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.

On Review from Questions Certified by the
Eleventh Circuit Court of Appeals

Consolidated Case Nos. 05-13457-FF & 05-14671-FF

ANSWER BRIEF OF LIGHTHOUSE INTRACOASTAL, INC., BROWARD EXECUTIVE BUILDERS, INC. AND JACK FARJI

Michael D. Kaplan, Esq.
LYDECKER, LEE, BEHAR,
BERGA & DE ZAYAS, LLC
Attorneys for Appellees,
LIGHTHOUSE, BROWARD, FARJI
1201 Brickell Ave., Fifth Floor
Miami, Florida 33131
Telephone: (305) 416-3180
Facsimile: (305) 416-3190

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STATEMENT OF THE CASE AND FACTS[1]

In the United States District Court for the Southern District of Florida, ESSEX INSURANCE COMPANY sought a determination and declaration of its respective rights and obligations under an insurance policy it issued to LIGHTHOUSE INTRACOASTAL, INC. (LIGHTHOUSE). (R1:1).[2] Both Appellant, ESSEX INSURANCE COMPANY (ESSEX), and Appellees, LIGHTHOUSE, BROWARD EXECUTIVE BUILDERS, INC. (BROWARD), JACK FARJI (FARJI), MERCEDES ZOTA and MIGUEL ZOTA (collectively, the ZOTAS), sought summary judgment as a matter of law. (R2:85, 88, 96, respectively).

A final declaratory judgment was entered against ESSEX and in favor of LIGHTHOUSE, BROWARD, FARJI and the ZOTAS, holding that ESSEX was precluded from asserting a lack of coverage in the underlying claim. In addition, a final judgment for attorney's fees and costs was entered against ESSEX and in favor of LIGHTHOUSE, BROWARD and FARJI. ESSEX appealed both final judgments to the United States Court of Appeals for the Eleventh Circuit which certified five questions to this Honorable Court for resolution.

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[1] LIGHTHOUSE, BROWARD and FARJI hereby adopt the Statement of the Case and Facts as set forth in Co-Appellees', the ZOTAS', Answer Brief.

[2] Citations to the record on appeal are consistent with the format used by ESSEX in its briefing.

A. Background

LIGHTHOUSE was established in 1998. (R1:58:63). Essentially, its business consisted of buying a home, hiring a contractor to build a new home, and then selling the home. (R1:58:98). Throughout the course of its existence, LIGHTHOUSE obtained various policies of insurance from various insurers through R.A. Brandon & Company, Inc. (Brandon). (R2:76:40, 51, 53, 82). Brandon would at times turn to the surplus lines market to obtain policies of insurance. (R2:76:17, 18). Brandon would only issue binders for those surplus lines insurers when it had *written permission* in the contract with the surplus lines agent to do so. (R2:76:74). As part of its practice, Brandon would provide a copy of the policy to the insured. (R2:76:19-20, 22). However, this was <u>not</u> done with the subject ESSEX policy. (R2:81, 162-63).

Over the years, LIGHTHOUSE'S business changed and so did its insurance needs. (R:76:164-65). Of significance, FARJI, a part owner of LIGHTHOUSE, became a licensed building contractor in 2001 and incorporated Broward Executive Builders, Inc. in December 2002. (R1:56:16, 17). BROWARD secured liability insurance for itself. (R1:58:51). With respect to obtaining insurance for LIGHTHOUSE for the 30th Court residence, Brandon understood that BROWARD was going to be the contractor on the job and that LIGHTHOUSE was the owner. (R2:76:170).

Brandon turned to surplus lines agent, MacDuff Underwriters, Inc. (MacDuff), in order to obtain a policy of insurance for LIGHTHOUSE as the owner of land where a dwelling was being built – specifically, the 30th Court residence. Ultimately, a commercial general liability policy was obtained from ESSEX (R2:76:168) and the Commercial Liability Declarations indicated, "Item 4. Business Description: OWNER OF LAND WHERE DWELLINGS ARE BEING BUILT." (R2:88:Ex. A). MacDuff, however, never delivered the policy and its exclusions to LIGHTHOUSE. (R2:88:Ex. E).

BROWARD pulled the permits issued by the City of Lighthouse Point for the construction of the 30th Court residence. (R2:88:Ex. I). This, however, was not BROWARD'S "sole" purpose. In its capacity as contractor, BROWARD handled all discussions and meetings with subcontractors and building inspectors and supervised the subcontractors. (R1:58:66, 85). In addition, BROWARD informed LIGHTHOUSE of the progress of the construction. (R1:58:66).

B. Mercedes Zota's Claim

MERCEDES ZOTA was an architectural wall artist and owner of Trompe L'Oeils 'R' Us. She was also a salaried employee of Permaco, Inc. (Perla Lichi Design) and was hired to paint a ceiling at a home owned by LIGHTHOUSE. (R2: 78:16-17 and R1:58:46). On or about February 5, 2004, MERCEDES ZOTA was involved in an accident at the home owned by LIGHTHOUSE when she fell from

the second floor of the home to the first floor. (R1:1:Ex. A). As a result, on or about February 25, 2004, the ZOTAS filed a negligence action against LIGHTHOUSE, FARJI and BROWARD in the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Florida. (R1:1:Ex. A).

C. Delivery of the Policy

ESSEX is a surplus lines insurer as defined in Fla. Stat. § 626.914 and is "an unauthorized insurer which has been made eligible by [the state] to issue insurance coverage under [Florida's] Surplus Lines Law." (R2:84:12-13). In order for ESSEX to issue policies of insurance, it must use a surplus lines agent within the state of Florida. (R2:84:12-13). A surplus lines agent is "an individual licensed as provided in this part to handle placement of insurance coverages with unauthorized insurers and to place such coverages with authorized insurers as to which the licensee is not licensed as an agent." Fla. Stat. § 626.914(1). Authorized and unauthorized insurers are required to deliver the policy of insurance to the prospective insured within 60 days of effectuation of coverage. *See* Fla. Stat. §§ 627.421(1) and 626.922(4).

In the instant matter, MacDuff was the surplus lines agent designated by ESSEX to issue and deliver the subject policy of insurance. (R2:84:13). The producing general lines agent (often referred to as the "retail agent" or "standard agent") was Brandon. Despite the plain language of § 626.922(1) requiring it to

deliver the policy of insurance to LIGHTHOUSE, MacDuff never did so. (R2:88:Ex. E). The only document evincing that MacDuff delivered the subject policy to anyone is a letter from MacDuff to Brandon. (R2:88:Ex. D). However, MacDuff did not provide written authority to Brandon – as was permissible under Fla. Stat. § 626.922(1) – to delegate its duty to deliver the policy of insurance to LIGHTHOUSE. (R2:81:162). Further, Brandon never delivered the policy to LIGHTHOUSE. (R2:81:162-63). In fact, neither ESSEX nor MacDuff delivered the subject policy and its exclusions to LIGHTHOUSE within 60 days of effectuating coverage. Rather, LIGHTHOUSE was finally faxed a copy of the policy – without Section 8 of the Combination General Endorsement (M/E-001) – after ZOTA's accident. (R2:81:163; R1:58:190; and R2:88:Ex. E).

D. Summary Judgment Proceedings

ESSEX filed a motion for summary judgment claiming that LIGHTHOUSE was "acting as" a contractor, builder or developer and was precluded from coverage under Section 8 of the Combination General Endorsement (M/E-001). In addition, ESSEX argued that MERCEDES ZOTA was an employee of LIGHTHOUSE and, therefore, there was no coverage for her claim under Section I-2 of the policy and Section 1 of the Combination General Endorsement (M/E-001). (R2:85).

LIGHTHOUSE, BROWARD and FARJI filed a motion for summary judgment and contended that ESSEX, *through its surplus lines agent*, failed to deliver the policy to LIGHTHOUSE as required by the plain language of § 626.922(1). In addition, Appellees asserted that LIGHTHOUSE was not a contractor, builder or developer and, as such, Section 8 of the Combination General Endorsement (M/E-001) did not apply. Further, they argued that Section 8 of the Combination General Endorsement (M/E-001) was ambiguous because the terms contractor, builder and developer were not defined in the policy and were each subject to more than one reasonable interpretation which provided coverage. Finally, Appellees maintained that MERCEDES ZOTA was not an employee as defined under the policy and, therefore, neither Section I-2 of the policy nor Section 1 of the Combination General Endorsement (M/E-001) applied. (R2:88).

The district court entered summary judgment in favor of LIGHTHOUSE, BROWARD and FARJI holding that ESSEX was precluded from denying coverage because it, through its surplus lines agent, failed to deliver the subject policy to the insured, LIGHTHOUSE, in violation of the plain language of Fla. Stat. § 626.922. (R3.:119). Because the district court determined that ESSEX could not rely on any exclusion under the policy to deny coverage, it did not reach any of the other arguments raised by ESSEX or LIGHTHOUSE, BROWARD and FARJI. (R3:119:1). Final Judgment was entered. (R3:120:1). Thereafter, ESSEX

submitted a motion for rehearing, new trial, or to alter or amend the judgment which the court denied. (R3:121:1; R3:146:1). As a result, ESSEX filed a notice of appeal. (R3:150:1).

E. Post-Judgment Proceedings

Subsequent to the entry of final judgment (R3:120:1) in their favor, LIGHTHOUSE, BROWARD and FARJI, as the prevailing parties, moved for attorney's fees pursuant to Fla. Stat. § 627.428 (R3:123; R3:134), and moved for costs pursuant to 28 U.S.C. § 1920 (R3:124; R3:133). ESSEX responded to the motion for attorney's fees arguing that Chapter 627, in its entirety, did not apply to surplus lines insurers. (R3:140; R3:144). However, Appellees contended that surplus lines insurers were only excluded from Part I of Chapter 627 – which does not contain § 627.428 – and that case law subsequent to the 1988 amendment to Fla. Stat. § 627.021 held that § 627.428 applied to surplus lines insurers. (R3:147). The district court agreed and entered an order granting in part attorney's fees and granting costs and, thereafter, entered a final judgment for attorney's fees and costs in the amount of $123,812.90. (R3:162; R3:163). As a result, ESSEX appealed. (R3:168).

Both appeals were consolidated and oral argument was held on August 18, 2006. On October 6, 2006, the Eleventh Circuit Court of Appeals certified the following five questions to the Florida Supreme Court:

1. Whether Fla. Stat. § 626.922 or § 627.421, or both, require delivery of evidence of insurance directly to the insured, so that deliver to the insured's agent is insufficient.
2. 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.
3. If either the first or second question is answered in the negative, whether Lighthouse is a "builder, contractor or developer' under the terms of the insurance contract, so that there is no coverage.
4. If either the first or second question is answered in the negative, whether Zota is an employee of Lighthouse under the policy.
5. If Lighthouse is entitled to coverage, whether § 627.428 applies to surplus lines insurers.

SUMMARY OF ARGUMENT

Florida courts have long recognized an insurer's obligation to deliver the policy of insurance to the insured. This holds true under Fla. Stat. §§ 627.421 and 626.922. While Florida's common law held that delivery of the policy of insurance to an insured's agent constitutes delivery to the insured, the plain language of § 626.922(1) states that the surplus lines agent shall deliver evidence of insurance to the insured. Further, Florida's common law has never interpreted §

626.922(1)'s plain language requirement that the *surplus lines agent* deliver evidence of insurance to the insured. Moreover, Florida's common law has not interpreted the 1998 amendment to § 626.922(1) which only permits a producing agent to deliver evidence of the policy of insurance to the insured up a written delegation of authority from the surplus lines agent.

Florida common law has held that where an insurer fails to deliver the policy and its exclusions to its insured, the insurer can be precluded from denying coverage based upon policy exclusions. The district court correctly applied the rules of statutory construction and correctly held that the plain language of § 626.922(1) was clear and required prior written delegation of authority for delivery of evidence of insurance. Thus, the lower court correctly held that ESSEX, as a surplus lines insurer, through its agent, MacDuff, failed to deliver the policy of insurance and its exclusions to LIGHTHOUSE and was precluded from denying coverage.

For public policy reasons and under Florida's common law, a prevailing party insured is entitled to recover attorney's fees against a surplus lines insurer pursuant to Fla. Stat. § 627.428. The district court correctly held that surplus lines insurers were not excluded from Part II of Chapter 627 and correctly relied upon *Chacin v. Generali Assicurazioni Generali Spa*, 655 So.2d 1162 (Fla. 3d DCA 1995) in granting attorney's fees in favor of LIGHTHOUSE and FARJI.

In the alternative, the lower court should have granted summary judgment in favor of LIGHTHOUSE, BROWARD EXECUTIVE and FARJI based on the fact that LIGHTHOUSE was not a contractor, builder or developer – it was the owner of the subject home and BROWARD EXECUTIVE was the contractor/builder on the job. At a minimum, whether LIGHTHOUSE was a contractor, builder or developer was a genuine issue of material fact that was in dispute thus precluding the entry of summary judgment in ESSEX's favor.

In addition, Section 8 of the Combination General Endorsement (M/E-001) is ambiguous as a matter of law. The terms contractor, builder and developer were not defined in the policy. Because ESSEX attempts to rely upon an exclusionary provision of the policy, it should be strictly construed. The terms contractor, builder and developer were each demonstrated to have been subject to more than one reasonable interpretation which provided coverage. Thus, should the Court reverse summary judgment as to the delivery issue, it should remand with direction that summary judgment be granted in favor of LIGHTHOUSE, BROWARD EXECUTIVE and FARJI due to the ambiguity of Section 8 of the Combination General Endorsement (M/E-001).

Further, should the court reverse the lower court's decision on the delivery issue, this court must not enter summary judgment in favor of ESSEX based on the employee exclusions under Section I of the policy or Section 1 of the Combination

General Endorsement (M/E-001) or the exclusion under Section 8 of the Combination General Endorsement (M/E-001). It was undisputed that MERCEDES ZOTA did not meet any definition of employee under the policy. As such, summary judgment should be denied.

Finally, under Florida law, a prevailing party insured is entitled to recover attorney's fees against a surplus lines insurer pursuant to Fla. Stat. § 627.428. The district court correctly held that surplus lines insures were not excluded from Part II of Chapter 627 and correctly relied upon *Chacin v. Generali Assicurazioni Generali Spa*, 655 So.2d 1162 (Fla. 3d DCA 1995) in granting attorney's fees in favor of LIGHTHOUSE and FARJI.

STANDARDS OF REVIEW

Appellate courts review a district court's granting of summary judgment de novo. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1265 (11th Cir. 2001). Appellate courts review *de novo* the legal question of whether a party is entitled to an award of attorney's fees pursuant to Fla. Stat. § 627.428. *See Fireman's Fund Ins. Co. v. Tropical Shipping and Constr. Co., LTD.*, 254 F.3d 987. 1009 (11th Cir. 2001).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE PLAIN LANGUAGE OF § 626.922 REQUIRES DELIVERY OF EVIDENCE OF INSURANCE FROM THE SURPLUS LINES AGENT TO THE INSURED

In its Brief, ESSEX claims that "[i]n a stunning, judicial rewrite of section 626.922, Florida Statutes, the district court transferred the duty of delivery of a policy from a regulated surplus lines agent to an unregulated surplus lines insurer…and appended a draconian sanction for violation of that duty to deliver." Appellant's Br., p. 14. Nothing could be further from the truth and ESSEX seeks to have this Court ignore the plain language of § 626.922, Fla. Stat., as well as Florida's common law.

A. Section 626.922 Requires Delivery to the Insured, Not to the Insured's Agent

Florida's Surplus Lines Law was specifically enacted to regulate those insurance companies who are not authorized to transact insurance in the state of Florida. *See* Fla. Stat. § 626.913. Notwithstanding the requirement of § 627.421(1),[3] a surplus lines insurer, through its surplus lines agent, is obligated pursuant to the plain language of § 626.922(1) to deliver the policy (or evidence of insurance) to the insured. Additionally, § 626.922(4), just like § 627.421(1), mandates that the policy, cover note or confirmation of insurance must be delivered to the insured within 60 days after the effectuation of coverage.

[3] Stating, "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."

"Delivery [of the policy] to an agent of the insured may not be effective under a statute which requires delivery to the insured, at least where such delivery would contradict the statutory purpose of preventing the insurer from *relying on exclusions of which the insured had no notice*." *See* Couch on Ins. 3d § 14:15 (2004) (emphasis added). In the instant case, ESSEX'S agent, MacDuff, was *statutorily obligated* to deliver the subject policy and its exclusions to LIGHTHOUSE. It was undisputed that it failed to do so. (R.3:119:6).

B. Section 626.922(1) Pre and Post 1998

Prior to 1998, § 626.922(1) read as follows:

> Upon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of insurance consisting of either 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 terms 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 risk assumed by each insurer.

See Fla. Stat. § 626.922(1) (1997).

However, in 1998, in an effort to "promote its underlying purposes, which will *protect consumers* seeking insurance in this state…"[4] the legislature amended Fla. Stat. §626.922(1) to include the following language:

> *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. §626.922(1) (1998) (emphasis added).

With this amendment, the legislature clarified that a surplus lines agent must deliver the policy or evidence of insurance to the insured and cannot delegate to a producing agent the duty of delivering the policy to the insured without prior written authority. This is clearly evidenced by the following sentence in the amended statute, "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**."

[4] See § 626.921(1), Fla. Stat.

Inexplicably, ESSEX fails to address this very important and controlling language in the statute.

C. Legislative History

"The rules of statutory construction are the means by which courts seek to determine legislative intent only when that intent is not plain and obvious enough to be conclusive." *Knowles v. Beverly Enterprises-Florida, Inc.*, 2004 WL 2922097 *8 (Fla. 2004). [5] While it is Appellees' contention that the statute is clear and unambiguous, the legislative history behind the 1998 amendment to § 626.922(1) reveals that the legislature's intent was to establish conditions under which a surplus lines agent could delegate to a producing agent the requirement to *deliver* or *provide* documentation of coverage to an insured. The first section of Florida Staff Analysis, S.B. 1372, March 12, 1998 (the Bill) states in pertinent part:

> **CS/SB 1372** makes various changes to the laws affecting insurance agents and other individuals licensed by the Department of Insurance. The bill: (1) *** (14) *specifies conditions under which a surplus lines agent may delegate to a producing agent the requirement to provide documentation of coverage to an insured*; ***

Section I. Summary, Florida Staff Analysis, S.B. 1372, March 12, 1998 (emphasis added).

[5] ESSEX admits that statute is clear and unambiguous but sets forth no explanation as to why the court should turn to or consider the legislative history behind § 626.922. *See* Appellant's Br., p. 18.

At the very outset of the Bill, the legislature let it be known that the purpose of the amendment was to provide specific circumstances where the surplus lines agent could delegate the requirement that it provide documentation of coverage to the insured. Here, nothing regarding "issuing" the policy is mentioned. The legislature chose the word "provide" and it is significant because it clearly evinces the legislature was concerned that the insured be provided, or in other words, delivered, a copy of the policy or some evidence of coverage. Any interpretation of § 626.922 limiting the written delegation requirement to issuance of the policy would absolutely defeat the purpose of the 1998 amendment.

ESSEX begins its legislative history analysis with the *second* sentence of Section III of the Bill, specifically, Section 68. However, the *first* sentence states, "Section 68 amends s. 626.922, F.S., *relating to the documentation of surplus lines insurance that must be provided to an insured*." *Id*. at Section III, Section 68. (emphasis added). ESSEX also discusses the May 28, 1998 version of the Florida Staff Analysis, S.B. 1372 but omitted the first few sentences. In its entirety it states:

> **Section 69** amends s. 626.922, F.S., relating to the duties of surplus lines agents. When a surplus lines insurance policy is issued, *the surplus lines agent must provide the insured with documentation of coverage,* consisting of either the insurance policy or other evidence of insurance, signed or countersigned by the surplus lines agent. The bill would allow the surplus lines agent to delegate to a licensed general lines agent the duty to issue the documentation of coverage, by providing the general lines agent with prior written authorization.

Section III. Substantive Research, E. Section-by-Section Research, Florida Staff Analysis, S.B. 1372, May 28, 1998 (italicized emphasis added).

If considering the legislative history, it must be done completely. The introductory language in both sections reiterates the legislature's intent and stresses that once the policy is issued, documentation of coverage must be provided, i.e. delivered to the insured – "When a surplus lines insurance policy is issued, the surplus lines agent must provide the insured with documentation of coverage." *Id*.

ESSEX recognizes that "the legislature is presumed to have known [of preexisting case law] and is presumed to have adopted that judicial meaning" but offers nothing to suggest that the legislature was either 1) not aware of the preexisting law when it amended § 626.922; or, 2) that it did not intend to address the delivery issue in the amendment. *See* Appellant's Br., p. 20. To the contrary, it is evident that the legislature was concerned with documentation of coverage being provided to the insured in the realm of surplus lines insurance. Without question, the best possible way to assure that the insured receives the policy (and/or documentation of coverage) is for the provider of the policy to be the entity that delivers the copy. For surplus lines insurance, that entity is the surplus lines agent.

D. Florida Case Law Pre-1998 Amendment to Section 626.922

The pre-1998 version of § 626.922(1) existed at the time *United Nat'l Ins. Co. v. Jacobs*, 754 F. Supp. 865 (M.D. Fla. 1990) and *Reliance Ins. Co. v. D'Amico*, 528 So.2d 533 (Fla. 2d DCA 1988) were decided. The seminal case

regarding delivery of the policy of insurance to the insured's agent, *Jefferson Standard Life Ins. Co. v. Lyons*, 165 So. 351 (Fla. 1936) was decided long before either §§ 627.421 and 626.922 were enacted. It neither analyzed § 627.421 nor contemplated the plain language in § 626.922(1) that states, "Upon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of insurance consisting of either the policy as issued by the insurer or, if such policy is not then available, a certificate, cover note, or other confirmation of insurance." Fla. Stat. § 626.922(1). Yet, ESSEX and the amicus curiae rely on these cases to support their position that delivery of the policy to the insured's agent constitutes delivery to the insured.

In addition, ESSEX and the amicus curiae do not provide case law subsequent to the 1998 amendment to § 626.922(1). The district court did not "abandon the long-standing judicial meaning" given to the term delivery in the pre-1998 cases. *See* Appellant's Br., p. 16. Once a statute is enacted or amended as was done in this case, the court cannot ignore the plain language of the statute – in fact, it would be improper to do so. As noted by the district court, the cases ESSEX relies upon do not analyze "the present incarnation of § 626.922" and cannot be deemed controlling law when the statute's plain language is clear. (R3:119:8). Accordingly, the first certified question should be answered: Yes.

II. THE APPROPRIATE REMEDY FOR FAILING TO DELIVER THE POLICY IS TO PRECLUDE ESSEX FROM RELYING UPON EXCLUSIONS IN THE POLICY

ESSEX and the amicus curiae rely on *AIU Ins. Co. v. Block Marina Investment, Inc.*, 544 So.2d 998 (Fla. 1989) for the proposition that a statute cannot create coverage where none exists. At issue in *AIU Ins.* was the applicability of the § 627.426(2), Fla. Stat., also known as the Claims Administration Statute. The Supreme Court of Florida simply "[did] not believe that it was the legislature's intent that *section 627.426(2)*" changed the rule that the doctrine of promissory estoppel cannot be used to create or extend coverage. *AIU Ins. Co.*, 544 So.2d at 1000. (emphasis added). Thus, *AIU Ins.* was decided under the context of the Claims Administration Statute and whether a violation of *that* statute could result in the insurer being precluded from denying coverage.

Florida's Fourth District Court of Appeals in the case of *ZC Ins. Co. v. Brooks*, 847 So.2d 547 (Fla. 4th DCA 2003) held that the failure of the insurer to deliver the policy and/or its exclusions to the insured precludes the insurer from relying on an exclusion to deny coverage. There is no penalty provision under § 627.421 for noncompliance and the court in *Brooks* considered this when rendering its decision. *See Brooks*, 847 So.2d at 551. The argument that § 626.922(5) sets forth the penalty for a surplus agent's noncompliance with the statute is misplaced. Section 626.922(5) addresses the situation where a surplus lines agent "knowingly

or negligently" issues a false certificate, cover note, etc. Holding a surplus lines insurer to the same sanction for noncompliance with § 627.421 – and logically § 626.922(1) – is permissible under the law. Importantly, the *Brooks* court, recognized that

> failing to provide [the insured] with adequate information regarding the scope of the coverage she purchased is tantamount to "fraud **or other injustice**." (citation omitted). Florida law recognizes that fraud can occur by omission, and places a duty on one who undertakes to disclose material information to disclose that information fully.

Brooks, 847 So.2d at 551.[6]

The *Brooks* court found that, "[t]he obvious point requiring insurers to deliver a policy to the insured with a summary of coverage and exclusions … *is to place sufficient information in the insured's hands to allow her to be fully informed of the scope of the coverage she has purchased*." *Id*. (emphasis added). Here, LIGHTHOUSE is in a worse position because it was *never* provided any portion of the policy or its exclusions until *after* MERCEDES ZOTA'S accident.

Within days of the district court's decision in the instant matter, Florida's Fifth District Court of Appeals decided *T.H.E. Ins. Co. v. Dollar Rent-A-Car Systems, Inc.*, 900 So.2d 694 (Fla. 5th DCA 2005). The Fifth District also viewed "[Section 627.421's] requirement [to deliver the policy] as one calculated to give notice of exclusions …." While the court in *T.H.E. Ins.* concluded that the remedy

[6] Here, the court was addressing the question raised in *Crown Life Ins. Co. v. McBride*, 517 So.2d 660 (Fla. 1987) regarding promissory estoppel.

of eliminating the particular exclusion seemed harsh and as such declined to do so, its reasoning was based on the fact that the exclusion was in the rental agreement, the most conspicuous document available to the insured; *thus, the insured was on notice of the particular exclusion*. The same cannot be said for LIGHTHOUSE in the instant matter.[7]

Neither the court in *Brooks* nor the court in *T.H.E. Ins.* addressed the insurer being precluded from denying coverage in the context of the Claims Administration Statute. To the contrary, they tackled the issue in the context of failing to deliver the policy in compliance with § 627.421(1) and, in fact, *AIU Ins.* was not mentioned in either decision. Again, the courts' focus was putting the insured on notice of the exclusions in the policy. The failure of the insurer to do so results in the inability to deny coverage based on the exclusions in the policy. *Brooks*, 847 So.2d at 551.

In sum, there is no "fatal contradiction" in LIGHTHOUSE'S argument construing the delivery requirement. Rather, the *distinction* between § 627.421(1) and § 626.922(1) is that the latter places the obligation on the surplus lines agent – *who is acting on behalf of the surplus lines insurer* – to deliver the policy to the

[7] Perhaps, although improper without the appropriate written delegation, had the policy been delivered by Brandon to LIGHTHOUSE at some point *prior* to MERCEDES ZOTA'S accident, ESSEX might have been able to claim "no harm, no foul." However, it was undisputed that Brandon never delivered the policy to LIGHTHOUSE until *after* MERCEDES ZOTA'S accident. This is exactly the kind of situation the 1998 amendment, if followed, prevents.

insured, unless the surplus lines agent obtains the appropriate written authority from the surplus lines insurer to delegate this duty to a producing agent.

Complying with § 626.922(1) can easily be done and will not cause "a chilling effect throughout the surplus line insurance market in Florida."[8] Moreover, the inability of the insurer to deny coverage based on an exclusion in the policy as a result of the surplus line insurer's agent's failure to deliver the policy (and its exclusions) to the insured is commensurate with long-standing and recent case law. ESSEX and its surplus lines agent can still delegate the duty of delivering the policy of insurance to the producing agent; however, it can only do so with prior written authority from the surplus lines insurer. Under Florida law, ESSEX cannot rely upon any exclusions which LIGHTHOUSE neither received nor had no notice of prior to MERCEDES ZOTA'S unfortunate accident. Accordingly, the second certified question should be answered: Yes.

III. LIGHTHOUSE IS NOT A CONTRACTOR, BUILDER OR DEVELOPER UNDER THE TERMS OF THE POLICY AND EXCLUSIONARY PROVISION SECTION 8 OF THE COMBINATION GENERAL ENDORSEMENT (M/E-001) IS AMBIGUOUS AS A MATTER AS A MATTER OF LAW

In the instant case, LIGHTHOUSE *owned* the land upon which BROWARD built a home. (R2:58:115). The building contractor was FARJI, who qualified BROWARD and pulled the permits issued by the City of Lighthouse Point for the

[8] *See* Amicus Br. of the Florida Surplus Lines Service Office, p. 12.

construction of the home. (R2:88:Ex. I). Further, the Commercial Liability Declarations stated, "Item 4. Business Description: OWNER OF LAND WHERE DWELLINGS ARE BEING BUILT." ESSEX'S attempt to obtain a declaration that there is no coverage under its policy is disingenuous in light of its investigation prior to issuing the policy, knowledge of LIGHTHOUSE'S business, and subsequent issuance of the Commercial Liability Declarations which describes LIGHTHOUSE'S business as the *owner* of land. (R2:109:Ex. D and E). Therefore, in the event the Court is inclined to reverse the decision of the District Court regarding delivery of the policy, the case should be remanded with instructions that ESSEX'S motion for summary judgment be denied and entered in favor of LIGHTHOUSE, BROWARD and FARJI because LIGHTHOUSE was not a contractor, builder or developer.

Further, under Florida law, "[i]f an insurance policy is ambiguous, the ambiguity must be resolved liberally in favor of the insured. Florida case law does not allow insurers to 'use obscure terms to defeat the purpose for which a policy is purchased.'" *Purrelli v. State Farm Fire and Cas. Co.*, 698 So.2d 618, 620 (Fla. 2d DCA 1997) (quoting, *Weldon v. All Am. Life Ins. Co.*, 605 So.2d 911 (Fla. 2d DCA 1992). "An insurance contract is deemed ambiguous if it is susceptible to two or more reasonable interpretations that can fairly be made." *Cont'l Cas. Co. v. Wendt*, 205 F.3d 1258, 1261 (11th Cir. 2000). Any ambiguities in an insurance

contract must be construed liberally in favor of the insured and strictly against the insurer who prepared the policy. *Exclusionary clauses* in insurance contracts are construed more strictly than coverage clauses. *Purrelli, supra*, at 620. (emphasis added). To properly interpret an exclusion, it must be read in conjunction with the other provisions of the policy, from the perspective of the ordinary person. *Powersports, Inc. v. Royal & Sunalliance Ins. Co.*, 307 F. Supp. 2d 1355, 1359 (S.D. Fla. 2004) (quoting, *Union Am. Ins. Co. v. Maynard*, 752 So.2d 1266 (Fla. 4th DCA 2000) (citations omitted). "In construing terms appearing in insurance policies, Florida courts commonly adopt the plain meaning of words contained in legal and non-legal dictionaries." *Cont'l Casualty, supra*, at 1264. (citations omitted).

In this case, ESSEX seeks to preclude coverage for MERCEDES ZOTA'S accident via Section 8 of the Combination General Endorsement (M/E-001). Section 8 is an exclusionary clause and must be strictly construed. *Purrelli v. State Farm Fire and Cas. Co.*, 698 So.2d at 620. Specifically, Section 8 states:

> If you are a contractor, builder or developer, there is no coverage under this policy for:
>
> 1. "Bodily injury," "personal injury," or "property damage" caused by acts of independent contractors/subcontractors contracted by you or on your behalf unless you obtain Certificates of Insurance from them providing evidence of at least like coverage and limits of liability as provided by this policy and naming you as an additional insured.

2. "Bodily injury," "personal injury," or "property damage" sustained by any independent contractor/subcontractor, or any employee, leased worker, temporary worker or volunteer help of same, unless a Named Insured or Employee of a Named Insured is on site, at the time of the injury or damage, and the Named Insured's actions or inactions are the direct cause of the injury or damage, or the injury or damage is directly caused by an employee of the Named Insured.[9]

ESSEX claims that LIGHTHOUSE is a contractor, builder or developer within the meaning of Section 8 of the Combination General Endorsement (M/E-001). The terms "contractor", "builder" and "developer" are neither defined in Section 8 of the Combination General Endorsement (M/E-001) nor in Section V – Definitions, of the policy.[10] As such, the Court must look to legal and non-legal definitions of contractor.

Title XXXII: Regulation of Professions and Occupations, addresses Contracting under Chapter 489, and the legislature set forth the following definition of contractor in Fla. Stat. § 489.105:

> (3) "Contractor" means the person who is *qualified for*, and shall only be responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any

[9] It was undisputed that Jack Farji was at the property at the time the subject accident occurred. No testimony was ever presented as to whether Jack Farji's actions or inactions were the direct cause of injury. Thus, subsection 2 cannot be found to exclude coverage.

[10] ESSEX could have defined the terms contractor, builder and developer just as it *attempted* to expand the definition of "employee" under exclusionary Section 1 of the Combination General Endorsement (M/E-001). It failed to do so.

> building or structure, including related improvements to real estate, for others or for resale to others; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs in this section. ***

(emphasis added).

LIGHTHOUSE was never *qualified* as a contractor and never obtained a license to do any contracting work. Rather, FARJI is a licensed building contractor as specifically defined in Fla. Stat. § 489.105 under subsection (3)(b) and he qualified BROWARD. In fact, BROWARD pulled all the permits for the construction of the home. (R2:88:Ex. H; R1:56:16, 67).

ESSEX would be hard pressed to argue that the legislature's definition of contractor is not a reasonable one. Contractor is also reasonably defined as:

> one who contracts on predetermined terms to provide labor and materials and to be responsible for the performance of a construction job in accordance with established specifications or plans – called also *building contractor*.

Webster's Third New International Dictionary, Unabridged. Merriam-Webster, 2002. (emphasis in original). It was BROWARD that acted as the contractor and FARJI, the licensed building contractor, who was responsible for the performance of the construction with the established specifications. (R2:88:Ex. H; R1:56:65-66). Therefore, under Merriam Webster's reasonable definition, LIGHTHOUSE was not a contractor because it was not responsible for the

performance of the construction of the home in accordance with the established specifications.

LIGHTHOUSE does not even meet ESSEX'S definition of a contractor because it did not *contract to supply certain materials or do certain work for a stipulated sum*. (R2:88:Ex. E). The ones contracting to supply certain materials or do certain work for a stipulated sum were the subcontractors, such as plumbers, electricians, etc., not the *owner*, i.e. LIGHTHOUSE, who paid *them*.

ESSEX provides the Court with the definition of builder as "a person in the business of constructing buildings." However, *Webster's Third New International Dictionary, Unabridged*. Merriam-Webster, 2002, also provides the following definition of builder:

> a person who *supervises* and usually has a financial interest in building operations and the arts and trades involved in their progress – compare CONTRACTOR.

(italicized emphasis added).

All of the construction *supervision* was performed by FARJI as a licensed building contractor and was always performed in his capacity with BROWARD. (R1:56:122). Under Merriam-Webster's reasonable definition, LIGHTHOUSE is not a builder because it did not *supervise* the construction of the home. In addition, Merriam-Webster likens the definition of builder to contractor. As demonstrated above, LIGHTHOUSE is not a contractor, and if builder is akin to contractor, it

can be concluded that, under this definition, Section 8 of the Combination General Endorsement (M/E-001) does not preclude coverage.

Even if the definition ESSEX relies upon excluded coverage, this does not end the analysis. Again, what is important is the fact that builder is susceptible to two or more reasonable interpretations that can fairly be made. As previously stated, when this occurs, the policy is deemed ambiguous and coverage is found. *Cont'l Cas. Co. v. Wendt,* 205 F.3d at 1261. Therefore, Section 8 of the Combination General Endorsement (M/E-001) is ambiguous as a matter of law.

Finally, the legislature also defined developer in Title XXXIII – Regulation of Trade, Commerce, Investments, and Solicitations, which addresses Consumer Protection under Chapter 501. The legislature set forth the following definition:

***

> (b) "Developer" means either a *building contractor* who offers new residential dwellings units for sale or any person who offers a new one-family or two-family dwelling unit for sale, *except for a person who sells or constructs less than 10 units per year statewide.*

Fla. Stat. § 501.1375(1)(b) (emphasis added).

If one is a *building contractor*, he or she might meet the foregoing definition. However, as previously stated, FARJI was the licensed building contractor who qualified BROWARD and LIGHTHOUSE was never licensed or qualified as a building contractor. Further, if one offers a new one-family or two-family dwelling unit for sale, he or she might meet the state's definition of

developer. However, the exception is if the person sells or constructs less than 10 units per year statewide. LIGHTHOUSE meets the state's exception because it never sold or constructed 10 or more units per year statewide. (R1:58:16, 67).

Developer is also reasonably defined as:

> a person who develops real estate; *often*, one that improves and subdivides land and builds and sells residential structures thereon.

Webster's Third New International Dictionary, Unabridged. Merriam-Webster, 2002 (emphasis in original). LIGHTHOUSE has never *subdivided* land and then built and sold residential structures thereon. (R2:88:Ex. E). LIGHTHOUSE does not meet the definition of developer as reasonably defined by Merriam-Webster and coverage is not excluded under Section 8 of the Combination General Endorsement (M/E-001).

ESSEX utilizes Webster's New World Dictionary's definition of developer which is "a person or thing that develops, specifically a person who develops real estate on a speculative basis." Even if it could be argued that LIGHTHOUSE meets this definition because the home was not built for anyone particular (i.e., it was a "spec" home), the possibility that coverage may be excluded under this definition is not determinative. The crucial factor is whether developer is susceptible to two or more reasonable interpretations that can fairly be made. That is exactly the situation in the instant case the policy is deemed ambiguous as a matter of law. *See Cont'l Cas. Co. v. Wendt,* 205 F.3d at 1261, *supra*.

In summary, LIGHTHOUSE is not a contractor, builder or developer. Further, Section 8 of the Combination General Endorsement (M/E-001) is an exclusionary provision of the policy that must be strictly construed. As the policy fails to define the terms contractor, builder and developer, and because each of these terms are subject to more than one reasonable, Section 8 is ambiguous as a matter of law. Therefore, in the event the Court is inclined to reverse the decision of the district court regarding delivery of the policy, the case should be remanded with instructions that summary judgment be entered in favor of LIGHTHOUSE, BROWARD and FARJI because Section 8 of the Combination General Endorsement (M/E-001) is ambiguous as a matter of law. Accordingly, the third certified question should be answered: No.

IV. ZOTA IS NOT AN EMPLOYEE OF LIGHTHOUSE UNDER THE POLICY AND NEITHER SECTION 1 OF THE COMBINATION GENERAL ENDORSEMENT (M/E-001) NOR SECTION I OF THE POLICY EXCLUDE COVERAGE

The first exclusionary provision of the policy that ESSEX claims excludes coverage is Section 1 of the Combination General Endorsement (M/E-001). Essentially, this section excludes coverage for injuries to employees of the insured (or in this case, employees of LIGHTHOUSE). ESSEX fails to provide any analysis or explain how ZOTA meets the definition of employee under its policy of insurance. Regardless, ZOTA does not qualify as an employee of LIGHTHOUSE under the definition contained in Section 1. Moreover, ESSEX's Associate Vice

President, Jack Miller, admitted that MERCEDES ZOTA was not an employee of LIGHTHOUSE as defined by the policy. (R2:84:64-66, 68).

Finally, there is nothing within the ESSEX policy that addresses "statutory" employers or employees in exclusion Section I-2 of the policy and "statutory employee" is not defined anywhere in the policy. Simply stated, the ESSEX policy neither contemplated "statutory employee" or employer, nor is this relevant to the analysis. In addition, it was undisputed that at the time of her accident, ZOTA was employed by Perla Lichi Designs and/or Excel Administrative Solutions, Inc. and was the owner of Trompe L'Oeils 'R' Us. (R2:78:16-18). Therefore, in the event the Court is inclined to reverse the decision of the district court regarding delivery of the policy, the case should be remanded with instructions that summary judgment be entered in favor of LIGHTHOUSE, BROWARD and FARJI because MERCEDES ZOTA was not an employee of LIGHTHOUSE. Accordingly, the fourth certified question should be answered: No.

V. FLORIDA STATUTE § 627.428 APPLIES TO SURPLUS LINES INSURERS

Fla. Stat. § 627.428 provides in pertinent part:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the

> insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

The district court awarded attorney's fees pursuant to Fla. Stat. § 627.428 because LIGHTHOUSE and FARJI were deemed prevailing party insureds. Because § 627.428 applies to surplus lines insurers, the district court's award of attorney's fees (and costs) should be affirmed.

A. Entitlement to Attorney's Fees Pursuant to Section 627.428

"Florida courts have consistently held that the purpose of § 627.428 and its predecessor is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are *compelled to defend* or sue to enforce their insurance contracts." *Ins. Co. of North Am. v. Lexow*, 602 So.2d 528, 531 (Fla. 1992) (citations omitted) (emphasis added). Where the insured successfully defends a declaratory judgment action brought by its liability carrier and obtains a judgment establishing coverage, the insured is entitled to attorney's fees pursuant to Fla. Stat. § 627.428. *See Storob v. Sphere Drake Ins.*, 730 So.2d 375 (Fla. 3d DCA 1999). In the instant matter, LIGHTHOUSE and FARJI obtained a final judgment establishing coverage; thus, they were entitled to attorney's fees pursuant to § 627.428.

B. Statutory Construction of Chapter 627

There should be no need to turn to statutory construction to determine whether § 627.428 applies to surplus lines insurers because Florida's Third District Court of Appeals confirmed - *subsequent* to the 1988 amendment to § 627.021 - its applicability. However, because ESSEX argues that § 627.428 does not apply to surplus lines insurers under the mistaken belief that the 1988 amendment to § 627.021 eviscerated surplus lines insurers from Chapter 627 in its entirety, Appellees respond accordingly.

Title XXXVII Insurance, Chapter 627 Insurance Rates and Contracts, consists of twenty one *different* parts. Several of the parts contain sections establishing the particular part's scope. Applicable to this case are Parts I and II. ESSEX contends that § 627.428, which is located in Part II of Chapter 627, does not apply to surplus lines insurers. In support of its position, ESSEX claims that surplus lines insurers were excluded from Chapter 627 in its entirety upon the 1988 amendment of § 627.021, which is located in Part I. However, a reasonable interpretation and application of the rules of statutory construction clearly evinces that surplus lines insurers were only excluded from Part I of Chapter 627, not Part II.

The district court below *interpreted* § 627.021, and in no way rewrote or altered it. Further, the district court's interpretation of § 627.021 did not render

any of the words of the statute "superfluous". To the contrary, the district court's reasonable construction gave the words force and meaning. *See C.R.C. v. Portesy*, 731 So.2d 770, 772 (Fla. 2d DCA 1999).

This is not a case where there is a hopeless inconsistency between *two* statutes; rather, this is a case where one section can be read as self-conflicting and/or ambiguous. When this occurs, "[t]he rule of strict construction of statutory grants does not prevent the courts from calling to their aid *other* rules of construction and giving each its appropriate scope." 73 Am. Jur. 2d *Statutes* § 210 (2006) (citations omitted) (emphasis added). When construed *in pari materia*, § 627.021 is easily given its intended meaning. *See State v. Bradford*, 787 So.2d 811, 819 (Fla. 2001) ([A]ll parts of a statute must be read *together* in order to achieve a consistent whole.") (emphasis in original) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992)). In this regard, the legislature's intent "may be shown by implications and intendments as well as by express words. When judicially declared to exist, implied provisions of a statute are as effective as those expressed." 48A Fla. Jur. 2d *Statutes* § 126 (2006) (citations omitted). And, "[a]lthough a title cannot add to or enlarge the operation or effect of an enactment, a court may look to the title of a statute as an aid in its interpretation or as a tool available for resolution of doubt about a statute's meaning." 48A Fla. Jur. 2d *Statutes* § 156; *see also Curry v. Lehman*, 47 So. 18

(1908). In fact, the Supreme Court of Florida has clearly stated that in determining legislative intent, "[courts] must give due weight and effect to the title of the section." *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So.2d 20, 25 (Fla. 2004) (holding that "the **title** of a statutory section is **more than** an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent") (emphasis added).

Chapter 627 is titled "Rates and Rating Organizations". The first section of Part I is 627.021 which states:

> **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:
>
> (a) Reinsurance, except joint reinsurance as provided in s.627.311.
>
> ***
>
> (e) Surplus lines insurance placed under the provisions of ss. 626.913-626.937.
>
> ***

Arguably there is some ambiguity to § 627.021. The title of the section – **Scope of this part** - limits the provisions contained within § 627.021 to Part I. Yet, the language of § 627.021(2) - This chapter does not apply to –suggests that

the insurers listed in § 627.021(2) are exempted from Chapter 627 in its entirety. However, by looking at Part II (as well as other parts) of Chapter 627 and the legislative history behind the 1988 amendment to § 627.021, it can easily be concluded that surplus lines insurers are only excluded from Part I of Chapter 627.

Part II is titled "The Insurance Contract" and Section 627.401 is the very first section in that part which states:

> **627.401 Scope of this part.--** No provision of this part of this chapter applies to:
>
> (1) Reinsurance.
>
> (2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code.
> (3) Wet marine and transportation insurance, except ss. 627.409, 627.420, and 627.428.
>
> (4) Title insurance, except ss. 627.406, 627.415, 627.419, 627.427, and 627.428.
>
> (5) Credit life or credit disability insurance, except ss. 627.419(5) and 627.428.

The district court properly exercised its ability to look to the titles of the foregoing sections giving them there *due weight* to reach its conclusion that surplus lines insurers are only excluded from Part I of Chapter 627. *See Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So.2d 20, 25 (Fla. 2004); *see also Curry v. Lehman*, 47 So. 18 (1908) (holding that "from a view of the whole law, or from other laws in parameteria, the evident intention is different from the literal import

of the terms employed to express it in a particular part of the law, that intention should prevail, for that, in fact, is the will of the Legislature.").

The district court's analysis was reasonable and appropriate:

> The titles of both sections, "Scope of this Part," indicate that the exclusions only apply to each part, and not the entire chapter. Furthermore, had the legislature intended for § 627.021 to apply to the entire chapter, it would not have included "Reinsurance" under both sections §§ 627.201 (sic) and 627.401. In other words, if the legislature had intended for § 627.201 (sic) to apply to the entire chapter, the legislature would only have excluded joint reinsurance under § 627.401, rather than all reinsurance, since that was the only form of reinsurance permitted under § 627.201 (sic). The fact that the statute excludes "reinsurance" in two separate parts indicates that the first exclusion was not intended to apply to the entire chapter, but only to apply to the first part.

See (R3:162:3-4).

ESSEX'S own argument that "there was no need for the legislature to specifically exclude surplus lines insurance from other parts of Chapter 627, including Part II," supports the district court's findings. Had the legislature intended for subparagraph (2) of § 627.021 to apply to the entire Chapter, there would have been no need to *also* exclude Reinsurance under Part II (§ 627.401), Part III (§ 627.451), and Part VI (§ 627.601). Thus, it can logically be concluded that had the legislature intended surplus lines insurers to be excluded from Part II, it would have indicated so, just as it did for Reinsurance. It can also be concluded

that § 627.021(2) only applies to Part I of Chapter 627. The district court's analysis gave full meaning and force to the words used by the legislature and harmonized the legislature's true intent in amending § 627.021 in 1988. *See Curry v. Lehman*, 47 So. 18 (1908). Finally, even ESSEX admits that the legislative history indicates that the 1988 amendment was for purposes of clarifying rating regulations for surplus lines insurers under Part I of Chapter 627 – not Part II. *See* Appellant's Br., p. 34, n. 16.; Fla. H.R. Comm. On Insurance, CS for SB 368 (1988) Staff Analysis 3, 4 (June 30, 1988).

Thus, the district court appropriately applied statutory construction of Chapter 627 and correctly found that surplus lines insurers are subject to § 627.428 attorney's fees and the decision below should be affirmed.

C. Florida Law Holds that Section 627.428 Applies to Surplus Lines Insurers

In 1995, Florida's Third District Court of Appeals held that "[a surplus lines insurer is] within the scope of Section 627.0127, F.S.1965, F.S.A., [now § 627.428, Fla.Stat. (1993)] [which provides for the award of attorney's fees upon rendition of a judgment against an insurer in favor of an insured]." *Chacin v. Generali Assicurazioni Generali Spa*, 655 So.2d 1162 (Fla. 3d DCA 1995). In fact, the Third District made its decision based on how Chapter 627 existed in 1993. *Id.* at 1162.

The proposition that surplus lines insurers are insurers for purposes of § 627.428 is supported by Florida Jurisprudence:

> The general attorney's fee provision of the Insurance Code authorizes the award of compensation or fees of an attorney upon the rendition of a judgment or decree by any of the courts of this state against an "insurer."[FN1] For purposes of this provision, a homeowner's warranty insurance company is an insurer,[FN2] **as is a surplus lines insurer**.[FN3]" * * *

31B Fla. Jur. 2d *Insurance* § 3593 (2005) (citations omitted) (emphasis added).

ESSEX'S contention that *English & Am. Ins. Co. v. Swain Groves, Inc.*, 218 So.2d 453 (Fla. 4th DCA 1969) and *Chacin v. Generali Assicurazioni Generali Spa*, 655 So.2d 1162 (Fla. 3d DCA 1995) are "no longer good law" because Fla. Stat. § 627.021 was amended in 1988 is simply not supported. For the last ten years, the effect of *Chacin* has not been challenged or addressed by the Florida legislature. "Because the legislature has failed to make any substantive changes to the pertinent statutory language" of Chapter 627, the courts should assume that it has no quarrel with the judicial construction placed on the statute in *Chacin*. *See Wood v. Fraser*, 677 So.2d 15, 18 (Fla. 2d DCA 1996) (citing *White v. Johnson*, 59 So.2d 532, 533 (Fla. 1952) "legislative inaction can be taken as an indication of the legislature's acceptance of prior construction of a statute").

Until the Florida Supreme Court overrules *Chacin*, the Third District recedes from its decision, or the legislature clearly expresses its disapproval of *Chacin* by

subsequent statutory enactment, the courts are bound by its holding. *See Wood v. Fraser*, 677 So.2d 15, 18-19 (Fla. 2d DCA 1996). The current law in the state of Florida interprets § 627.428 to apply to surplus lines insurers. As such, the decision of the district court should be affirmed. Accordingly, the fifth certified question should be answered: Yes.

CONCLUSION

This court should answer the certified questions as follows:

1. Whether Fla. Stat. § 626.922 or § 627.421, or both, require delivery of evidence of insurance directly to the insured, so that deliver to the insured's agent is insufficient. **YES**.
2. 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. **YES**.
3. If either the first or second question is answered in the negative, whether Lighthouse is a "builder, contractor or developer' under the terms of the insurance contract, so that there is no coverage. **NO**.
4. If either the first or second question is answered in the negative, whether Zota is an employee of Lighthouse under the policy. **NO**.
5. If Lighthouse is entitled to coverage, whether § 627.428 applies to surplus lines insurers. **YES**.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven (7) copies will be filed with the Clerk of Court of the Florida Supreme Court and one copy of the foregoing was mailed this 1st day of December, 2006, to: Clyde W. Galloway, Esq. and L. Michael Billmeier, Jr., Esq., Galloway, Brennan & Billmeier, 240 East 5th Avenue, Tallahassee, Florida 32303; Anthony J. Russo, Esq. and William R. Lewis, Esq., Butler Pappas, et al., 777 S. Harbour Island Blvd., Suite 500, Tampa, Florida 33602; Douglas M. McIntosh, Esq. and Robert C. Weill, Esq., McIntosh, Sawran, Peltz & Cartaya, P.A., 1776 East Sunrise Boulevard, P.O. Box 7990, Fort Lauderdale, Florida 33338-7990; John R. Catizone, Esq., Litchfield Cavo, LLP, 5201 W. Kennedy Blvd., Suite 450, Tampa, Florida 33609; Daniel S. Green, Esq., Ullman, Bursa, Hoffman & Ragano, LLC, 410 S. Ware Blvd., Suite 1100, Tampa, Florida 33619; Tracy Raffles Gunn, Esq., Fowler, White, Boggs & Banker, P.A., 510 E. Kennedy Blvd., Suite 1700, Tampa, Florida 33602; Matthew D. Weissing, Esquire, The Weissing Law Firm, 1735 East Atlantic Blvd., Pompano Bch., FL 33060; Mara Shlackman, Esquire, 101 Southeast 21st Street, Ft. Lauderdale, FL

33316.

LYDECKER, LEE, BEHAR,
BERGA & DE ZAYAS, L.L.C.
Attorneys for Appellees
1201 Brickell Ave., Fifth Floor
Miami, FL 33131
Telephone: (305) 416-3180
Facsimile: (305) 416-3190

By:_____
MICHAEL D. KAPLAN
Fla. Bar. No. 149586

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Initial Answer Brief was prepared in Times New Roman 14-point typeface.

By: _____
Michael D. Kaplan, Esq.