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 REPLY BRIEF ON THE MERITS

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

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I. SUMMARY OF ARGUMENT

The plain language of the policy in question defines Soneet Kapila as an insured, and further provides that any suit brought by one insured against another insured is outside coverage. Because Mr. Kapila was expressly named in the policy as an insured, the policy does not cover the action he brought against T. Alec Rigby, who is another insured under the policy.

As written, the policy wording simply cannot be read to permit coverage for the action Mr. Kapila brought against Mr. Rigby. In seeking to avoid this result, Mr. Rigby argues at length regarding the coverage he asserts the policy *should* provide in a bankruptcy setting. But that argument, and the Court of Appeal decision below, contradict established Florida law holding that courts cannot rewrite unambiguous contract language to alter the bargain reached between the parties. *See, e.g., Travelers Indem. Co. v. PCR Incorporated, et al.*, 889 So.2d 779, 785 (Fla. 2004). The policy does not qualify or limit the definition of Mr. Kapila as an insured, and the Respondent's effort to insert words not found in the contract is improper.

Finally, the Respondent cites various cases declining to apply "insured vs. insured" exclusions to actions by bankruptcy trustees, but those cases are inapposite here because – unlike the policy in this case – the insurance policies in

those cited cases did not define the relevant trustee as an insured.

II. ARGUMENT

A. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURT OF APPEALS

T. Alec Rigby ("Respondent" or "Mr. Rigby") makes the same exact argument that he made in his Brief On Jurisdiction which this Court previously rejected. Specifically, the Respondent argues that the decision by the Florida Court of Appeal for the Third District (the "Appeals Court") reversing the Circuit Court's decision granting summary judgment to certain Underwriters at Lloyd's, London ("Petitioner" or "Underwriters") did not conflict with any decision of this Court or of any Florida appellate court because those courts have not previously held that an "insured v. insured" exclusion in a directors and officers liability insurance policy applies to bar claims made by a bankruptcy trustee. The Respondent further contends that the Appeals Court did not rewrite the terms of the certificate of insurance (the "Certificate") issued by Underwriters to Atlas Environmental, Inc. ("Atlas") and did not apply the "doctrine of reasonable expectations of the insured," it rather just looked to the judgment that was entered and concluded that it was not entered in favor of any "Assured."

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

Certificate did not apply to a lawsuit brought by Atlas's bankruptcy trustee, Soneet Kapila, against the Respondent (the "Kapila Action"). The Appeals Court's decision was based upon the rationale that Mr. Kapila brought the suit in his capacity as a trustee for the benefit of the creditors of Atlas, and not in his capacity 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.

The Respondent acknowledges that the Appeals Court did not find that the definition of Assured or the IvI Exclusion was ambiguous, and admits that Mr. Kapila is an "Assured," as defined by the Certificate. In finding that the IvI Exclusion was not triggered by the suit brought by Mr. Kapila 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, 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 Respondent contends that the Appeals Court "simply looked to the judgment that was entered against Mr. Rigby to determine whether Mr. Rigby was entitled to indemnification under the policy and concluded that it was not entered in favor of any "assured" under the language of the policy." However, the Order does not state or imply that the underlying judgment was not entered in favor of an Assured, and the judgment was in fact entered in favor of the trustee, who is undisputedly an Assured. Further, the Respondent fails to identify the specific words that the Appeals Court purportedly gave their "plain and ordinary" meanings when it concluded that the IvI Exclusion does not apply because the

trustee commenced the Kapila Action "based upon his statutory duty as trustee," as opposed to his insured capacity.

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. v. PCR Incorporated, supra*, 889 So.2d at 785 (Fla. 2004). *See also 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"); *Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998) (declining to adopt the doctrine of reasonable expectations because to apply the "doctrine to an unambiguous provision would be to rewrite the contract").

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 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 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 and ordinary terms of the unambiguous definition of Assured, as amended by Endorsement No. 14 and 18, and the 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. Accordingly, the decision by the Appeals Court was contrary to the well established case law cited above and this Court's Order accepting jurisdiction was proper.

B. THE KAPILA ACTION IS EXCLUDED BY THE PLAIN TERMS OF THE UNAMBIGUOUS IvI EXCLUSION

The gravamen of the Respondent's argument is that the IvI Exclusion does not apply to the Kapila Action because the plaintiff in that action purportedly was

not prosecuting the lawsuit in his insured capacity. The Respondent attempts to confuse what is a very simple and straightforward contract interpretation issue by making various irrelevant arguments regarding how certain courts have analyzed inapposite cases involving bankruptcy trustee plaintiffs who were *not* expressly named as insureds under the relevant policies, as well as providing a tutorial of the statutory duties of a bankruptcy trustee.

The Respondent argues that in *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F.Supp.2d 376, 404 (D. Del. 2002), the District Court of Delaware confronted the "precise issue faced by this Court," and came to the conclusion that the "insured v. insured" exclusion in the applicable policy did not bar coverage for an action commenced by a bankruptcy trustee. However, the issue in *Alstrin* was not the "precise issue" faced by this Court because the policy at issue in that matter did not expressly name the trustee plaintiff at issue as an "Insured."

The Respondent highlights in his Answer Brief that the court in *Alstrin* held that the "insured v. insured" exclusion did not apply to claims brought by a bankruptcy "Estate Representative" against the former directors and officers of the "Debtor" where the "Debtor" is the insured entity because the "Estate Representative" and the "Debtor" are separate entities. The *Alstrin* court further held that it did not vary the plain language of the policy because it determined that the "Estate" is not the "Debtor," and thus, the adversary proceeding does not

fall within the plain language of the applicable "insured v. insured" exclusion. *Id.* at 404. It is clear that the basis of the ruling of the court in *Alstrin* is that the plaintiff in that case was not an "Insured" or the "Company," as defined by the relevant policy. [1]

Unlike *Alstrin* and its progeny,[2] in which the courts determined that the plaintiffs were not "Insureds" or the "Company" as defined by the respective policies, Mr. Kapila is specifically named as an Assured under the Certificate. The Respondent contends that Underwriters are using circular reasoning when it argues that since Mr. Kapila is undisputedly an Assured, the IvI Exclusion is applicable. There is nothing circular or remarkable about Underwriters' argument that the express and unambiguous terms of the IvI Exclusion exclude coverage for Claims made by an Assured, and that cases in which the plaintiff is not expressly

[1] The "insured v. insured" exclusion at issue in *Alstrin* excluded coverage for any claim made against an Insured which is brought by any Insured or by the Company. *Id.* at 404.

[2] *See County Seat Stores, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 280 B.R. 319, 328 (Bankr. S.D.N.Y. 2002) (The language of the insured v. insured exclusion is not ambiguous. The words "brought by" refer specifically to those entities and individuals who are *defined and named* in the policy. "Company" as defined by the policy means County Seat and its subsidiaries and does not include or contemplate a bankruptcy trustee.) (emphasis added). In contrast to the trustee in *County Seat*, Mr. Kapila is expressly named as an Assured in the Certificate.

named as an insured under the relevant policies are inapposite and their holdings inapplicable to this appeal.

It appears the Respondent cites certain case law and "scholarly publications" for the proposition that courts should consider the intent behind the insured v. insured exclusion when determining whether it excludes coverage for a Claim. However, the United States Court of Appeals for the Eleventh Circuit, applying Florida law, 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). *See Deni Assocs. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1139 (Fla. 1998), *citing Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700 (Fla. 1993) (unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider the arguments pertaining to the drafting history of the exclusion).

The Respondent further argues that if Endorsements No. 14 and 18 mean what Underwriters contend they mean, they were superfluous and the Trustee enjoyed protection under the Certificate in the absence of the Endorsements. However, the Respondent admits that Underwriters amended the Certificate to name Mr. Kapila as an Assured at his specific request after he was named as a

trustee. Further, Underwriters have never taken the position that Mr. Kapila would be covered under the Certificate in the absence of Endorsement No. 14 and 18. Accordingly, the Respondent's argument is completely unsupported and without merit.

The Respondent further asserts that the creditors could have asserted the same Claim as the trustee, and that a Claim made by the creditors would not have been excluded. The Respondent concludes that it would be inappropriate to turn an action into a non-covered Claim simply because it was made by the Trustee for the benefit of those same creditors.

The Respondent is basically arguing that the IvI Exclusion only excludes coverage for a Claim if: (1) it is brought by an Assured who is acting in his or her insured capacity, and (2) that no "non-Assured" party could have asserted the same Claim. However, all that is required for the IvI Exclusion to apply is that the plaintiff making the Claim is an Assured. Mr. Kapila's insured capacity and the fact that the Claim theoretically could have been made by non-Assured creditors 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 or theoretical Claims that could have been made by other parties.

The District Court, applying Florida law, held that an insured vs. insured exclusion[3] was unambiguous and it barred coverage because the plaintiff was an "Insured" since he 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). 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 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. Further, given that the lawsuit was a purported securities class action, the same action could have theoretically been commenced and prosecuted by a different shareholder of *Sphinx* who was not an "Insured."[4] Thus, the court,

[3] The insured v. insured exclusion in *Sphinx* provided that there is no coverage for a claim "[b]y or at the behest of . . . any Director or Officer, or by any security holder of the Company, whether directly or derivatively, unless such Claim is instigated and continued totally independent of, and totally without the solicitation of, or assistance of, or active participation of, or intervention of, any Director or Officer or the Company or any affiliate of the Company." *Id.*

[4] The Respondent argues that the IvI Exclusion does not apply because the trustee only has standing to bring the "adversary claim" because he was appointed as trustee. However, the plaintiff in *Sphinx* would not have standing to assert a securities class action but for the fact he was a shareholder.

applying Florida law, concluded that the fact that the person making the "Claim" is not prosecuting the lawsuit in his or her insured capacity and that the "Claim" would have been covered if it was asserted and prosecuted by a different shareholder who is not an "Insured" is not relevant to the determination of whether an insured vs. insured exclusion is applicable. Based on the ruling in *Sphinx*, all that is required for the IvI Exclusion to apply is that the person making the Claim is in fact an Assured, which Mr. Kapila undisputedly is.

In support of the position that other jurisdictions have expressly rejected the argument that an "insured vs. insured" exclusion is only applicable if the plaintiff was acting in an insured capacity when the litigation was commenced, the Petitioner cited various cases in the Brief on the Merits, including *American Medical Int'l, Inc. v. National Union Fire Ins. Co.*, 244 F.3d 715 (9th Cir. 2001). In *American Medical*, the United States Court of Appeals for the Ninth Circuit 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 Respondent argues that the analysis used by the court in *American Medical* is not applicable to the Certificate because the IvI Exclusion, unlike the exclusion in the *American Medical* policy, has language that limits the application

of the exclusion to the claimant's specific capacities. The Respondent highlights that the IvI Exclusion provides that it does not apply "to the extent 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."

First, the highlighted section of the IvI Exclusion cited above does not limit the exclusion to the Assured plaintiff's capacity. Rather, the clause simply clarifies that derivative actions brought by "non-Assured" shareholders on behalf of the Company will not be excluded by the IvI Exclusion provided that the "non-Assured" shareholder is acting independently of all of the Assureds when they first commence the derivative action. Second, the Respondent only cites in his brief a portion of the insured v. insured exclusion from the *American Medical* policy when he attempts to differentiate the wording of the IvI Exclusion. The full wording of the *American Medical* exclusion provides that there is no coverage for any claim "by the corporation, its subsidiaries or successors or by one or more past, present or future directors or officers including their estates, beneficiaries, heirs, legal representatives, assigns or any affiliate of the company, or *by any security holder of the company whether directly or derivatively except where such security holder bringing such claim is acting totally independently of, and totally without the solicitation of, or assistance of, or participation of, or intervention of, any director or officer of the company or any affiliate of the*

company." *American Medical*, 244 F.3d 715, 719 (9th Cir. 2001) (emphasis added). Accordingly, the insured v. insured exclusion at issue in *American Medical* and the IvI Exclusion actually have similar exceptions for derivative lawsuits that are brought by shareholders who are acting independently of the Assureds. Therefore, the Respondent's argument that the rational used in *American Medical* does not apply to the language used in the IvI Exclusion does not have any merit.

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: _____

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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 24th day of February, 2006.

By_____
Eric Saida

CERTIFICATE OF COMPLIANCE

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

By_____
Eric Saida