SUPREME COURT OF FLORIDA

Case No. SC04-1737
Lower Tribunal 2D03-5145

VICTOR BORDEN, ET. AL.,
Petitioner

V.

EAST-EUROPEAN INSURANCE COMPANY, OCEAN INSURANCE MANAGEMENT INC., BARNHARDT MARINE INSURANCE, INC.
Respondents

ON REVIEW OF CONFLICT BETWEEN DISTRICT COURTS OF APPEAL

INITIAL BRIEF OF RESPONDENT BARNHARDT MARINE INSURANCE

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TABLE OF CONTENTS

TABLE OF CITATIONS **PAGE**

STATUTES

RULES

STATEMENT OF CASE AND FACTS

Respondent Barnhardt Marine Insurance (Barnhardt) adopts the Statement of Facts offered by Petitioner Victor Borden. To avoid duplicative appendices, Barnhardt relies in part on the Appendix of Petitioner Borden and Ocean Insurance Management cited (Borden App. at ____ or Ocean App. at _____). Barnhardt filed its own appendix (‘hereinafter Barnhardt App. ___”). East-European and Alfa Insurance are referred to as East-European or the “carrier defendants” for simplicity.

Barnhardt supplements the factual statement of Petitioner with the following information. In the trial court Victor Borden initially sued the Respondents in the state court. Barnhardt, the wholesale broker located in Jacksonville, served a notice of removal to federal court. (Barnhardt App. 1). Counsel for East-European and Alfa Insurance filed a notice of appearance and written consent to removal. (Barnhardt App. 2, 3). East-European and Alfa thereafter filed a motion for extension of time in federal court to respond to Borden’s motion to remand. (Barnhardt App. 4). In the first three papers filed East-European and Alfa Insurance did not raise improper service or in personam jurisdiction. (Barnhardt App. 2, 3, 4). Ten days after the order remanding the case to Hillsborough County, East-European and Alfa Insurance PLC filed a motion to quash service challenging the constitutionality of in personam jurisdiction.

Upon returning to state court, the agency defendants sought abatement of the claims against them pursuant to the holding in *Blumberg v. USAA Casualty Insurance Co.*, 790 So.2d 1061 (Fla. 2001). The trial court reserved ruling on the motion to abate the claims against the agency defendants - holding that the court would rule on the abatement issue in the future after discovery. (Barnhardt App. 7). The court initially limited discovery from the agent defendants to matters relating to jurisdiction over the insurers. *Id.*

After service of the amended complaint by Borden, defendant Barnhardt answered and asserted a crossclaim against the insurer defendants East-European and Alfa Insurance. (Borden App. 5). Barnhardt alleged that the insurer defendants wrongfully inserted a foreign arbitration clause into the policy after the binder or cover note was agreed upon. (Borden App. 5 at pp. 8-11). Barnhardt alleged that East European and Alfa Insurance obtained premium, engaged in business or directly or indirectly sold policies through agents or subagents located in the State of Florida. (Borden App. 5 at pg. 7). Barnhardt sued the insurers for equitable subrogation, indemnity and reformation. (Borden App. 5 at pp. 8-11). Barnhardt alleged that through various brokers including South Sea, 2K Shipping, and Ocean Insurance Management, that a cover note was issued for Borden's vessel (Borden App. 7 and 9). The cover note between MICI and Barnhardt (Borden App. 9) and the cover note

purportedly signed in Jacksonville and intended for the insured (Borden App. 7) do not include any choice of law or arbitration provision. The arbitration clause in the policy was purportedly issued August 1, 2001, the day after the cover note. The earlier insurance quotations (offers) between the agents in July, 2001, (Borden App. 10 and 11) made no mention of foreign arbitration clauses. The cover note of July 31, 2001 does not include a foreign arbitration clause. (Borden App. 7). The arbitration provision ultimately inserted in the policy provided that "all disputes hereunder shall be subject to " the Russian legislation or English legislation and to be settled in the Maritime Arbitration Commission of Russian Chamber of Commerce and Industry, Moscow." (Borden App. 21).

Barnhardt sued the insurers claiming this incongruous choice of law and arbitration clause was not expressly or impliedly agreed upon, was in violation of industry custom and practice and that the agent Barnhardt was now being sued as a result of the carrier's wrongful denial of the claim and reliance upon the arbitration provision. (Borden App. 5 at pg. 8-9). Barnhardt alleged it was being sued and was incurring legal expense and attorney's fees in the defense of allegations brought made by Borden against Barnhardt for failing to provide proper coverage. *Id.* Barnhardt alleged East-European was the actual wrongdoer, not Barnhardt. *Id.* East-

European is alleged to have unilaterally inserted a foreign arbitration clause that neither the insured nor Barnhardt had agreed upon. *Id.*

In addition to seeking money damages under theories of indemnity and equitable subrogation against the insurers, Barnhardt sued for reformation of the policy. Barnhardt alleged the policy as issued did not conform to the original intent of the parties as reflected in the cover note, that the arbitration clause was the product of fraud or inequitable conduct by the insurers, and that the insurers were indispensable parties to the claim for reformation. (Borden App. 5 at pp. 11).

After removal and then remand to state court, the insurers filed a motion to quash the crossclaim asserting that they were organized and existing under the laws of Russia, not subject to service of process and re-asserted their jurisdictional challenge. (Barnhardt App. 6).

In its detailed order of October 17, 2003, the trial court conducted an exhaustive review of the depositions, discovery materials, affidavits and authorities. (Borden App. 3). The trial court specifically found the cover note was received through a series of agents by Silvia Borden in Florida prior to the loss. (Borden App. 3, pg. 14, footnote 47). The trial court did not discuss the separate crossclaim filed by Barnhardt. The trial court denied the "Motion to Quash" referring to that motion in the singular not plural. See Borden App. 3 at page 24. Presumably the trial court

was referring to both the Motion to Quash directed to Borden and the second motion directed to the crossclaim, but the trial court's order is vague. *Id.* The trial court did not discuss the allegations in the crossclaim. The trial court reaffirmed its early order reserving ruling on the motions to abate or stay filed by the agency defendants. See Borden App. 3, at pg. 24, footnote 80.

The Second District noted only that Barnhardt had supported Borden and Ocean's argument that service of process was appropriate under the Unauthorized Insurer's Process Law (UIPL)(Borden App. 1 at pg. 2). In its opinion the Second District stated that Barnhardt had argued jurisdiction was available under §48.193 and ruled without explanation that this argument had no merit and was waived below. Contrary to the statement of the Second District the record clearly establishes that in its effort to seek indemnity and equitable subrogation from the carrier defendants, Barnhardt alleged in the lower court that jurisdiction was proper under §48.193. See ¶4 of Crossclaim, Borden App. 5.

The residency of Victor Borden's agent, Silvia Borden, and the residency of the Barnhardt Insurance was not considered by the Second District in its decision. Respondent Barnhardt files this initial brief in support of the Petitioner Borden's argument and in support of the exercise of jurisdiction over East-European and Alfa Insurance, PLC.

SUMMARY OF ARGUMENT

Respondent East-European filed a notice of appearance, consent to removal and motion for extension of time to respond to the motion for remand without asserting a jurisdictional argument. This is a waiver of the jurisdictional defense as the insurers were duty bound to assert their objection to jurisdiction in the first paper filed. Rule 1.140(h). *Fla. Dept. of Children and Families v. Sun-Sentinel, Inc.,* 865 So.2d 1278 (Fla. 2004); *Romellotti v. Hanover AMGRO Insurance Co.,* 652 So.2d 414 (Fla. 5th DCA 1995).

The solicitation and application process leading to the delivery of the cover note and payment of premium through Florida agents, as well as cancellation and notice of reinstatement constitutes the transaction of insurance business in Florida satisfying the UIPL and due process. A cover note is a contract of insurance within the meaning of the UIPL and delivery of the cover note occurred in Florida. The presence of a questionable foreign arbitration clause does not defeat the propriety of jurisdiction under the UIPL. *Aero Associates, Inc. v. La Metropolitana,* 183 F. Supp. 357 (S. D. N.Y. 1951). Silvia Borden and the Barnhardt Insurance agency are Florida residents within the meaning of the UIPL.

The Second District misconstrued the residency and delivery language in the UIPL. The appellate court failed to consider the crossclaim filed by Barnhardt against

the insurers, East-European and Alfa Insurance. Barnhardt stated a valid cause of action in tort or contract against the insurer defendants for equitable subrogation, indemnity and reformation. Jurisdiction is assertable under §48.193(1)(b) or (1)(g). The insurers are alleged to have wrongfully inserted a foreign arbitration clause into the policy contrary to and after delivery of the cover note. The agent is entitled to indemnity where it suffers money damages as a result of a claim denial by the carrier. *Occidental Fire & Casualty Co. v. Stevenson*, 370 So.2d 1211 (Fla. 2d DCA 1979).

The carrier defendants are properly joined and indispensable parties to both Borden's claim and the crossclaim for indemnity, equitable subrogation, and reformation.

ARGUMENT

I. THE APPELLATE COURT ERRED BY FAILING TO FIND THE RESPONDENTS EAST-EUROPEAN AND ALFA INSURANCE WAIVED THEIR DEFENSES TO SERVICE AND JURISDICTION BY FAILING TO ASSERT THEM IN THE FIRST PAPER FILED

In the state court, counsel for the insurer defendants filed a notice of appearance in the state court, and in the federal court, a written consent to removal in the federal court and a motion for extension of time to respond to Borden's motion to remand. (Barnhardt App. 2, 3, 4). The insurer defendants did not assert an objection to service of process or a jurisdictional defense prior to serving the notice of appearance, joining in removal or in the motion for extension of time to respond to the motion for remand filed in federal court. This court recently held a party does not waive a jurisdictional defense by objecting to jurisdiction and simultaneously seeking a change of venue. *Fla. Dept of Children and Families v. Sun-Sentinel, Inc.*, 865 So.2d 1278 (Fla. 2004)(no waiver where defendant contests jurisdiction and simultaneously moved for venue transfer disapproving *Hubbard v. Cazares*, 413 So.2d 1192 (Fla. 2d DCA 1981). However, here the service of process and jurisdictional defense was not raised in the notice of appearance, or simultaneously with the joinder in removal, or in the motion for extension of time but only after the remand to state court. Under extant case law there appears to have been an implied

consent to the exercise of jurisdiction by the state court and waiver of the jurisdictional defense because it was not included in the first paper filed in state or federal court. *Fla. Dept of Children and Families, supra; Golden State Industries, Inc. v. Cueto,* 883 So.2d 817, 2004 Fla. App. LEXIS 5221, at *7 (Fla. 3rd DCA 2004)(a defendant may manifest consent to the court's in personam jurisdiction in any number of way, from failure seasonably to interpose a jurisdictional defense to express acquiescence); *Romellotti v. Hanover Amgro Ins. Co.,* 652 So.2d 414 (Fla. 5th DCA 1995)(the defense must be raised at the "first opportunity") and cases cited therein. *Compare, Palmer v. Eldon Braun,* 376 F.3d 1254 (11th Cir. 2004)(venue challenge in first Rule 12 motion does not preserve jurisdictional challenge and court found waiver); *In re Worldwide Web Systems, Inc.* 328 F.3d 1291, 1299 (11th Cir. 2003)(court noted that "we have found that a party's right to dispute personal jurisdiction on insufficient service of process grounds is waived if the party fails to assert the objection in his first Rule 12 motion, other initial pleading or general appearance" and held waiver of jurisdictional defense by failing to include ground in Rule 60(b) motion to set aside default).

In *Hollis v. Florida State University*, 259 F. 3d 1295 (11th Cir. 2001) the court held the defendants could not challenge improper venue on state law grounds in a subsequently filed motion to dismiss *after removal* where the defendant asserted that

when originally filed in state court, venue was improper under state law. Other courts have found implied waivers in a variety of cases. *Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir. 1990)(recognizing waiver for failing to timely assert jurisdictional defense); *Harris Corp v. Nat'l Iranian Radio & Television,* 691 F.2d 1344, 1353 n. 18 (11th Cir. 1982)(an objection to service of process dos not preserve the issue of personal jurisdiction). East European and Alfa Insurance did not include an objection to improper service or in personam jurisdiction in the first three papers filed. Under *Fla Dept. of Families and Children, Hollis,* and *Romellotti* there appears to be a waiver of the service and jurisdictional defenses.

II. THE APPELLATE COURT ERRED IN FINDING THERE WERE NO INSURANCE TRANSACTIONS WITHIN THE MEANING OF SECTIONS 626.906 (1) - (4), FLA. STAT., (2001).

This is a case where the UIPL has been given words it does not have in connection with the requirements of residency and delivery of contracts. Moreover, the legal significance of the crossclaim asserted by Barnhardt against the insurers has been ignored. The Second District opinion is in error because it fails to appreciate the factual record below which demonstrates multiple grounds for application of the UIPL and more than one "insurance transaction" within §626.906 (1)- (4). It is undisputed that the binder or cover note was procured by Florida agents and created in Jacksonville and delivered to Ms. Silvia Borden's mailing address in Tampa. See

Order of October 17, 2003. (Borden App. 3 at pg. 3, footnotes 7-8; pg. 5, footnote 17). A cover note is the phrase Europeans, particularly those in the London market, use to refer to what we in the U.S. call a "binder." An oral or written binder is a temporary insurance contract that normally contains a description of the risk, the name of the insured, limits, premium to be charged, the type of coverage, and other material terms. *South Carolina Ins. Co. v. Wolf,* 331 So.2d 337 (Fla. 1st DCA 1976); *Rowland v. National States Ins. Co.,* 295 so.2d 335 (Fla. 1st DCA 1974). Binders are recognized as temporary insurance contracts and the Florida legislature has expressly recognized that binders for marine insurance are valid and enforceable. §627.420, Fla. Stat. (2001) The notice of cancellation sent after the cover note was delivered lists Barnhardt as East European's representative and the notice was delivered in Florida to the home owned by Victor and Silvia Borden. The reinstatement letter from Barnhardt was created and mailed to the insured in Florida. (Borden App. 3 at pg. 7). The collection of premium occurred in Florida, was given to Florida agents, and the issuance of notices of cancellation and the subsequent reinstatements are all "transactions" occurring within the State of Florida. The cover note, i.e., contract arose under Florida law. These transactions in the state were conducted by agents of East-European acting with the actual, implied or apparent authority of East-European.

The Second District erred by focusing on the residency of Victor Borden and impliedly interpreted the UIPL to require that the named insured be a Florida resident. The residency of the named insured's business agent was not appreciated. The UIPL does not state the " named insured" must be a resident, only that there be delivery of a contract of insurance to a resident. §626.906(1). While in most every case the recipient of the contract is the named insured and the named insured will usually be a Florida resident, the UIPL, as tool for effectuating joinder should not be limited by judicial gloss. There is no evidence of legislative intent evincing a desire to limit jurisdiction over alien insurers and the scope is not limit to "named insureds" residing in Florida. The residency of the named insured is not controlling under the literal language of the statute.

The policy was negotiated and brokered through two agents in Florida (Ocean Insurance Management and Barnhardt). The premium was collected in Florida. The cover note was delivered in Florida to a Florida resident, Silvia Borden. Silvia Borden stated by affidavit she was her father's business manager and acted as his agent for purposes of procuring coverage. These facts are not contradicted. Affidavit of Silvia Borden, Borden App. 6.

The binder or cover note when sent to Ms. Borden in Tampa serves as delivery of a "contract of insurance" to a Florida resident (Silvia Borden) in Florida within

the meaning of §626.906(1). The carriers and the Second District wrongfully conclude, we infer, that delivery must be had to "a or the named insured" who must be a Florida resident. The statute does not so state. The statute does not require that the *policy* must be delivered, only an insurance contract. A binder is a contract. The statute does not state the delivery must to the named insured, only that there be delivery of a contract of insurance to a Florida resident. §626.906(1). Delivery to the named insured's business agent in Florida does not take the matter outside the UIPL. All that must occur to satisfy the subsection (1) of the UIPL is the delivery of a contract of insurance to a resident of this state. It does not say that the party to whom the policy is delivered must be a resident or that the named insured must be a Florida resident. The resident must be one who accepts delivery of an insurance contract. Victor Borden's agent Silvia Borden accepted delivery in Florida. Once the legal significance of the cover note is understood, the carriers argument collapses and the error of the Second District's reasoning become manifest.

A cover note or binder is contractual and carries legal import that a certificate does not. The mere furnishing of an insurance certificate to the insured in Florida has been held to constitute "delivery" within the meaning of §627.428, Fla. Stat. *East Coast Ins. Co. v. Cooper*, 415 So.2d 1323, 1325 (Fla. 3rd DCA 1982). *Accord. Security Nat. Life Ins. Co. v. Washington*, 113 A.2d 749 (Mun. Ct. App. D.C. 1955)

app. den. 226 F.2d 251 (D.C. App. 1955). A certificate is merely indicia of coverage. There was delivery of a contract in the form of the cover note to Silvia Borden in Florida. This is undisputed.

Nothing in the plain language of the UIPL would suggest jurisdiction cannot be obtained by conduct involving delivery to a business agent of a "contract of insurance" in Florida. Facts supporting service under subsections (1), (2) and (3) are clearly present when the statute is not read with additional terms that do not exist. Here Victor Borden's residency is dispositive of nothing. The dispositive fact is that Silvia Borden was a resident and "a" or "the" contract in form of a cover note or binder was delivered to her.

Under subsection (2) of the UIPL, the record reveals that the solicitation of the application for the contract that was delivered took place in Florida. Borden affidavit, Borden App. 6, ¶ 4. Nothing in §626.906(2) requires, as the Second District opinion implies, that the solicitation be undertaken directly with the *named insured* living as Florida resident. The solicitation must be related to the contract delivered to a Florida resident. The UIPL does not require that the party *on whose behalf the policy is issued* be a Florida resident during the solicitation process. Again all that is required is the solicitation of an application for "such contracts" meaning a contract delivered to a Florida resident within the meaning of subsection (1). The delivery of the cover note

was delivery of such a contract to a Florida resident. The solicitation with Silvia Borden was with a Florida resident.

There was also a collection of premium for the cover note, that is, "such contracts" within the meaning of subsection (3). All three section are satisfied when the statute is not infused with the requirements that unnaturally and improperly demand residency of the named insured at the time of solicitation, payment or delivery. This is just a misreading of the statute.

The incongruity is manifest. Suppose all of the same facts occurred, and Victor Borden intended to a become a resident of the State of Florida and did become a resident the day after the loss occurred. Would he be unable to invoke the UIPL because he personally was not a resident at the time of delivery of the cover note? Jurisdiction does not turn on the residency of the Plaintiff. For decades since *International Shoe*, *Hanson v. Denckla,* and *Burger King,* jurisdiction had depended upon the purposeful conduct of the defendant acting through its employees or agents. The issue presented here should not turn on who is the named insured and where he resides, but whether there was the sort of conduct between the insurers and the forum such that the literal language of the UIPL is followed and there is no violation of due process. Can there be any doubt that Florida is the center of gravity or situs of this entire insurance transaction? If the carrier or one of the agents had sued Victor

Borden in Florida to collect premium owed, could Borden fairly claim he is not amenable to jurisdiction in the state? Why can Borden be sued in Florida for premium but the carriers obligation to pay is not reciprocal even though the cover note was made, delivered and paid for in Florida?

Where foreign insurers have collected premium, solicited the policy, and delivered the policy through dealings with the insured's resident agent in Florida, and have through letters (approved of by the carriers) generated and received premium, cancelled and reinstated coverage, such carriers have transacted insurance in the state. Court have found jurisdiction proper under statutes nearly identical to our own or serving purposes analogous to Florida's UIPL. *Caronia v. American Reliable Ins. Co.,* 999 F. Supp. 299 (E.D. N.Y. 1998); *Armada Supply v. Wright,* 858 F.2d 842, 849 (2nd Cir. 1988); *Aero Associates, Inc. v. La Metropolitana,* 183 F.Supp. 357 (D. C. N.Y. 1960)(arbitration clause did not defeat assertion of jurisdiction over Latin-American insurers where insurers executed memorandum of understanding agreeing to reinsure hull and liability insurance on quota share basis); *Ace Grain Co. v. American Eagle Fire Ins. Co.,* 95 F. Supp. 784 (D. C. N.Y. 1951)(contracts negotiated by telephone between Plaintiff's broker in NY and carrier representative who claimed he was in Philadelphia); *Sec. Nat. Life Ins. Co. v. Washington,* 113 A.2d 749 (D.C. Mun. Ct. App. Div.1955) *app. den.,* 226 F. 2d 551 (D.C. App. 1955)(individual

certificate under master policy sent through the mail from St. Louis to Washington D.C. rendered carrier amenable to suit). The delivery of the cover note, collection of premium, cancellation and reinstatement all occurred with Florida with the express or implied authority of the carrier and its agents. Jurisdiction has been found under New York's UIPL under less compelling jurisdictional facts. *Security National, supra; Zacharakis v. Bunker Hill Mut. Ins. Co.,* 120 N.Y.S.2d 418 appeal granted 281 App. Div. 1019, 121 N.Y.S.2d 271 (N.Y. App. Div. 1953).

Service is unquestionably proper on this record when the statute is read according to its plain meaning. Victor Borden's residency outside Florida does not defeat application of the UIPL. The Second District ignores the cover note and residency of its recipient Silvia Borden who acted as agent for Victor Borden. There is no jurisdictional impediment to the constitutional exercise of jurisdiction on these facts.

III. THE APPELLATE COURT ERRONEOUSLY FAILED TO CONSIDER BARNHARDT'S CROSS CLAIM WHICH PRESENTED A SEPARATE JURISDICTIONAL BASIS FOR SUING THE INSURERS UNDER THE UIPL OR §48.193.

Neither the trial court nor the Second District discussed the jurisdictional significance of Barnhardt's crossclaim for equitable subrogation, indemnity and reformation. Barnhardt crossclaimed against the alien insurers for indemnity,

equitable subrogation and reformation. These may be construed as tort actions under §48.193(1)(b) or equivalent to a breach of contract under §48.193(1)(g). In the claim for reformation Barnhardt alleges that the carriers or their agents wrongfully inserted a foreign arbitration clause and wrongfully denied Borden's claim subjecting Barnhardt to liability. Their denial of the claim and insertion of a foreign arbitration clause contrary to the terms of the cover note, caused Borden to sue Barnhardt which rightfully brought suit against the insurers. Barnhardt alleged that the insurer's unilateral modification of the cover note and the terms agreed upon was fraudulent or inequitable conduct warranting, at a minimum, reformation of the policy, and money damages payable to Barnhardt. Borden App. 5 at pp. 8-11. Barnhardt alleged that the policy was intended to include standard marine clauses and terms and that neither the insured nor the agents had agreed to a foreign arbitration or choice of law clause. *Id.*

It was proper for Barnhardt to assert jurisdiction under §48.193. The allegations are non-specific because at the time of filing the crossclaim Barnhardt did not have the benefit of the later jurisdictional discovery. Case law from Florida and elsewhere supports the right of the agent to sue for indemnity or equitable subrogation where the agent suffers damages as a result of the insurer's failure to pay a claim. *Occidental Fire & Casualty Co. v. Stevenson,* 370 So.2d 1211 (Fla. 2d DCA

1979). *Accord. Mutual Life Ins. Co v. Estate of Wesson,* 517 So.2d 521 (Miss. 1987) *cert. den.*, 486 U.S. 1043, 108 S. Ct. 2035, 100 L. Ed. 2d 620 (1987)*; INA Ins. Co. v. Valley Forge Ins. Co.*, 722 P.2d 975 (Ariz. App. 1986); *Southern Farm Bureau Casualty Ins. Co. v. Gooding,* 565 S.W.2d 421 (Ark. 1978).

Count III of Barnhardt's claim is for reformation of the policy to eliminate the arbitration provision. Reformation claims and related suits for declaratory relief are not expressly referenced in the long arm statute or the UIPL, but for long-arm purposes are analogized to a breach of contract action. Reformation can clearly can give rise to and support the assertion of long arm jurisdiction under §48.193. Indeed at least one Florida court has found a prima facie basis for jurisdiction and required an evidentiary hearing in a suit for declaratory relief against a California resident even where no separate claim in contract or tort was alleged to have occurred in Florida. *Overdorff v. Transam Financial Services*, 2002 Fla. App. LEXIS 7620, 27 Fla. L. Weekly D 1280 (Fla. 5th DCA, May 31, 2002)(evidentiary hearing on jurisdiction required under *Venetian Salami* where plaintiff sued California resident in Florida for declaratory relief even though defendants owned no property in state, and despite absence of any allegation that contract was breached or tort was committed in the state).

It is not clear why the trial court and Second District overlooked the viable claim by Barnhardt against the insurers and the jurisdictional ramifications of that claim. Contrary to the holding of the Second District, analysis of the claims asserted under §48.193(1)(b) or (g) is proper and warranted. The UIPL is not the exclusive basis for predicating jurisdiction.

More fundamentally, why is due process offended by permitting Barnhardt to pursue indemnity or equitable subrogation from the insurers in a foreign country where the carriers willingly accepted premium from Florida brokers? The foreign insurers in this case cannot be heard to complain that the exercise of jurisdiction is unconstitutional or violates traditional notions of fair play. The insurers knowingly collected premium, delivered a cover note and reinstated a policy through a series of letters and emails or letters originating within Florida. Suppose Borden had breached his contractually duty, to wit, failed to pay the premium. Surely the carriers would contend Victor Borden was amenable to suit in Florida on the debt. The application of the UIPL does not solely turn on where in the ocean the boat floats or sinks, or where the captain hangs his hat. This is a dubious and some might argue unconscionable attempt by alien insurers to avoid the contractual indemnity obligation to their insured after a loss through the wrongful assertion of jurisdictional defenses coupled with an improperly added foreign arbitration provision. The

arbitration clause would require a Honduran boat owner who procures coverage in Florida arising from the business transactions conducted by Florida agents, including a cover note paid for and received in Florida, to pursue his claim in a Russian arbitration forum subject to Russian or English law. Borden App. 2. The policy language and Victor Borden's plight is Kafkaesque. If he is dismissed, Borden will be made to travel to Russia to argue (as the policy provides) before the Russian Chamber of Commerce that the arbitration clause was improperly asserted into the policy and is invalid[1].

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[1] Of course our protagonist, the aptly named Victor B., finds himself in an awkward predicament as the opening act unfolds:

[Scene One at the Russian Chamber of Commerce. The appointed Chairman and Deputy Ministers to hear the case are seated as Victor B. stands before them]

Chairman: Welcome Victor, and why have you brought this claim against the insurer?

Victor B: I have come from Honduras by way of America and am suing the Russian insurer to recover for a lost vessel which went down some 150 miles from Honduras but I do not think I should be here.

Chairman: Why is that Victor?

Victor: The insurance policy issued by your countrymen through agents in Florida compels my attendance here before the Chamber but I did not agree to it, I only agreed to the cover note.

Minister: The agents in Florida, they gave you two contracts?

Victor: One policy and one cover note.

Minister: The agents, are they here?

Victor: No, they cannot be made to come here.

Chairman: You have a policy and a cover note?

Victor: Yes, but I did not agree to to the policy, only to the cover note.

Chairman: The cover note is a contract of insurance, yes? You did not agree to have the Russian company insure your vessel?

Victor: No, I agreed that they should insure my vessel but I did not agree to the language in the policy requiring me to come here to Russia.

Chairman: So you object to one contract but not the other.

Victor: Yes.

Chairman: Do you now object to Russian law and to the decision of this Chamber?

Victor: Yes.

Chairman: I understand. You do not want to enforce a portion of the contract?

Victor: No. I do want to enforce the contract.

Chairman: Do you wish for the Chamber to enforce the contract that insures the vessel?

Victor: Yes.

Chairman: Now I understand. You do not want the contact enforced if it requires you to be here, but you wish to enforce the contract and be paid under the contract if you are here?

Victor: Yes this is so.

Chairman: Why then did you tell us you do not wish to be here?

Victor: Because I wanted to be in Florida with the Russian insurer.

Chairman: The Russian insurer went to America?

Victor: Yes.

Chairman: Did you recover from the Russian insurer in Florida?

Victor: No.

Chairman: Why not, if the Russian company was there?

Victor: The Russian company was there but the American court said the

company was not there, so it could not be made to stay even though it came.

Chairman: And you were happy in a country with courts like this?

Victor: Yes.

Chairman: Why then Victor did you leave?

Victor: The American court said it did not have jurisdiction over the Russian company and I could not collect money there.

Chairman: You went to Florida and could not collect because the Russian company was not there. This made you unhappy, yes? Now, the Russian insurer is here, you are here, and you have come to Russia but you are still not happy?

Victor: This is true. I came because the contract says I must come here.

Chairman: You mean the contract that you did not agree to?

Victor: Yes.

Chairman: Why did you come all the way here under a contract you claim you did not agree to?

Victor: Because the court in America said that under my contract I should go

to Russia.

Chairman: But the American court could not enforce the contract.

Victor: Correct.

Chairman: I think I understand now. You live in Honduras but went to America to sue a Russian insurer that was never there but was there but could not stay on a contract that you could not enforce there. You have traveled very far to tell us that the Russian insurer cannot be made to go to America, and that you should not be made to go to Russia.

Victor: Yes, this is true.

Chairman: Do you want us to dismiss our case and excuse you from the obligation of traveling to Russia so that you may leave?

Victor: No, I would like to be paid for my ship and cargo.

Chairman: You would like to be paid in Russia, yes?

Victor: Yes.

Chairman: So we shall decide your case today?

Victor: Yes.

Chairman: You do not object to being paid money here in Russia under the underwriter's policy if that is our decision?

Victor: I will accept payment in Russia.

Chairman: It seems, Victor, you have agreed to the underwriter's terms after all.

The situs of this action is Florida. But for the challenged venue and choice of law provision, Florida law would control under the rule of *lex loci contractus*. *Sturiano v. Brooks,* 523 So.2d 1126 (Fla. 1988). Everything of any substance relating to the creation of the insurance contract happened in Florida with the knowledge of the carriers and with agents residing in Florida.

CONCLUSION

This court should find that the elements of the UIPL were satisfied on this record by the delivery of the cover note to Silvia Borden, as this constitutes delivery of a contract of insurance to a Florida resident. The contract application was solicited in Florida and negotiated by and between Florida residents. Payment was made by a Florida resident to agents in Florida on behalf of the carrier.

§626.906 does not require that the delivery, negotiation or payment of premium be done or made personally by Victor Borden the "named insured" in Florida or that the named insured must be a Florida resident.

Barnhardt rightfully filed a crossclaim for indemnity, equitable subrogation and reformation which independently supports the exercise of jurisdiction over the foreign insurers who wrongfully inserted a foreign choice of law and arbitration clause in the policy inconsistent with the contractual terms of the cover note. §48.913(1)(b) or (1)(g). The trial court and Second District overlooked the crossclaim. The carriers could rightfully expect to be sued by Florida agents in a Florida court for breach of implied obligations and damages from a wrongful claim denial. The insurers are indispensable parties to the reformation claim.

The opinion of the Second District should be overturned, and the decision of the Circuit Court reinstated.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this ____ day of December, 2004 to: **Steven L. Brannock, Paul Parrish and Maegen E. Peek**, Holland & Knight, LLP, 100 N. Tampa Street, Tampa, Florida 33602-3644; **Nathaniel G. W. Pieper**, Lau, Lane, Pieper, Conley & McCreadie, P.A., 100 S. Ashley Drive, Suite 1700, Tampa, Florida 33602, and to

John Bond Atkinson, Atkinson Brownell, P.A., One Biscayne Tower, 2 South Biscayne Blvd., Suite 3750, Miami, Florida 33131.

_____

David W. Henry

CERTIFICATE OF COMPLIANCE

Counsel for Respondent certifies that this Initial Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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David W. Henry