SUPREME COURT OF FLORIDA

CASE NO. SC02-971

U.S.C.A. No. 01-11249-A

UNITED STATES OF AMERICA

vs.

PEPPER'S STEEL & ALLOYS, INC.

REPLY BRIEF OF PEPPER'S STEEL AND ALLOYS, INC. AND NORTON BLOOM ON CERTIFIED QUESTION OF LAW FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

BALES & SOMMERS, P.A.
Courvoisier Centre II, Suite 702
601 Brickell Key Drive
Miami, FL 33131
Tel: 305/372-1200
Fax: 305/372-9008

HICKS, ANDERSON & KNEALE, P.A.
9900 Stirling Road, Suite 243

Hollywood, FL 33024
Tel: 954/620-6371
Fax: 954/620-6372

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I. THIS COURT HAS JURISDICTION TO CONSIDER THE CERTIFIED QUESTION.

This Court has jurisdiction to consider the certified question regarding the interpretation of a Florida insurance statute. *See, e.g., Anderson v. Auto-Owners Ins. Co.*, 172 F.3d 767 (11th Cir. 1999)(certifying to Florida Supreme Court question of whether two separate vehicles traveling in tandem and causing one accident constitutes one or two "occurrences" under insurance policy), *certified question answered by Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000); *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 742 (Fla. 1961)("It is now well established procedure for a federal court to abstain from deciding the merits of a case so as to afford the state courts a reasonable opportunity to construe a state statute involved in the case.").

On June 6, 2001, USF&G filed a motion for reconsideration in the Eleventh Circuit, arguing that the certified question should be withdrawn because an affirmative answer to the question would not be "determinative of this cause" as required by Florida law. (App. 2-19).[1] When USF&G filed its brief in this Court, the motion for reconsideration was still pending. However, on July 16, 2002, the Eleventh Circuit entered an order denying USF&G's motion. The order read in its totality, "Appellee-Cross-Appellant's 'Motion for Reconsideration,' seeking reconsideration of this Court's April 25, 2002, certification of a question to the Florida Supreme Court, is

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[1] "App." refers to the Appendix to this Reply Brief, which includes USF&G's motion for reconsideration; Pepper's Steel's response to USF&G's motion for reconsideration; USF&G's reply in support of its motion for reconsideration; and the Eleventh Circuit's order denying USF&G's motion for reconsideration. These documents were not transmitted to this Court by the Eleventh Circuit and are therefore the subject of Pepper's Steel's pending unopposed motion to supplement the record.

DENIED." (App. 1). In light of that ruling, this jurisdictional issue raised by USF&G is now moot, and the only question properly before this Court is the certified question.

Even if this Court holds that the jurisdictional issue is not moot, USF&G's "no jurisdiction" argument should be rejected as baseless. USF&G first argues that this Court lacks jurisdiction to consider the certified question because the district court's conclusion that Pepper's Steel released any fee claims under section 627.428 was not reversed by the Eleventh Circuit. USF&G then quotes from a portion of the magistrate judge's Report and Recommendation ("R&R") in an effort to portray a written settlement agreement *that never existed*. In fact, what happened is that, after much litigation, the district court judge entered an order adopting the R&R (DE 1773) and an Amended Final Judgment (DE 1522) regarding the terms of the parties' *oral settlement agreement.* The portion of the R&R quoted by USF&G states in full as follows:

> The undersigned concludes that the clear, unambiguous language of the District Court's Final Judgment, defining and enforcing the terms of the parties' agreement, forecloses a fee award. That Judgment (incorporating the terms of the agreement) released the insurance company from <u>any and all claims</u>, including <u>future</u> claims, that relate in <u>any way</u> to these consolidated cases. Movants request for attorneys' fees is clearly a "claim" that relates to this litigation.

(DE 1755 at 15)(emphasis in original). The order adopting the R&R, quoted in USF&G's brief at page 17 for the proposition that "the settlement agreement simply cannot be read to allow attorneys' fees for its enforcement," was also actually discussing "the terms of the oral settlement agreement, as embodied in the final judgment, ..." (DE 1773, at 3). Thus, there was never a written release of *any* attorneys' fee claims.

Moreover, the Eleventh Circuit has already considered and properly rejected

USF&G's argument that the language of the Amended Final Judgment acted as a release of all claims for fees. In fact, the Eleventh Circuit has rejected USF&G's argument three times. First, the Eleventh Circuit held in the prior appeal that the "all claims" portion of the Amended Final Judgment was vacated and remanded as applied to a potential claim for attorneys' fees incurred after October 22, 1993. *United States v. Pepper's Steel & Alloys*, No. 94-5187 (11th Cir. May 31, 1996), DE 1552, at 17-18. The Eleventh Circuit explained in that opinion:

> If the Movants are attempting to collect fees for the prosecution of their coverage action against USF&G *prior* to the parties' settlement on October 22, 1993, then the Movants' claim is foreclosed by the parties' settlement. . . . Yet, if the Movants are seeking an award of fees incurred *after* October 22, 1993, in connection with their motion to enforce the agreement, then they may have a viable claim. Since theses fees were incurred post-agreement, we cannot assume the parties compromised them in their settlement.

Id. (italics in original). Second, in its April 25, 2002 certification opinion, the Eleventh Circuit quoted from its previous opinion and again rejected the argument that the parties' settlement included a release of the fee claim at issue here. *United States v. Pepper's Steel & Alloys, Inc.*, 289 F.3d 741, 742 (11th Cir. 2002). Third, the Eleventh Circuit denied USF&G's motion for reconsideration of the certification opinion. (App. 1). The parties extensively briefed this issue in their Eleventh Circuit briefs and in connection with USF&G's motion for reconsideration. *See* Brief of Pepper's Steel filed in Eleventh Circuit at 15-16; Brief of USF&G filed in Eleventh Circuit at 9, 11, 12-22; Reply Brief of Pepper's Steel filed in Eleventh Circuit at 6-10; and memoranda filed in connection with USF&G's motion for reconsideration contained in the Appendix. Additionally, the unrebutted testimony of Hugh Lumpkin, Esq. was that the parties did not intend to compromise, release, or waive any right to recover attorneys' fees incurred after October 22, 1993. (DE 1778 at 8-9). USF&G's fourth

attempt here to rely on the language of the Amended Final Judgment to dispose of this case should be rejected again. The Eleventh Circuit clearly found that no alleged release of the fees currently in dispute had occurred. That should end the matter. The Eleventh Circuit thus certified a dispositive question of Florida law to this Court, which question is the only issue properly before this Court.

USF&G then argues that a case precluding any fee claims as untimely was not applied by the Eleventh Circuit, citing *Pesin v. Rodriguez*, 244 F.3d 1250 (11th Cir. 2001). The certification opinion does not refer to USF&G's arguments regarding the alleged undue delay in filing the motion for fees at all. Had the Eleventh Circuit found this argument persuasive, let alone dispositive of this case, it certainly would have been mentioned in the opinion. Again, this argument was previously presented to the Eleventh Circuit and extensively briefed by both sides. *See* USF&G's Eleventh Circuit Brief at 10-11, 34-39; Pepper's Steel's Eleventh Circuit Reply Brief at 11-15). By denying USF&G's motion for reconsideration, the Eleventh Circuit once again refused to affirm the district court's order on the ground that the fee petition was untimely.[2]

Accordingly, the Eleventh Circuit has rejected USF&G's claims that other issues are dispositive of this case so that the certified question is not "determinative of this cause." § 25.031, Fla. Stat.; Fla. R. App. P. 9.150. The Eleventh Circuit's

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[2]In sum, Southern District Local Rule 7.3 provides that any motion for attorneys' fees shall be filed within 30 days of entry of Final Judgment or other dispositive order "which gives rise to a right to attorneys fees or costs." The district court originally ordered USF&G to pay the $2 million settlement amount but required the parties to bear their own costs and attorneys' fees. (DE 1755 at 2). This order disallowed fees. Thus, USF&G's contention that the motion for fees was untimely because it was not submitted within 30 days of the final judgment denying Pepper's Steel the right to such recovery was properly rejected by the magistrate judge as "specious." (DE 1755 at 7).

certification of this determinative issue of construction of a Florida insurance statute was proper. The fee claims at issue here were not released and are not time barred. This Court therefore has jurisdiction to answer the certified question and, as explained below, should answer it in the affirmative.

II. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE.

Throughout its brief, USF&G attempts to reargue whether it ever intended to enter into a binding settlement agreement. Such reargument is completely inappropriate and is foreclosed by the law of this case.[3] The district court's findings of fact, including the fact that (1) prior to their acceptance, no counsel for any movant had rejected USF&G's November 12, 1991 offer; (2) no movant had made a counter-offer to USF&G's offer; and (3) USF&G never revoked its offer prior to the acceptance, are unassailable, and are not at issue here. (DE 1494 at 8, 9).

USF&G argues that Florida follows the American Rule barring an award of attorneys' fees in contract disputes, including disputed settlement agreements, citing *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *Don L. Tullis*

& Assocs., Inc. v. Benge, 473 So. 2d 1384, 1386 (Fla. 1st DCA 1985); *Woodco, Inc. v. B&H Realty Corp.*, 501 So. 2d 1330, 1332 (Fla. 3d DCA 1987). While Pepper's Steel does not dispute the general proposition that Florida follows the American Rule, that proposition is irrelevant in this case, which involves an insurance company and is governed by section 627.428, Florida Statutes.

Moreover, these cases do not hold that Florida disallows fees for the

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[3]The district court determined that there was a binding settlement agreement. USF&G appealed, and the Eleventh Circuit affirmed the district court's determination. *United States v. Pepper's Steel & Alloys, Inc.*, 87 F.3d 1329 (11th Cir. 1996)(table).

enforcement of an insurer's settlement agreement. In fact, in the *Palma* case, the only one of the three cases involving an insurance company, this Court held that State Farm was obligated to pay Palma's attorney's fees incurred in the trial and appellate court in pursuing its claim for no-fault benefits. The *Palma* court reasoned, as this Court previously stated in *Insurance Co. of North America v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992), "[i]f the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees." 629 So. 2d at 832. The *Palma* court framed the issue as "when does a dispute relating to attorney's fees fall within the scope of section 627.428." *Id*. at 832. The *Palma* court explained, "When an insured is compelled to sue to enforce an insurance contract because the insurance company has contested a valid claim, the relief sought is both the policy proceeds *and* attorney's fees pursuant to section 627.428. The language of subsection (3), which provides that 'compensation or fees of the attorney shall be included in the judgment or decree rendered in the case[,]' also supports this conclusion." 629 So. 2d at 832. The *Palma* court concluded, "if an insurer loses such a suit but contests the insured's *entitlement* to attorney's fees, this is still a claim under the policy and within the scope of section 627.428." *Id*. at 832-833. The *Palma* court held "that attorney's fees may properly be awarded under section 627.428 for litigating the issue of entitlement to attorney's fees." *Id*. at 833. Thus, *Palma* did not deal with a settlement agreement but did award the insured its fees for establishing entitlement to fees. Here, as in *Palma*, awarding Pepper's Steel its attorney's fees incurred in litigating its entitlement to fees "comports with the purpose of section 627.428 and with the plain language of the statute." 629 So. 2d at 833.

Next, USF&G argues that section 627.428 must be given its plain and obvious meaning. USF&G then argues for a strained construction of this statute.

USF&G's entire argument rests on the premise that the plain terms of section

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." (USF&G's brief at 20). This argument fails on many levels.

First, the statute does not contain the phrase "coverage disputes." Section 627.428(1) reads as follows:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

(Emphasis added).

This Court, in a case cited by USF&G, has clearly ruled that entitlement to fees is an issue encompassed by the statute. *See State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 832 (Fla. 1993).

Next, USF&G argues that the statute is in derogation of the common law and should be strictly construed against fees. Pepper's Steel is not asking this Court to rewrite the statute or to go beyond its plain meaning in awarding fees in this case. Rather, Pepper's Steel is entitled to its fees for enforcing the settlement agreement because such fees are provided for, contemplated by, and within the legislative intent of section 627.428. The cases cited by USF&G for the proposition that the statute should be strictly construed do not impact Pepper's Steel's position. For example, in *Roberts v. Carter*, 350 So. 2d 78 (Fla. 1977), this Court ruled that an injured third party was not entitled to recover fees from State Farm because he was not "an insured or the named beneficiary under a policy or contract executed by the insurer," as

required by section 627.428. Here, however, it is not disputed that Pepper's Steel was the named insured under a policy of insurance executed by USF&G. Moreover, USF&G does not dispute that Pepper's Steel obtained a judgment that originated under a policy of insurance. USF&G would not have been sued otherwise. *See Travelers Indem. Co. v. Chisholm*, 384 So. 2d 1360, 1361 (Fla. 2d DCA 1980)("The paramount condition is the entry of a judgment against the insurer and in favor of the insured."); *Vermont Mut. Ins. Co. v. Bolding*, 381 So. 2d 320, 321 (Fla. 5th DCA 1980)("There is no dispute as to the fact the judgment was against an insurer; the appellant issued the insurance policy."). It is undisputed in this case that Pepper's Steel was the insured under a policy issued by USF&G, and that judgment was obtained by Pepper's Steel against USF&G, the insurer. As the Eleventh Circuit reasoned in *Insurance Co. of North America v. Lexow*, 937 F.2d 569, 573 (11th Cir. 1991), "Provided that these requisite conditions are met, we note that the literal language of the statute appears to direct an appellate court to award attorney's fees to a successful insured." The literal language thus appears to direct an award of attorney's fees to Pepper's Steel.

USF&G's argument also fails because it too narrowly construes the phrase "under a policy or contract" in section 627.428, and its narrow construction of this phrase completely contradicts this Court's interpretation. In *Insurance Co. of North America v. Lexow*, 602 So. 2d 528 (Fla. 1992), the Court held that an insured was entitled to recover fees under the statute for battling with its insurer over funds recovered from a third party. The insured there, Lexow, operated a warehouse facility that was destroyed by an electrical fire. The damage generated customer lawsuits and unfavorable publicity such that Lexow decided not to rebuild. Lexow submitted a claim to its insurer, INA, which paid it $430,571.26 in exchange for a subrogation receipt.

INA and Lexow jointly sued two tortfeasors for causing the fire. One tortfeasor's insurer paid INA $100,000, which INA placed in an interest bearing account. INA then filed a declaratory judgment action in federal court regarding its right to the $100,000, and Lexow filed a counterclaim seeking the same funds plus its attorney's fees and costs. The district court awarded Lexow the $100,000 because it was entitled to be made whole before INA's subrogation rights arose. The district court, however, denied Lexow's motion for fees. The Eleventh Circuit certified the fee issue to this Court, which ruled that the phrase "under a policy or contract" in section 627.428 includes litigation subsequent to the insurer's payment of its policy proceeds to determine whether the insurer or the insured is entitled to funds obtained from a third party. The Court rejected INA's argument, which was similar to USF&G's argument here, that the dispute over entitlement to the fund recovered from a third party was not a dispute under the insurance policy and did not involve INA's policy obligations to Lexow.

The *Lexow* court stated: "Florida courts have consistently held that the purpose of section 627.428 and its predecessor 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." 602 So. 2d at 531. "We are persuaded that the lawsuit involved in this case falls within the scope of this rationale." *Id.* Thus, this Court broadly construed the phrase "under a policy or contract" to include the insurer's right to claim subrogation, which existed by virtue of having paid a claim under the policy. As Pepper's Steel's dispute with USF&G also exists by virtue of USF&G's payment of a claim under its policy, this lawsuit falls within the scope of both the plain language and the rationale of section 627.428.

Other cases cited by USF&G have also broadly construed section 627.428.

See, e.g., *Fewox v. McMerit Constr. Co.*, 556 So. 2d 419, 423 (Fla. 2d DCA 1990), *approved sub nom*., *Ins. Co. of N. America v. Acousti Eng'g Co.*, 579 So. 2d 77 (Fla. 1991)(holding that the term "suit" includes arbitration proceedings: "The legislative policy underlying section 627.428 is served by requiring insurers to pay attorney's fees to a prevailing insured or beneficiary, regardless of whether the insurers contest coverage through arbitration or in the trial courts."); *Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217 (Fla. 1983)(insurer's payment of claim satisfied statutory requirement of a "judgment"); *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000)("Florida law is clear that in 'any dispute' which leads to judgment against the insurer and in favor of the insured, attorney's fees shall be awarded to the insured.").

USF&G glosses over these decisions and then argues that Florida courts have declined to award fees for litigation "like the present settlement dispute" that related in some way to insurance, but did not involve the disputed terms of an insurance policy. (USF&G's Brief at 22). The cases cited by USF&G, however, are not at all like this one and are clearly distinguishable. *See* Pepper's Steel's Initial Brief at 20-22 (distinguishing *Travelers Indem. Co. v. Morris*, 390 So. 2d 464 (Fla. 3d DCA 1980), regarding post-judgment fees for collection services, not fees such as Pepper's Steel incurred for <u>obtaining</u> a judgment); *United States Auto. Ass'n v. Kiibler*, 364 So. 2d 57 (Fla. 3d DCA 1978)(where coverage and liability cases were consolidated, successful tort claimant was not entitled to fees for litigating the tortfeasor's liability); *Sheridan v. Greenberg*, 391 So. 2d 234 (Fla. 3d DCA 1980)(fees incurred during suit against insurance agents were not recoverable); *H&S Corp. v. USF&G Co.*, 667 So. 2d 393 (Fla. 1st DCA 1995)(dealing with interpretation of contractual fee provision).

USF&G's argument that no policy of insurance was ever at issue during the settlement dispute is untenable. Contrary to USF&G's assertions, the district court's 1994 order enforcing the settlement did discuss the pollution exclusion clause and

USF&G's exposure for all claims arising out of the Pepper's Steel site. (DE 1494 at 8, 13). The sole basis for the third party complaint against USF&G was to enforce Pepper's Steel's rights to coverage under the policies issued by USF&G. (DE 89 at 20-26). USF&G denied coverage in its answer and asserted 19 affirmative defenses related to coverage issues. (DE 119). The Eleventh Circuit noted that USF&G was sued by its insureds for claims they alleged were covered under their policies with USF&G. (DE 1552 at 17). USF&G's $2 million payment was not gratuitous but was made to resolve a coverage dispute and satisfy its obligations to Pepper's Steel under policies of insurance. USF&G's argument that it simply made this payment to obtain a release of "all claims" and without regard to insurance policies that it executed and delivered in Florida should be quickly rejected.

USF&G's argument that section 627.428 does not apply because the settlement was accepted by letter faxed to Washington, D.C. and is not an executed Florida contract is also unavailing. As the Eleventh Circuit ruled, "Although USF&G settled this case, Florida courts have equated an insurance company's settlement of a coverage dispute with a confession of judgment. [citation omitted] Hence, an insured may be entitled to collect a reasonable attorneys' fee from its insurer under § 627.428 despite the insurer settling and avoiding an adverse judgment or decree." (DE 1552 at 16).

Other cases cited by USF&G are equally and obviously inapplicable. For example, the Florida Supreme Court in *Bohlinger v. Higginbotham*, 70 So. 2d 911 (Fla. 1954), rejected a fee claim under section 627.428's predecessor statute because the action was not against an insurance company at all. In *Wilder v. Wright*, 278 So. 2d 1 (Fla. 1973), the Florida Supreme Court held that an injured third party could not recover fees under section 627.428 because he did not meet the statute's requirement of being "an insured or the Named beneficiary" under a policy or contract executed

by the insurer.

Contrary to USF&G's argument, the cases on which Pepper's Steel relies did not award fees for litigation directly involving and interpreting the disputed terms of an insurance policy. As discussed above, *Lexow* involved fees incurred after the insurer had paid out its policy proceeds. In *Bankers Security Ins. Co. v. Brady*, 765 So. 2d 870 (Fla. 5th DCA 2000), the Fifth District mandated that fees be awarded to an insured who sued the insurance company "for breach of an oral settlement agreement." *Id.* at 870. In *Wollard*, this Court held that section 627.428 "must be construed to authorize the award of an attorney's fee to an insured . . . even though technically no judgment for the loss claimed is thereafter entered favorable to the insured . . . due to the insurer voluntarily paying the loss before such judgment can be rendered." 439 So. 2d at 218. USF&G's attempt to distinguish these cases fails.

USF&G's contention that Pepper's Steel "admits" that its fees to litigate coverage from the start of this litigation in the 1980s through the 1993 settlement was extinguished by the settlement is untrue. What Pepper's Steel "admits" is that the Eleventh Circuit held that said fees were extinguished by the settlement. (DE 1552 at 18; Initial Brief at 18). The fees Pepper's Steel seeks here are fees incurred in connection with the enforcement of the agreement that USF&G unilaterally and unsuccessfully attempted to disavow, and fees incurred in pursuing its efforts to obtain fees.

USF&G's argument that any insured involved in a coverage dispute "always will have the option to negotiate in good faith to reach a clear settlement that can be summarily enforced" (USF&G's brief at 35) is unbelievable. This case alone, in which Pepper's Steel has been trying to enforce the settlement since 1993, reflects that settlements with insurers are not so "summarily" enforced and therefore should fall within the ambit of section 627.428's fee provision if the insurer fails to abide by its

contractual obligations.

USF&G brushes aside the survey of national cases supporting Pepper's Steel's argument as "irrelevant" and as a "tacit admission" by Pepper's Steel that Florida law is not supportive. The exact opposite is true. The cases from other states reflect the national trend of awarding fees to insureds under similar statutes in similar situations and are persuasive authority. Upon examination, the cases cited by USF&G fall short of supporting USF&G's contention that section 627.428 is not applicable here.

This Court should construe section 627.428 to allow recovery for attorney's fees an insured has incurred in securing a judgment against its insurer to enforce the settlement of a coverage dispute.

CONCLUSION

Pepper's Steel respectfully requests that this Court accept jurisdiction in this case and answer the Eleventh Circuit's certified question in the affirmative.

BALES & SOMMERS, P.A.
Courvoisier Centre II, Suite 702
601 Brickell Key Drive
Miami, FL 33131
Tel: 305/372-1200 Fax: 305/372-9008

HICKS, ANDERSON & KNEALE, P.A.
9900 Stirling Road, Suite 243
Hollywood, FL 33024
Tel: 954/620-6371 Fax: 954/620-6372

By_____
RALPH O. ANDERSON
Fla. Bar No. 503207

By_____
CINDY L. EBENFELD
Fla. Bar No. 980579

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **August 1, 2002**, a true and correct copy of the foregoing was served by U.S. Mail on:

Edward J. Grass, Esq.
Shaw Pittman
2300 N. Street, NW
Washington, D.C. 20037-1128
Tel 703/770-7600
Fax 703/770-7901
Attorneys for USF&G

_____

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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APPENDIX