OA 11-3-97

IN THE SUPREME COURT OF FLORIDA
CASE NO. 90,323

LEXINGTON INSURANCE COMPANY,

Petitioner,

vs.

SIMKINS INDUSTRIES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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A. Simkins has only those rights expressly set out in the subject policy in which it is named a "mortgagee" and is **entitled** to only those benefits due a mortgagee under the policy.

SIMKINS has no right to recover additional proceeds under the policy in its capacity as assignee in light of WAKON'S violation of LEXINGTON'S "no assignment" clause.

ARGUMENT

THE TRIAL COURT CORRECTLY DETERMINED THAT SIMKINS. AS MORTGAGEE UNDER THE LEXINGTON POLICY, WAS NOT ENTITLED TO RECEIVE PROCEEDS OTHER THAN THOSE NECESSARY TO SATISFY WAK'S MORTGAGE

A. Simkins has only those rights expressly set out in the subject policy in which it is named a "mortgagee" and is entitled to only those benefits due a mortgagee under the policy.

SIMKINS responds to our argument that its rights are thus circumscribed by claiming that its "status as a mortgagee-payee is separately established by an endorsement to the policy that names Simkins as the mortgagee and which states that a "[l]oss, if any, shall be payable to [Simkins]" as first mortgagee." Brief of Respondent, p. 6. According to SIMKINS, "[t]hat endorsement does not limit Simkins' right to receive proceeds to losses under the Building and Personal Property Coverage section of the policy, nor does it suggest in any manner that proceeds from any particular coverages are excluded." Id. SIMKINS' response, premised as it is on its self-serving disregard of the exact language of the policy, is no response at all.

First, SIMKINS has omitted a significant portion of the endorsement. When the endorsement is read as written, not as edited by SIMKINS, it is apparent that SIMKINS' argument fails. On page 7 of Brief of Respondent, SIMKINS includes a copy of the Declarations page of the policy. The Declarations page contains a section listing mortgagees to whom building proceeds are payable. That section provides: "Mortgagee Clause: loss if any, shall be payable to: . . . ." (R.6)(emphasis added) By omitting the words "Mortgagee Clause",

SIMKINS has omitted the very words that expose the fallacy of its argument. Those words can refer only to the Mortgagee Clause in the policy -- there is no other mortgagee clause -- and that clause limits SIMKINS' recovery to building damage only. So, contrary to SIMKINS' contention, the mortgagee clause in the policy explicitly limits entitlement to what SIMKINS has already collected.

Second, SIMKINS has omitted from its pictorial demonstration on page 7 of its Brief, additional words modifying the language contained in the inset. The inset advises that SIMKINS, as first mortgagee, and Edgar Galvin, as second mortgagee, "are hereby added to Item 6 of the Policy Declarations". Brief of Respondent at 7. (R.7) The inset language arises, however, from an endorsement that provides "[a]ll other terms and conditions of the policy remain the same." (R.7) Thus, both the endorsement and Declarations page refer to the policy itself with respect to the coverages available to the mortgagees and do not purport to provide coverage separate and apart from that provided in the policy itself. Hence, SIMKINS' argument that because the Declarations page of the policy does not limit the coverage available to it as mortgagee it necessarily expands that coverage to whatever is available to the named insured, is specious.

Much the same argument was addressed by the Supreme Court of Wyoming in Martin v. Farmers Ins. Exchange, 894 P. 2d 618 (Wyo. 1995). There, Whitney Martin was seriously injured when the car she and her husband owned was in an accident caused by Annette Failes, who was driving another vehicle. Id. Both the Martins and the Failes had almost identical insurance coverage with Farmers, which provided

$100,000 in coverage. Id. The Martins' policy, however, contained a "household exclusion" which limited the Martins' recovery to $25,000 under their own policy, Id. Accordingly, Farmers' paid to the Martins $100,000 under the Failes' policy and $25,000 under the Martins' own policy. Id.

The Martins sued Farmers, arguing that because the Declarations page of the policy, which provided $100,000 in coverage per person for bodily injury. did not contain the "household exclusion" relied upon by Farmers to limit their coverage, the policy was ambiguous and should be read to provide Whitney Martin the full $100,000 in coverage. Id. The Declarations page identified the insureds, the coverage vehicle and the available bodily injury coverage of $100,000 and also included the following:

> This Declarations page, when signed by us, becomes part of the policy numbered on the reverse side. It supersedes or controls anything to the contrary. It is subject to all the other terms of the policy.

Id. at 619. The trial court disagreed with the Martins that this language created an ambiguity in the policy that should be read to broaden their coverage and accordingly, the court entered summary judgment in favor of the insurer. Id..

The Supreme Courtaffirmedthe summary judgment, agreeing that the language on the declarations page did not render the policy ambiguous. Id. The Court reasoned:

> The Martins urge us to rule that the $100,000.00 bodily injury liability limit on their declarations page voids the houshold exclusion contained in the body of the policy by operation of the statement that "[i]t [the declarations page] supersedes or controls anything to the contrary." Such an

> interpretation is not without its appeal, partiularly in light of Whitney Martin's grievous injuries. However, the issue here is not certification of the Martins' need, which is manifest, but interpretation of the pre-existing agreement made between the Martins and Farmers.
>
> The difficulty with the Martin's position, as correctly diagnosed by the district court, is that it impermissibly tortures one sentence on the declarations page in an effort to create a semblance of ambiguity where none actually exists . . . This confounds our general reluctance to read parts of an insurance contract, such as the declarations page, in isolation as opposed to interpreting the contract as a whole to effectuate the intent of the parties . . .
>
> Hard by the assertion of the declarations page that it 'supersedes and controls anything to the contrary' is the caveat that '[i]t [the declarations page] is subject to all other terms of the policy.' This is but one of the ubiquitous reminders that the contractbetweenthe Martins and Farmers encompasses both the declarations page and the policy.
>
> Before the declarations page is competent to supersede and control anything to the contrary, it must be possessed of sufficient integrity, standing alone, to convey a clear and definite meaning. Moreover, the same must be true of 'anything to the contrary.' in order that it may be adjudged 'contrary' ab initio. Put another way, the declarations page cannot supersede and control the policy when both are inchoate and without meaning unless read in concert with the other.

Id. at 620-621.

SIMKINS argument in the present case is identical to that made by the Martins. SIMKINS would have this Court read the Declarations Page of the policy in a vacuum, without any reference to the policy whatsoever. If SIMKINS' reasoning were taken to its extreme, the Declarations Page would be the sole measure of coverages provided, and any policy language relating to the scope of, and exclusions from,

coverage would not apply to SIMKINS, or for that matter the insured WAK, simply because the policy language was not repeated within the four (4) corners of the Declarations page itself. Such an argument simply makes no sense.

As Martin correctly observes, the Declarations and Endorsement pages are integral parts of the policy, which must be construed with reference to the whole. The Declaration page does not address the scope of coverage available while the remainder of the policy does not address who is insured or the limits of such coverage. Likewise, the Endorsement page on which SIMKINS is listed as first mortgagee, must be read together with the Declarations page (setting forth the limits of coverage) and the policy itself (setting forth the scope of the coverage). None of these portions of the policy, standing alone, specifies the insured(s) as well as the nature and extent of coverage provided to different classes of insureds.

Finally, even SIMKINS' selective editing can not disguise that both the Declarations Page and the Endorsement Page refer to the policy relative to the coverage provided to SIMKINS. The Declarations page refers to the "mortgagee clause" and the Endorsement specifies that the "terms and conditions of the policy remain unchanged." Since only the policy sets forth the coverage available to a mortgagee there is, by definition, no conflict between the Endorsement, Declarations Page and the policy, there is no ambiguity that enables SIMKINS to claim broader coverage than the policy affords.

B SIMKINS has no riaht to recover additional proceeds under the policy in its cawacitv as assianee in light of WAK'S violation of LEXINGTON'S "no assignment" clause.

SIMKINS' argument in response to LEXINGTON'S second point on appeal is two-fold. First, SIMKINS says that it is entitled to recover additional insurance proceeds because of its status as a secured creditor under the UCC. Second, it argues that the Third District Court of Appeal was correct in reasoning that LEXINGTON'S "no-assignment" clause did not bar assignment of the policy as collateral for its loan.

A. A secured creditor has no riaht to claim insurance proceeds directlv from the insured

While SIMKINS argues that the UCC somehow alters the terms of the contract between and insurer and its insured, the fact that insurance proceeds are included in the UCC'S definition of "proceeds" does not compel the insurer to pay those proceeds to anyone other than the named insured.[1] See, 68A Am. Jur. 2d, Secured Transactions §92

[1] It is questionable whether this argument was ever made to the District Court of Appeal. SIMKINS referred to the issue in passing in its Initial Brief in a footnote which reads "[e]ven if Simkins' perfected security interest did not extend to insurance proceeds by its terms -- as it specifically does under the Mortgage and Security Agreements -- such an interest would be applicable to proceeds by operation of law." SIMKINS' Initial Brief on Appeal, p. 18, n. 6. In a footnote in its Reply Brief, SIMKIN'S noted "Lexington cites to no case law excluding insurance companies from application of the notice provisions of the Uniform Commercial Code. See Section 679.306, Fla. Stat. (security interest in collateral continues in identifiable proceeds, including insurance payable by reason of loss or damage to collateral)." SIMKINS' Reply Brief on Appeal, p. 14, n. 5. Other than these footnotes, SIMKINS never presented the issue in argument form and these passing references are inadequate to preserve the argument for consideration by this court. Cf. Perez v. Winn-Dixie, 639 So. 2d 109 (Fla. 1st DCA 1994)(failure to object or argue a specific point before

("although the secured creditor has a security interest in insurance proceeds that have been received by the debtor, the creditor cannot sue the insurer to recover the proceeds when the policy did not name the creditor as an insured or as a loss payee").

While Florida courts have not directly addressed this issue, other courts have almost consistently held that, where the creditor is not a named insured or loss payee on the policy, the creditor's claim to insurance proceeds lies with the debtor, not the insurer. In Terra Western Corp. v. Berry & Co., 295 N.W.2d 693 (Neb. 1980), the Nebraska Supreme Court addressed the issue in the context of a creditor's claim against the insurer for alleged conversion of insurance proceeds. The creditor claimed that the insurer had the obligation to pay it, rather than its insured, the policy proceeds since insurance was subject to a security interest under UCC Section 9-306.[2] In holding that the insurer had not acted tortiously by paying benefits in accordance with its obligations under the contract, the Court opined:

> An examination of the language of the statute shows that proceeds of an insurance policy covering destroyed property or other proceeds do not become 'proceeds' within the meaning of the code until the money 'is received.' Patently this means receiving by the owner. The insurer does not receive the proceeds; it pays them. This is made clear by the language of subsection (1) referring to acts by the mortgagor: 'when collateral or proceeds is sold, exchanged, collected or otherwise disposed of.' These refer to acts of the mortgagor. This conclusion is further reinforced by the language of

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lower tribunal will preclude appellate review). Nevertheless, LEXINGTON has addressed the merits of the argument in the event this Court wishes to consider the issue.

[2] UCC §9-306 is codified in Florida Statute 679.306.

> subsection (2) which refers to 'sale, exchange or other disposition thereof by the debtor.' All this language makes it plain that the mortgagee's lien extends to proceeds received by the debtor. It patently does not apply to an insurer who, in good faith and without actual notice or legal obligation arising from a loss payable clause, fulfills its contractual obligation to pay the owner.

Id. at 697-698. Accord, Fidelity Financial Services v. Blaser, 889 P.2d 68 (Okla. 1995); Chrysler Credit Corp. v. Smith, 434 Pa. Super. 429, 643 A. 2d 1098 (1994); Scholfield Brothers. Inc. v. State Farm Mut. Auto, Ins. Co., 242 Kan. 848, 752 P. 2d 661 (1988). But see, Fonda v. General Casualty Co. of Illinois, 665 N.E. 2d 439 (Ill. App. 1996); First Nat. Bank of Bethany v. American General, 927 F. 2d 1126 (10th Cir. 1991)[3]; Nationwide Ins. Co. v. Bank of Forest, 368 So. 2d 1273 (Miss. 1979).

Likewise, the drafters' explanation of the amendment to UCC Section 9-306, which added "insurance payable by reason of loss or damage to the collateral" to the definition of the term "proceeds", further supports our contention that the only sensible construction of the statute is that which is in harmony with insurance and contract law. The "Official Reasons for 1972 Change" to UCC Section 9-306, is clearly dispositive of the issue:

> The new second sentence of subsection (1)[to UCC Section 9-306] is intended to overrule various cases to the effect that proceeds of insurance on collateral are not proceeds of collateral. The 'except' clause is intended to say that if the insurance contract specifies the person to whom the

[3] The federal court's holding in First National a case applying Oklahoma law, is of questionable precedential value' in light of the Oklahoma Supreme Court's later contrary pronouncement in Fidelity Financial.

insurance is savable, the concept of 'proceeds will not interfere with performance of the contract.

U.C.C. § 9-306, Official Reasons for 1972 Change.

It is thus obvious that while insurance benefits are deemed proceeds under Florida Statute, Section 679.306(1), those benefits are not payable to a creditor until they are received by the debtor. Nothing in the UCC authorizes a creditor to demand payment of insurance proceeds directly from the insurer where, as here, the creditor is not a loss payee, Chrysler, 643 A. 2d at 1102. To hold otherwise would not only fundamentally alter established insurance and contract law but would also defeat the public policy of encouraging early settlements between the insurer and the insured. "The question becomes whether an insurer, before paying a routine loss, must conduct a search of public records in order to avoid becoming liable to some secured but otherwise undisclosed creditor. Such a startling -- and expensive -- requirement is certainly not required by the uniform commercial code." Chrysler, 643 A. 2d at 1102. See also, Automobile Mutual Ins. Co. v. Chrysler Credit Corp., 792 S.W. 2d 626, 629 (Ky. App. 1990)("[a] requirement that a wrongdoer or his insurance carrier become embroiled in satisfaction of security liens would, in our view, have a chilling effect on prompt settlements"). It is far more preferable to require lenders to familiarize themselves with basic insurance law rather than to dispense with established law. See, Henry Boroff, Insurance Proceeds Under Section 9-306: Before and After, 79 Comm. L. J. 442, 444 (1974)("the secured creditor who does not arrange to be made loss payee may fall into a trap for the unwary"); Ray Henson, Insurance Proceeds

as "Proceeds" Under Article 9, 18 Cath. L. Rev. 453, 456 (1968)("[i]f a secured party is named as loss payee in a policy, the insurance company's requirements will be met: this act in itself does not create any kind of security interest and Article 9 does not apply to it; and in the event of an insured loss, the proceeds are payable according to the terms of the policy with Section 9-306 merely stating the security consequences of the payment, if any").

SIMKINS' reliance on Kahn v. Capital Bank, 384 So. 2d 976 (Fla. 3d DCA 1980) is misplaced because Kahn pre-dated Florida's adoption of the amendment to Section 9-306(1) of the UCC and the Commentary thereto. The Third District Court of Appeal's decision in Kahn, based as it was on pre-amendment law and interpretations thereof, is not persuasive in light of the drafters' own view of the addition of "insurance proceeds" as proceeds subject to a security interest. According to the Commentary, SIMKINS' security interest in the insurance policy and its proceeds, gives it a right to those proceeds only after they have been paid to the insured WAK.

B.K'S assisnment of its insurance policy was not a pledge of insurance proceeds and was barred by the policy's "no assignment" clause

SIMKINS agrees that the weight of authority regarding "no assignment" clauses is in LEXINGTON'S favor in that it is well-established that insurers have a vested interest in knowing who and what they are insuring. Brief of Respondent at 13-14. SIMKINS nevertheless argues that "the question whether and to what extent 'anti-assignment' clauses will be enforced cannot be answered in a vacuum". Accordingly, it urges this Court to find that the assignment

at issue was simply a "technical" breach of the policy that should be overlooked because, it says, there was no increase in risk and hazard of loss resulting from the assignment in this case. But it cites to nothing in the record on Appeal to support this assertion, likely because the record demonstrates that 1) SIMKINS never raised this argument at the trial or appellate court levels and 2) the argument, had it been raised, would have been groundless as SIMKINS adduced no evidence that the assignment in this case did not increase the risk to LEXINGTON.

More to the point, SIMKINS ignores that neither the policy language nor the statute expressly approving the "no assignment" clause contain an exception for circumstances in which the assignment does not operate to increase the risk of hazard to the insurer. Rather, it simply urges this Court to overlook the "technical" breach of the policy and overlook the clear legislative intent that the insurer have the sole authority to require compliance with the policy's "no assignment" clauses.

In the process, of course, SIMKINS pays little heed to Florida Statute Section 627.422 ("[a] policy may be assignable, or not assignable, as provided by its terms"), which makes this case very different from Hartford Fire Ins. Co. v. Mutual Savings and Loan Co., 193 Va. 269, 68 S.E. 2d 541 (1952), cited by the Third District in its opinion, and very different from all of the other cases SIMKINS' claims supports the appellate court's conclusion that assignment of a policy as collateral security does not vitiate a "no-assignment" clause in an insurance policy. None of these cases interprets the "no assignment"

clause against the backdrop of legislation expressly validatins these clauses as thev are written. As we argued in our initial brief to this Court, SIMKINS' and the Third District's failure to address meaningfully the only Florida Statute directly on point will not make it go away. It is, after all, the statute that operates to distinguish this case from all of the cases cited in SIMKINS' Brief of Respondent.

Notably, SIMKINS itself agrees with LEXINGTON that an insurer "certainly may insist on giving consent" to a "true assignment of an insurance policy." Brief of Respondent, p. 16. However, SIMKINS characterizes the assignment in this case as a "pledge of insurance proceeds as security for a loan." Id. But that is not what SIMKINS' own financing documents provide. Rather, the security agreement expressly states that "[s]uch policies of insurance and all renewals thereof are hereby assigned to [Simkins] as additional security for payment of the indebtedness hereby secured." (R.147) It is clearly the policy, and not the proceeds, that were assigned by WAK.[1] Given SIMKINS' concession that an assignment of an insurance policy is a violation of the "no assignment" clause in the LEXINGTON policy, this

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[1] SIMKINS recognizes that its legal position is less than secure, by virtue of the fact that it repeatedly attempts to characterize this clear assignment of the policy as "a pledge of insurance proceeds", an "assignment of an equitable interest in the proceeds of an insurance policy", a "pledge of an equitable interest pursuant to a security agreement" and "a formal recognition by the parties of Simkins' rights a a secured creditor under the UCC." Brief of Respondent at 16, 18. By going to such lengths to distinguish its assignment from those that it admits would be violative of the policy and statute and are justifiably prohibited in light of the insurer's interest in maintaining control over those whom it insures, SIMKINS tacitly concedes that if the security agreement is read literally, and there is no reason that it should not be, the assignment therein is prohibited by both the policy and statute.

Court should reverse the decision of the Third District Court of Appeal and remand the case with instructions to reinstate the summary judgment in LEXINGTON'S favor.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court should reverse the appellate court's decision and reinstate final judgment in favor of LEXINGTON.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of ~~August~~ October, 1997, to: DANIEL S. PEARSON, Holland & Knight, 701 Brickell Avenue, Miami, Florida 33131; ALAN T. DIMOND, ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131; ELLIOTT SCHERKER, ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131; PATRICIA M. SILVER, ESQ., Silver & Waldman, P.A, 800 Brickell Avenue, Suite 902, Miami, Fla., 33131.

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