IN THE SUPREME COURT OF FLORIDA
Case No. SC06-2031

ESSEX INSURANCE COMPANY,

Petitioner,

vs.

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

Respondents.

AMICUS BRIEF OF LANDMARK AMERICAN INSURANCE COMPANY, AXIS SURPLUS INSURANCE COMPANY, and ARCH SPECIALITY INSURANCE COMPANY IN SUPPORT OF ESSEX INSURANCE COMPANY

On Review From Questions Certified by the Eleventh Circuit Court of Appeals
Consolidated Case Nos. 05-13457-FF & 05-14671-FF

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP
ANTHONY J. RUSSO, ESQ.
Florida Bar No.: 0508608
WILLIAM R. LEWIS, ESQ.
Florida Bar No.: 879827
777 S. Harbour Island Blvd., Suite 500
Tampa, Florida 33602
Phone: (813) 281-1900; Fax: (813) 281-0900
Attorneys for *Amici* Landmark American Insurance Company, Axis Surplus Insurance Company and Arch Specialty Insurance Company

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTEREST

Landmark American Insurance Company ("Landmark") is a surplus lines carrier domiciled in Oklahoma. Arch Specialty Insurance Company ("Arch") is a surplus lines carrier domiciled in Wisconsin. Axis Surplus Insurance Company ("Axis") is a surplus lines carrier domiciled in Illinois. According to the Florida Surplus Lines Insurance Office, Landmark, Axis and Arch were the third, sixth and eighth largest surplus lines insurers (by premium) in the State of Florida in 2005. These three surplus lines carriers insure high-risk, difficult-to-insure properties and risks in Florida that are not insurable by domestic, authorized insurers. For example, they provide property and builders risk insurance for waterfront condominiums, government buildings, cell phone towers, new small and medium sized businesses, and coastal construction. They offer several lines of insurance and their business in the state is substantial. In 2005, they collectively wrote over 10,000 policies of many types, including Commercial Property, Builder's Risk, General Liability, Professional Liability, Directors and Offices Liability, and Umbrella/Excess policies. This case has the potential to fundamentally affect what policies they write are "eligible for export", and what may be included in those policies. In turn, this will affect the availability of insurance from this market of last resort.

ARGUMENT

I.

The plain language of section 627.701(2)(e) provides that no part of Chapter 627 applies to Surplus Lines Insurance

The opening section of Chapter 627, provides as follows:

§ 627.021. Scope of this part

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

(2) This chapter does not apply to:

* * * *

(e) Surplus lines insurance placed under the provisions of ss. 626.913–626.937 [Surplus Lines Law].

This language is clear: Chapter 627 does not apply to policies issued by surplus lines carriers. This language must be given effect. See *S.R.G. Corp. v. Department of Revenue*, 365 So. 2d 687,689 (Fla. 1978)

> In statutory construction, case law clearly requires that legislative intent be determined primarily from the language of the statute. . . . The reason for this rule is that the Legislature must be assumed to know the meaning of the words and to have expressed its intent by the use of the words found in the statute.

State v. Egan, 287 So. 2d 1, 4 (Fla. 1973). No resort to rules of construction is required when the language of the statute is clear.

> The purpose of all rules relating to the construction of statutes is to discover the true intention of the law. But such rules are useful only in case of doubt and should never be used to create doubt, only to remove it. Where the legislative intent as evidenced by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to the plain meaning of its terms.

The plain meaning and effect of this language was recognized in *General Star Indemnity Company v. West Florida Village Inn, Inc.*, 874 So. 2d 26 (Fla. 2d DCA 2004), wherein the Court stated in footnote three of the opinion:

> FN3. We note that section 627.701, Florida Statutes (1997), which places certain restrictions upon deductible provisions specific to hurricane damage subject to enforcement by the Department of Insurance, does not apply to the contract of insurance in this case. General Star is an excess lines carrier based in Connecticut and is not subject to regulation by the Florida Department of Insurance.

When the Legislature wants to include Surplus Lines Insurance within the ambit of Chapter 627, it does so expressly and deliberately. *See, e.g.*, sections 627.701(2)(d)(4), 627.912(1)(a), and 627.952(1)(b). If surplus lines insurance were generally subject to the provisions of Chapter 627, then no such special references would be needed.

Surplus lines carriers, like any business, seek a stable, predictable legal environment. Such an environment is essential to accurately ascertaining one's contractual duties, assessing risks, calculating premiums, writing binding contracts, efficiently adjusting claims, and promptly resolving lawsuits. A regulatory scheme comprised of a patchwork of contradictory or confusing legislative enactments and conflicting case opinions promotes litigation, not the efficient delivery of surplus lines insurance.

The questions at issue between Essex and its insured are fundamental: Who may, or must, deliver a surplus lines policy to the insured, and does section 627.428 apply to surplus lines carriers? Although section 627.021(e) plainly states that Chapter 627 does not apply to surplus lines insurance, the federal district and circuit courts ruled that no plain direction in Florida statutes or case law existed to guide their resolution of these questions.

Amici urge this Court to plainly state that section 627.021(2)(e) precludes application of any section of Chapter 627 to surplus lines insurance. The Legislature provided a plainly worded, easily understood statute. That plain language should be the polestar for this Court's resolution of the certified questions.[1]

[1] In *National Corporacion Venezolana v. M/B Manaure*, 511 So. 2d 968 (Fla. 1987) this Court addressed the reach of a parallel subpart of section 626.021 and ruled that, prior to the Legislature's 1988 amendment, the word "chapter" meant "part." However, subsequent amendments to Chapter 627 have reaffirmed the Legislature's intent to use the word "Chapter", and not "Part", in section 627.021, thus superseding the construction imposed on the statue in *Manaure*.

II

Surplus lines carriers insure risks that admitted carriers cannot or will not insure, and can do so because they are exempt from the regulation imposed on admitted carries.

The Florida Surplus Lines Insurance Office defines "Surplus Lines Insurance" as insurance for

> [a] risk or a part of a risk for which there is no market available through the original or producing agent in the standard or "admitted" market. Therefore, it is placed with non-admitted insurers, who are made eligible by the Florida Department of Financial Services to offer coverage in the State of Florida, in accordance with the surplus lines provisions of the state law.[2]

Before a policy of surplus lines insurance can be sold in the State of Florida, a surplus lines agent must document the declinations of three admitted carriers to sell the insurance sought. Section 626.910(1)(a). Examples of property risks insured by surplus carriers are large, high-risk structures, like waterfront condominiums or apartment properties, whether completed or under construction, motor truck cargo, or farm and construction equipment. Examples of activities that the admitted market will not always insure includes cargo transportation, the operations of social service organizations, organized public events, and a host of professional

[2] Florida Surplus Lines Service Office ("FSLSO") website: www.fslso.com

services. Without surplus lines insurance these activities would be too risky, and could not be conducted in a socially-responsible manner, or would not be conducted at all.

The FSLSO reports that 647,818 commercial and personal policies have been issued so far in 2006 by surplus lines carriers. *See* exhibit A attached. Far and away the greatest amount of coverage, as a function of premiums collected, were commercial general liability, commercial property, commercial package, commercial inland marine, builders risk and excess general liability.[3] Most of the policies were written in hard-to-insure coastal counties. *See* exhibit B. Small businesses regularly insure in the surplus market.

These commercial policies are often issued as one layer in a package of policies assembled to share the risk on some high-value, high-risk property or project. To tailor the insurance product on these properties or activities in the amount required by the purchaser, at a price the purchaser can afford, and in a manner the company is able to provide, requires a certain degree of regulatory freedom. Keep in mind that by the time the

[3] By way of illustration, in addition to waterfront or wind-exposed properties, surplus lines carriers insure exhibitions, carnivals, arena events, concerts, skating rinks, fairs, livestock breeders, rodeos and all manner of public events.

surplus market is accessed, the admitted, fully-regulated market has failed to provide the insurance and is not an option. The choice for these businesses as recognized by the Legislature, was to either allow these projects, properties and enterprises to be left un-insured, or to invite, in a controlled fashion, insurance products from otherwise unauthorized carriers to provide the required insurance.

Surplus lines insurance is available precisely because it is exempt from the statutory regimen that has failed to make available the insurance needed by the consumer. *Amici* urge this Court to expressly recognize and uphold the plain language of section 627.021(2)(e), and the beneficial purpose that the surplus lines laws promotes, and assure that its opinion does not impose on surplus lines carriers, in some wholesale manner, the full weight of the statutory regimen of Chapter 627 that applies to highly-regulated, admitted carriers.

III

Surplus lines insurance products are regulated by sections 626.913 - 626.937 (the "Surplus Lines Law")

The stated purposes of the Surplus Lines Law are to (1) provide orderly access to insurance coverages sold by unauthorized carriers that would not be otherwise available, and (2) to protect 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 the Surplus Lines Law, would not be subject to similar requirements." [4] Section 626.913(2).

The Surplus Lines Law allows, non-admitted, or unauthorized, carriers to sell insurance products in Florida if the carrier is deemed by the Department to be "eligible," and the insurance they seek to sell is "eligible for export." Section 626.914(2); *see generally*, 30 Fla. Jur. 2d, *Insurance* § 162. In section 626.915, the Legislature provided that if coverage cannot be procured from authorized, admitted insurers, then:

> [S]uch coverages, hereinafter designated 'surplus lines,' may be procured from unauthorized insurers, subject to the following conditions:
>
> (1) The insurance must be eligible for export under s. 626.916 or s. 626.917;
> (2) The insurer must be an eligible surplus lines insurer under s. 626.917 or s. 626.918;
> (3) The insurance must be so placed through a licensed Florida surplus lines agent; and
> (4) The other applicable provisions of this Surplus Lines Law must be met.

[4] As discussed below, section 626.915 does not impose on surplus lines carriers the statutory regulations that are imposed on admitted insurers.

Section 626.915, Fla. Stat. While admitted carriers must comply with a host of regulations set out in Chapter 627 [5], surplus lines carriers need only assure they are "eligible" to export their insurance products, and that those insurance products are "eligible for export". What makes a policy "eligible for export" is explained in section 626.916(1)(c), as follows:

> The policy or contract form under which the insurance is exported shall not be more favorable to the insured as to the coverage or rate than under similar contracts on filed and in actual current use in this state by the majority of authorized insurers actually writing similar coverages on similar risks:

And to this singular requirement an exception is stated:

> "[E]xcept that a coverage may be exported under a unique form of policy designed for use with respect to a particular subject of insurance. . . ."

Section 626.916(1)(c), Fla. Stat. The point is this: The Legislature recognizes that surplus lines policies are not, and in fact may not be, issued on the same terms as policies offered by authorized insurers. Application of the same regulations to both admitted and surplus carriers would require the policies to be the same, as surplus lines policies could neither provide more nor less coverage than the policies of admitted carriers. This is an illogical result plainly not contemplated in the legislative scheme. This conundrum explains why, in the case of surplus lines insurance, a policy form simply

[5] See section IV below.

needs to be *approved* by the FSLO to be "eligible for export," the Legislature never said the policy form had to conform to the same requirements applied to the policies of admitted carriers.[6]

Finally, section 626.915(4), requiring compliance with the "other conditions of the Surplus Line Law," expressly defines the outer limit of regulations applicable to surplus lines policies. Omitted from this statute is any requirement that surplus lines policies conform to regulations imposed from other parts of Florida's statutory framework *Amici* urge this Court to expressly recognize in its opinion the plain intent of the Legislature to restrict regulation of surplus lines policies to the provisions of the Surplus Lines Law in Chapter 626.

IV

Admitted carriers are subject to regulations not applicable to surplus lines carriers

Admitted carriers are subject to a host of regulations not applied to surplus lines carriers. To place insurance in the state of Florida as an "admitted carrier," an insurer must be first authorized to do so by the Department of Business Services. Section 624.401(1). The insurer must

[6] The third requirement of section 626.915(3), that the policy be issued through an authorized surplus lines agent, seems to answer the delivery issue raised in the first certified question favorably to Essex.

possess a valid certificate of authority issued by the Department, and this certificate will specify the lines of business in which it may engage. Section 624.401(2). To qualify and hold authority to transact insurance in the state of Florida as an admitted carrier, an insurer must comply with various restrictions on the corporate structure of the business. Section 624.404. The carrier must comply with certain capital and surplus requirements. Section 624.407. The certificate of authority will not be granted if the admitted insurer's managers, officers or directors are found to be unfit. *See* 624.404(3)(a). Domestic carriers must file specified annual financial reports with the National Association of Insurance Commissioners. Section 624.4085(2). Failure to meet these conditions will result in a revocation of the certificate. Section 624.430(1). By contrast, the Department of Business Services undertakes no duty to assure the soundness of the surplus carrier's financial condition or claims practices. Section 626.919(4). The protections of the Florida Insurance Guaranty Act (FIGA) do not extend to insureds of surplus lines carriers. Section 626.924.

What makes an insurer "eligible" to export its insurance products is set out in section 626.918. That section provides that the insurer must be currently authorized in a state of domicile "as to the kind or kinds of insurance proposed to be so placed and must have been such an insurer for

not less" than the three preceding years. For example, an insurer authorized for the past three years to sell property insurance in Oklahoma may become an eligible surplus lines insurer in Florida for purposes of selling property insurance. But it may not be eligible if it only was authorized to sell, *e.g.*, health insurance in its domestic jurisdiction.

The Department of Business Services takes a central role in regulating the activity of admitted insurers. The regulation of surplus lines insurers under Florida's legislative regimen is approached from an entirely different angle. With section 626.921, the Legislature established the Florida Surplus Lines Office, an association to which all surplus lines agents are members. The stated purpose of the FSLO is to allow the surplus lines carriers to self-regulate the sale of surplus lines insurance in Florida. Section 626.921(1). This self-regulation was intended to promote the stated purposes of the Surplus Lines Law. [7] The point is that insurance products by admitted, domestic carriers are regulated in a far different manner than the way insurance products sold by surplus lines carriers are regulated. The Legislature has established a separate set of statutes and established a

[7] In that statute, the Legislature also stated that one of underlying purposes of the Florida Surplus Lines Law was to "promote and permit orderly access to surplus lines insurance in this state, [and to] enhance the number and types of insurance products available to consumers in this state . . . ." Section 626.921(a).

different regulatory body to oversee surplus lines insurance. *Amici* urge this Court to expressly recognize in its written opinion, this important legislative distinction, and to avoid any language that would impose all the regulations of Chapter 627 onto surplus lines insurance.

V

Conclusion

Surplus lines insurance fills a gap in the financial security of property and business owners critical to the functioning of Florida's economy, thereby allowing them to grow and thrive. It also protects, in the event of an accident, the patrons, consumers, tenants and other members of the public who use the properties or services of these businesses insured by surplus lines insurance. The Legislature has always sought to promote the availability of this alternative insurance. The current conditions of the Florida insurance market highlight the strong need to keep this alternative market open to Florida's consumers. The salutary purpose of the Surplus Lines Law is to enhance the availability of insurance for risks not accepted by, and not acceptable to, admitted, domestic insurers. To achieve this purpose, the Legislature has developed a less onerous regulatory regime applicable to the surplus lines market. The Legislature plainly exempted Surplus Lines insurance from the restraints of Chapter 627. *Amici*

respectfully urge this Court to recognize and uphold the plain language of section 627.021(2)(e) and plainly state that no part of Chapter 627 applies to surplus lines insurance.

Respectfully submitted,

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP

_____

ANTHONY J. RUSSO, ESQ.
Florida Bar No. 0508608
WILLIAM R. LEWIS, ESQ.
Florida Bar No.: 879827
777 S. Harbour Island Blvd., Suite 500
Tampa, Florida 33602
Phone: (813) 281-1900;Fax: (813) 281-0900
Attorneys for *Amici* Landmark American Insurance Company, Axis Surplus Insurance Company and Arch Specialty Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this *Amicus* Brief has been furnished by regular U.S. Mail this _____ day of November, 2006 to:

Robert C. Weill, Esq.
Douglas M. McIntosh, Esq.
Louise H. McMurray, Esq.
McIntosh, Sawran, Peltz, Cartaya & Petruccelli, P.A.
Post Office Box 7990
Fort Lauderdale, FL 33338

Michael Kaplan, Esq.,
Lydecker, Diaz, Lee, Behar, Berga & de Zayas, LLC
1201 Brickell Avenue, Suite 200
Miami, Florida 33131

Matthew D. Weissing, Esq.
The Weissing Law Firm
1735 East Atlantic Boulevard
Pompano Beach, Florida 33060

Mara Shlackman, Esq.
Law Offices of Mara Shlackman, P.L.
PMB 309
757 SE 17th Street
Fort Lauderdale, FL 33316

Billy Galloway, Esq.
L. Michael Billmeier
Volpe Bajalia Wickes Rogerson Galloway & Wachs
106 E. College Avenue, Suite 600
Tallahassee, Florida 32301

ANTHONY J. RUSSO, ESQ.

CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Brief is 14 point Times New Roman, which is 10 characters per inch.

ANTHONY J. RUSSO, ESQ.