IN THE SUPREME COURT OF FLORIDA

Case No. SC06-2031

ESSEX INSURANCE COMPANY,

Petitioner,

v.

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

Respondents.

ON CERTIFIED QUESTIONS TO THE FLORIDA SUPREME COURT FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

AMENDED BRIEF OF DEFENSE RESEARCH INSTITUTE AND FLORIDA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

(Amended as to Certificate of Service Only)

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INTEREST OF THE AMICUS CURIAE

Defense Research Institute (DRI) is the national "voice of the defense bar." It is a 22,500 member national association of defense lawyers who represent insureds, insurance carriers, and corporations in the defense of civil litigation. It serves as a counterpoint to the plaintiff's bar and seeks to balance the justice system nationwide.

In this matter, DRI joins Florida Defense Lawyers Association (FDLA) on the first certified question from the Eleventh Circuit: "Whether Fla. Stat. § 626.922 or § 627.421, or both require delivery of evidence of insurance directly to the insured, so that delivery to the insured's agent is insufficient." *Essex Ins. Co. v. Zota*, 2006 WL 2847811 at 10 (11th Cir. Oct. 6, 2006). Since evidence of insurance is commonly delivered to insureds' agents nationwide, and most states, including Florida, permit delivery through the method used this case, the issue potentially impacts the operation of the entire insurance industry. DRI therefore sought leave to join in and file this amicus brief.

Florida Defense Lawyers Association ("FDLA") is a statewide organization of attorneys whose primary practice is the defense of civil matters. FDLA's membership consists of over 1000 attorneys.

FDLA strives to ensure and promote fair opportunities for the defense of its clients in civil cases. Its membership consists of attorneys with extensive

experience in all phases of defense litigation. By participating as amicus curiae, it shares this experience and insight with courts around the state on important legal issues such as those raised in the certified questions under this Honorable Court's review.

A particular focus for FDLA has been insurance litigation of significant statewide impact. FDLA specifically wishes to address the first and second certified questions. The Eleventh Circuit's construction will irreparably disrupt longstanding Florida case law that permits delivery of evidence of insurance to an insured's agent. The first question should therefore be answered in the negative. Moreover, the legislative history and existing case law that addresses the preclusion of an insurer from asserting lack of coverage is not consistent with the facts of this case and will adversely impact the insurance industry in a way that the Florida Legislature never intended. The second question should therefore also be answered in the negative. Accordingly, FDLA sought leave to file this amicus brief.

SUMMARY OF THE ARGUMENT

The first two certified questions should be answered in the negative. As to the first question, Florida case law preceding the amendment to Fla. Stat. § 626.922(1) and in effect prior to enactment of Fla. Stat. § 626.421(1) established an almost 70-year old rule that delivery of evidence of insurance to an agent of the insured constitutes delivery to the insured. An analysis of the amendment to Fla. Stat. § 626.922(1) reveals that the language dealing with delivery of evidence of insurance to the insured is unchanged. Legislative history also fails to show any intent of the legislature to change the existing law regarding the delivery requirement. Several other states have adopted this position with long standing case law as well.

The second question should be answered in the negative because creating coverage where there was none before is a form of equitable estoppel, which this Honorable Court has noted was to only be used in the case of fraud or some other severe conduct on the insurer's part. This Court created a narrow rule by which coverage can be created only in limited circumstances, none of which apply to this case, where the sole basis for Respondents' estoppel argument arises from their contention that delivery of evidence of insurance was insufficient. Since the requirement was met under Florida's longstanding case law, there is no evidence or allegations of fraud, and the policy exclusions were properly sent to the insured's

agent, estoppel cannot be applied to create otherwise excluded coverage in this case.

For the foregoing reasons, DRI and FDLA respectfully request this Honorable Court to answer the first two certified questions in the negative.

ARGUMENT

DRI and FDLA respectfully assert that the first two certified questions before this Honorable Court should be answered in the negative. A positive response to the first two certified questions will confuse and frustrate longstanding holdings and principles allowing delivery of evidence of insurance to intermediaries as satisfaction of the delivery requirement. In addition, the preclusion provisions of the statutes raised in the first two certified questions were never intended to apply to the delivery of evidence of insurance to an insured's agent, and should therefore not apply to a case such as this.

I. DELIVERY OF EVIDENCE OF INSURANCE TO AN INSURED'S AGENT SATISFIES THE REQUIREMENT OF DELIVERY TO THE INSURED UNDER FLA. STAT. §§ 626.922 AND 627.421[1] (1998).

The first certified question from the Eleventh Circuit asks this Honorable Court "[w]hether Fla. Stat. § 626.922 or § 627.421, or both, require delivery of evidence of insurance directly to the insured, so that delivery to the insured's agent

[1] DRI and FDLA's position on Fla. Stat. 627.421 assumes that this statute applies to surplus lines carriers.

is insufficient." *Essex Ins. Co. v. Zota*, 2006 WL 2847811 at 10 (11th Cir. Oct. 6, 2006).

Prior to the statute's amendment in 1998, the relevant portion of Fla. Stat. § 626.922 read as follows:

> (1) *Upon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of the insurance consisting either of the policy as issued by the insurer or, if such policy is not then available, a certificate, cover note, or other confirmation of insurance.* Such document shall be executed or countersigned by the surplus lines agent and shall show the description and location of the subject of the insurance; coverage, conditions, and term of the insurance; the premium and rate charged and taxes collected from the insured; and the name and address of the insured and insurer. If the direct risk is assumed by more than one insurer, the document shall state the name and address and proportion of the entire direct risk assumed by each insurer.

Fla. Stat. § 626.929(1) (1997) (emphasis added). The Florida Legislature amended the statute in 1998, to state as follows:

> (1) *Upon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of the insurance consisting either of the policy as issued by the insurer or, if such policy is not then available, a certificate, cover note, or other confirmation of insurance.* Such document shall be executed or countersigned by the surplus lines agent and shall show the description and location of the subject of the insurance; coverage, conditions, and term of the insurance; the premium and rate charged and taxes collected from the insured; and the name and address of the insured and insurer. If the direct risk is assumed by more than one insurer, the document shall state the name and address and proportion of the entire direct risk assumed by each insurer. A surplus lines agent may not delegate the duty to issue any such document to producing general lines agents without prior written authority from the surplus lines insurer. A general lines agent may issue any such document only

> if the agent has prior written authority from the surplus lines agent. The surplus lines agent must maintain copies of the authorization from the surplus lines insurer and the delegation to the producing general lines agent. The producing agent must maintain copies of the written delegation from the surplus lines agent and copies of any evidence of coverage or certificate of insurance which the producing agent issues or delivers. Any evidence of coverage issued by a producing agent pursuant to this section must include the name and address of the authorizing surplus lines agent.
>
> Fla. Stat. § 626.929(1) (1998).

Prior to amendment in 1998, the applicable portion of Fla. Stat. § 627.421 read as follows:

> (1) Subject to the insurer's requirement as to payment of premium, every policy shall be mailed or delivered to the insured or to the person entitled thereto not later than 60 days after the effectuation of coverage.
>
> Fla. Stat. § 627.421(1) (1997). This statute has not been amended.

There should be no dispute that Florida law has long held that delivery of evidence of insurance to an insured's agent constitutes delivery for purposes of these two statutes. *See Jefferson Standard Life Ins. Co. v. Lyons*, 165 So. 351 at 353 (Fla. 1936) ("When the policy was sent to the soliciting agent of the company, he became the agent of both the insurer *and insured* for the purpose of delivery . . . ."); *Prudential Ins. Co. of Am. v. Latham*, 207 So.2d 733 at 734 (Fla. 3d DCA 1968) (". . . . we are in accord with the chancellor's ruling that delivery of the policy to the agent constitutes delivery to the insured."); *Reliance Ins. Co. v. D'Amico*, 528 So.2d 533 at 534 (Fla. 2d DCA 1998) ("The fact that D'Amico may

never have received a copy of the subject insurance policy because his insurance agent kept it on file for him is irrelevant because delivery of an insurance policy to an agent constitutes delivery to the insured."); *United Nat. Ins. Co. v. Jacobs*, 754 F.Supp. 865 at 869 (M.D. Fla. 1990) (". . . . even if Jacobs never received a copy of the policy, under the law of Florida, when a policy is delivered to an agent, that constitutes delivery to the insured.").

This Court should therefore answer the Eleventh Circuit's first question in the negative unless this Court determines that the above statutory language is unclear or ambiguous. *See Doe v. Emerson*, 2006 WL 2971314, 11 (Fla. June 2, 2006). In *Doe*, this Court held as follows:

> When construing the meaning of a statute, courts must first examine the plain language of the statute. *Montgomery v. State*, 897 So.2d 1282, 1285 (Fla. 2005). "'When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Id.* (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)).

There is no decision under Florida law in which a court found that the language of either Fla. Stat. § 626.922(1) or 627.421(1) were unclear or ambiguous in any way. Quite the opposite, the above case law dealing with delivery of evidence of insurance, which has been in effect since 1938, maintained a distinct and reliable rule allowing delivery of evidence of insurance to an insured's agent.

Moreover, a simple reading of the revisions to the statute did not change any statutory language that would implicate, relax or otherwise change the delivery rule set forth in Florida case law. The amendment to Fla. Stat. § 622.911(1) did not change the first sentence at all. *See* Fla. Stat. § 622.911(1) (1997) and (1998). The 1998 modification only added language precluding a surplus lines agent from delegating the duty to issue evidence of insurance to a producing general lines agents unless the surplus lines insurer provides written authorization. *See id.* In no place did the Florida Legislature alter the statutory language of the delivery requirement to an insured. *See id.* Accordingly, this Court should hold that the language of the statute is as clear now as it was before the amendment and uphold the 68-year old rule allowing delivery of the evidence of insurance to the insured's agent.

The same is true for Fla. Stat. § 627.421(1). The Florida Legislature has not amended this statute since 1997, which shows that the Florida Legislature believes that this language is sufficiently clear. It is not in dispute that the Florida Legislature has amended other provisions of the Florida Insurance Code. The legislature's lack of action on Fla. Stat. § 627.421(1) means that there has not been a perceived lack of clarity or ambiguity. As a result, this Court should similarly hold that the statute is clear and unambiguous.

Another holding of the *Doe* decision is that "'[o]ne of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature.'" *Doe*, 2006 WL 2971314 at 11 (citing *Green v. State*, 604 So.2d 471 at 473 (Fla. 1992) and *Fisheries Ass'n, Inc. v. Dep't of Natural Res.*, 453 So.2d 1351 (Fla. 1984)). Should this Court choose to analyze the legislative history, it will find that there was no discussion, report or concern regarding the delivery requirement or longstanding case law holding that delivery to an insured's agent satisfies the requirement. *See Florida Staff Analysis*, S.B. 1372, March 12, 1998 and May 28, 1998.

Accordingly, this Court should hold that the applicable statutes are clear an unambiguous on their faces, that there is no legislative history to require reversing Florida's longstanding holdings allowing delivery to an insured's agent, and answer the Eleventh Circuit's first question in the negative.

The holding is consistent with other states that allow delivery of evidence of insurance to an insured's or insurer's agent. *See Powell v. Republic Nat. Life Ins. Co.*, 337 So.2d 1291, 1299 (Ala. 1976); *Pruitt v. Great Southern Life Ins. Co.*, 12 So.2d 261, 262 (La. 1942); *John v. Gourmet Pizzas, Inc.*, 778 So.2d 1223, 26 (La.App. 4th Cir. 2001); *Sims v. Buena Vista School Dist.*, 360 N.W.2d 211, 213 (Mich. 1984) (allowing delivery of insurance policy to insured's employer);

Wanshura v. State Farm Life Ins. Co., 275 N.W.2d 559, 564 (Minn. 1978); *Jackson Nat. Life Ins. Co. v. Receconi*, 827 P.2d 118, 123 (N.M. 1992); *Krause v. Washington Nat. Ins. Co.*, 468 P.2d 513, 518 (Or. 1970); *Moore v. Prudential Ins. Co. of America*, 491 P.2d 227, 228-229 (Utah 1971) (precluding an insurer from denying coverage where it had delivered a policy to its agent for delivery to the insured); *Rose v. Travelers Indem. Co.*, 167 S.E.2d 339, 342 (Va. 1969); *Weed v. Lepianka*, 140 N.W.2d 305, 308 (Wis. 1966).

For the foregoing reasons, DRI and FDLA respectfully argue that the first certified question of the Eleventh Circuit be answered in the negative.

II. FAILURE TO SATISFY THE DELIVERY REQUIREMENT OF FLA. STAT. §§ 626.922 AND 627.421 DOES NOT NECESSARILY PRECLUDE AN INSURER FROM ASSERTING A LACK OF COVERAGE.

Should this Court determine that delivery requirements of Fla. Stat. §§ 626.922(1) and 627.421(1) somehow failed, it should nonetheless answer the Eleventh Circuit's second certified question in the negative.

The Eleventh Circuit correctly cited *Crown Life Ins. Co. v. McBride*, 517 So.2d 660, 661 (Fla. 1987) for the general holding that "in Florida . . . equitable estoppel may not be used affirmatively to create or extend coverage under an insurance contract." *Id.* It also correctly cited Crown Life for the exception to the general holding, which would apply "to create insurance coverage where to refuse to do so would sanction fraud or other injustice." *Id.* Finally, the Eleventh Circuit

appropriately found that "the defendants do not allege that Essex or MacDuff engaged in conduct that would amount to fraud." *Essex*, 2006 WL 2847811 at 3.

Against this backdrop, DRI and FDLA would like for this Court to take notice of other Florida cases dealing with equitable estoppel. A review of these cases shows that the exception can only apply where fraud, malice or bad faith is evident. As the Eleventh Circuit noted, none of those factors have been proved or even alleged.

The Eleventh Circuit discussed the two Florida cases specifically applying equitable estoppel to the failure to comply with the delivery requirement of Fla. Stat. § 627.421(1). *See id.* at 4. The first case is *ZC Ins. Co. v. Brooks*, 847 So.2d 547, 550 (Fla. 4th DCA 2003), which held that equitable estoppel applied to provide coverage under a supplemental rental car insurance policy for family members where the actual policy contained an exclusion for such coverage. In *Brooks*, the rental car agency delivered policy summaries that did not specifically contain the family member exclusion upon which the insurer later denied coverage. *See id.* at 548. At no point did the insurer deliver the policy itself or otherwise put the insured on notice of the family member exclusion. *See id.* at 550-551. The Fourth District held that failing to disclose material information, which operated to create an "unacceptable paradox" whereby an insured is provided a document that evidences coverage while another, undisclosed document denies coverage. *See id.*

at 551. The Fourth District equated this conduct with fraud and applied the doctrine of equitable estoppel accordingly. *See id.*

This case is easily distinguishable from the case before this Court. In this case, the applicable policy was delivered to the insured's agent, Brandon & Company. *See Essex*, 2006 WL 2847811 at 1. The documents provided included the full policies, including exclusions, which adequately communicated the terms of the policy to the insured, assuming this Court upholds the holdings regarding delivery to an agent of the insured. There is no fraud alleged or demonstrated in this case, so Brooks does not apply here.

The second case that the Eleventh Circuit analyzed was *T.H.E. Ins. Co. v. Dollar Rent-A-Car Sys., Inc.*, 900 So.2d 694 (Fla. 5th DCA 2005). In *T.H.E.*, the exception to the general rule against imposing coverage did not apply. *See id.* at 696. The insured was involved in an accident while allegedly driving the rented vehicle under the influence of alcohol. *See id.* at 695. The accident resulted in his fiancee's death, which resulted in a suit against the insured. *See id.* The insured sought coverage under the policy for the suit against him and the insurer denied coverage under an exclusion for intoxicated drivers. *See id.* The exclusion was noticed (but not fully printed) in rental agreement itself, "the most conspicuous document available at any time during the inception of the rental transaction." *Id.* at 696. The Fifth District held that the insured was certainly on notice of the

exclusion and suffered no prejudice by not having the whole policy before his accident. *See id.* The Fifth District vacated the insured's summary judgment. *See id.*

T.H.E. does not need to be distinguished and supports the Petitioner's argument that equitable estoppel should not be applied to the instant case. There was no allegation of fraud, adequate notice of any applicable exclusions had been provided, and there was no evidence of wrongdoing on the insurer's part.

The elements of estoppel were recently explained in *Goodwin v. Blu Murray Ins. Agency, Inc.*, 2006 WL 2632075 (Fla. 5th DCA 2006). They are as follows: "(1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position that it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and reliance on it." *Id.* at 4. The Goodwin Court stated that "[t]he essence of estoppel is that a person should not be permitted to unfairly assert inconsistent positions, *but estoppel will not lie unless the party seeking to assert it was misled.*" *Id.*

No principle of estoppel can be used to create coverage in this case where it was previously excluded because Essex never misled the insured in any way. There is no allegation that Essex misled the insured. The only allegation is that the

policy with the applicable exclusion was not appropriately delivered, which is simply not supported by Florida case law as explained above.

Additional case law shows the circumstances in which courts have applied the doctrine of estoppel to create coverage. They show that estoppel is to be used in cases of an insurer's fraud, malice or bad faith. *See Romo v. Amedex Ins. Co.*, 930 So.2d 643 (Fla. 3d DCA 2006). *Romo* involved a claim for reformation of a policy to provide health insurance coverage for a liver transplant. *See id.* at 647. The third count of the complaint alleged a claim for equitable estoppel pursuant to the *Crown Life* case discussed above. *See id.* at 650. The Third District held that the complaint sufficiently stated a claim for estoppel where it alleged that the insurer's agent promised the insureds that the coverage provided in the policy was the same as that provided in earlier policies the insureds had purchased (which presumably allowed coverage for organ transplants), that the insureds had relied on the promise to their detriment, and that they had suffered damages as a result. *See id.* The specific inconsistency on the insurer's part is better seen in the court's analysis of the fraud claim, which alleged that the agent who sold the insureds the policy knew that the new policy did not provide the same coverage as the old policies at the time he told the insureds that the coverage was the same. *See id.*

Accordingly, the doctrine of estoppel cannot be used to create coverage where it has not existed before. This case is simply not one in which estoppel was

intended to apply. This Court should therefore answer the second certified question in the negative.

CONCLUSION

For the foregoing reasons, DRI and FDLA respectfully urge this Honorable Court to answer the first two certified questions in the negative.

Respectfully Submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief of Amicus Curiae is written in Times New Roman 14-point, which complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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