IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 84,791

FIRST STATE INSURANCE COMPANY,

Petitioner,

vs.

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

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

ABRAMOWITZ & POMERANTZ, P.A.
Suite 101
7800 West Oakland Park Boulevard
Sunrise, FL 33351
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3-A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (407) 686-8010
Attorneys for Petitioner

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PREFACE

This is a Petition for discretionary review of an issue certified by the Fourth District Court as one of great public importance. Petitioner, Fidelity & Deposit Company of Maryland, as subrogee of Commonwealth Federal Savings & Loan Association, was the Plaintiff and First State Insurance Company was the Defendant. The parties will be referred to as they stood in the lower court, or Respondents will be referred to as "First State Insurance", and Petitioner will be referred to as "Fidelity & Deposit". The following symbols will be used:

(R) - Record-on-Appeal

(D) - Depositions filed in Supplemental Record

(A) - Petitioner's Appendix

STATEMENT OF THE CASE

Fidelity & Deposit, as subrogee for Commonwealth Federal Savings & Loan Association ("Commonwealth S&L") sued to recover insurance proceeds from First State Insurance, which had issued a one million dollar property insurance policy to the Fountainebleau Racquet Club ("Fountainebleau") (R72-80). First State Insurance's policy listed Commonwealth S&L as the mortgagee on the insured property. The policy also provided that if it was cancelled or not renewed, First State Insurance would give the mortgagee 10 days notice before the cancellation or expiration date.

Fidelity & Deposit alleged that First State Insurance had attempted to cancel the policy by mailing a Notice of Cancellation to its insured, Fountainebleau, but had failed to mail a copy of the Notice of Cancellation to the mortgagee bank, Commonwealth S&L, as required by the insurance policy. Accordingly, it was Fidelity & Deposit's contention that First State Insurance had not effectively cancelled the policy of insurance as to the mortgagee, but that it still remained in force and effect on May 1, 1988, when the insured premises were totally destroyed by fire. Fidelity & Deposit claimed in three counts, i.e., breach of contract, declaratory relief, and estoppel, that it was entitled, as subrogee for Commonwealth S&L, to the insurance proceeds provided by First State Insurance's policy for the damage caused by the fire (R72-80).

First State Insurance filed an Answer and Affirmative Defense claiming that it had cancelled the policy in question for non-payment of premium effective October 1, 1987, prior to the destruction of the Fountainebleau by fire (R143-56). Alternatively, First

State Insurance alleged, that even if it had not given written notice of cancellation to Commonwealth S&L, as required by the policy, Commonwealth S&L had received actual notice of that cancellation four months thereafter, but prior to the fire (R143-46).

Fidelity & Deposit's Reply alleged, inter alia, that oral notice of cancellation is insufficient under Florida law (R159-60).

The trial court granted summary judgment for Fidelity & Deposit on the issue of insurance coverage, finding that First State Insurance had not given the mortgagee written notice of cancellation, as required by the policy, thereby rejecting the argument that oral notice of cancellation was sufficient (R212).

The parties stipulated that the recoverable damages under First State Insurance's policy were $591,411.79, plus interest from December 8, 1988 (R215-17), and a Final Judgment in favor of Fidelity & Deposit was entered in that amount (R218-19).

First State Insurance appealed to the Fourth District, which not only reversed the summary judgment, but ordered that judgment be entered in First State Insurance's favor. Although the court found that a factual dispute existed as to whether written notice of cancellation had been given the mortgagee, the court found that that dispute was not material since oral notice of cancellation received by Commonwealth S&L from a third party four months after the policy was cancelled, but before the fire occurred, was sufficient.

The Fourth District held that strict compliance with the notice requirements could be excused under certain circumstances, based upon its prior decision in FRAZIER v.

STANDARD GUARANTY INS. CO., 382 So.2d 392 (Fla. 4th DCA 1980), and this Court's decision in CAT 'N FIDDLE v. CENTURY INS. CO., 213 So.2d 701 (Fla. 1968). Such circumstances, the Fourth District ruled, include situations where oral notice of cancellation is given. Under the Fourth District's decision, henceforth an insurer in this State is relieved of its obligation to strictly comply with its contractual and statutory requirements to give written notice of cancellation as a prerequisite to effective cancellation of its insurance policy, so long as oral notice of cancellation is given the mortgagee, or the insured, prior to the loss. The Fourth District's ruling is contrary to well-established law in this State. The fact that an insured has received oral notice of cancellation of an insurance policy has never been held sufficient to relieve an insurer of its obligation to give written notice of cancellation in order for the cancellation to be effective.

The Fourth District certified the following issue to this Court as one of great public importance:

> **MAY A MORTGAGEE WHO RECEIVES ACTUAL NOTICE OF THE CANCELLATION OF A POLICY OF INSURANCE ON THE MORTGAGED PROPERTY BE ESTOPPED FROM RELYING ON THE STATUTORY AND CONTRACTUAL PROVISIONS REQUIRING WRITTEN NOTICE?**

STATEMENT OF THE FACTS

Commonwealth S&L held a $1,750,000 mortgage on the Fountainebleau. It was initially listed as the mortgagee on an INA insurance policy on the property, which was replaced by First State Insurance's policy covering the property. Commonwealth S&L was also listed as the mortgagee on that insurance policy (A33), which specifically provided in provision F(2)(f) (A32):

> 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 non-payment of premium; or
>
> (2) 30 days before the effective date of cancellation if we cancel for any other reason. (emphasis added).

The premiums for the First State Insurance policy were financed by Fountainebleau through a premium finance company, Tifco, Inc. (Miller D13). Fountainebleau gave Tifco a power of attorney to direct First State Insurance to cancel the policy for non-payment of premiums (A1).

On May 28, 1987, Tifco advised First State Insurance to cancel Fountainebleau's policy for non-payment of premiums (A3). This resulted in First State Insurance, through its underwriter/agent Cameron & Colby, sending a June 10, 1987 written Notice of Cancellation for non-payment of premium to both the insured (Fountainebleau), and the mortgagee (Commonwealth S&L). Cameron & Colby's file contained two "Receipts for Certified Mail" that were date-stamped by the post office confirming that Notices of

Cancellation had been sent to both the insured and the mortgagee (A6,Miller D42). Subsequently, the insured paid the premiums and the policy was reinstated, with no lapse in coverage (Miller D42-43).

On September 22, 1987, Tifco again advised First State Insurance to cancel Fountainebleau's policy for non-payment of premiums (A7,Miller D46). Accordingly, on October 1, 1987, First State Insurance's underwriter/agent, Cameron & Colby, again sent Fountainebleau a Notice of Cancellation for non-payment. Cameron & Colby's file contained a Receipt for Certified Mail date-stamped by the post office reflecting that the notice was sent to the insured (A9). However, its file contained no receipt showing that a Notice of Cancellation was also sent to the mortgagee (A10).

A fire occurred and partially destroyed the Fountainebleau on May 1, 1988. The mortgagee made a demand for payment under First State Insurance's property insurance policy. First State Insurance refused to pay, claiming that it had cancelled the policy. First State Insurance could provide no proof whatsoever that Cameron & Colby had actually sent a notice of cancellation to the mortgagee. It could only say that Cameron & Colby's normal procedure was to send notices of cancellation to mortgagees (Miller D41-42).

When First State Insurance refused to pay the mortgagee's claim for the fire damage, the mortgagee was forced to seek recovery under its Mortgagee and Fiduciary insurance policy with Fidelity & Deposit. That policy covered losses to the mortgagee's interest in property arising from a lack of insurance because of an "error or omission"

(A19-20). Although the mortgagee filed an errors and omissions claim under Fidelity & Deposit's policy, it still maintained that First State Insurance was primarily liable for payment for the fire loss under its property insurance policy (Robertson D34).

Fidelity & Deposit ultimately paid the mortgagee $591,411.79 under its policy (Belstock D28-29,34), in return for which the mortgagee assigned to Fidelity & Deposit its right to recover under its policy with First State Insurance (A29-30,Penley D59). Fidelity & Deposit then sued First State Insurance to recoup the amount it had paid the mortgagee. One year into the discovery of the lawsuit, First State Insurance contended for the first time that oral Notice of Cancellation had been received by one of the mortgagee's employees from a third party four months after the policy was cancelled, and that that notice was sufficient. First State Insurance based this contention upon file notations of one of Commonwealth S&L's employees, Fern DiSario. She had worked for one year in the department handling the bank's loans or mortgages on commercial property, and testified that whenever she received a written notice cancelling insurance on any commercial property she would act upon it immediately (DiSario D9,13-14,17). Ms. DiSario was responsible for seeing that insurance was maintained on the bank's mortgaged property. If the mortgagor did not obtain other insurance coverage, she would do so and charge the mortgagor for it (DiSario D68-70).

Ms. DiSario's file notations indicated that she had received a telephone call on February 11, 1988 from a third party, i.e., Louisa Diaz, an employee of the insurance agent for the mortgagor, Fountainebleau. Ms. Diaz happened to mention to Ms. DiSario

that the Fountainebleau's insurance had been cancelled by First State Insurance four months earlier, in October, 1987 (DiSario D63-64). Ms. DiSario did not know whether this was true or not (DiSario D76). When she contacted the mortgagor, he did not indicate that he was without insurance coverage (DiSario D67). Rather, he simply told her he was "trying to place a new policy" on the Fountainebleau (DiSario D76), and that he would get back with her (DiSario D78). Ms. DiSario did not know whether, in fact, Fountainebleau's insurance coverage had been cancelled (DiSario D75-76). She also did not think that a "verbal cancellation" could cancel coverage as to the mortgagee's interest (DiSario D67). At the time her deposition was taken, Ms. DiSario stated that she had apprised her supervisor of what Ms. Diaz had told her, but she could not remember whether she had taken any other action regarding the insurance (DiSario D79-80,86-87). She left the bank's employment in March, 1988 (DiSario D5), and did not recall whether she diaried the matter for her replacement to check to see if Fountainebleau had ever obtained a new insurance policy (DiSario D87).

Ms. DiSario explained that the mortgagee-bank had a procedure to follow once a written notice of cancellation of insurance was received for property on which the bank held a mortgage (DiSario D17). However, that procedure anticipated receipt of a written Notice of Cancellation, at which time that notice and the bank's file relating to the underlying mortgage, would be placed in a particular location so that Ms. DiSario would continue to check on the matter until it was resolved (DiSario D20). The bank's

procedure would not necessarily be activated based upon something a third party told Ms. DiSario orally about insurance coverage (Robertson D57).

CERTIFIED QUESTION

MAY A MORTGAGEE WHO RECEIVES ACTUAL NOTICE OF THE CANCELLATION OF A POLICY OF INSURANCE ON THE MORTGAGED PROPERTY BE ESTOPPED FROM RELYING ON THE STATUTORY AND CONTRACTUAL PROVISIONS REQUIRING WRITTEN NOTICE?

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. The Fourth District's change in the law to allow oral notice of cancellation on behalf of an insurer should be reversed. The Fourth District's ruling is contrary to the requirements of First State Insurance's own insurance policy, the applicable Florida statutes and well-established case law. Heretofore, if an insurer in this State wished to cancel an insurance policy, it had to strictly comply with its policy provisions, and with the Florida Statutes, regarding cancellation. Even the Fourth District Court of Appeal held that there was a disputed issue of fact as to whether First State Insurance had done so here. Accordingly, the Fourth District erred in directing that judgment be entered in First State Insurance's favor because of oral notice of cancellation, which was not allowed under either First State Insurance's policy or the Florida Statutes.

Oral cancellation of insurance policies by insurers can only lead to abuses and uncertainties. That is exactly what the well-established body of law in this area of insurance law, which requires strict compliance with the terms of insurance policies and statutes regarding cancellation, was designed to prevent. The Fourth District's decision clearly constitutes a setback for Florida's consumers in the area of cancellation of their insurance policies. This Court should return the Florida consumers' rights regarding cancellation of their insurance policies to the position they were in before the Fourth District's decision.

PRELIMINARY STATEMENT REGARDING COURT'S JURISDICTION

The certified question is indeed one of great public importance. The Fourth District has changed the law in this State in a fashion that will open the floodgates of litigation on the issue of cancellation of insurance policies. Heretofore, when an insurance policy required written notice of cancellation a certain number of days prior to cancellation, that is exactly what was required. The Fourth District has now held that even though a question of fact exists as to whether written notice of cancellation was given by an insurer, as required by the insurance policy and Florida Statutes, judgment should be entered for the insurer because the mortgagee's employee was given oral notice by a third party, not even the insurer, four months after the cancellation. Oral notice of cancellation by an insurer has never been sufficient in this State.

It has previously been very easy for the parties to an insurance contract, and the courts, to determine whether proper notice of cancellation was given by an insurer. The notice requirements in the policy and in the statutes had to be strictly complied with by the insurer or the cancellation was ineffective. Written notice of cancellation by the insurer, even if defective in some respects, was always required. The Fourth District has now held that oral notice is sufficient. Accordingly, in the future there will have to be a trial under a myriad of factual circumstances in order to resolve whether oral, rather than written, notice was actually given. The Fourth District's ruling makes an insurance agent's testimony that he or she called an insured and cancelled their insurance policy over the telephone sufficient to effectively cancel the policy, despite the fact that the

insurance policy and the applicable statutes require written notice of cancellation. Cases in which the result was clear before because written notice of cancellation was not given as required by the policy, are now unclear. An insured/mortgagee[1] in this State is no longer entitled to rely upon clear contract provisions requiring written cancellation of their insurance policies prior to the policy's cancellation.

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[1]/A mortgagee under an insurance policy is an "insured" with independent rights not derived from the rights of the named insured. STATE FARM FIRE & CAS. v. AETNA FIRE, 413 So.2d 144 (Fla. 5th DCA 1982); NATIONAL CASUALTY CO. v. GENERAL MOTOR ACCEPT. CORP., 161 So.2d 848 (Fla. 1st DCA 1964).

ARGUMENT

Oral Notice of Cancellation is Insufficient to Cancel the Policy on Behalf of the Insurer

For the first time in this State, the Fourth District has held that oral notice of cancellation of an insurance policy four months after the policy was cancelled, given not by the insurer, but by a third party, satisfied the insurer's obligation to give written notice of cancellation required by its policy language (A32):

> 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 non-payment of premium; or
>
> (2) 30 days before the effective date of cancellation if we cancel for any other reason. (emphasis added).

The court also held that oral notice satisfied the insurer's obligation to give written notice of cancellation required by Florida Statutes. 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.[2] It further provides that the insurer, "in accordance with such prescribed notice [written notice 10 days before cancellation] ...shall give notice to...such mortgagee".

The Fourth District's ruling that oral notice of cancellation is sufficient to estop an insured or mortgagee from insisting upon written notice of cancellation, which is

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[2]/Section 627.848 applies to cancellation of insurance policies where premiums for the insurance policy are financed be a premium finance company, as here (Miller D13).

clearly required by the insurance policy and by Florida Statutes, overlooks the following black-letter law: An insurer's right to cancel an insurance policy must be carried out in strict compliance with statutory directions, SENTRY INSURANCE v. BROWN, 424 So.2d 780 (Fla. 1st DCA 1982), and in strict compliance with the terms of its policy in order to effectively accomplish the cancellation. BRADLEY v. ASSOCIATES DISCOUNT CORP., 58 So.2d 857 (Fla. 1952). Restrictions placed upon insurance companies in cancelling or failing to renew existing insurance policies call for a broad or liberal interpretation favoring the insured (here mortgagee). SENTRY INS. v. BROWN, 424 So.2d at 783.

An insurer's duty to send the proper cancellation notice to its insured in the form required by statute or its contract cannot be delegated to a third person. DON SLACK INS., INC. v. FIDELITY & CASUALTY CO., 385 So.2d 1061 (Fla. 5th DCA 1980). See for example MARTIN v. RITCHESON, 306 So.2d 582 (Fla. 1st DCA 1976), where the court held that since §627.728 required that a notice of cancellation of an automobile insurance policy be "mailed or delivered by the insurer" it was irrelevant that the insured had received a notice of cancellation from the premium finance company. Florida case law has always been very clear that if an insurer does not adhere to its own contractual requirements, and statutory requirements, for cancellation of its insurance policy, the purported cancellation is ineffective. HUNSUCKER v. ARROW INS., 242 So.2d 205 (Fla. 1st DCA 1970)l; and MARTIN v. RITCHESON, supra.

The above cases clearly hold that in order to effectively cancel insurance in Florida, the insurer must strictly comply with both the statutory provisions regarding cancellation, and its own policy cancellation provisions. Where written notice is required by the insurance policy and the applicable Florida Statutes, anything less is ineffective to cancel the policy. Accordingly, the Fourth District erred in relying upon FRAZIER v. STANDARD GUARANTY INS. CO., 382 So.2d 392 (Fla. 4th DCA 1980) to conclude that oral notice of cancellation is sufficient. In FRAZIER, the insurer mailed a notice of cancellation to its insured pursuant to a statute requiring the notice to be mailed to the address shown in the policy. The insurer failed to properly address the notice, however, since the apartment number was omitted from the address. The trial court determined that the insured had actually received the written notice of cancellation, notwithstanding its improper address.

The insured appealed, arguing that his actual receipt of the written notice of cancellation was immaterial because it was not sent to the address required by the statute. He relied upon a Michigan case, DORSEY v. MICHIGAN MUTUAL LIABILITY CO., 250 N.W.2d 143 (Mich. 1976), where the insurer had mailed a notice of cancellation by first class mail, rather than by certified mail, return receipt requested, as required by a Michigan statute. Even though the insured actually admitted receiving the Notice of Cancellation, the Michigan appellate court concluded that it was ineffective since the insurer had not strictly complied with the notice requirements of cancellation statute. The court based its ruling upon the fact that the purpose of the notice statute

went beyond that case, and that it was to avoid embroiling the courts in needless litigation on the issue of whether written cancellation notices had in fact been received.

The Fourth District in FRAZIER rejected the Michigan court's conclusion that an insurer's written cancellation notice is ineffective because the statutory method for mailing it was not strictly complied with, if in fact the notice was actually received by the insured. Rather, the court held that actual receipt of the insurer's written notice of cancellation, though improperly addressed as in FRAZIER, was sufficient notice. The Fourth District stated that: "Actual receipt means that there has been a delivery - postal or manual". 382 So.2d at 395. The Fourth District also indicated that its holding was consistent with the underlying purpose of a notice of cancellation, which is to enable the insured to obtain other insurance "before he is subjected to risk without protection". Id. at 395.

Fidelity & Federal has no qualms with the FRAZIER decision. However, the Fourth District should not have extended its ruling in FRAZIER to the facts of this case. FRAZIER pertained to the effect of a defective written notice of cancellation that was in fact mailed by the insurer and in fact received by the insured prior to cancellation of the policy. In FRAZIER, the insurer substantially complied with its statutory and contractual cancellation requirements. The only defect in its written notice of cancellation was that it was mailed to the wrong address, but it was received. The question was the sufficiency of the insurer's written notice of cancellation. Here, the Fourth District ruled that a

question of fact existed as to whether a written notice of cancellation was ever sent. If a jury determines that it was not, then FRAZIER should not apply.

The rule of law adopted by FRAZIER is not novel. See 40 ALR 4th 867, Actual Receipt of Cancellation Notice Mailed by Insurer as Prerequisite to Cancellation of Insurance. Many cases cited therein hold that where a written notice of cancellation is improperly addressed or mailed by the insurer, but the written notice is actually received by the insured, it is effective to cancel the policy. None of the cases contained in the annotation hold that oral notice of cancellation is sufficient. In fact, cases cited therein hold that an oral cancellation is insufficient. BACICH v. TRANSAMERICA INSURANCE CO., 296 Minn. 370, 208 N.W.2d 868 (1973); BRAGG v. ROYAL INSURANCE CO., 115 Me. 196, 98 A. 632 (1916); ROSEN v. GERMAN ALLIANCE INSURANCE CO., 106 Me. 229, 76 A. 688 (1909).

In NU-AIR MANUFACTURING CO. v. FRANK B. HALL & CO. OF NEW YORK, 822 F.2d 987 (11th Cir. 1987), the Eleventh Circuit held that oral notice was not sufficient to meet the requirement of "written notice", stating that if an insurer chooses to invoke such a clause, it must abide by its explicit terms. The Eleventh Circuit cited to GRAVES v. IOWA MUTUAL INSURANCE CO., 132 So.2d 393 (Fla. 1961) where this Court held that a cancellation notice, received four days after the cancellation was to be effective, violated a provision requiring 30 days advance notice of cancellation, and therefore it was ineffective to cancel the policy at any time.

EDENS v. SOUTH CAROLINA FARM BUREAU MUTUAL INSURANCE CO., 308 S.E.2d 670 (S.C. 1983) also held that the term "giving written notice" in an insurance policy involves a "physical delivery to the insured of the document". Obviously, oral notice would not meet the requirement of written notice under that definition.

Notice of Cancellation Must Be Received Before, Not After, the Cancellation

Not only was Commonwealth S&L required to give written notice of cancellation by §627.848(5) and by First State Insurance's own policy provisions, but the notice had to be received by Commonwealth S&L before the cancellation in order for it to be effective. In GRAVES v. IOWA MUTUAL INSURANCE CO., 132 So.2d 393 (Fla. 1961), this Court held that a notice of cancellation received after the purported effective date of the cancellation was ineffective to cancel the policy. AETNA v. SIMPSON, 128 So.2d 420 (Fla. 3d DCA 1961) also held that notice of cancellation must be given prior to the expiration of the stipulated number of days before cancellation becomes effective.

Likewise, in HEPLER v. ATLAS MUTUAL INS. CO., 501 So.2d 681 (Fla. 1st DCA 1987), the court held that notice must be given sufficiently in advance to afford the insured the reasonable opportunity to make payment without interruption of coverage, before the policy can be terminated for non-payment. In COOKE v. INA, 603 So.2d 520 (Fla. 2d DCA 1992), modified on other grounds 624 So.2d 252 (Fla. 1993), the court held that even if there was a telephone conversation with the insured advising him of the

finance company's notice of intent to cancel insurance, that notice was insufficient where it did not give the insured ten days to pay before cancellation. Here, the mortgagee was not given ten days to pay the premium before the cancellation was effective, even though it was given that right under the policy (A32).

The Fourth District acknowledged that this Court held in CAT 'N FIDDLE, supra, that the purpose of a written notice requirement followed by a prescribed period of time [10 days] is to give the insured an opportunity to obtain insurance elsewhere "before he is subjected to risk without protection". The Fourth District excused the fact that 10 days prior notice was not given here, and the fact that even the oral notice came four months after the policy was cancelled, by relying upon the fact that the mortgagee had 79 days thereafter to obtain insurance before the fire occurred. In effect, under the Fourth District's ruling as long as Commonwealth S&L received oral notice, regardless of how and from whom, and so long as this notice occurred prior to the fire, cancellation was effective. The Fourth District makes First State Insurance's failure to give written notice of cancellation 10 days before cancelling the policy meaningless.

The Fourth District also improperly relied upon the fact that the mortgagee's recovery under its errors and admissions policy was based upon an acknowledgement that it mistakenly "failed to act" after receiving oral notice of cancellation. That fact has never been in dispute, but it is irrelevant. The issue is whether the mortgagee had a legal duty "to act", or whether it could rely upon the policy and statutory requirements imposed upon First State Insurance to give written notice of cancellation. If the latter is

true, then Fidelity & Deposit is entitled to recoup the amount it paid to the mortgagee under its errors and omissions policy. Without question, First State Insurance's mistake in not sending a written Notice of Cancellation created the very opportunity for the mortgagee's mistake. The mortgagee-bank's procedures for making sure that insurance was maintained on its mortgaged property were not set into motion unless and until a written notice of cancellation of insurance, to which the bank was entitled under the insurance policy, was received by the bank.

The Fourth District overlooked the fact that the very reason for imposing cancellation restrictions on insurers by statute and by policy language is to avoid endless litigation by clearly setting forth the method of giving such notice.[3] The Fourth District also overlooked the fact that §627.848 provides that "the insurance contract shall not be cancelled unless cancellation is in accordance with the following provisions." Under Subsection (5) of the statute, an insurance policy cannot be cancelled unless the insurer "first satisfies" any contractual or statutory restriction by giving the prescribed notice of cancellation to the mortgagee. Accordingly, giving proper notice of cancellation is a condition precedent to the cancellation being effective. Since First State Insurance's policy required ten days written notice prior to cancellation, the cancellation was not effective when oral notice was received four months after the cancellation.

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[3]/The goal of notice statutes was discussed by the Michigan court in DORSEY, supra. The court in FRAZIER did not reject the salutary purpose of that goal, only the Michigan court's conclusion that strict compliance with notice statutes is required where the insured actually receives the insurer's written notice.

As in each of the above cases, oral notice of cancellation given by a third party four months after the policy was cancelled, rather than the insurer's written notice of cancellation ten days before the prospective cancellation date, as required by the insurance policy, and by statute, was insufficient here as a matter of law. The Fourth District incorrectly ruled that oral notice of cancellation was legally sufficient.

Estoppel Is Inapplicable Here and Cannot Preclude the Mortgagee from Relying Upon Clear Contract Terms

The Fourth District came to its erroneous ruling by concluding that the mortgagee was estopped to rely upon the policy and statutory provisions requiring written notice since it had received oral notice. In fact, the elements of estoppel do not exist here. Estoppel requires proof of a representation of a material fact by the party sought to be estopped, which representation is contrary to a later asserted position; reliance on that representation by the party claiming the estoppel; and a change in position of that party to his detriment as a result of the representation and reliance thereon. QUALITY SHELL HOMES & SUPPLY CO. v. RELEY, 186 So.2d 837 (Fla. 1st DCA 1966). Certainly, Commonwealth S&L made no representation upon which First State Insurance relied to its detriment. Moreover, First State Insurance cannot use estoppel to excuse its own failure to give the required written notice of cancellation in the first instance.

The ramification of the Fourth District's decision is that henceforth in this State, insurers will be relying upon all sorts of alleged oral notifications of cancellation to estop

insureds [and mortgagees] from claiming that their insurance coverage was not effectively cancelled pursuant to the notice requirements of its policy and Florida Statutes. Insurance policies will be cancelled by telephone, and contract and statutory provisions requiring written notice of cancellation will no longer be effective. In fact, if anyone is to be estopped, the insurers should be estopped from claiming cancellation if they failed to comply with their own contractual requirements, and the statutory requirements, regarding cancellation. An insurance contract is like any other contract. If it provides that one party must give the other party written notice ten days before cancellation, oral notice by a third party is not sufficient. A party to a contract is entitled to require the other party to strictly comply with the contract provisions. That is the very purpose of having the contract reduced to writing. It is wrong to apply "estoppel" to preclude an insured from requiring an insurer to strictly comply not only with statutory requirements regarding cancellation, but also to strictly comply with the very cancellation provisions the insurer chose to place in its own contract. As stated in NU-AIR MFG. CO. v. FRANK B. HALL & CO OF NEW YORK, 822 F.2d 987 (11th Cir. 1987):

> First, the termination clause requires "written notice", whereas the March 19 communication was oral. If FCIA chooses to invoke such clauses, it must abide by their explicit terms. See Graves v. Iowa Mut. Ins. Co., 132 So.2d 393, 395 (Fla. 1961).

The Failure to Give Written Notice of Cancellation Extended Coverage to the Date of the Fire

Since Commonwealth S&L cannot be estopped to rely upon receipt of written notice of cancellation as required by its policy and by §627.8848(5), it is irrelevant that the fire occurred after the policy term. First State Insurance did not effectively cancel the policy as to the mortgagee's interest therein, and therefore the policy remained in force and effect as to that interest. Accordingly, coverage for the mortgagee's interest in the property still existed as expiration of the policy period approached in March, 1988. At that time, First State Insurance was required to, but failed to, give the mortgagee notice of non-renewal as required by its policy. First State Insurance's policy provides in subsection F(2)(g) (A32):

> If we do not renew this policy, we will give written notice to the mortgage holder at least 10 days before the expiration date of this policy.

Subsection F(2)(d)(1) also allows the mortgagee to pay the premium due at First State Insurance's request if the named insured fails to do so (A32).

The failure to provide Commonwealth S&L with a Notice of Cancellation in October, 1987 and/or a Notice of Non-renewal in March, 1988 automatically extended coverage to the date of the fire. Otherwise, Commonwealth S&L would be provided no protection because First State Insurance would be totally absolved of any responsibility for failing to give the proper written notice of cancellation, so long as the loss occurred outside the policy period.

Florida law specifically provides that a cancellation notice that does not comply with the terms of the policy is ineffective to cancel the risk. In SILVERNAIL v. AMERICAN FIRE AND CASUALTY CO., 80 So.2d 707 (Fla. 1955), the court held that four and one-half days notice in light of a five-day notice provision in the policy was not effective cancellation. Likewise, the Supreme Court held in GRAVES v. IOWA MUTUAL INSURANCE CO., 132 So.2d 393 (Fla. 1961), that cancellation received on June 24, 1958, to be effective July 20, 1958, violated the thirty-day provision of the policy, and therefore the policy was in effect at the time of the incident which gave rise to the claim.

Finally, in FOREMOST INS. CO. v. PEOPLES TRUST OF N.J., 344 So.2d 1289 (Fla. 3d DCA 1977) the Third District affirmed a summary judgment entered for the insured on the issue of insurance coverage. The court held that as a matter of law an aircraft insurer's notice of cancellation was ineffectual to cancel an insured risk, despite the fact that the loss occurred well in excess of 30 days after notification that the insurance would be terminated, citing to GRAVES.

Out-of-state cases also hold that where a Notice of Cancellation is ineffective, the policy remains in force, HOME INS. CO. v. RON PACIONE INS. AGENCY, 368 N.E.2d 1029 (Ill. App. 1977), and that the failure to adhere to notice requirements results in non-cancellation of the policy. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INS. CO. v. PERSON, 297 S.E.2d 337 (Ga. App. 1982). In METRO TRANSPORTATION CO. v. NORTH STAR REINSURANCE CO., 912 F.2d 672 (3d

Cir. 1990), the court specifically held that under Pennsylvania law, an insured's failure to comply with notice of cancellation requirements "results in the continuation of coverage under the policy regardless of any prescribed date of expiration". See to the same effect ROYAL INDEMNITY CO. v. ADAMS, 455 A.2d 135 (Pa. Super. 1983).

Likewise, in GEICO v. CONCORD GENERAL MUTUAL INSURANCE CO., 458 A.2d 1205 (Me. App. 1983), GEICO's failure to comply with the mandatory method for cancelling an insurance policy precluded it from asserting that the policy had been cancelled. The court held that there was coverage for an accident occurring two years later stating: "GEICO's failure to file notice of cancellation extended the policy period by operation of law to the date of the accident".

In STEVENSON v. MISSOURI PROPERTY INSURANCE, 770 S.W.2d 288 (Mo. App. 1989), an insured was held to be entitled to recover for a loss under a fire policy where the insurer did not send a non-renewal notice to the insured. The policy required a non-renewal notice in writing at least 30 days before the expiration of the policy. The court held there was coverage even though the loss occurred 15 months after the expiration date of the policy.

Finally, in INA v. RALL, 520 A.2d 506 (Pa. 1986), the court held that an insured must be offered an opportunity to renew his coverage upon expiration of the policy, or at least be notified that his coverage will not be renewed. The insurer did not give either the insured nor the mortgagee notice of non-renewal or an offer to renew. Accordingly, the court held that a fire which occurred at the mortgaged premises more than a year after

the policy's expiration date was covered under the policy. Interestingly, the court rejected the insurer's argument that the mortgagee was negligent for not instituting a system to provide itself with notice of when insurance on the mortgaged premises was due to expire. Rather, the court held that the insurer had the duty to notify the mortgagee of the imminent lapse of coverage and the mortgagee was entitled to rely upon the insurer in that regard.

As in the above cases, First State Insurance's failure to provide a written Notice of Cancellation to Commonwealth S&L pursuant to the requirements of its policy and §627.848 extended the policy period by operation of law to the date of the fire.

Public Policy Considerations Require This Court to Hold that Oral Notice of Cancellation of Insurance Policies on Behalf of an Insurer is Insufficient in This State

The Fourth District's ruling is directly contradictory to a whole body of Florida law that has been established over the years. That well-established law came about in order to protect Florida insureds by requiring insurers to strictly comply with the cancellation provisions contained in their insurance policies, and in Florida's statutes. Strict compliance has been required to eliminate doubt as to what is required by insurers in order to effectively cancel insurance policies, to eliminate doubt as to whether policies had been effectively cancelled by insurers, and to eliminate the possibility of insurers taking advantage of their insureds or dealing unfairly with them in cancelling insurance policies. For this reason, the burden has been placed upon insurers to at least comply

with their own policy provisions, which they chose, in regard to cancelling their insurance policies.

Many insureds in this State are large corporations or institutions, such as the mortgagee bank here. Certain procedures are set up within those institutions to be followed once a written notice of cancellation of insurance is received. Those procedures are set up in reliance upon clear contract provisions in insurance policies that require written notice of cancellation before a cancellation is effective. As demonstrated in this case, if First State Insurance had sent the proper written notice of cancellation, receipt thereof would have triggered established procedures within the bank. The failure to send the written notice of cancellation, upon which the bank relied and its procedures depended, is what brought about Ms. DiSario's mistake. The mortgagee bank, and all other insureds in this State, should be allowed to rely upon receipt of a written notice of cancellation, as clearly provided for in their insurance policies, and by Florida Statutes.

Oral notice of cancellation of insurance policies can only lead to abuses by insurance companies, and their agents, and it will result in many factual questions as to whether, when and to whom oral notice of cancellation was given. The Fourth District's decision has brought Florida law full circle. Strict compliance with cancellation provisions and statutes was originally required in order to eliminate needless factual litigation on the question of whether proper notice of cancellation had been given. Now there will be needless, and endless, litigation on the question of whether oral notice of cancellation has been given.

CONCLUSION

The certified question should be answered in the negative. This case should be remanded to the trial court for the jury's resolution of the disputed issue of whether written notice of cancellation was given the mortgagee as required by First State Insurance's policy and Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 30th day of JANUARY, 1995, to: PAUL B. BUTLER, JR., ESQ., Butler, Burnette & Pappas, 6200 Courtney Cambell Causeway, Bayport Plaza, Suite 1100, Tampa, FL 33607-1458.

Howard Pomerantz, Esq.
ABRAMOWITZ & POMERANTZ, P.A.
7800 W. Oakland Park Blvd.
Suite 101
Sunrise, FL 33351
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3-A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (407) 686-8010
Attorneys for Petitioner

BY: Edna L. Caruso
EDNA L. CARUSO
FL BAR NO: 126509

P/FIRST/SCT/BRF/pss