IN THE SUPREME COURT OF THE STATE OF FLORIDA

ARTHUR MODDER AND GAIL MODDER,

Appellants,

vs. CASE NO.: 88,402

AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS,

Appellee.
_____/

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEE AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS

Brett J. Preston
Florida Bar No. 603716
HILL, WARD & HENDERSON, P.A.
Suite 3700 - Barnett Plaza
101 East Kennedy Boulevard
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900
Attorneys for Appellee
AMERICAN NATIONAL LIFE
INSURANCE COMPANY OF TEXAS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

I. NATURE OF THE CASE.

The Eleventh Circuit has asked this Court to interpret two Florida Statutes, Fla. Stat. §627.6515(2) (1992) and 627.6698 (1992), as a matter of first impression. The issue is whether the trial court correctly interpreted these statutes when it concluded that §627.6515(2) renders §627.6698, an attorney's fee statute, inapplicable to certain types of insurance policies, including the one at issue in this case.

II. COURSE OF THE PROCEEDINGS AND DISPOSITION IN LOWER TRIBUNAL.

American National Life Insurance Company of Texas, defendant and appellee ("ANTEX"), insured Arthur and Gail Modder, plaintiffs and appellants (the Modders"), under a group health insurance policy. The Modders sued ANTEX to recover benefits they claimed were owed under that policy. R-1-2-1.[1] ANTEX removed this diversity action, R-1-1-1, and defended and counterclaimed for declaratory relief on the grounds that Arthur Modder made material misrepresentations in his application for coverage under ANTEX's group health insurance policy. R-1-3-1, 4.

The case was tried before a jury. The district court entered a judgment, consistent with the jury's verdict, finding that Arthur Modder's coverage under ANTEX's policy would not be rescinded

---

[1] References to the record shall be made to the volume, docket number, and page following the symbol "R."

despite Mr. Modder's material misrepresentations, but also finding that the Modders were not entitled to recover any benefits under the terms of that policy. R-2-80. Because the Modders prevailed on the rescission issue, they moved for attorney's fees under Fla. Stat. §627.428, R-3-85-1, and later under §627.6698. R-3-102-2.

The district court ruled that the Modders were not entitled to recover attorney's fees under Fla. Stat. §627.428. R-4-108-14. (The Modders did not appeal this ruling.) The court requested additional briefing and evidence regarding the Modders' claim for fees under §627.6698. R-4-108-16. After receiving a memorandum and evidence from ANTEX and a memorandum from the Modders, the court ruled that the Modders could recover fees under §627.6698. R-4-113. The court then granted ANTEX's motion for reconsideration, and changed its ruling. On reconsideration, the district court found that, by operation of Fla. Stat. §627.6515(2), the Modders were not entitled to recover attorney's fees under §627.6698. R-4-122. This is the order which is the subject of this appeal.

Both parties filed briefs in the Eleventh Circuit. Shortly before oral argument, the Modders' counsel filed with the clerk a copy of Aperm of Florida, Inc. v. Trans-Coastal Maintenance Co., 505 So. 2d 459 (Fla. 4th DCA 1987), rev. denied, 515 So. 2d 229 (Fla. 1987) as "supplemental authority." After oral argument, the Eleventh Circuit issued its certification order pursuant to Fla.R.App.P. 9.150.

The Eleventh Circuit has certified the following two-part question to this Court:

1. Does the exclusionary provision of §627.6515(2), Fla. Stat. exempt an insurer from attorney's fees liability under §627.6698, Fla. Stat.; and
2. if so, has the insurer in this case provided the factual predicate necessary to come within the exclusionary provision.

The Modders waived their right to file an initial brief in this Court. ANTEX has filed this brief in order to assist the Court in its consideration of the Eleventh Circuit's certified question.

SUMMARY OF THE ARGUMENT

The answer to the first part of the Eleventh Circuit's certified question is yes. The exclusionary provision of §627.6515(2) exempts insurers from liability for attorney's fees under §627.6698. Sections 627.6515(2) and 627.6698 are found in part VII of Chapter 627 of the Florida Statutes. Section 627.6515(2) clearly and unambiguously provides: "This part does not apply to a group health insurance policy issued or delivered outside of this state under which a resident of this state is provided coverage if . . .," (emphasis supplied) and then sets forth three requirements that the policy in question must meet. The plain meaning of this statute is that none of the provisions in part VII of Chapter 627 apply to certain types of group health insurance policies issued out of state. Section 627.6698 is among the statutes that are not applicable to those policies.

The answer to the second part of the certified question is also yes. ANTEX has provided a sufficient factual predicate to demonstrate that its policy falls within the exclusionary provision. The uncontradicted evidence before the district court establishes that ANTEX's policy is one of the policies that are described in §627.6515(2), and the district court so found. This finding is consistent with that of the Florida Department of Insurance, which independently determined that ANTEX's policy meets the criteria set forth in §627.6515(2). The finding by the district court that ANTEX's policy complies with §627.6515(2) is supported by the record, and is not clearly erroneous.

ARGUMENT

I. THE EXCLUSIONARY PROVISION OF §627.6515(2) EXEMPTS AN INSURER FROM ATTORNEY'S FEES LIABILITY UNDER §627.6698.

Section 627.6515(2) is clear and unambiguous. A copy is attached as Appendix A to this brief. This statute is found in Part VII of Chapter 627, and begins: "This part does not apply to . . . ." The statute then describes certain types of group health insurance policies issued or delivered outside of the state of Florida. By its plain meaning, §627.6515(2) precludes the application of the statutes found within Part VII of Chapter 627 to the types of insurance policies described in the balance of §627.6515(2).[2]

Section 627.6698, the attorney's fees provision under which the Modders have based their attorney's fees claim, is one of the statutes found in Part VII of Chapter 627. Section 627.6515(2) does not contain any exception for §627.6698 that would make it applicable to the policies described in §627.6515(2). Had the legislature so desired, it could have made §627.6698 applicable to these policies. It did not.

In sum, under the clear language of §627.6515(2), the attorney's fees provision of 627.6698, like the rest of Part VII, is not applicable to policies described in §627.6515(2). ANTEX

---

[2] Later, §627.6515(2)(c) expressly requires the out-of-state policies to provide specific health insurance benefits that are described in certain statutes found within Part VII. Section 627.6698 is not among the statutes listed in this provision.

therefore requests this Court to answer the first part of the Eleventh Circuit's certified question in the affirmative.

A more detailed analysis of the reasons supporting this conclusion is set forth in pages 7 through 12 of the brief that ANTEX filed in the Eleventh Circuit. ANTEX's Eleventh Circuit brief is attached at Appendix B, and is incorporated herein by reference. ANTEX would respectfully request the Court to read and consider its Eleventh Circuit brief when the Court decides this appeal.

II. THE RECORD BEFORE THE DISTRICT COURT PROVES THAT ANTEX'S POLICY COMES WITHIN THE EXCLUSIONARY PROVISION OF §627.6515(2)

In the second part of its certified question, the Eleventh Circuit asks this Court to determine whether ANTEX has "provided the factual predicate necessary to come within the exclusionary provision" of §627.6515(2). This Court should consider two principles of law when it answers this question.

First, the Modders, not ANTEX, have the burden of proof with respect to Plaintiffs' a claim for attorney's fees. United Services Automobile Assn. v. Kiibler, 364 So. 2d 57 (Fla. 3d DCA 1978) (an attorney who requests a court awarded fee has the burden of proving his entitlement to the fee). This burden required the Modders to present the district court with evidence that §627.6698 was applicable to this case. This required them to prove that ANTEX's policy was not one of those described in Fla. Stat. §627.6515(2). In fact, the Modders presented no evidence to the district court regarding this issue.

Second, the district court found, as a factual matter, that ANTEX's policy was one of the types of policies described in Fla. Stat. §627.6515(2). R-4-122-3. In the Eleventh Circuit, factual determinations must be reviewed under the "clearly erroneous" standard. Godfrey v. BellSouth Telecommunications, Inc., 10 FLW Fed. C184 (11th Cir. July 26, 1996); see also cases cited at p. 5 of ANTEX's brief filed in the Eleventh Circuit. Thus, the district court's determination that ANTEX's policy met the requirement of §627.6515(2) should be affirmed unless that finding was clearly erroneous. That finding was not clearly erroneous, but instead was entirely consistent with and supported by the evidence.

Regardless of the burden of proof and the standard of review, the undisputed evidence before the district court establishes that ANTEX's policy satisfies the requirements of §627.6515(2). Among the other evidence before the district court was the compelling fact that the Florida Department of Insurance has independently determined that ANTEX's policy meets the requirements of this statute. R-4-117-2, 3, 4, 5, and exhibits thereto. That finding is consistent with the other evidence presented to the district court, which establishes that ANTEX's policy met each and every requirement of §627.6515(2). ANTEX would refer this Court to the analysis of this evidence set forth in pages 12 through 18 of its brief filed in the Eleventh Circuit. In light of this evidence, ANTEX respectfully requests this Court to answer the second part of the Eleventh Circuit's certified question in the affirmative.

III. THE MODDERS' "SUPPLEMENTAL AUTHORITY" HAS NO BEARING ON THE OUTCOME OF THIS APPEAL.

Shortly before oral argument, the Modders filed with the Eleventh Circuit the case of Aperm of Florida, Inc. v. Transcoastal Maintenance Co., 505 So. 2d 459 (Fla. 4th DCA 1987). Aperm has no bearing whatsoever on the outcome of this appeal.

The Aperm case addressed whether the plaintiff was entitled to recover attorney's fees under Fla. Stat. §627.428. 505 So. 2d at 460. The specific issue in that case was whether the individual liability insurance policy in question was properly deemed by the trial court to have been "constructively delivered" in Florida. Id at 461, 462. The appellate court found that, where an individual liability insurance policy is issued in another state but is intended to cover an insured whose risk and place of business are known to the insurer to be in Florida, the policy is constructively delivered in Florida or issued for delivery in Florida, with reference to Fla. Stat. §627.401 and 627.428. Id.

Aperm is distinguishable from the present case for two very important reasons. First, §627.428 is not at issue in this appeal. In fact, the Modders originally claimed that they were entitled to recover fees under §627.428. The trial court rejected that claim, partially on the strength of Wilmington Trust Co. v. Manufacturer's Life Ins. Co., 749 F.2d 694 (11th Cir. 1985). Plaintiffs did not appeal that ruling. Instead, Plaintiffs have only appealed the court's denial of their claim for fees under §627.6698.

Second, constructive delivery, which was central to the Aperm decision, has never been an issue in this case. The entire concept of constructive delivery has no application with respect to group health insurance certificates, which must be provided to insureds in the state of Florida. §627.6515(2)(b), Fla. Stat. (1992). See Albury v. Equitable Life Assurance Society, 409 So. 2d 235 (Fla. 1st DCA 1982) (delivery of a certificate of insurance under a group policy is insufficient to establish "delivery" of policy in Florida in connection with an attorney's fees claim under §627.428).

In his transmittal letter of the Aperm case to the clerk of the Eleventh Circuit, a copy of which is attached as Appendix C, the Modders' attorney states that the Aperm case "argues against the 'anomalous situation' of policy coverage in Florida but no corresponding Florida fee provision due simply to the issuance of the policy in another state." In fact, there is nothing "anomalous" about the district court's ruling in the present case. As it did with respect to §627.428, the Florida legislature has limited the availability of fees under §627.6698 to only certain types of insurance policies. By virtue of §627.401, §627.428 does not allow insureds to recover attorney's fees when they prevail against insurers under policies that are delivered or issued for delivery outside of the state of Florida. Wilmington Trust Co. v. Manufacturer's Life Ins., 749 F.2d 694 (11th Cir. 1985). Similarly, by operation of §627.6515(2), attorney's fees under §627.6698 are available only to successful litigants whose group

insurance policies were issued or delivered in Florida, or outside of Florida to groups other than those described in §627.6515(2). The legislature made the decision not to make fees available in all cases. Accordingly, there is nothing "anomalous" about implementing this decision by refusing to award fees to the Modders, who elected to purchase insurance under this out-of-state group policy that satisfies §627.6515(2).

CONCLUSION

The Florida legislature could have, but did not, allow every insured who successfully sues an insurer in Florida to recover attorney's fees. Instead, the legislature made a reasoned decision to enact statutes that afford fees to successful litigants in only certain, specified cases, involving certain, specified insurance policies. Because ANTEX's policy is one that the Florida legislature has exempted from any exposure for attorney's fees, the district court properly refused to award attorney's fees to the Modders.

For the reasons set forth herein and in its Eleventh Circuit brief, ANTEX respectfully requests this Court to answer both parts of the Eleventh Circuit's certified question in the affirmative.

Respectfully submitted,

Brett J. Preston
Florida Bar No. 603716
HILL, WARD & HENDERSON, P.A.
Suite 3700 - Barnett Plaza
101 East Kennedy Boulevard
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900
Attorney for Appellee
AMERICAN NATIONAL LIFE
INSURANCE COMPANY OF TEXAS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 22nd day of August, 1996 to William Rutger, Esquire, 200 North Garden Avenue, Suite A, Clearwater, Florida 34615 and Ronald P. Teevan, Esquire, 200 North Garden Avenue, Clearwater, Florida 34615.

Brett J. Preston

Appendix A

627.6515 Out-of-state groups.—

(1) Any group health insurance policy issued or delivered outside this state under which a resident of this state is provided coverage shall comply with the provisions of this part in the same manner as group health policies issued in this state.

(2) This part does not apply to a group health insurance policy issued or delivered outside this state under which a resident of this state is provided coverage if:

(a) The policy is issued to an employee group the composition of which is substantially as described in s. 627.653; a labor union group or association group the composition of which is substantially as described in s. 627.654; an additional group the composition of which is substantially as described in s. 627.656; a group insured under a blanket health policy when the composition of the group is substantially in compliance with s. 627.659; a group insured under a franchise health policy when the composition of the group is substantially in compliance with s. 627.663; an association group to cover persons associated in any other common group, which common group is formed primarily for purposes other than providing insurance; a group which is established primarily for the purpose of providing group insurance, provided the benefits are reasonable in relation to the premiums charged thereunder and the issuance of the group policy has resulted, or will result, in economies of administration; or a group of insurance agents of an insurer, which insurer is the policyholder;

(b) Certificates evidencing coverage under the policy are issued to residents of this state and contain in contrasting color and not less than 10-point type the following statement: "The benefits of the policy providing your coverage are governed primarily by the law of a state other than Florida"; and

[1](c) The policy provides the benefits specified in ss. 627.419, 627.6574, 627.6575, 627.6579, 627.6613, 627.667, and 627.6675.

(3) Section 624.428 is not applicable when residents of this state are enrolled for coverage under a policy or certificate issued in accordance with subsection (2).

(4) Prior to solicitation in this state, a copy of the master policy and a copy of the form of the certificate evidencing coverage that will be issued to residents of this state shall be filed with the department for informational purposes.

(5) Prior to solicitation in this state, an officer of the insurer shall truthfully certify to the department that the policy and certificates evidencing coverage have been reviewed and approved by the state in which the group policy is issued.

(6) Any insurer who provides coverage under certificates of insurance issued to residents of this state shall designate one Florida-licensed resident agent as agent of record for the service of such certificates, unless the policy is issued to a group substantially as described in s. 627.653, s. 627.654, s. 627.656, s. 627.659, or s. 627.663.

History.—ss. 499, 809(2nd), ch. 82-243; s. 79, ch. 82-386; s. 110, ch. 83-216; s. 3, ch. 84-202; s. 5, ch. 86-122; s. 2, ch. 89-190; s. 7, ch. 90-249; s. 2, ch. 90-255; ss. 129, 149, ch. 92-33; s. 114, ch. 92-318.

[1]**Note.**—

A. Section 23, ch. 90-249, provides for applicability to policies issued or renewed on or after October 1, 1990.

B. Section 4, ch. 90-255, provides for applicability to policies or contracts issued on or after October 1, 1990.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ARTHUR MODDER AND GAIL MODDER,

Appellants,

vs. CASE NO.: 95-3020

AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS,

Appellee.
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLEE
AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS

Brett J. Preston
Florida Bar No. 603716
Dennis P. Waggoner
Florida Bar No. 509426
HILL, WARD & HENDERSON, P.A.
Barnett Plaza, Suite 3700
101 East Kennedy Boulevard
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900

Attorneys for Appellee
American National Life
Insurance Company of Texas

Arthur Modder and Gail Modder v. American National Life Insurance Company of Texas
Case No. 95-3020

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Counsel for Defendant/Appellee American National Life Insurance Company of Texas certifies that the following persons and entities have or may have an interest in the outcome of this case and are otherwise required to be disclosed in accordance with Rule 26.1, Federal Rules of Appellate Procedure, and Circuit Rule 26.1-1.

American National Life Insurance Company of Texas

American National Insurance Company

The National Business Association

The National Business Association Incorporated Trust (also known as the National Business Association)

Brett J. Preston

Dennis P. Waggoner

Hill, Ward & Henderson, P.A.

William A. Rutger

Ronald Patrick Teevan

Arthur Modder

Gail Modder

Counsel of Record for Appellee
American National Life Insurance
Company of Texas

Date: March 1, 1996

STATEMENT REGARDING ORAL ARGUMENT

The trial court's order denying Plaintiffs' motion for attorney's fees should be affirmed based upon a plain reading of Fla. Stat. §627.6515(2). Oral argument is unlikely to aid this Court in its interpretation of this statute. Accordingly, American National Life Insurance Company of Texas requests that this Court not allow oral argument.

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF JURISDICTION

This court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

Whether Fla. Stat. §627.6515(2) (1992) precludes a party from recovering attorney's fees under Fla. Stat. §627.6698 (1992) in litigation involving a group health insurance policy which meets the requirements of Fla. Stat. §627.6515(2)? If so, whether the trial judge's factual determination that ANTEX's[1] policy complies with §627.6515(2), and that Plaintiffs could not recover attorney's fees, was clearly erroneous?

STATEMENT OF THE CASE

I. Course of the Proceedings Below.

Plaintiffs Arthur Modder and Gail Modder sued ANTEX for benefits they alleged were due under a group health insurance policy ANTEX issued to the National Business Association ("NBA"), which insured Plaintiffs. R-1-2-1. ANTEX removed this diversity action, R-1-1-1, and filed its answer and a counterclaim seeking a declaratory judgment that Plaintiffs' coverage under ANTEX's group health insurance policy had been rescinded, or rescinding it by operation of the Court's judgment, due to material misrepresentations Plaintiffs made in their insurance application.

---

[1] American National Life Insurance Company of Texas shall refer to Appellants as "Plaintiffs" or by the use of their proper names, and shall refer to itself as "ANTEX" in this brief. References to the record shall be made to the volume, docket number, and page following the symbol "R."

R-1-3-1, 4. The parties later agreed that Plaintiff Gail Modder's coverage should remain in force. R-2-47-1.

After a jury trial, the court entered judgment in ANTEX's favor with respect to Plaintiffs' damages claim, and in Plaintiffs' favor with respect to ANTEX's counterclaim. R-2-80. Plaintiffs then filed a motion for attorney's fees. R-3-85-1. In this motion, Plaintiffs did not request attorney's fees under Fla. Stat. §627.6698, which is the subject of this appeal, but instead relied on another statute, §627.428, for their request. R-3-85-1, 2, 3. ANTEX filed a memorandum in opposition to Plaintiffs' motion for attorney's fees, R-3-96-1, in which ANTEX argued that Plaintiffs were not entitled to recover attorney's fees under Fla. Stat. §627.428 or, for the sake of completeness, under Fla. Stat. §627.6698, R-3-96-1, 3. Plaintiffs thereafter amended their motion for attorney's fees to request fees under Fla. Stat. §627.6698, for the first time. R-3-102-2.

The trial judge denied Plaintiffs' motion for attorney's fees under Fla. Stat. §627.428, R-4-108-14; Plaintiffs do not challenge this ruling in this appeal. The judge requested the parties to file supplemental memoranda, affidavits, and transcripts addressing the question of whether Plaintiffs could recover attorney's fees under Fla. Stat. §627.6698. R-4-108-16. ANTEX filed affidavits and a memorandum of law in support of its position that Plaintiffs could not recover attorney's fees under Fla. Stat. §627.6698. R-4-109, 110, 111. Three days later, Plaintiffs filed their memorandum on this subject. R-4-112. Plaintiffs did not present the trial

judge with any affidavits or other evidence in support of their contention that they were entitled to recover fees under this statute.

The trial judge entered an order granting Plaintiffs' motion for attorney's fees. R-4-113. The judge granted Plaintiffs' motion based upon what the judge later deemed to be an incorrect interpretation of Fla. Stat. §627.6515, which Plaintiffs had advocated in their memorandum directed to this question. R-4-122-2, 3. ANTEX requested the trial judge to reconsider this order, and contemporaneously filed a timely affidavit in support of its motion. R-4-114, 115, 116, and 117. The judge reconsidered her order granting fees, and entered the order denying Plaintiffs' motion for attorney's fees that is the subject of this appeal. R-4-122. In that order, the judge articulated certain factual determinations based upon the evidence presented by ANTEX, R-4-122-3, and conclusions of law concerning the proper interpretation of §627.6515(2)(a), R-4-122-2, 3, and ruled that Plaintiffs were not entitled to recover attorney's fees.[2] R-4-122-3. Plaintiffs then initiated this appeal.

---

[2] Though the judge's order only addresses Gail Modder's claim for attorney's fees, ANTEX acknowledges that both Arthur and Gail Modder asked the court to award attorney's fees. Thus, ANTEX acknowledges that, because the same result should obtain for both Arthur and Gail Modder, the court's order should be treated as if it were applicable to both of them.

II. Statement of the Facts.

Plaintiffs are insured under a group health insurance policy issued by ANTEX to the National Business Association ("NBA"), an association that provides a variety of services, information, and products for its members. R-4-110-2; R-4-111-2, 3. This policy was issued and delivered outside of the state of Florida, but insured NBA members who were residents of Florida, including the Plaintiff Arthur Modder and his wife as his dependent. R-4-110-2; R-4-111-2, 3; R-1-3-12, 13, 14, 15.

The trial judge determined as a matter of fact, based on affidavits that ANTEX filed on this subject, R-4-110, 111, and 117, that the NBA was formed for purposes other than providing insurance. R-4-122-3. The NBA was established to help small employers and self-employed individuals, such as Arthur Modder, achieve their professional and personal goals. R-4-111-1. The NBA provides a variety of business, educational, lifestyle, and health-oriented benefits, services, and opportunities to its members. R-4-111-1. NBA members' benefits include: access to information and services concerning how to better manage small business; access to computer software; availability of discounts for a variety of services and supplies; and eligibility to join a credit union. R-4-111-2. While eligibility for coverage under the group health insurance policy issued by ANTEX to the NBA is also a benefit of membership, NBA members need not apply for coverage nor become insured under this policy. R-4-111-2.

The Department of Insurance of the state of Florida has determined that the group health insurance policy that ANTEX issued to the NBA meets the requirements of Fla. Stat. §627.6515(2)(a). R-4-117-3, 4, 5, and exhibits thereto. The trial judge found, as a matter of fact, that: "A review of the supplemental affidavit and exhibits submitted by Defendant establish that the State of Florida Department of Insurance found that it does [comply with §627.6515(2)]. Plaintiff does not dispute this administrative action. In approving Defendant's policy, the Department of Insurance found that the group qualified under §627.6515." R-4-122-3.

III. Statement of the Standard of Review.

Plaintiffs have challenged the trial court's interpretation of a statute and the trial court's findings of fact upon which the order on appeal is based. In this diversity action, this Court must review de novo the district court's interpretation of state law. Insurance Company of North America v. Lexow, 937 F.2d 569, 571 (11th Cir. 1991). However, the trial court's findings of fact must be reviewed under the "clearly erroneous" standard. Dahl-Eimers v. Mutual of Omaha Life Insurance Co., 986 F.2d 1379, 1381 (11th Cir. 1993); E. Remy Martin & Co. v. Shaw-Ross International Imports, Inc., 756 F.2d 1525, 1529 (11th Cir. 1985). See also Schwartz v. Florida Board of Regents, 954 F.2d 620, 623 (11th Cir. 1991) (district court's finding of fact will not be reversed on appeal unless clearly erroneous).

SUMMARY OF THE ARGUMENT

Plaintiffs seek attorney's fees under Fla. Stat. §627.6698. Plaintiffs may not recover attorney's fees under that statute because Fla. Stat. §627.6515(2), which limits the applicability of §627.6698, clearly provides that §627.6698 does not apply in this case.

Fla. Stat. §627.6515(2) and §627.6698 are found in Part VII of Chapter 627 of the Florida Statutes. Section 627.6515(2) provides: "This part does not apply to a group health insurance policy issued or delivered outside this state under which a resident of this state is provided coverage if . . .," and then sets forth three requirements that the policy in question must meet. ANTEX's policy was issued and delivered outside of the state of Florida, and meets all three of those requirements. For this reason, Part VII of Chapter 627, including Fla. Stat. §627.6698, does not apply in this case, and Plaintiffs may not recover attorney's fees under §627.6698.

Plaintiffs' challenge to the trial judge's interpretation of the statutes in question fails because the judge's interpretation is correct. Plaintiffs' challenge to the factual basis for the order denying Plaintiffs' motion for attorney's fees fails because the trial judge's factual findings are supported by the record, and are not clearly erroneous.

ARGUMENT

I. Fla. Stat. §627.6515(2) Limits the Applicability of Fla. Stat. §627.6698.

This controversy arises out of the proper interpretation of Fla. Stat. 627.6515(2), which is attached as Appendix A to this brief. Section 627.6515(2) controls the outcome of this appeal because it determines whether or not §627.6698 (attached as Appendix B hereto), which provides for an award of attorney's fees, applies in this case. If §627.6698 applies, Plaintiffs may recover fees; if it does not, then they may not. The correct interpretation of §627.6515(2), which the trial judge ultimately adopted, compels the conclusion that §627.6698 does not apply under the facts of this case, because ANTEX's policy meets the requirements of §627.6515(2).

A. According to its Clear and Unambiguous Terms, §627.6515(2) Determines Whether §627.6698 Applies.

The starting point in statutory construction must be the language of the statute itself. Gonzalez v. McNary, 980 F.2d 1418, 1420 (11th Cir. 1993). The meaning of the statute must be sought in the language in which the act is framed, and if that is plain the sole function of the courts is to enforce it according to its terms. Id. When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the statute must be given its plain meaning. Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc., 32 F.3d 528 (11th Cir. 1994), (pet. for cert. filed 64 USLW 3297 (October 11, 1995). The

language of §627.6515(2) clearly and unambiguously provides that Part VII of Chapter 627 (which includes §627.6698) does not apply to group health insurance policies that fall within the scope of §627.6515(2). In this situation, the statute must be given its plain meaning, which precludes Plaintiffs from recovering fees under Fla. Stat. §627.6698.

§§627.6515(2) and 627.6698 are found in Part VII of Chapter 627, Florida Statutes. Though the text of §627.6698 does not limit its application to certain types of policies, §627.6515(2) limits the application of **all** of Part VII of Chapter 627, in which §627.6698 is found, to only certain types of policies.[3] Section 627.6515(2) provides:

> **This part does not apply to** a group health insurance policy issued or delivered outside this state under which a resident of this state is provided coverage **if** . . . (emphasis added)

Subsections (a), (b), and (c) of §627.6515(2) then contain the three requirements that an out-of-state group policy must satisfy in order for Part VII **not** to apply to that policy. Subsection (a) provides that the policy must be issued to a certain type of group; it is this provision that is at the heart of this appeal. Subsection (b) requires that certificates evidencing coverage under

---

[3] Many of the 21 parts of Chapter 627 contain a statute that limits the applicability of each part to only certain types of insurance contracts. For example, see Fla. Stat. §627.021 (Part I); 627.401 (Part II); 627.451 (Part III); 627.501 (Part IV); 627.5515 (Part V); and 627.601 (Part VI).

the policy contain a certain statement; it is undisputed that the certificate issued to the Plaintiffs complied with this provision. Subsection (c) requires that the group policy provide the benefits specified in certain other sections of the Florida Statutes; it is undisputed that ANTEX's policy complied with this requirement. Thus, according to the clear and unambiguous language of §627.6515(2), Part VII (including §627.6698) does not apply to out-of-state group policies that fall within §627.6515(2). ANTEX's policy satisfies all of the requirements of §627.6515(2) which renders all of Part VII, and thus §627.6698, inapplicable to ANTEX's policy.

B. Other Principles of Statutory Construction Support ANTEX's Interpretation of §627.6515(2).

Statutes providing for awards of attorney's fees must be strictly construed. Wilmington Trust Co. v. Manufacturers Life Ins. Co., 749 F.2d 694, 700 (11th Cir. 1985); Insurance Co. of North America v. Lexow, 937 F. 2d 569, 573 (11th Cir. 1991) (the fundamental rule in Florida is that an award of attorney's fees is in derogation of the common law, and statutes allowing for the award of such fees should be strictly construed). The trial court's jurisdiction to award an attorney's fee to an insured is dependent upon the conditions imposed by the statute. Id. The literal and plain interpretations of §§627.6515(2) and 627.6698 urged by ANTEX comply with these principles, and would allow Plaintiffs to recover attorney's fees only if the facts of this case satisfy the conditions of the statutes. Because Part VII, and

§627.6698, do not apply to the type of coverage Plaintiffs elected to purchase, Plaintiffs are not entitled to recover attorney's fees.

Additionally, in interpreting a statute, a court is to assume that the legislature did not intend to pass vain or meaningless legislation. Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987). A court must look at the statute as a whole, so that its various parts function as a consistent whole; a court should not presume that the legislature intended any part of a statute to be without meaning. Id. The only way in which §627.6515(2) may be interpreted such that it is not rendered meaningless, and the only way to interpret §627.6515(2) and §627.6698 to function as a consistent whole, is to interpret them as advocated by ANTEX -- §627.6515(2) means what it says, and allows parties to recover fees under §627.6698 only with respect to insurance policies that do not fall within §627.6515(2).

Wilmington Trust Co., supra, involved a statutory scheme that is similar to the one involved in this case. In Wilmington Trust, this Court faced the question of whether Fla. Stat. §627.428 (attached as Appendix C) allows a party to recover fees in a lawsuit involving a policy that was issued and delivered outside of the state of Florida. Wilmington Trust at 699. As in this case, the applicability of §627.428 is limited, not by its own terms, but by §627.401 (attached as Appendix D), an earlier statute in Part II, the same part of Chapter 627 in which §627.428 is found. Section 627.401 provides, in part:

> **Scope of this part** - No provision of this part of this Chapter applies to:
>
> (2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code.

While the text of §627.428 is not self-limiting, in Wilmington Trust this Court recognized that §627.401 restricted the applicability of §627.428 to policies issued for delivery and delivered in Florida, because it is in the same part as §627.401. Wilmington Trust at 700. This Court then held that the plaintiff could not recover fees under §627.428 because the policy in question was issued for delivery and delivered in Delaware.[4] Id.

The brief and simple analysis found in Wilmington Trust is directly applicable in this case. While the text of §627.6698 is not self-limiting, its applicability is clearly limited by §627.6515(2). Like §627.401, §627.6515(2) restricts the applicability of the entire part in which it is found to only certain types of policies. Because §627.6698 is within that part, its applicability is restricted by §627.6515(2), just as the applicability of §627.428 is restricted by §627.401. Consistent

---

[4] Since Plaintiffs unsuccessfully moved for fees under §627.428, and do not challenge the order denying their motion, they apparently acknowledge the merit of this analysis and conclusion. See supra, p. 2. The identical statutory scheme contained in §627.6515(2) and 627.6698 is not distinguishable.

with the teachings of Wilmington Trust, §627.6698 does not provide a basis upon which Plaintiffs may recover fees in this case.

The portion of §627.6698 that states that fees are available under that statute with respect to group policies "whether issued or delivered inside or outside this state" does not affect this conclusion. Under §627.6515, Part VII does apply to certain group health policies that are issued or delivered outside of the state of Florida. In fact, Part VII (and §627.6698) applies to all of such policies unless they are issued to one of the types of groups described in §627.6515(2)(a) and unless they comply with §627.6515(2)(b) and (c). Thus, the language of §627.6698 that relates to group policies issued or delivered outside of the state of Florida has application and effect in certain situations. However, it simply is not applicable in this case, by operation of §627.6515(2), because the policy at issue is among the particular group policies described in §627.6515(2).

II. Because ANTEX's Policy Meets the Requirements of §627.6515(2)(a), §627.6698 is Not Applicable.

§627.6515(2)(a) describes the nature of the group policyholders to which a group policy must be issued in order for Part VII (including §627.6698) of Chapter 627 not to apply to that group policy. Under the proper reading of this subsection, the group policy ANTEX issued to the NBA meets the requirements of this subsection.

In its entirety, §627.6515(2)(a) provides:

(2) This part does not apply to a group health insurance policy issued or delivered outside this state under which a resident of this state is provided coverage if:

(a) The policy is issued to

an employee group the composition of which is substantially as described in s. 627.653;

a labor union group or association group the composition of which is substantially as described in s. 627.654;

an additional group the composition of which is substantially as described in s. 627.656;

a group insured under a blanket health policy when the composition of the group is substantially in compliance with s. 627.659;

a group insured under a franchise health policy when composition of the group is substantially in compliance with s. 627.663;

an association group to cover persons associated in any other common group, which common group is formed primarily for purposes other than providing insurance;

a group which is established primarily for the purpose of providing group insurance, provided the benefits are reasonable in relation to the premiums charged thereunder and the issuance of the group policy has resulted, or will result, in economies of administration;

or **a group of insurance agents of an insurer**, which insurer is the policy holder. (emphasis and spacing added)

This subsection follows a pattern in the way it describes each of the various types of "groups" to which a policy may be issued under this subsection. In each portion of this subsection, one group policyholder is described. The group first is described generally: as an employee group, a labor union group, etc. Then, in the same portion of the subsection, the nature of each group is

described in more detail by reference to a specific statute, which separately and comprehensively describes the composition of the group: §627.653, which applies to employee groups; §627.654, which applies to labor union and association groups; etc. After reading each discreet portion of the subsection in turn, one reaches the portion that the Florida Department of Insurance and the trial judge found is applicable to the NBA:

> An association group to cover persons associated in any other common group, which common group is formed primarily for purposes other than providing insurance.

Following the pattern established in the preceding portions of the subsection, this portion first generally identifies the group to which the policy may be issued as an "association group," and then more specifically describes the type of group this "association group" must be. However, unlike the types of groups that precede it, there is no other statute that more specifically describes the composition of the "association group" that is the subject of this portion. For this reason, this portion of the statute describes the composition of the association group by distinguishing it from the "other" types of common groups that were described in the preceding portions of the statute. This is a "catch all" provision for association groups other than the common groups described in the preceding portions of §627.6515(2)(a), i.e. other than employee groups, labor unions groups, additional groups described in §627.656, etc., but which were formed primarily for purposes other than providing insurance.

Because the NBA is an association group other than an employee group, a labor union group, etc., and was formed primarily for purposes other than providing insurance, the NBA is the type of association group contemplated by the applicable portion of §627.6515(2)(a) set forth above. Therefore, Part VII of Chapter 627 does not apply to ANTEX's policy, and the Plaintiffs may not recover fees under §627.6698. The trial judge properly adopted this interpretation in the order that is the subject of this appeal. R-4-122-2.

The factual record supports the trial judge's determination that the group policy ANTEX issued to the NBA meets all of the requirements of §627.6515(2). Whether one refers to the NBA in an abbreviated form as the National Business Association, or as the National Business Association, Inc. Trust[5], the "National Business Association" is the single association group to which ANTEX's group health insurance policy was issued. R-4-110, 111, 117. Plaintiffs agree. Plaintiffs' Brief, pp. 12, 19. It is undisputed that ANTEX's group policy meets the requirements of Fla. Stat. §627.6515(2)(b) and (c). Thus, the only factual issue involved in this appeal is whether the record demonstrates, to the degree required by the clearly erroneous standard, that the NBA is one of the types of groups contemplated by Fla. Stat. §625.6515(2)(a). As

---

[5] These different descriptions of the National Business Association appear in the affidavits of Tullo, LeGrand, and Moriarty. R-4-110, 111, and 117.

the trial judge found, based on the record supplied by ANTEX, the NBA is one of those types of groups. R-4-122-1, 2, 3.

The Florida Department of Insurance's identical determination on this subject is sufficient to establish that the trial judge's finding is not clearly erroneous. The Department of Insurance has determined that the NBA, and ANTEX's group policy issued to the NBA, meet the requirements of Fla. Stat. §627.6515(2)(a). R-4-117-2, 3, 4, 5, and exhibits thereto. Plaintiffs suggest that certain exhibits to Mr. Moriarty's affidavit (letters from the Department of Insurance) are hearsay. However, Plaintiffs do not dispute the truth of the historic fact that is set forth in Mr. Moriarty's affidavit independent of the exhibits, i.e. that the Department of Insurance found that ANTEX's policy met the requirements of Fla. Stat. §627.6515(2)(a), and approved the policy to insure Florida residents under that provision. R-4-117-2, 3, 4, 5. In fact, while Plaintiffs have nitpicked the record evidence submitted by ANTEX, Plaintiffs did not submit any evidence to the trial judge, whether to dispute this finding or any other fact in question.

This is especially curious in light of the fact that Plaintiffs have the burden of proving that they are entitled to recover fees. United Services Automobile Association v. Kiibler, 364 So. 2d 57 (Fla. 3d DCA 1978) (an attorney who requests a court awarded fee has the burden of proving his entitlement to the fee). Thus, Plaintiffs have the burden of proving that §627.6698 is applicable in this case, which requires them to prove that ANTEX's policy does not fall within §627.6515(2). Plaintiffs have not done

so. In fact, the record evidence submitted by ANTEX, including the findings of the Department of Insurance, constitutes compelling evidence that ANTEX's policy meets the requirements of §627.6515(2).

As Mr. Moriarty's affidavit describes, ANTEX submitted the NBA group policy to the Department of Insurance for approval under the very same portion of §627.6515(2)(a) that is at issue in this case:

> An association group to cover persons associated in any other common group, which common group is formed primarily for purposes other than providing insurance.

R-4-117-3, 4. Mr. Moriarty's Affidavit also confirms that the Florida Department of Insurance approved this policy under this very same provision, finding that the NBA "qualifies under F.S. 627.6515(2)(a) as an association group to cover persons associated in any other common group, which common group is formed primarily for purposes other than providing insurance." R-4-117-4, 5, and Exhibits D, E, F, and I thereto.

For five years, ANTEX has provided insurance to individuals in Florida through the policy it issued to the NBA. R-4-117-5. It has done so with the approval of the Florida Department of Insurance, and with the understanding that the policy it issued to the NBA complies with Fla. Stat. §627.6515(2) because the NBA meets the above-quoted provision of Fla. Stat. §627.6515(2)(a). R-4-117-5.

The other evidence submitted by ANTEX likewise supports the trial judge's finding of fact that ANTEX's policy issued to the NBA meets the requirements of §627.6515(2)(a). ANTEX's policy was

issued to an association group, the NBA, to cover persons associated in that common group, which is a group other than an employee group, labor union group, or any of the other types of groups listed in §627.6515(2)(a). Additionally, the NBA was formed primarily for purposes other than providing insurance. Plaintiffs have never suggested to the contrary. In fact, the record reflects that the NBA is an association group that was formed for a variety of purposes completely unrelated to insurance, including educating its members, making services and products available to them at a discount, and otherwise helping them manage their small businesses and enjoy their lives. R-4-111-2, 3, and exhibit thereto. See also the discussion of the benefits of membership in the NBA set forth at p. 4, supra. The availability of ANTEX group health insurance coverage is merely one of dozens of benefits that are available to members of the NBA. R-4-111-2, 3, 6, 7, and following.

Thus, it is undisputed in the record before this Court that the NBA is an association group that was formed primarily for purposes other than providing insurance. ANTEX's group policy issued to the NBA therefore meets the requirements of Fla. Stat. §627.6515(2)(a). Because the policy also meets the requirements of §627.6515(2)(b) and (c), and was issued and delivered outside of the state of Florida, §627.6698 does not apply in this case, by operation of Fla. Stat. §627.6515(2). This Court should not disturb the trial judge's finding to this effect because that finding is not clearly erroneous.

III. Plaintiffs' Interpretations of §627.6515(2) and §627.6515(2)(a) are Incorrect.

A. The Text of §627.6515(2) Directly Contradicts Plaintiffs' Proposed Interpretation.

Plaintiffs contend that, despite the plain and unambiguous language of §627.6515(2), this statute leaves certain portions of Part VII of Chapter 627 (§627.6698 in particular) applicable to out-of-state group policies that meet the requirements of §627.6515(2). Plaintiffs' interpretation has no foundation in the language of the statute.

Plaintiffs treat §627.6515(2) as if it said: "With the exception of §627.6698, this part does not apply to . . .". However, the statute simply does not say this. That the legislature knew how to create such an exception to §627.6515(2), but chose not to, is evidenced by Fla. Stat. §627.401. Section 627.401 (attached as appendix D) is located in Part II of Chapter 627. It provides that Part II does not apply to certain types of insurance policies, just as §627.6515(2) does with respect to Part VII. However, §627.401 (3), (4), and (5) contain an exception: they provide that §627.428, which also is located in Part II and allows a party to recover attorney's fees, applies to certain types of policies to which the balance of Part II does not apply. That the legislature elected not to word §627.6515(2) in a similar fashion, to allow a party to recover fees under §627.6698 even where the rest of Part VII is inapplicable, compels the conclusion that Plaintiffs' interpretation of §627.6515(2) is incorrect.

In support of their interpretation of §627.6515(2), Plaintiffs observe that the legislature enacted Fla. Stat. §627.6698 after it enacted §627.6515(2). Plaintiffs' Brief at pp. 6-8. Plaintiffs claim that the legislature "could not have intended" to exempt the fees provision found in §627.6698 from policies that fall within Fla. Stat. §627.6515(2), simply because §627.6698 was enacted after §627.6515(2). Plaintiff's Brief at 7. However, Plaintiffs ignore the fact that, since it enacted §627.6698, the legislature has amended §627.6515(2) on numerous occasions, and caused §627.6515(2) to refer to several statutes other than §627.6698. See Fla. Law ch. 89-190, §2, which amends §627.6515 to require policies to provide benefits specified in §627.6574; ch. 90-249, §7, which entirely reenacts §627.6515(2)(c) for the purpose of incorporating amendments to §627.667 and §627.6675; ch. 90-255, §2, which amends §627.6515(2)(c) to provide that Fla. Stat. §627.419 ("Construction of Policies") applies to group health insurance policies issued or delivered outside of this state under which a resident of this state is provided coverage; ch. 92-93, §129, which requires such policies to provide benefits specified in §627.6613; and ch. 92-93, §149, which prevents the repeal of §627.6515 and maintains it in full force and effect as amended.

Despite these numerous amendments since the enactment of §627.6698, the legislature has never amended §627.6515(2) to provide that §627.6698 applies to policies that fall within the scope of §627.6515(2). The legislature's failure to amend §627.6515(2) in this fashion supports the conclusion that the

legislature intended just what the statute says: Section 627.6698 does not permit a litigant to recover attorney's fees in litigation that involves a group health policy that falls within §627.6515(2). Plaintiffs' contention that the legislature "could not have intended" this result ignores yet another fundamental principle of statutory construction. To the extent that newly enacted legislation modifies or repeals some statutes but leaves other statutes intact, the conclusion to be drawn is that the legislature made a determined choice not to alter the unaffected statutes. United States v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990). Of course, Plaintiffs also ignore the fact that the legislature indisputably intended to, and did, make fees unavailable to plaintiffs insured under other out-of-state policies. See §627.401, §627.428, and Wilmington Trust, supra.

In effect, Plaintiffs argue that the legislature impliedly repealed or contradicted §627.6515(2) when it enacted §627.6698. This argument is directly contradicted by Florida law, including cases cited by the Plaintiffs in their brief. Courts presume that statutes are passed with knowledge of prior existing statutes, and that the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so. Woodgate Development Corp. v. Hamilton Investment Trust, 351 So. 2d 14, 16, (Fla. 1977). Where possible, it is the duty of the courts to adopt the construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act. Id. While

Plaintiffs acknowledge these principles (Plaintiffs' Brief at p. 10), Plaintiffs ignore their application in this case.

Under Woodgate Development, this Court must presume that §627.6515(2) is in harmony with, and is consistent with, §627.6698. The only interpretation of these statutes that harmonizes them, and renders them non-contradictory, is that which gives effect to the plain terms of §627.6515(2): Part VII, including §627.6698, only applies to those policies that do not fall within §627.6515(2). This conclusion is the same as that reached by this Court in Wilmington Trust, supra, with respect to Fla. Stat. §§627.401 and 627.428, the relationship of which raises an identical issue of statutory construction.

Plaintiffs argue that this Court should consider, as a form of legislative history, the preamble to Fla. Law, ch. 87-278 (which enacted §627.6698, and which is quoted on p. 7 of Plaintiffs' Brief). However, courts should consider legislative history only if the statute in question is ambiguous. Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1559 (11th Cir. 1989). There is no need to consult legislative history here because the language of the statute in question is not ambiguous. Nonetheless, to the extent the preamble to Fla. Law, ch. 87-278 constitutes legislative history, its language is entirely consistent with the limitation of the applicability of §627.6698 that is found in §627.6515(2).

While Plaintiffs have elected to emphasize and quote a certain portion of that language (at pp. 7 and 9 of Plaintiffs' Brief), Plaintiffs' emphasis and quote are incomplete. The portion of that

language which Plaintiffs de-emphasized, by not highlighting it and by leaving it out of the quote Plaintiffs extracted from this language, is the following highlighted phrase:

> Providing for award of attorney's fees in any action against an insurer under a group health insurance policy **under certain circumstances**;

This highlighted qualifying language clearly expresses the legislature's intention that fees be awarded under §627.6698 **only under certain circumstances**, not in all cases. In light of the plain terms of §627.6515(2), fees may not be awarded under §627.6698 under the circumstances of this case.

Plaintiffs' position that §627.6515(2) merely excuses certain out-of-state group insurers from "compliance" with "some of the provisions of" Part VII of Chapter 627 (Plaintiffs' Brief at p. 7) and that §627.6515 only regulates the "benefits offered" under group policies (Plaintiffs' Brief at pp. 13 and 14) is completely contradicted by the plain wording of the statute. The language of this statute clearly provides that "This part does not apply . . .", and does not distinguish between statutes within Part VII that relate to benefits and any other statutes found in that part. In contrast, §627.651 (attached as Appendix E hereto), which immediately precedes §627.6515, does distinguish between such statutes within Part VII: it specifically requires self-insurance programs to comply with provisions of Part VII that relate to specified "benefits and coverages," but not other provisions of Part VII. Fla. Stat. §627.651(1). That the legislature distinguished the "benefits and coverages" provisions of Part II

from the other provisions of Part II in §627.651, but did not do so in §627.6515(2), counsels against interpreting §627.6515(2) as if it did.

B. Plaintiffs' Interpretation of §627.6515(2)(a) is Incorrect and Non-Sensical.

Plaintiffs' interpretation of the applicable portion of §627.6515(2)(a) renders this provision meaningless. There is no evidence in the record that an insurance arrangement even exists to which this provision, as interpreted by Plaintiffs, might apply. Furthermore, Plaintiff's interpretation is erroneous and is inconsistent with the balance of the statute.

Under Plaintiffs' interpretation, the subject portion of §627.6515(2)(a) would apply only to a policy issued to "an association group" to cover persons associated in some group other than that association group. Plaintiffs' Brief, pp. 19 and 20. It is difficult to conceive of a situation in which such an arrangement could exist. In his affidavit, after describing his qualifications, Michael Moriarty states:

> I am not aware of any insurance plan in which a group policy is issued to an association group to cover persons associated in any common group other than the association to which the policy is issued. To be eligible for coverage under a group insurance plan, the proposed insured must be an eligible member of the group to which the policy is issued.

R-4-117-5, 6.

Because the Plaintiffs' interpretation of this provision would cause it to apply only in situations where a policy is issued to one group to insure the members of a different group, and because

there is no record evidence that such situations even exist, Plaintiffs' interpretation of this statute probably renders it meaningless. The trial judge so found. R-4-122-2, 3. Courts should assume that the legislature did not pass vain or meaningless legislation. Gulf Life Ins. v. Arnold, supra. This statute must be construed so that effect is given to all of its provisions, and so that no part of it will be inoperative, superfluous, void, or insignificant. Gonzalez v. McNeary, supra, at 1420. Because Plaintiffs' interpretation renders the subject provision meaningless, superfluous, and insignificant, this Court should reject it.

Furthermore, Plaintiffs' interpretation is inconsistent with the pattern and structure of the portions of this subsection that precede the applicable portion. As described in detail supra at p. 13, in each portion of §627.6515(2)(a) only one group, that to which the policy is issued, is being described; at first generally, and then specifically.

If one applies this pattern to the portion of the statute applicable to the NBA, the portion describes only one group. The first part of the provision states that it must be an association group. The second part of the provision then describes what kind of group the association group may be, by distinguishing the association group from the other types of groups listed in preceding portions of the statute. It describes the association group with a "catch all" description: "persons associated in any

other common group"; "other" meaning "other than the types of groups previously described in this subsection."

In contrast, the interpretation of the applicable portion of this subsection urged by Plaintiffs is inconsistent with the pattern established in the rest of the statute. Under the Plaintiffs' erroneous interpretation, the relevant portion refers to two groups: first, an "association group," to which the policy is issued; second, another group, whose members are insured by the policy issued to the first. This interpretation is inconsistent with the balance of the subsection, and makes no sense.

Because the interpretation urged by Plaintiffs is non-sensical and is inconsistent with the rest of the statute, and because it renders this portion of the statute meaningless, superfluous, and impossible to satisfy, this Court should reject Plaintiffs' interpretation and adopt the interpretation urged by ANTEX and accepted by the trial court. Under ANTEX's interpretation, Plaintiffs may not recover attorney's fees.

IV. Conclusion.

The Florida Legislature has enacted statutes that allow plaintiffs to recover attorney's fees in certain cases in which they prevail against insurers, but not in others. The legislature has elected not to allow a Florida resident who is insured by a group policy that is issued and delivered out of this state, and that is issued to an association group such as the NBA, to recover attorney's fees in litigation involving that policy. In this case, Plaintiffs are simply seeking to recover fees under a statute that

does not apply by virtue of the nature of the policy under which Plaintiffs elected to become insured. For all of the reasons set forth herein, this Court should affirm the trial judge's order denying Plaintiffs' motion for attorney's fees.

Brett J. Preston
Florida Bar No. 603716
Dennis P. Waggoner
Florida Bar No. 509426
HILL, WARD & HENDERSON, P.A.
Suite 3700 - Barnett Plaza
101 East Kennedy Boulevard
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900
Attorney for Defendant
AMERICAN NATIONAL LIFE
INSURANCE COMPANY OF TEXAS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on March 1, 1996 to William Rutger, Esquire, 200 North Garden Avenue, Suite A, Clearwater, Florida 34615.

Brett J. Preston

Appendix A

627.6515 Out-of-state groups.—

(1) Any group health insurance policy issued or delivered outside this state under which a resident of this state is provided coverage shall comply with the provisions of this part in the same manner as group health policies issued in this state.

(2) This part does not apply to a group health insurance policy issued or delivered outside this state under which a resident of this state is provided coverage if:

(a) The policy is issued to an employee group the composition of which is substantially as described in s. 627.653; a labor union group or association group the composition of which is substantially as described in s. 627.654; an additional group the composition of which is substantially as described in s. 627.656; a group insured under a blanket health policy when the composition of the group is substantially in compliance with s. 627.659; a group insured under a franchise health policy when the composition of the group is substantially in compliance with s. 627.663; an association group to cover persons associated in any other common group, which common group is formed primarily for purposes other than providing insurance; a group which is established primarily for the purpose of providing group insurance, provided the benefits are reasonable in relation to the premiums charged thereunder and the issuance of the group policy has resulted, or will result, in economies of administration; or a group of insurance agents of an insurer, which insurer is the policyholder;

(b) Certificates evidencing coverage under the policy are issued to residents of this state and contain in contrasting color and not less than 10-point type the following statement: "The benefits of the policy providing your coverage are governed primarily by the law of a state other than Florida"; and

[1](c) The policy provides the benefits specified in ss. 627.419, 627.6574, 627.6575, 627.6579, 627.6613, 627.667, and 627.6675.

(3) Section 624.428 is not applicable when residents of this state are enrolled for coverage under a policy or certificate issued in accordance with subsection (2).

(4) Prior to solicitation in this state, a copy of the master policy and a copy of the form of the certificate evidencing coverage that will be issued to residents of this state shall be filed with the department for informational purposes.

(5) Prior to solicitation in this state, an officer of the insurer shall truthfully certify to the department that the policy and certificates evidencing coverage have been reviewed and approved by the state in which the group policy is issued.

(6) Any insurer who provides coverage under certificates of insurance issued to residents of this state shall designate one Florida-licensed resident agent as agent of record for the service of such certificates, unless the policy is issued to a group substantially as described in s. 627.653, s. 627.654, s. 627.656, s. 627.659, or s. 627.663.

History.—ss. 499, 809(2nd), ch. 82-243; s. 79, ch. 82-386; s. 110, ch. 83-216; s. 3, ch. 84-202; s. 5, ch. 86-122; s. 2, ch. 89-190; s. 7, ch. 90-249; s. 2, ch. 90-255; ss. 129, 149, ch. 92-33; s. 114, ch. 92-318.

[1]Note.—

A. Section 23, ch. 90-249, provides for applicability to policies issued or renewed on or after October 1, 1990.

B. Section 4, ch. 90-255, provides for applicability to policies or contracts issued on or after October 1, 1990.

Appendix B

[1]627.6698 Attorney's fees.—

(1) Upon the rendition of a judgment by any of the courts of this state against an insurer and in favor of any resident of this state who is one of a group of persons insured under a master group health insurance policy executed by the insurer and covering residents of this state, whether issued or delivered inside or outside this state, the trial court or, in the event of an appeal in which the insured prevails, the appellate court shall award the insured a reasonable attorney's fee. However, attorney's fees shall not be allowed if the suit was commenced prior to the expiration of 60 days after proof of the claim was duly filed with the insurer.

(2) When so awarded, the attorney's fee shall be included in the judgment or decree rendered in the case.

History.—ss. 2, 3, ch. 87-278.

[1]**Note.**—Repealed effective October 1, 1992, by s. 3, ch. 87-278, and scheduled for review pursuant to s. 11.61.

Appendix C

[1]627.428 Attorney's fee.—

(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

(2) As to suits based on claims arising under life insurance policies or annuity contracts, no such attorney's fee shall be allowed if such suit was commenced prior to expiration of 60 days after proof of the claim was duly filed with the insurer.

(3) When so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.

History.—s. 477, ch. 59-205; s. 1, ch. 67-400; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 2, 3, ch. 81-318; ss. 376, 377, 809(2nd), ch. 82-243; s. 79, ch. 82-386.

[1]**Note.**—Expires October 1, 1992, pursuant to s. 809(2nd), ch. 82-243, and is scheduled for review pursuant to s. 11.61 in advance of that date.

Appendix D

[1]**627.401 Scope of this part.**—No provision of this part of this chapter applies to:

(1) Reinsurance.

(2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code.

(3) Wet marine and transportation insurance, except ss. 627.409, 627.420, and 627.428.

(4) Title insurance, except ss. 627.406, 627.415, 627.416, 627.419, 627.427, and 627.428.

(5) Credit life or credit disability insurance, except ss. 627.419(5) and 627.428.

History.—s. 450, ch. 59-205; s. 1, ch. 70-322; s. 1, ch. 70-371; s. 1, ch. 71-45 s. 163, ch. 73-333; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 2, 3, ch. 81-318; ss. 358 377, 809(2nd), ch. 82-243; s. 79, ch. 82-386.

[1]**Note.**—Expires October 1, 1992, pursuant to s. 809(2nd), ch. 82-243, and is scheduled for review pursuant to s. 11.61 in advance of that date.

Appendix E

627.651 Group contracts and plans of self-insurance must meet group requirements.—

[1](1) Except as otherwise provided by law, a group health insurance policy or certificate insuring more than one individual delivered or issued for delivery in this state must be delivered or issued for delivery to one of the groups provided for in ss. 627.653-627.656. A plan of self-insurance providing health coverage benefits to residents of this state must comply with s. 627.419 and the applicable provisions of this part relating to the rights of individuals to specified benefits and coverages.

(2) Subsection (1) does not apply to health insurance policies or plans of self-insurance:

(a) Insuring or providing benefits only to individuals related by blood, marriage, or legal adoption.

(b) Insuring or providing benefits only to individuals who have a common interest through ownership of a business enterprise, or a substantial legal interest or equity in the business enterprise, and who are actively engaged in the management of the business enterprise.

(c) Insuring or providing benefits only to individuals otherwise having an insurable interest in each other's lives.

(d) Issued as blanket insurance pursuant to s. 627.659.

(3) A nongovernmental self-insurance plan for health benefits may not be contributory by participants.

[1](4) This section does not apply to any plan which is established or maintained by an individual employer in accordance with the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, or to a multiple-employer welfare arrangement as defined in s. 624.437(1), except that a multiple-employer welfare arrangement shall comply with ss. 627.419, 627.657, 627.6575, 627.6576, 627.6578, 627.6579, 627.6615, 627.6616, and 627.662(5). This subsection does not allow an authorized insurer to issue a group health insurance policy or certificate which does not comply with this part.

History.—s. 584, ch. 59-205; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 4, 10, ch 80-341; ss. 2, 3, ch. 81-318; ss. 498, 500, 523, 809(2nd), ch. 82-243; ss. 62, 79, ch 82-386; s. 6, ch. 83-203; s. 1, ch. 83-213; s. 17, ch. 83-288; s. 1, ch. 84-50; s. 4 ch. 86-122; s. 1, ch. 90-255; ss. 61, 114, ch. 92-318.

[1]**Note.**—Section 4, ch. 90-255, provides for applicability to policies or contracts issued on or after October 1, 1990.

Appendix C

WILLIAM RUTGER
ATTORNEY & COUNSELOR AT LAW

200 NORTH GARDEN AVENUE, SUITE A
CLEARWATER, FLORIDA 34615
(813) 461-7556
FAX (813) 443-7136

PLEASE RESPOND TO
CLEARWATER ADDRESS

COUNSEL SQUARE
7627 LITTLE ROAD
NEW PORT RICHEY, FLORIDA 34654
(813) 849-6152

April 24, 1996

Miguel J. Cortez, Clerk
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Modder v. American National Life Insurance Company
Case No.: 95-3020

Dear Mr. Cortez:

Pursuant to Rule 28(j), Federal Rules of Appellate Procedure, please accept the following supplemental authority which argues against the "anomalous situation" of policy coverage in Florida but no corresponding Florida fee provision due simply to the issuance of the policy in another state. Aperm of Florida, Inc. v. The Trans-Coastal Maintenance Company, 505 So.2d 459, 462 (Fla. 4th DCA 1987), rev. den. 515 So.2d 229 (Fla. 1987). Copies of the foregoing case authority are enclosed herewith for your convenience.

Very truly yours,

William Rutger

WR:smt
cc: Brett Preston, Esq. (with enclosure)