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IN THE SUPREME COURT OF FLORIDA

WILLIAM J. WHITE,

Petitioner,

vs.

Case No. SC01-96
Lower Tribunal No.: 2D99-5043

STEAK AND ALE OF FLORIDA, INC, d/b/a BENNIGAN'S

Respondent,

_____/

BRIEF OF AMICUS CURIAE,

FLORIDA DEFENSE LAWYERS ASSOCIATION

ON DISCRETIONARY REVIEW FROM DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

This brief is filed on behalf of the Florida Defense Lawyers Association. We have no quarrel with the statements of the case and facts set forth in the briefs of the Petitioner and the Respondent respectively.

SUMMARY OF ARGUMENT

This Court should resolve the conflict between the decisions of the Second and Third District Court's of Appeal by adopting the holding of the lower court requiring a Court not to consider pre-offer costs when interpreting the term "judgement obtained" in section 768.79, Florida Statutes (Supp. 1993).

The statute at issue is the result of years of legislative wrangling and previous statutes authorizing Offers of Settlement specifically required pre-offer costs to be included in addition to the verdict obtained by the Plaintiff in determining whether the threshold of a statutory Offer has been met. The decision of the Florida Legislature to not include such a provision in the statute at issue compels a holding that the legislature did not intend the inclusion of pre-offer costs.

ARGUMENT

The Ruling of the Lower Court should be affirmed as it is based upon an interpretation of Florida Statutes 768.79 (1993) that is supported by the intention of the Florida legislature when it was drafted

The 1993 version of Florida Statute 768.79 is at issue as the incident leading to this action occurred during the effective dates of this statute. This version of the statute was the end result of various efforts by the Florida Legislature over several years and further was the result of continuing concerns by both the Florida Legislature and the Florida court system as to intrusion into the procedural aspects of civil litigation.

Florida Statute 768.79 was first passed by the 1986 Florida Legislature and initially concerned the presentment of Offers of Settlement and Demands for Judgement. This version of the statute stated in pertinent part "the defendant shall be entitled to recover costs and attorney's fees incurred from the date of the offer if the judgement obtained by the plaintiff is at least 25 percent less than such offer ...." The phrase "judgement obtained" was not clarified further.

Florida statute 45.061 was enacted by the 1987 Florida Legislature. This statute addressed the issuance of Offers of Settlements in civil litigation. If a court determined that an Offer presented under that statute had been unreasonably rejected the offeror was presumptively entitled to attorney's fees and costs

incurred after the making of the Offer of Settlement, plus interest.

An offer was "presumed to have been unreasonably rejected by a defendant if the judgement entered (was) at least twenty five percent greater than the offer rejected and an offer shall be presumed to have been unreasonably rejected by the Plaintiff if the judgement entered (was) at least twenty five percent less than the offer rejected." Section 45.061 (2)(b) Fla. Stat. (Supp. 1989). In pertinent part, the statute went on to clarify the calculation of the amount of the judgement as follows: "for the purposes of this section, the amount of the judgement shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law." Id.

Therefore the Florida legislature intended that Florida Statute 45.061 (1989) include a Plaintiff's pre-offer costs when determining the amount of recovery to test against the rejected Offer of Settlement.

In 1990 the Florida Legislature substantially revised these above statutes through Chapter law 90-119. It was the intent of the Florida Legislature for Florida Statute 768.79 to become the reference for all statutory offers of judgement and offers of settlement. See Senate Staff Analysis and Economic

Impact Statement regarding CS/SB 2670 (May 24, 1990) at page 7, attached as appendix A.

Initially, the law amended Florida Statute 45.061 by limiting its application to causes of action occurring before the effective date of the act, October 1, 1990. See Ch. 90-119, sections 22 and 55, Laws of Florida.

This law also significantly altered Florida Statutes 768.79 and this amended law is the version which was applicable in 1993 on the date of the incident and which is to be interpreted by this Court.

This 1990 version of the Statute states that "if defendant serves an offer which is not accepted by the Plaintiff and if the judgement obtained by the Plaintiff is at least twenty five percent less than the amount of the offer, the defendant shall be awarded reasonable costs including investigative expenses and attorneys fees ... incurred from the date the offer was served ...."

This statute clarifies the term "judgement obtained" concerning a Plaintiff's offer to mean "the amount of the net judgement entered, plus any postoffer or collateral source payment received or due as of the date of the judgement, plus any postoffer settlement amounts by which the verdict was reduced." The statute also clarifies the term "judgement obtained" when a Plaintiff's Demand for Judgement is at issue.

The Petitioner in this case is seeking to have this Court weld the statutory interpretation for calculation of "judgement" used in Florida Statutes 45.061 (Supp. 1989) upon the applicable statute 768.79. Using the general rules of statutory construction, such an interpretation is not justified. When the Florida Legislature amended the present 768.79 in 1990, it had before it the interpretation of the judgement calculation sought by the Petitioner in Florida Statutes 45.061. However, the Legislature rejected this in favor of the definition of the term "judgement obtained" quoted above.

A court may ascertain the intent of the legislature enacting a statute by considering other statutes enacted in the same legislative session. State v. Allen, 743 So. 2d 532, 534 (Fla. 1997). Further, different statutes on the same subject passed by the same legislature should be construed in light of each other. See State v. Florida Dep't of Education, 317 So. 2d 68 (Fla. 1975).

As the statute which contained the interpretation sought by the Petitioner was limited by its terms to not apply to this action by the 1990 legislature, this Court should not use the inapplicable law as a guide for interpretation. Instead the decision by the 1990 legislature to not include the interpretation sought by the Petitioner reveals it intended not to apply this interpretation outside of the limited statute.

CONCLUSION

Based upon the arguments and authorities cited, this Court should affirm the holding of the Second District Court of Appeal and find that pre-offer costs should not be included in an adjusted verdict for comparison purposes under Florida Statutes Section 768.79 (Supp. 1993).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by US Mail to: JOSEPH A. EUSTACE, JR., ESQUIRE, 1802 North Morgan Street, Tampa, FL 33602 and CHARLES T. CONE, ESQUIRE, PO Box 1438, Tampa, FL 33601 this 8th day of March, 2001.

Thomas Thompson

THOMAS R. THOMPSON, ESQUIRE

Appendix

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	Stupski	Fort	1.	INS	Fav/CS
2.			2.		
3.			3.		
4.			4.		

SUBJECT: Insurance

BILL NO. AND SPONSOR: CS/SB 2670 by Insurance and Senator Langley

I. SUMMARY:

A. Present Situation:

The committee substitute makes several amendments to various portions of the Insurance Code. In addition, Sections 22 through 42 amend several aspects of the code and other laws relating to motor vehicles.

B. Effect of Proposed Changes and Section-by-Section Analysis:

This bill revises the information required to be contained in the annual reports issued by the Department of Insurance (department); provides authority for the department to require audited financial statements based on statutory principles consistent with the insurance laws of the state of domicile with certain exceptions; revises certain allowable investments; clarifies the valuation of certain assets; increases fees for service of process upon the department; revises certain notice requirements; requires certain policy forms to include a reduced paid-up nonforfeiture benefit; revises restrictions in the sale of credit life and credit disability insurance; deletes certain insurer reporting requirements; and specifies a delivery time for home warranties; and makes several amendments relating to motor vehicle insurance.

Section 1. Currently, the department is required to include information regarding availability, affordability, and profitability of manually rated commercial multiperil and commercial casualty lines of insurance. The report must contain information from Florida and countrywide: regarding loss reserves, premiums written, premiums earned, incurred losses, paid losses, allocated loss adjustment expenses, renewal ratio and other relevant information. Renewal ratios collected from insurance companies must be held confidential unless the data reveals a violation of the Florida Insurance Code or rules adopted by the department.

The bill allows the department discretion in determining what information regarding the availability, affordability, and profitability of manually rate commercial multiperil and casualty lines of insurance should be included in the department's annual report. If renewal ratios are collected from companies there would no longer be a specific provision in this section requiring that the ratios be held confidential.

Section 2. Amends s. 624.418(2)(f) to provide authority for the department to suspend or revoke certificates of authority of health insurers that have net premiums to surplus that exceed 4 to 1 and the financial condition endangers the interests of policyholders.

Section 3. Currently an insurer is required to annually file audited financial statements, an opinion, and a letter report of weaknesses with the department.

The audited financial statements and opinions must be based upon generally accepted accounting principles or on statutory principles consistent with the Florida Insurance Code. If an insurer has less than $500,000 in direct written premiums in Florida during the calendar year for which a statement would be prepared or with less than 1,000 policyholders or certificateholders at the end of the calendar year, the insurer is allowed to submit an affidavit sworn by a responsible officer of the insurer specifying the amount of direct premiums written in this state and number of policyholders and certificateholders.

An insurer may also submit an application for exemption from compliance with this filing requirement if the department determines that compliance would result in an undue financial hardship on the insurer due to the cost of preparing the statements. The insurer must file financial statements which have been reviewed or compiled by an independent certified public accountant and which the department determines are sufficiently reliable and complete for the department to evaluate the financial conditions and stability of the insurer. If the insurer is a member of an insurance holding company system, it is required to file an audited consolidated financial statement and opinion.

The committee substitute provides authority for the department to require the filing of statutory financial statements. In requiring submission of statutory financial statements, the department is required to consider the solvency of the company and the best interests of the policyholders.

Section 4. Provides authority for commercial self insurance funds to become domestic mutual insurers by obtaining approval from the Department of Insurance.

The section prohibits the department from approving the plan unless the plan is equitable to members of the Commercial Self Insurance Fund and the plan fulfills the requirements of forming a domestic mutual insurer.

Section 5.

This bill amends s. 624.502, F.S., to increase the service of process fee paid to the department from $7.50 to $15.00 and to include all service of process made upon the Insurance Commissioner not just those required by the Insurance Code.

Section 6. This bill clarifies and codifies the department's current practice regarding the valuation of investments in subsidiaries and related corporations. These investments would be valued in an amount which in the aggregate does not exceed the less of: (a) 10 percent of the insurer's admitted assets, or (b) 50 percent of the insurer's surplus as to policyholders in excess of the minimum surplus as to policyholders as required by the Insurance Code.

Section 7. This bill creates s. 625.181, F.S., to require that assets received by an insurer as a capital or surplus contribution be deemed to be purchased by the insurer at a cost equal to the market value, appraised value, or at prices determined by the department as representing the fair market value.

Section 8. Currently, an insurer is allowed to invest in stocks or other securities of one or more subsidiaries or related corporations with certain limitations. This bill amends s. 625.325, F.S., to codify the department's current

interpretation on the limitation of such investments to provide that at the time any new or additional investment is made, the sum of the insurer's cost of the investment and the aggregate values of all existing investments in the corporation shall not exceed the less of: (1) 10 percent of the insurer's admitted assets or (b) 50 percent of the insurer's surplus as to policyholders in excess of the minimum surplus as to policyholders required to be maintained by the insurer.

Sections 9 and 10. These sections amend ss. 625.50 and 625.52, F.S., to allow the same form and types of deposits and securities for agents as are allowed and accepted for insurers.

Section 11. This section republishes s. 627.331. Subsection (4) is currently not listed in the Florida Statutes due to a statutory revision interpretation that legislation in 1989 repealed this provision.

Section 12. Amends s. 627.4133, F.S., to exempt mortgage guaranty insurers from giving insureds 45-day notice of nonrenewal or of the renewal premiums.

Section 13. Amends s. 627.476, F.S., to require certain life insurance policies to provide a reduced paid-up nonforfeiture provision.

"Reduced paid-up nonforfeiture benefit" is defined in the bill as a benefit whereby the policy may be continued at the option of the insured as reduced paid-up life insurance, and includes the amount attributed to such benefit. This requirement would not be applied to policy forms filed prior to October 1, 1990.

Section 14. Credit life rates are not allowed to contain age restrictions which make ineligible those debtors or lessors 70 years old or under at the time the indebtedness is incurred or which makes eligible those debtors who will be 71 or under on the scheduled maturity date of the indebtedness.

This bill amends s. 627.6785, F.S., to disallow a credit disability rate if it contains an age restriction which makes a debtor or lessor ineligible for coverage if they are 65 or under at the time the indebtedness is incurred. This provision also deletes the allowance for a restriction on credit life rates which would make eligibility based on an age on the scheduled maturity date. Additionally, this section sets forth the minimum time period for which coverage is required.

Section 15. Provides that the deductible provisions of combined additional coverage policies are not applicable to windshield damage.

Section 16. Technical.

Section 17. This section amends s. 627.803, F.S., to require that contracts or certificates providing variable or indeterminate values in annuity contracts, life insurance contracts, and contracts upon the lives of beneficiaries under life insurance contracts in certain circumstances, state that the initial interest rate is guaranteed only for a limited period of time.

Section 18. This section amends s. 627.915, F.S., to delete certain reporting requirements for insurers transacting medical malpractice, private passenger automobile liability, commercial automobile liability, or other liability insurance since this information is required by other sections of the Insurance Code.

Section 19. This bill amends s. 634.312, F.S., to require that every home warranty be mailed or delivered to the warranty

holder no later than 45 days after the effectuation of coverage.

Section 20. This section reenacts ss. 624.11(2), 624.316(1)(b), 632.638(3), and 636,091 for purpose of incorporating the amendments made to these sections in this bill.

Section 21. Providing for future repeal of the provisions in this act added to chapter 625.

Section 22. Amends s. 316.066(6), F.S., to provide that failure to file written accident and supplemental reports when required subjects the offender to civil penalties prescribed in s. 318.18(2), F.S.

Section 23. Provides that the failure to use a seat belt when required cannot be considered in mitigation of damages, but is admissible for establishing comparative negligence.

Section 24. Presently, if the estimated costs of repairing the physical and mechanical damage to a vehicle is equal to 80 percent or more of the current retail cost of the vehicle, as established in the Official Used Care Guide of the National Automobile Dealers Association, the DHSMV declares the vehicle unrebuildable and prints a notice on the salvage certificate that the vehicle is unrebuildable and refuses to issue a certificate of title for the vehicle.

This section amends paragraph (b) of subsection (2) of s. 319.30, F.S., to exempt those vehicles that have a retail value of less than $1,500 in undamaged condition from being determined as unrebuildable.

Section 25. Requires proof of insurance cards to include name of insurer, policy number, and make, year, and vehicle identification number.

Section 26. Amends s. 322.0261, F.S., to require drivers who are convicted or plead nolo contendere to traffic offenses to take a driver safety education course administered by the DOI if the driver has: (1) been involved in accidents causing bodily injuries or death, (2) had two accidents within a 2-year period with property damage in an apparent amount of at least $500.

Requires the department to consider factors designed to promote safety in approving a driver improvement course.

Section 27. Removes exemptions due to lack of injuries and court determination of liability from financial responsibility laws.

Section 28. Provides that in the event an insurer does not pay a financial obligation of the insured, the insured license will not be suspended.

Section 29. Amends s. 624.155, F.S., to provide a correct cross-reference.

The committee substitute provides language that the civil remedy provision of the Insurance Code does not preempt any other statutory or common law remedy. However, double recoveries are prohibited.

The committee substitute provides that damages under the civil remedy section must be reasonably forseeable and may include amounts that exceed policy limits.

Section 30. Reenacts s. 624.488, F.S., to incorporate the changes to s. 624.155, F.S.

Section 31. Requires the Department of Insurance to publish complaint ratios of motor vehicle insurers.

Section 32. Amends s. 626.9541, F.S., to expand the time of subsequent information from 18 to 36 months in order to raise premiums or not renew policies.

Section 33. Current law allows automobile insurers to implement rate changes for up to 30 days before notifying the department of the rate change.

After being notified of the rate change, the department reviews the rate to determine if the rate is excessive, inadequate, or unfairly discriminatory. Section 627.0651, F.S., lists numerous factors such as loss experience for the department to consider in determining whether rates are excessive, inadequate, or unfairly discriminatory.

Current law does not require automobile insurers to refund any premiums collected from rate increases that are subsequently determined as excessive by the department. However, s. 627.066, F.S., provides a method for returning excess profits to the consumer based on 3-year underwriting results.

Except for automobile insurers, property and casualty insurers may either notify the department more than 60 days prior to implementing a rate change, to notify the department within 30 days after using a new rate. For those insurers that elect to notify the department after implementing a rate change, the department is authorized to order refunds for excessive rates.

Under the provisions of the bill, insurers may notify the department 60 days before the proposed effective date of a rate filing. Under this "file and use" method, the department would have 60 days to initiate proceedings to disapprove the rate filing. Failure of the department to notify the insurer within 60 days of disapproval will allow rate approval.

The committee substitute provides a use and file method for automobile insurers. "Use and file" requires insurers to notify the department within 30 days after the effective date of a new rate. The committee substitute requires the department to order credits or refunds for premiums filed through the "use and file" method if the rate exceeds actuarially justified levels.

This section provides that the practice of using a single zip code as a rating territory is unfairly discriminatory.

The committee substitute clarifies that judgments for bad faith actions are not included in the rate base.

In addition, portions of settlements, relating to bad faith claims are excluded from the rate base.

Section 34. Transfers s. 627.331(4), F.S., to s. 627.065(13), F.S.

Section 35. Authorizes the Department of Insurance to develop a pilot program to require all insurers to designate one county as a single rating territory for personal injury protection benefits.

Section 36. Requires premium discounts for motor vehicles equipped with antilock brakes.

Section 37. Replaces a provision requiring persons not insured with the insurer to obtain a judgment against an insured of the company prior to bringing suit with a requirement to obtain a settlement or verdict prior to bringing suit.

Provides authority for insurers to recover costs and fees paid on behalf of an insured. Allows joining liability insurers as a party after settlement or judgment.

Section 38. Provides that uninsured motorists coverage must be rejected by the policyholder in writing.

Section 39. Provides provisions in personal injury policies for binding arbitration. Exempts supplies or services provided by entities licensed under chapter 395, from the binding arbitration provisions.

Section 40. Provides procedures and policies for mediating personal injury claims.

Section 41. Extensive rewording of the current law on offers of judgment and demand. Provides for the inclusion of investigative expenses in awards of costs and attorney fees.

Section 42. Provides a first degree misdemeanor penalty for persons providing false, incomplete, or misleading information on motor vehicle insurance applications with the intent to injure, defraud, or deceive motor vehicle insurers.

Section 43. Requires insurers on October 1, 1992, to report to the department rate savings as a result of the provision of this act.

Sections 44 and 45. Provides for repeals of this section created in this act in accordance with the repeal scheduled for those chapters.

Section 46. Requires the Department of Insurance to conduct a feasibility study on making automobile coverage available at district tax offices.

Authorizes sufficient expenditures from the Insurance Commissioner's Regulatory Trust Fund to fund the provisions of this act.

Section 47. Provides authorization for expenditures from the Insurance Commissioner's Regulatory Trust Fund to implement this act.

Section 48. Provides that the act is effective on October 1, 1990, and applies to policies issued or renewed on or after that date.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

Those insurers required to file statutory financial statements may incur additional costs. Persons requiring service of process on the Insurance Commissioner would be charged an increased fee.

Persons 65 and under will be able to purchase credit disability insurance without age being a requirement for qualification.

Provisions of the committee substitute providing authority for the Department of Insurance to return excessive motor vehicle insurance rates may provide economic benefits to policyholders.

B. Government:

The Department of Insurance estimates that $150,000 is needed to conduct the feasibility study on providing insurance through tax collector offices.

III. COMMENTS:

Section 41 of the committee substitute attempts to combine ss. 45.061 and 768.79, F.S., regarding offers of settlement. Section 41 is nearly identical to the CS/CS/SB-389 of 1989 which originated from a committee interim project, but did not become law. The changes from last year's bill include:

-- Application of the offer of judgment provisions to any civil action for damages;

-- Calculation of costs, expenses and fees in accordance with the guidelines promulgated by the Supreme Court; and

-- Expansion of the definition for the term "judgment obtained."

However, s. 45.061, F.S., is not repealed as it was in CS/CS/SB 389. As the apparent purpose of the substantial rewording is to consolidate ss. 45.061 and 768.79, F.S., the absence of a repealer of s. 45.061, F.S., would seem to aggravate the present confusion resulting from the interpretation and application of two similar sections. Section 41 deletes the time limitations on when an offer of judgment may be filed which are provided in existing law under ss. 45.061 and 768.79, F.S. Additionally, there are drafting inconsistencies with the use of the term "offer of judgment" in the catch line and throughout part of the text while the term "offer of settlement" is also used in the text.

IV. AMENDMENTS:

None.

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STEAK AND ALE OF FLORIDA, INC.

Respondent,

_____/

NOTICE OF COMPLIANCE WITH TYPE REQUIREMENTS

The undersigned cetifies that the The Florida Defense Lawyer's Association, Amicus Curiae Brief filed herein is written in 14 point Times New Roman typeface.

Dated this 8th day of March, 2001.

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