

IN THE SUPREME COURT OF FLORIDA

ESSEX INSURANCE
COMPANY,

PETITIONER,

v.

MERCEDES ZOTA, ET. AL.,

RESPONDENTS.
_____ /

CASE NO. SC06-2031

AMENDED AMICUS CURIAE BRIEF OF THE FLORIDA SURPLUS LINES SERVICE
OFFICE IN SUPPORT OF PETITIONER

Discretionary Review of Questions of Law Certified by the United
States Court of Appeals for the Eleventh Circuit, Case Nos. 05-
13457 and 05-14671

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Interest of Amicus

The Florida Surplus Lines Service Office is a nonprofit association created by section 626.921, Florida Statutes. Subsection 626.921(1), Florida Statutes, explains the purpose of the Service Office:

There is hereby created a nonprofit association to be known as the Florida Surplus Lines Service Office. **The Legislature hereby finds and declares that the establishment of a surplus lines self-regulating organization is necessary to establish a system that will permit better access by consumers to approved unauthorized insurers.** Accordingly, the Legislature declares that this section shall be liberally construed and applied to promote its underlying purposes, which will protect consumers seeking insurance in this state, permit surplus lines insurance to be placed with approved surplus lines insurers, **establish a self-regulating organization which will promote and permit orderly access to surplus lines insurance in this state,** enhance the number and types of insurance products available to consumers in this state, **provide a source of advice and counsel for the benefit of consumers, surplus lines agents, insurers, and government agencies concerning the operation of the surplus lines insurance market,** and protect the revenues of this state. (emphasis added).

This brief will be submitted as part of the Service Office's duty to help "promote and permit orderly access to surplus lines insurance in this state" and to provide counsel to "government agencies concerning the operation of the surplus lines insurance market."

Preliminary Statement

The only citation to the record on appeal in this brief is to slip opinion in Essex Insurance Company v. Zota, Nos. 05-13457 and 05-14671 (11th Cir. October 6, 2006). A copy of the opinion is attached as an appendix to this brief.

Summary of Argument

This case is before this Court on certified questions from the 11th Circuit in Essex Insurance Company v. Zota, Nos. 05-13457 and 05-14671 (11th Cir. October 6, 2006). The Florida Surplus Lines Service Office submits this brief in order to suggest answers to questions 1, 2, and 5.

Question 1

It is well established in Florida law that delivery to an agent constitutes delivery to the insured. Contrary to the trial court's assertion, there is nothing in section 626.922 to alter this long-standing precedent. Allowing this ruling to stand will create unnecessary confusion in the insurance law - a situation where delivery has one meaning under section 626.922 and a different meaning under other sections of the Insurance Code. This Court should not create such confusion in the Florida insurance market. This Court should answer the 11th Circuit's first question in the negative and hold that section

626.922, Florida Statutes, does not require delivery directly to the insured in cases where delivery was made to the agent.

Question 2

The 11th Circuit asked if failure to comply with the delivery requirement created by the trial court barred the insurer from enforcing the exclusions contained in the policy. This Court should answer this question in the negative. There is nothing in section 626.922 that requires such a result. In effect, the trial court rewrote the terms of the insurance contract as a penalty for noncompliance with the statute. A court is not permitted to rewrite the terms of an insurance contract. Even if this Court agrees with the trial court's ruling that delivery must be made directly to the insured, it should not penalize the insurer by creating coverage where no coverage is provided by the policy.

Questions 1 and 5

The 11th Circuit asks whether two provisions of chapter 627, Florida Statutes, apply to surplus lines insurers. This Court should answer any questions about the applicability of chapter 627 to surplus lines insurance in the negative and hold that chapter 627, by its clear language, does not apply to surplus lines insurers.

Argument

ISSUE I

WHETHER FLA. STAT. § 626.922 REQUIRES DELIVERY OF EVIDENCE OF INSURANCE DIRECTLY TO THE INSURED, SO THAT DELIVERY TO THE INSURED'S AGENT IS INSUFFICIENT.

Section 626.922, Florida Statutes, does not require delivery of evidence of insurance directly to the insured. It is well established in Florida law that delivery to an agent constitutes delivery to the insured. Amendments to section 626.922, Florida Statutes, did nothing to alter this long-standing precedent. Section 627.421, Florida Statutes, does not apply to surplus lines insurers so it is irrelevant to this case. Section 627.021(2)(e), Florida Statutes, exempts surplus lines insurance from all of chapter 627. This Court should answer the question as posed by the 11th Circuit in the negative.

Section 626.922, Florida Statutes, Does Not Require Delivery to the Insured. Delivery to the Agent is Sufficient.

Subsection 626.922(1), Florida Statutes, provides, in pertinent part:

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... 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.

Florida courts have consistently held that delivery of an issued policy to an insurance agent is tantamount to delivery to the insured. This Court announced the rule in 1936. See Jefferson Standard Life Ins. Co. v. Lyons, 165 So. 351 (Fla. 1936)

(holding that by the delivery of life insurance policy to the soliciting agent of the insurer for delivery to the insured, the agent became the agent of both the insurer and the insured for the purpose of delivery and delivery was in effect performed).

The rule has been applied consistently in subsequent decisions.

See Prudential Ins. Co. of America v. Latham, 207 So. 2d 733, 735 (Fla. 3d DCA 1968) (delivery of a life insurance policy to the insurer's agent constituted "delivery" to the insured);

Reliance Ins. Co. v. D'Amico, 528 So. 2d 533, 534 (Fla. 2d DCA 1988) ("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, 869 (M.D. Fla. 1990) (under Florida law, delivery of a policy to an agent constitutes delivery to the insured).

The trial court refused to apply this rule because it believed that language in section 626.922 requires actual delivery to the insured. See Essex Insurance Company v. Zota, Nos. 05-13457 and 05-14671 (11th Cir. October 6, 2006) at 6. Absence of language setting forth how delivery to an insured may be accomplished should not be read to mean that the only method for delivery is by direct conveyance from the surplus lines agent to the insured. There is nothing in section 626.922 to indicate that constructive delivery, or delivery to the agent, is not sufficient. The statute was enacted in 1959, See Chapter 59-205, Laws of Florida, after this Court's discussion of constructive delivery in Jefferson Standard Life Ins. Co. The statute was subsequently amended without any indication that the Legislature intended to change the rule. The Legislature is presumed to know judicial constructions of its statutes. See Wood v. Fraser, 677 So. 2d 15 (Fla. 2d DCA 1996) (noting "Florida's well-settled rule of statutory construction that the legislature is presumed to know the existing law where a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute' ") (quoting Collins Inv. Co. v. Metropolitan Dade County, 164 So. 2d 806 (Fla. 1964)). If the Legislature had wanted to limit delivery to actual delivery, it could have done so. The Legislature's

amendment to the statute without any indication that it intended to change the rule relating to delivery of a policy to an agent indicates that longstanding rule should continue to be followed.

The 1998 Amendments to Section 626.922 Did Not Change Florida Law Relating to the Delivery of an Insurance Policy

The District Court noted the rule that delivery to the agent constitutes delivery to the insured but refused to apply it, noting that the cases cited to the court were decided prior the 1998 amendment to section 626.922. Essex Insurance Company at 6. This was error. The 1998 amendment to section 626.922 did not alter the requirements relating to delivery. See s. 69, ch. 98-199, Laws of Florida. The 1998 amendment dealt with the duties of surplus lines agents relating to issuance of insurance policies, not the delivery of such policies. In 1998, the following language was added to section 626.992:

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.

See s. 69, ch. 98-199, Laws of Florida.

The trial court's observation is that Latham and Jacobs were decided prior to 1998 is not relevant to the issue before the court. The issue before the trial court, and before this Court, is whether the 1998 amendments did anything to alter the rule that delivery to the insured's agent is equivalent to delivery to the insured. The Florida Surplus Lines Service Office submits that it is. This Court should answer the 11th Circuit's first question in the negative.

ISSUE II

WHETHER, IF THE DELIVERY REQUIREMENT OF FLA. STAT. 626.922 OR 627.421, OR BOTH, WAS NOT MET IN THIS CASE THE APPROPRIATE REMEDY IS TO PRECLUDE THE INSURER FROM ASSERTING LACK OF COVERAGE UNDER THE TERMS OF THE POLICY.

The trial court held that the appropriate remedy for failing to comply with the delivery requirement was to prevent the insurer from relying on the terms of the insurance policy to define the terms of coverage. Essex Insurance Company at 4. The 11th Circuit asked if failure to comply with the delivery requirement barred the insurer from enforcing the exclusions contained in the policy. This Court should answer this question in the negative. There is nothing in section 626.922 that requires such a result. In effect, the trial court rewrote the terms of the insurance contract as a penalty for noncompliance with the statute. A court is not permitted to rewrite the terms of an insurance contract. Even if this Court agrees with the trial court's ruling that delivery must be made directly to the insured, it should not penalize the insurer by creating coverage where no coverage is provided by the policy.

Failure to Comply With Section 626.922, Florida Statutes, Does Not Preclude an Insurer from Arguing that Certain Risks Are Not Covered Under an Insurance Policy

The trial court ruled that because a surplus lines agent failed to deliver a policy to the insured, the insurer is

precluded from arguing that exclusions from coverage contained in the policy apply. Essex Insurance Company at 4. Assuming that there is some actual delivery requirement in section 626.922, there is nothing in the statute that precludes an insurer who does not comply with the terms of the statute from arguing that relevant exclusions apply. The only penalty provision in the statute is found in subsection 626.922(5), Florida Statutes, which provides penalties if the surplus lines agent fails to take specified actions. The statute does not prohibit an insurer from asserting that the terms of the policy apply.

In effect, the trial court is arguing that because the surplus lines agent failed to strictly comply with section 626.922, the insurer is estopped from asserting that exclusions contained in the insurance policy apply. However, theories of estoppel are not available to bring uncovered risks within the coverage of a policy. The general rule is that the doctrine estoppel may be used to prevent a forfeiture of insurance coverage but may not be used to create or extend coverage. See AIU Ins. Co. v. Block Marina Investment, Inc., 544 So. 2d 998, 1000 (Fla. 1989).

AIU Insurance is instructive. In that case, the statute at issue prohibited the insurer from denying coverage based on a

specific "coverage defense" unless certain notice requirements were met. See AIU Insurance Co., 544 So. 2d at 998. The issue before this Court was whether failure to comply with the statutory notice requirements precluded the insurer from arguing that certain coverage is excluded from the policy. See Id. at 999-1000. This Court held that the statute did not prohibit the insurer from asserting that the exclusion applies:

Further, construing the term "coverage defense" to include a disclaimer of liability based on an express coverage exclusion has the effect of rewriting an insurance policy when [the statute] is not complied with, thus placing upon the insurer a financial burden which it specifically declined to accept.

Id. at 1000.

Similarly, here, the trial court's ruling that a failure to comply with section 626.922 precludes the insurer from asserting that exclusions contained within the policy apply has the effect of rewriting the policy and forcing the insurer to accept risks that it specifically declined to accept. This Court warned in AIU Insurance that rewriting an insurance contract in such a manner presented "grave constitutional questions, the impairment of contracts and the taking of property without due process of law." AIU Insurance, 544 So. 2d at 1000 (footnote omitted). The same constitutional issues would arise here, if the trial

court's ruling that coverage applies as a matter of law even when the policy has a specific exclusion were allowed to stand.

The trial court's order focused only on the issue of policy delivery. The insurer's claim that coverage did not exist under this policy was not considered by the District Court. The end result of this was to create, as a matter of law, coverage without regard to the fact that coverage was arguably expressly excluded. The trial court barred the insurer from using the terms of its own policy, and instead, as a matter of law, created coverage where none existed. It is not within the purview of the court to create insurance coverage where none exists. See Liberty Mutual Ins. Co. v. Capeletti Bros., Inc., 699 So. 2d 736, 738 (Fla. 3d DCA 1997). By holding that a failure to comply with section 626.922 precludes an insurer from relying on terms of a contract, the court has rewritten the contract between the parties. This Court should not interpret Florida law to allow judicial reformation of insurance contracts.

The Insurance Market Benefits from Consistency in Interpretation of Statutes and Cannot Function in an Orderly Manner if the Courts Are Rewriting Insurance Contracts

The Service Office submits that the trial court's ruling on the delivery of insurance policies has the effect of altering

almost 70 years of Florida precedent. Changing this longstanding rule will force insurance companies and agents to reconsider how they conduct business. Under the ruling of the trial court, "delivery" could have one meaning under section 626.922, Florida Statutes, and a different under another statute. While the Florida Legislature could, if it chose to do so, make such a change, this Court should decline to rewrite Florida laws. There is no sound policy reason for creating such confusion in the insurance market.

Further, the effect of a ruling that failure to strictly comply with a statute allows for judicial reformation of a contract could have a chilling effect throughout the surplus lines insurance market in Florida. The trial court's ruling has the effect of creating a "strict liability" rule where any failure to comply with a statute creates insurance coverage but does not allow for any exclusions from coverage contained in the policy to be enforced. Such a scheme makes it impossible for an insurance company to know whether the exclusions under its policy have any meaning. The creation of a remedy not authorized by statute for the violation of a statute could lead to a situation where an insured party searches for technical violations of statutes in order to preclude an insurer from denying coverage on the basis of policy exclusions. Insurers

should not be expected to operate in an environment where any violation of a statute can lead to the alteration of its contract with the insured. The courts should not be involved in re-writing the terms of valid contracts. This Court should answer the 11th Circuit's question in the negative.

ISSUE III

WHETHER SECTIONS 627.421 AND 627.428, FLORIDA
STATUTES, APPLY TO SURPLUS LINES INSURANCE

The 11th Circuit also asked whether section 627.421, Florida Statutes, and section 627.428, Florida Statutes, apply in this case. This Court should answer that question in the negative. Pursuant to section 627.021, Florida Statutes, nothing in chapter 627 applies to surplus lines insurance. Accordingly, neither section 627.421, Florida Statutes, nor section 627.428, Florida Statutes, apply to surplus lines insurers.

Section 627.021, Florida Statutes, provides:

627.021 Scope of this part.--

(1) This part of this chapter applies only to property, casualty, and surety insurances on subjects of insurance resident, located, or to be performed in this state.

(2) This chapter does not apply to:

(a) Reinsurance, except joint reinsurance as provided in s. 627.311.

(b) Insurance against loss of or damage to aircraft, their hulls, accessories, or equipment, or against liability, other than workers' compensation and employer's liability, arising out of the ownership, maintenance, or use of aircraft.

(c) Insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine insurance policies.

(d) Commercial inland marine insurance.

(e) Surplus lines insurance placed under the provisions of ss. 626.913-626.937.

(3) For the purposes of this chapter, all motor vehicle insurance shall be deemed to be casualty insurance only.

(4) This part does not apply to health insurance.

(emphasis added).

The plain language of the statute clearly exempts surplus lines insurance from all of chapter 627. If the Legislature had intended to exempt surplus lines insurance only from Part I of Chapter 627, it would have done so. Instead, it exempted surplus lines insurance from the entire chapter. The Legislature created the Surplus Lines Law, sections 626.913-626.937, Florida Statutes, to regulate the surplus lines insurance market and excluded it from Chapter 627. There is no indication to that the Legislature intended to apply chapter 627 to that market.

This analysis should end here. The language of section 627.021 is clear and unambiguous. There is no need for further interpretation. Sections 627.421 and 627.428, Florida Statutes, do not apply to surplus lines insurance.

Background on Surplus Lines Insurance

Although the analysis should end with a simple reading of the statute, the Florida Surplus Lines Service Office presents some background on surplus lines insurance in order to show that the plain language of the statute supports good public policy. Traditional insurance markets consisting of Florida-licensed ("admitted") insurers are not always available for every risk for many reasons. For example, a business may wish to obtain more insurance coverage than an admitted insurer believes is appropriate to offer or a business might want to insure a risk that an admitted insurer does not want to insure. Florida has dealt with this by allowing certain non-admitted insurers to sell insurance on a "surplus lines" basis. These companies are regulated by the Florida Surplus Lines Law, sections 626.913-626.937, Florida Statutes. About 153 surplus lines companies operate in Florida.¹ These insurers are not licensed to sell insurance in Florida and can only operate in this state pursuant to the Surplus Lines Law. To be eligible, however, they must be licensed in their home country or home state to sell the kind of insurance they sell in Florida and meet certain financial

¹ Information from the records of the Florida Surplus Lines Service Office.

requirements.² Surplus lines insurance agents are licensed under section 626.927, Florida Statutes. Surplus lines agents can place risks with surplus lines companies only after making a "diligent effort" to find an admitted insurer to issue a policy.³ Rates may not be more favorable than rates offered by a majority of authorized insurers writing in Florida.⁴

Surplus lines insurers' rates and policy language are not subject to review by the Office of Insurance Regulation and consumers are not protected by the insurance guaranty act.⁵ This gives these insurers flexibility to provide a market for unusual or large or hard-to-place risks. The Office of Insurance Regulation can withdraw eligibility from insurers that do not meet statutory requirements.⁶

Applying Chapter 627 to Surplus Lines Insurance is Inconsistent with the Surplus Lines Law

Applying chapter 627, Florida Statutes, to surplus lines insurance would be inconsistent with the surplus lines law. Sections 627.011-627.381, Florida Statutes, deal with rate regulation. Section 627.410, Florida Statutes, specifically requires insurance companies to file policies and forms with the

² See s. 626.918, Florida Statutes.

³ See s. 626.916(1)(a), Florida Statutes.

⁴ See s. 626.916(1)(b), Florida Statutes.

⁵ See s. 626.924, Florida Statutes.

⁶ See s. 626.919, Florida Statutes.

Office of Insurance Regulation. Surplus lines insurance is specifically not so heavily regulated in order to allow Florida consumers and businesses access to insurance that is not available in the regulated market. Section 626.913(2), Florida Statutes, gives the purpose of the Surplus Lines Law:

(2) It is declared that the purposes of the Surplus Lines Law are to provide orderly access for the insuring public of this state to insurers not authorized to transact insurance in this state, through only qualified, licensed, and supervised surplus lines agents resident in this state, for insurance coverages and to the extent thereof not procurable from authorized insurers; **to protect such authorized insurers, who under the laws of this state must meet certain standards as to policy forms and rates, from unwarranted competition by unauthorized insurers who, in the absence of this law, would not be subject to similar requirements;** and for other purposes as set forth in this Surplus Lines Law.

(emphasis added).

This statute clearly evidences intent that authorized insurers are subject to rate and form regulation while surplus lines insurers are not. The statute notes that "in the absence of this law," unauthorized insurers would not be subject to any rate and form regulation. If surplus lines insurers are required to submit to rate regulation and form filing as set forth in chapter 627, there is no reason for the Legislature to have created the Surplus Lines Law. Instead of extensive form regulation, the Surplus Lines Law has a provision for Office of

Insurance Regulation review of "unique" forms.⁷ Instead of requiring extensive regulation by the Office of Insurance Regulation, the Legislature has created the Florida Surplus Lines Service Office to receive, record, and review surplus lines insurance policies, to maintain required records, and to collect surplus lines taxes.⁸ Any policy must be submitted to the Office of Insurance Regulation within 30 days of a request.⁹ In summary, the Legislature created the Surplus Lines Law to allow access to insurance products provided by non-admitted insurers when admitted insurers choose not to offer the product. If such products were being offered by admitted insurers, consumers would have no need to go to non-admitted insurers. The Surplus Lines Law provides the regulatory scheme for non-admitted insurers so there is no policy reason to apply chapter 627 to these insurers. This sound policy is consistent with the clear, unambiguous language of chapter 627 itself, which provides that the chapter does not apply to surplus lines insurance. This Court should answer the 11th Circuit's question in the negative and hold that sections 627.421 and 627.428, Florida Statutes, do not apply to surplus lines insurance.

⁷ See s. 626.916(1)(c), Florida Statutes.

⁸ See s. 626.921, Florida Statutes.

⁹ See s. 626.923, Florida Statutes.

Conclusion

Based on the foregoing argument and authorities, the Florida Surplus Lines Service Office urges this Court to answer questions 1, 2, and 5 as posed by the 11th Circuit in the negative.

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