FLORIDA SUPREME COURT

CASE NO.: SCO5-1725
Lower Tribunal No.: 3D04-1202

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON **vs.** **T. ALEC RIGBY**

Petitioner **Respondent**

_____/

PETITIONER'S BRIEF ON THE MERITS

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

Christine J. Testaverde
DUANE MORRIS, LLP
380 Lexington Ave.
New York, NY 10168
(212) 692-1000

Eric Saida
Florida Bar No. 0178187
DUANE MORRIS, LLP
200 S. Biscayne Blvd.
Miami, FL 33131
(305) 960-2200

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I. STATEMENT OF THE CASE

This is an insurance coverage lawsuit. In the complaint filed in the Circuit Court for Miami-Dade County, plaintiff-below/Respondent, T. Alec Rigby ("Respondent" or "Mr. Rigby"), sought a declaration of coverage for a Claim under a certificate of insurance issued by defendants-below/Petitioner, certain Underwriters at Lloyd's, London ("Petitioner" or "Underwriters"). Underwriters contend that Mr. Rigby is not entitled to coverage for the Claim at issue because the "insured versus insured" exclusion (the "IvI Exclusion") contained in the certificate of insurance is applicable. The Circuit Court, in granting summary judgment to Underwriters, agreed with Underwriters and concluded that the IvI Exclusion is not ambiguous and the plain language of the certificate excludes coverage for the Claim because the underlying plaintiff is an Assured, as defined by the certificate. The Circuit Court's decision was properly based upon a straightforward reading of the certificate's plain and unambiguous language.

On May 25, 2005, the Florida Court of Appeals for the Third District (the "Appeals Court") issued a decision reversing the Circuit Court's decision granting summary judgment to Underwriters (the "Order"). In the Order, the Appeals Court held that the IvI Exclusion contained in the certificate did not apply to the lawsuit brought by Atlas Environmental, Inc.'s ("Atlas") bankruptcy

trustee, who was expressly named as an Assured by way of endorsement. Order at pp. 4-5.

The Appeals Court's decision was based upon the rationale that the IvI Exclusion only applies if the Assured plaintiff is prosecuting the lawsuit in their insured capacity. Order at pp. 4-5. Accordingly, since the trustee, Mr. Soneet Kapila, brought the suit in his uninsured capacity as a bankruptcy trustee, the IvI Exclusion does not exclude coverage.

Respondent is a former president and director of Atlas. (R. 2-45 (Complaint) at ¶ 3)[1]. Respondent served in such positions from January 14, 1997 to April 1998. (R. 2-45 at ¶ 13).

On or about January 14, 1997, Atlas and its subsidiaries filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. (R. 2-45 at ¶ 9). On or about October 16, 1998, the Bankruptcy Court denied confirmation of the debtors' then-pending reorganization plan and directed the appointment of a Chapter 11 trustee. *Id.* On or about August 11, 1999, the Chapter 11 cases were converted to Chapter 7. (R. 2-45 at ¶ 11). On or about

[1] Since, as of the date of this filing, the Record from the Third District Court of Appeal has not been transmitted to this Court, all references to the Record refer to the Record transmitted from the Circuit Court in and for Miami-Dade County, Florida.

September 22, 1999, Mr. Kapila was appointed permanent Chapter 7 trustee. (R. 2-45 at ¶ 12). After he was appointed as trustee, Mr. Kapila requested that he be named as an Assured under the certificate.

Underwriters issued to Atlas and its subsidiaries Directors and Officers and Company Reimbursement Indemnity Certificate No. DOM3000854 (the "Certificate") effective for the period June 1, 1998 through June 1, 1999 (the "Certificate Period"). (R. 2-45 at ¶ 24). The "Optional Extended Reporting Period" was later purchased, and extended the time for reporting a Claim under the Certificate to June 1, 2000. (R. 2-45 at ¶ 26).

Standard Directors and Officers policies contain insured v. insured exclusions that exclude coverage for causes of action by one insured (such as a current or former officer) against another insured. The Certificate contains the following IvI Exclusion:

> **III. Exclusions**
>
> Underwriters shall not be liable to make any payment in connection with any Claim:
>
> * * *
>
> F. by, on behalf of, or at the direction of any of the Assureds, except and to the extent that such Claim is brought derivatively by a security holder of the Company who, when such Claim is first made, is acting independently of all of the Assureds.

(R. 2-45 at Ex. "A").

The term "Assureds" is defined in the Certificate as "the Company and the Directors and Officers." The term "Directors and Officers" is defined by Section II.G. of the Certificate, as modified by Endorsement Nos. 14 and 18 of the Certificate, as:

> G. [A]ny persons who were, now are or shall be
>
> 1) directors or officers of the Company, or
>
> 2) Soneet Kapila
>
> including their estates, heirs, legal representatives or assigns in the event of their death, incapacity or bankruptcy.

In 2000, Mr. Kapila filed an adversary complaint (the "Kapila Action") against Mr. Rigby in the bankruptcy proceeding for negligence and breach of his fiduciary duties in his capacity as an officer of Atlas. (R. 2-45 at ¶¶ 27 and 28). Mr. Rigby notified Underwriters of the Kapila Action both before and after it was filed and demanded that Underwriters fund the defense and agree to indemnify any potential judgment pursuant to the terms of the Certificate. (R. 2-45 at ¶ 24). In response to such demands, Underwriters informed Mr. Rigby that coverage for the Kapila Action was excluded pursuant to the IvI Exclusion. (R 132-136 (Defendants' Motion For Summary Judgment and Supporting Memorandum of Law) at Exs. "A" and "B"). Mr. Rigby thereafter agreed to the entry of judgment in favor of Mr. Kapila and proceeded to file suit against Underwriters seeking a

declaration of coverage under the Certificate in connection with the Kapila Action. (R. 2-45 at ¶ 25).

Following limited discovery, Mr. Rigby and Underwriters filed cross-motions for summary judgment on the issue of whether the Kapila Action was excluded from coverage under the Certificate pursuant to the IvI Exclusion. The Circuit Court granted Underwriters' motion for summary judgment and denied Mr. Rigby's motion for summary judgment, finding that the IvI Exclusion is unambiguous and by its plain terms it excluded coverage for the Kapila Action. (R. 195). The Appeals Court reversed the granting of summary judgment. Order at pp. 4-5. The Appeals Court – neither employing a plain reading of the IvI Exclusion, nor finding the wording of the exclusion to be ambiguous, held that the IvI Exclusion was not applicable because the exclusion only applies to suits brought by an "Assured" acting in their insured capacity. Order at pp. 4-5. After the Appeals Court denied Underwriters' request for a rehearing, Underwriters filed this appeal.

II. ARGUMENT

A. Summary of the Argument

The IvI Exclusion excludes coverage for any Claim brought "by, on behalf of, or at the direction of any of the Assureds[.]" In finding that the IvI Exclusion was not triggered by the suit brought by Mr. Kapila against Mr. Rigby, the

Appeals Court essentially rewrote the unambiguous language of the IvI Exclusion by inserting a condition limiting the applicability of the exclusion to suits brought by an "Assured" acting in his or her insured capacity. However, there is no such limitation in the IvI Exclusion as written -- the plain and express terms of the IvI Exclusion clearly require only that the suit be brought by or at the direction of an "Assured."

The Appeals Court's construction of the IvI Exclusion to bar coverage only for suits brought by an "Assured" acting in his or her insured capacity is contrary to precedent established by decisions of this Court that where the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written. In fact, the Appeals Court's decision is in direct contrast to numerous decisions in which courts have held that similar insured vs. insured exclusions bar coverage even though the respective plaintiffs were prosecuting the lawsuits at issue in their uninsured capacity.

It is undisputed, and was in fact admitted by the Respondent, that Mr. Kapila is an Assured under the Certificate. Because the Kapila Action was brought by Mr. Kapila (an Assured) against Mr. Rigby (an Assured), based upon a straightforward reading of the Certificate's plain and unambiguous language,

the Claim is excluded from coverage under the Certificate pursuant to the IvI Exclusion.

B. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). The standard of review applicable to an order granting summary judgment is *de novo*. A lower court's interpretation of a contract, such as an insurance policy, is also reviewed *de novo* on appeal. *Fayad v. Clarendon National Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005). Thus, because the subject of this appeal is the reversal of the grant of summary judgment based upon the Appeal Court's interpretation of the wording of the Certificate, the standard of review applicable to the entirety of the appeal is *de novo*.

C. The Kapila Action Is Excluded By The Plain Terms Of The Unambiguous IvI Exclusion

1. Courts Must Interpret Unambiguous Policy Language In Accordance With the Plain Language Of The Policy

Under Florida law, insurance policies, like all contracts, must be given effect as written unless the specific term at issue is found to be ambiguous. *Travelers Indem. Co. v. PCR Incorporated, et al.*, 889 So.2d 779, 785 (Fla. 2004) ("if language used in an insurance policy is plain and unambiguous, a court must

interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written."); and *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla. 2003) (holding that unless found to be ambiguous, "insurance policies must be construed in accordance with the plain language of the policy"). Unambiguous exclusions are treated in the same manner as other unambiguous policy terms. *Taurus Holdings, Inc. v. United States Fidelity and Guaranty Co.*, 913 So.2d 528, 532 (Fla. 2005) ([i]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision), *citing Hagen v. Aetna Cas. & Sur. Co.*, 675 So.2d 963 (Fla. 5th DCA 1996). This Court has expressly declined to adopt the doctrine of reasonable expectations of the insured because to apply the "doctrine to an unambiguous provision would be to rewrite the contract." *Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998). As the established precedent cited above demonstrates, courts applying Florida law are prohibited from rewriting insurance contracts and required to apply the unambiguous language of an exclusion as written.

2. The Language In The Certificate Is Unambiguous

The IvI Exclusion, as quoted above, excludes coverage for any Claim brought "by, on behalf of, or at the direction of any of the Assureds[.]" This

exclusion, clearly and unambiguously excludes from coverage Claims brought by or at the direction of one Assured against another.

Similar insured v. insured exclusions have been held to be unambiguous by courts applying Florida law. *See Sphinx Int'l, Inc. v. National Union Fire Ins. Co.*, 412 F.3d 1224 (11th Cir. 2005) (holding "insured vs. insured" exclusion "not ambiguous"); *see also Powersports, Inc. v. Royal & Sunalliance Ins. Co.*, 307 F. Supp. 2d 1355 (S.D. Fla. Feb. 25, 2004) (following *Sphinx*). In *Sphinx*, the district court, applying Florida law, held that an insured vs. insured exclusion was unambiguous and it barred coverage because the plaintiff was a former officer and director of the insured company. *Sphinx Int'l, Inc. v. National Union Fire Ins. Co.*, 226 F.Supp. 2d 1326, 1340 (M.D. Fla. 2002). Further, the court indicated that although the insureds might believe it is unfair to exclude coverage based upon a suit by a former director or officer who was no longer with the company at the time the policy was issued and had no involvement with the wrongful acts at issue, there is nothing unclear or uncertain about the language used in the insured v. insured exclusion. *Id.* In the decision affirming the district court's ruling that the insured v. insured exclusion barred coverage, the United States Court of Appeals for the Eleventh Circuit held that a court should not search for countervailing rationales for an otherwise unambiguous insured vs.

insured exclusion, rather, it should apply the exclusion as written. *Sphinx Int'l, Inc. v. National Union Fire Ins. Co.*, 412 F.3d 1224, 1230 (11th Cir. 2005).

It is undisputed that Mr. Kapila is an Assured under the Certificate. In fact, Mr. Kapila is expressly identified by name in Endorsement Nos. 14 and 18 as being included in the definition of "Directors and Officers." Pursuant to Section II.B., an Assured under the Certificate includes any individual who falls under the definition of Directors and Officers. Based upon the plain meaning of the IvI Exclusion and related definitions, the Kapila Action, because it was brought by an Assured against Mr. Rigby, also an Assured, is excluded from coverage under the Certificate. The Circuit Court's straightforward interpretation of the plain unambiguous policy wording was correct and should not have been reversed by the Appeals Court.

3. The Capacity Of Mr. Kapila Has No Bearing Upon The Applicability Of The IvI Exclusion

All that is required for the IvI Exclusion to apply is that the person making the Claim is an Assured. Mr. Kapila's insured capacity simply has no bearing upon the applicability of the IvI Exclusion. The plain wording of the IvI Exclusion does not provide an exception or limitation based upon the capacity in

which the Assured brings a Claim.[2] In reversing the grant of the summary judgment, the Appeals Court rewrote the Certificate to include terms that do not exist – *i.e.*, that a Claim brought by an Assured is excluded only if brought in an insured capacity. However, there is no such limitation contained in the Insured v. Insured Exclusion or anywhere else in the Certificate.

In *Sphinx*, the underlying plaintiff, a *former* officer and director of the insured company, commenced the purported securities class action in his capacity as a shareholder of Sphinx. *Sphinx Int'l, Inc. v. National Union Fire Ins. Co.*, 412 F.3d 1224, 1227 (11th Cir. 2005). Given that the underlying plaintiff was a

[2] The Respondent has previously argued that coverage for the Kapila Action is not excluded because insured vs. insured exclusions do not exclude coverage for suits brought by bankruptcy trustees. The Respondent specifically relies on *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F.Supp.2d 376, 404 (D. Del. 2002) and its progeny, in which courts have held that adversary bankruptcy proceedings were not excluded because "claims brought 'by' the respective estate representatives are not the same as claims brought 'by' the Debtor under the exclusionary provision". However, the various cases relied on by the Respondent do not stand for the broad proposition that Claims brought by bankruptcy trustees could never be subject to insured v. insured exclusions. Rather, the issue in each of the cases relied on by the Respondent was whether the term "insured" in the relevant policies includes a bankruptcy trustee. Unlike those cases in which the court determined that the plaintiffs were not insureds as defined by the respective policies, Mr. Kapila is specifically named as an Assured under the Certificate. Accordingly, the issue of whether Mr. Kapila is an Assured is not in dispute and those cases are inapposite and their holdings inapplicable to this appeal.

former officer and director at the time he commenced the lawsuit at issue, the lawsuit clearly was not brought by the plaintiff in an insured capacity.

The Appeals Court held that the IvI Exclusion did not exclude coverage because Mr. Kapila was not acting in his insured capacity when he commenced the Kapila Action. However, as the court applying Florida law held in *Sphinx*, the fact that the person making the claim is not prosecuting the lawsuit in his or her insured capacity is not relevant to the determination of whether the insured vs. insured exclusion is applicable. All that is required for the IvI Exclusion to apply is that the person making the Claim is in fact an Assured.

The position that an insured vs. insured exclusion is only applicable if the plaintiff was acting in an insured capacity when the litigation was commenced has been expressly considered – and soundly rejected – by courts in other jurisdictions. For example, the case of *American Medical Int'l, Inc. v. National Union Fire Ins. Co.*, 244 F.3d 715 (9th Cir. 2001) involved a situation where an insurer denied coverage to an insured entity pursuant to an insured v. insured exclusion on the basis that the underlying claim had been brought by a former director.[3] The insured entity argued that the underlying claim was not subject to

[3] Numerous decisions in other jurisdictions are also in accord with the holding that insured v. insured exclusions bar coverage for Claims brought by insureds who are not acting in their insured capacity. *See, e.g., Level 3 Comms. v. Federal* (Continued…)

the policy's insured v. insured exclusion because it sought redress for harm suffered by the individual in his capacity as a shareholder, and not in his insured capacity as a former director. The United States Court of Appeals for the Ninth Circuit, analyzing California law, rejected this argument, holding that the insured v. insured exclusion at issue did not distinguish between dual capacities. *Id*. at 722. The court found it significant that while the policy did define coverage in terms of capacity, *i.e.*, the definition of "wrongful act" included only misconduct arising out of actions undertaken in an insured's capacity as a director or officer, the insured v. insured exclusion did not contain such a limitation. *Id*. The lack of such limiting language signaled to the court the clear intent of the parties "broadly to preclude suits by [insureds] regardless of the capacity in which they sue." *Id*.

(Continued…)

Ins. Co., 168 F.3d 956, 958 (7th Cir. 1999) (insured v. insured exclusion bars coverage for Claim brought by *former* director); *Foster v. Kentucky Housing Corp.*, 850 F.Supp. 558, 561 (E.D. Ky. 1994) (rejecting argument that unambiguous insured v. insured exclusion required inquiry into collusive potential of lawsuit brought by *former* director); and *Voluntary Hospitals of America, Inc. v. National Union Fire Ins. Co.*, 859 F.Supp. 260, 263 (1993) *aff'd* 24 F.3d 239 (5th Cir. 1994) (unambiguous insured v. insured exclusion bars coverage for lawsuit in which a *former* director and officer assisted with the prosecution because the definition of insured unambiguously included former directors and officers).

The reasoning of *American Medical* applies here. As in *American Medical*, "Wrongful Act" is defined in the Certificate as misconduct by a Director or Officer "solely in their capacity as a director or officer of the Company." (R. 2-45 (Complaint) at Ex. "A"). As in *American Medical*, the IvI Exclusion contains no limitation based upon capacity. Thus, as in *American Medical*, the wording of the Certificate makes clear the intent is to exclude any suit brought by an insured regardless of the capacity in which the suit is brought.

The plain language of the IvI Exclusion requires the Court to determine only whether Mr. Kapila is an Assured under the Certificate, which Respondent cannot deny, and has, in fact, admitted. As the Circuit Court correctly held, because Mr. Kapila is an Assured under the Certificate, the plain wording of the IvI Exclusion serves to exclude coverage under the Certificate of the Kapila Action which was brought "by" Mr. Kapila. The language of the exclusion makes no mention whatsoever of capacity of the person making the Claim and the Certificate contains no exception to this exclusion based upon the capacity of the person bringing the Claim. Mr. Kapila's insured capacity is irrelevant to the application of the IvI Exclusion, his status as an Assured is all that is required to trigger the exclusion. Therefore, the IvI Exclusion is applicable and precludes coverage for the Kapila Action, thus entitling Underwriters to a grant of summary judgment in their favor.

III. Conclusion

Defendant/Petitioner respectfully requests that this Court reverse the Appeals Court's decision reversing the decision granting summary judgment to Underwriters by the Circuit Court.

Respectfully submitted,

By: _____

Christine J. Testaverde
DUANE MORRIS, LLP
380 Lexington Ave.
New York, NY 10168
(212) 692-1000

Eric Saida
Florida Bar No. 0178187
DUANE MORRIS, LLP
200 S. Biscayne Blvd.
Miami, FL 33131
(305) 960-2200
Attorneys for Petitioner/Defendant

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief on the Merits complies with the font requirement as stated in the Florida Rules of Appellate Procedure 9.210(a)(2).

By_____
Eric Saida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Joseph M. Matthews, Esq.**, Colson Hicks Eidson, 225 Aragon Ave., Second Floor, Coral Gables, FL 33134 by regular U.S. Mail this 12th day of January, 2006.

By_____
Eric Saida