a notice of cancellation in June of 1987 for that particular policy covering that particular mortgaged property?

A. Any time a cancellation notice was received it was called upon immediately. That was never something that had anything to do with the tickler system. That was acted upon immediately.

Ms. DiSario never testified that the bank had a procedure once a "written notice" was received. She merely testified that the procedures were activated once notice of cancellation was given. Such notice could have been oral as well as written.

Finally, on Page 8 Petitioner contends Ms. DiSario did not know whether, in fact, FOUNTAINEBLEAU's insurance coverage had been cancelled (DiSario D75-76). To the contrary, Ms. DiSario testified that she knew there was no coverage in effect where she stated:

Q. Therefore did you conclude that he had no coverage in February of '87?

A. Correct.

Q. And as a result of concluding that he had no coverage in February of '87 you told him that he better go out and get a policy and if he didn't get the policy you explained to him that Commonwealth would go purchase one for him and charge him the cost of the premium plus interest, is that correct?

A. Correct.

Q. That was in February of '87, right?

A. Mmhmm.

Similar, inaccuracies occur throughout the Statement of the Facts contained in the Petitioner's Brief. Thus, in an effort to supplement the Statement of Facts, Respondent has set forth an accurate Statement of Facts as follows:

FIRST STATE issued a policy of insurance to FOUNTAINEBLEAU as the named insured for the policy period March 31, 1987 through March 31, 1988. (R. 6). COMMONWEALTH was named as a mortgagee on the policy. (R. 35). FOUNTAINEBLEAU financed the policy premiums through an agreement with TIFCO, INC. (hereinafter referred to as "TIFCO"), and COMMONWEALTH gave TIFCO a Power of Attorney to act on its behalf. (R. 184). By it terms, the Power of Attorney granted TIFCO the authority to cancel the policy on behalf of FOUNTAINEBLEAU as a result of nonpayment of premium.

On two occasions TIFCO exercised its right of cancellation for nonpayment of premium. On both occasions, FIRST STATE acted in compliance with TIFCO's request and cancelled the policy. Shortly after the first request to cancel, FIRST STATE was requested and did in fact reinstate the policy. (R. Suppl., Deposition of Vera Etta Miller, page 43). Upon the second request for cancellation made by TIFCO, FIRST STATE cancelled the policy of insurance in October of 1987. COMMONWEALTH claims not to have received a Notice of Cancellation from FIRST STATE in October of 1987. However, COMMONWEALTH clearly admits receiving actual notice on February 11, 1988, that the insurance policy had been cancelled and was no longer in force.

It is undisputed that Fern DiSario, an employee of COMMONWEALTH, knew on February 11, 1988, there was no coverage on the FOUNTAINEBLEAU property. Ms. DiSario's notes indicate that:

"The coverage for the building and liability was cancelled back in October."

(R. Suppl., Exhibit 9 to the Deposition of Fern DiSario and Exhibit 3 to the Deposition of S. Lyle Robertson. [Note: both DiSario and Robertson were former employees of Commonwealth]). Additionally, Ms. DiSario testified at deposition as follows:

Q. And did Ms. Diaz [the insurance agent with Beltran/Alexander and Alexander who Commonwealth recommended to the insured] tell you that the coverages for both the building and the liability had been cancelled as of October 1987?

A. On what date?

Q. February 11, 1988.

A. Yes.

. . .

Q. Well, read for us, for the jury, what the notes are that you are reading from, please, ma'am.

A. "Spoke with Louisa Diaz at Beltran/Alexander and Alexander. The coverage for the building and liability was cancelled back in October."

Q. All right. Did you understand that to mean that the coverage was cancelled in October of 1987?

. . .

A. Yes. According to Louisa, yes, it was cancelled back in October. (R.199-206 and R. Suppl., Deposition of Fern DiSario at pages 64 and 65).

. . .

Q. Did you tell anybody verbally with COMMONWEALTH that Louisa Diaz had told you the coverage for the building and liability was cancelled in October?

A. To the best of my knowledge I seem to remember Keith Schleicher as being my supervisor at that time.

. . .

Q. Do you have an independent recollection of having told Keith Schleicher about what Louisa Diaz said regarding the cancellation, apart from your having read Exhibit 1?

A. Yes.

. . .

Q. Well, you indicate you have a specific recollection of, or independent recollection of having told him. Would you tell me all the facts and circumstances that you can recall surrounding your going to him and telling him about this?

A. I don't remember if it was in passing or that I just happened to be talking to him about concerns. I don't remember how it came about, or what we actually spoke about, but I know I voiced my concern.

Q. When you say you voiced your concern, what do you mean?

A. About what Louisa Diaz told me. (R. Suppl., Deposition of Fern DiSario at pages 79-81).

Ms. DiSario of COMMONWEALTH also called Pedro Napolis, the owner of FOUNTAINEBLEAU, COMMONWEALTH's mortgagor, and told him that if he did not purchase insurance coverage, COMMONWEALTH, as mortgagee, would purchase it for him and charge him interest for the use of the funds. COMMONWEALTH, however, took no action and was without insurance to protect itself when the mortgaged property sustained damage on May 1, 1988.

After discovering its error in failing to procure insurance, COMMONWEALTH filed a claim with its Errors and Omissions insurance carrier, FIDELITY AND DEPOSIT. FIDELITY AND DEPOSIT conducted an investigation of the claim, ascertained the amount of the loss and made payment to COMMONWEALTH. (R. Suppl., Exhibit 9 of the Deposition of Leonard Belstock). As part of its claim for insurance proceeds from its Errors and Omissions carrier,

which was signed by a corporate officer, COMMONWEALTH made the following admission, the terms of which were pertinent to the cause of action:

> . . .
>
> On February 11, 1988 while DiSario was preparing audit reports for her department, and verifying insurance coverage on COMMONWEALTH's mortgage loan business, she realized that COMMONWEALTH had not yet received the written insurance policy or other documentation confirming the existence of insurance from Cameron & Colby. DiSario then telephoned Diaz [the insurance agent with Beltran to whom COMMONWEALTH had referred FOUNTAINEBLEAU] to request such documentation, but was then told that the FOUNTAINEBLEAU insurance policy was cancelled in October of 1987 for nonpayment of premium, and that a Notice of Cancellation was sent to COMMONWEALTH. Diaz did not say who sent the cancellation notice. This was the first time that COMMONWEALTH learned that the racquet club was uninsured. COMMONWEALTH never received a written Notice of Cancellation from Cameron & Colby [FIRST STATE's General Agent] or from Beltran.
>
> After learning that there was no insurance on the racquet club, DiSario advised her supervisor, Keith Schleicher, about the lack of insurance coverage. Schleicher advised DiSario that the property was in a work out status due to a default on the loan. At that same time, DiSario was preparing to leave COMMONWEALTH for a new job. DiSario was engaged in preparing the real estate files so that they would be in proper order for her successor following her departure and she took no steps to secure replacement insurance protecting the bank's mortgage. Likewise, Schleicher failed to obtain hazard insurance due to confusion as to who was responsible for procuring the insurance. This confusion was based in large part on the work out status of the matter.

(See attachment to Sworn Proof of Loss filed by COMMONWEALTH attached as Exhibit 1 to the deposition of Fern DiSario and Exhibit 1 to the deposition of Dennis Penley, former employees of COMMONWEALTH, filed as a supplement to the record). Thereafter, FIDELITY AND DEPOSIT, the Errors and Omissions carrier, brought this subrogation action against FIRST STATE.

The specific events regarding the cancellation, fire loss and subsequent events are set forth chronologically and are as follows:

(a) On **March 31, 1987** the policy became effective.

(b) On **May 6, 1987** a Notice of Intent to Cancel was mailed from TIFCO to FOUNTAINEBLEAU indicating a premium must be paid by **5/20/87** or the finance company would cancel the policy. The amount due was $4,025.79.

(c) On **May 28, 1987** TIFCO sent a Notice of Cancellation to FIRST STATE and to FOUNTAINEBLEAU indicating the policy would be cancelled effective 12:01 a.m. on **5/29/87** as a result of the failure to pay a premium due 4/30/87.

(d) On **June 10, 1987** FIRST STATE, through its agents, Cameron & Colby, sent a Notice of Cancellation to FOUNTAINEBLEAU. The Notice of Cancellation indicated it was to be effective **6/23/87.**

(e) On **June 10, 1987** a Notice of Cancellation was sent by Cameron & Colby to COMMONWEALTH.

(f) On **June 24, 1987**, a Reinstatement Request was sent by TIFCO asking that coverage be reinstated.

(g) On **June 27, 1987** the Reinstatement Request of TIFCO was received by Cameron & Colby.

(h) On **July 6, 1987** correspondence from Cameron & Colby to FOUNTAINEBLEAU with a "cc" to COMMONWEALTH advised that "the Direct Notice of Cancellation to take effect on **June 28, 1987**, is hereby rescinded and the above remains in full force [and] effect with no lapse in coverage."

(i) After FOUNTAINEBLEAU again failed to make timely premium payments, on **September 22, 1987** TIFCO sent a Notice of Cancellation on behalf of FOUNTAINEBLEAU to FIRST STATE requesting the policy be cancelled.

(j) On **October 1, 1987** a Notice of Cancellation was sent by Cameron & Colby, as agents for FIRST STATE, to FOUNTAINEBLEAU indicating the policy would be cancelled as of **10/14/87**. Cameron & Colby has a U. S. Post Office stamped Proof of Mailing for the Notice of Cancellation.

(k) Cameron & Colby, as agents for FIRST STATE, contend it is their normal practice and procedure to mail a Notice of Cancellation to the mortgagee at the same time a notice is mailed to the named insured. Cameron & Colby cannot state why they do not have a Post Office stamped proof of mailing for the notice to COMMONWEALTH, although the documents in their file otherwise would indicate the normal business procedure was followed for notifying COMMONWEALTH that the policy was being cancelled.

(l) Cancellation of the policy became effective on **October 14, 1987**.

(m) On **February 11, 1988,** COMMONWEALTH was advised verbally by Beltran/Alexander and Alexander that the insurance coverage had been cancelled for nonpayment of premium in **October, 1987**. This telephone conversation occurred between Louisa Diaz at Beltran/Alexander and Alexander and Fern DiSario, the person at COMMONWEALTH who was charged with the responsibility of maintaining insurance on mortgaged property.

(n) On **March 31, 1988,** the policy of insurance naming COMMONWEALTH as a mortgagee would have expired on its own terms notwithstanding any cancellation process or procedure.

(o) On **May 1, 1988**, a fire occurred at the FOUNTAINEBLEAU.

(p) On **October 11, 1988,** COMMONWEALTH executed a Proof of Loss seeking payment for the fire damage from FIDELITY AND DEPOSIT, the insurance carrier providing Errors and Omissions insurance coverage for COMMONWEALTH.

(q) On **December 8, 1988,** COMMONWEALTH executed a Release and Assignment acknowledging that COMMONWEALTH "sustained a loss in the amount of $596,411.79, as a result of the FOUNTAINEBLEAU RACQUET CLUB fire loss of **May 1st, 1988** . . ." and after a $5,000 deductible acknowledged payment of $591,411.79 and did "release and discharge FIDELITY AND DEPOSIT INSURANCE COMPANY from any and all liability on its described Policy arising and growing out of the claims and said Proof of Loss relating to the fire loss of FOUNTAINEBLEAU RACQUET CLUB." (R. Suppl., Exhibit 3 and Exhibit 9 to the Deposition of Leonard Belstock).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal properly held that actual notice to COMMONWEALTH was sufficient to meet the underlying purpose of the statutory and contractual notice requirements. There is no dispute over the fact that COMMONWEALTH received "actual notice" prior to the loss that the policy of insurance was cancelled for nonpayment of premium. The method of notification is irrelevant in this regard. Florida courts indicate the keystone in such cases is whether notice itself is given and not the method of notice. Thus, FIRST STATE's cancellation of this policy was not in violation of Florida Statute § 627.848 and the insurance policy provisions. The purpose and spirit of the statute and contractual provisions have indisputably been met.

Contrary to FIDELITY AND DEPOSIT's contentions, FOUNTAINEBLEAU cancelled the policy. Under the terms of the contract, FIRST STATE was not required to give notice to the mortgagee when the insured cancelled the policy.

Finally, the policy by its own terms had expired prior to the loss. The fire which forms the basis of this claim occurred more than thirty (30) days after the applicable expiration date of this policy. COMMONWEALTH had actual notice of the cancellation of the policy forty-nine (49) days before its stated expiration and either intentionally or inadvertently failed to obtain new insurance and, thus, by its own actions allowed the policy to expire by its own terms notwithstanding the cancellation issue. No recovery can be had under a policy which has expired by its own terms prior to a loss.

ARGUMENT

I. THE FLORIDA FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT ACTUAL NOTICE OF CANCELLATION WAS SUFFICIENT TO EFFECTIVELY SATISFY ANY STATUTORY AND CONTRACTUAL REQUIREMENTS.

The Florida Fourth District Court of Appeal properly held that where it was undisputed that "actual notice" was received, and there was no contention to the contrary, "actual notice" of cancellation is

sufficient to comply with the statutory and contractual requirements.

There is no dispute that COMMONWEALTH received actual notice on February 11, 1988, that the policy of insurance was cancelled in October 1987, for nonpayment of premium. (R.199-206). In a sworn affidavit submitted to FIDELITY AND DEPOSIT, COMMONWEALTH admitted it knew on February 11, 1988, that coverage had been cancelled for nonpayment of premium. In that same sworn affidavit, COMMONWEALTH admitted that Fern DiSario, the person responsible for insurance on mortgaged property, and Keith Schleicher, her supervisor, neglected to obtain other insurance knowing that the COMMONWEALTH policy had been cancelled. (R. Suppl., Exhibit 1 to the Deposition of Dennis Penley). It was for this very reason that COMMONWEALTH submitted a claim to its Errors and Omissions insurance carrier, FIDELITY AND DEPOSIT, and accepted from FIDELITY AND DEPOSIT the full amount of the loss. (R. Suppl., Exhibit 9 to the Deposition of Leonard Belstock).

Under Florida law, strict statutory compliance is not always required. Florida courts have found statutory compliance to occur when the spirit of the statute has been met. This issue was recently addressed in *Teachers Insurance Co. v. Bollman*, 617 So. 2d 817 (Fla. 2d DCA 1993). In *Teachers,* the Second District Court of Appeal held that the insured's memorandum

to an agent directing the agent to change the policies from stacked coverage to unstacked was satisfactory, notwithstanding the fact that a statutorily prescribed form was not used. The Court held that even though the insured's written rejection was not on the statutorily prescribed form it did not undermine its effect, i.e., "demonstrating a knowing rejection of uninsured motorist coverage." The Second District Court of Appeal found that the "spirit" and purpose of the statute had been met.

Similarly, in *Frazier v. Standard Guaranty Insurance Co.*, 382 So. 2d 392 (Fla. 4th DCA 1980), an insurer brought a declaratory judgment action to determine whether a policy was in effect. The insurance company had attempted to cancel an automobile liability policy because the insured never provided the insurer with a drivers license number which was one of the insurer's requirements. The insurance company mailed the Notice of Cancellation to an incomplete address, leaving out the insured's apartment number. The insured testified that he never received the notice. However, the facts at trial supported a finding that the insured did receive "actual notice." Nevertheless, the insured argued that there had been a failure to comply specifically with the terms of the policy because the address was incomplete and, therefore, there had been a failure to give the statutorily prescribed notice properly mailed to the last known address of the insured.

The insured in *Frazier* relied on a Michigan appellate decision, *Dorsey v. Michigan Mutual Liability Co.*, 250 N.W.2d 143 (Mich. 1976), which held there must be strict compliance with the statute before cancellation is effected. The Michigan court held actual notice is immaterial if there has been noncompliance with the statute. Significantly, the *Frazier* court refused to adopt the *Dorsey* reasoning and stated:

> It can be seen from the foregoing that while the insurer did not properly address the notice of cancellation by omitting the apartment number, the record reflects substantial competent evidence that Frazier actually received the notice. The sole issue before us is whether actual notice is sufficient notice of cancellation. . . . While the insured's position and the logic of the Michigan court are appealing, we nevertheless reject their conclusions. The better conclusion, we are convinced, is that actual notice is sufficient notice. . . . Notice, not the method of the notice, is the keystone of the statute. . . .
>
> Our holding is consistent with the underlying purpose of notice of cancellation, which is to enable the insured to obtain other insurance "before he is subjected to risk without protection." Cat 'N Fiddle, Inc. v. Century Insurance Co., 213 So. 2d 701 (Fla. 1968), judgment conformed to 214 So. 2d 503 (Fla. 3d DCA 1968) (emphasis supplied).

Id. at 394-5.

The decision of the Florida Supreme Court in *Cat 'N Fiddle, Inc. v. Century Insurance Co.*, 213 So. 2d 701 (Fla. 1968), a case cited by the *Frazier* Court and, interestingly relied upon by COMMONWEALTH in its Motion for Partial Summary Judgment and its underlying brief, concerned a fire insurance policy. The insurer had directed a notice of cancellation to the insurance agent, and the agent never communicated this to the insured in accordance with the policy provisions. The main issue debated by the Court was that of agency and the agent's apparent authority to accept notice of cancellation on behalf of the insured. In *Cat 'N Fiddle*, the Supreme Court of Florida echoed the policy reasons for requiring that a notice of cancellation be given to an insured and stated:

> The purpose of a provision in an insurance policy providing that the insurer can cancel the policy after giving notice to the insured for a prescribed period, is to enable the insured to obtain insurance elsewhere before he is subjected to risk without protection.

Cat 'N Fiddle, 213 So. 2d at 704.

Petitioner cites *Hunsucker v. Arrow, Ins.*, 242 So. 2d 205 (Fla. 1st DCA 1970), for the proposition that strict adherence to policy conditions regarding cancellation is mandatory. However, *Hunsucker* based its holding on the general principle cited above which states that the purpose of the statutory and contractual provisions is to enable the insured to obtain insurance elsewhere. The *Hunsucker* court held:

> Thus, the legislative scheme is clearly designed to require that the insurance company apprise the insured of his rights of recourse prior to the cancellation becoming effective.

There is no dispute that COMMONWEALTH knew of the cancellation 79 days before the fire and over 30 days before the policy expired by its own terms. Rather than obtain replacement insurance, COMMONWEALTH through its employee DiSario, chose to rely on the insured to obtain other insurance. (Deposition of Fern DiSario, P. 75-76; R 199-206).

Petitioner further contends that *Nu-Air Manufacturing Co. v. Frank B. Hall & Co. of New York*, 822 F. 2d 987 (11th Cir. 1987), and *Graves v. Iowa Mutual Insurance Co.*, 132 So. 2d 393 (Fla. 1961), supports the proposition that "actual notice" is insufficient. However, in *Nu-Air* the court held that:

> Notice must clearly convey to the insured the fact of termination so that he may obtain other insurance and avoid being subject to risk without coverage.

This policy rationale was satisfied here where the mortgagee had 79 days to procure alternate coverage. Finally, in *Graves* the court implied that cancellation was only improper because the "insured never received <u>actual notice</u> of cancellation." Implicit in this holding is that cancellation would have been proper if "actual notice" had been given to the insured.

No Florida case has ever found that "actual notice" is insufficient to cancel the policy, as long as the insured is given sufficient time to procure insurance.[1] In the instant case, there has never been any contention, nor can there be, that the cancellation with regard to the insured was improper. The insured was clearly given sufficient time to procure insurance prior to the loss. Similarly, COMMONWEALTH, even assuming that the allegations regarding written notice are true, was given sufficient time, through actual notice, to procure insurance for the insured. In fact, COMMONWEALTH admitted that it erred in failing to procure insurance when it had an opportunity to do so. This fact was confirmed when COMMONWEALTH filed its claim with it Errors and Omissions carrier.

Clearly, COMMONWEALTH, the mortgagee, could have obtained insurance elsewhere, but sat on its opportunity to do so. COMMONWEALTH's Errors and Omission carrier, through this subrogation action, now attempts to shift the blame to FIRST STATE.[2] This Court should affirm the Fourth District Court of Appeal's holding and find that an undisputed receipt of "actual notice" was sufficient to cancel the policy.[3]

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[1] In fact, the Appellate Court in *Cooke v. Insurance Company of North America,* 603 So. 2d 520 (Fla. 2nd DCA 1992) *modified on other grounds*, 624 So. 2d 252 (Fla. 1993), implied that actual notice may be proper if the insured is given sufficient time to procure alternative insurance.

[2] The only claim remaining is the subrogation claim of FIRST STATE. Although the record shows COMMONWEALTH initially pursued a claim for what it contended were uninsured losses, that claim was dismissed with prejudice following an amicable resolution between it and FIRST STATE. Florida law has traditionally held that an insurer cannot avoid its assumed risk by paying on the claim and later suing another insurer based on its insureds own negligence. *Dixie National Bank v. Employers Commercial Union Insurance Company*, 463 So. 2d 1147 (Fla. 1985).

[3] It should be noted that contrary to Petitioners contention, even if this court were to hold that cancellation must be received before an effective cancellation, this fact alone would not

II. CONTRARY TO PETITIONER'S CONTENTIONS, FOUNTAINEBLEAU, THE INSURED, NOT FIRST STATE, CANCELLED THE POLICY. HENCE, FIRST STATE WAS NOT REQUIRED TO SEND A NOTICE OF CANCELLATION.

Essentially, Petitioner's argument is based on, and revolves around, the following statement contained in its Initial Brief: "Section 627.848(5), Fla. Stat. applies here and imposes a statutory requirement that contractual restrictions regarding notice to a mortgagee must be complied with when cancellation of insurance is effected." The premise of Petitioner's argument is that a provision of the policy requires the insurer to give written notice to the mortgagee prior to cancellation of the insurance policy. Petitioner's contentions are meritless.

On September 22, 1987, TIFCO, FOUNTAINEBLEAU's premium finance company, sent a notice of cancellation on behalf of FOUNTAINEBLEAU to FIRST STATE requesting that the policy be cancelled. This notice of cancellation was sent pursuant to the authority set forth in section 627.848, Florida Statutes, after FOUNTAINEBLEAU failed to make timely premium payments to TIFCO. Section 627.848, Fla. Stat., provides in pertinent part:

> **627.848. Cancellation of insurance contract upon default**
>
> When a premium finance agreement contains a power of attorney or other authority **enabling the premium finance company to cancel any insurance contract listed in the agreement**, the insurance contract shall not be canceled unless cancellation is in accordance with the following provisions:
>
> (4) Upon receipt of a copy of the cancellation notice by the insurer or insurers, the insurance contract shall be canceled with the same force and effect as if the notice of cancellation had been submitted by the **insured himself**,

---

create coverage for the instant loss. Generally, when notice is improper, the policy remains in effect only for the specified number of days required by the statute or contract for cancellation. See generally section 627.4133(1)(e) Fla. Stat. and section 626.9201(3) Fla. Stat. Thus, even if notice is deemed to have been received by the mortgagee on February 11, 1988, the policy would have remained in force, at most until February 21, 1988. Because the loss occurred several months later, coverage was properly denied.

> without requiring any further notice to the insured or the return of the insurance contract.
>
> (5) All statutory, regulatory, and contractual restrictions providing that the **insured** may not cancel his insurance contract unless he or the insurer first satisfies such restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, a mortgagee, an individual, or a person designated to receive such notice for such governmental agency, insurance carrier, or individual shall apply when cancellation is effected under the provisions of this section. The insurer, in accordance with such prescribed notice when it is required to give such notice in behalf of itself or the insured, shall give notice to such governmental agency, person, mortgagee, or individual; and it shall determine and calculate the effective date of cancellation from the day it receives the copy of the notice of cancellation from the premium finance company.

(emphasis supplied).

Section 627.848(5), Florida Statutes, provides that all contractual restrictions providing that the insured may not cancel his insurance unless he satisfies certain contractual restrictions by giving notice to a mortgagee shall apply when cancellation is effected under section 627.848, i.e. when a premium finance company cancels the policy. Essentially, section 627.848(5) provides that cancellation of an insurance policy by a premium finance company is tantamount to cancellation by the insured and that any requirements the insured would have had to comply with if the insured had cancelled the policy are equally applicable when the premium finance company cancels the policy on behalf of the insured.[4] Thus, under the first sentence of section

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[4] Florida law holds that a cancellation by the premium finance company is equivalent to a cancellation by the insured, at least from the insurer's perspective. *Tate v. Hamilton Insurance Co.*, 466 So. 2d 1205 (Fla. 3d DCA 1985). In *Tate,* the court stated: "Where the finance company is named as attorney-in-fact for the insured, a cancellation by the finance company is equivalent to a cancellation by the insured himself, at least from the insurer's perspective." The Florida Legislature's most recent amendment to 627.848 clearly indicates their support of the holding in *Tate*. It is clear, based on the statute's new language, that the law in Florida remains the same and recognizes an insurance company's right to treat cancellation by a premium finance company as being identical to cancellation by the insured itself. This is evidenced by the following revision to subsection (4) now designated subsection (c):

627.848(5), Fla. Stat., when cancellation is accomplished by a premium finance company, all contractual restrictions in the insurance policy applicable when the insured cancels the policy are equally applicable when the premium finance company cancels the policy. The key to the first sentence of section 627.848(5), Fla. Stat., and to Petitioner's arguments on appeal, is that there must be a contractual provision requiring notice to the mortgagee when the insured cancels the policy.

The instant policy contains two cancellation provisions. One provision applies to cancellations by the insured[5] and one applies to cancellation by the insurer.[6] Under the policy

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> (c) Upon receipt of a copy of the cancellation notice by the insurer or insurers, the insurance contract shall be canceled with the same force and effect as if the notice of cancellation had been submitted by the insured himself, whether or not the premium finance company has complied with the notice requirement of this subsection, without requiring any further notice to the insured or the return of the insurance contract.

[5] The cancellation provision applicable when an insured cancels the policy states that:

> A. CANCELLATION
>
> 1. The first Named Insured shown in the Declarations may cancel the policy by mailing or delivering to us advance written notice of cancellation.

Additionally, the policy defines the words "we", and "our" as the company providing the insurance.

[6] The cancellation provision applicable when the insurer cancels the policy states in pertinent part:

> f. If we cancel this policy, we will give written notice to the mortgage holder at least:
>
> (1) 10 days before the effective date of cancellation if we cancel for your non-payment of premium; or
> (2) 30 days before the effective date of cancellation if we cancel for any other reason.

The policy defines "we" as the company providing the insurance, i.e., FIRST STATE.

at issue here, there were no contractual restrictions that the insured give notice to a mortgagee prior to the insured cancelling the policy. The only requirement when the insured cancels the policy is that the insured notify the insurance carrier of its desire to cancel the policy. There was no requirement that the insured notify the mortgagee. Thus, when the premium finance company, TIFCO, cancelled the policy for the insured pursuant to section 627.848, Fla. Stat., there was no policy provision requiring the insured to notify the mortgagee. Notice to the insurer was all that was required to cancel the policy from the standpoint of the insurer. Any other action or notice given by the insurer, whether verbal or written, was gratuitous and not required by either the policy or statute.

The next issue is whether the second sentence of section 627.848(5), Fla. Stat., imposes some duty on the insurer to notify the mortgagee of cancellation. Section 627.848, Fla. Stat., deals with cancellation of an insurance policy by a premium finance company. As noted above, the first sentence of section 627.848(5), Fla. Stat., requires the insured to comply with contractual obligations, if there are any, with regard to notice when the insured cancels the policy. Under the second sentence of section 627.848(5), Fla. Stat., the insurer also looks to the policy provisions regarding an insureds cancellation of the policy. Specifically, section 627.848(5), Fla. Stat., states that "[t]he insurer, in accordance with such prescribed notice". . . shall give such notice. The "prescribed notice" the statute is referring to is that notice required under the policy when the insured cancels the policy. However, the triggering event in section 627.848(5) is the insured's cancellation and any notice requirements in the policy applicable when the insured cancels the policy. As noted above, the policy did not require any notice,

either from the insured or the insurer, to the mortgagee when the insured cancelled the policy. If "such prescribed" conditions had required the insurer to give notice to a mortgagee when the insured cancelled the policy, then the insurer would have had to comply with those provisions when the premium finance company canceled the policy. Such a requirement is simply not found in the policy. Wish as it might, the Petitioner is not at liberty to read such a condition into the policy.

The purpose of section 627.848(5) is to effectively state that cancellation by a premium finance company amounts to cancellation by the insured and any policy provisions applicable when the insured cancels the policy, are equally applicable when a premium finance company cancels the policy. Because the instant policy did not require the insured or the insurer to give notice to the mortgagee when the insured cancelled the policy, Petitioner's argument is meritless.

III. THE FOURTH DISTRICT COURT OF APPEAL PROPERLY HELD THAT "ACTUAL NOTICE" WAS SUFFICIENT TO CANCEL THE POLICY.

Contrary to Petitioner's assertions, the Fourth District did not hold that the "mortgagee was estopped to rely upon the policy and statutory provisions requiring written notice. . . ." The Fourth District held that "actual notice received by appellee was sufficient to meet the underlying purpose of the contractual and statutory notice requirements." While the certified question raises the issue of estoppel, this issue was clearly not the holding of the Fourth District. Thus, at most the certified question could be restated to delete any reference to estoppel.

In any event, should this court feel the need to do so, a distinction may be drawn between those situations where receipt of "actual notice" is disputed, and those situations, as here, where the party seeking recovery admits it received actual notice. It may be argued that

the purpose of the procedural requirements of a statute is to resolve disputes over whether notice was received. However, the court should not construe a civil statute such as this in a way that would lead to an unjust result.

IV. CONTRARY TO PETITIONER'S CONTENTIONS, THE INSURANCE POLICY HAD EXPIRED BY ITS OWN TERMS, PRIOR TO THE LOSS.

The above arguments and citation of authority have been premised upon an effective cancellation of the FIRST STATE policy of insurance based on actual notice to COMMONWEALTH and FIRST STATE's contention that no statutory duty required it to give notice in the first place. There is, however, yet another reason why the Fourth District was correct.

The policy under which FIDELITY AND DEPOSIT seeks to recover had an effective period from March 31, 1987 to March 31, 1988. The fire which forms the basis of the claim occurred on May 1, 1988. In other words, the fire occurred more than 30 days after the applicable expiration date of the policy.

For reasons previously set forth, a mortgagee, when it has actual notice of the cancellation of a policy, may not intentionally or even inadvertently fail to obtain new insurance, allow the policy to expire by its own terms, and then claim coverage by contending an insurer did not mail a Notice of Cancellation. For the reasons just stated, and based on the case authority cited, the purpose of a notice of non-renewal, like a notice of cancellation, was satisfied when COMMONWEALTH received actual notice of the cancellation for nonpayment of premium more than forty-five (45) days prior to the loss. Moreover, COMMONWEALTH's business records and the testimony of its employee, Fern Disario, indicate COMMONWEALTH

communicated with the owner of FOUNTAINEBLEAU on February 11, 1988 and advised him the policy had been cancelled for nonpayment of premium. (R. 199-206).

Under FIDELITY AND DEPOSIT's contention, an insured could have actual notice of the cancellation or expiration of a policy but wait for technical notice before ever obtaining new insurance. In effect, under the Petitioner's reasoning, an insured or mortgagee could wait 20 years before obtaining new insurance, pay no premium, wait for a loss to occur, and then make a claim under the policy. Clearly, the intent of the statute, i.e., to allow the insured time to obtain new insurance, would not be satisfied by such a result.

The cases cited by Appellee are distinguishable and the majority of those include cases from other jurisdictions. The Florida cases cited by Appellee are: *Silvernail v. American Fire and Casualty Co.*, 80 So. 2d 707 (Fla. 1955), *Graves v. Iowa Mutual Insurance Co.*, 132 So. 2d 393 (Fla. 1961) and *Foremost Ins. Co. v. Peoples Trust of N.J.*, 344 So. 2d 1289 (Fla. 3d DCA 1977). These cases are distinguishable in that the courts in each case did not address or indirectly discuss the issue of an extension of coverage beyond a policy expiration date. These cases only address an extension of coverage beyond the date of cancellation set forth in a cancellation notice. These cases are clearly inapplicable.

The following out-of-state cases cited are also distinguishable for the same reason and are therefore inapplicable. In *Home Ins. Co. v. Ron Pacione Ins. Agency*, 368 N.E. 2d 1029 (Ill. App. 1977), the policy had an expiration date of November 21, 1974 and the loss occurred on June 21, 1974, 5 months prior to the expiration of the policy. In *Pennsylvania National Casualty Ins. v. Person*, 297 S.E.2d 337 (Ga. App. 1982), the policy was issued August 7, 1980, and the date of loss was December 27, 1980, four months prior to the expiration date.

Finally, the following cases are also inapplicable: *Metro Transportation Co. v. North Star Reinsurance Co.*, 912 F.2d 672 (3d Cir. 1990); *Royal Indemnity Co. v. Adams*, 455 A.2d 1205 (Me. App. 1983); *Geico v. Concord General Mutual Insurance Co.*, 458 A.2d 1205 (Me. App. 1983); *Stevenson v. Missouri Property Insurance Placement Facility*, 770 S.W.2d 288 (Mo. Ct. App. 1989); and *Insurance Company of North America v. Rall*, 520 A.2d 506 (R.I. Superior Ct. 1987). The decisive factor in all of those cases was that no notice of cancellation was ever received. In the present case, it is undisputed that COMMONWEALTH received actual notice of cancellation prior to the loss. Upon receipt of this notice, COMMONWEALTH had ample time in which to procure new insurance. It was through its own negligence that the property in question was uninsured at the time of the loss. Therefore, the justification contained in the out-of-state decisions does not exist in the case before this court.

V. PUBLIC POLICY CONSIDERATIONS MANDATE THAT THE UNDISPUTED RECEIPT OF "ACTUAL NOTICE" IS SUFFICIENT TO CANCEL AN INSURANCE POLICY AS TO THE MORTGAGEE.

As noted above, the policy considerations involved in the cancellation of insurance policies is that the insured should be able to obtain other insurance before "he is subjected to risk without protection." *Cat 'N Fiddle, supra.* This underlying policy has been satisfied where the insured is properly cancelled by its premium finance company and the mortgagee is given "actual notice" of the cancellation. Thus, this court should hold that public policy considerations dictate that "actual notice" is sufficient to cancel a mortgagees interest. This is particularly true where the receipt of "actual notice," 79 days before the loss occurred is readily acknowledged.

CONCLUSION

The Fourth District Court of Appeal properly held that the spirit and purpose of Florida Statute §627.848 and the insurance policy provisions were clearly met. It has never been disputed that COMMONWEALTH received actual notice of the cancellation in ample time prior to the loss to have procured new insurance on the property in question. FIDELITY AND DEPOSIT seeks to recover from FIRST STATE for the negligence of COMMONWEALTH, the very negligence which FIDELITY AND DEPOSIT insured and for which it made payment. Thus, the "actual notice" was sufficient to meet the underlying purpose of the contractual and statutory provisions.

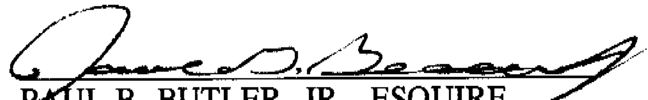
In any event, the policy at issue was cancelled by the Insured, FOUNTAINEBLEAU. Under the terms of the contractual and statutory provisions, notice was not required to be given to the mortgagee by FIRST STATE. Thus, the policy was effectively cancelled.

Finally, the subject policy had expired by its own terms on March 31, 1988, 49 days after COMMONWEALTH received actual notice. The loss did not occur for an additional 30 days thereafter. Thus, COMMONWEALTH had 79 days to procure insurance prior to the loss. The public policy concerns for extending policies of insurance past the date of cancellation are satisfied because the insured and mortgagee were given sufficient time to procure insurance. Indeed, the longest period contained in any statute for cancellation or non-renewal was more than satisfied by the notice received by COMMONWEALTH.

WHEREFORE, Respondent, FIRST STATE, respectfully requests this honorable court to affirm the Fourth District Court of Appeal's order granting FIRST STATE's motion for partial summary judgment.

Respectfully Submitted,

BUTLER, BURNETTE & PAPPAS



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on the 22nd day of March, 1995 to:

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