IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. SC09-1849

LAZARO E. SOSA, in his own right and on behalf of all persons similarly situated,

Petitioners,

v.

SAFEWAY PREMIUM FINANCE COMPANY, a Florida corporation,

Respondent.

On Discretionary Conflict Review of Decisions of the Third District Court of Appeal and other District Courts of Appeal

JURISDICTIONAL BRIEF OF PETITIONERS

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I. STATEMENT OF CASE AND FACTS

Petitioners, Lazaro E. Sosa, in his own right and on behalf of all persons similarly situated ("Sosa" or "Petitioners"), seek discretionary review of a decision of the Third District Court of Appeal that overturned the trial court's granting of class certification and which, as a result, created a conflict with the decisions of the Fourth District Court of Appeal.

Respondent, Safeway Premium Finance Company ("Respondent" or the "Premium Finance Company"), is a Florida premium finance company engaged in the business of entering into premium finance agreements with insureds in the State of Florida and is regulated by the Department of Financial Services. The business of the Premium Finance Company is to enter into agreements with insureds, whereby the Premium Finance Company pays the insured's premiums to the insured's auto insurance company, and the insured repays the Premium Finance Company in monthly installments at an extremely high annual percentage rate.

In connection with such agreements, a Premium Finance Company may charge the insured interest, plus an additional charge, not to exceed twenty dollars ($20) in a twelve-month period, as permitted by section 627.840, Florida Statutes.

Section 627.840, Florida Statutes provides:

Fla. Stat. § 627.840: Limitation on service and other charges.

> (1) A premium finance company shall not charge, contract for, receive, or collect a service charge other than as permitted by this part.
>
> …
>
> **(b) <u>The service charge shall be a maximum of $12 per $100 per year plus an additional charge not exceeding $20</u>**, which additional charge need not be refunded upon prepayment. **<u>Such additional charge may be charged only once in a 12-month period for any one customer</u>** unless that customer's policy has been canceled due to nonpayment within the immediately preceding 12-month period....
> Fla. Stat. § 627.840 (emphasis added).

The remedy for a violation is also set by statute:

> **Fla. Stat. § 627.835: Excessive premium finance charge; penalty.**
>
> Any person, premium finance company, or other legal entity who or which knowingly takes, receives, reserves, or charges a premium finance charge other than that authorized by this part **shall thereby forfeit the entire premium finance charge to which such person, premium finance company, or legal entity would otherwise be entitled**; and any person who has paid such unlawful finance charge may personally or by her or his legal or personal representative, by suit for recovery thereof, recover from such person, premium finance company, or legal entity **twice the entire amount of the premium finance charge so paid**.
> Section 627.835, Florida Statutes (emphasis added).

On November 26, 2002, Mr. Sosa purchased a six-month insurance policy and financed the policy through the Premium Finance Company. At the time of purchase of the initial six-month auto insurance policy, Sosa was charged the

$20.00 charge permitted by Section 627.840, Florida Statutes. Upon the expiration of the initial six-month policy, however, Sosa renewed the auto insurance policy for a second and third six-month term, and was again assessed a $20.00 charge each time the policy was renewed. Thus, it is undisputed that during a continuous twelve-month period, the Premium Finance Company charged Sosa and others similarly situated the $20.00 charge more than once, a direct violation of section 627.840(b), Florida Statutes.

On December 10, 2003, Petitioners filed a class action lawsuit against the Premium Finance Company under Section 627.835 for its violations of Section 627.840(b) in the Eleventh Judicial Circuit in and for Miami-Dade County. In accordance with Florida Rule of Civil Procedure 1.220 and applicable case law, Petitioners engaged in class discovery only and thereafter filed a Motion for Certification which, after the trial court's review of the evidence before it, was granted. Respondents appealed and on April 8, 2009, the Third District Court of Appeal reversed, finding that Sosa failed to sufficiently establish a knowing violation of 627.840(b) and, as a result of the knowingly element in the statute, that Petitioners' claim was not viable as a class action due to Petitioners' alleged failure to meet the commonality requirement for class certification pursuant to Rule 1.220. Specifically, the Third District ruled:

> Sosa personally has not alleged any individual facts showing intentional actions by Safeway or on behalf of

> potential members of the class sufficient to demonstrate a cause of action for damages under sections 627.840(b) and 627.835, Florida Statutes (2002), for knowingly collecting an excess finance charge sufficient to meet the commonality requirement of a class action.

Safeway Premium Finance Co. v. Sosa, 15 So.3d 8, 11 (Fla. 3d DCA 2009) (emphasis in original) ("*Sosa* Opinion").

In essence, the Third District's opinion – as elucidated by Judge Gersten in his dissent – centered around two points: (1) that Sosa failed to state a cause of action qualifying for class certification, and (2) that *any* claim for a knowing violation of a statute would not satisfy the commonality requirement for class certification pursuant to Rule 1.220. These holdings contravene the rules of civil procedure and directly and expressly conflict with the decisions of the Fourth District Court of Appeal in that they eviscerate and otherwise eliminate class action suits as a mechanism for the resolution of lawsuits brought under a statute with a knowledge or willful component. Further, the Third District's opinion makes the establishment of the commonality prong an impossible goal and misconstrues that prong in view of the holdings of the Fourth District Court of Appeal. Such a result cannot be held to stand and flies in the face of volumes of Florida jurisprudence, as discussed below.

II. SUMMARY OF ARGUMENT

In *Smith v. Foremost Ins. Co.*("*Smith* Opinion"), the Fourth District Court of Appeal, in a suit arising out of the same premium financing statutes involved in

this case, reversed in part and affirmed in part the granting of summary judgment in favor of the insurers on grounds which are not pertinent to the instant matter. However, what is important is that, in express and direct conflict with the *Sosa* Opinion, a class action was filed and maintained by the insureds against two insurers for their alleged violations of the same statutes which are at issue in the *Sosa* Opinion. What must be gleaned from the *Smith* Opinion is that a class action suit can in fact be maintained and used to resolve mass violations of Sections 627.840(b) and 627.835, Florida Statutes, and other statutes which may contain a "knowingly" or "willfully" element.

Furthermore, with respect to Rule 1.220's class action elements (numerosity, commonality, typicality and adequacy), the Third District's *Sosa* Opinion and its discussion of the commonality requirement expressly and directly conflicts with the Fourth District Court of Appeal's decision in *Olen Properties Corp. v. Moss* ("*Moss* Opinion"). In direct contrast with the *Sosa* Opinion, the *Moss* Opinion involved three different types of fees in the landlord-tenant context and the court in *Moss*, despite having neater and clearer facts than those present in *Sosa*, held that the commonality requirement of Rule 1.220 was satisfied because what was necessary to satisfy that prong was not the issue of the different fees but the practice of their being charged and that the primary concern for purposes of establishing commonality was whether the representative members' claims arise

from the same course of conduct that gave rise to the other claims and whether the claims are based on the same legal theory.

Accordingly, Petitioners invoke this Court's jurisdiction under Article V, § 3(b) 3 of the Florida Constitution based on the conflict with decisions of the Florida Supreme Court and other district courts of appeal.

III. ARGUMENT

A. A CLASS ACTION BASED ON A STATUTE WITH A KNOWINGLY OR WILLFULLY COMPONENT IS VIABLE UNDER RULE 1.220 AND ITS FEDERAL COUNTERPART

As stated above, a cause of action arising out of violations of Section 627.840(b) and 627.835, Florida Statutes, require the pleading and establishment of a premium finance company's "knowing" violation of 627.840(b). The Third District's decision in *Sosa* agreed with Respondent's arguments that Petitioners failed to establish that element. However, the Third District's opinion goes further than that and holds that no class action lawsuit can be maintained as a matter of law because, according to the Third District, "[i]n order to prove damages, individual questions pertinent to all potential class members are subject to different explanations and defenses relating to knowing violations of these statutes. Therefore, individual questions of law and fact predominate over common allegations of simple overcharge." *Sosa*, supra, at 11 (emphasis in original). The Third District's holding is broad and therefore expressly and directly conflicts with

decisions from the Fourth District Court of Appeal because the "requirement of knowledge is a prerequisite to stating and proving a cause of action for damages under the statutes. We find that Sosa does not state a cause of action for which a class action is *appropriate*." *Id*. (emphasis added).

Therefore, the Third District did not rule that Sosa failed to establish the knowingly element of a cause of action under Sections 627.840(b) and 627.835, Florida Statutes, but rather, that due to the fact that Section 627.835 contains a knowingly element of proof, that such a claim is simply *not appropriate* for class certification. That holding, in and of itself, is violative of Florida Rule of Civil Procedure 1.220 (and Federal Rule of Civil Procedure 23 on which Florida's Rule is modeled) since the Rule makes no mention of such a restriction on class actions.

Further, the Fourth District's ruling in *Smith v. Foremost Ins. Co.*, a class action lawsuit, expressly and directly conflicts with the *Sosa* Opinion. The *Smith* case revolved around whether the Appellee insurers and the service fees they charged the Appellants were governed by the premium financing statutes and therefore subject to the penalties in 627.835. *Smith*, supra, at 341. In partially overturning summary judgment which had been granted to the insurers on that issue, the Fourth District ruled that Florida' premium financing statutes applied to the insurers' fees and that they may be subject to the penalties of 627.835 if said fees were found to be substantially more than those permitted under 627.901. This

decision expressly and directly conflicts with the *Sosa* Opinion because the class action mechanism was employed in *Smith* to resolve a legal controversy which contained a "knowingly" element of proof.

Similarly, the Fourth District's ruling in *Equity Residential Properties Trust v. Yates*, another class action, also expressly and directly conflicts with the *Sosa* Opinion. In *Yates*, a class of former tenants sued their landlord for violations of Chapter 501, the Consumer Collection Practices Act and Florida's Deceptive and Unfair Trade Practices Act. The civil penalty section of Chapter 501, Section 501.2075, provides that

> any person…or entity…who is **willfully using**, or has **willfully used**, a method, act or practice declared unlawful…or who is **willfully violating** ant of the rules of the department…is liable for a civil penalty…. **Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule.**

Section 501.2075, Florida Statutes (emphasis added).

The terms "willfully" and "knowingly" can be used interchangeably for purposes of establishing scienter. In *Yates*, the Fourth District affirmed the tenants' certification of their class in light of the language used in Section 501.2075 and the requirements of Rule 1.220 in express and direct contravention of the *Sosa* Opinion.

B. THE THIRD DISTRICT MISSAPPLIED THE COMMONALITY REQUIREMENT OF RULE 1.220

In the Sosa Opinion, the Third District held that Sosa failed to establish the commonality element required to establish a class because "there would be different circumstances for each individual member of the class which would serve as the bases for and as defenses to the additional premiums charged such that the class action requirement of commonality cannot be met." *Sosa,* supra, at 11.

The Fourth District has taken a conflicting approach to the question of commonality and the predominance of allegations. In *Olen Properties Corp. v. Moss*, the Fourth District stated that "the issue is not whether the three types of fees were the same, but whether or not Appellants' practice of charging liquidated damages rather than actual damages violated Florida law…" *Id*. at 520. Stated simply, the Fourth District recognized that the common issue of whether the defendants' conduct violated Florida law and affected the class outweighed the individual circumstances that may exist for each member.

The Third District in the instant case looked precisely to these "different circumstances" and weighed them disproportionately. The Third District found that the individual circumstances outweighed the general allegations even though the instant case is even more streamlined than *Olen* in that it involves only one type of fee that was improperly applied in violation of Florida law.

Similarly, in *Smith v. Glen Cove Apartments Condominiums Master Association, Inc.*, the Fourth District found, in a class action suit alleging fourteen

questions of fact that "the common question of law and fact against appellee are whether appellee violated its statutory duty or was negligent…" *Id.* at 1110. Further, the determining factor is "whether the representative members' claims arise from the same course of conduct that gave rise to the other claims, and whether the claims are based on the same legal theory." *Id*. citing *Terry L Braun, P.A. v. Campbell*, 827 So.2d 261, 267 (Fla. 5th DCA 2002).

Finally, in *Yates*, the Fourth District, in affirming the class certification, opined that

> The biggest hurdle facing the former tenants was the landlord's contention that the need for individualized proof to establish damages necessarily undermined commonality, typicality, predominance, and superiority. **For purposes of class certification, though, liability – not damages – is the focus of the inquiry.**

Yates, supra, at 403 (emphasis added).

It is clear that the Third District misapplied the standards for establishing and proving commonality in the class certification context and that misapplication directly and expressly conflicts with opinions of the Fourth District, which, like Federal Rule 23, favors certification.

IV. CONCLUSION

For the foregoing reasons, this Court should exercise its conflict jurisdiction and grant review of the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 5th day of November, 2009 to: Roniel Rodriguez, IV, Esq., 20533 Biscayne Blvd., Suite 1243, Aventura, Florida 33180, and Maria E. Abate, Esq., Colodny, Fass, Talenfeld, Karlinsky & Abate, PA, One Financial Plaza, 23rd Floor, 100 S.E. Third Avenue, Fort Lauderdale, Florida 33394.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing was prepared using Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210.

_____
Eduardo Gomez