IN THE SUPREME COURT OF FLORIDA

KATHLEEN MILLER and ROD MILLER,	:	
Appellants/Plaintiffs,	:	
v.	:	CASE NUMBER: SC05-936
SCOTTSDALE INSURANCE CO.,	:	
Appellee/Defendant.	:	

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANTS' INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellants, Kathleen Miller and Rod Miller, refer to themselves as "the Millers" or as "Plaintiffs," their status in the trial court.

The Millers refer to Appellee, Scottsdale Insurance Company, as "Scottsdale" or as "Defendant," its status in the trial court.

The Millers refer to the Cuban Club Foundation, Inc. and Circula Cubano, Inc. collectively as "the Cuban Club."

As this appeal has been certified from the federal court system by the Eleventh Circuit Court of Appeals, the Millers designate references to the record on appeal by the prefix "DE" for the federal district court docket entry, followed by the page number of the document.

STATEMENT OF THE CASE AND FACTS

Scottsdale issued a commercial property and general liability insurance policy to the Cuban Club for the period October 27, 2000 to October 27, 2001; the Cuban Club financed the policy premium through Premium Financing Specialists, Inc. ("PFS") (DE 23, p. 1). Northside Bank of Tampa ("Northside"), the Cuban Club's mortgagee, was an additional insured on the policy (DE 23, p. 3).

The financing agreement contained a power of attorney granting PFS authority to cancel the policy (the actual policy number was misidentified in the financing agreement) in the event of non-payment by the Cuban Club (DE 23, pp. 1-2, fn. 1). When the Cuban Club failed to make its December, 2000, payment, PFS mailed a "notice of cancellation" to the Cuban Club and to the brokers for the policy on December 28, 2000; this notice purported to cancel the policy as of December 31, 2000 (DE 23, p. 2). The notice of cancellation was not received by Scottsdale until January 9, 2001 (DE 23, p. 3). The policy also contained a provision requiring Scottsdale to provide Northside, as the mortgagee, with ten days notice prior to cancellation of the policy for non-payment of premiums (DE 23, p. 3). Scottsdale did not give this required notice to Northside until January 22, 2001 (DE 23, p. 4).

Kathleen Miller was injured on the Cuban Club's property on January 13, 2001 -- four days after Scottsdale received the notice of cancellation, but nine days before Scottsdale provided the statutorily required notice of cancellation to Northside (DE 23, p. 2).

The Millers sued the Cuban Club in state court for damages arising from Kathleen Miller's injuries on the Cuban Club's property (DE 23, p. 2). The Millers recovered a judgment against the Cuban Club in the amount of $330,000 (DE 3, p. 1). The Cuban Club assigned to the Millers all of its rights as named insured under its policy with Scottsdale (DE 23, p. 2). The Millers then filed suit against Scottsdale in state court alleging the Scottsdale policy provides coverage for the damages for which the Cuban Club is legally responsible (DE 3, p. 2; DE 23, p. 2). Scottsdale removed the case to federal court on the basis of diversity of citizenship (DE 2).

The Millers and Scottsdale filed cross motions for summary judgment (DE 11, 14). Scottsdale contended it had no duty to pay the Millers for any portion of the judgment on the ground that its policy had been canceled as to the Cuban Club on January 9, 2001, and thus was not in effect on the date of Kathleen Miller's injury (DE 11, p. 3). The Millers asserted Scottsdale's policy remained in force as of the date of Mrs. Miller's injury because cancellation of the policy could not take

effect prior to the statutorily required notice to Northside, and this notice did not occur until after the date of the injury to Kathleen Miller (DE 14, p. 1).

The federal district court granted Scottsdale's motion for summary judgment. That court held that although the policy requires Scottsdale to provide written notice to Northside, the Cuban Club's mortgagee, ten days before the effective date of cancellation in the event of non-payment of premium, "this notice requirement exists for the exclusive benefit of Northside apart from any duty owed by Scottsdale to the Cuban Club." Therefore, according to the federal district court, "Scottsdale's notice to Northside nine days after Kathleen Miller's injury fails to invalidate the cancellation of the Cuban Club's insurance on January 9, 2001" (DE 23, p. 4). However, the federal district court also recognized this issue represented an unsettled issue of Florida law, and in its order suggested certification of the question to this Court in the event of an appeal (DE 23, p. 4, fn. 2).

The Millers appealed this summary judgment to the United States Court of Appeals for the Eleventh Circuit. On May 26, 2005, the Eleventh Circuit issued an opinion certifying to this Court the question of whether

> WHETHER §627.848, FLA. STAT. (2000) 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?

SUMMARY OF THE ARGUMENT

The federal district court erred in holding that the insurance policy Scottsdale issued to the Cuban Club had been canceled as to the Cuban Club by January 13, 2001, because all of the applicable statutory prerequisites to cancellation set forth in Section 627.848 -- the statute governing cancellations of insurance policies by premium finance companies -- expressly provides for a single cancellation date on which "the insurance contract" is cancelled. That cancellation date does not occur until all applicable statutory prerequisites to cancellation have been satisfied. The Florida premium financing statute does not authorize piecemeal cancellation of a policy; rather, once the statutory prerequisites have been met, the policy is canceled as of a single date that is applicable to all insureds.

Florida's statutory determination that there is a single cancellation date is also reflected in a unanimous body of Florida case law interpreting

SECTION 627.848, FLA. STAT. (2000) CONTEMPLATES A SINGLE DATE OF CANCELLATION FOR THE ENTIRE INSURANCE CONTRACT.

This appeal presents the certified question of whether the Florida premium financing statute, §627.848, Fla. Stat. 2000 ("§627.848(1)(a)1, Fla. Stat. (2000)§627.848, the statute which governs cancellations by premium finance

companies, contemplates separate, successive dates of cancellation for different insureds, or a single cancellation date applicable to all insureds.

Both §627.848 with particular relevance to this case are as follows:

> (1) When a premium finance agreement contains a power of attorney or other authority enabling the premium finance company to cancel any insurance contract listed in the agreement, **the insurance contract shall not be canceled unless cancellation is in accordance with the following provisions**:
>
> (a)1. Not less than 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 unless the defaulted installment payment is received within 10 days.
>
> * * *
>
> (c) Upon receipt of 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 or the return of the insurance contract.
>
> (d) **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 to a governmental agency, the insurance **carrier, a mortgagee, an individual, or a person designated to receive such notice for such**

> **governmental agency, insurance carrier, or individual shall apply when cancellation is effected under the provisions of this section. The insurer, in accordance with such prescribed notice when it is required to give such notice in behalf of itself or the insured, shall give notice to such governmental agency, person, mortgagee, or individual; and it shall determine and calculate the effective date of cancellation from the day it receives the copy of the notice of cancellation from the premium finance company** (emphasis added).

The plain language of §627.848(1), Fla. Stat. (2000)§677.848(1)(d), Fla. Stat. (2000)§677.848(1)(d), which states that the insurer shall give the prescribed notice to the mortgagee or other additional party and that "it shall determine and calculate the effective date of cancellation from the day it receives the copy of the notice of cancellation from the premium finance company." This provision unequivocally requires an insurer that has received a notice of cancellation from a premium finance company under a policy requiring notice to an additional party to calculate a new date of cancellation, based on the additional party notice requirement, that only **begins** when the insurance company receives the notice of cancellation from the premium finance company. Applied to the facts of this case, the statute expressly dictates that the earliest date on which Scottsdale could possibly have been effectively canceled the Cuban Club policy was January 19,

2001, six days **after** Ms. Miller's accident (as previously noted, the policy was not actually canceled until even later).

In addition to being directly at odds with the express language of the statute, the federal district court's holding that §627.848 and when it gives notice to additional parties. The statute employs a common sense approach that eliminates this problem by providing that the policy is canceled on a single date as to all insureds. The amount of the premium that the insurance company is entitled to retain can thus easily be calculated using the cancellation provisions of the policy.

Florida's statutory determination that there is but a single date of cancellation after all statutory prerequisites have been met is also clearly reflected in the Florida case law interpreting *Southern Group Indemnity, Inc. v. Cullen*,

831 So. 2d 681 (Fla. 4th DCA 2002) *Cullen*, like this case, involved a situation in which a notice of cancellation requested a cancellation date prior to the date on which the notice was received by the insurance company. §677.848(1)(d) served to incorporate all contractual restrictions on cancellation, including a provision requiring advance notice of cancellation to the insurer. *Cullen* controlled the outcome of this case. Section *Cullen* to have incorporated a contractual restriction on cancellation requiring advance notice from the insured, and to prevent cancellation of the policy under the statute until that advance notice

provision had been satisfied. The Millers respectfully submit that it necessarily follows that this same statutory provision, which in the present case incorporated a contractual notice provision requiring ten days prior notice of cancellation to Northside, must likewise have served to delay the effective cancellation date of the Scottsdale policy until this additional party notice requirement had been satisfied.

In fact, this case presents a more compelling argument for delaying the cancellation date than *Cullen*, the court found that §627.848 prevents an insured, or its agent, from cancelling its own policy with less than the required statutory notice, it obviously must also preclude the insurer from prematurely cancelling the policy when the insurer has failed to satisfy a statutory obligation imposed on the insurer. However, other than noting that *Cullen* on the notice issue in this case.

Other Florida case law buttresses the conclusion that all statutory prerequisites must be satisfied before a policy may be canceled under *Fidelity and Deposit Co. of Maryland v. First State Ins. Co.*,

677 So. 2d 266 (Fla. 1996)§627.848(1)(d), and held: "Failure to give the prescribed notice nullifies the attempted cancellation by the premium finance company." 677 So.2d, at 268. Similarly, in American Reliance Ins. Co. v. Martinez, 683 So. 2d 575 (Fla. 3d DCA 1996) ("*Martinez*"), the Third District upheld a jury verdict finding that an insured's efforts to cancel its own insurance

policy were ineffective when the insurer had not provided the mortgagee and loss payee with proper notice of cancellation.

The federal district court purported to distinguish both *Martinez* on the ground that, in these cases, the mortgagee who failed to receive notice of cancellation was an injured plaintiff in the underlying suit. Neither of these decisions, however, purport to limit their holding only to claims by mortgagees. Furthermore, by purporting to distinguish these cases on this ground, the federal district court presupposed the correctness of its assumption that the statute authorizes piecemeal cancellations as to different insureds at different times.

In Alfred v. Security National Ins. Co., 766 So. 2d 449 (Fla. 4th DCA 2000) ("*Alfred*"), the court reversed a summary judgment in favor of the insurer on a tow truck driver's policy that was alleged to have been canceled for non-payment prior to an accident; however, the insurer had failed to comply with an ordinance requiring that thirty days notice of the cancellation be given to the Broward County Consumer Affairs Department. Relying on the then-current statutory equivalent of *Alfred* court held that, if the insurer was required to give notice to this department, and had failed to do so, the cancellation was ineffective.

The federal district court purported to distinguish §627.848. Moreover, this purported distinction of the *Cullen*. In *Alfred* on the ground that the Millers were

not "intended beneficiaries" of the notice provision is not only unsupported by the opinion in *Cullen*.

In contrast to the substantial body of Florida authority refusing to recognize attempted cancellations that did not fully comply with *Dunbar v. National Union Fire Ins. Co.*,

561 N.E.2d 450 (Ill.App. 1990)*Dunbar*, an intermediate Illinois appellate court summarily dismissed the claim that a policy cancellation was ineffective because the insurance company had not notified third party lien holders with the statement that: "This requirement is irrelevant to any duty owed to the insured plaintiff." The only authority cited for this holding was a "*see generally*" citation to an earlier Illinois intermediate appellate court decision that did not even involve a premium financing statute. The opinion also quoted only a part of the Illinois statute, and did not include the provision which required notice to additional parties. Finally, the out-of-state *Cullen*, *Martinez* and *Dunbar* may or may not be good law in Illinois, it is plainly not the law in Florida.

In short, the federal district court purported to distinguish a unanimous body of Florida authority requiring strict compliance with statutory cancellation

requirements of *Cullen* also explicitly recognizes Scottsdale's position as a fallacious argument, rejecting a similar contention in that case with the observation that: "[n]or do we see any reason why the insurer should feel aggrieved by having to provide coverage, since the premium, which had been advanced by the finance company, was current" (831 So. 2d, at 683).

In sum, the federal district court's ruling that the Cuban Club policy was cancelled before Ms. Miller was injured is contrary to the plain language of §627.848 contemplates a single cancellation date for the policy as a whole.

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[1] Premium finance companies protect themselves in establishing the repayment schedule. In this case, the premium finance company received a total of $2,327.53 in payments from the Cuban Club (consisting of a down payment of $1,743.42 and a November, 2003 payment of $584.16); the premium charged by Scottsdale for the period the policy was in effect was $1,964.38 (consisting of a total policy premium of $6,605.26, less a return premium of $4,640.88) (*see* DE 11, Exs. A and B). Thus, as of the date of cancellation, the premium finance company had received almost $400 more in payments from the Cuban Club than Scottsdale charged for this coverage.

CONCLUSION

For the reasons stated, the Millers respectfully submit the federal district court erred as a matter of law in holding that the insurance policy issued by Scottsdale to the Cuban Club had been canceled as to the Cuban Club by January 13, 2001, the date when Kathleen Miller was injured on the Cuban Club's property, when all of the applicable statutory prerequisites to cancellation had not been satisfied by that date. The Millers request this Court answer the certified question by holding that the statute contemplates a single cancellation date. The Eleventh Circuit can then reverse the final judgment entered below and direct the entry of judgment for the Millers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of June, 2005, a true and correct copy of the foregoing Appellants' Initial Brief has been provided via U.S. Mail to:

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This Appellants' Initial Brief has been typed in Times New Roman 14-point font.

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