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

REPLY BRIEF OF ESSEX INSURANCE COMPANY

Douglas M. McIntosh, Fla. Bar No. 325597
Robert C. Weill, Fla. Bar No. 009962
MCINTOSH SAWRAN PELTZ & CARTAYA, P.A.
Attorneys for Petitioner
1776 East Sunrise Boulevard
P. O. Box 7990
Ft. Lauderdale, FL 33338-7990
Telephone: (954) 765-1001
Facsimile (954) 765-1005

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I

NEITHER § 626.922 NOR § 627.421 REQUIRE DELIVERY OF EVIDENCE OF INSURANCE DIRECTLY TO THE INSURED; DELIVERY TO THE INSURED'S AGENT IS SUFFICIENT

Respondents have failed to rebut the fact that the lower court's reasoning is completely unsupported by the rules of statutory construction and contrary to the cases construing "delivery." Respondents attempt to buttress their argument by interposing the word "deliver" where it is conspicuously absent in the fourth sentence of section 626.922(1), Florida Statutes, to argue that only the surplus lines agent may deliver the policy or evidence of insurance to the insured. This is curious, since, if the Legislature were mindful enough to place the word "deliver" in the first sentence of section 626.922(1), it would have surely placed the same word in another sentence of the same subsection had it intended it to be there. Further, section 627.421 does not even apply to surplus lines insurers.[1] Essex's position thus remains stalwart despite Respondents' arguments.

[1]Section 627.021(2), Florida Statutes, expressly provides that the entire "chapter" 627, which contains section 627.421(1), does not apply to "[s]urplus lines insurance." Respondents' statutory construction should not countermand the plain meaning.

Section 626.922(1) begins by announcing: "Upon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of insurance. . .." On the other hand, section 627.421(1), Florida Statutes—assuming that it even applies—permits delivery of a policy to the insured "or the person entitled thereto." In this regard, the longstanding rule is that delivery of a policy to the insured's agent is tantamount to delivery to the insured. See, e.g., Jefferson Std. Life Ins. Co. v. Lyons, 165 So. 351, 353 (Fla. 1936); see also United Nat'l Ins. Co. v. Jacobs, 754 F. Supp. 865, 869 (M.D. Fla. 1990). It is undisputed that Petitioner Essex and its managing general or surplus lines agent, MacDuff Underwriters, Inc., effectuated delivery to Lighthouse's producing agent, A. Brandon & Company, Inc.

The Legislature, well aware of the state of affairs set forth above, amended section 626.922 to prevent surplus lines agents from delegating the duty to **issue evidence of insurance** in the absence of written authority from the surplus lines insurer. The surplus lines agent, already empowered by statute and case law to delegate to the general lines agent the duty to **deliver** the policy, continued to be so authorized. Nothing in the new language affected that–much less eliminated it.

Consistent with the foregoing, the newly added language says only that "[t]he producing agent must maintain copies of the written delegation [of authority] from

the surplus lines agent and copies of any evidence of coverage or certificate of insurance which the producing agent issues or delivers." Thus, the new provision merely requires authorized producing agents to keep copies of the delegation documents, along with copies of evidence of coverage or certificates of insurance they issue. Respondents cite nothing to refute this.

In fact, Respondents' position rests on the shaky ground that the 1998 amendment somehow changed the firmly-entrenched common law. In this instance then, the statute must be strictly construed which means that: (1) the statute "will not be interpreted to displace the common law further than is clearly necessary"; (2) this Court must infer that the statute "was not intended to make any alteration other than was specified and plainly announced"; and (3) the statute "must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard." See Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977). Respondents' analysis of the statute crumbles under this strict construction.

Moreover, the Legislature has repeatedly evinced its understanding that the words "deliver" and "issue" are not interchangeable. For example, in section 626.905, Florida Statutes, the Legislature set forth its purpose in establishing an Unauthorized Insurers Process Law. There, the Legislature has proclaimed that "it is

a subject of concern that many residents of this state hold policies of insurance **issued or delivered** in the state by insurers while not authorized to do business in this state." (Emphasis added). Indeed, no less than thirty-one separate provisions of Florida's statutory insurance laws use the terms "issue" and "deliver" disjunctively with reference to policies of insurance.[2]

That the Legislature omitted the word "deliver" from the new scheme by which general lines agents may **issue** evidence of insurance is significant. It cannot be glossed over by Respondents' bare assertions about what would, in their opinion, be "the best possible way to assure that the insured receives the policy. . .." Lighthouse Answer Br. at 17. This Court must also recognize that Essex discharged its statutory duty to deliver the policy by providing it through its licensed surplus lines agent, directly to the insured's own agent.

Most importantly, Respondents' position is antithetical to the Legislature's surplus lines framework. Because surplus lines insurers are, by definition, not admitted in Florida, the Legislature requires them to have appointed surplus lines

[2]See §§ 624.123, 624.428, 626.88, 626.905, 626.922, 626.9541, 626.9706, 626.9707, 627.410, 627.418, 627.4195, 627.4236, 627.4239, 627.5515, 627.569, 627.640, 627.6409, 627.64171, 627.6418, 627.6515, 627.656, 627.6563, 627.66121, 627.6613, 627.669, 627.6691, 627.6698, 627.6699, 627.6845, 627.728, 627.987, Fla. Stat.

agents–licensed by the State of Florida–through which they place insurance. §§ 626.913(2), 626.915(3), 626.917(1)(a), 626.927, Fla. Stat. The surplus lines agent also acts as the surplus lines insurer's "point person" for purposes of complying with the surplus lines law[3] and in dealing with the Florida Surplus Lines Service Office. See § 626.921, Fla. Stat. On the other hand, a producing agent represents the insured's interests in the surplus lines arena, see, e.g., § 626.916(1)(a) (requiring producing agent to diligently procure insurance for the insured through authorized insurers before placing coverage with a surplus lines insurer), and the surplus lines law does not contemplate an insured's direct contact with the surplus lines insurer, whatsoever. See § 626.922(1) (requiring the surplus lines agent to collect the premium tax from the insured). Accordingly, requiring delivery directly from the surplus lines insurer to the insured contravenes the intended and true dynamic between the surplus lines insurer, the surplus lines agent, the producing agent, and the insured under the Florida Surplus Lines Law.

Amicus for Respondents cites four out-of-state cases to persuade this Court

[3]See, e.g., § 626.916(1)(c) (requiring surplus lines agent to file unique policy forms); § 626.918 (requiring surplus lines agent to request eligibility for a surplus lines insurer); § 626.918(3) (designating surplus lines agent to receive department's published list of eligible surplus lines insurers); § 626.918(5) (requiring surplus lines agent to file with department the surplus lines insurer's "statement of condition"); § 626.924 (requiring surplus lines agent to include certain information on policy or other document evidencing insurance).

that it should impose a non-statutory duty upon **all** insurers to provide a copy of the policy directly to the insured. See Brief of the Acad. of Fla. Trial Lawyers (AFTL) at 4-6. However, the cases cited by AFTL are not only factually dissimilar to this case but do not deal with the nub of the issue—whether delivery to the insured's agent is sufficient to constitute delivery to the insured. In this regard, **at least** 27 jurisdictions hold that delivery to the insured's agent constitutes delivery to the insured. See J.R. Kemper, Annotation, Transmission of Insurance Policy to Insurance Agent As Satisfying Provision Requiring Delivery to Insured, 19 A.L.R.3d 953, §§ 3[a], [b] (orig. publ'd in 1968; updated in 2007) (citing cases therein); see also 43 Am. Jur. 2d Insurance § 243 (May 2006); 44 C.J.S. Insurance § 310 (May 2006). Accordingly, this Court should answer the first certified question in the negative.

II

FLORIDA LAW DOES NOT PRECLUDE AN INSURER FROM ASSERTING LACK OF COVERAGE IF THERE IS NO EVIDENCE OF FRAUD OR OTHER INJUSTICE

Respondents cannot provide any substantive support for the proposition that the failure of the insured's agent (who undisputedly received the policy on behalf of the insured) to transmit the policy to the insured operates to extend unlimited universal coverage and nullifies all terms, conditions, and exclusions contained in the policy.

In arguing to uphold the district court's ruling, Respondents rely on two cases that are unlike the present case. Neither ZC Insurance Co. v. Brooks, 847 So. 2d 547 (Fla. 4th DCA 2003), nor T.H.E. Insurance Co. v. Dollar Rent-A-Car Systems, Inc., 900 So. 2d 694 (Fla. 5th DCA 2005), dealt with surplus lines insurers and agents, who may permissibly look to the producing or general lines agents to deal directly with the insureds. If the insurers in ZC Insurance and T.H.E. Insurance did not deliver the policies to the insureds themselves, there was no other avenue by which delivery would occur. Such was not the case in the instant matter. Thus, Respondents rely on inapposite case law—as recognized by the Eleventh Circuit in its opinion—to support the notion that the terms of an insurance contract purposely procured by a savvy consumer, Lighthouse, must be set aside. See Essex Ins. Co. v. Zota, 466 F.3d 981, 985 (11th Cir. 2006).

As even Respondents recognize (see Lighthouse Answer Br. at 21), the T.H.E. Insurance court noted the harshness of eliminating an exclusion based on the insurer's failure to deliver the policy. Indeed, as Judge Warner noted in her dissent in ZC Insurance:

> The policy in question specifically excluded coverage for family members. The effect of the trial court's ruling, and the majority's affirmance, is to create coverage where none existed. The only circumstance where courts have authorized the creation of coverage has been in promissory estoppel cases to prevent forfeiture of coverage

> where failure to do so would sanction fraud or injustice. See Crown Life Ins. Co. v. McBride, 517 So. 2d 660, 662 (Fla. 1987). The Crown court further explained that '[s]uch injustice may be found where the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance substantial in nature, and where the promisee shows that such reliance thereon was to his detriment.' Id. (emphasis added). See also Travelers Indem. v. Billue, 763 So. 2d 1204, 1204 (Fla. 1st DCA 2000) (noting promissory estoppel requires proof that one party relied to his detriment on the affirmative misrepresentation of another); Prof'l Underwriters Ins. Co. v. Freytes & Sons Corp., 565 So. 2d 900, 903 (Fla. 5th DCA 1990) (holding the statement by insurer's agent that insured 'had what he needed' lacked specificity to constitute a representation for purposes of promissory estoppel to create coverage).

847 So. 2d at 551-552. In short, aside from a single exception for fraud or injustice, which is not applicable here, theories of estoppel do not give courts license to magically transform uncovered risks to covered risks by judicial fiat.

The present case is nothing like those where courts have sanctioned the creation of otherwise nonexistent coverage to punish an insurer for its malfeasance. To extend that policy to the present situation would be detrimental to the continued availability of diverse insurance products to Florida businesses and citizens. Moreover, this rule would theoretically create coverage for claims historically not covered by policies or subsumed within the cost of premiums, thereby creating a potential financial crisis for the insurance industry.

Furthermore, the out-of-state cases relied on by Amicus AFTL are inapplicable

since they do not address the precise issue of whether an insurer may be estopped to deny coverage when the insured's agent is provided with a copy of the policy. Additionally, some of the cases are factually distinguishable since there is no evidence of prejudice or misrepresentations in this case as there was in those cited. See, e.g., Brown Mach. Works & Supply Co. v. Ins. Co. of N. Am., 659 So. 2d 51 (Ala. 1995); Foremost Ins. Co. v Putzier, 627 P.2d 317, 322 (Idaho 1981). Accordingly, the second certified question should be answered in the negative.

III & IV

THERE WAS NO COVERAGE BECAUSE LIGHTHOUSE IS A "BUILDER, CONTRACTOR, OR DEVELOPER" AND ZOTA IS LIGHTHOUSE'S EMPLOYEE

In determining the construction of an insurance policy, it is sometimes appropriate to consider the degree of sophistication and experience possessed by the insured. See, e.g., Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976). In arguing that the policy exclusions must be construed in favor of Lighthouse because the terms "contractor, builder or developer" are ambiguous, Respondents fail to acknowledge Lighthouse's sophistication and experience in determining what coverages would meet its needs, and procuring those policies which would meet its needs. Respondents fail to address the fact that

Lighthouse had previously requested and obtained different types of insurance with more comprehensive coverage as a builder/contractor/developer:

- In 1998, Lighthouse applied for a commercial general liability policy from Colony Insurance, specifically identifying itself as a "General Contractor - Home Builders." (R2:76:35, 48, 51-55); and
- In 2000, Scottsdale Insurance Company issued Lighthouse a commercial general liability policy which specifically identified its business as a "General Contractor - Builder - Single family dwelling". (R2:76:51-55).

Respondents also fail to address the fact that Lighthouse's intention in obtaining the Essex Policy was undeniably motivated by financial considerations, and that Lighthouse was well aware that it was obtaining less comprehensive coverage with the Essex Policy. (R2:76:65, 108, 128; R2:74:Ex. C).[4]

Here, it is completely disingenuous for Lighthouse to now claim that some of the very terms it used previously to describe its own business activities are ambiguous. It is also disingenuous to suggest Lighthouse and Farji were surprised to

[4]The fact that Lighthouse and its principals were sophisticated and experienced in insurance matters vitiates AFTL's argument that Essex's failure to deliver a policy directly to the insured thwarted the insured's knowledge of the policy's coverage limitations and how it should report a claim. See Brief of AFTL at 7-9.

learn of Essex's interpretation of their activities in light of the policy language. Their experience belies this notion, and this Court should look past it.

Similarly, Respondents overlook their own admissions when they claim Mercedes Zota was not an employee, another fact that demonstrates Lighthouse was not merely the landowner, as it asks the Court to believe. In answering the Zotas' complaint, Lighthouse itself acknowledged it was Ms. Zota's employer. (R2:74:Ex. B; R2:71:Ex. C). For Lighthouse to now claim that Mercedes Zota does not fit the definition of "employee" is unbelievable. It is inequitable for Lighthouse to deem Mercedes Zota its employee when it serves its financial interest in one arena, and then to deny that same fact to serve its interests in another arena. Accordingly, this Court should answer the third and fourth certified questions in the affirmative.

V

SECTION 627.428, FLORIDA STATUTES, DOES NOT ENTITLE AN INSURED TO ATTORNEYS' FEES FROM A SURPLUS LINES INSURER

To open its argument, Respondents would have this Court believe that because Lighthouse and Farji are insureds who obtained a judgment against an insurer that they are automatically entitled to attorneys' fees pursuant to section 627.428. However, there are many instances when insureds are not entitled to fees under

section 627.428 if they prevail against an insurer.[5] This case presents another exception to fee recovery under the statute–specifically, when the policy is issued by a surplus lines insurer. See § 627.021(2)(e), Fla. Stat.

To begin with, any statutory construction or examination of the Legislature's intent beyond the words used in section 627.021 is unwarranted and inappropriate given the plain and unambiguous language of section 627.021(2)(e), Florida Statutes, which states that "chapter [627] does not apply to . . . surplus lines insurance placed under the provisions of ss. 626.913-626.937." Even if the Legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for **it** to amend the statute, not for this Court to rewrite it by judicial fiat. See Overstreet v. State, 629 So. 2d 125, 126 (Fla. 1993) ("Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.")

[5] See, e.g., § 627.401(1), Fla. Stat. (2006) (reinsurance policies); § 627.401(2) (policies issued for delivery outside the state or delivered outside the state); § 627.727(8) (when an insured sues its uninsured motorist insurer under § 627.727 and there is no dispute over coverage); Greenough v. Aetna Cas. & Sur. Co., 449 So. 2d 1001 (Fla. 4th DCA 1984) (when an insured does not recover more than the insurer offered to pay under the policy).

Respondents' segue into their statutory construction of section 627.021 is that its title creates ambiguity. However, the title of a statute is not a part of the statute and cannot alter the meaning of the statute's substantive provisions. See Askew v. MGIC Dev. Corp. of Fla., Inc., 262 So. 2d 227, 228 (Fla. 4th DCA 1972). Because there is no ambiguity, then no statutory construction is required. In any event, the lower court and Respondents' construction of section 627.021 ignores not only numerous key points which nullify their conclusion, see Initial Br. at pp. 38-40, but also the Second District's decision which held that section 627.701 does not apply to surplus lines insurers. Gen. Star Indem. Co. v. W. Fla. Village Inn, Inc., 874 So. 2d 26, 30 n.3 (Fla. 2d DCA 2004).

Lastly, this Court should not adopt the reasoning of an appellate court decision which was superseded by statutory amendment. Over thirty-seven years ago the Fourth District in English & American Insurance Co. v. Swain Groves, Inc., 218 So. 2d 453 (Fla. 4th DCA 1969), held that a surplus lines carrier was within the scope of section 627.0127 (now § 627.428). At that time, section 627.021(2), Florida Statutes, **did not exclude** surplus lines insurers from the operation of Chapter 627. The Florida Legislature then amended section 627.021 to **exclude** surplus lines insurers from **Chapter** 627, which necessarily superseded English. See Ch. 88-166, § 2, Laws of Fla.; see Seddon v. Harpster, 403 So. 2d 409, 411 (Fla. 1981) (because the

Legislature is presumed to be aware of the judicial construction of former laws, when it amends a statute, it intends to accord the statute a meaning different from that accorded it before the amendment). Because English was superseded by statute, any subsequent decision premised on English–such as Chacin v. Generali Assicurazioni Generali Spa, 655 So. 2d 1162 (Fla. 3d DCA 1995)–is likewise bad law. Respondents offer several ineffectual arguments to rewrite this legal history.

First, Respondents claim that the Chacin court rendered its decision "based on how Chapter 627 existed in 1993." Lighthouse Answer Br. at 38. However, there is no evidence in Chacin to support this assertion. To the contrary, the following militates against such a finding: (1) Nowhere does the opinion mention or reconcile the amendment with section 627.021 which expressly provided that Chapter 627 does not apply to surplus lines insurers; (2) While the Chacin court bracketed the amended forms for certain statutes, it never specifically mentioned the amended form of section 627.021–the statute at issue here; and (3) The sum and substance of the Chacin court's reasoning was a parroting of the analysis in English.

Second, Respondents attempt to bolster their conclusion by noting that the legal encyclopedia, Florida Jurisprudence, reached the same conclusion. Lighthouse Answer Br. at 39. However, this is a bit circular since Florida Jurisprudence cites

only to the Chacin decision which, as discussed above, had been superseded by statute.

Third, Respondents claim that because Chacin has not been challenged or addressed by the Legislature, it means that it is good law. The fallacy in this argument is that the Legislature has already clearly established that Chacin is bad law when it superseded English by the 1998 amendment. Additionally, with the exception of the title to section 627.021, the legislature could not make the statute any more clear that chapter 627 does not apply to surplus lines insurers.[6]

CONCLUSION

For the foregoing reasons, this Court should answer the certified questions as follows: Question One: No.; Question Two: No; Question Three: Yes; Question Four: Yes; Question Five: No.

[6]AFTL's argument that section 627.428 is unconstitutional has been waived. It was never raised by the Respondents in the district court, the Eleventh Circuit, or in the Respondents' briefs before this Court. In any event, the existence of the attorneys' fee provision in section 626.911 undercuts its equal protection argument.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven (7) copies have been filed with the Clerk of the Florida Supreme Court and one copy of the foregoing has been furnished by U.S. Mail to: **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; and **Billy Galloway, Esq. & Michael Billmeier**, **Esq.**, Galloway, Brennan & Billmeier, 240 East 5th Avenue, Tallahassee, Florida 32303; **Mara Schlackman, Esq.**, PMB 309, 757 SE 17th Street, Fort Lauderdale, FL, 33316; **Anthony Russo, Esq.**, Butler Pappas, et al., 777 South Harbour Island Blvd., Suite 500, Tampa, FL 33602; **John Catizone, Esq.**, Litchfield, Cavo, 5201 W. Kennedy Blvd., Suite 450, Tampa, FL 33609; **Daniel Green, Esq.**, Ullman, Bursa, et al., 410 S. Ware Blvd, Suite 1100, Tampa, FL 33619; **Tracy Gunn, Esq.,** Fowler White, 510 E. Kennedy Blvd., Suite 1700, Tampa, FL 33602, and **Roy Wasson, Esq.**, Wasson & Associates, 1320 South Dixie Hwy., Suite 450, Miami, FL 33146 on this **11th** day of **January, 2007**.

McINTOSH SAWRAN PELTZ &
CARTAYA, P.A.
Attorneys for Petitioner
1776 East Sunrise Boulevard
P. O. Box 7990
Ft. Lauderdale, FL 33338-7990
Telephone: (954) 765-1001
Facsimile (954) 765-1005

By:_____
DOUGLAS M. McINTOSH
Fla. Bar No.: 325597
E-mail: dmcintosh@mspcesq.com
ROBERT C. WEILL
Fla. Bar No.: 009962
E-mail: rweill@mspcesq.com

CERTIFICATE OF FONT SIZE

The undersigned hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Robert C. Weill