IN THE SUPREME COURT OF FLORIDA

KATHLEEN MILLER and
ROD MILLER,

Appellants/Plaintiffs,

v.

SCOTTSDALE INSURANCE CO.,

Appellee/Defendant.

CASE NUMBER: SC05-936

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

**APPELLANTS' REPLY BRIEF**

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## REPLY ARGUMENT

Scottsdale's[1] answer brief shows that Scottsdale has recognized that its position in the United States District Court and in the Eleventh Circuit Court of Appeals, namely that §627.848, Fla. Stat. (2000) ("§627.848") contemplates piecemeal cancellations of a single policy as to different insureds at different times, is unlikely to prevail in this Court. This is hardly surprising since, as the Millers demonstrated in their initial brief, this position contradicts the plain language of §627.848, is contrary to the unanimous body of Florida case law interpreting this statute, and creates obvious practical problems, including how the return premium would be calculated.

In light of this recognition, Scottsdale now attempts to argue, for the first time in its answer brief in this Court, that the policy it issued to the Cuban Club under a single policy number was actually two separate and distinct contracts of insurance: a contract of insurance between Scottsdale and the Cuban Club, and a second contract of insurance between Scottsdale and the Cuban Club's mortgagee, Northside. Scottsdale then argues that different cancellation provisions apply to

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[1] The Millers will use the same designations of the parties and the records as in their initial brief. References to the Millers' initial brief will be designated by the prefix "IB." References to Scottsdale's answer brief will be designated by the prefix "AB."

these two separate contracts of insurance. Finally, Scottsdale completes its proposed syllogism by arguing that, since there are two separate insurance contracts subject to different cancellation provisions, §627.848 applies separately to the two contracts so that one of them may be effectively cancelled under the statute without affecting the other.

Scottsdale's change in position before this Court has required Scottsdale to engage in some interesting mental gymnastics in its brief. For example, the Eleventh Circuit asked this Court to advise it "Whether section 627.848 contemplates a single date of cancellation for the insurance contract as a whole [the Millers' position] 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 [Scottsdale's position in the federal courts]." The Eleventh Circuit adopted this form of certified question both because it accurately summarized the parties' positions and because Scottsdale raised no objection to the form of the question, which had been proposed by the Millers. However, since Scottsdale is now advocating its newly-minted "two contract" theory, Scottsdale's brief refers to the Eleventh Circuit's phrasing of the certified question as "unclear," as "contain[ing] an incorrect assumption," or as "unfortunate" (AB 6, 31). It is none of the above.

In this reply brief, the Millers will demonstrate that Scottsdale's new theory is no more viable than in its prior position, particularly when crucial facts that Scottsdale neglects to mention in its brief are considered. However, the Millers also object to Scottsdale's attempt to recast the certified question. In the Eleventh Circuit, Scottsdale opposed certification to this Court, presumably because it anticipated receiving an unfavorable answer,[2] and it should not be permitted to muddy the waters by trying to change the issue at this point in the appeal.

The predicate for the new theory advanced in Scottsdale's answer brief is that the mortgagee clause in the Cuban Club's policy constituted a separate contract between Scottsdale and Northside, distinct from the rest of the policy. As Scottsdale phrases it, the mortgagee clause is "a separate agreement between the Insurer and the Mortgagee that imposes a separate contractual obligation on the Insurer to give the Mortgagee ten days' advance notice of cancellation" (AB 10).

Scottsdale purports to support its claim that there are two separate policies by extracting "sound bites" from cases that involved entirely different issues. For example, Scottsdale discusses at length the Fifth District's decision in *State Farm Fire and Cas. Co. v. Aetna Fire Underwriters*, 413 So.2d 144, 146 (Fla. 5th DCA

[2] The Millers filed this action in state court. Scottsdale then removed it to federal court.

1982) ("*Aetna*") (AB 11-12). *Aetna* involved a situation where home purchasers had applied to assume the existing mortgage on the property they were buying. The purchasers obtained their own fire insurance policy, and the sellers cancelled their policy as of the same date the purchaser's policy became effective. Less than ten days later, the house was destroyed by fire. The purchaser's fire insurer then claimed that it was entitled to prorate the loss with the seller's insurer because the standard mortgagee clause in the seller's policy required a ten-day notice of cancellation. The Fifth District rejected this contention and held that the purchaser's insurer was liable for the entire loss.

Scottsdale seizes on *dictum* in *Aetna* to the effect that the mortgage 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" (413 So.2d, at 146), as "authority" for its separate contract argument. Scottsdale makes this claim even though *Aetna* had nothing to do with §627.848 or, for that matter, with the rights of an owner. An insurance company issuing a replacement policy, which **receives** a premium to **provide** coverage, is obviously in a much different position than a property owner, who has **paid** a premium to **obtain** coverage, including coverage protecting the mortgagee in order to comply with the covenants of his or her mortgage.

A particular irony in Scottsdale's reliance on *Aetna* is that the opinion specifically states that its construction of the mortgagee clause is consistent with that court's earlier holding in *Insurance Co. of North America v. Morgan*, 406 So.2d 1227 (Fla. 5th DCA 1981) ("*Morgan*"). *Morgan* held that the former liability insurer of a tow truck operator, whose policy had been replaced by a policy from another insurer, was not obligated to contribute to a post-replacement loss even though the former insurer had failed to give the required thirty-day notice of the policy's expiration to the Public Service Commission.

The Court will recognize that the underlying facts in *Morgan* are virtually identical to those in *Alfred v. Security National Ins. Co.*, 766 So.2d 449 (Fla. 4th DCA 2000) ("*Alfred*"), a case interpreting §627.848. The result, however, was exactly the opposite. *Alfred* held that a tow truck driver's policy that had been cancelled for non-payment prior to an accident, but as to which the insurer had failed to give the required thirty-day notice of cancellation to government authorities, had **not** been effectively cancelled under §627.848 and continued to provide coverage. Thus, Florida case law has specifically rejected the analogy Scottsdale has sought to draw between a policy that has been replaced by another policy, and a policy that has been cancelled under §627.848.

A non-Florida decision on which Scottsdale also heavily relies, *Fireman's Fund Ins. Co. v. Appalachian Ins. Co.*, 572 F.Supp. 799 (E.D.Pa. 1983), *aff'd.*, 738 F.2d 422 (3d Cir. 1984) (*see* AB 12-13) ("*Fireman's Fund*"), also does not support Scottsdale's position. *Fireman's Fund* held that where a property policy has been replaced by another policy, neither the second insurer nor the mortgagee may utilize the cancellation provisions of the mortgagee clause to obtain coverage from the first insurer. Thus, under *Fireman's Fund*, obtaining replacement coverage extinguishes not only the rights of third parties, but also of the mortgagee. This holding again refutes the conclusion Scottsdale has attempted to distill from the *Aetna dictum*.

*Fireman's Fund* is further enlightening in that it holds that references to the mortgagee clause as an "independent contract" is a misnomer, and that actually this clause "is more 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." 577 F.Supp., at 802. *Fireman's Fund* holds the mortgagee's actual status is of a third party beneficiary of the contract between insurer and insured. *Id.*

Scottsdale's two contract theory also fails as a matter of basic contract law. A separate and independent contract between Scottsdale and Northside would have required a meeting of the minds between these parties on the mortgagee clause's terms and an exchange of consideration between them. There is absolutely no record evidence of any communication between Scottsdale and Northside as to the terms of the mortgagee clause; to the contrary, the mortgagee clause is just another one of the pre-printed provisions of Scottsdale's form policy. There is also no evidence of any consideration flowing from Northside to Scottsdale for including this clause; again to the contrary, it is undisputed that the entire premium for the Scottsdale policy was paid by the Cuban Club (or on the Cuban Club's behalf by the premium financing company).

Another compelling reason that Scottsdale's new theory collapses like a house of cards is that, like many theories that have been created by working backward from the desired result, Scottsdale ignores undisputed facts that are inconsistent with its theory. In developing its "two contract" theory, Scottsdale has overlooked that there were **three** insureds under the Cuban Club policy, not two. In addition to the Cuban Club and Northside, Sailaway Productions, Inc. ("Sailaway") was also named as an additional insured for comprehensive general liability coverage under the policy. Just as with respect to Northside, the Scottsdale policy was not cancelled as to Sailaway until **after** Mrs. Miller's injury. This is not in dispute; Scottsdale's memorandum in support of its summary judgment motion in federal district court specifically acknowledged this fact, stating:

> **SCOTTSDALE concedes that the Policy was not canceled as to Northside and Sailaway until nine days after KATHLEEN MILLER's injury of January 13, 2001**. However this does not invalidate the January 9, 2001 cancellation of the Policy as to the Cuban Club. On its face, chapter 627.848(1)(d) contemplates and presupposes such a bifurcated cancellation; one effective as to the named insured and a *later* one effective as to any additional insured or other party entitled to notice. (DE 11, p. 4 (emphasis added).

The fact that Sailaway also had coverage under the Scottsdale policy as of the date of Mrs. Miller's accident renders completely ineffectual Scottsdale's efforts to argue that Northside's coverage should be disregarded on the ground that the mortgagee clause is a totally separate policy provision that affects only mortgagees. Sailaway was not a mortgagee, so that Scottsdale's musings about the "union, standard or New York clause" are not only often inaccurate but irrelevant. Similarly, Scottsdale's argument that the Northside cancellation provision should not be taken into consideration because Northside was insured under the property insurance coverage part of the policy, rather than for general liability coverage, becomes not only specious but immaterial. Sailaway was insured under the Scottsdale policy for general liability coverage, the same coverage under which the Millers' claim was asserted. In short, even if it had merit, which it does not, Scottsdale's two-contract theory implodes because there are three insureds involved, not just two as Scottsdale's answer brief incorrectly assumes.

The reason that Scottsdale has advanced its new theory is that the "bifurcated cancellation" position it advocated in the federal courts is plainly at odds with the plain language of §627.848, Florida case law interpreting this statute, and ordinary common sense. Under the terms of §627.848, a policy that is subject to no statutory, regulatory or contractual restrictions on cancellation terminates on the date specified by the premium finance company in the cancellation notice. Section 627.848(1)(c). In this case, that date would have been December 31, 2000 (*see* DE 32, p. 2). However, if statutory, regulatory or contractual restrictions exist, as they do here, §627.848(1)(d) becomes applicable. This subsection states that all such restrictions "shall apply when cancellation is effected under the provisions of this section." *Id.*

In this case, there were two such restrictions. First, the cancellation provisions of the Scottsdale policy required advance written notice of cancellation. Since Scottsdale did not receive the cancellation notice until January 9, 2001, this restriction delayed the cancellation until at least that date. Scottsdale does not dispute this requirement, and concedes that cancellation was not effective until January 9, 2001.

However, there was also a second restriction, the requirement of ten days notice of cancellation to Northside and Sailaway. This situation is also specifically addressed by §627.848(1)(d), which states that when either the insurer or the insured is obligated to provide notice to a third party, the insurer shall give such notice on behalf of itself or the insured. Most importantly, the very same sentence of §627.848(1)(d) specifies the date on which the policy is deemed to have been cancelled when a third party notice provision exists. It instructs the insurer in such cases to "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" *Id.* Thus, under the plain terms of this statute, when third party notice is required, the insurer must use the date it receives the notice of cancellation as the **starting date** for calculating the effective date of cancellation, not the **ending date** as Scottsdale has attempted to do. The actual date of cancellation depends on how long a third party notice period is required. Since ten day's notice was required here, under the plain language of §627.648(1)(d), Scottsdale's policy could not have been cancelled before January 19, 2001, six days **after** Mrs. Miller's accident.

Finally, the preamble of §627.848, unequivocally states that "the insurance contract shall not be cancelled unless cancellation is in accordance with the following provisions," including subsection (d). In short, the statute mandates that, when third party notice is required, policy cancellation cannot occur until at least the number of days required by the third party notice provision has elapsed **after** the insurer receives notice of cancellation.

This clear expression of legislative intent has been reflected in a unanimous body of Florida case law. Every Florida case which has construed §727.848 has held that all relevant statutory, regulatory or contractual requirements to cancellation must have been satisfied before a policy may be cancelled under this statute. The factual grounds on which Scottsdale and the federal district court relied on to "distinguish" these cases have no support in the holdings of the cases themselves. Rather, each of these cases simply identifies a statutory, regulatory or contractual restriction that had not been satisfied as of the date of cancellation, and then applies the clear language of the statute to hold that, under §627.848, the policy had not been effectively cancelled because this requirement had not been satisfied. *See Southern Group Indemnity, Inc. v. Cullen*, 831 So.2d 681 (Fla. 4th DCA 2002); *Fidelity and Deposit Co. of Maryland v. First State Ins. Co.*, 677 So.2d 266 (Fla. 1996); *American Reliance Ins. Co. v. Martinez,* 683 So.2d 575 (Fla. 3d DCA 1996); *Alfred*, *supra*.

Finally, there are obvious common sense reasons why the legislature opted for a single, bright-line date of cancellation after all statutory, regulatory and contractual requirements had been satisfied. First, this bright-line test should minimize litigation such as that in this case, which was necessitated by the insurer's attempt to parse the coverages in its policy after a loss had occurred in order to avoid paying a claim. Second, the legislature also obviously recognized that this rule could not possibly prejudice insurers. The essence of premium financing is that the insurer receives its entire premium at the inception of the policy. Accordingly, the insurer will always receive the full premium it has earned even if policy cancellation is deferred until all statutory, regulatory and contractual restrictions have been satisfied.

The bright-line test provided by §627.848 also avoids serious practical problems, such as how a return premium is to be calculated following policy cancellation. The cancellation provisions of most insurance policies, including Scottsdale's, contemplate cancellation of the entire policy, and provide a mechanism for calculating a return premium only for the policy as a whole. If §627.848 were construed so as to permit piecemeal cancellations as to different insureds on different dates, there would normally be no contractual basis on which to compute the amount of the return premium, and any allocation between insureds would be inherently arbitrary and would likely lead to further litigation. This morass is avoided by the simple expedient of establishing a single date of cancellation for the entire policy, as §627.848 does.

This is aptly demonstrated by analyzing the response in Scottsdale's answer brief on the premium issue. Scottsdale argues that calculating a return premium in this case was a matter of "simple arithmetic" and would present "no practical problem whatsoever" (AB 30), because all one would need to do is to extend the property insurance premium for an additional ten days beyond the cancellation date of the liability coverage. This calculation, however, ignores the fact that both the Cuban Club and Northside were insureds under the property coverage section of the Scottsdale policy. It is the rare mortgage that is for one-hundred percent of a structure's value, with no owner's equity. Rather, the usual situation in the event of a loss is that the mortgage is paid off and the balance of the coverage, representing the owner's equity interest, is then paid to the owner. Since it is Scottsdale's position that both the Cuban Club's liability and property coverage was cancelled as of January 9, 2001, this would mean that if the Cuban Club had burned to the ground on January 13, 2001 (rather than Mrs. Miller having been injured on that date), Scottsdale would have paid Northside the amount of its mortgage but would have paid the Cuban Club nothing for its equity interest in the building. Moreover, the mortgagee clause expressly grants Scottsdale the right to recoup any amounts it pays to Northside from the Cuban Club. Obviously, it would be grossly inappropriate for Scottsdale to charge the full property coverage premium when it was providing only partial coverage solely to Northside, and had reserved the right of subrogation against another of its insureds.

Finally, Scottsdale's argument regarding return premium calculations misses the point. Even if Scottsdale were correct that calculating the return premium would be no problem in this particular case, Scottsdale's position would unquestionably make it difficult or impossible to calculate a return premium in many other cases. Since §627.848 applies to all cancellations effected by premium financing companies, a single cancellation date, which allows the return premium to be calculated in all cases, is mandated.

## 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 that 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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I HEREBY CERTIFY that, on this 30th day of August, 2005, a true and correct copy of the foregoing Appellants' Reply 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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