CA 12-5-96

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September 16, 1996

FILED
SID J. WHITE
SEP 19 1996
CLERK, SUPREME COURT
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88,402

Sid J. White, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Modder v. American National Life
USDC No. 92-1243-CIV-T-24C

Dear Mr. White:

After reviewing the ANTEX answer brief in the above-referenced matter, Appellants note that the "new" case authority cited by ANTEX, Albury v. Equitable Life Assurance Company, 409 So.2d 235 (Fla. 1st DCA 1982), quite likely precipitated the later enactment Section 627.6698, Fla. Stat., (effective 10/1/87). Appellants are content to stand on the reply brief filed in the Eleventh Circuit in all other respects.

Very truly yours,

William Rutger

WR:smt
cc: Brett J. Preston, Esq.
Dennis Waggoner, Esq.

FILED
SID J. WHITE
SEP 23 1996
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT
ATLANTA, GEORGIA

CASE NO.: 95-3020

ARTHUR MODDER and GAIL MODDER,

Appellants,

vs.

AMERICAN NATIONAL LIFE INSURANCE
COMPANY OF TEXAS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
THE HONORABLE ELIZABETH A. JENKINS, PRESIDING

REPLY BRIEF

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TABLE OF AUTHORITIES

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Other Authorities:

Section 627.401, Fla.Stat. 1

Section 627.401(3),(4) and (5) 1

Section 627.428, Fla.Stat. 1

Section 627.6515, Fla.Stat. 1

Section 627.6515(2), Fla.Stat. 2,3

Section 627.6515(2)(a), Fla.Stat. 3

Section 627.6698, Fla. Stat. 1

REPLY

Defendant/Appellee argues that Section 627.401, Fla.Stat., is a fee-limiting statute and that the Florida legislature was content to allow insurers like Defendant/Appellee to be governed by Florida law in the coverages it provides Florida residents but to be able to breach those same provisions with impunity. That certainly makes no sense in light of the Section 627.401(3),(4) and (5), Fla.Stat., exemptions granted to wet marine insurance, title insurance and credit life insurance which expressly retain fee liability under Section 627.428, Fla.Stat.

It is clear from reading the plain wording of Section 627.6515, Fla.Stat., that the "compliance" portions of Part VII are the only concerns addressed by that statute. The all-encompassing "penalty" portion, Section 627.6698, Fla. Stat., is not addressed and would not have been addressed as it was not even in existence at the time that compliance issues were addressed by the Florida legislature.

Defendant/Appellee has failed to cite a single example of any type of insurance coverage in Florida as heavily regulated as Defendant/Appellee's without a corresponding fee provision to assist civil enforcement. This issue is addressed at page 8 and 9 of Plaintiffs/Appellants' initial brief.

Defendant/Appellees's argument as to the meaning of the "under certain circumstances" language that is a part of the legislative history is absurd as well. The "circumstances" referenced in Section 627.6698, Fla.Stat., clearly refer to "the rendition of a judgment...against an insurer in favor of any resident of this state."

In addition to the above, in its brief, Defendant/Appellee has now switched back again to the proposition that National Business Association is a single association group to which Defendant/ Appellee's group health insurance policy was issued. This is found on page 15 of Defendant/Appellee's brief. Defendant/Appellee reasserts this position on pages 17 and 18 of its brief where again it says that the policy was issued to an association group, the NBA, to cover persons associated in that common group. In doing so, Defendant/Appellee has admitted that there is only one group and in doing so, shows that it is outside of the provisions of Section 627.6515(2), Fla.Stat. The wording of that statute is very specific. Basically it absolutely requires that in order for that section not to apply, the policy in question must be issued to a group to cover persons associated in another common group. In its brief Defendant/Appellee argues that the statute must be read the way it is written and there is no need for judicial construction of same. The Plaintiffs/Appellants' Modder would agree. The statute is very specific on its face. Initially in the lower court there was the Order entered by the court granting Gail Modder's motion for attorney's fees because Defendant/Appellee had failed to establish that the insurance policy in question was within the exclusionary provision of Section 627.6515(2), Fla.Stat. (R.3-113-1 through 5) Defendant/Appellee then submitted affidavits claiming that there really were two different groups and associations and therefore they did fall within the exclusionary provisions of the statute. Based upon those additional affidavits filed by

Defendant/Appellee, the court reconsidered its ruling regarding attorney's fees and reversed itself and thereupon ruled that the Plaintiffs/Appellants' Modder were not entitled to attorney's fees. Now, in its brief, Defendant/Appellee goes back to its original position that there was only one group. Plaintiffs/Appellants' Modder, agree. Since there is only one group, Defendant/Appellee does not fall within the exclusionary provisions of Section 627.6515(2) Fla.Stat. Since there is no exclusion, the provision of Section 627, Fla.Stat. pertaining to the award of attorney's fees is applicable.

In its brief, Defendant/Appellee further takes the position beginning on page 24 thereof, that Plaintiffs/Appellants' interpretation of the applicable portion of 627.6515(2)(a) renders the provision therein meaningless. Simply stated, Plaintiffs/ Appellants did not write the statute, the Florida Legislature did. It specifically required that there be two groups. It required that if there is a group of persons in one particular organization and those persons desire to obtain insurance for their members who might be interested therein, under the provisions of Section 627.6515(2)(a), all that would be required would be that a second group be set up to which the policy is issued. Then those members of the first group, if they are interested in doing so, would in fact join the second group and pay the premium for their insurance. Why this is so hard to understand and to be conceived under the wording of the statute is beyond the understanding of the Plaintiffs/Appellants. In fact, it was only because Defendant/

Appellee claimed that it met with the specific provisions of 627.6515(2)(2), F.S., that the lower Court reversed its prior Order which had granted attorney's fees to Plaintiffs/Appellants. Therefore the position of the Plaintiffs/Appellants is correct and certainly is not "non-sensical".

Respectfully submitted,

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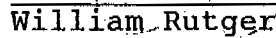
By: ______________________________
William Rutger, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by regular U.S. Mail upon Brett J. Preston, Esq. and Dennis Waggoner, Esq., P. O. Box 2231, Tampa, Florida 33601, this 4 day of ~~February,~~ March 1996.



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Re: Modder v. American National Life
USDC No. 92-1243-CIV-T-24C

Dear Mr. White:

Pursuant to your office's request of September 20, 1996, enclosed are eight copies of Appellant's Reply Brief, which was filed in the Eleventh Circuit Court of Appeals, along with seven copies of the letter to your office dated 9/16/96. Thank you for your attention to this matter.

Very truly yours,

William Rutger

WR:smt
Enclosures

cc: Brett J. Preston, Esq.
Dennis Waggoner, Esq.