SUPREME COURT OF FLORIDA

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

VICTOR K. BORDEN, ET AL **Petitioners**	**vs.**	**EAST-EUROPEAN INSURANCE COMPANY ET AL.** **Respondents**

ON REVIEW OF CONFLICT BETWEEN DISTRICT COURTS
On Review from the Second District Court of Appeal
Case No. 2D03-5145

PETITIONER VICTOR BORDEN'S AMENDED REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

INTRODUCTION[1]

For some reason, the respondent insurance company seeks to impress upon this Court the idea that the claim of Mr. Borden is baseless on the merits. It asserts that the loss occurred outside the waters covered under the policy. (Respondent's brief pp. 1, 19). That simply is incorrect.

Apparently East European hopes that this court will assent to the theory of "no harm, no foul." "Borden can't win anyway, so why be concerned about jurisdiction?" Let there be no mistake, Mr. Borden has every reason to be confident that once the jurisdictional issue is decided, he will prevail on the merits.[2]

FACTUAL DISCUSSION

The marine insurance industry, international in scope as to insureds, brokers, underwriters, and risks and losses, operates much differently that the local casualty insurance market where captive insurance agents abound. "Communication up and down a chain of brokers with no direct

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[1] Citations to the appendices filed in this Court will be "Borden App." or "East-European App."

[2] The brokers at various levels agree that East-European has attempted to pull a fast one by issuing an insurance policy, delivered after the loss, that is drastically inconsistent with the underlying cover note or binder (East-European App. 10, Ex.3, para. 23,26) and that the insurance policy is "hopelessly wrong." (East-European App. 10, Ex.3, para. 26,27,91; East-European App. 10, Ex.13).

communication with the underwriter is common practice in the marine insurance industry." (East-European brief, p. 5).

There are several assertions of "facts" by respondent underwriters that require comment. East-European did have substantial contacts with Florida through Barnhardt and did benefit from those contacts.[3]

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[3] 1. Barnhardt, in Florida, had an application for insurance from Borden. (Borden App. 16, pp.20, 21).

2. Barnhardt, in Florida, provided Borden with an insurance quote from East-European. (Borden App. 10; Borden App.16, pp. 23, 24).

3. Barnhardt, in Florida, provided Borden with descriptive information about East-European. (Borden App.10; Borden App. 16, pp. 23, 24).

4. Barnhardt, in Florida, prepared and wrote the insurance Cover Note naming East-European as the insurer. (Borden App. 7; Borden App. 16, p. 15). The Cover Note is a Florida contract. This Cover Note was only issued because East-European agreed to bind the insurance (Borden App. 22, questions 9, 12; Borden App. 17; Borden App. 16, p. 17) and East-European never restricted Barnhardt on its authority to sign the Cover Note for East-European. (Borden App. 16, pp. 16, 18).

5. Barnhardt, in Florida, delivered the Cover Note to Borden's Tampa agent Ocean Insurance and who then mailed it to Sylvia Borden at her home in Tampa. (Borden App. 6; Borden App. 8).

6. Borden paid the insurance premiums in Florida. (Borden App. 6; Borden App. 7; Borden App. 12; Borden App. 13; Borden App. 16, pp. 22, 23).

7. East-European received the insurance premiums. (Borden App. 23, question 34).

Absent Barnhardt's activities in Florida on behalf of East-European, there would have been no East-European cover note issued and delivered, no contract made and no premium collected. Absent the relationship between Barnhardt and East-European, East-European would not have had the business relationship with Mr. Borden from which it benefited by receiving premium income.

REPLY ARGUMENT

I. THIS COURT HAS JURISDICTION. THERE IS A CLEAR CONFLICT.

Respondent basically fails to deal with the merits of *Winterthur International, Ltd. v. Palacios*, 559 So.2d 1214 (Fla.3d DCA 1990), rev.dism. 564 So.2d 1088 (Fla. 1990) but rather urges that "there is no actual conflict" or, if there is a conflict, *East-European* is a "poor vehicle" to resolve the conflict.

The Second District Court of Appeal below recognized a direct conflict between the decisions. *Winterthur* remains valid law in the Third District and survives *Hassneh Insurance Co. of Israel, Ltd. v. Plastigone*

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8. A Notice of Cancellation was prepared and delivered to Borden in Florida. (Borden App. 14; Borden App. 16, p. 25).

9. After the loss, the policy of insurance was delivered to Borden in Florida. (Borden App. 16, p. 32).

Technologies, Inc., 623 So.2d 1223 (Fla. 3d DCA 1993). One sentence of broad dicta in *Hassneh* cannot be supposed to overrule the prior precedent of *Winterthur*. In *Hassneh*, an Israeli insured obtained an insurance policy from the Israeli insurance company Hassneh in Israel with Hassneh apparently having no colorable representative or agent in Florida. The Israeli insured had contracted to indemnify the plaintiff Florida company and when it refused to do so, the Florida company sued the Israeli insurer in Florida. Understandably, the Third District held that the Israeli insurer was not subject to Florida jurisdiction under section 626.906 because it had "no agent" in Florida; "did not solicit" or engage in any business in Florida; had "no contractual relationship" with the plaintiff; "never engaged in any negotiations" in Florida; and the policy was not delivered in Florida. Apparently there was no argument made by plaintiff, as indeed there could not be under the facts, that the defendant insurer engaged in "(4) Any other transaction of insurance" as contemplated by section 626.906(4). Comparison of those facts with *Winterthur* clearly demonstrates why *Hassneh* cannot fairly be considered to have undermined the holding of *Winterthur*.

Although Respondent cites numerous cases dealing with Fla.Stat. 626.906 in general, those cases are not on point with regard to subpart (4)

which is the limited issue before this Court.[4] Respondent asserts that *Walter v. Blue Cross & Blue Shield of Wisconsin*, 181 F.3d 1198 (11th Cir. 1999) comments adversely on *Winterthur*. However all *Walter* says is that although the *Winterthur* policy was issued in Florida, the *Winterthur* court did not discuss the possible impact of the policy having been delivered in Peru instead of Florida. This was an issue that the *Walter* court considered to be crucial in the *Walter* case since its holding was that Walter did not have jurisdiction over defendant insurer because the policy in that case was neither issued nor delivered in Florida. The import of *Walter* is that for Florida law to apply, the policy must be delivered in Florida. *Walter* has absolutely no relevance to Mr. Borden' case since his East-European cover note, the insurance agreement in effect at the time of the loss, was both issued and delivered in Florida.[5]

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[4] Respondent cites *Parmalee v. Iowa State Traveling Men's Association*, 206 F.2d 518 (5th Cir. 1953) as holding that Section 626.906 applies "only to insurance policies issued and delivered in Florida to Florida residents." The court did not consider an argument based on subpart (4) as indeed the insured in that case was a Florida resident and the court stated that "We attempt no construction of the statute further than is necessary for the present decision." *Parmalee,* at 522. Petitioner Borden did not refer to this case because again, it is mere dicta of no significance to deciding the conflict before this Court presented by *Winterthur* and *East-European*.

[5] "Delivery of a policy by a broker, acting on behalf of the insurer, or at most on behalf of both underwriter and insured, of an insurance policy in Florida is clearly sufficient to satisfy the delivery requirement of Florida

Only in *Winterthur* and *East-European* below were the courts called upon to consider the application of 626.906 subpart (4).

The two cases are nearly identical to the extent that in both *East-European* and *Winterthur*, the plaintiffs chose to pursue the underwriters solely on the basis of Fla.Stat. 626.906 and not under the doing business provisions of Fla.Stat. 48.193.[6]

II. SECTION 626.906(4) IS NOT SUPERFLUOUS. THE LEGISLATURE'S WORDS ARE PLAIN, CLEAR AND UNAMBIGUOUS AND UNDER RECOGNIZED RULES OF STATUTORY CONSTRUCTION, SUBPART (4) MUST BE UPHELD TO PERMIT JURISDICTION REGARDLESS OF RESIDENCY.

At the outset it is of utmost importance to again focus on why this case is before this Court and to direct attention to the narrow conflict issue that is before the Court. Petitioner is here because of a conflict between the Districts on the narrow issue of whether or not a state insurance statute is

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law." "Delivery to an agent is tantamount to delivery to the principal." *Morrison Grain Company, Inc. v. Utica Mutual Insurance Company,* 632 F.2d 424, 442 (5th Cir. 1980).

[6] Respondent contends that *East-European* is a "poor vehicle for analysis of Section 626.906" and that the *Winterthur* court's holding as to Section 626.906 was unnecessary." Respondent's statement is totally inaccurate. Fla.Stat. Section 48.193 was never raised by the plaintiff in *Winterthur* as jurisdiction was alleged solely by reason of Section 626.906. As stated in *Winterthur,* "The insured bases his claim of jurisdiction on section 626.906. . . ." at page 1215. That is exactly the basis urged by Mr. Borden to support jurisdiction in the case before this Court. Thus, interpretation of Section 626.904(4) was determinative in *Winterthur* and is crucial to Mr. Borden.

limited solely to application to residents under the factual circumstances presented. The issue is whether under the facts of this case, Fla.Stat. 626.906(4) subjects the non-authorized alien insurer to service of process and jurisdiction of Florida courts regardless of residency of the insured.

Petitioner Mr. Borden says it does based on established rules of statutory construction of legislative enactments.

Respondent insurer answers by disagreeing with the Second District by denying that there even is a conflict; by ignoring the established rules of statutory construction when assessing the applicable statute sub-part Fla.Stat. 626.906(4); by focusing on Fla.Stat. 626.906 subparts (1) through (3) which are not in issue; and by demeaning the legislative language as being superfluous.

The presence of a conflict issue is discussed in Reply Argument I above.

We are not arguing about Fla.Stat. 626.906(1)-(3). Rather the issue is: "Did the Florida legislature mean to require that only Florida residents have the benefit of sub-part (4)?"

Respondent ignores discussing the rules of statutory construction and instead urges that those activities mentioned in Fla.Stat. 626.906 subparts (1) "issuance of contracts of insurance" to residents of Florida, (2) "solicitation

of applications for contracts of insurance" issued to residents of Florida, and (3) "collection of premiums for insurance contracts" issued to residents of Florida subsume all of what might be considered "transactions of insurance" as referred to in subpart (4) and Fla.Stat. 624.10 and therefore subpart (4) has no value and is superfluous. Does not providing information, delivering a cover note in Florida or issuing a notice of cancellation, or notifying and forwarding the claim to the underwriter, or seeking information about a loss constitute "any other transaction of insurance?" Clearly each does.

Mr. Borden submits the Respondent's example of a "Peruvian resident on vacation in Florida buying a policy of insurance from a Bahamian insurance company who set up shop in the lobby of the Peruvian tourist's hotel" (Respondent's brief, p. 20) is exactly a situation which Section 626.906(4) was designed to cover. That is why, although Section 626.906 subparts (1)-(3) are restricted to residents, subpart (4) is not. In the example, just because the policy was solicited, issued or delivered, and premiums collected and paid in Florida, the interest of the Florida legislature and Florida law in regulating "other transactions of insurance" occurring in Florida is not destroyed. Florida has an interest in regulating contractual relationships made in Florida, whether involving a non-resident or not.

The rules of statutory construction are crystal clear. Courts cannot assume that the legislature used the actual language for no reason at all, but must respect that the legislature knew the meaning of the words in the statute and expressed its intent by the use of the words found in the statute. *Overstreet v. State*, 629 So.2d 125, 126 (Fla. 1993); *S.R.G. Corp v. Department of Revenue*, 365 So.2d 687 (Fla. 1978).

III. FAIR PLAY AND SUBSTANTIAL JUSTICE REQUIRE THE UNDERWRITER WHICH ACCEPTED THE BENEFITS OF SELLING AN INSURANCE POLICY IN THE STATE OF FLORIDA TO LIKEWISE BE SUBJECT TO THE RESPONSIBILITIES INHERENT IN THAT COVER NOTE BY RESPONDING TO SUIT IN FLORIDA.

It cannot be disputed that the activities of Barnhardt in Florida were critical to the establishment of the contractual relationship between East-European and its insured Mr. Borden. Absent Barnhardt's activities, there would have been no cover note "Dated at Jacksonville, FL" stating that the insurance was "100% East-European Insurance Company" and obligating Mr. Borden to pay premiums in the amount of $22,265. (Borden App. 7). East-European benefited from the transacting of insurance that took place on its behalf. East-European was satisfied with receiving premium payments from Mr. Borden and it accepted the benefits of its bargain.

Now, after a loss occurs and it is time to respond to the claim, East-European seeks to distance itself from its agent Barnhardt as far as possible. The reason is clear. Barnhardt did all those things described in Fla. Stat. Sec. 624.10 which constitute "Transacting Insurance" in Florida without any limitations placed on Barnhardt's activities by East-European. (Borden App. 16, pp. 15 -18, 24-25, 27). If East-European had desired to restrict Barnhardt's activities, it could have issued instructions to be passed through the chain of brokers to Barnhardt. (Borden App. 16, p. 27).

It is uncontradicted that agent Barnhardt "solicited" or "induced" Borden in Florida by providing information about East-European, engaged in "preliminary negotiations" with Borden in Florida by providing a quote for a policy by East-European, "effectuated the contract of insurance" by collecting and forwarding premiums in Florida and delivering the cover note in Florida, and "transacted matters subsequent to the effectuation of the contract of insurance" by preparing and delivering the notice of cancellation of insurance in Florida, by notifying and forwarding the claim in Florida, and by requesting information about the loss. All these things are included in the definition of "transacting insurance" as set forth in Fla.Stat. 624.10.

How can it be said that East-European had no meaningful contacts with the State of Florida in transacting insurance?

Since marine insurance is effected by communications up and down a chain of brokers with the insured at one end and the insurer at the other, [7] concepts of agency and apparent authority in the international marine insurance context require some modification from those concepts as might be applied in the context of a domestic underwriter which operates through a network of agents throughout the state. Here, operating in the usual manner in the international marine insurance industry, East-European sat at the top of its chain of brokers and agents. Albeit there was no "direct' contact between East-European and Barnhardt, nevertheless East-European enjoyed the benefits of that relationship to the same extent that State Farm enjoys the benefits of the work of its agents writing insurance on the local level.

IV. MISCELLANEOUS CLARIFICATION AND REBUTTAL

A. The Allegations of the Amended Complaint are Adequate.

Respondent now asserts that the allegations of the amended complaint fail to sufficiently allege jurisdiction under Section 626.906(4) and refers to only two subparts. The amended complaint (Borden App. 4) alleges much

[7] Barnhardt's DeAngelo testified that in the marine insurance and marine brokerage business, the protocol of broker to broker to broker to underwriter is pretty well followed and is exactly what was done in this case. (Borden App. 16, p. 18). In her experience, if an underwriter desires to communicate with the broker who has the most direct contact with the agent for the insured, the insurance company can communicate and does communicate through the line of brokers. They always follow the chain. (Borden App. 16, pp. 18-19, 29).

more in that it details actions of Barnhardt and East-European which clearly fall within the ambit of "any other transaction of insurance" as stated by Section 626.906(4) and "transacting insurance" as defined by Section 624.10. The amended complaint alleges a broad series of events and relationships that demonstrate Respondent's transaction of insurance in the State of Florida through its agent Barnhardt.

B. Who is This Barnhardt?

Incredibly, Respondent asserts that Barnhardt "took it upon itself to create its own cover note". (Respondent's brief, p. 41). Further that Borden did not even know that Barnhardt prepared the cover note since the "cover note does not say 'Barnhardt' anywhere." (Respondent's brief, p. 41). Such statements ignore the evidence. The Cover Note was only issued by Barnhardt because East-European agreed to bind the insurance (Borden App. 22, questions 9, 12; Borden App. 17; Borden App. 16, p. 17). Borden was not ignorant of who Barnhardt was and its involvement in effectuating the insurance coverage. Borden was certainly aware that Barnhardt was seeking to provide insurance for his vessels. Barnhardt had an application for insurance from Borden (Borden App. 16, pp.20, 21); provided Borden with descriptive information about East-European (Borden App.10; Borden App. 16, pp. 23, 24); provided Borden with an insurance quote from East-

European (Borden App. 10; Borden App.16, pp. 23, 24); prepared and wrote the insurance Cover Note naming East-European (Borden App. 7; Borden App. 16, p. 15); and caused the cover note to be delivered to Borden. (Borden App. 6, Borden App. 8). Borden knew full well who Barnhardt was and that Barnhardt wrote the insurance for East-European.

C. Respondent's reliance on *Toshiba Funding Authority, Ltd. v. Somerset Marine, Inc.*, 923 F.Supp. 982 (S.D.Tex. 1996) is misplaced.

Factually, *Toshiba* is a far different case than *Borden*. Plaintiff Toshiba had no contacts with the forum state other than its attorney resided there and the attorney received some letters from an entity that was not acting as the defendant insurer's agent. Toshiba had no presence in the state. Conversely, Borden had a presence in Florida. The defendant insurance company did not have any agent soliciting insurance business in the state and the insurance policy was not issued nor delivered in the state. Texas had no interest in resolving the dispute. Conversely, East-European had an agent in Florida, information about the insurer was provided in Florida, the cover note was issued and delivered to Borden's agent in Florida, and the premium was collected and paid in Florida.

East-European, acting through its relationships, had sufficient contacts with Florida to fairly permit application of jurisdiction.

Florida does have an interest in the outcome of this case since East-European has received the advantages of contacts made in Florida and would gain a competitive advantage over domestic and foreign underwriters that are otherwise subject to the Florida Unauthorized Insurer's Process Law if it can escape jurisdiction here. Furthermore, the courts of Florida are an appropriate forum for this case since East-European received the advantages of the contract made in Florida. Section 626.906(4) is a legitimate exercise of its legislative power by the Florida Legislature leading to the conclusion that a transaction of insurance involving a non-resident making an insurance contract in the State of Florida subjects the parties to the jurisdiction of Florida.

CONCLUSION

For all the reasons set forth in Mr. Borden's initial and reply briefs, he respectfully requests that this Court reverse the appellate court below and remand with instructions that the trial court's order denying East-European's motion to quash be affirmed. Let the case proceed to resolution on the merits.

Respectfully submitted,

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner certifies that this 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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Attorney

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy was furnished by U.S. mail to Steven L. Brannock, Esq., Holland & Knight LLP, P.O. Box 1288, Tampa, FL 33601-1288; David W. Henry, Esq., Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., 225 South Orange Avenue, Suite 1401, Orlando, FL, 32801; and John Bond Atkinson, Esq., Atkinson & Brownell, P.A., Suite 3750, 2 South Biscayne Blvd., Miami, FL 33133 on February 9, 2005. A copy has also been submitted to this Court electronically via e-mail in Microsoft Word format pursuant to Administrative Order AOSC04-84.

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Attorney