Florida Supreme Court

Case No. SC06-2031

ESSEX INSURANCE COMPANY,

Petitioner,

v.

MERCEDES ZOTA, MIGUEL, ZOTA,
LIGHTHOUSE INTRACOASTAL, INC.,
JACK FARJI, individually, and
BROWARD EXECUTIVE BUILDERS, INC.,

Respondents.

ACADEMY OF FLORIDA TRIAL LAWYERS' AMICUS CURIAE BRIEF IN SUPPORT OF POSITION OF RESPONDENTS

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SUMMARY OF THE ARGUMENT

The Academy of Florida Trial Lawyers ("Academy") submits that this Court should find a non-statutory duty on the part of all insurance companies, standard and surplus lines carriers alike, to provide their insureds with copies of the policies of insurance they issue. As reflected by numerous cases from other states, public policy imposes such a duty wholly apart from any statutory requirements that may exist.

The duty arising by virtue of public policy cannot be satisfied by issuing an insurance policy to the independent broker from whom the insured purchased insurance. Unless the insured personally receives a copy of the policy, the insured will have no way of verifying that the policy contains the coverages requested by the insured. Further, the policy will have exclusions, conditions, and limitations on coverage that may be unexpected, so receipt of the policy is necessary to allow the insured to make other arrangements if a given risk is not adequately protected against.

Likewise, receipt of the policy is necessary to inform the insured as to claims procedures, deadlines, and conditions for coverage that must be met. The broker from whom the policy is purchased has no incentive to provide the insured with a copy of the policy, and may have an adverse interest, in those circumstances

where the policy as issued differs from that represented by the broker and expected by the insured.

The Academy submits that the remedy fashioned by the federal district court in this case for non-delivery of the policy by Essex—estoppel to contest coverage and to rely upon exclusions from coverage—is appropriate and necessary in cases such as this. Numerous cases from other jurisdictions reflect that insurers who fail to provide copies of their policies are estopped from denying coverage and relying upon policy exclusions that were not made known to the insured.

Finally, the Academy submits that the provisions of section 627.428, Fla. Stat. must apply to litigation between surplus lines insurers and their insureds, whether or not Florida Statutes so provide. Section 627.428 is an integral part of Florida insurance law providing access to the court system to insureds who suffer wrongful denials of coverage, and there is no rational basis or legitimate legislative reason for discriminating against persons and entities insured by surplus lines carriers. To discriminate against such insureds amounts to a violation of due process and equal protection, so this Court should respond to the certified question concerning the applicability of that statute in the affirmative.

ARGUMENT

I.

THIS COURT SHOULD HOLD THAT PUBLIC POLICY IMPOSES UPON ESSEX AND ALL INSURERS A NON-STATUTORY DUTY TO PROVIDE A COPY OF THE POLICIES THEY ISSUE DIRECTLY TO THE INSURED

A. Introduction:

The parties and other *amici* have extensively briefed the issue of whether Essex was under a ***statutory*** duty to deliver a copy of the policy directly to its insured. The Academy of Florida Trial Lawyers ("Academy") agrees with the Respondents' position that § 626.922 imposes such a duty, as this Court should find. In addition, this Court should find that public policy imposes upon all insurers—whether standard or surplus lines carriers—a duty outside of those statutes to furnish the insured with the policy.

This argument has two main parts. First, before reaching the question of ***who*** should be recognized as a suitable recipient of a copy of the policy[1], the Academy

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not, by using those terms, mean to suggest that the non-statutory duty it advocates cannot be met by providing the insured with written notice of the important parts of the insuring agreement in some other form.

will demonstrate that public policy requires all insurers to furnish ***someone*** on behalf of the insured with copies of insuring agreement, or at least written descriptions of the insurance policy's important coverage terms, conditions, limitations and exclusions. Once the existence of that non-statutory duty has been established, the Academy will explain why the Court should conclude that an insurer cannot meet that duty by delivering a copy of the policy to an independent insurance broker, as opposed to the insured itself.

B. Public Policy Mandates a Nonstatutory Duty To Provide Policy:

Rather than just parsing the language of the pertinent statutes in an attempt to divine legislative intent, this Court also should hold that public policy considerations mandate recognition of a nonstatutory duty on the part of insurers to provide their insureds with copies of the insurance policies they issue. Courts in other states have so concluded:

> statutory provisions requiring delivery of the policy or a certificate of insurance to the insured. . . . Other cases, however, have held that, ***in the absence of such a statute, public policy nevertheless requires notice to the insured of the essential terms of coverage***: . . . .

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Kippen v. Farm Bureau Mut. Ins. Co., 421 N.W.2d 483, 484 (N.D. 1988)(emphasis added). Florida should follow that line of cases, some of which are listed below:

Illinois: In *Salloum Foods & Liquor, Inc. v. Parliament Ins. Co.*, 388 N.E.2d 422 (Ill. App. 1979), the insurer failed to re-deliver a copy of the policy to its insured during the processing of a claim; the policy had been returned to the insurer because the policy had been cancelled after the loss. Although no statute required the insurer to provide Salloum Foods with the policy, the Illinois appellate court held that, "[a]s a simple matter of fairness and logic, and in keeping with the modern view that an insurer must deal fairly and in good faith with its insureds, we conclude that Salloum Foods had a right to a copy of its entire insurance policy." *Id.* at 31.

North Dakota: In *Kippen v. Farm Bureau Mut. Ins. Co.*, 421 N.W.2d 483, 484 (N.D. 1988) the court addressed the fact that no statute in North Dakota required insurers to deliver copies of policies to their insureds. Noting several of the cases from other states that had found such a duty arising under public policy, and noting a North Dakota statute requiring both insurers and insureds to "communicate to the other in good faith all facts within his knowledge which are or which he believes to be material to the contract and which the other has not the means of ascertaining," the *Kippen* court recognized that the nonstatutory duty of "an insurer to provide notice of coverage and relevant provisions to a named insured is a logical extension of the policy enunciated in the statute." *Id.* at 485.

Utah: The Supreme Court of Utah has recognized the duty of insurers, outside of any statute, to provide their insureds with copies of their policies or other written descriptions of the specific policy provisions and exclusions. In *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 236-37 (Utah 1985), the court noted that—while a Utah statute required delivery to the insured of a credit life or disability policy—there was no such statute imposing a similar duty to deliver an automobile insurance policy. Notwithstanding the lack of such a statutory duty, the Utah court found a duty based on public policy that insureds under automobile policies be informed about pertinent policy provisions.

Wisconsin: In *Kozlik v. Gulf Ins. Co.*, 673 N.W.2d 343 (Wis. App. 2003), the court noted that many of the decisions recognizing the duty of an insurer to provide its insured with a copy of the policy base such a duty on statutes. Although no such statute existed, the *Kozlik* court found a duty, following the lead of the courts of other states that "have held that, in the absence of such a statute, public policy nevertheless requires notice to the insured of the essential terms of coverage." *Id.* at 501.

This Court should likewise recognize the public policy requirement that insurers like Essex provide their policies to their insureds, apart from the question whether the statutes involved in this case impose such a duty.

C. The Reasons Underlying This Public Policy Render Insufficient Delivery of a Copy of the Insurance Policy to the Insured's Broker:

There are at least two main reasons why the public policy requiring delivery of a copy of an insurance policy to the insured cannot be sufficiently satisfied by allowing constructive delivery to an independent insurance broker who acts as the insured's agent. First, delivery of the policy to the broker will not enable the insured to review the policy to learn of coverage restrictions and exclusions of which the insured is unaware. Second, by the insured itself not receiving its own copy of the policy, the insured is left in the dark about when, where and how to make a claim for a covered loss, and may innocently breach unknown coverage conditions.

Often, insurance policies as issued fail to provide the coverage requested by the insured and promised by the broker. *See, e.g., Ranger Ins. Co. v. Phillips*, 544 P.2d 250 (Ariz. App. 1976)(policy of undelivered aircraft insurance contained exclusion for student pilots to which insured had not agreed, contrary to parol agreement by agent to provide student pilot coverage). The broker and insured will have a conflict of interest in the situation where the broker is unable to place certain coverages required by the insured, so the broker will have an incentive to conceal the actual policy when it is issued only to the broker, rather than a reason

to provide it to his or her "principal," the insured.

Even if the limitations on coverage in the policy actually issued do not contradict the oral undertaking of the broker, policies have many limitations on coverage that the insured, if and when made aware of, will address through other sources of insurance or risk management measures that would not be taken if the insured was left ignorant of the policy provisions. Thus, one important underpinning of the public policy requirement of furnishing a copy of the policy is to ensure that the insured has actual notice of the extent and limitations on coverage, so the insured can make other arrangements if a desired coverage is absent or unaccepably limited. "If an insured is not given a copy of the policy, he or she cannot take whatever action is appropriate to protect his or her interests nor can he or she ensure that the coverage, which he or she thinks has been contracted for, is actually provided." *Kozlik v. Gulf Ins. Co.,* 673 N.W.2d 343, 349 (Wis. App. 2003).

Second, if the policy is provided only to the insured's broker and placed in a drawer without being read by the insured, the insured will be unaware of notice requirements, claim deadlines, and other policy defenses that the insurer will raise once a covered claim is made. Unless by fortuity the broker is made aware of the claim and volunteers information about perfecting and processing the claim to the

insured, the insured may innocently violate policy conditions of which he or she is unaware. *See generally, e.g., Kippen v. Farm Bureau Mut. Ins. Co.*, 421 N.W.2d 483, 484 (N.D. 1988)(insurer's failure to deliver a copy of the policy to the insured led to the insured's failure to give notice of a liability claim and the insured's settlement with the claimant without the consent of the insurer).

This Court should reject the judicial fiction that constructive notice to the insured's broker—with whom the insured may have no ongoing relationship and no communication about the content of the policy the broker places—satisfies the public policy requirement of delivery of a copy of the policy to the insured. Public policy requires that the policy be delivered to the insured itself.

II.

THE APPROPRIATE REMEDY FOR FAILING TO DELIVER A COPY OF THE POLICY TO THE INSURED IS ESTOPPEL TO DENY COVERAGE

This Court should conclude that the federal district court fashioned the proper remedy for Essex's failure to provide Lighthouse with a copy of its insurance policy. Several courts in other states confronted with this issue have agreed that the insurer will be estopped from contesting coverage and from relying upon coverage exclusions when the duty to deliver the policy is breached. Even courts

in states which follow the general rule applicable in Florida—that estoppel may not be used to create coverage that otherwise is absent under a policy—recognize an exception to that rule where the policy is not delivered to the insured.

Alabama: Alabama courts follow a rule similar to the rule in Florida: "the general rule in Alabama law is that 'coverage under an insurance policy cannot be enlarged by waiver or estoppel.'" *Brown Mach. Works & Supply Co. v. Insurance Co. of North America*, 659 So. 2d 51, 53 (Ala. 1995)(quoting *Johnson v. Allstate Ins. Co.*, 505 So. 2d 362, 365 (Ala. 1987)). Notwithstanding that general rule, the law of Alabama is that "when an insurer has not complied with [its statutory duty to furnish a copy of the policy to its insured under Alabama Code] § 27-14-19 and its failure to comply has prejudiced the insured, ***the insurer may be estopped from asserting an otherwise valid coverage exclusion***." *Brown Machine Works*, 659 So. 2d at 57 (emphasis added).

The Academy notes that—although the source of the duty to deliver the policy in Alabama, and some other states' cases mentioned herein, is statutory—the remedy recognized for a violation of that duty would be equally appropriate where the duty is based on public policy instead of a statute.

Idaho: The failure of an insurer to deliver a copy of the policy to the insured results in coverage beyond the written terms of the policy under Idaho law.

Foremost Ins. Co. v. Putzier, 627 P.2d 317 (Idaho 1981). In *Foremost*, in upholding a finding of coverage for a first party theft claim under a policy written only as a liability policy, the Idaho "Supreme Court held that ***when an insurance company does not send a copy of the insurance policy to the insured, it is bound by any misrepresentations [concerning the scope of the coverage] made to the insured*** by its agent." *Chester v. State Farm Ins. Co.*, 789 P.2d 534, 536 (Idaho App. 1990)(emphasis added).

Illinois: In *Salloum Foods & Liquor, Inc. v. Parliament Ins. Co.*, 388 N.E.2d 422 (Ill. App. 1979), the court held that the failure of the insurer to re-deliver a copy of the policy to its insured during the processing of a claim estopped the insurer from relying on a one-year limitations period contained in the policy.

Kentucky: In *Breeding v. Massachusetts Indem. & Life Ins. Co.*, 633 S.W.2d 717, 718 (Ky. 1982) the Supreme Court of Kentucky held that a blanket health insurer's violation of its statutory duty to provide insureds with a "certificate . . . reasonably setting forth a summary of such person's coverage and restrictions thereon" estopped the insurer from relying on an exclusion in the policy for losses "caused directly or indirectly by . . . intoxicants or narcotics."

Louisiana: The Louisiana Supreme Court has held that an insurer may not rely on exclusionary language in a Commercial General Liability policy that was never

delivered to the insured or its agent. *Louisiana Maintenance Svcs, Inc. v. Certain Underwriters at Lloyds of London*, 616 So. 2d 1250, 1253(La. 1993)("Insurance policy exclusions are not valid unless clearly communicated to the insured").

Michigan: Under Michigan law, the failure of an insurer to deliver to the insured a copy of the policy or certificate of insurance, which must "include a description of the insurance coverage and exceptions, limitations, or restrictions," precludes the insurer from relying on coverage eligibility limitations in the policy. *Gardner v. League Life Ins. Co.*, 210 N.W.2d 897, 898 (Mich. App. 1973).

Utah: The Supreme Court of Utah has held that where an insurance company fails to deliver to its insured a copy of the policy containing exclusions from coverage, and the insured otherwise "is not informed of them in writing, those exclusions are invalid." *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 236-37 (Utah 1985)(automobile policy). *Accord, General Motors Acceptance Corp. v. Martinez*, 668 P.2d 498 (Utah 1983)(credit life or disability policy).

Washington: In *Safeco Ins. Co. v. Dairyland Mut. Ins. Co.*, 446 P.2d 568 (Wash. 1968) the highest court of Washington State held that the failure of a liability insurance company to deliver to its insured a copy of the policy prevented the insurer from relying on an exclusionary provision in the policy restricting

coverage to only drivers age 25 and above.

Wisconsin: Under Wisconsin law, where the insurer fails to furnish its insured with a copy of the policy, the insurer may not rely upon exclusions from coverage. In *Kozlik v. Gulf Ins. Co.,* 673 N.W.2d 343 (Wis. App. 2003), the Court discussed several of the cases cited above and held as follows:

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> the insurance company had not informed him or her of the exclusion or given him or her the means to ascertain its existence. Purchasers of insurance policies, like the one at issue here, commonly rely on the assumption that they are fully covered by the insurance that they buy. *See Farmers Ins. Exch.*, 712 P.2d at 236-37; *Louisiana Maint. Servs., Inc. v. Certain Underwriters at Lloyd's of London*, 616 So. 2d 1250, 1252-53 (La. 1993) (observing that "notice of any exclusionary provisions is essential because the insured will otherwise assume the desired coverage exists."). ***If an insured is not given a copy of the policy, he or she cannot take whatever action is appropriate to protect his or her interests nor can he or she ensure that the coverage, which he or she thinks has been contracted for, is actually provided.*** We therefore hold that an insurer may not deny coverage based on limitations or exclusions in a policy, even if clearly stated, where the insured was not otherwise informed of such provisions.

Id. at 502-03 (emphasis added).

This Court should similarly hold that Essex's failure to deliver the policy to Lighthouse precludes it from relying on exclusions and limitations to coverage contained therein.

III.

DUE PROCESS AND EQUAL PROTECTION REQUIRE THAT SECTION 627.428 APPLY TO THOSE WHO ARE INSURED BY SURPLUS LINES CARRIERS

The parties and other *amici* have thoroughly briefed the issues of statutory construction and legislative intent on the question of the applicability of section 627.428 to cases like this one involving a party insured by a surplus lines carrier. The Academy agrees with the position taken by the Respondent Lighthouse, and will not repeat those statutory analyses. However, in addition to accepting those arguments, this Court should conclude that it would violate Lighthouse's due process and equal protection rights to construe the applicable statutes to deny Lighthouse the protection of section 627.428.

Millions of Floridians—individuals and corporate citizens alike—receive the valuable protection of section 627.428, which levels the playing field in litigation against insurance companies. According to Essex's position, Lighthouse and others who share the misfortune of being insured under policies issued by unregulated surplus lines carriers, are unprotected by that important statutory protection, merely by virtue of their status. This Court should reject Essex's position, because there is no rational basis to discriminate against Lighthouse, and

no legitimate legislative objective behind denying such insureds equal access to justice.

This case is similar to *Delta Cas. Co. v. Pinnacle Medical, Inc.*, 721 So. 2d 321 (Fla. 5th DCA 1998), *affirmed, sub nom., Nationwide Mut. Ins. Co. v. Pinnacle Medical, Inc.*, 753 So. 2d 55 (Fla. 2000). That was a case in which the Fifth District and this Court struck down as unconstitutional amendments to the PIP statute on grounds including the ground "that section 627.736(5) arbitrarily discriminates against medical providers by subjecting them to a prevailing party test of attorney's fee recovery when insureds enjoy the benefits of section 627.428(1)." 721 So. 2d at 326; *aff'd*, 753 So. 2d at 59. Similarly, there is no valid reason to discriminate against insureds who, through no fault of their own, were issued policies by surplus lines carriers instead of domestic insurers.

Finally on this point, the Academy recognizes that this Court may be disinclined to hold that section 627.021(2) is unconstitutional (insofar as it purports to render § 627.428 inapplicable to surplus lines insurers), due to the parties' failure to argue this issue before the district court and failure to brief it in this appeal. The Academy submits, however, that the unconstitutional effect of interpreting section 627.021(2) so as to render section 627.428 unavailable to Lighthouse, should be considered as further evidence that the Florida Legislature could not have

intended for surplus lines insureds to lose the protection of section 627.428. The fifth certified question should be answered in the affirmative.

CONCLUSION

WHEREFORE, this Court should answer certified questions nos. 1, 2 and 5 in the affirmative; should recognize that public policy imposes a non-statutory duty on insurers to deliver their policies directly to their insureds; should agree that the federal district court employed the appropriate remedy of estopping Essex from denying coverage; and should find section 627.428 applicable to all insurers, standard and surplus lines alike.

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CERTIFICATE OF SERVICE

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By: _____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

By: _____
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