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IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

SUPREME COURT NO. 85,396

RJT ENTERPRISES, INC., etc.,

District Court of Appeal,
4th District - No. 93-2135

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Allstate Insurance Company (hereinafter "Allstate"), adheres to and adopts by reference in this Reply Brief the Statement of the Case and Facts contained in Petitioner's Brief on the Merits. The parties will be referred to in this brief as "Allstate" (Petitioner) and "RJT" (Respondent).

The symbols for reference used in Petitioner's Brief on the Merits will also be used in this Reply Brief and are restated for convenience.

"R" refers to index to record on appeal. "T" refers to the transcript of proceedings taken March 3, 1993 and filed August 17, 1993 (noted on page 2 of the index to record).

SUMMARY OF ARGUMENT

The trial court was correct in ruling that RJT was not owed a defense under the Allstate insurance policy issued to its insured, John Weinerth. Accordingly, Allstate respectfully requests that this Court answer the certified question in the negative and reverse the decision of the District Court of Appeal.

RJT contends that Florida Statute § 627.7263 confers upon a rental company the status of "omnibus insured" under the lessee's insurance policy. This contention is refuted by the plain language of the statute. By its clear and unambiguous terms, Florida Statute § 627.7263 merely allows a rental company to shift to a lessee's insurance carrier the primary responsibility for payment of the limits of liability and personal injury protection required by Florida Statutes § 324.021(7) and 627.736. The statute in no way confers upon a rental company the status of "omnibus insured" and does not mention, let alone impose, a duty to defend.

Absent a statutorily imposed duty to defend, the duty to defend is determined by a fair reading of the insurance policy. It is undisputed in this case that RJT does not fall within the Allstate policy definition of "persons insured". Accordingly, Allstate had no contractual obligation to provide a defense to RJT.

Finally, RJT contends that rental companies will realize no economic benefit from Florida Statute § 627.7263 if Allstate's interpretation of the statute is accepted. In truth, rental companies such as RJT receive substantial benefits under Allstate's interpretation of the statute. Specifically, once the technical

requirements of the statute have been satisfied, the lessee's carrier is obligated to pay the first \$10,000 of bodily injury claims of one person in any one accident; the first \$20,000 of bodily injury claims of two or more persons in any one accident; the first \$10,000 in claims for destruction of property; and \$10,000 in personal injury protection benefits. Before passage of § 627.7263, the law required the rental company to pay these statutorily defined limits. This obligation on the part of the lessee's carrier confers a substantial economic benefit upon rental companies inasmuch as \$10,000.00 goes a long way toward settlement of claims. But for § 627.7263, the rental company, rather than the lessee's carrier, would have responsibility for payment of the above described amounts.

Allstate respectfully requests that this Court answer the certified question in the negative and reverse the decision of the District Court of Appeal.

ARGUMENT

I. FLORIDA STATUTE § 627.7263 DOES NOT MAKE RJT AN "OMNIBUS INSURED" UNDER THE ALLSTATE AUTOMOBILE POLICY

RJT asserts in its Response Brief that Florida Statute § 627.7263 "has the effect of" making a rental car company an "omnibus insured" or "person insured" under the lessee's insurance policy. RJT contends that once this status has been acquired, the rental company enjoys all the contractual benefits contained in the lessee's policy, including the contractual duty to defend. As demonstrated below, the clear and unambiguous language of Florida Statute § 627.7263 does not support such a broad interpretation.

Florida Statute § 627.7263 provides in pertinent part the following:

- (1) The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.

§ 627.7263, Fla. Stat. (1985). As set forth in Allstate's Brief on the Merits, the historical purpose behind the statute was to resolve the question of which insurance policy is primary for payment of claims against the lessee up to the limits of the financial responsibility law -- the rental company's policy or the lessee's policy. Before enactment of the statute, the rental company, as owner of the vehicle, was required to pay the first layer of indemnification. The passage of § 627.7263 in its current form, however, allows a rental company to shift to its lessee's

insurance carrier the primary responsibility for payment of the limits of liability and personal injury protection required by Florida Statute § 324.021(7) and 627.736.

Florida Statute § 627.7263 simply establishes which policy will be primary for payment of the limits specified in the financial responsibility law. It no way confers upon a rental company the status of "omnibus insured" or imposes a duty to defend. This is apparent from a plain reading of the statute. In the absence of language conferring the status of "omnibus insured" or imposing a duty to defend, the statute should not receive the broad, unsupported interpretation advanced by RJT. As stated by Judge Stevenson in his dissent below, "such a broad design should not be read into this statute where the legislature has not made that purpose manifest". *RJT Enterprises, Inc. v. Allstate Insurance Company*, 650 So.2d 56, 60 (Fla. 4th DCA 1994) (Stevenson, J., dissenting). See also *Lipof v. Florida Power and Light Co.*, 596 So.2d 1005 (Fla.1992) (court is not free to expand rights and obligations under Florida Statutes § 627.730 - 627.7405 to encompass uninsured motorist coverage -- such a decision must come from legislature); *Special Disability Trust v. Motor and Compressor Company*, 446 So.2d 224, 226 (Fla. 1st DCA 1984) (any doubt as to legislative intent should be resolved in favor of not adding words to the statute); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553,

1559 (11th Cir. 1989) (court must look to plain language of statute itself).¹

Significantly, Florida courts have rejected previous attempts to broaden the scope of § 627.7263 beyond its plain language. See *Mondello v. Liberty Mutual Insurance Company*, 507 So.2d 1178 (Fla. 2d DCA 1987) (because § 627.7263 makes no reference to uninsured motorist coverage, no such coverage required); *Maryland Casualty Company v. Reliance Insurance Company*, 478 So.2d 1068 (Fla. 1985) (plain language of § 627.7263 did not support contention that Reliance's coverage is primary to the full extent of its policy limits). See also *Grant v. New Hampshire Insurance Co.*, 613 So.2d 466, 470 (Fla. 1993) (§ 627.7263 merely allows lessor to shift primary limits of liability to lessee); *RJT Enterprises, Inc. v. Allstate Insurance Company*, 650 So.2d 56, 59 (Fla. 4th DCA 1994) (Stevenson, J., dissenting) (§ 627.7263 shifted responsibility for primary layer of indemnification; statute does not require that lessee's insurer provide a defense). As in *Mondello* and *Maryland Casualty Company*, *supra*, had the legislature intended to confer the status of omnibus insured or impose a duty to defend, it certainly could have made the appropriate reference in the statute.

In addition, Florida Statutes § 324.021(7) and 627.736, the statutes referenced in § 627.7263, do not confer the status of "omnibus insured" or impose a duty to defend. These statutes refer only to the ability to respond by payment of \$10,000 for bodily

¹ For a complete discussion on the principles of statutory construction as they apply to this case, see Sections I B 2-4 of Allstate's Brief on the Merits.

injury or death of one person in any one accident; \$20,000 for bodily injury or death of two or more persons in any one accident; \$10,000 because of injury or destruction of property of others; and \$10,000 in personal injury protection. No Florida court has ever held these statutes to transform a rental company into an "omnibus insured" or to impose a duty to defend.

The Florida Administrative Code Rule which implements Florida Statute § 627.7263 also supports Allstate's position in this case. Florida Administrative Code Rule 4-177.022 states that language substantially in the following form should be used in rental car lease agreements:

"BY ACCEPTING THE TERMS OF THIS AGREEMENT, YOU ARE AGREEING TO MAKE THE INSURANCE COVERAGE PROVIDED BY YOUR INSURER IDENTIFIED BELOW PRIMARY. Your insurance being PRIMARY means that in the event of a covered loss, your insurer will be responsible for payment of all personal injury or property damage claims arising from the operation of this vehicle up to the limits of your coverage."

Fla. Admin. Code Rule 4-177.022 (underscore added; capitalization in original). Significantly, the language set forth in the Rule narrowly defines "PRIMARY" as the responsibility for *payment* of claims. Like the statute it implements, the rule does not confer upon a rental company the status of "omnibus insured" or "person insured" for all purposes of the policy. It does not mention a duty to defend. It merely states that the lessee's carrier will be primary for *payment* of claims.

In light of the above, it is clear that § 627.7263 does not make RJT an "omnibus insured" under the Allstate policy or impose

a duty to defend. The statute simply establishes primacy of payment. Under Florida law, the duty to defend is strictly a contractual undertaking between the insurer and its insured and does not arise by operation of statute or common law. *Argonaut Insurance Company v. Maryland Casualty Company*, 372 So.2d 960, 963-64 (Fla. 3d DCA 1979); *RJT Enterprises, Inc. v. Allstate Insurance Company*, 650 So.2d 56, 60 (Fla. 4th DCA 1994) (Stevenson, J., dissenting). Moreover, the duty to defend is entirely separate and distinct from the duty to indemnify. *Klaesen Bros., Inc. v. Harbor Ins. Co.*, 410 So.2d 611, 612 (Fla. 4th DCA 1982); *Baron Oil Company v. Nationwide Mutual Fire Insurance Company*, 470 So.2d 810, 813 (Fla. 1st DCA 1985). Therefore, the fact that § 627.7263 shifts the primary responsibility for indemnification has no bearing on the duty to defend.

**II. THE ALLSTATE POLICY IS NOT IN CONFLICT WITH
FLORIDA STATUTE § 627.7263**

RJT claims the Allstate policy is in conflict with § 627.7263 because it excludes rental companies such as RJT from the definition of "persons insured" and therefore does not afford a defense to such companies. RJT has, however, missed the point of the statute. As discussed above, the statute does not in any fashion confer upon rental companies the status of "omnibus insured" or "person insured". The statute merely establishes primacy of payment between the lessee's policy and the rental company's policy. Where the technical requirements of the statute have been satisfied, the lessee's policy will be primary for payment of the limits of liability required by Florida Statutes

§ 324.021(7) and 627.736. In the instant case, Allstate in fact paid the \$10,000 limits required by § 324.021(7) on behalf of the lessee and thus fulfilled the requirements of § 627.7263. (T 27-28).

Moreover, RJT's contention that the Allstate policy is in conflict with § 627.7263 overlooks the point discussed above: § 627.7263 does not impose a duty to defend. Absent a statutory restriction, an insurance company has the same right as an individual to limit its liability and impose conditions upon its obligations. *Canal Insurance Company v. Giesenschlag*, 454 So.2d 88, 89 (Fla. 2d DCA 1984). In this case, § 627.7263 does not impose upon the lessee's insurance carrier a duty to defend the rental company. An insurance carrier such as Allstate is therefore free to draft its policy in such a way as to exclude rental companies such as RJT from the definition of "persons insured".

III. ALLSTATE DID NOT OWE A DEFENSE TO RJT

The most significant point in RJT's Response Brief appears at page 8. There, RJT admits the duty to defend is a contractual duty and, in the absence of statutory regulation, should be established by a fair reading of the contractual language. Because Florida Statute § 627.7263 does not impose a duty to defend, this admission is fatal to RJT's position.

As set forth herein and in Allstate's Brief on the Merits, Florida Statute § 627.7263 does not impose a duty to defend. Rather, it provides that the lessee's insurer shall be primarily responsible for payment of the limits required by Florida Statute

§ 324.021(7) and 627.736. Florida Statutes § 324.021(7) and 627.736, the two statutes referenced in § 627.7263, also do not impose an obligation to defend. They merely require that certain limits be carried by an operator of a motor vehicle. Accordingly, there is a total absence of statutory regulation concerning a duty to defend. The duty to defend should therefore be determined by a fair reading of the Allstate policy language.

In this case, it is undisputed that RJT does not fall within the Allstate policy definition of "persons insured".² RJT never paid premiums to Allstate and never had a contract with Allstate.

² The Allstate policy contains the following definition of "persons insured":

Persons Insured.

- (1) while using your insured auto
 - (a) you,
 - (b) any resident, and
 - (c) any other person using it with your permission.

- (2) while using a non-insured auto
 - (a) you,
 - (b) any resident relative of your household using a four-wheel private passenger, station wagon or utility auto,

- (3) any other person or organization liable for the use of an insured auto if the auto is not owned or hired by this person or organization.

Allstate Automobile Policy, p. 4. (Contained in R83) (underscore added). RJT does not fall within the policy definition of "persons insured" inasmuch as it owned the automobile involved in the accident. (T 4).

Consequently, there is no contractual basis on which to impose upon Allstate an obligation to defend RJT.³

The fact that neither § 627.7263 nor the Allstate policy afford a defense to RJT was recognized by Judge Stevenson in his dissent in the lower court:

"The insurance contract at issue in the instant case specifically excludes the duty to defend an organization which owns a covered auto other than the named insured. In this case, the organization which owned the auto was the rental agency. Even though this exclusion seems to be a slick attempt to avoid any possibility that section 627.7263(1) would require the provision of a defense to a rental agency, the truth is that the statute does not require such a result in any event.... Because the statute does not require that the renter's insurer provide a defense for the rental agency and the clear language of the policy excludes the provision of a defense to a rental agency, I would affirm the order of the trial court"

RJT Enterprises, Inc. v. Allstate Insurance Company, 650 So.2d at 60. Allstate respectfully submits that because neither Florida law nor the Allstate policy impose a duty to defend, the certified question should be answered in the negative.

IV. ALLSTATE'S INTERPRETATION OF FLORIDA STATUTE § 627.7263 DOES NOT FRUSTRATE LEGISLATIVE INTENT

Finally, RJT claims the legislative intent behind Florida Statute § 627.7263 would be frustrated under Allstate's interpretation of the statute. Specifically, RJT asserts that

³ Allstate does not contend that a direct contractual relationship is necessary to create an obligation to defend. However, a person or entity must fall within the policy definition of "persons insured" to be entitled to a defense.

rental car companies would gain no economic benefit if Allstate's argument is accepted.

The truth of the matter is that under Allstate's interpretation of § 627.7263, rental companies receive *substantial* benefits which did not exist before passage of the statute. Before § 627.7263 was passed, rental companies were responsible for payment of the first layer of indemnification, up to the limits required by the financial responsibility law. Now, once the technical requirements of the statute have been satisfied, the lessee's carrier is obligated to pay the first layer. This means the lessee's carrier is required to pay the first \$10,000 of bodily injury claims of one person in any one accident; the first \$20,000 of bodily injury claims of two or more persons in any one accident; the first \$10,000 in claims for destruction of property; and \$10,000 in personal injury protection benefits. See § 324.021(7) and 627.736, Fla. Stat. (1993). This obligation confers a substantial economic benefit upon rental companies inasmuch as \$10,000.00 goes a long way toward settlement of claims. But for § 627.7263, the rental company, rather than the lessee's carrier, would have responsibility for payment of the above described amounts. Accordingly, RJT's assertion that rental companies would not realize economic benefit if Allstate's position is accepted is simply without basis in fact. Substantial benefits are conferred under Allstate's interpretation of Florida Statute § 627.7263.

The legislative history behind Florida Statute § 627.7263 reflects the following purpose behind the statute:

"The purpose of this bill appears to be three-fold: 1) to lower the insurance premiums paid by automobile leasing companies; 2) to clarify the statutory law on primacy of coverages in lease car situations; and 3) to extend the privilege of renting automobiles to certain drivers who have their own insurance but who may be precluded from leasing an automobile because of age, an adverse driving record, etc."

Senate Staff Analysis, HB 3686 (July 12, 1976). (The Senate Staff Analysis is attached to Petitioner's Brief on the Merits as an Appendix). Allstate's interpretation of § 627.7263 forwards, rather than frustrates, these purposes enumerated by the Florida Senate.

CONCLUSION

Florida Statute § 627.7263 does not convert a rental car company such as RJT into an "omnibus insured" or "person insured" under the lessee's insurance policy. The statute merely allows a rental company to shift to a lessee's insurance carrier the primary responsibility for payment of the limits of liability and personal injury protection required by Florida Statutes § 324.021(7) and 627.736. The statute by its plain terms does not impose a duty to defend.

Absent a statutorily imposed duty to defend, the duty to defend must be determined by a fair reading of the lessee's insurance policy. In this case, it is undisputed that RJT does not fall within the Allstate policy definition of "persons insured". Allstate therefore had no contractual obligation to provide a defense to RJT.

Finally, RJT's assertion that rental companies will realize no benefit from Florida Statute § 627.7263 if Allstate's interpretation of the statute is accepted is without merit. Before passage of § 627.7263, the law required the rental company to pay the first layer of indemnification up to the limits of the financial responsibility law. Now, by operation of § 627.7263, the lessee's carrier must pay the first layer of indemnification. This legislative switch in primacy of coverage confers a substantial benefit upon rental companies inasmuch as \$10,000 goes a long way toward settlement of claims.

Allstate respectfully requests that this Court answer the certified question in the negative and reverse the decision of the District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Samuel Tyler Hill, 800 S.E. Third Ave., Suite 200, Ft. Lauderdale, FL 33316; Ronald E. Solomon, P. O. Box 14156, Ft. Lauderdale, FL 33302 and Nancy Little Hoffman, Suite 100, 4419 West Tradewinds Ave., Ft. Lauderdale, FL 33308 this 6th day of July, 1995.

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