IN THE SUPREME COURT
STATE OF FLORIDA

KATHLEEN MILLER AND
ROD MILLER,

Appellants/Plaintiffs,

v. Case No.: SC05-936

SCOTTSDALE INSURANCE
COMPANY,

Appellee/Defendant.

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# ANSWER BRIEF
# SCOTTSDALE INSURANCE COMPANY

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On Certified Question from the United States Court of Appeals
For the Eleventh Circuit
Case No.: 04-11660-JJ

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP
ANTHONY J. RUSSO, ESQ.
Florida Bar No.: 0508608
One Harbour Place, Suite 500
777 S. Harbour Island Boulevard
Tampa, Florida 33602
Phone: (813) 281-1900; Fax: (813) 281-0900
Attorneys for Appellee, Scottsdale Insurance
Company

## TABLE OF CONTENTS

TABLE OF CITATIONS ........................................ ii, iii

CITATIONS TO RECORD ........................................ iv

STATEMENT OF THE FACTS ........................................ 1

STATEMENT OF THE CASE ........................................ 2

SUMMARY OF ARGUMENT ........................................ 6

ARGUMENT ........................................ 8

The Named Insured (and its assignee, PFS) held a contractual right to cancel the liability coverage part of the policy effective on the date notice was given to the Insurer. Scottsdale extended the Mortgagee's property insurance coverage for an additional ten days under a separate contractual arrangement. The district court properly ruled section 627.848 enforces both these contractual rights, and that the Named Insured's liability coverage was cancelled before the Mortgagee's property coverage was cancelled.. ........................................ 8

CONCLUSION ........................................ 32

CERTIFICATE OF SERVICE ........................................ 33

CERTIFICATE OF TYPE SIZE & STYLE ........................................ 34

## TABLE OF CITATIONS

### CASES

*Alfred v. Security National Ins. Co.*,
766 So. 2d 449 (Fla. 4th DCA 2000) ........................................................22, 23

*American Reliance Ins. Co. v. Martinez*,
683 So. 2d 575 (Fla. 3d DCA 1996)................................................................ 22

*Atwater v. Dep't of Consumer and Regulatory Affairs*,
566 A.2d 462 (D.C. App. 1989)...................................................................... 26

*Brown v. Travelers Ins. Co.*,
649 So. 2d 912 (Fla. 4th DCA 1995)............................................................... 14

*Cat 'N Fiddle, Inc. v. Century Ins. Co.*
213 So. 2d 701(Fla. 1968) .............................................................................. 11

*Dunbar v. National Union Fire Ins. Co.*,
561 N.E.2d 450 (Il. App. 1990) ...................................................................... 26

*Fidelity and Deposit Co. of Maryland v. First State Ins. Co.*,
*677* So. 2d 266 (Fla. 1996) .........................................................................passim

*Fireman's Fund Ins. Co. v. Appalachian Ins. Co.*,
572 F. Supp. 799 (E.D. Pa. 1983) .................................................................12, 13

*Flores v. Allstate Ins. Co.*,
819 So. 2d 740 (Fla. 2002) ............................................................................. 17

*Palma Del Mar Condominium Assn. v. Commercial Laundries of West Florida, Inc.*,
586 So. 2d 315 (Fla. 1991) ............................................................................. 27

*Secured Realty Investment Fund, Ltd., III v. Highlands Ins. Co.*,
678 So. 2d 852 (Fla. 3d DCA 1996)................................................................ 10

*Southern Group Indemnity, Inc. v. Cullen*,
831 So. 2d 681 (Fla. 4th DCA 2002)...........................................................24, 25

## TABLE OF CITATIONS (Cont.)

### CASES

*State Farm Fire & Cas. Co. v. Aetna Fire Underwriters Ins. Co.*,
413 So. 2d 144 (Fla. 5th DCA 1982) ............................................ 11, 12, 13, 17

*USAA Casualty Ins. Co. v. Gordon*,
707 So. 2d 1185 (Fla. 4th DCA 1998) ............................................................ 14

*Wong Ken v. State Farm Fire & Casualty Co.*
685 So. 2d 1002 (Fla. 3d DCA 1997) .............................................................. 17

### STATUTES

Section 627.4133, FLA. STAT. ........................................................................ 3

Section 627.848, FLA. STAT. (2002) ..........................................................passim

### OTHER AUTHORITIES

1 COUCH ON INSURANCE 3d, section 1:3 ......................................................... 15

48A Fla. Jur. 2d, *Statutes*, section 173 .............................................................. 26

5 COUCH ON INSURANCE 3d section 79:21 ......................................................29, 30

## CITATIONS TO RECORD

The record is cited as "DE ___," referring to the docket entries assigned by the clerk of the federal district court. The Cuban Club is referred to as "the Named Insured" or "the Insured." "Premium Financing Specialists, Inc." is referred to as "PFS." Northside Bank of Tampa is referred to as "the Mortgagee." Pertinent documents from the record on appeal have been collected in an appendix accompanying this Answer Brief. These documents are referred to as "App. ___." The record on appeal contains a certified copy of the Scottsdale policy at DE 11 with its pages numbered "Miller/Scottsdale 00049" through "Miller/Scottsdale 00131." These policy pages will be referred to as "Policy p. ___." The Initial Brief of this matter is cited as "IB___." All emphasis is counsel's unless otherwise noted.

## STATEMENT OF THE FACTS

In 2000, Scottsdale issued to the Cuban Club Foundation, Inc. & Circulo Cubano, Inc." ("Cuban Club") a policy numbered CPS 0330763, effective from October 27, 2000, through October 27, 2001. (DE 11, Exhibit A). This policy provided both commercial property and commercial general liability coverages. (Policy p. 00049; App. 1). The Cuban Club financed the payment of the insurance premium with PFS and signed a standard premium finance contract with Premium Financing Specialists, Inc. ("PFS"). This contract included a power of attorney permitting PFS to cancel the policy for non-payment by the Cuban Club. (DE 11, Exhibit B). Northside Bank of Tampa was identified in the "Commercial Property Coverage Part – Supplemental Declarations" as a "mortgage holder." (DE 11; Policy p. 00053; App. 2).

As the Eleventh Circuit's recitation of the facts shows, the Cuban Club failed to make its December 2000 installment payment. On December 28, 2000, PFS mailed a Notice of Cancellation to Yanoff South, Inc., the wholesale insurance agent, the Cuban Club, and JC Barnett Insurors, Inc., the retail insurance agent. On January 9, 2001, Scottsdale received a copy of the Notice of Cancellation from PFS. Scottsdale sent a 10-day notice of cancellation (DE 11; Policy p. 00130; App. 8) to Northside Bank.

On January 13, 2001, Kathleen Miller was injured on the Cuban Club's premises. She and her husband, Rod Miller, sued the Cuban Club for damages resulting from Kathleen Miller's injuries. The Cuban Club tendered the lawsuit to Scottsdale. Scottsdale denied the Cuban Club's request for a defense and indemnity against the Millers' suit on the grounds that the policy was not in effect on the date of Kathleen Miller's injury. The Millers' suit proceeded against the Cuban Club and resulted in a $330,953.84 verdict in favor of the Millers. The Cuban Club assigned to the Millers its rights against Scottsdale seeking indemnification under the policy. (DE 23)(District court order at 2).

## STATEMENT OF THE CASE

In this action, the Millers sued Scottsdale and alleged that the policy was in effect on January 13, 2001, the date Kathleen Miller sustained her injuries. (DE 3). The Millers further alleged that by virtue of Cuban Club's assignment of rights, the Millers were entitled to indemnification for their judgment against Cuban Club. (DE 3).

Scottsdale maintained its position that the policy was not in effect on the date of Kathleen Miller's injury because it was cancelled on January 9, 2001, and therefore it had no duty to indemnify the Cuban Club against the Millers' judgment. (DE 4, 11).

Because there were no issues of fact, the Millers and Scottsdale both moved for summary judgment (DE 11, 14) and filed memoranda of law in support of their positions. (DE 12, 15). On January 15, 2004, the district court conducted a hearing on the motions (DE 18, p. 1) and ruled thereafter that Scottsdale was entitled to summary judgment. (DE 23, p. 5).

The insurance contract contains two cancellation provisions pertinent to this case. The first is a form titled "Cancellation and Nonrenewal – Florida." (DE 11, Exhibit A; Policy p. 00107; App. 5). This endorsement brings the cancellation provisions of the entire policy, both as to the liability coverage and property coverage parts, into conformance with section 627.4133, FLA. STAT.[1] This form states, in part, as follows:

> A. Cancellation.
>
> 1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advanced written notice of cancellation.

The "first Named Insured" is the Cuban Club. (Policy p. 00049, App. 1). This provision is applicable to both the liability insurance coverage part and the property insurance coverage part of the policy. The second pertinent cancellation

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[1] The "Common Policy Conditions" (Policy p. 00054; App. 4) applies to "All Coverage Parts" of the policy. Section A of these "Common Policy Conditions" controls cancellation. The Florida Cancellation Endorsement (Policy p. 00071; App. 5) replaces section A of the "Common Policy Conditions" and so it too controls the cancellation rights of "all coverage parts of the policy."

provision is found in the property insurance coverage part of the policy (Policy p. 00057, *et. seq.*) that applies only to the Mortgagee. This "mortgagee clause" (Policy p. 00065; App. 3) states as follows:

> If we [i.e., Scottsdale] cancel this policy, we will give written notice to the mortgage holder [*i.e.*, Northside Bank of Tampa] at least:
>
> **(1)** 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or
>
> **(2)** 30 days before the effective date of cancellation if we cancel for any other reason.

The district court determined that this 10-day notice requirement exists for the exclusive benefit of Northside Bank apart from any duty owed by Scottsdale to the Cuban Club (DE 23, p. 4). ("[T]his notice requirement exists for the exclusive benefit of Northside apart from any duty owed by Scottsdale to the Cuban Club.") The policy's liability coverage part contains no requirement for notice to Northside Bank. The district court concluded that Scottsdale's cancellation of the mortgagee coverage nine days after Kathleen Miller's January 13, 2001 accident failed to invalidate PFS's earlier cancellation of the Cuban Club's liability insurance coverage effective on January 9, 2001. (DE 23, p. 4).

The district court's decision was appealed to the Circuit Court of Appeals for the Eleventh Circuit, which has, in turn, certified a question to this Court.

"Whether § 627.848, FLA. STAT. (2002), contemplates a single date of cancellation for the insurance contract as a whole or whether the contract can be cancelled as to different insureds at different times depending on when a statutorily required notice is given to that insured."

Because this appeal is from a summary judgment, and involves the construction of statutes and contracts, a *de novo* standard of review should apply.

## SUMMARY OF ARGUMENT

The insurance contract or, more precisely, the separate insurance contracts contained within the Scottsdale policy, contemplate and allow cancellation of different parts of the policy at different times as to the different classes of insureds. The certified question thus is unclear or contains an incorrect assumption, *i.e.*, that the statute might dictate cancellation of some part of the policy contrary to the contractual arrangement established by the policy itself. In fact, this policy is not a singular contract of insurance with uniform cancellation procedures for all the classes of persons or entities insured under the various coverages in the policy, and section 627.848 does not change that fact.

Instead, section 627.848, FLA. STAT., provides that the various Insureds' and third parties' contractual, statutory, and regulatory rights to notice of cancellation shall be observed when the policy is cancelled by a premium finance company.

This policy contains a separate contract between Scottsdale and the Mortgagee whereby Scottsdale is obligated to provide the Mortgagee (and only the Mortgagee) with an additional, and separate, 10 days' notice of cancellation of the *property insurance coverage part* of the policy when the policy is cancelled for non-payment. The Mortgagee is the sole holder of this contractual right to an additional 10 days' notice.

The Millers, assignees of the Cuban Club's rights under the *liability insurance coverage part* of the policy, improperly seek to rewrite the insurance contract to extend to themselves the benefit of the Mortgagee's contractual right to an additional 10 days notice.

But nothing in section 627.848 requires Scottsdale to extend its liability insurance coverage for the Named Insured, *i.e.*, the Cuban Club (or its assignees), during the 10-day hiatus created for the sole benefit of the Mortgagee. The statute only protects existing contractual rights and does not create new ones. This Court should not construe the statute in a way that rewrites the insurance contract and expands coverage beyond that contemplated and negotiated by the parties.

## ARGUMENT

> The Named Insured (and its assignee, PFS) held a contractual right to cancel the liability coverage part of the policy effective on the date notice was given to the Insurer. Scottsdale extended the Mortgagee's property insurance coverage for an additional ten days under a separate contractual arrangement. The district court properly ruled section 627.848 enforces both these contractual rights, and that the Named Insured's liability coverage was cancelled before the Mortgagee's property coverage was cancelled.

### Introduction

The insurance contract or, more precisely, the separate insurance contracts contained within the Scottsdale policy contemplate and allow cancellation of different parts of the policy at different times and permit the policy to be cancelled at different times as to the various classes of insureds. Section 627.828 provides that the various Insureds and third parties' contractual, statutory, and regulatory rights to notice of cancellation shall be observed when the policy is cancelled by a premium finance company. This statute does not alter the terms of the insurance contract as to cancellation rights of the various types of insureds.

The policy contains a separate contract between Scottsdale and Northside Bank ("the Mortgagee") whereby Scottsdale is obligated to provide the Mortgagee with an additional, and separate, 10 days' notice of cancellation of the *property insurance coverage part* of the policy. The Mortgagee is the sole holder of this contractual right to an additional 10 days' notice.

The Millers, assignees of the rights of the Named Insured, *i.e.*, the Cuban Club, under the *liability insurance coverage part* of the policy, improperly seek to rewrite the insurance contract by extending the Mortgagee's contractual notice rights under the *property insurance coverage part* to themselves to extend the liability coverage part. As discussed below, the property insurance coverage part of the Scottsdale policy is an entirely separate and severable contractual undertaking from the liability insurance coverage part.

Resolution of this case requires analysis of what rights the policy establishes as to cancellation (section 1, below) and how section 627.848 enforces those rights (section 2, below).

### 1. Cancellation rights under the insurance contract

#### a. The insurance contract permits the "first Named Insured" to cancel the entire policy with notice to the insurer; the Mortgagee holds a separate contractual right to an additional 10 days' notice of cancellation of the property coverage portion of the contract when the policy is cancelled for non-payment.

The policy provides that the "first Named Insured" (*i.e.*, the Cuban Club) may cancel the entire policy by mailing notice to the insurer.[2] (App. 4). This right may be tempered by the "Mortgagee Clause," a separate agreement between the

[2] The cancellation provision of the policy provides: *"A. Cancellation 1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation."*

Insurer and the Mortgagee that imposes a separate contractual obligation on the Insurer to give the Mortgagee ten days' advance notice of cancellation.[3] (App. 3).

"Generally, two types of loss payable clauses exist and are often referred to as (1) an open loss payable clause and (2) a union, standard or New York clause." *Secured Realty Investment Fund, Ltd., III v. Highlands Ins. Co.*, 678 So. 2d 852, 854 (Fla. 3d DCA 1996). An "open loss payable" clause simply identifies the person who may collect the insurance proceeds. But a union, standard or New York clause (referred hereinafter as a "Mortgagee clause") provides, in addition to identifying the entity entitled to receive the proceeds, that the mortgagee's right to those proceeds may continue even though the claim may be denied as to the Named Insured.

The Mortgagee clause (1) insulates the Mortgagee from the effects of fraud by the Insured that would otherwise void coverage and (2) provides the Mortgagee with a separate right to notice of cancellation of the policy in the event the Insurer

[3] The mortgagee clause of the policy provides in part: *"If we [i.e., Scottsdale] cancel this policy, we will give written notice to the mortgage holder at least: 10 days before the effective date of cancellation if we cancel for your nonpayment of premium . . ."* This is a typical union, standard or New York clause.

cancels the policy.[4] *See Fidelity and Deposit Co. of Maryland v. First State Insurance Co.,* 677 So. 2d 266, 268 (Fla. 1996).

Pursuant to this Mortgagee clause, property insurance coverage, for the sole benefit of the Mortgagee, continues until the Insurer has given the Mortgagee 10 days' notice of cancellation.[5] The continuation of coverage for the Mortgagee pursuant to this clause does not act to extend coverage for anyone else under the policy. *State Farm Fire & Cas. Co. v. Aetna Fire Underwriters Ins. Co.*, 413 So. 2d 144, 146 (Fla. 5th DCA 1982). There the Insureds cancelled their State Farm homeowners' policy. The cancellation was to take effect on a certain date. The policy contained a Mortgagee clause indistinguishable from the one in this case, and it established State Farm's obligation to cover the interest of the Mortgagee for an additional 10 days. As the court stated: "[T]his cancellation [of the homeowner's coverage] was subject to State Farm's direct obligation to the mortgagee under the mortgagee clause, *which obligation continued to protect the*

[4] Note that Scottsdale did not cancel this policy; the policy was cancelled by the agent of the Insured, PFS. For purposes of these proceedings, Scottsdale treated this as a cancellation for non-payment and provided the 10-day notice to the Mortgagee even though it was the Insured (or more accurately, its agent) who cancelled the contract.

[5] "[I]t is evident that the 10-day period is to give the mortgagee opportunity to acquire replacement insurance to protect its interest." *State Farm Fire & Cas. Co. v. Aetna Fire Underwriters Ins. Co.*, 413 So. 2d 144, 146 (Fla. 5th DCA 1982) citing *Cat 'N Fiddle, Inc. v. Century Ins. Co.* 213 So. 2d 701 (Fla. 1968).

*mortgagee's interest* for 10 days after the written notice of cancellation to the [insureds]." *Id*. at 146.

Fire destroyed the insured structure after the date of cancellation as to the insured but before the expiration of the 10-day period as to the Mortgagee. In the interim, the insureds had purchased replacement insurance from the Aetna Insurance Company that became effective on the date the State Farm policy had been cancelled as to the Insureds. For a period of 10 days, there was double coverage for the mortgagee, during which time the fire occurred. In resolving the dispute between the two insurers as to which one of them would pay for the loss, the court noted that the 10 days' additional coverage in State Farm's Mortgagee clause "*is obviously for the benefit of the mortgagee and its interest and not for the benefit of the owner or any third party,* such as another fire insurance company writing a policy intended to replace the prior policy." *Id*. at 146. (The court held Aetna was liable.) The important points to take from this case are (1) separate contracts of insurance contained in a single policy of insurance may expire at different times as to the named insured and the mortgagee and (2) the extra time allowed the mortgagee under a mortgagee clause cannot be extended for the benefit of any other insured or third party.

Also instructive is the case of *Fireman's Fund Insurance Co. v. Appalachian Insurance Co.*, 572 F. Supp. 799 (E.D. Pa. 1983), *aff'd,* 738 F.2d 422

(3d Cir. 1984), cited with approval by this Court in *Fidelity and Deposit Co. v. First State Ins. Co.*, 677 So. 2d 266 (Fla. 1996). There, the court was faced with the question whether a fire policy, cancelled without notice to the mortgagee in contravention to a mortgagee clause, would act to block cancellation of the policy as to any other party. The *Fireman's Fund* court said "no" and ruled as follows:

> In actuality, however, what has been termed an "independent" contract is more accurately characterized as a right of estoppel which the mortgagee holds against the insurer so that the mortgagee is not subject to forfeiture because of any act or omission of the insured, unknown to the mortgagee. *Existing case law reveals that this estoppel right exists only for the benefit of the mortgagee.* The Court has not been presented with any authority which would allow a party other than the one intended to be benefited from the mortgage clause to assert a claim against an insurer for failure to notify the Mortgagee as required by the standard mortgage clause.

*Id.* at 802. In sum, the *Fireman's Fund* court denied the claim of continued coverage made by a party who was not the mortgagee based on the failure of the insurer to give notice to the mortgagee. Here, Appellants attempt to do what was not permitted in the *Fireman's Fund* case, *i.e.*, assert that coverage as to the Named Insured continued so long as coverage continued as to the Mortgagee. But as the *State Farm* and *Fireman's Fund* cases make clear, the mortgagee's contractual right to continued coverage for an additional 10 days exists for the sole benefit of the mortgagee and does not prolong coverage for anyone else.

**b. The Scottsdale policy consists of two separate contractual undertakings: property insurance coverage and liability insurance coverage.**

The Scottsdale policy, a typical commercial policy, is divided into two, severable parts. Property insurance is provided in section I ["Building and Personal Property Coverage Form"] and liability insurance is provided in section II ["Commercial General Liability Coverage Form"]. (*See* App. 1). They are separate and severable, contractual undertakings. The Mortgagee's coverage that continued an additional 10 days after Scottsdale received the cancellation notice was limited to property insurance coverage. No liability insurance coverage persisted after Scottsdale received that notice. *See Brown v. Travelers Insurance Co.*, 649 So. 2d 912, 915 (Fla. 4th DCA 1995)(refusing to apply exclusions from the liability coverage part to the property insurance coverage part).[6] S*ee also USAA Casualty Insurance Co. v. Gordon*, 707 So. 2d 1185 (Fla. 4th DCA 1998)(refusing to import provisions from the liability coverage part of the policy into the property coverage part).[7]

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[6] The *Brown* court noted the insurer's argument that provisions in one part should be applied to another part "invites us to erase all context, exclude all headings and sub headings, ignore contrary provisions, and limit our attention to only the words [insurer] selects to make its case. We are simply unable to do what [insurer] suggests. " *Id.* at 914.

[7] The *Gordon* court stated the property and liability coverage sections of the policy "represent two distinct types of insurance coverage, and each has its own set of exclusions and conditions which are physically set apart from each other in the policy."

The Property Insurance and Liability Insurance parts of the Scottsdale policy contain separate policy conditions, definitions and exclusions. Separate premiums are established for each of these two parts. (See App. 1). These two types of coverage may stand alone, although they are commonly sold as a package. *See* 1 COUCH ON INSURANCE 3d, section 1:3 (historically, property and liability coverages were written as separate policies).

Section I of the policy contains an insuring clause that provides indemnity to the Insured when insured property is damaged.

> **A. Coverage**
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

(DE 11; Policy p. 00057).[8] The Mortgagee's insurable interest in the property exists because the property stands as collateral for a loan, the impairment of which would be impairment of this collateral.

Section II of the policy provides liability insurance coverage, *i.e.*, an obligation to provide a defense and indemnity to the "Insured," as that term is defined in the liability coverage section entitled "Who is an Insured." (Policy p. 00117; App. 6). This defense (*i.e.*, the hiring of an attorney for the insured) and

[8] The Mortgagee, Northside Bank, is insured only under the Property Insurance part of the policy.

indemnity (payment of a judgment or settlement up to liability policy limits) is provided when the Insured incurs certain enumerated liabilities, *e.g.*, a personal injury claim for a slip and fall on the insured's premises. This case, of course, involves a claim by the assignee, (i.e. the Millers) of the first Named Insured, (*i.e.*, the Cuban Club) for liability coverage only.

This entirely separate insuring agreement states as follows:

1. Insuring Agreement

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

(DE 11; Policy p. 00111). The Mortgagee is not an insured under the liability insurance coverage part of the policy.[9] This case does not involve a claim by the Mortgagee, Northside Bank, for property insurance coverage.

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[9] Mortgagees are not among the entities deeded to be "an insured" "*See* Section II – Who is an Insured" defining the parties insured in the Commercial General Liability Coverage form. (*See* Policy p. 00117; App. 6).

The insurer's obligations under the property and liability coverages are separate, and severable, obligations. One part may exist, and the other may be cancelled. This is exactly what happened in *State Farm Fire & Cas. Co. v. Aetna Fire Ins. Underwriters Co.*, *supra*. *See generally Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 749(Fla. 2002)(recognizing that fraud in relation to one severable coverage part of a policy may void coverage as to that part and yet not disturb coverage as to another part). *Cf. Wong Ken v. State Farm Fire & Casualty Co.* 685 So. 2d 1002 (Fla. 3d DCA 1997)(policy condition that *entire* policy was void for fraud as to any part was enforceable).

**c. Both the liability and property coverage parts of Scottsdale's policy, except for the Mortgagee's interest discussed above, were cancelled when Scottsdale received the notice of cancellation from the premium finance company.**

The cancellation provision of the policy provides: *"A. Cancellation 1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation."* This provision is found in the form entitled "Cancellation and Nonrenewal-Florida," DE 11, Policy p. 00071, and is incorporated into the "Cancellation Condition" section of the "Common Policy Conditions." (DE 11; Policy p. 00054). This "Common Policy Conditions" applies to "[a]ll Coverage Parts included in this policy. . . ." Therefore, the Florida cancellation clause applies to both the property coverage and liability coverage parts of the policy. Thus, the Named Insured, *i.e.*, Cuban

Club, (or its agent, PFS) has a contractual right to cancel the entire policy with written notice to Scottsdale. By contrast, when the insurer cancels the policy for non-payment, the separate contractual right of the Mortgagee to 10 days' advance notice of cancellation is triggered. (Scottsdale treated this situation as a cancellation for non-payment, and provided the 10-day notice to the mortgagee.)

When Scottsdale received the premium finance company's notice of cancellation on January 9, 2001, the entire policy, except for the Mortgagee's interest in the property insurance coverage, was cancelled. *See* section 627.848(1)(c)("Upon receipt of a copy of the cancellation notice by the insurer . . . the insurance contract shall be canceled as of the date specified in the cancellation notice with the same force and effect as if the notice of cancellation had been submitted by the insured himself or herself."). Only the Mortgagee's coverage persisted.

**2. Section 627.848, FLA. STAT. (2002) acts to enforce existing contractual, statutory and regulatory rights.**

**a. Section 627.848 has three functions pertinent to this case:**

First: It requires the premium finance company to send advance notice "to each insured" before sending the cancellation notice to the Insurer;[10]

[10] 627.848(1)(a)1 provides "not less that 10 days' written notice shall be mailed to each insured shown on the premium finance agreement of the intent of the premium finance company to cancel her or his insurance contract . . . ."

Second: It provides that cancellation is effective when this notice from the premium finance company is received by the Insurer;[11]

Third: It provides that existing contractual, regulatory and statutory restrictions on cancellation as to mortgagees and governmental entities are not disturbed.[12]

Nothing in this statute purports to create or extend or disturb the contractual rights of parties as to notice of cancellation.

**b. The unifying principle in all case opinions construing section 627.848 is this: the statute will be applied to enforce the existing contractual, statutory or regulatory rights to notice of cancellation.**

This statute has never been applied by a court to disturb the contractual, statutory or regulatory rights of the parties as to cancellation of an insurance policy.

[11] Section 627.848(c) provides that "upon receipt by a copy of the cancellation notice by the insurer or insurers, the insurance contract shall be canceled as of the date specified in the cancellation notice with the same force and effect as if the notice of cancellation had been submitted by the insured herself or himself, whether or not the premium finance company has complied with the notice requirement of this subsection, without requiring any further notice to the insured . . . ."

[12] Section 627.848(d) provides that "all statutory, regulatory, and contractual restrictions providing that the insured may not cancel her or his insurance contract unless she or he or the insurer first satisfies such restrictions by giving a prescribed notice . . . shall apply when cancellation is effected under . . . this section."

This Court, in the same vein, should construe the statute to enforce the contract and not, as the Appellants urge, to rewrite the contract. Analysis of the Florida cases that have construed the statute follows:

*Fidelity and Deposit Co. of Maryland v. First State Insurance Co.*, 677 So. 2d 266 (Fla. 1996), addressed the effect of section 627.848 on facts that were similar to, but not precisely on point with, the current case. The operative policy language was virtually identical,[13] and as in this case, the premium finance company cancelled the policy. But unlike this case, in *First State* the property was damaged by fire implicating the mortgagee's coverage under the policy and the insurer, in *First State,* had failed to give written notice of cancellation to the mortgagee.

Here, the Mortgagee's coverage is not implicated, and the separate property coverage was not triggered. The decision of this Court in *First State* rested on this independent contractual obligation of the insurer to provide notice to the mortgagee. The insurer's breach of that obligation blocked the attempted cancellation of the policy but only *as to the mortgagee*. This case, by contrast, involves no breach of a contractual notice obligation to the Mortgagee or to any

[13] The insurer's mortgagee clause in the *First State* case read: "If we cancel this policy, we will give written notice to the mortgage holder at least: (1) ten days before the effective date of cancellation if we cancel for your nonpayment of premium . . . ."

insured who suffered an insured loss. This Court, in *First State*, ruled that the statute only enforces the contract, and no more:

> This mortgage clause operated as an independent contract of insurance between First State and [the mortgageholder] and made notice to the mortgagee a prerequisite to cancellation when the insured cancelled the policy [citation omitted]. Because notice was required under the contract, notice was also required under the statute [section 627.848].

*Id*. at 268. Since the ruling in *First State* expressly limited enforcement of the statute to the enforcement of the existing contractual obligations, and since Scottsdale's policy permits differential cancellation as to the named insured and the Mortgagee, therefore section 627.848 permits the policy to be cancelled immediately as to the Named Insured and later as to the Mortgagee.

Both the federal district and circuit courts have distinguished *First State* on the grounds that the case did not address whether a failure to provide notice of cancellation to a mortgagee also means that the policy cannot be cancelled as to the named insured.[14] Appellants, at IB 16, have attacked this distinction claiming that *First State* did not purport to limit its holding to claims by mortgagees. This attack fails. The two operative principles in *First State* were (1) that the Mortgagee clause operates as an "independent contract of insurance between First State and

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[14] *See* district court opinion (App. 10) at footnote 4; circuit court opinion (App. 11) at footnote 6.

Commonwealth and made notice to the mortgagee a prerequisite to cancellation when the insured cancelled the policy," *First State* at 268, and (2) "because notice was required under the contract, notice was also required under the statute." *Id*. at 268.

Applying these principles to this case yields the following result: during the pendency of the 10-day notice period, the mortgagee's contractual interest is not cancelled. But the continued viability of this separate contract for ten days, does not mean the entire policy, including the other, severable contracts of insurance contained in the policy, which have been properly cancelled, likewise continue.

The case of *American Reliance Insurance Co. v. Martinez*, 683 So. 2d 575 (Fla. 3d DCA 1996), is so brief as to be unhelpful. It is not clear whether this case implicated the mortgagee's property insurance coverage or unrelated liability coverage for the named insured. Nothing in the opinion construes the statute as disturbing existing contractual rights or expanding coverage for the Named Insured during the 10-day hiatus created for the benefit of the mortgagee.

In the case of *Alfred v. Security National Insurance Co.*, 766 So. 2d 449 (Fla. 4th DCA 2000), the insurer issued a singular policy of liability insurance, *i.e.*, one with no separate property insurance component. *Id.* at 450. The insured was a towing company under contract with the municipality to provide towing services. A municipal ordinance, *i.e.*, a statute, required that the *"insurance shall provide for*

*thirty (30) days notice . . . to the Consumer Affairs Division of any material change, cancellation or expiration of the policy." Id.* at 452. This ordinance, or statute, controlled cancellation notice of the *entire policy*. By contrast, the Mortgagee clause in Scottsdale's policy does not affect the entire policy. The Mortgagee clause in Scottsdale's policy controls only the Mortgagee's right to notice. Application of section 627.848 in *Alfred* enforced the existing statutory rights belonging to the municipality to notice of cancellation affecting the entire policy. The municipality's right to notice was not created by section 627.848; the right to notice was created by the municipal ordinance. Section 627.848 simply enforced that statutory right, which happened to control the entire policy in that case. Here, the Mortgagee's right to notice applies only to its own, separate contractual rights under the property section of the policy.

The federal district and circuit courts ruled *Alfred* was not controlling,[15] and indeed, the Appellants in their Initial brief (in the circuit court) conceded the same. ("[T]here is no controlling precedent . . ." Initial Brief – circuit court at 20). The distinction, argued by Appellants to this Court, as to the insured's status of intended beneficiary is, in the end, entirely academic. What is important is this: The cases applying section 627.848 always do so in the way that enforces existing

[15] Circuit court opinion at 8; district court ruling at footnote 3.

contractual and statutory rights to notice, and the courts never apply it in a way that creates new rights or disturbs existing contractual rights.

*Southern Group Indemnity, Inc. v. Cullen*, 831 So. 2d 681 (Fla. 4th DCA 2002) illustrates this point perfectly. In *Cullen*, the sole question was whether a premium finance company could cancel a policy on behalf of the insured to be effective on a date before its notice of cancellation was received by the insurer. The problem for the insurer in *Cullen* was that its policy expressly required *advance* notice of cancellation.[16] The *Cullen* court ruled

> Under the terms of the statute [section 627.848 (1)(d)] the advance notice cancellation requirement contained in the policy applies to the premium finance company. The [premium finance] company could not, therefore, make cancellation effective prior to the insurer receiving notice of the cancellation.

*Id*. at 682. Note the essence of the ruling here: the statute will be applied to enforce existing contractual obligations as to cancellation – this statute will not be applied in a way that disturbs those contractual rights. Section 627.848 was not created to be an independent wellspring of cancellation notice rights.

[16] The *Cullen* policy provided in part that "[t]he named insured shown in the Declarations may cancel by . . . giving us *advance* written notice of the date cancellation is to take effect."

Appellants attempt to rely on *Cullen* arguing, at IB15, that "[i]f section 627.848 prevents an insured, or its agent, from canceling its own policy with less than the required *statutory notice*, it obviously must also preclude the insurer from prematurely canceling the policy when the insurer has failed to satisfy a *statutory obligation* imposed on the insurer."

Appellants are mistaken: C*ullen* holds that section 627.848 prevents an insured, or its agent, from canceling its own policy with less than the required *contractual notice*. The operative notice provision in *Cullen* was a contractual requirement for *advance* notice of cancellation, not some statutory requirement of section 627.848. The role of section 627.848 was simply to enforce the contractual notice provision.[17] This is what the *Cullen* court meant when it wrote "the advance notice requirement of the policy . . . is applicable by statute [*i.e.*, section 627.848] to the premium finance company." *Id.* at 683.

The *Cullen* insurance contract required *advance* notice, and the statute simply assured that this contractual requirement was observed. In this case, the Scottsdale policy requires 10 days' notice for the sole benefit of the Mortgagee and, then, only for property insurance coverage. Here the statute must similarly be construed to enforce this contractual provision, and to do no more.

[17] Appellants (IB at 14, 15) err in describing Scottsdale's 10-day notice obligation under the Mortgagee clause as a "statutory" obligation – it is a contractual obligation.

c. **Persuasive precedent.**

The case of *Dunbar v. National Union Fire Insurance Co.*, 561 N.E.2d 450 (Il. App. 1990), is useful because it demonstrates, in a similar context and under a similarly worded statute, that a policy may be cancelled as to the Named Insured even though cancellation was not yet fully executed as to the mortgagee.

Neither Scottsdale's case nor the decision on appeal depend upon the holding of *Dunbar.* Scottsdale notes that the Illinois statute is virtually identical to the Florida statute, and when a statute is patterned similarly to a statute of a sister state, the judicial construction placed on the statute by the courts of that other state properly may be considered and given weight. *See generally*, 48A Fla. Jur. 2d, *Statutes*, section 173 (describing judicial construction of uniform or pattern laws among the various jurisdictions).[18] Appellants' dissection of *Dunbar* is of no consequence to the correctness of the decision of the federal district court in this case. The plain language of section 627.848 does not support their reading of the statute as an independent source of expanded coverage rights.

[18] This premium finance statute appears to be such a uniform law. *See, e.g., Atwater v. Dep't of Consumer and Regulatory Affairs*, 566 A.2d 462, 470-71(D.C. App. 1989)(noting that Congress enacted, in 1966, section 35-1561 of the District of Columbia Code, a statute that is virtually identical to section 627.848).

**d. Section 627.848 must be construed in a way that protects the sanctity and integrity of the contract and does not lead to absurd consequences.**

When this Court has been faced with conflicting interpretations of a statute previously, it has invoked the principle that "the interpretation that should be applied is the one that least restricts the right to contract. This is necessary in order to give proper recognition to the constitutional prohibition against the impairment of contracts." *Palma Del Mar Condominium Assn. v. Commercial Laundries of West Florida, Inc.*, 586 So. 2d 315 (Fla. 1991).

This policy, a contract or set of contractual obligations, authorizes the first Named Insured to cancel the policy with notice to the insurer. This right may be restricted, when cancelled for non-payment, by the existence of the separate and severable contract between the Insurer and the Mortgagee providing for an additional ten days' notice to the Mortgagee. But this ten days of additional coverage exists for the Mortgagee only and only for a continuation of property insurance coverage. Section 627.848 must be applied by this Court in a way that preserves this contractual arrangement.

Moreover, the construction of the statute urged by Appellants would give the insured something for nothing – liability insurance coverage for a period beyond

that which it paid a premium.[19] Remember, this policy was cancelled because Cuban Club did not pay its premium. A judicially-created extension of coverage for a period Scottsdale received no premium would impose a substantial, uncompensated, liability on Scottsdale.

Further, Appellants' proposed construction of this statute would create an internal conflict in the statute: On the one hand, the statute provides for cancellation of the policy upon receipt of the notice by the insurer [section 627.848 (1)(c)]; but, on the other hand, under the Appellants' proposal, the policy would not be cancelled upon delivery of notice to the insurer, but would be delayed until the entire policy was cancelled for every class of insured on every separate coverage. This result would fatally conflict with section 627.848(1)(c).

**e. Appellants' premium refund question**

Appellants' premium refund issue was not raised by the facts of the case, and it is not an issue that needs to be decided. The argument was not raised in its opposition papers in the trial court. (DE 15). It is an entirely theoretical question and is therefore not ripe for review. Even so, closer scrutiny of this question

[19] Scottsdale may have received the entire premium from the premium finance company, but the "cancellation ticket," attached to the policy and made a partof this Court's record, shows it calculated and processed the refund premium. (App. 9). There is <u>no evidence</u> that Scottsdale kept premium for a period during which it did not provide coverage.

reveals that the answer would support the result reached by the federal district court.

First, the facts: Separate premiums were assessed for the property and liability coverages of this policy. The Declarations page of the policy (App. 1, Policy p. 00049) shows the liability coverage premium was $1,669. The property coverage premium was $4,500. The "cancellation ticket," also attached to the policy (DE 11; Policy p. 00131; App. 9), shows that the unearned, and returned, premiums as to these separate coverages were separately computed as well. "In the absence of contrary provisions, when the duty to return premiums arises, it is a duty to return the unearned portion of the premiums. The amount of the premium which is unearned is in direct proportion to the unexpired time during which the policy is to run." 5 COUCH ON INSURANCE 3d section 79:21.

If this *pro rata* approach had been applied to this case, such a computation would be simple: The coverage for the Mortgagee, *i.e.*, property coverage, was extended for an additional 10 days past the cancellation date of the liability coverage. The per diem calculation of the refunds due on these separate premiums

is simple arithmetic and presents no practical problem whatsoever.[20] The imagined difficulty in calculating the refund raised by Appellants simply does not exist. As it turns out, in this case the "short rate" calculation for premium refunds was used.[21] This "short rate" permits the insurer to retain a minimum of 25 percent of the premium. (Policy p. 00051-52). For this reason, the cancellation ticket reflects a flat 75 percent refund.

The Appellants' worry that more than one cancellation date makes "obvious practical problems" in calculating a premium refund is wholly illusory. The theoretical question where coverage for one insured under a particular coverage section is cancelled before coverage for a different insured is cancelled under the same coverage section does not exist here.

**f. Clarifying the certified question**

The Eleventh Circuit phrased its certified question as follows:

> Whether section 627.848 contemplates a single date of cancellation for the insurance contract as a whole or whether the contract can be cancelled as to different

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[20] A premium refund calculation is elementary: the premiums for the property and liability coverages are separately divided by the total number of days in the policy period. This yields the *per diem* premium for each of the two separate coverages. The number of days remaining in the policy period is multiplied against the *per diem* charge for each of the liability and property coverages If applied to this case, the property insurance refund calculation would contain ten fewer days than the liability calculation.

[21] "The short-rate computation, generally employed when the insured cancels, is to be distinguished from the *pro rata* return of premiums required when the insurer cancels the policy . . ." 5 COUCH ON INSURANCE 3d, section 79:22.

> insureds at different times depending on when a statutorily required notice is given to that insured.

This particular phrasing of the question by the Eleventh Circuit is unfortunate[22] because it obscures the following important facts:

1. The "different insureds" to whom the Court is referring are the first Named Insured (Cuban Club) and the Mortgagee (Northside Bank); and

2. These two entities are insured under two different, severable parts of the policy – liability insurance coverage and property insurance coverage; and

3. These two different parts of the policy may be cancelled separately and at different times; and

4. The Mortgagee holds a separate and severable contractual right to an additional 10 days' notice of cancellation of the property coverage section.

The short answer to the question, as it is stated by the Eleventh Circuit, is "different parts of the policy may be cancelled at different times." The question, in light of the legal principles discussed in this Brief and by the facts of this case, may be restated as follows:

> Whether section 627.848 permits the immediate cancellation of the "Commercial General Liability Coverage" form as to the first Named Insured in accordance with the policy's terms, while coverage continues under the separate "Building and Personal Property Coverage Form" for the benefit of the

[22] And, as the Eleventh Circuit noted, the phrasing is suggestive only and in no way limits this Court's consideration of this case.

> Mortgagee pending the expiration of the separate 10-day notice provision in the Mortgagee clause?

The answer to the certified question, as restated, is easily answered: "Yes. The liability and property coverage parts of the policy are separate contractual undertakings that may be cancelled separately, and further, the Mortgagee is the sole beneficiary of a separate and exclusive right to an additional 10 days' notice."

## CONCLUSION

The matter should be returned to the Eleventh Circuit Court of Appeals with a recommendation that the judgment of the district court should be affirmed.

Respectfully submitted,

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP

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ANTHONY J. RUSSO, ESQ.
Florida Bar No.: 0508608
One Harbour Place, Suite 500
777 S. Harbour Island Boulevard
Tampa, Florida 33602
Phone: (813) 281-1900; Fax: (813) 281-0900
Attorneys for Appellee, Scottsdale Insurance Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellee's Answer Brief has been furnished by regular U.S. mail this ________ day of August, 2005, to:

Charles P. Schropp, Esq.
Amy S. Farrior, Esq.
Schropp, Buell & Elligett, PA.
3003 W. Azeele Street, Suite 100
Tampa, FL 33609

H. Vance Smith, Esq.
Smith Clark Delesie Bierley
Mueller & Kadyk
Post Office Box 2939
Tampa, FL 33601-2939

_________________________________
ANTHONY J. RUSSO, ESQ.

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ANTHONY J. RUSSO, ESQ