FLORIDA SUPREME COURT

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

Petitioner,

vs.

T. ALEC RIGBY,

Respondent.
_____/

Case No.

Third District Court of Appeal
Case No. 3D04-1202

PETITIONER'S BRIEF ON JURISDICTION

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

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I. Legal Basis To Invoke Discretionary Jurisdiction Pursuant To Fla. R. App. P. 9.030(a)(2)(A)(iv)

Defendant/Petitioner, Certain Underwriters at Lloyd's, London ("Underwriters"), respectfully submits that this Court has jurisdiction to review the decision of August 17, 2004 by the Florida Court of Appeals for the Third District (the "Appeals Court"), denying Underwriters' request for rehearing of the Appeals Court's May 25, 2005 decision reversing the decision granting summary judgment to Underwriters by the Circuit Court for Miami-Dade County, because it is contrary to the decisions of this Court in *Travelers Indem. Co. v. PCR Incorporated, et al.*, 889 So.2d 779 (Fla. 2004), *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161 (Fla. 2003) and *Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998), among others, and other district courts of appeal. Therefore, Underwriters respectfully submits this motion for discretionary jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

II. The Gravamen Of This Motion For Discretionary Jurisdiction Is Whether A Court Applying Florida Law May Interpret An Exclusion In An Insurance Policy Contrary To Its Plain Meaning – Where The Court Did Not Find That The Exclusion Is Ambiguous

In its May 25, 2005 opinion, the Appeals Court held that the "insured versus insured exclusion" (the "IvI Exclusion") contained in a certificate of

insurance (the "Certificate") issued by Underwriters to Atlas Environmental, Inc. ("Atlas") did not apply to a lawsuit brought by Atlas's bankruptcy trustee against the Appellant, Mr. T. Alec Rigby. The Appeals Court's decision was based upon the rationale that the trustee, Mr. Soneet Kapila, brought the suit in his capacity as a trustee and not as a director or officer of Atlas.

The IvI Exclusion provides as follows:

> **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.

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. Directors and Officers means any 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.

It was undisputed, and was in fact admitted by the Appellant, that Mr. Kapila is an "Assured" under the Certificate. Additionally, while Appellant did argue that the definition of "Assured" was ambiguous, the Appeals Court did not find that the definition of Assured or the IvI Exclusion was ambiguous. In finding that the IvI Exclusion was not triggered by the suit brought by Mr. Kapila (undisputedly an "Assured") against Mr. Rigby, the Appeals Court rewrote the IvI Exclusion by inserting a condition limiting the applicability of the exclusion to suits brought by an "Assured" acting in its insured capacity. However, there is no such limitation in the IvI Exclusion as written -- the plain and express terms of the IvI Exclusion 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 only suits brought by an "Assured" acting in his 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." *Travelers Indem. Co.*, 889 So.2d at 785. *See also Swire Pacific Holdings, Inc.*, 845 So.2d at 165 (holding that unless found to be

ambiguous, "insurance policies must be construed in accordance with the plain language of the policy").[1]

The Appeals Court's interpretation of the IvI Exclusion is also contrary to well-established decisions of the other district courts of appeal. For example, in *Buckhalter v. Commercial Union Ins. Co.*, 787 So. 2d 949 (Fla 4th DCA 2001), the district court of appeal held that the rule that exclusions are construed against the insurer only applies when there is a genuine inconsistency or ambiguity, and thus, an unambiguous exclusion for claims made by family members was applicable and barred coverage. *See also Allstate Ins. Co. v. Shofner*, 573 So. 2d 47 (Fla. 1st DCA 1990) (rule that ambiguities must be construed against the insurer applies only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to ordinary rules of construction, it does not allow

[1] The Appeals Court cited to *Sphinx Int'l, Inc. v. National Union Fire Ins. Co.*, 226 F. Supp. 2d 1326 (M.D. Fla. 2002), for the proposition that the words in an insurance policy are to be given their plain and ordinary meaning. In *Sphinx*, the district court, applying Florida law, held that an "Insured v. Insured" exclusion barred coverage because the plaintiff, who commenced the litigation in his uninsured capacity as a shareholder of Sphinx, was a former officer and director of Sphinx. 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 v. 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).

courts to rewrite contracts); *Roberts v. Florida Lawyers Mut. Ins. Co.*, 839 So. 2d 843, 846 (Fla 4th DCA 2003) (unreasonable reading of an insurance policy provision does not create an ambiguity that must be construed most favorably to the insured); *The Great Global Assur. Co. v. Shoemaker*, 599 So.2d 1036, 1039 (Fla 4th DCA 1992) (unless ambiguous, the language used in an insurance contract must be given its plain and ordinary meaning).

As discussed above, the Appeals Court did not identify any purported ambiguous language in the Certificate or find that the definition of Assured or the IvI Exclusion is ambiguous. Nevertheless, despite the fact that the language of the IvI Exclusion makes no mention whatsoever of the capacity of the Assured who made the Claim, or contain any exception to the exclusion regarding the capacity of the plaintiff, the court determined that the exclusion only applies if the person who made the Claim was acting in his insured capacity when he commenced the suit at issue. Accordingly, the only explanation is that the Appeals Court's rewriting of the IvI Exclusion is based on what the court believes was the "reasonable expectations" of the Assureds with respect to the naming of Soneet Kapila as an Assured pursuant to Endorsement Nos. 14 and 18. However, this Court has expressly declined to adopt the doctrine of reasonable expectations because to apply the "doctrine to an unambiguous provision would be to rewrite the contract." *Deni Assoc. of Florida, Inc.*, 711 So.2d at 1140.

As the established precedent cited above demonstrates, the Appeals Court was prohibited from rewriting the contract and required to apply the unambiguous language of the IvI Exclusion *as written*. As written, the IvI Exclusion applies to *any* suit brought by an "Assured;" there is nothing in the IvI Exclusion or the Certificate which conditions the application of the IvI Exclusion upon the capacity in which the "Assured" brings the suit. Since it was and remains undisputed that Mr. Kapila is an "Assured," the Appeals Court's decision, because it clearly did not involve the application of the plain terms of the unambiguous IvI Exclusion *as written*, is contrary to the above-cited authority from this Court, as well as the decisions of other district courts of appeal.

III. Conclusion

Defendant/Petitioner respectfully requests that this Court accept jurisdiction of this matter pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

Respectfully submitted,

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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 22nd day of September, 2005.

By_____
Eric Saida

CERTIFICATE OF COMPLIANCE

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

By_____
Eric Saida