IN THE SUPREME COURT OF FLORIDA

Case No. SC02-971

(U.S.C.A. No. 01-11249-AA)

PEPPER'S STEEL AND ALLOYS, INC., et al.

vs.

UNITED STATES OF AMERICA, et al.

INITIAL BRIEF OF UNITED STATES FIDELITY & GUARANTY COMPANY ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTRODUCTION

This case began in 1983 as a government action in federal court to clean up toxic waste dumped over more than twenty years at a site in Medley, Florida. Through third-party suits, the case quickly became an effort by the alleged polluters to improperly shift the cost to insurance companies like USF&G, despite pollution exclusions barring such coverage. The cleanup is long over and all issues in this case are resolved, except for one matter now before this Court.

Two of the alleged polluters, collectively referred to as "Pepper's Steel" in this brief, claim that Fla. Stat. § 627.428 allows them to recover attorneys' fees that they incurred to dispute the terms and enforceability of a settlement agreement with USF&G. The federal district court flatly rejected this claim twice. Among other reasons, the court explained that such fees cannot be obtained under the statute, which only awards fees to litigate the terms and scope of insurance coverage. On appeal, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") elected to certify the following question to this Court. "Under Section 627.428 of the Florida Statutes, is an insured entitled to an award of attorneys' fees incurred in enforcing a settlement against an insurer?"

In 1991, USF&G had made an oral offer of $2 million in return for a global settlement that would allow it to end the growing litigation costs it was incurring to dispute the alleged polluters' spurious claims. USF&G believed that the offer was rejected, and the litigation continued for two more years.

In 1993, this Court's decision in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., 636 So. 2d 700 (Fla. 1993), destroyed any possible basis for coverage claims against USF&G. Dimmitt held that exclusions barring coverage for pollution unless the "discharge, dispersal, release or escape is sudden and accidental" apply unless the polluting event was immediate or "abrupt." The years long dumping of waste at the site therefore could not possibly be covered.

Immediately after the 1993 Dimmitt decision, Pepper's Steel and the other alleged polluters – all collectively "Movants" – conducted a secret "brainstorming" session to try to devise some way to make USF&G pay despite the ruling in Dimmitt that precluded coverage. The Movants decided to surprise USF&G by accepting the two year old oral offer that they knew USF&G thought was long dead. After the Movants faxed a one-page letter accepting the global settlement, they nevertheless continued to demand millions of dollars in attorneys' fees under § 627.428 allegedly incurred to litigate coverage prior to the 1993 settlement. USF&G therefore disputed the enforceability of the settlement and the possibility of any attorneys' fees under § 627.428. The Eleventh Circuit ultimately enforced

the settlement, rejected the Pepper's Steel claim under § 627.428 for fees incurred before the settlement, and certified the question regarding post-settlement fees to this Court.

Assuming jurisdiction exists to consider the scope of § 627.428, which USF&G questions below, the answer to the certified question should be "no." An insured does not have a right under § 627.428 to obtain fees incurred to litigate a disputed settlement agreement with its insurer. This result is required by the plain language and intent of § 627.428 that only allows fees incurred to litigate a coverage dispute under a policy of insurance, and does not grant fees for other litigation with an insurer such as a settlement dispute.[1]

STATEMENT OF THE CASE AND FACTS

I. FACTUAL AND PROCEDURAL HISTORY

A. General Litigation And Site Background

This case began in 1983 in the United States Federal District Court for the Southern District of Florida as a lawsuit by the federal government to clean up PCB and other contamination on thirty acres of marsh land in Medley, Florida, the

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[1] This brief also should be considered a response to the Pepper's Steel one page motion, May 30, 2002, Motion for Attorneys' Fees filed in this Court. That motion automatically fails to the extent this Court determines that § 627.428 allows no fee award to dispute a settlement agreement.

so-called "Pepper's Steel site." See e.g., (D.E. 1).[2] The site had been used from the late 1960s until the early 1980s for electric-transformer and battery cracking operations. For example, Pepper's Steel & Alloys, Inc. ("Pepper's Steel") purchased approximately 10,000 to 15,000 used transformers each year. Pepper's Steel broke each one open, removed salvageable metals, and dumped 30 to 40 gallons of PCB-contaminated oil directly onto the ground. See, e.g., (D.E. 1); (D.E. 1030); (D.E. 1126).

The United States argued in its complaint that numerous landowner, operator, and PCB-generating polluters like Pepper's Steel – collectively referred to as "Movants" during recent litigation – were jointly and severally liable under federal law to remediate the Pepper's Steel site. The site ultimately was remediated and the government ordered clean-up is now complete.

B. The Insurance Coverage Litigation

The Movants brought direct and third-party actions against United States Fidelity and Guaranty Company ("USF&G") and other insurers to shift the cost of the government action and clean up. See e.g. (D.E. 89). USF&G defended against

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[2] The record in this appeal was certified by the United States Court of Appeals for the Eleventh Circuit. Therefore, citations to the record follow the format used by that court, *i.e.* by referencing docket entry or "D.E." numbers made by the United States District Court for the Southern District of Florida throughout the course of the litigation.

the Movants' coverage claims throughout the 1980s and into the 1990s on many bases, including that the Movants could not establish a right to insurance coverage at all and that any coverage that otherwise might exist would be barred by exclusions for pollution unless "the discharge, dispersal, release or escape is sudden and accidental." See e.g., (D.E. 119).

C. The Disputed Settlement Between USF&G And Movants

During the years of complex litigation that followed regarding the Pepper's Steel site, well over 1000 pleadings were filed. USF&G incurred ever increasing expenses to defend itself from the spurious coverage claims. In November 1991, USF&G's counsel at the time made an oral offer to pay $2 million jointly to the Movants. In return, USF&G would receive a global release that would hold it harmless from the complex, ever-expanding, and costly litigation. However, USF&G understood that the offer was rejected, and the litigation continued for two more years. See (D.E. 1189) through (D.E. 1456).

On July 1, 1993, this Court issued a ruling in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., 636 So. 2d 700 (Fla. 1993), that removed any possible basis for Movants' coverage claims against USF&G. This Court held in Dimmitt that exclusions barring coverage for pollution unless "the discharge, dispersal, release or escape of pollutants is sudden and accidental" clearly apply

unless the polluting event was immediate or "abrupt." Because the pollution at the Pepper's Steel site had been caused by the regular, daily dumping of PCB contaminated oil and other waste over a period of decades, any theoretical coverage claim against USF&G was barred.

In a July 8, 1993, secret "brainstorming session," counsel to Pepper's Steel and the other Movants devised a plan to avoid Dimmitt by accepting without warning the two year old settlement offer that USF&G thought had been rejected. (D.E. 1490) (strategy letter by Movants' counsel) (Tab A). In October, 1993, the Movants faxed a letter to USF&G's newly assigned counsel in the case accepting the global settlement offer. (D.E. 1490) (Tab B).

USF&G and Movants then sharply disputed both the existence and the terms of the settlement. USF&G argued that no valid settlement existed because, among other reasons, any settlement would require a complete release and indemnification, terms that the Movants disputed were part of the settlement offer and refused to honor. (D.E. 1503); (D.E. 1537). Indeed, the Movants argued that the settlement did not release USF&G from millions of dollars in attorneys' fees under § 627.428, that the Movants allegedly had incurred from the start of the case in the 1980s through the date of the 1993 settlement. See (D.E. 1458) through (D.E. 1494).

D. The 1994 Federal District Court Order Enforcing the Settlement And Rejecting Movants' Fee Claims Under Fla. Stat. § 627.428

On February 15 and March 28, 1994, following written discovery between the parties, the federal district court conducted a bench trial regarding the disputed settlement. On June 15, 1994, the court entered an Order and later entered a September 14, 1994 judgment enforcing the settlement. (D.E. 1494) (attached as Tab C); (D.E.1512). The Order and judgment only considered and ruled upon the factual and legal status of the offer and acceptance, and said nothing about the terms or scope of any insurance coverage. Id. The district court rejected the Pepper's Steel demand for attorneys' fees incurred before and after the 1993 settlement when the court set forth the terms of the final settlement as follows:

> [Movants including Pepper's Steel] shall jointly recover from [USF&G] the [settlement] sum of two million dollars . . . with each party to bear its own costs and attorneys' fees . . . .
>
> * * *
>
> [A]ll claims and causes of actions [sic] that have been brought against USF&G in this litigation are hereby dismissed with prejudice, and USF&G is dismissed as a party in case numbers 85-0571-Civ-Paine and 86-1531-Civ-Paine.
>
> [Movants including Pepper's Steel], jointly and severally, shall hold USF&G harmless with respect to any and all claims or causes of action that have been or may in the future be asserted against USF&G relating in any way to the Pepper's Steel site or to case numbers 85-0571-Civ-Paine and 86-1531-Civ-Paine.

(D.E. 1522) (October 27, 1994 Amended Final Judgment Enforcing Settlement) (Tab D).

E. The 1996 Eleventh Circuit Order Enforcing The Settlement And Rejecting Certain Fee Claims Under Fla. Stat. § 627. 428

USF&G appealed the district court order enforcing the settlement agreement and the Movants, including Pepper's Steel, cross appealed the denial of fee and interest claims. (D.E. 1524); (D.E. 1525). The United States Court of Appeals for the Eleventh Circuit affirmed that a valid $2 million settlement agreement had been reached. May 31, 1996 Memorandum Ruling, United States v. Pepper's Steel & Alloys Inc., No. 94-5187 (11th Cir.) (hereinafter "Eleventh Circuit Ruling I") (D.E. 1553).

However, the Eleventh Circuit rejected Movants' cross-appeal demanding millions of dollars more in attorneys' fees incurred prior to the acceptance of the October 1993 settlement under § 627.428. The Eleventh Circuit held that the release plainly barred claims for such fees. See Eleventh Circuit Ruling I at 18. The Eleventh Circuit remanded the consideration of claims for fees incurred after October 1993 to litigate the settlement dispute, explaining that the question "is best addressed by the district court." Id.

F. The 2000 Remand Proceedings And Second Federal District Court Rejection Of All Fee Claims Under Fla. Stat. § 627.428

On remand to the federal district court, USF&G promptly paid the $2 million in settlement proceeds plus all post-judgment interest into the district court registry. The parties later settled all other disputes in this nearly twenty-year old case, except for one. Pepper's Steel continued to demand attorneys' fees that it incurred to litigate the terms and enforceability of the settlement after October, 1993, based on Fla. Stat. § 627.428.[3]

1. The Magistrate Judge's Hearing And Report Rejecting All Fees Under Fla. Stat. § 627.428

On June 27, 2000, following a district court referral, a federal magistrate judge conducted an evidentiary hearing regarding the fee dispute. (D.E. 1756). On July 19, 2000, the magistrate judge issued a detailed ruling rejecting all fee claims. (D.E. 1755) (Report and Recommendation to District Judge, hereinafter the "Report") (Tab E). The magistrate judge ruled in favor of USF&G on all

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[3] This procedural history does not discuss an additional appeal to the Eleventh Circuit in 1998 regarding prejudgment interest, because that matter ultimately was resolved by agreement.

substantive issues reached in the Report. The Report stated "that the clear, unambiguous language of the District Court's Final Judgment [in 1994] forecloses a fee award. That Judgment . . . released [USF&G] from any and all claims, including future claims, that relate in any way to these consolidated cases. Movants request for attorneys' fees is clearly a 'claim' that relates to this litigation." See Report at 15-16 (emphasis in original).

The Report also concluded that the American Rule independently bars any fee award to litigate the disputed oral settlement. Id. at 14, 17. The Report rejected an argument by Pepper's Steel that Fla. Stat. § 627.428 could trump the American Rule in this case. Id. at 17. The Report instead held that the statute only applies to the litigation of coverage disputes under insurance contracts and not to settlements. "Although an insured is entitled to fees for litigating a coverage issue, once that portion of the litigation is completed, the insured should then be in the same position – without a fee entitlement – as any other litigant who would seek to enforce a settlement agreement." Id.

2. The Second Federal District Court Order Rejecting All Fees Under § 627.428 Fla. Stat.

On February 14, 2001, the federal district court adopted the magistrate's recommendations and issued an order reiterating the earlier 1994 decision rejecting all fee claims. (D.E. 1773) (Order Adopting Report and Recommendation,

Denying Motion for Attorneys' Fees, and Closing Case, hereinafter "Order") (Tab F). The district court agreed with the magistrate that the "settlement agreement clearly released USF&G from any and all claims in this case" including for attorneys' fees. Order at 3. The district court also rejected Fla. Stat. § 627.428 as a basis for fees because the statute only allows recovery for costs incurred to litigate coverage, not to dispute a settlement. Id. at 5.

G. The 2002 Eleventh Circuit Certification To This Court

Pepper's Steel appealed the denial of its fee claims to the Eleventh Circuit for a second time. United States v. Pepper's Steel & Alloys Inc., No. 01-11249-A (11th Cir.). USF&G cross-appealed, arguing that federal court Local Rule 7.3 provided an alternative basis to affirm the district court order. Because the Pepper's Steel fee petition was first filed in 1996, it violated the strict time limit under the rule that requires the filing of such claims no later than 30 days after the original 1994 judgment.

On April 25, 2002, the Eleventh Circuit certified the following question to this Court: "Under Section 627.248 of the Florida Statutes, is an insured entitled to an award of attorneys' fees incurred in enforcing a settlement agreement against an insurer." United States v. Pepper's Steel & Alloys, Inc., 289 F.3d 741, 744 (11th Cir. 2002) ("Eleventh Circuit Ruling II"). Although "the district court concluded

that section 627.428 did not permit Pepper's Steel to recover attorneys' fees," the Eleventh Circuit could locate no controlling authority on the issue and concluded that it was "difficult to reconcile the conflicting language" in two Florida intermediate appellate court cases. Id. at 743 (citing Travelers Indem. Co. of Am. v. Morris, 390 So. 2d 464, 465 (Fla. 3d DCA 1980) and Bankers Sec. Ins. Co. v. Brady, 765 So. 2d 870, 873 (Fla. 5th DCA 2000)).

H. The USF&G Motion For Reconsideration In The Eleventh Circuit Disputing The Propriety of Certification

On June 6, 2002, USF&G filed a motion for reconsideration in the Eleventh Circuit, which is fully briefed and still pending. USF&G argued that the Eleventh Circuit's certification must be withdrawn because an affirmative answer to the certified question would not be "determinative of this cause" as required by Florida certification law. See § 25.031, Fla. Stat.; Fla. R. App. P. 9.150.

USF&G argued that the Eleventh Circuit never addressed an independent reason that the federal district court provided for its February 14, 2001, order rejecting all fee claims in this case. The federal district court held that Pepper's Steel released all potential fee claims against USF&G -- whether or not § 627.428 otherwise might be interpreted as creating a right to fees. The certified question to this Court regarding the scope of that statute therefore is moot in USF&G's view because the Eleventh Circuit has not reversed the federal district court ruling that

Pepper's Steel released all such claims under § 627.428. The Eleventh Circuit also did not consider its own binding precedent establishing that the fee petition by Pepper's Steel is time barred under Local Rule 7.3 -- regardless of whether or not § 627.428 theoretically would have allowed a claim for fees if made timely. See Pesin v. Rodriguez, 244 F.3d 1250, 1253 (11th Cir. 2001) (per curiam).

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eleventh Circuit certified the following question to this Court. "Under Section 627.428 of the Florida Statutes, is an insured entitled to an award of attorneys' fees incurred in enforcing a settlement against an insurer?" As an initial matter, this Court has no jurisdiction to consider the question. An affirmative answer would not be "determinative of the cause," and therefore the question is incapable of consideration by this Court according to Florida law. The Eleventh Circuit has not yet addressed alternative bases for dismissing all such fee claims. The federal district court held that the settlement in favor of USF&G clearly bars any hypothetical fee claim under § 627.428, and this ruling has never been reversed. Moreover, the Eleventh Circuit has not yet addressed its own binding precedent providing that the fee claims must be barred because Pepper's Steel missed a strict 30 day filing deadline by several years.

Assuming the certified question is reached, the answer should be "no." An insured does not have a right under § 627.428 to obtain fees incurred to litigate a disputed settlement agreement with its insurer. This result is required by the plain language of the statute, this Court's prior decisions applying the statute narrowly in favor of the general American Rule against fee awards, and public policy against judicial intervention in the legislative process.

The plain language of § 627.428 only allows an insured to recover attorney fees incurred to obtain a judgment against an insurance company "under a policy or contract executed by the insurer" in Florida. This Court has explained that § 627.428 was enacted by the Florida Legislature in derogation of the common law American Rule against any award of attorneys' fees, and thus must be interpreted and applied narrowly. Accordingly, this Court has allowed fees only where the exact requirements of the statute or their functional equivalent are met.

The fees sought by Pepper's Steel did not arise from litigation over the meaning or terms of any insurance policy executed in Florida as required by § 627.428, nor anything that remotely could be considered the functional equivalent of such a coverage dispute. Instead, the fees that Pepper's Steel seeks were incurred to litigate the enforceability and terms of a sharply disputed $2 million oral settlement.

Furthermore, the disputed settlement was not executed in Florida, it was accepted through a one page faxed letter to Washington, DC. During the entire process of litigating the enforceability and scope of the oral settlement, the dispute centered on whether USF&G had made an offer that remained open and precisely what settlement terms were part of any final agreement. The federal district court and Eleventh Circuit were repeatedly required to intervene to identify the settlement terms and force Pepper's Steel to honor the global release that it had promised. The meaning and applicability of USF&G insurance policy terms was not at issue. Thus, the present fee claims do not arise under Florida insurance policy executed in Florida as required by § 627.428.

This conclusion is further confirmed by the fact, conceded by Pepper's Steel, that it released all claims under § 627.428 for the fees incurred prior to the 1993 settlement, *i.e.*, all fees that even arguably might have been incurred to litigate coverage under USF&G policies. Therefore, the post-1993 fees that Pepper's Steel now seeks necessarily had nothing to do with any policy dispute and instead were incurred solely to litigate the oral settlement. In addition, this Court's 1993 decision in Dimmitt eliminated any possible insurance coverage claim, meaning that any fees incurred later in 1993 to dispute the settlement could not possibly have been to establish coverage. For all of these reasons, the oral settlement dispute

neither complies with the requirements of § 627.428 nor can it be considered the functional equivalent of a coverage dispute like that contemplated by the statute.

ARGUMENT

I. NO JURISDICTION EXISTS IN THIS COURT TO CONSIDER THE CERTIFIED QUESTION, BECAUSE A RESOLUTION IN THE AFFIRMATIVE WOULD NOT BE "DETERMINATIVE OF THE CAUSE"

The Florida constitution and implementing statutes only grant the Florida Supreme Court jurisdiction to review a certified issue where the answer will be "determinative of the cause." See § 25.031, Fla. Stat.; Fla. R. App. P. 9.150. Any question that is not "determinative of the cause" is an "academic discussion" that cannot be answered. Greene v. Massey, 384 So. 2d 24, 28 (Fla. 1980).

Here, an independent portion of the federal district court ruling barring any hypothetical fee claim was never reversed, much less addressed, by the Eleventh Circuit. In addition, a binding Eleventh Circuit case precluding any fee claims as untimely has not yet been addressed or applied by the Eleventh Circuit. Therefore, an affirmative answer to the certified question would be irrelevant and not determinative of the cause when returned to the Eleventh Circuit. This renders any question regarding the scope of § 627.428 academic and incapable of consideration in this Court.

Specifically, the federal district court concluded that Pepper's Steel released any and all fee claims under § 627.428, regardless of whether the statute could be interpreted to create a right to fees incurred to dispute a settlement agreement. The

"clear, unambiguous language . . . . released . . . any and all claims, including future claims, that relate in any way to these consolidated cases" including any "request for attorneys' fees" incurred to dispute the settlement. See Report at 15-16 (emphasis in original); Order at 3 ("the settlement agreement simply cannot be read to allow attorneys' fees for its enforcement . . . ." under § 627.428).

Moreover, binding precedent in the Eleventh Circuit articulated in Pesin v. Rodriguez, 244 F.3d 1250, 1253 (11th Cir. 2001) (per curiam), and not addressed in Eleventh Circuit Ruling II, confirms that the fee petition was untimely. The version of federal court Local Rule 7.3 in effect in 1994 obligated Pepper's Steel to file a properly verified and documented fee petition within 30 days of the 1994 judgment that supposedly entitled it to fees, regardless of the prospect of appellate proceedings. Pepper's Steel waited until 1996 to file its first defective petition, some two years after the judgment allegedly entitling it to fees. (D.E 1558).

In Pesin, the plaintiff prevailed but the federal district court rejected all fee claims. The Eleventh Circuit held that despite such a rejection any fee petition still must be filed within 30 days of the judgment, on the chance that the appellate court might reverse the entitlement decision. 244 F.3d at 1253. The fee claims in Pesin were barred because no petition was filed within 30 days of the judgment even though it denied all the claims. Id. This binding precedent establishes that the

Pepper's Steel fee petition must be time barred when this case returns to the Eleventh Circuit – even were the certified question answered in the affirmative.

Accordingly, USF&G respectfully submits that this Court should decline to answer the certified question as moot, and return this case to the Eleventh Circuit, based on the federal district court's ruling that any theoretical fee claims under § 627.428 were released and based on the Pesin decision confirming that they were time barred.

II. FLA. STAT. § 627.428 ONLY AUTHORIZES FEES INCURRED TO LITIGATE AN EXECUTED FLORIDA INSURANCE POLICY, NOT TO LITIGATE A DISPUTED SETTLEMENT

A. The Plain Terms of § 627.428 Must Be Applied As Written, And Any Ambiguity Identified by This Court Strictly Construed Against a Fee Award.

1. Florida Favors The American Rule Against Fees.

Florida does not normally allow the recovery of attorneys' fees in contract disputes. Instead, Florida follows the American Rule barring any award of such costs, including to dispute settlement agreements. State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993) (citations omitted); Don L. Tullis & Assocs., Inc. v. Benge, 473 So. 2d 1384, 1386 (Fla. 1st DCA 1985) (settlements governed by standard law of contracts); Woodco, Inc. v. B&H Realty Corp., 501 So. 2d 1330, 1332 (Fla. 3d DCA 1987) (per curiam) (no attorney fee award available to enforce settlements);

Report at 15-16 (same conclusion by federal magistrate in this case); Order at 3-5 (same conclusion by federal district court judge in this case). Only a

specific statutory command by the Florida Legislature can overcome the American Rule and allow a fee award. Id.

The Eleventh Circuit has asked this Court to determine whether or not Fla. Stat. § 627.428 provides such authority to award an insured "attorneys' fees incurred in enforcing a settlement agreement against an insurer." Eleventh Circuit Ruling II. In pertinent part, § 627.428 provides that "upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any [insured] under a policy or contract executed by the insurer" the court "shall adjudge or decree against the insurer and in favor of the insured . . . a reasonable sum as fees or compensation . . . ." This statute only applies to Florida insurance policies, and not any other contract that an insurer might enter. See § 627.401, Fla. Stat. ("No . . . part of this chapter [containing § 627.428] applies to" any insurance contracts "not issued for delivery in this state nor delivered in this state . . . ."); see also § 627.402, Fla. Stat. (Florida insurance code provisions like § 627.428 control rights and obligations under Florida insurance policies, defined as "a written contract of insurance . . . .").

2. Florida Courts Defer To The Legislature By Applying The Plain Terms Of Unambiguous Statutes Like § 627.428.

This Court exercises extreme deference to the Florida Legislature by applying statutes as written. When statutory language "is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." McLaughlin v. Florida, 721 So. 2d 1170, 1172 (Fla. 1998) (citing Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)) (other citations omitted). This judicial deference arises directly from the Florida constitution. "[T]he courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." Id.

As discussed further below, the plain terms of § 627.428 only allow the recovery of fees incurred to litigate coverage disputes under an insurance policy, not to dispute the enforceability or scope of a settlement that does not involve policy terms or coverage.

3. If This Court Identifies Ambiguity With § 627.428, The Statute Must Be Strictly Construed Against Fees.

Assuming for sake of argument that this Court identifies an ambiguity in § 627.428, this Court has created a special rule of statutory construction. The law must be "strictly construed" when resolving any doubts regarding its scope and applicability, because it was enacted in "derogation of the common law" American

Rule against attorney fee awards. Roberts v. Carter, 350 So. 2d 78, 78-79 (Fla. 1977) (citations omitted); Ins. Co. of N. Am. v. Lexow, 937 F.2d 569, 573 (11th Cir. 1991) (citing Roberts for this proposition).

This Court has "consistently held that the purpose" of § 627.428 is "is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts" – not any contract that an insurance company might dispute. Ins. Co. of N. Am. V. Lexow, 602 So. 2d 528, 531 (Fla. 1992) (allowing fees incurred to litigate meaning of subrogation term in policy of insurance) (emphasis added); Fewox v. McMerit Constr. Co., 556 So. 2d 419, 423 (Fla. 2d DCA 1990) *approved sub nom.*, Ins. Co. of N. Am. v. Acousti Eng'g Co., 579 So. 2d 77 (Fla. 1991) (§ 627.428 designed to award fees when "insurers contest coverage" and lose that contest) (emphasis added). This description of legislative intent plainly arises from the statutory limitation in § 627.428 that fees may only be recovered for disputes that arise "under" the policy. See Miele v. Prudential-Bache Sec., Inc., 656 So. 2d 470, 471 (Fla. 1995) (per curiam) (when at issue, "legislative intent must be determined primarily from the language of the statute").

Therefore, even when the application of § 627.428 has been unclear, this Court has only narrowly allowed fee awards when the "functional equivalent" of the

statutory requirements have been satisfied. See e.g., Wollard v. Lloyd's and Cos. of Lloyd's, 439 So. 2d 217, 218 (Fla. 1983) (sudden payment of claim on "eve of trial" constituted a "confession of judgment" that would serve as the functional equivalent of the "judgment" requirement in § 627.428); Ivey v. Allstate Ins. Co., 774 So. 2d 679, 684-685 (Fla. 2000) (same rule).

Florida courts following this Court's directions have declined to expand or rewrite the statute to award fees for litigation like the present settlement dispute that related in some way to insurance, but did not actually involve the disputed terms of an insurance policy. See, e.g., Travelers Indem. Co. of Am. v. Morris, 390 So. 2d 464, 465 (Fla. 3d DCA 1980) (fees impossible under § 627.428 for litigation to "secur[e] payment of" previously litigated and validated insurance "benefits," even though the suit obviously related to a policy); United Servs. Auto. Ass'n v. Kiibler, 364 So. 2d 57, 58 (Fla. 3d DCA 1978) ("claimant is only entitled . . . to a reasonable fee for litigating the issue of insurance coverage" under § 627.428 and not other related issues such as "the tortfeasors's liability"); Sheridan v. Greenberg, 391 So. 2d 234, 236-237 (Fla. 3d DCA 1980) (action for agent's failure to procure insurance contract related to a policy, but was not a suit under a policy subject to § 627.428); H&S Corp. v. United States Fid. & Guar. Co., 667 So. 2d 393 (Fla. 1st DCA 1995) (no fees for disputed contract that related to rights under insurance bond).

In sum, attorneys' fees may be recovered under § 627.428 only when the strict requirements of the statute have been satisfied, or, in the case of ambiguity, the "functional equivalent" of the requirements have been met. As discussed further below, neither the plain terms of the statute nor their functional equivalent can be satisfied regarding the litigation of a sharply disputed oral settlement agreement.

B. The Plain Terms Of § 627.428 Do Not Allow Fees Incurred To Dispute An Oral Settlement With An Insurer.

The plain terms of § 627.428 have nothing to do with the enforcement of a disputed oral settlement agreement. Rather, the statute only can be triggered and potentially allow fees "[u]pon the rendition of a judgment . . . against an insurer and in favor of any named or omnibus insured . . . under a policy or contract executed by the insurer . . . ." § 627.428, Fla. Stat. None of these clear statutory requirements can be satisfied here.

1. No Policy Of Insurance Was Ever At Issue During The Settlement Dispute To Trigger § 627.428.

Pepper's Steel tries to satisfy the § 627.428 requirement that litigation arise under the terms of an insurance policy by repeatedly claiming without any support that the settlement dispute did so. For example, Pepper's Steel claims that USF&G's settlement was a "promise to pay a claim under its insurance policies" and therefore "resolving the dispute over whether there was a settlement ultimately

determined whether the claim under the policies was paid." May 31, 2002, Amended Initial Brief of Pepper's Steel and Alloys, Inc. and Norton Bloom on Certified Question of Law From the Eleventh Circuit Court of Appeals at 19 (hereinafter "Pepper's Brief"). Pepper's Steel also asserts that "the substance of Pepper's Steel's motion to enforce [the] settlement agreement was to require USF&G to meet its obligations under its insurance policies . . . ." Id. at 20.

However, no insurance policy was ever at issue in regarding the disputed settlement or the fee claims that followed. None of the fees sought by Pepper's Steel were incurred to challenge the terms or applicability of an insurance contract. Rather, Pepper's Steel litigated the existence and terms of a settlement, making any hypothetical dispute regarding the scope of coverage under any USF&G insurance contract entirely irrelevant. Therefore, none of the fees were incurred to litigate coverage under an insurance policy as required by § 627.428. See Bassette v. Fire Ins. Co., 803 So. 2d 744, 747 (Fla. 2d DCA 2001) (§ 627.428 "fees only for that period of time during which coverage was at issue") (citing Moore v. Allstate Ins. Co., 570 So. 2d 291 (Fla. 1990)); Sheridan, 391 So. 2d at 236-237 (an action for an agent's failure to procure an insurance contract is not a suit under a policy for purposes of § 627.428, even though it is a suit related to insurance); H&S Corp., 667 So. 2d at 400 (no fees available under § 627.428 to dispute a contract even though it directly related to rights under an insurance bond).

The extensive 1994 federal district court order and judgment enforcing the settlement did not include a single finding or conclusion regarding the terms of coverage under any USF&G insurance policy. See (D.E. 1494) *passim*; (D.E. 1512). The terms and meaning of USF&G insurance coverage had nothing to do with whether there was a valid acceptance of the disputed offer and the identification of the disputed settlement terms. Id. Indeed, buried deep in the Pepper's Steel brief, is an admission that that the 1996 ruling by the Eleventh Circuit rejected fee claims under § 627.428 incurred prior to 1993, *i.e.*, all fees that theoretically might be related to an insurance coverage dispute. Pepper's Brief at 18; see also Eleventh Circuit Ruling I at 17-18 (confirming that "all claims" for § 627.428 fees incurred during pre-settlement litigation were released).

In sum, none of the fees now at issue arose from a dispute under an insurance contract as required by § 627.428, and instead arose solely from a settlement dispute. The certified question therefore should be answered "no."

2. The Settlement Is Not An Executed Florida Contract.

Only Florida insurance policies that are "executed by the insurer" can trigger § 627.428 according to its own terms. Another provision of the same insurance code explains: "No . . . part of this chapter [containing § 627.428] applies to" any insurance contracts "not issued for delivery in this state nor delivered in this state . . ." § 627.401, Fla. Stat. This requirement of an executed Florida insurance

agreement cannot be met.

Pepper's Steel does not even attempt to satisfy this requirement because Pepper's Steel cannot do so. Pepper's Steel seeks attorneys' fees to enforce a disputed settlement that was accepted when its counsel signed and faxed a letter to counsel for USF&G. See Tab B. The letter is not an insurance contract and was never "executed by the insurer" in Florida or elsewhere. In fact, USF&G never put anything in writing or signed anything. To the contrary, USF&G made an oral offer that Pepper's later accepted without any executed settlement document. This offer and acceptance was enforced under terms that were first documented by the federal district court in 1994 following an evidentiary hearing to identify the unwritten settlement provisions. (D.E. 1494); (D.E. 1522); cf. Skinner v. Haugseth, 426 So. 2d 1127, 1131 (Fla. 2d DCA 1983) (agreement may be enforced even if not executed by all parties).

Fla. Stat. § 627.428 therefore cannot be satisfied because the fees incurred by Pepper's Steel did not arise to dispute an insurance contract executed in Florida. The dispute regarded an oral settlement that was accepted in Washington, DC and was never executed by anyone. The certified question should be answered "no" for this additional, independent reason.

C. An Oral Settlement Dispute Is Not The Functional Equivalent Of The Coverage Dispute Required By § 627.428.

Assuming for sake of discussion that § 627.428 is deemed ambiguous in the present circumstances, the statute must be "strictly construed." Roberts, 350 So. 2d at 78-79. No reasonable construction of the statute, much less a narrow one, allows its extension beyond executed insurance policies to any agreement that an insurer might enter. As discussed above, the language of § 627.428 has the appropriate intent and effect of restricting fee awards to coverage litigation under insurance policies such as general liability and homeowner's liability coverage or other insurance like fidelity bonds and guaranty contracts. See e.g., § 627.402, Fla. Stat. (Florida insurance code defining "'[p]olicy' [as] a written contract of insurance . . . ."); § 627.406, Fla. Stat. (explaining "[p]ower to contract; purchase of insurance" as a right to "contract for insurance; § 624.606, Fla. Stat. ("'[s]urety insurance' includes . . . [a] contract bond").

The Florida legislature did not create a special and universal disability under § 627.428 for insurance carriers entering any agreement. The federal magistrate in this case aptly summarized the statutory language and design: "[A]n insured is entitled to fees for litigating a coverage issue, [but] once that portion of the litigation is completed, the insured should then be in the same position – without a fee entitlement – as any other litigant who would seek to enforce a settlement agreement." Report at 17. The fact that the settlement dispute might happen to relate to terminated insurance coverage litigation does not change this conclusion.

Many Florida decisions have applied this distinction. For example, this Court refused to allow fees under § 627.428 when an insured successfully sued to secure policy payments out of funds that the insurance company had deposited with the state. Even though the money was deposited by a former insurance company in relation to the insurance contract, and due to the policyholder based on that contract, this Court held that § 627.428 "is applicable only to actions brought on an insurance policy" and not suits against such a fund. Bohlinger v. Higginbotham, 70 So. 2d 911, 916 (Fla. 1954).

A Florida appellate decision similarly rejected a fee award for litigation after a coverage dispute to "secur[e] payment of" previously litigated and validated insurance "benefits" – even though the suit obviously related to an insurance policy. Travelers Indem. Co. of Am. v. Morris, 390 So. 2d 464, 465 (Fla. 3d DCA 1980). As the federal district court explained in this case when it identified the Morris decision as controlling, "Florida courts have not gone so far as to read the statute to cover Pepper's situation," but rather have held directly "[t]o the contrary." Order at 4.

Another Florida intermediate appellate court rejected the possibility of a fee award under § 627.428, even though the contract that was litigated had been entered by an insurer and breached in direct relation to an insurance policy dispute. H&S Corp. v. United States Fid. & Guar. Co., 667 So. 2d 393, 400 (Fla. 1st DCA 1995); see

also Wilder v. Wright, 278 So. 2d 1, 3 (Fla. 1973) (this Court held it "clear" that "§ 627.428 . . . was intended to govern the relationship between the contracting parties to the insurance policy"); United Services Auto. Ass'n v. Kiibler, 364 So. 2d 57, 58 (Fla. 3d DCA 1978) ("claimant is only entitled . . . to a reasonable fee for litigating the issue of insurance coverage" and not other related issues such as "the tortfeasors's liability").

Pepper's Steel relies upon three key Florida cases, and other decisions that copy their words, to try to broadly rewrite § 627.428 to allow fees to litigate a settlement dispute. However, every one of these cases awarded fees where the litigation *directly* involved and interpreted the disputed terms of an insurance policy, and thus might serve as the functional equivalent of an insurance coverage dispute "under" a policy as required by § 627.428. See Lexow, 602 So. 2d at 531 (holding that right to fees existed because dispute over "subrogation" clause arose "under policy"); Bankers Sec. Ins. Co. v. Brady, 765 So. 2d 870, 873 (Fla. 5th DCA 2000) (awarding fees where insurer promised to pay claim under policy, paid a portion of the claim, and then refused to pay remainder based in part on a misreading of an "arbitration" clause under the policy); Wollard, 439 So. 2d at 218 (Fla. 1983) (awarding fees incurred to litigate coverage where insurer made "confession of judgment" by agreeing to pay claim on "eve of trial," and parties expressly carved fee claims out of release).

In Lexow, the Florida Supreme Court held that § 627.428 only provides "successful insureds . . . their attorney's fees when they . . . sue to enforce their insurance contracts." 602 So. 2d at 531. The insured in Lexow successfully litigated its right to keep a payment made by an insurer under a policy, despite a subrogation provision in the insurance contract. Id. The insured recovered its coverage litigation fees, but only because the insurer's "right to claim subrogation [at all arose] solely by virtue of having paid a claim under the policy [making] any dispute . . . concerning subrogation in this case . . . under the policy." Id. (emphasis added).

Here, the parties disputed the enforceability and scope of a settlement. The dispute did not invoke the application of any term within an insurance contract. This is entirely unlike Lexow, which involved a claim payment and a "subrogation" provision "under the policy." 602 So. 2d at 531. As the federal district court held when it rejected the applicability of § 627.428 in this case, Lexow "did not address" the enforcement of a settlement but rather directly involved a dispute regarding the applicability of insurance coverage terms. Order at 4.

In Bankers, an insurance company confessed that coverage existed under a homeowner's insurance policy, agreed that the covered loss was $65,000, paid a significant portion of this confessed amount, and then refused to pay the remainder based in part on an incorrect interpretation of the policy's "appraisal provisions."

765 So. 2d at 873. The intermediate appellate court affirmed the fee award because the insurer already had paid the policyholder "$55,000 (plus an amount close to $8,000.00), and would have paid an additional [amount] for a total of approximately $65,000," yet the policyholder "was forced to file suit against [the insurer] for breach of its agreement to pay for his loss" as required by the policy. Id. at 872-873.

Here, USF&G always disputed and never confessed coverage, and all claims regarding coverage were released without any admission of liability by USF&G. Thus, quite unlike the policyholder in Bankers, Pepper's Steel has never established any relevant insurance contract or any payment under such a contract for purposes of § 627.428. Moreover, Pepper's Steel has never demonstrated that USF&G breached or misapplied any term of an insurance contract, such as the "appraisal" provision in Bankers or the "subrogation" provision in Lexow. The Bankers case also notably did not discuss Morris, Woodco, and similar Florida authority that the federal district court correctly applied to the present circumstances. Bankers did not consider these Florida Supreme Court and intermediate appellate cases only because the dispute in Bankers arose directly "under an insurance policy." For all of these reasons the Bankers case is distinguishable from Morris, which held that no fees can be awarded for additional litigation to secure payment after a coverage dispute is resolved.

In Wollard, the fees at issue all arose during coverage litigation under the terms of a Florida insurance policy. The insurer misread the policy and erroneously denied coverage, defended that decision during litigation, realized its error, and subsequently agreed to pay the claim "on the eve of trial." 439 So. 2d at 218. The parties in Wollard expressly "stipulated" that the fees incurred to litigate insurance coverage under § 627.428 were not released by the settlement and could be litigated later. Id. The parties only disputed whether or not § 627.428 could allow fees where the court had not been given an opportunity to enter a formal "judgment." Wollard simply held that the fees incurred to establish coverage were recoverable without requiring the insured to reject the payment and "continue litigation" to obtain a formal "judgment." Id. The insurer's "confession of judgment" served as the functional equivalent of a "judgment" under the statute. Id.

Here, Pepper's Steel admits that its fees to litigate coverage from the start of this litigation in the 1980s through the 1993 settlement were extinguished by the settlement. See Pepper's Brief at 18. The Eleventh Circuit confirmed this as the law of this case in 1996. Eleventh Circuit Ruling I at 17-18. Therefore, all pre-settlement attorneys' fees that arguably might have been available under the rationale of Wollard were released. The Wollard decision never analyzed the

possibility of recovering *post*-settlement fees to litigate the enforceability of settlement because the settlement in Wollard never was disputed. See Report at 9; Order at 2.[4]

As discussed above, many Florida cases have reached the question of whether § 627.428 allows recovery of fees incurred to litigate disputes that arise *after* coverage issues have been resolved or relate in some way to insurance. Those situations, like the present dispute are not the functional equivalent of coverage litigation under § 627.428 and thus fees cannot be recovered. See e.g., Bohlinger, 705 So. 2d at 916 (no fees to litigate entitlement to state fund even though availability based on insurance contract); Morris, 390 So. 2d at 465 (fees impossible under § 627.428 for litigation to "secur[e] payment of" previously

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[4] All of the other cases cited by Pepper's Steel that allowed the recovery of fees involved the interpretation of an insurance contract and its terms. See Fewox, 556 So. 2d at 425 (fees awarded because payment of arbitrator's award was "due and owing" under the policy and was a "confession of judgment" that was "equivalent" to a "judgment under § 627.428); Leaf v. State Farm Mut. Auto. Ins. Co., 544 So. 2d 1049, 1050 (Fla. 2d DCA 1989). (fees for arbitration of coverage due under terms of policy); Bassette, 803 So. 2d at 745-46 (fees for declaratory action regarding scope of underinsured motorist coverage); Ivey, 774 So. 2d at 684 (fees for failure to pay claim due to policy misapplication by insurer when it later confessed error). These cases therefore have nothing to do with the present question regarding fees to litigate a settlement dispute, for the same reason as Wollard, Lexow, an Bankers.

litigated and validated insurance "benefits" – even though the suit related to a policy); Kiibler, 364 So. 2d at 58 ("claimant is only entitled . . . to a reasonable fee for litigating the issue of insurance coverage and not other related issues such as "the tortfeasors's liability"); Sheridan, 391 So. 2d at 236-237 (action for agent's failure to procure insurance contract not a suit under policy and thus not subject to § 627.428); H&S Corp., 667 So. 2d at 400 (no fees for disputed contract, even though it related to rights under insurance bond). All of these decisions are directly on point with the present case, which involves litigation of a settlement agreement that is not itself an insurance contact and that did not involve the terms of any insurance policy.

Because the facts and law fail to support any fee award under § 627.428, Pepper's Steel ultimately resorts to questioning USF&G's motives in making the 1991 settlement offer, and later disputing both the enforceability of the settlement and the availability of attorneys' fees. See Pepper's Brief at 9, 19. Pepper's Steel argues that USF&G always intended to renege in honoring the offer and then claim that any subsequent litigation involved "obligations under a settlement rather than 'under a policy or contract'" as required by § 627.428. Therefore, Pepper's Steel apparently believes that USF&G should be punished by requiring USF&G to pay fees regardless of the actual language and intent of § 627.428.

In reality, USF&G did not have and could not have had any intent to leave the 1991 offer open given the 1993 Dimmitt decision, which terminated any theoretical coverage claim months before the offer was accepted. Moreover, neither USF&G, nor any other insurer in a future case, could force an insured to enter a settlement without written terms that would result in a settlement dispute in lieu of coverage litigation. Any insured who is party to legitimate coverage litigation always will have the option to negotiate in good faith to reach a clear settlement that can be summarily enforced.

Indeed, as Wollard demonstrates and Ivey specifically says, an insured always may decline to release § 627.428 fees, particularly when the insurer realizes it made a mistake and must confess judgment to avoid bad faith or other penalties. Wollard, 439 So. 2d at 218 (when insurance company confessed that it owed money under the policy, the insured refused to release claims under § 627.428 for fees incurred during the coverage litigation); Ivey, 774 So. 2d at 685 (fees allowed because the insurer "voluntarily paid [the] claim only after the [coverage] lawsuit was filed and without any type of settlement agreement which would preclude" § 627.428 fee claims). Here, Pepper's Steel instead elected to take the $2 million payment in return for a release of "all claims," including those under § 627.428 for fees prior to 1993, the only fees that theoretically might have been incurred to dispute coverage.

Pepper's Steel also chose not to negotiate a clear written settlement that would have defined the rights and obligations of the parties and allowed for quick enforcement. Instead, Pepper's Steel hoped to avoid the Dimmitt decision by quickly "capitaliz[ing] upon" a two-year "old settlement offer" that USF&G thought had been rejected and included no written terms. See (Tab A). Had Pepper's Steel instead sought to negotiate a written agreement in good faith, Pepper's Steel knew that "the offer would be withdrawn" by USF&G immediately because "the exposure is not worth the offer" in light of Dimmit. Id. After the acceptance, when Pepper's Steel declined to release the millions of dollars in fees it allegedly incurred before 1993, USF&G had every reason to question the settlement's validity and little choice but to litigate to the Eleventh Circuit and win an order barring the pre-1993 fee claims.

An oral settlement dispute therefore is not the circumstance that the language or intent of § 627.428 contemplates. The "purpose" of § 627.428 is nothing more than to "reimburse successful insureds for their attorney's fees when they are compelled to defend or to sue to enforce their insurance contracts," not the fees incurred to litigation a settlement offer that was unintentionally left open. Lexow, 602 So. 2d at 531 (allowing fees incurred to litigate meaning of subrogation clause under policy of insurance). The Pepper's Steel brainstorming session led to a partially successful litigation strategy to obtain settlement proceeds, but was not

coverage litigation that results in fees under § 627.428. Fewox, 556 So. 2d at 424 (statute designed to award fees only when "insurers contest coverage" and lose that dispute).[5]

CONCLUSION

USF&G respectfully requests that this Court answer the certified question "no," assuming jurisdiction exists to resolve the matter. Pepper's Steel does not have a right under Fla. Stat. § 627.428 to recover fees incurred to litigate a

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[5] Pepper's Steel also asks this Court to write a new rule in Florida awarding fees whenever an insurer is sued because courts in other states "liberally construe[]" their own fee statutes and grant fees in any "declaratory judgment action." Pepper's Brief at 22, n12, 23. This argument is a tacit admission that Fla. Stat. § 627.428 allows no fees to litigate a settlement dispute. Moreover, this Court has never condoned such judicial activism. McLaughlin, 721 So. 2d at 1172 (Florida statutes given "plain and obvious meaning," and judicial extension of a statute would be an "abrogation of legislative power") (citations omitted). Even when statutory ambiguity creates a need to consider legislative intent, it "must be determined primarily from the language of the statute," not from irrelevant laws in other states. Miele, 656 So. 2d at 471. Finally, this case involved a breach of contract action over a settlement, not a "declaratory judgment action" regarding insurance coverage. The citations by Pepper's Steel therefore are irrelevant, and actually show that other states typically restrict fee awards to disputes over policy language.

disputed oral settlement because this does not constitute a suit under a Florida insurance policy as required by the plain language and intent of the statute.

Respectfully Submitted,

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Dated: July 8, 2002

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was served via overnight mail on Richard Bales, Bales & Sommers, P.A., 601 Brickell Key Drive, Suite 702, Miami, FL 33131, and Ralph O. Anderson, Hicks, Anderson & Kneale, PA, 9900 Stirling Road, Suite 243, Hollywood, FL 33024, this 8th day of July, 2002

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief has been prepared using Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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