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.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE FACTS

First State Insurance argues that Fidelity and Deposit has misstated three facts in its Statement of the Facts. First, First State Insurance states that Ms. DiSario did not state at page 67 of her deposition that a verbal cancellation does not cancel coverage. First State Insurance claims Ms. DiSario simply did not finish her sentence. She was asked: "After you hung up the phone from talking to Louisa Diaz, and after you hung up the phone from talking to Pedro Napolis, did you think that coverage had been cancelled as of October, 1987?" and her answer was "A verbal cancellation does not...". Reading the question and answer together, it is obvious that Ms. DiSario's answer was that a verbal cancellation does not cancel coverage, whether she finished her sentence or not.

Second, First State Insurance states that Ms. DiSario never testified that the bank's procedure required written notice. Ms. DiSario's testimony discussed receipt of a notice of cancellation and at D37-38 she discussed what action she would take "when you received a notice of cancellation". After taking that action, she would never put the file up, but rather she would place it in a particular location on her desk so that she would continue to follow up on the matter until it was resolved (DiSario D20-21). Ms. DiSario's testimony is clear that she was talking about receipt of a "notice of cancellation", which First State Insurance equates with "receipt of notice of cancellation" and claims the notice could be oral. If there is any ambiguity in Ms. DiSario's testimony, Lyle Robertson, on behalf of Commonwealth Savings & Loan, testified that

the document that would have made Ms. DiSario act was the Notice of Cancellation which she should have, but did not, receive from First State Insurance (Robertson D41); and that Ms. DiSario would not rely or act on something a third person told her orally, but she would want the actual document [written Notice of Cancellation] in front of her before she would act (Robertson D51).[1]

Third, First State Insurance contends that Fidelity & Deposit incorrectly stated in its brief that Ms. DiSario did not know whether Fountainebleau's insurance coverage had been cancelled. First State Insurance quotes testimony regarding the fact that Ms. DiSario knew there was no coverage for the Fountainebleau in February, 1987. First State Insurance overlooks the fact that in February, 1987 the Fountainebleau was insured by INA, not Fountainebleau (DiSario D52). Accordingly, the testimony quoted by First State Insurance at page 4 of its brief has nothing to do with Ms. DiSario's knowledge in October, 1987 when Fountainebleau's coverage was cancelled by First State Insurance for the second time for nonpayment. Ms. DiSario's testimony in regard to that point in time is clear that in February, 1988 she did not know whether, based upon her conversation with Ms. Diaz and Mr. Napolis, she believed Fountainebleau's policy had actually been cancelled in October, 1987 (DiSario D74-76).

At page 5 of its brief, First State Insurance states that it is undisputed that Ms. DiSario knew there was no coverage in February, 1988 because her notes indicate that "the coverage for the building and liability was cancelled back in October". However,

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[1]/On page 9 of Petitioner's main brief, Robertson's deposition testimony was incorrectly cited as D57, when it should have been D51.

her notes simply reflected what Ms. Diaz had told Ms. DiSario. Ms. DiSario testified that she did not know whether she believed what Ms. Diaz had told her (DiSario D76).

First State Insurance states that Ms. DiSario also called Pedro Napolis, who owned the Fountainebleau, and advised him that if he did not purchase insurance coverage Commonwealth S&L would do so. In fact, when she contacted Mr. Napolis, he simply stated that he was shopping for a new policy (DiSario D67). While Ms. DiSario reminded Mr. Napolis that he had to have coverage and that if he did not have coverage Commonwealth S&L would purchase coverage for him, Mr. Napolis "didn't indicate that he was without coverage" (DiSario D67). Ms. DiSario testified that she came away from the conversation with Ms. Diaz and Mr. Napolis without knowing whether coverage had in fact been cancelled in October, 1987 (DiSario D76).

First State Insurance emphasizes the fact that Commonwealth S&L filed an errors and omissions claim against Fidelity & Deposit for failing to obtain insurance coverage on the Fountainebleau. This was based upon the fact that Ms. DiSario was preparing to leave Commonwealth for a new job and did not take steps to follow up on the oral notice of cancellation. However, if the bank had received a timely written Notice of Cancellation, as it should have, it would have instituted a procedure to follow up on whether the Fountainebleau obtained replacement insurance and, if not, the bank would have done so and billed the Fountainebleau. Commonwealth S&L, as other financial institutions in this State, which are mortgagees on perhaps millions of parcels of property, should be afforded the protection of requiring a written Notice of Cancellation of insurance on those properties, where the insurance company has agreed in its contract of

insurance to give written notice of cancellation. It is unfair to require a bank holding thousands of mortgages to operate on oral notice of cancellation of an insurance policy on one of its properties.

SUMMARY OF ARGUMENT

Oral notice of cancellation of an insurance policy four months after the policy was cancelled, given by a third party, does not satisfy the insurer's contact and statutory obligations to give written notice of cancellation 10 days before cancellation.

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?

ARGUMENT

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

First State Insurance argues that "strict statutory compliance is not always required," citing to TEACHERS INSURANCE CO. v. BOLLMAN, 617 So.2d 817 (Fla. 2d DCA 1993). That case is totally inapplicable. It had nothing to do with cancellation of an insurance policy, or the responsibility of an insurer, under Florida statutes and

under its insurance policy, to give the required notice as a condition precedent to cancellation. Case law is clear that an insurer's right to cancel or non-renew an insurance policy must be carried out in strict compliance with Florida's statutory and contractual directions. SENTRY INSURANCE CO. v. BROWN, 424 So.2d 780, 783 (Fla. 1st DCA 1982). The statutes restricting insurance companies in cancelling or failing to renew their insurance policies call for a broad or liberal interpretation favoring the insured (here mortgagee). Id. at 783.

In BOLLMAN, the issue was whether the insureds had expressly and knowingly rejected the stacking of UM coverage on their four vehicles. The Second District held that they had. It was undisputed that when the rates for stacked coverage increased, the insureds sent a memorandum to their agent asking for a change from stacked to unstacked coverage. After an accident, the insureds claimed that their written directive to their agent was insufficient, since it was not on the statutorily prescribed form. The Second District held that the insureds' written memorandum constituted a sufficient knowing rejection of coverage in writing, despite the fact that it was not on the prescribed form.

Unlike BOLLMAN, here the issue is not whether a written document required by statute was equivalent to the written document actually used and received. Here, the requirement of a written notice of cancellation was never complied with by First State Insurance. This is not a situation where First State Insurance sent the mortgagee a written Notice of Cancellation that was simply defective in some manner. First State Insurance never sent a Notice of Cancellation at all, and therefore there is no analogy

between this case and BOLLMAN.[2] Nothing in BOLLMAN leads to the conclusion that a statutory and policy requirement that the insurer give notice in writing can be complied with even though the insurer gives no written notice whatsoever, but the insured receives oral notice four months later from a third party.

As demonstrated in Fidelity & Deposit's Initial Brief, FRAZIER v. STANDARD GUARANTY INSURANCE CO., 382 So.2d 392 (Fla. 4th DCA 1980) concerned a defective written notice of cancellation, not a total failure to give written notice, as here. Accordingly, First State Insurance's reliance upon FRAZIER is misplaced.

First State Insurance's reliance upon CAT N' FIDDLE, INC. v. SENTRY INSURANCE CO., 213 So.2d 701 (Fla. 1968) is also misplaced. The issue in that case was whether an insurance agent was authorized to accept a notice of cancellation on behalf of its insured, and the court held that the agent had no such authority. And, if an agent was instructed by an owner to keep the owner's property insured, he was not authorized to accept a notice of cancellation without substituting another policy therefor. Importantly, this Court stated:

> The burden of proving cancellation in accordance with the policy provisions is in the party asserting it.

213 So.2d at 704.

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[2]/Even if this case dealt with a defective written notice of cancellation instead of no written notice of cancellation, the rationale discussed in BOLLMAN in regard to stacking uninsured motorist coverage does not apply to cancellation cases in any event. This Court has clearly held that a defective notice of cancellation is ineffective to cancel an insurance policy. GRAVES v. IOWA MUTUAL INS. CO., 132 So.2d 393 (Fla. 1961).

At page 16, First State Insurance says that Ms. DiSario, rather than obtaining replacement insurance, chose to rely upon the insured to obtain other insurance. In fact, Ms. DiSario simply did not follow through with seeing that insurance was maintained on the property because she left the bank's employment.

First State Insurance argues that oral notice of cancellation was sufficient because the bank still had 79 days to procure coverage before the fire. This totally ignores that Commonwealth S&L, like other financial institutions, are not necessarily set up to deal with "oral" cancellation of insurance coverage on the many properties on which they hold mortgages. Allowing oral notice to suffice also relieves the insurance company of its contractual obligation to the bank to provide written notification. The terms of the contract should control, and if an insurance company agrees to provide written notification, it should be required to do so as a condition precedent to cancelling the policy. Both mortgagee-banks, and insureds, should be allowed to rely upon specific contract provisions dealing with cancellation of insurance, particularly where the insurance company was the one who chose the language in those contract provisions.

First State Insurance argues that oral notice has never been held insufficient to cancel an insurance policy. In fact, it has never been held sufficient to cancel an insurance policy. COOKE v. INSURANCE COMPANY OF NORTH AMERICA, 603 So.2d 520 (Fla. 2d DCA 1992) did not imply that actual notice may be proper. The Second District held that <u>even</u> <u>if</u> an oral telephone conversation regarding notice of

cancellation was sufficient, the notice was otherwise insufficient since it did not occur 10 days prior to the cancellation as required by statute.

In footnote 2, for the first time in this litigation, First State Insurance argues that Fidelity & Deposit should not be able to seek a subrogation claim based upon DIXIE NATIONAL BANK v. EMPLOYERS COMMERCIAL UNION INSURANCE CO., 463 so.2d 1147 (Fla. 1985). This defense was never pled below, was not argued in the Fourth District, and is being raised for the very first time before this Court. Also, DIXIE NATIONAL BANK is inapplicable. The fidelity bond in that case covered the directors of the bank for their negligence in failing to prevent any embezzlement. This Court held that the insurer could not pay the bank under its fidelity bond and then seek subrogation from the directors for their negligence, since they were additional insureds under the policy. The basic principle applied in that case is that an insurer cannot exercise a right of subrogation against its own insured, or additional insured, for risks of their negligence for which it received premiums. In this case, Fidelity & Deposit is not seeking subrogation against one of its insureds, or additional insureds.

In footnote 3, First State Insurance argues that its failure to give written notice of cancellation only meant that the policy would remain in effect for the 10 day period required by the contract and statute. For this result, First State Insurance relies upon §627.4133(3) and §626.9201(3) Fla. Stat., which concern notice of cancellation to the "named insured", not the mortgagee, as here. Moreover, even as to the named insured those provisions extend coverage where advance written notice is not properly given for

nonrenewal (which requires 45 days advance written notice) or for cancellation during the first 90 days for reasons other than nonpayment of premium (which requires 20 days advance written notice): The coverage remains in effect "until 45 days after the notice is given or until the effective date of replacement coverage obtained by the named insured, which ever occurs first". Thus, even as to the named insured, coverage is extended under those circumstances, and the statute does not address what occurs when written notice of cancellation for nonpayment is not given the named insured.

Importantly, §§627,4133(3) and 626.920(3) Fla. Stat. do not control cancellation as to the mortgagee where the insured has failed to pay his insurance premiums. Cancellation as to the mortgagee is controlled by the insurer's policy provisions and by §627.848(5) (1983).[3] Subsection (5) specifically deals with notice to be given mortgagees where a premium finance agreement is involved, as here. The very beginning of the statute provides that the insurance contract "shall not be cancelled unless cancellation is in accordance with the following provisions". Subsection (5) requires notice to the mortgagee pursuant to "contractual restrictions". Also, First State Insurance's policy requires written notice of cancellation to the mortgagee 10 days prior to cancellation. Accordingly, oral notice by a third party four months after the cancellation did not satisfy First State Insurance's obligation to give 10 days written notice to the bank prior to cancellation of Fountainebleau's insurance.

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[3]/§627.848 was amended effective November 10, 1993, and that amendment is not applicable to First State Insurance's policy which was issued prior to that date.

First State Insurance, Not TIFCO, Cancelled the Policy

This argument was first raised on appeal by First State Insurance in its Reply Brief before the Fourth District. Fidelity & Deposit moved to strike the argument, and the Fourth District correctly chose not to even address the argument since it had been untimely raised in a reply brief. First State Insurance is now again attempting to raise this belated issue.

While First State Insurance claims that the Fountainebleau, through its premium finance company, TIFCO, cancelled the policy, this is directly contrary to other statements contained throughout its brief, such as page 5, where First State Insurance acknowledges that "First State...cancelled the policy" and again "First State cancelled the policy of insurance in October, 1987".

First State Insurance makes two arguments. It first argues that there was no statutory requirement that it give the mortgagee notice of cancellation. First State Insurance contends that §627.848 Fla. Stat. only requires notice of cancellation to the mortgagee if the insured cancels the policy. That argument totally ignores the fact that Subsection (5) of the statute requires "the insurer, in accordance with such prescribed notice [in statutory, regulatory and contractual restrictions] when it is required to give such notice in behalf of itself...shall give notice to such...mortgagee...".

First State Insurance's second argument is that it was also not required by its policy provisions to give a mortgagee written notice of cancellation. First State Insurance argues that its policy provisions only require written notice of cancellation to be given to

the mortgagee if First State Insurance, rather than the insured, cancelled the policy. It argues that the premium finance company, TIFCO, cancelled the policy on behalf of the insured, and therefore it was not required to notify the mortgagee of the cancellation.

The record in this case is clear that First State Insurance, not TIFCO, cancelled Fountainebleau's insurance policy. TIFCO's notice requested First State Insurance to cancel the policy effective September 23, 1987 (A7). TIFCO's notice also provided (A7):

> ...If the policy or any statute requires the insurer to give notice to a mortgagee...before the policy can be cancelled, the insurer shall give the prescribed notice... (emphasis added)

First State Insurance thereafter sent its own Notice of Cancellation to the Fountainebleau, making cancellation effective on October 14, 1987 (A8, Miller D46-50). First State Insurance's employees admitted that the very reason First State Insurance changed TIFCO's requested date of cancellation was because there was a mortgagee involved, and First State Insurance had to give the mortgagee ten days notice (Miller D49). First State Insurance so advised TIFCO so that it would understand why First State Insurance changed the requested cancellation date of the policy (Miller D49). The only problem is that when First State Insurance sent its Notice of Cancellation to the insured, Fountainebleau, it failed to send one to the mortgagee also.

It is clear that the "Named Insured" did not cancel First State Insurance's policy. TIFCO's request for First State Insurance to cancel the policy effective September 23, 1987 was superseded by First State Insurance's actual cancellation of the policy by its

own Notice of Cancellation effective October 14, 1987. First State Insurance clearly was the one who cancelled the policy for nonpayment, and therefore it was required to give Commonwealth S&L, the mortgagee, ten days notice of cancellation under the terms of its policy. Even TIFCO's notice required First State Insurance to give the mortgagee notice of cancellation.

The Fourth District's Ruling Was Based on Estoppel

Apparently recognizing that estoppel will not support the Fourth District's ruling, First State Insurance argues that although the certified question raises the issue of estoppel, that was not the basis for the Fourth District's holding. The certified question was one which the Fourth District, not Commonwealth S&L, drafted. Estoppel was pled as a defense by First State Insurance and argued in its brief. The Fourth District's decision, as evidenced by its certified question, was based on "estoppel".

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

First State Insurance cites no case to support its position that coverage would not be extended to the date of the fire. If written notice of cancellation is not given the mortgagee by the insurer, as here, then the policy would remain in effect as to the mortgagee.

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 8th day of MAY, 1995, to: PAUL B. BUTLER, JR., ESQ., Butler, Burnette & Pappas, 6200 Courtney Cambell Causeway, Bayport Plaza, Suite 1100, Tampa, FL 33607-1458.

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