

IN THE SUPREME COURT OF FLORIDA

**ORIGINAL**

**FILED**

SID J. WHITE

OCT 9 1998

CASE NO. 93,543

CLERK, SUPREME COURT  
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Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HOLLIS FESSENDEN,

Respondent.

DISCRETIONARY REVIEW OF A DECISION AND CERTIFIED  
QUESTION FROM THE DISTRICT COURT OF APPEAL,  
SECOND DISTRICT, STATE OF FLORIDA

Amicus Curiae Brief on Behalf of Petitioner  
By the Florida Department of Insurance

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PRELIMINARY STATEMENTS

1. Pursuant to this Court's Administrative Order dated July 13, 1998, this Brief has been prepared with a font of Courier New 12 point type.

2. Amicus Curiae, Florida Department of Insurance, hereby adopts the Brief on the Merits of the Petitioner, State of Florida. The Florida Department of Insurance also adopts all other briefs regarding the criminal law aspects of this appeal. The Department of Insurance wishes only to provide the Court with information regarding the underlying insurance transactions which are the subject of the original convictions of Respondent.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Department of Insurance, accepts the Statement of the Case and Facts as set forth by the Petitioner, State of Florida, in its Brief on the Merits.

### SUMMARY OF ARGUMENT

The Second District Court of Appeal erred in determining that an "estimated premium" has no value and cannot be the subject of theft. In worker's compensation an "estimated premium" is interchangeable with the term "deposit premium", or "advance premium". It is not simply an estimate. Upon receipt of an application and a premium deposit from an insured, the insurer issues a policy of insurance covering the insured for certain specified perils. This legal significance is far different than other types of situations in which an estimate is given.

The terminology is irrelevant to the legal significance of the transaction. In worker's compensation insurance where the policies are retrospectively rated, the "estimated premium" is, in fact, a "deposit premium". If an audit is performed by the insurer, the "final premium", or "actual premium", will typically result in "additional premium" to be paid by the insured, or "unearned premium" to be returned by the insurer. Whatever the premiums are called, the character of the criminal offenses committed by Respondent has not changed.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN DETERMINING THAT AN ESTIMATED PREMIUM HAS NO VALUE AND THEREFORE CANNOT BE THE SUBJECT OF THEFT

On July 17, 1998, the Second District Court issued an opinion overturning the convictions of Respondent, JOHN HOLLIS FESSENDEN, on its determination that the conduct asserted did not constitute grand theft. The Court's decision was premised on the same grounds upon which it had previously overturned the convictions of Respondent's codefendant, CHARLES CLINTON AMOS, for violating Florida's Racketeer Influenced and Corrupt Organizations (RICO) Act and multiple counts of grand theft. See Amos v. State, \_\_\_ So.2d \_\_\_, 23 F.L.W. D1156 (Fla. 2d DCA April 27, 1998). In Amos, as in this case, the Court certified the following question as being of great public importance:

IS THE OBTAINING OF A REDUCED INITIAL PREMIUM FOR  
WORKERS' COMPENSATION INSURANCE BY MISREPRESENTATIONS  
OF STATUTORILY-REQUIRED FACTORS USED TO DETERMINE THAT  
PREMIUM THEFT UNDER SECTION 812.014, FLORIDA STATUTES?

Notwithstanding the question framed by the Second District Court of Appeal, the real issue appears is whether an "estimated premium" has value and, therefore, can be the subject of theft. In the context of worker's compensation insurance an "estimated premium" does have value and can indeed be the subject of theft.

The reason that an "estimated premium" can have value is that it is not the kind of "estimate" defined by the Second District Court of Appeal. Amos, slip op. at D1156-1157. This

would be true if the "estimated premium" were akin to an estimate for the repair of a damaged automobile, or some other type of service simply giving an idea of the anticipated cost of repair. Typically, an estimate standing alone has no legal significance. However, in context of the underlying criminal acts of this case, the "estimated premium" has legal significance.

The application for worker's compensation insurance, normally accompanied by the premium, when accepted by the insurer creates a legally enforceable binding contract. Liberty Mutual Insurance Company v. Scalise, 627 So.2d 87 (Fla. 1st DCA 1993). The premium, whether estimated or not, is the consideration paid, or to be paid, to an insurer for the issuance and delivery of a binder or policy of insurance. Section 627.041(2), Florida Statutes (1985). The policy ". . . means a written contract of insurance or written agreement for or effecting insurance, or the certificate thereof, by whatever name called, and includes all clauses, riders, endorsements, and papers which are a part thereof". Section 627.402(1), Florida Statutes (1985). Upon receipt of a premium payment, which is the consideration to the insurer for agreeing to indemnify the insured against a specified peril, coverage is bound and a policy is issued. 5 Couch on Insurance 3rd, Section 69:1 (Anderson & Rhodes 1996).

It is undisputed in this matter that a sum of money was paid on behalf of each prospective insured to the insurer and that a policy of worker's compensation insurance was issued. This sum of money was clearly an insurance premium. Unfortunately, the



Second District Court of Appeal misunderstood the fundamental nature of the insurance transaction and found when the word "estimated" was placed before the word "premium", the character of the funds that were paid to the insurer had changed. Respectfully, this is simply a matter of semantics which should never have changed the outcome of this case.

The "estimated premium" that caused the Second District Court of Appeal to erroneously conclude that the offenses occurred at the policy's inception and to reverse Respondent's convictions was, in reality, a "deposit premium". Amos, slip op. at D1157. In American Insurance, 829 F.2d 702 (8th Cir. 1987), the court stated:

Plaintiff insurer had issued a general and automobile policy and a worker's compensation policy to defendant. The policies covered the period from August 1, 1978 to August 1, 1981. **Deposit Premiums** were paid, but were subject to adjustment up or down (within an agreed range) in light of the loss experience of the insureds in accordance with a Retrospective Premium Endorsement. (Emphasis supplied).

Another term interchangeable for "estimated premium" is "advance premium". 5 Couch on Insurance 3d Section 69:15 (Anderson & Rhodes 1996). Both "deposit premium" and "advance premium" mean exactly what the Second District Court of Appeal attempted to define as "estimated premium". The "deposit premium", or "estimated premium", is deposited with the insurer as consideration for the issuance of the insurance policy. 5 Couch on Insurance 3d, Section 69:15 (Anderson & Rhodes 1996). Worker's compensation policies, unlike standard insurance

policies, are rated retrospectively at the policy's inception. That is, the premium obligations are initially determined on the insured's past claims, loss experience and payrolls. Id. Therefore, the insured's premiums are calculated after the fact rather than before. Liberty Mutual Insurance Company v. President Container, Inc., 297 N.J.Super. 24, 687 A.2d 760 (Super. Ct. of N.J. 1997).

In a retrospectively rated policy, the premium is computed at the conclusion of the policy period with reference to the insurer's rate schedules, rules and manuals. Nationwide Mutual Insurance Company v. Ed Soules Construction Company, 397 So.2d 775 (Fla. 1st DCA 1981). Following an audit, at which the insurer's rate schedules, rules and manuals are applied, the "estimated premium" or "deposit premium" may be adjusted upward or downward depending upon the actual loss experience and payrolls of the insured. If it is adjusted upward, then additional premium is due the insurer. If the audit reflects a downward adjustment the return to the insured is a return of unearned premium.

Therefore, while the Second District Court of Appeal found the term "estimated premium" problematic, it could have just as easily been titled an "deposit premium", or "advance premium". Further, the sum of money due at the end of the policy period following an audit is referred to in a number of ways. It may be referred to as the "actual premium", "final premium", or "total premium". American Insurance Company, 829 F.2d at 703 (the

premium at end of the policy period referred to as "final" premium). In Re: MEI Diversified, Inc., 106 F.3d 829, 832 (8th Cir. 1997) (premium at the end of the policy period is referred to as "total premium").

Following an audit and recalculated in accordance with actual experience, "Additional premium" would be the premium due the insurer if the premium is ultimately adjusted upward following an audit. "Unearned premium" would be the premium payment returned to the insured if the premium is ultimately adjusted downward from the advance premium deposited with the insurer. However, irrespective of the terminology used, the character of the offenses committed by Respondent has not changed. A rose, by whatever name, is still a rose. His acts were criminal, found to be so by a jury, and the convictions should be reinstated.

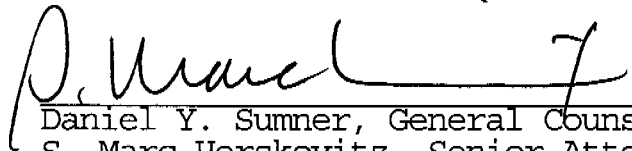
## II. THE CRIMINAL LAW ISSUES

The Department of Insurance adopts the brief filed by the Attorney General of the State of Florida on all criminal law issues not discussed above. This brief is filed only to address the erroneous conclusion of the Second District Court of Appeal as to the nature of the underlying insurance transactions.

CONCLUSION

Based on the foregoing discussion, it is clear that the Second District Court of Appeal erred in reversing the convictions of Respondent by determining that an "estimated premium" could not be the subject of theft.

Respectfully submitted this 9th day of October, 1998.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: ANN PFEIFFER HOWE, ESQUIRE, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607; SUZANNE ROSSOMONDO, ESQUIRE, Office of the Statewide Prosecutor, Florida Department of Legal Affairs, 4211 North Lois Avenue, Tampa, Florida 33614; and MEGAN OLSON, ESQUIRE, Office of the Public Defender, 14255 49th Street North, Clearwater, Florida 33762 by U.S. Mail this 9<sup>th</sup> day of October, 1998.

  
S. MARC HERSKOVITZ