FLORIDA SUPREME COURT

CASE NO. SC05-1725
DCA No. 3D04-1202

CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON,

Petitioner,

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

vs.

T. ALEC RIGBY,

Respondent.
_____/

**RESPONDENT'S BRIEF ON JURISDICTION**

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## STATEMENT OF THE CASE AND FACTS

Petitioner, Certain Underwriters at Lloyd's (Lloyds) seeks discretionary review of *Rigby v. Underwriters at Lloyd's, London,* 907 So.2d 1187, (Fla. 3rd DCA 2005) pursuant to Fla. R. App. P. 9.030(a) (2)(A)(iv). Lloyds claims that the decision of the Third District "is contrary" to three decisions of this Court and four decisions of other courts of appeal. However, Lloyds cites no decisions of this Court or any district court of appeal with which the decision of the Third District directly and explicitly conflicts, because no such decisions exist.

This was a declaratory judgment action by T. Alec Rigby, a former officer and director of Atlas Environmental, Inc. ("Atlas"). Atlas and its eleven subsidiaries went through an unsuccessful period under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq*, operating as a "debtor-in-possession" which was ultimately converted to Chapter 7. Soneet Kapila was appointed as bankruptcy trustee and, in his capacity as trustee obtained a judgment for damages against Rigby for negligence and breach of fiduciary duty, for the benefit of Atlas' creditors. Rigby brought this action against Lloyds seeking a declaratory judgment that he was entitled to indemnity coverage under a policy of directors and officers' liability insurance for the bankruptcy court judgment against him.

The trial court concluded that what is commonly referred to as the "insured v. insured" exclusion in the insurance policy barred indemnity coverage for the trustee's damage judgment against Rigby. The Third District reversed, holding that the insured v. insured exclusion in this policy did not apply to this claim brought by the trustee pursuant to his statutory authority to collect and reduce to money the property of the debtor's estate for the benefit of the debtor's creditors.

## SUMMARY OF ARGUMENT

The decision of the Third District does not conflict with any decision of this Court or of any other Florida appellate court. There can be no conflict jurisdiction because there are no other Florida decisions on point. No appellate court in Florida has previously decided whether an "insured v. insured" exclusion in a directors and officers liability insurance policy applies to bar claims by a trustee in bankruptcy brought for the benefit of the debtor's creditors against a former officer or director of the debtor corporation. Therefore, the decision of the Third District did not announce a conflicting rule of law, nor did it apply a previously stated rule of law based on controlling facts substantially similar to the facts in this case and reach a different conclusion. See *Fla. R. App. P.* 9.030(a) (2) (A) (iv) and *Mancini v. State,* 312 So.2d 732 (Fla. 1975).

Lloyds' argument that the Third District had to first conclude that the subject policy was ambiguous before finding that the exclusion did not apply to bar coverage

for the trustee's damage judgment against Rigby, is a red herring designed to create an apparent conflict with prior decisions where no such conflict exists.

## ARGUMENT

### I. THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH *PCR, SWIRE OR DENI,* EITHER AS TO THE RULE OF LAW OR THE APPLICATION OF A RULE OF LAW TO THE FACTS OF THE CASE

Petitioner asserts that the Third District's decision is "contrary" to the decisions of this Court in *Travelers Indem. Co. v. PCR Inc.,* 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). This is not the standard for determining whether conflict jurisdiction exists under this Court's discretionary jurisdiction provided by Rule 9.030(a) (2) (A) (iv).

Moreover, the result is not even "contrary" to the cited authority. The Third District decision announced no rule of law. Rather, it specifically cited, in footnote 1 of its decision, the very authority provided by Lloyds for the applicable rule of law. Relying on *Sphinx Int'l, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 226 F. Supp.2d 1326 (M.D. Fla. 2002) and *Thomas v. Prudential Prop. & Cas.,* 673 So.2d 141 (Fla. 5th DCA 1996), the Third District gave the words used in the subject policy their plain and ordinary meanings. The court merely disagreed with Lloyds and the trial court as to the plain and ordinary meaning of the words. Very simply, the Third District held that the complaint against the insured in this case, Mr. Rigby, and the

judgment entered thereon against him were pursued by the trustee, based solely on the statutory authority granted to bankruptcy trustees. (Rigby, 907 So.2d at 1188-89)

The Third District decision thus does not conflict with the decision in *PCR*, 889 So.2d at 779 that an "intentional acts" exclusion did not apply to tort claim against employer based on ambiguity; the holding in *Swire Pacific*, 845 So.2d at 161 that a "design defect" exclusion in a builder's risk insurance policy was not made ambiguous by the lack of a definition of the terms "loss or damage" in the exclusion of coverage for loss or damage caused by fault, defect, error, or omission in design or plan; nor with the holding in *Deni Assoc.*, 711 So.2d at 1135 that a "pollution exclusion" was applicable based on the determination that it was not ambiguous

Recognizing that there is no direct and express conflict with any existing precedent, Lloyds attempts to manufacture a conflict. Although Lloyds apparently concedes that the Third District could have reached the same result by concluding that the language used to define officers and directors in this policy was ambiguous as to Soneet Kapila's status, it argues that by failing to specifically base its determination upon a finding that the policy is ambiguous, the decision thus "is contrary" to the decisions of this Court and other courts of appeal. This argument fails the basic test for discretionary conflict jurisdiction under Rule 9.030(a) (2) (A) (iv).

As stated by England and Simon, "the test of jurisdiction under this provision is not whether this Court would have arrived at a conclusion different from that reached

by the district court, but whether the district court decision on its face so collides with a prior decision of this Court or another district court on the same point of law as to create an inconsistency or conflict among precedents." Arthur England and Tobias Simons, *Florida Appellate Practice Manual,* Chapter 2 at 40a, (citing *Kincaid v. World Ins. Co.*, 157 So.2d 517 (Fla. 1963)).

Lloyds' assertion that the Third District's decision conflicts with inapposite decisions of this Court that addressed different coverage exclusions in other types of insurance contracts is wholly contrived and provides no basis for this Court to exercise its discretionary jurisdiction under Rule 9.030(a) (2) (A) (iv).

## II. THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE DISTRICT COURTS OF APPEAL.

Lloyds also asserts conflict between the Third District's decision and several decisions of district courts of appeal. Again, there is no conflict.

First, this Court's jurisdiction depends on express conflict that appears *on the face of the opinion* sought to be reviewed. Art. V, § 3(b) (3), Fla. Const.; *Hardee v. State*, 534 So.2d 706 (Fla. 1988). On its face, the decision of the Third District does not purport to be based on any of the rules of law which the decisions cited by Lloyds announced. Thus, Lloyds' reference to *Buckhalter v. Commercial Union Ins. Co.,* 787 So.2d 949 (Fla. 4th DCA 2001) (construction against insurer where ambiguity exists); *Allstate Ins. Co. v. Shofner*, 573 So.2d 47 (Fla. 1st DCA 1990) (ambiguity must be real

before resort to rules of construction apply; courts not permitted to rewrite contracts); *Roberts v. Florida Lawyers Mut. Ins. Co.*, 839 So.2d 843 (Fla. 4th DCA 2003) (unreasonable reading does not create ambiguity); and *The Great Global Assur. Co. v. Shoemaker*, 599 So.2d 1036 (Fla. 4th DCA 1992) (unless ambiguous, insurance policy must be given its plain and ordinary meaning) are either inapposite or completely consistent with the rule of law applied by the Third District.

Lloyds is most frustrated with the fact that the Third District actually relied directly upon the only cited decision, a federal court decision applying Florida law, that actually addressed an "insured v. insured" exclusion, *Sphinx Int'l, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 226 F. Supp.2d 1326 (M.D. Fla. 2002), *aff'd* 412 F.3d 1224 (11th Cir. 2005). In *Sphinx*, the federal courts applied an "insured v. insured" exclusion contained in that directors and officers liability insurance policy to deny coverage for a claim initiated by a former officer and director of Sphinx against the company several years after he was terminated by Sphinx, finding that under the plain language of that policy, the exclusion applied to the claim being pursued against that insured.

Obviously, a decision of the U.S. Court of Appeals cannot provide the basis for conflict jurisdiction in this Court. Moreover, the Third District ***followed*** the rule announced in *Sphinx*. It simply applied the plain meaning of the words in this policy to the facts of this case and concluded that they did not apply to the claim brought

against Rigby by the bankruptcy trustee for the benefit of creditors. Neither the language of the policy exclusions, nor the controlling facts of the disputes in these two cases are substantially similar. Even if it were a decision of this Court or of another district court of appeal in Florida, the Third District decision does not, on its face, so collide with *Sphinx* on the same point of law as to create an inconsistency or conflict among precedents.

No prior Florida appellate court decision addresses the applicability of an "insured v. insured" exclusion to claims brought by a bankruptcy trustee against former officers or directors. Therefore, there cannot be conflict jurisdiction.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny Petitioner's request for review of the Third District's decision for lack of jurisdiction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this ____ day of October 2005, to: Christine Testaverde, Esq., DUANE MORRIS, LLP, 380 Lexington Ave., New York, NY 10168 and Eric Saida, DUANE MORRIS, LLP, 200 S. Biscayne Blvd., Miami, Florida, 33131.

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## CERTIFICATE OF TYPE SIZE AND STYLE

Respondent certifies that this brief complies with the type-volume limitations and the font is in Times New Roman 14-point typeface, in compliance with Florida Rule of Appellate Procedure 9.210(a) (2).

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