IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1816

LT Number 2DO4-896

LUMBERMENS MUTUAL CASUALTY COMPANY, an Illinois Corporation,
Petitioner,
v.

RYAN INCORPORATED EASTERN,
a Florida Corporation, and
HARTFORD FIRE INSURANCE
COMPANY, a Connecticut Corporation,

Respondents.

INITIAL BRIEF OF LUMBERMENS MUTUAL CASUALTY COMPANY

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

A. Overview

This case comes before this Court from a decision rendered by the Florida Second District Court of Appeal involving Florida Statute §627.428 and whether a Surety may recover its attorneys' fees and costs for bringing a declaratory judgment action against its Principal's Commercial General Liability carriers. The Second District believed that a Surety stands in the shoes of the Principal, such that the Surety qualifies as a First Party Claimant under the Principal's Commercial General Liability policies; and, as a First Party Claimant standing in the shoes of the Principal, the Surety is entitled to an award of attorneys' fees under Florida Statute §627.428, conditioned upon the ultimate entry of judgment in favor of the Principal's Surety on remand. Because the Second District held that its decision is in direct conflict with the portion of the First District's decision in *Western World Insurance Company v. The Travelers Indemnity Company,* 358 So.2d 602 (Fla. 1st DCA 1978) that denies an award of appellate attorneys' fees to a Surety under comparable facts, the Second District certified the question to this Court. A copy of the Second District's decision is attached hereto. (App. 1 pp. 1-7).

B. Statement of the Facts

The Underlying Construction Contract and Related Bonds

In November of 2000, Ryan entered into a contract with 951 Land Holdings, Ltd. ("951 Land Holdings"), for the construction of a golf course in Naples. Ryan was to build the golf course known as "Fiddler's Creek", on property owned by 951 Land Holdings.[1] (RII: 153-163).

Ryan, as general contractor and Principal, and Hartford, as Surety, (hereinafter "the Surety") made, executed and delivered to 951 Land Holdings, as Owner, performance and payment bonds in December 2000. (RII: 259-262; App 2 pp. 8-11). The parties had previously executed a General Indemnity Agreement ("GIA"), dated August 1, 1994. (App 3 pp. 12-17).

The Commercial General Liability Policies

Continental issued a commercial general liability policy (hereinafter "CGL policy") to Ryan, as insured. (RII: 17-102). Lumbermens issued an excess CGL policy to Ryan, as insured. (RII:104).

The Underlying Litigation

951 Land Holdings brought suit against Ryan and its surety (Hartford) alleging that the Tifsport grass supplied by Ryan's subcontractor, Tifton Turf, was

[1] References to the Record on Appeal are cited in the following format: (R [Volume Number]:[Page Number]). References to the Appendix which is submitted under separate cover, are cited in the following format: (App [Tab][Page Number]).

contaminated with other grasses and/or weeds. (RII:145-151*)* The case was settled at mediation.

C. Statement of the Case – the Proceedings to Date

Following the resolution of the underlying matter, the Surety filed a declaratory judgment action against Continental and Lumbermens in Collier County. (RII: 300-349) The Surety sought reimbursement for defense and indemnity costs from the CGL carriers for resolution of the suit brought by 951 Land Holdings. (*Id.*) The parties filed cross-motions for summary judgment. (The Surety's Motion and Memorandum RV:859-861, RVI:959-1099, & RVII:1100-1153; Continental's Motion and Memorandum at RVII:163-1299, RVIII: 1300-1414, & RIX 1415-1587; and, Lumbermens Motion and Memorandum at RIX:1599-1615). The trial court determined that summary judgment should be granted in favor of Continental Casualty and Lumbermens. (RIX:1637-1638). The trial court thereupon entered final judgment in favor of Continental Casualty Company and Lumbermens Mutual Casualty Company. (*Id.*)

The Surety noticed its appeal to the Second District. As part of the appeal, the Surety filed a Motion for Attorneys' fees, seeking in part, its costs and fees associated with filing the declaratory judgment. (App. 4 pp. 18-25) Lumbermens filed a response to the Motion for Attorneys' Fees (App. 5 pp. 19-28).

On appeal, the Second District reversed the summary judgment in favor of the CGL carriers and remanded the case back to the trial court. (App 1, pp. 1-7). With respect to the Motion for Attorneys' fees and application of Florida Statute §627.428, the Second District held that its decision that the Surety is entitled to attorneys' fees under the Statute conflicted with the portion of the First District's decision in *Western World Insurance Company v. The Travelers Indemnity Company*, 358 So.2d 602 (Fla. 1st DCA 1978), that denies an award of appellate attorneys' fees to a Surety under comparable facts. (*Id.)* Because of the conflict, the Second District certified the question to this Court.

This Court entered an order postponing a decision on jurisdiction, and setting a schedule for briefing on the merits (*See* Order of this Court dated November 18, 2005). This initial merits brief on behalf of Petitioner, Lumbermens Mutual Casualty Company is submitted accordingly.

SUMMARY OF ARGUMENT

It is undisputed that a Surety qualifies as an insurer under Florida law. It is further undisputed that on its face, Florida Statute §627.428 provides that only an insured and its beneficiaries may seek attorneys' fees and costs in successfully prosecuting a declaratory judgment action against its insurer. While there is a line of Florida case law that allows assignees of an insured to seek relief under the Statute, there is no evidence before this Court that the Surety is an assignee of its Principal, Ryan.

The relationship between the Surety and its Principal is governed by contract, in this case, in the form of a Surety Bond and a General Indemnity Agreement. These contracts provide the Surety with a right of indemnification from its Principal. Thus, to the extent that the Principal may be entitled to defense or indemnity from its CGL carriers, for a claim paid by the Surety, the CGL policies may create a fund to which the Surety has a subrogated interest. However, the Surety's right of subrogation is limited to the extent of performance of payment. Significantly, the Surety has no direct interest under the CGL policies. Thus, the Surety's subrogated interest in payment is not the equivalent of the Surety having insured status under a CGL policy.

Although the Second District believed that the Surety qualifies as a First Party Claimant under the CGL policies, close review of the Second District's

decision and the cases upon which it relied, offer no support for this contention. Instead, the better-reasoned decisions, and the decisions that track this Court's holding in *Transamerican Insurance Company v. Barnett Bank of Marion County*, 540 So.2d 113 (Fla. 1989) regarding the relationship between the Surety and its Principal, are *Western World Insurance Company v. The Travelers Indemnity Company*, 358 So.2d 602 (Fla. 1st DCA 1978) and *American Home Assurance Company v. City of Opa Locka*, 368 So.2d 416 (Fla. 3rd DCA 1979).

These cases recognize that while the Surety has a subrogated interest in the potential fund created by the CGL policy, that interest is limited to the extent of payment. These cases recognize that a subrogated interest does not transform a Surety from its status as an insurer to an insured. Rather, when a Surety has a subrogated interest, that interest is in the form of an insurer seeking coverage from another insurer. Under the clear language of the Statute, an insurer is not entitled to attorneys' fees in bringing a declaratory judgment action against another insurer.

This matter is merely a dispute between two insurance companies as to which party owed Ryan defense and indemnity and as such, under clear Florida precedent, the Surety is not entitled to fees and costs under Florida Statute §627.428.

ARGUMENT

Florida Statute §627.428 is a Derogation of the Common Law, and as such, must be Strictly Construed

Under Florida law, each party generally bears it own attorneys' fees, unless a contract or statute provides otherwise. *Pepper's Steel & Alloys, Inc. v. United States of America*, 850 So.2d 462, 465 (Fla. 2003).

The Florida Legislature enacted Florida Statute §627.428 to allow an insured to recover its attorneys' fees from its insurer under certain circumstances. The Statute provides in relevant part:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state **against an insurer and in favor of any named or omnibus insured**, or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. (emphasis added).

On its face, the Statute only affords relief on behalf of the insured against its insurer. "The Statute is a one-way street offering the potential for attorneys' fees only to the insured or beneficiary." *Danis Industries Corporation v. Ground Improvement Techniques*, 645 So.2d 420 (Fla. 1994). The Statute prohibits recovery by the insurance company if it prevails. *McCarthy Brothers Company v. Tilbury Construction Inc.*, 849 So.2d 7, 11 (Fla. 1st DCA 2003) and *Smith v. Conlon*, 355 So.2d 859, 860 (Fla. 3rd DCA 1978).

The purpose of Florida Statute §627.428 is to discourage insurance companies from contesting valid claims, and to reimburse insureds for their attorneys' fees incurred when they must enforce in court their contract with the insurance company. *Insurance Company of North America v. Lexow,* 602 So.2d 528 (Fla. 1992); *Danis Industries Corporation v. Ground Improvement Techniques,* 645 So.2d 420 (Fla. 1994); *Pepper's Steel & Alloys, Inc. v. United States of America*, 850 So.2d 462 (Fla. 2003). Because the Statute is in derogation of the common law, it must strictly construed. *Family Care Center, P.A. v. Truck Insurance Exchange,* 875 So.2d 750, (Fla. 4th DCA, 2004)(citing to *Pepper's Steel & Alloys, Inc. v. United States of America*, 850 So.2d 462 (Fla. 2003).

A Surety Qualifies as an Insurer under Florida Statute §627.428 and, therefore, a Surety is not Entitled to Collect Fees Under the Statute

The term "insurer" is clearly defined under the Florida Insurance Code to include a "Surety." *Nichols v. Preferred National Insurance Company*, 704 So.2d 1371, 1373 (Fla. 1998); *David Boland Incorporated v. Trans Coastal Roofing Company,* 851 So.2d 724 (Fla. 2003). In *Danis Industries Corporation v. Ground Improvement Techniques,* 645 So.2d 420 (Fla. 1994) this Court held that Florida Statute §627.428, "specifically applies to payment or performance bonds written by a Surety insurer to indemnify against losses associated with construction projects." As part of this decision, the Court clarified that the Surety does not have the right to collect its attorneys' fees under Florida Statute §627.428. *Id.* at 421.

In the *Danis* litigation, 645 So.2d 420 (Fla. 1994), a sub-contractor sued the general contractor and its Surety over a construction dispute. The sub-contractor prevailed on some, but not all, of its claims against the Surety. The trial court permitted the sub-contractor to recover its attorneys' fees from the Surety. On appeal, the Surety argued that it was also a prevailing party, and, therefore, it was entitled to collect its fees from the subcontractor under Florida Statute §627.428. This Court held that the Surety could not collect its fees under the statute: "Under the present Statute, an insured or beneficiary who prevails is entitled to attorneys' fees. The Statute offers no similar prospect to the Surety, nor does the Statute say that the fees will be unavailable if the Surety prevails on some, but not all of the issues." *Id.* at 421.

Where a Declaratory Judgment Action Qualifies as a Dispute Between Two Insurance Companies, Florida Statute §627.428 is Inapplicable

When determining whether fees may be awarded under §627.428, the court will closely examine the relationship between the parties to determine whether the dispute was an action between two insurance companies, rather than between an insured and an insurer. *Fireman's Fund Insurance Co. v. Tropical Shipping and Construction Co. Ltd.*, 254 F.3d 987, 1009 (Fla. 11th Cir. 2001) and *Utica Mutual Insurance Company v. Pennsylvania National Mutual Casualty Insurance Company*, 639 So.2d 41 (Fla. 5th DCA 1994). Where the declaratory judgment action is a dispute between insurers, attorneys' fees are not recoverable.

Associated Electric and Gas Insurance Service, Ltd. v. Ranger Insurance Company, 560 So.2d 242, 243 (Fla. 3rd DCA 1990); *Smith v Conlon*, 355 So.2d 859 (Fla. 3rd DCA 1978).

In *Fireman's Fund Insurance Co. v. Tropical Shipping and Construction Co., Ltd.*, 254 F.3d 987, 1009 (Fla. 11th Cir. 2001), the court held that it must strictly construe §627.428 because the Statute is in the nature of a penalty against an insurer who wrongfully refuses to pay a legitimate claim. In examining the relationship between the parties in that litigation, the court was persuaded that although the action was brought in the name of the insured, the real party in interest was the insurance company that paid the loss (Fireman's Fund), which was looking to pass the loss on to another insurer of the insured (Seven Seas.) The court was persuaded that the action was solely between two insurers, and, therefore, §627.428 was not applicable.

An Insurer's Right to Indemnification by another Insurer does not Equate to a Right to Attorneys' Fees under §627.428

Under Florida law, the general rule is that attorneys' fees incurred in the defense of a claim indemnified against are part of the damages allowable, but attorneys' fees incurred by one insurance company in establishing the right to indemnification from another insurance company are not allowable. *Snider v. Continental Insurance,* 519 So.2d 12, 13 (Fla. 5th DCA 1988). Similarly, in *Continental Casualty Company v. City of South Daytona*, 807 So.2d 91 (Fla. 5th

DCA 2002) where the City of Daytona and its Insurer, Nutmeg Insurance Company, filed a declaratory judgment action another insurer, Continental Casualty Company, the court held that neither the City nor its insurer, Nutmeg were entitled to attorneys' fees for establishing the right to indemnification.

Likewise, in *Western World Insurance Company v. The Travelers Indemnity Company*, 358 So.2d 602 (Fla. 1st DCA 1978), the court held that where the Surety may be indemnified from its Principal for a judgment which the Surety paid to a third party on behalf of the Principal, the Surety has the right to be subrogated to any rights which its Principal has against the Principal's insurance carrier. However, the court held that despite its right of subrogation, **the Surety has no right to recover attorneys' fees under §627.428 because the Surety is, "neither an insured nor a named insured, as contemplated by §627.428, Florida Statutes (1975) entitling it to a fee."**

Florida case law recognizes that while a Surety may have contractual and subrogation rights, those rights do not transform a Surety into an "insured" under Florida Statute §627.428 such that the party is entitled to attorneys' fees for bringing a declaratory judgment. *American Home Assurance Company v. City of Opa Locka*, 368 So.2d 416 (Fla. 3rd DCA 1979).

In the *Opa Locka* decision, *supra*, the City of Opa Locka and one of its police officers were sued in a wrongful death action arising out of an incident in

which the officer shot and killed a man. Travelers insured the City of Opa Locka. The officer was not an insured under the Travelers policy, instead, he carried a separate policy through American Home. Travelers defended both the City and the officer, despite the fact the officer was not an insured under its policy. American Home declined to participate. The case went to verdict with the jury finding in favor of the decedent's estate. Travelers satisfied the judgment after American Home refused to contribute. Travelers filed a declaratory judgment action against American Home seeking reimbursement of judgment, costs and attorneys' fees. The trial court awarded Travelers all of the above, including Travelers' attorneys' fees in bringing the declaratory judgment action.

The appellate court reversed the trial court. The appellate court agreed that Opa Locka's liability was based solely upon vicarious liability and thus, Opa Locka had a right to indemnification from the officer for the wrongful death judgment and his carrier, American Home. The court further held that Travelers, the party that expended the sums to protect Opa Locka, was the City's subrogee and was likewise entitled to recovery. The court held that Travelers became subrogated to the Officer's rights to recover from American Home the fees and costs due him because of its wrongful refusal to defend.

Nevertheless, despite the foregoing factors, the appellate court refused to allow Travelers to recover the fees and costs associated with bringing the declaratory judgment action. The court held:

> What we have already said, however, shows that his case was not brought "under" American Home's policy with Opa Locka, but was rather based upon the City's and Travelers' indemnity and subrogated rights against American, as the insurer for LeMeur. **The plaintiff's fees are therefore not recoverable under Section 627.428.**
>
> Furthermore, although Opa Locka was a nominal party plaintiff, the judgment in this case clearly inured entirely to the benefit of Travelers which was not entitled to fees under *Roberts v. Carter*, 350 So.2d 78 (Fla. 1977). [The appellate court noted that Travelers did not secure an assignment from the City or Le Meur with respect to their rights against American Home.] *American Home Assurance Company v. City of Opa Locka*, 368 So.2d at 420 (emphasis added).

In summary, the court held that a successful indemnitor may not recover its attorneys' fees for the prosecution of the indemnification action itself without a contractual or statutory basis.

The Contractual Relationship between the Surety and its Principal, Confers no Rights to the Surety under the CGL Policies

Here, the Second District believed that the Surety "stands in the shoes" of its Principal, and thus, because the Principal may be entitled to fees under Florida Statute §627.428 (if it is the prevailing party) so too is the Surety. The danger, however, in applying a broad catch phase such as "standing in the shoes" to solve a narrow legal issue, is that one can overlook the nature of the agreement between

the parties in the first instance. *Colonia Insurance Company v. Assuranceforeningen Skuld,* 588 So.2d 1009 (Fla. 3rd DCA 1991).

A review of the agreement/contracts between the parties in this litigation reveals that that Ryan did not assign or otherwise grant the Surety any contractual rights or interests under the insurance policies issued by the CGL carriers to Ryan, and, therefore, did not grant any corresponding right to seek attorneys' fees under the Statute. Specifically, the General Indemnity Agreement entered between the Surety and Ryan provides the following:

> VII
>
> With respect to any Bond issued on behalf of an Indemnitor, all Indemnitors assign, transfer and convey to the Surety:
>
> A. All rights of the Indemnitors in arising from or related to such Bonds or any bonded or unbonded contracts or any extension, modifications, alterations or additions thereto:
>
> B. All right, title and interest of the Indemnitors in and to (1) the work performed, (2) all supplies, tools, plant, machinery, equipment and material on or near work sites or elsewhere, and 3) all material purchased for or chargeable to the contract which may be in the process of manufacture, construction or transportation, or in storage anywhere.
>
> These assignments shall take effect with respect to each Bond as of its execution date, but only in the event of any of the following.
>
> (a) An Indemnitor's abandonment, forfeiture or breach of, or failure, refusal or inability to perform, a contract guaranteed by any Bond;

(b) An Indemnitor's failure, refusal or inability to pay any bills or satisfy any debts incurred in connection with the performance of a contract guaranteed by any Bond;

(c) An Indemnitor's failure, refusal or inability to satisfy any condition of any Bond or to comply with any term or provision of this Agreement;

(d) An Indemnitor's failure to pay when due, any debt owed to the Surety;

(e) An Indemnitor's assignment for the benefit of creditors, or the appointment of, or the application for the appointment of, a receiver or trustee for any indemnitor whether insolvent or not;

(f) A proceeding which prevents or interferes with an indemnitor's use of any of the supplies, tools, plant, machinery, equipment or other materials referred to in paragraph B. of this Section;

(g) The death, absconding, disappearance, incompetency, imprisonment or felony conviction of any Indemnitor.

XIV

Any Indemnitor shall immediately notify the Surety in writing of any demand, notice, suit, action or proceeding relating to any Bond. The Surety may adjust, settle or compromise any claim, demand, suit or judgment upon any Bonds. If requested by an Indemnitor, the Surety shall litigate such claim or demand, or defend such suit, or appeal from such judgment provided that the Indemnitor deposits with the Surety, at the time of such request, collateral satisfactory to the Surety to be used to pay any judgment rendered plus interest, costs, expenses and fess, including those of the Surety. (App. pp)

In summary, while these contractual provisions assign certain rights to the Surety, the provisions do not grant the Surety any rights under the insurance policies issued by the CGL carriers to the Principal. In other words, there is no

language in the Indemnity Agreement that assigns to the Surety any rights Ryan held under its insurance contracts with its CGL carriers. For this reason, the Surety has no contractual basis upon which to take the position that it is a First Party Claimant or beneficiary under the CGL policies.

Because the Surety has no contractual right to "step into the shoes" with regard to its Principal's CGL carriers, we next examine what rights, if any, the Surety has under a theory of subrogation. As shown below, the right of subrogation is a limited right. Outside of the right to payment that flows through the Principal's right of defense and/or indemnity, the Surety/Subrogor has no independent rights under the CGL policy.

Contrary to the Position taken by the Second District, the Surety does not Qualify as a First Party Claimant under the CGL Policies and, further, is not Entitled to Fees under Florida Statute §627.428.

As discussed above, under the authority of *Western World Insurance Company v. The Travelers Indemnity Company*, 358 So.2d 602 (Fla. 1st DCA 1978) and *American Home Assurance Company v. City of Opa Locka*, 368 So.2d 416 (Fla. 3rd DCA 1979), while the Surety may seek indemnity from the CGL carriers, that right does not allow for attorneys' fees under Florida Statute §627.428.

The Second District, in this matter, disagreed with the reasoning of *Western World Insurance Company v. The Travelers Indemnity Company*, 358 So.2d 602

(Fla. 1st DCA 1978) and, instead, held that the Surety "stands in the shoes" as a First Party Claimant under the CGL policies, and, therefore, in that capacity, the Surety is entitled to an award of fees under the statute.

A "First Party Claimant" is generally interpreted to mean a claim made by an insured against his or her own policy. Thus, by characterizing the Surety as a "First Party Claimant" the Second District has conferred "insured" status upon the Surety. Such a finding is one of first impression under Florida state law.

In rendering its decision, the Second District first determined that where a Surety properly makes payment to correct defective construction or to complete a construction project undertaken by its Principal, the Surety becomes subrogated to the rights and remedies of the Principal. In support, the Second District cites to *Argonaut Ins. Co. v. Commercial Standard Ins.*, 380 So.2d 1066 (Fla. 2nd DCA 1980) and also *U.S. Fid. & Guar Co. v. N. Am. Steel Corp,* 335 So.2d 18, (Fla. 2nd DCA 1976). While these cases may support a finding that the Surety is subrogated to the rights and remedies of the Principal, these cases most certainly do not stand for the proposition that the Surety becomes a First Party Claimant under the CGL policies. Moreover, as shown below, these cases are consistent with *Western World Insurance Company,* 358 So.2d 602 and *City of Opa Locka,* 368 So.2d 416, and thus, to the extent this Court finds that the cases cited by the Second District are persuasive, the cases support the CGL carrier's position in this matter.

In *U.S. Fid. & Guar Co. v. N. Am. Steel Corp*, 335 So.2d 18, (Fla. 2nd DCA 1976), one of the cases cited by Second District as authority, the court held that the Surety is subrogated to the rights and remedies of its Principal.

In *Argonaut Ins. Co. v. Commercial Standard Ins.*, 380 So.2d 1066 (Fla. 2nd DCA 1980), the other case cited by the Second District as authority, Peninsular was a general contractor hired to construct an apartment complex. *Id* at 1067. Peninsular purchased a performance bond from Argonaut Insurance. *Id*. The bond named Peninsular "Principal and obligee." *Id*. Thereafter, Peninsular subcontracted the heat and air work on the project to a contractor named McBroome. McBroome purchased a performance bond from Commercial Standard Insurance. *Id*. In 1974, Peninsular went into default on the prime contract, and, as the Surety, Argonaut stepped in and took over the contract. *Id*. Argonaut asked Commercial to accept responsibility for the excess costs caused by McBroome. *Id.* Commercial refused. Argonaut brought suit against Commercial. In response, Commercial argued that Argonaut had no standing to bring suit. *Id*.

The court held that pursuant to the terms of the performance bond, once Peninsular defaulted and Argonaut stepped in, Argonaut became subrogated to the rights of Peninsular and Pinehurst. *Id* at 1068. As a consequence of carrying out the construction contract, Argonaut was entitled to assert a claim that McBroome had breached its subcontract with Peninsular. *Id*. Argonaut was so entitled because

Argonaut assumed Peninsular's rights and obligations in taking over Peninsular's role as a general contractor. *Argonaut* 380 So.2d at 1068.

The decisions in *Argonaut,* 380 So.2d 1066 and *U.S. Fid. & Guar Co* 335 So.2d 18, are in accord with *Western World Insurance Company,* 358 So.2d 602, and *City of Opa Locka,* 368 So.2d 416. All of these cases stand for the proposition that where a Surety pays a claim under a bond on behalf of its Principal, the Surety has a limited right of subrogation. However, while the Surety may have a right to indemnification by virtue of paying a claim on behalf of its Principal, and while the Principal's CGL policies may establish a fund for indemnity, the Surety has no direct rights under the CGL policies. Instead, these cases hold that the Surety's rights are limited to whatever right the Principal is owed under the CGL policy with respect to indemnification. For this reason, the Surety does not accrue any right greater than the potential for indemnity. Thus, the Surety "steps into the shoes" of its Principal in a very limited fashion. As will be discussed within, these cases are also in accord with this Court's decision in *Transamerica Insurance Company v. Barnett Bank of Marion County,* 540 So.2d 113 (Fla. 1989).

Because none of the foregoing cases hold that a Surety qualifies as First Party Claimant under a CGL policy, and, moreover, because there are no Florida State Court cases which stand for that proposition, the Second District took a judicial plunge when it determined that the Surety qualifies as a First Party

Claimant under the CGL policies. In coming to this conclusion, the Second District relies upon a federal court decision, *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d 1248, 1260 (M.D. Fla. 2002). While the *Auto Owners* decision does indeed conclude that a Surety qualifies as First Party Claimant under its Principal's CGL policies, close inspection of the decision reveals that the *Auto Owner's* court did not base this decision on any Florida case law or precedent.

In *Auto Owners*, the federal court first cites to this Court's decision in *Transamerica Insurance Company v. Barnett Bank of Marion County,* 540 So.2d 113 (Fla. 1989) where this Court held that a Surety who performs or pays on behalf of an obligee steps into the shoes of the obligee **to the extent of the performance of payment.** *Id.* at 116 (emphasis added.) This holding is consistent with *Western World Insurance Company*, 358 So.2d 602, and *City of Opa Locka*, 368 So.2d 416, in that the right of the Surety is a limited right to the extent of performance of payment. Under no circumstances does this Court's holding in *Barnett Bank of Marion County* open the door, or even lay the foundation, for the proposition that the Surety steps into the shoes of the obligee such that the Surety becomes a First Party Claimant.

Following its discussion of *Barnett Bank of Marion County*, the *Auto Owners* court simply concludes:

> [W]here Reliance, as Sun's Surety, performed or paid on behalf of Sun an obligation that is covered by the policies issued by Auto Owners and Northbrook, then Reliance stands in Sun's shoes to that extent, is equitably subrogated to the rights of Sun, and is considered a First Party Claimant on the CGL policies. *Auto Owners Ins. Co.* 227 F.Supp.2d at 1260.

The *Auto Owner's* court offers no citation or legal authority for its leap in logic that the Surety qualifies as a First Party Claimant under the CGL policies. Although the *Auto Owner's* court cites to the general language of the Indemnity Agreement, as is the case here, the Indemnity Agreement relied upon by the *Auto Owner's* court does not confer any rights to the Surety, such that the Surety becomes a named insured or a First Party Claimant under the CGL policies.

Because the court's holding in *Auto Owners* is not based upon any Florida jurisprudence, it follows that the foundation for the Second District's holdings that, "a Surety is subrogated to any rights which the Contractor may have against its CGL carriers" and that a Surety qualifies as First Party Claimant, also lack support. The Second District's conclusion that a Surety is subrogated to any rights is much broader than the prior decisions rendered by the Florida State courts, including this Court, which held that the Surety's right to subrogation was no greater than performance of payment.

The facts of this case do not support a basis for rewriting Florida law to allow a Surety special status as a First Party Claimant under a CGL carrier. As the law currently stands, the Surety has a method to seek reimbursement if it believes

that another carrier was obligated to cover a loss. If the Surety pays a claim on behalf its insured that it believes should have been covered by another insurer, the Surety can file a declaratory judgment action against that insurer. If the courts determine that the Surety was correct and the other insurer should have defended and/or indemnified the loss, then the Surety may seek reimbursement from that insurer. If the court determines that in fact, there was no coverage under the other policy, then the Surety may exercise its contractual rights under its performance bond with the Principal. As the law now stands, the Surety is fully protected without having First Party Claimant status.

There is no reason to change well established Florida law merely to allow the Surety to collect its attorneys fees in bringing a declaratory judgment action pursuant to Florida Statute §627.428. As discussed below, if the Surety and the Principal had desired this result, they could done so contractually by entering into an assignment.

The Second District's Concern about "Form Over Substance" Is Unfounded since the Surety and the Principal had a Legal Remedy, but Apparently, Chose not to Exercise It

The Second District examined the GIA and observed that the following language contained within the GIA required the Principal to indemnify the Surety for the Surety's court costs and attorneys' fees:

III

> The Indemnitors [Ryan] will indemnify and hold the Surety harmless from all loss, liability, damages and expenses, including, but not limited to, court costs, interest and attorneys' fees, which the Surety incurs or sustains 1) because of having furnished any Bond or 2) because of the failure of an Indemnitor to discharge any obligation under the Agreement or 3) in enforcing any of the provisions of this Agreement.

The Second District was concerned that if it denied the Surety the right to attorneys' fees under the Statute, that pursuant to the foregoing clause, Ryan could be obligated to indemnify the Surety for the Surety's costs and attorneys' fees in bringing the declaratory judgment action, a result which would defeat the purpose of the Statute. *Ryan Inc. v. Continental Casualty*, 910 So.2d 298, 300-301 (Fla. 2nd DCA 2005). The court further opined that in order to sidestep this perceived potential inequity, the Surety and the Principal could simply agree that the Principal would "carry the ball" through the declaratory judgment litigation for both parties and then exercise its right to attorneys' fees under the Statute if it prevailed. *Id.* at 301. The court held that since the Surety and the Principal could easily side step the issue of attorneys' fees, to bar the Surety from collecting fees under the Statute would promote form over substance. *Id.*

In trying to be equitable to the insured, the Second District overlooked two salient points. First, Florida law recognizes that an insured may assign its rights to another party. Where an insured has executed a valid assignment of its rights and

obligations under an insurance policy to another party, that party may seek attorneys' fees under Florida Statute §627.428 in bringing a declaratory judgment action against an insurer. *Roberts v. Carter*, 350 So.2d 78 (Fla. 1977). Thus, if Ryan was concerned that the Surety may try to later collect its attorneys' fees in bringing the declaratory judgment, then Ryan could have assigned its rights to the Surety.[2] Hartford and Ryan are sophisticated entities that were represented by counsel in the underlying matter. Because the parties did not exercise a right to assignment, the Surety is not entitled to fees under Florida Statute §627.428. A failure to exercise a right does not justify changing the status of the Surety to a First Party Claimant so that the Surety may now recover its attorneys fees.

Second, the Second District did not fully consider that its holding would abrogate the very purpose of the Statute. The purpose of the Statute is to discourage insurance companies from contesting valid claims, and to reimburse insureds for their attorneys' fees. The Statute is not designed to permit an insurer to collect attorneys' from another insurer where the two insurers are disputing their respective obligations owed to the insured. Where the insured has been satisfied by one insurer or the other, the insured no longer has an interest in bringing coverage litigation against its insurers, and, therefore, the public policy concerns of

[2] Moreover, it is questionable whether the GIA must be read so broadly so as to infer that attorneys' fees incurred by the Surety in seeking reimbursement from the Principals' CGL carrier, were incurred by the Surety, "because of having furnished any Bond."

Florida Statute §627.428 no longer exist. Thus, here, where Ryan has been satisfied by the Surety, Ryan has no incentive or need to incur the costs of filing a declaratory judgment action against its CGL carriers. The only party with an interest in bringing the declaratory judgment is the Surety, the other insurer. Once the public policy concerns have been ameliorated, the insurers revert to the Florida Common Law Rule which requires each party to bear its own fees.

SUMMATION OF ARGUMENT

Here, there was no need for the Second District to hold that a Surety qualifies as a First Party Claimant under the CGL policies issued to its Principal because Florida law already affords ample protection and remedies to both the Surety and its Principal.

The Surety's right of reimbursement is protected because it can bring a declaratory judgment action against the insurers it believes were responsible for paying the claim. As shown by this record, the Surety has fully exercised this right by bringing this declaratory judgment action. If the Surety prevails in the declaratory judgment action, it may be entitled to seek reimbursement from the CGL carriers. However, because the declaratory judgment action is a dispute brought by one insurer against another insurer, neither insurer is entitled to recover fees for bringing the declaratory judgment action under Florida Statute §627.428. The purpose of the Statute is to protect insureds not insurers.

The Principal is protected because 1) it has been indemnified for its losses by the Surety and 2) if the Principal was concerned that the Surety might exercise its contractual right to seek recovery of attorneys fees by bringing the declaratory judgment, the Principal could have assigned its rights to the Surety. If the Surety refused to accept the assignment, then the Principal could choose to bring the declaratory judgment action itself and then seek recovery of its fees under the Statute. Either way, if the Principal or Surety is the prevailing party in the declaratory judgment action, the attorneys fees will be covered. This Court should not confer special status upon a Surety simply because the General Indemnity Contract provides a right of indemnification.

Florida Statute §627.428 clearly states that only an insured or its beneficiary has the right to seek attorneys' fees and costs for bringing a declaratory judgment action against its insurer. The Surety does not qualify as either. The First and Third Florida District Courts of Appeal have addressed a Surety's rights under Florida Statute §627.428 and have correctly held that the Surety is not entitled to seek attorneys' fees under the statute. *Western World Insurance Company v. The Travelers Indemnity Company*, 358 So.2d 602 (Fla. 1st DCA 1978) and *American Home Assurance Company v. City of Opa Locka*, 368 So.2d 416 (Fla. 3rd DCA 1979). Here, however, the Second District chose not to follow the authority of its sister courts; instead, the Second District relying upon *Auto Owners Ins. Co. v.*

Travelers Cas. & Sur. Co., 227 F.Supp.2d 1248, 1260 (M.D. Fla. 2002), held that the Surety qualifies as a First Party Claimant under its Principal's CGL policies. The Second District's reliance upon *Auto Owners* for this proposition was misplaced, in that the *Auto Owners* court did not cite to any Florida precedent in support of its conclusion that the Surety qualifies as a First Party Claimant.

Because the Surety has no contractual right to seek attorneys' fees from the CGL carriers, and because Florida Statute §627.428 will not afford an insurer relief from another insurer, the Surety is not entitled to fees under Florida Statute §627.428.

CONCLUSION

Based upon the foregoing facts and authorities, Petitioner, Lumbermens Mutual Casualty Company respectfully submits that the decision of the Second District Court of Appeal issued herein should be reversed with respect to its decision on the application of Florida Statute §627.428, such that this Court should find that should the Surety prevail in its declaratory judgment action against the CGL carriers, that the Surety is not entitled to fees and costs under Florida Statute §627.428.

JURISDICTION

This Court's order of November 18, 2005 reserved ruling on jurisdiction. Petitioner respectfully submits that the Court has jurisdiction pursuant to Article V, §3(b)(3), Fla. Const. because the Second District's decision expressly and directly conflicts with the portion of the First District Court of Appeal's decision in *Western World Insurance Company v. The Travelers Indemnity Company,* 358 So.2d 602 (Fla. 1st DCA 1978), that denies an award of appellate attorneys' fees to a Surety under comparable facts. The Petitioner respectfully urges the Court to exercise jurisdiction in order to eliminate the unwarranted anomaly in Florida law created by the Second District's decision herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of the Initial Brief of the Petitioner have been furnished by U.S. Mail this 21st Day of December, 2005 to **THE SUPREME COURT OF FLORIDA,** Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-192; and a copy each has been furnished by regular U.S. Mail to Stephen Schember, Esquire, Shumaker, Loop and Kendrick, LLP, 101 E. Kennedy Blvd. Suite 2800, Tampa, FL 33602-5151, Attorneys for Hartford Fire Insurance Company, to Paul M. Woodson, Esquire, Adorno & Yoss, 350 E. Las Olas Boulevard, Suite 1700, Ft. Lauderdale, Fl 33301, Attorney for Ryan Incorporated Eastern; William M. Martin, Esquire, Peterson Bernard, Post Office Drawer 14126, Fort Lauderdale, Florida 33302-4126, attorneys for Continental Casualty, and Jonathan L. Gaines, Esquire, Russo Appellate Firm, P.A. 6101 Southwest 76th Street, Miami, Florida 33143.

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CERTIFICATE OF COMPLIANCE

By my signature below, I certify that I have complied with Florida Rule of Appellate Procedure 9.210(a), by using the Times New Roman 14-point font throughout the entirety of the foregoing brief.

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