Supreme Court of Florida

January Term 2012

No. SC12-323

WASHINGTON NATIONAL INSURANCE CO.,
Petitioner,

v.

SYDELLE RUDERMAN, et al.,
Respondents.

L.T. 10-14714
Certified Question from the U. S. Court of Appeals for the Eleventh Circuit

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ANSWER BRIEF OF RESPONDENTS

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Statements of Case and Facts

The case history and facts on which the certified question must be decided are set forth in the opinion of the Eleventh Circuit.[1] Respondent accepts the case history and facts as stated by the Eleventh Circuit. Any additional facts necessary for a specific issue will be included in the argument.

Issues on Review

> A. Question Certified (*restated*): If an insurance policy contains provisions fairly susceptible to conflicting or inconsistent meanings, should courts first attempt to resolve the ambiguity by considering admissible extrinsic evidence before construing the policy in favor of the insured and against the insurer who drafted the policy?
>
> B. Is the policy ambiguous in describing three different types of benefits and stating on the declarations page that "benefits shall increase each year" by a specified percentage, while another part of the policy states only that the "daily benefit" increases, thereby requiring that the policy must be construed so that the other two types of benefits covered must increase annually as well?
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> C. Should Florida abandon the century-old ambiguity principle governing interpretation of insurance policies in favor of a new standard allowing the insurer to resolve any ambiguities by extrinsic evidence?

Summary of Argument

From the time in 1904 when this Court first adopted the principle in *L'Engle v. Scottish Union and National Fire Insurance Company*, 37 So. 462 (Fla. 1904), that ambiguities in insurance policies will be resolved by a construction in favor of the

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[1] *Ruderman v. Washington Nat'l Ins. Co.*, 671 F.3d 1208 (11th Cir. 2012).

insured and against the insurer as the drafter of the policy, this Court has unwaveringly applied it to govern the resolution of all ambiguities in insurance policies in Florida for more than a century. The holdings stated in this Court's many decisions on the subject since then—the latest only a few months ago—have never strayed from that principle.

The Eleventh Circuit misread and misapprehended the holding and reasoning of *Excelsior Insurance Company v. Pomona Park Bar and Package Store*, 369 So.2d 938 (Fla. 1979), cherry-picking words and phrases out of context and thereby ignoring the actual holding and reasoning for the outcome of the case.[2] Properly understood, the passage from *Excelsior* quoted by the Eleventh Circuit merely observed that courts should use ordinary linguistic interpretive aids to harmonize apparent inconsistencies—if reasonably possible—before concluding that a policy

[2] When even a United States Court of Appeals is now doing so, it is safe to say that the use of non-contextual, isolated words and phrases from case authorities to support an asserted legal proposition—instead of relying only on the actual holding and its stated rationale—has become too routine. Once there was an accepted teaching that "briefing the case" (facts, issues, holding and rationale) must be done for the proper use and application of case authority—something to which this very Court has itself called attention. The opinion in *U.S. Fire Insurance Company v. J.S.U.B. Inc*., 979 So.2d 871, 877 (Fla. 2007), took the trouble to assert that proper case precedent must derive from a decided case "that furnishes a basis for determining later cases involving similar facts or issues," that "where policies and underlying facts are different the previous decision should not be binding." Unlike statutes, where even isolated words and phrases may have serious import, the proper use of case-authority to find governing law requires reliance on the actual holding and reasoning. When *Excelsior* is "briefed" in the old way, it could not possibly be found authority for the admission of extrinsic evidence to resolve an ambiguity in an insurance policy.

is ambiguous, thence to resolve the ambiguity in favor of the insured and against the insurer.

This Court does not intentionally overrule itself *sub silentio*. An express holding is required to conclude that the Court has receded from a one hundred years-long precedent such as *L'Engle*. Nothing in *Excelsior* could possibly be deemed to approach an explicit, expressed abandonment or contradiction of the *L'Engle* ambiguity principle in favor of a new rule allowing an insurer to "clarify" or resolve the ambiguity by extrinsic evidence and thereby avoid a construction in favor of the insured.

Although petitioner continues to argue that its policy is not ambiguous (both the trial and appellate courts have found it so), the conflict between the certificate of coverage and policy text unquestionably fits this Court's standard for insurance ambiguity. That test is whether policy text is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage. None of the policy text—even that on which petitioner relies—modified the term "benefits" in any way to restrict the increase to the single category advocated later in court. In short, the policy text is reasonably and fairly found ambiguous.

Because the ambiguity principle is entrenched in this State's jurisprudence and long understood by insurance carriers and those who purchase their policies with the expectation that it would govern their liabilities and rights, any change in favor

of the new one sought by petitioner would upset the fundamental ordering and settlement of affairs fixed by many existing insurance policies of all kinds and cause immense prejudice to all insureds.

Argument

> A. Question Certified (*restated*): *If an insurance policy contains provisions fairly susceptible to conflicting or inconsistent meanings, should courts first attempt to resolve the ambiguity by considering admissible extrinsic evidence before construing the policy in favor of the insured and against the insurer who drafted the policy?*

The issue is whether this Court has ever explicitly held that courts must first allow an insurer to attempt to resolve a true ambiguity by offering admissible extrinsic evidence before the policy may be construed in favor of the insured.[3] The short answer is ***NO***. This Court has applied the unconditional ambiguity principle consistently since its adoption.

In reviewing this Court's authorities to find the rule of decision, the Eleventh Circuit was mistaken in concluding there are two lines of cases in this Court conflicting with each other (one it labeled *Anderson* and the other *Excelsior*) about the proper application of the ambiguity principle to insurance policies.[4] To be

[3] Many of petitioner's case authorities are irrelevant. The fact that federal courts and some District Courts of Appeal over the years have referred to resolving policy ambiguities by extrinsic evidence hardly establishes that *this Court* has ever explicitly authorized that approach. The answer to the certified question must be found in this Court's decisions—not in the interpretation made by other courts. This Court should ignore citations of such decisions and focus on its own cases.

[4] 671 F.3d at 1211, referring to *Auto-Owners Inc. Co. v. Anderson*, 756 So.2d 29

sure, the Eleventh Circuit did correctly describe the actual holding in *Auto-Owners*: ambiguities must be resolved in favor of the insured and against the insurer who drafted the policy text.

In saying that it "qualified the long-standing rule of construing an ambiguity against the drafter,"[5] however, the Eleventh Circuit misunderstood the actual holding and rationale of *Excelsior*. The policy in *Excelsior* is not ambiguous, so there is no rational basis to think that it could authoritatively qualify any precedent relating to an insurance ambiguity.

Indeed this Court's breadth and constancy of actual holdings on the ambiguity principle began more than a century ago with *L'Engle v. Scottish Union and National Fire Insurance Company*, 37 So. 462 (Fla. 1904), and continues to this very day as the unchanging law of Florida on the subject. *Excelsior* and the later decision in *Auto-Owners* can be truly understood only by appreciating their place in the entire line of decisions beginning with *L'Engle* and extending to this very time.

Today the *L'Engle* opinion is challenging with its argot of common law pleading: *demurrer*, *amended declaration*, *plea in defense*, and *issue joined*. Nevertheless, in order to appreciate the holding and its rationale, one simply must

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(Fla. 2000); and *Excelsior Ins. Co. v. Pomona Park Bar & Pkg. Store*, 369 So.2d 938 (Fla. 1979). In this brief *Anderson* is referred to as *Auto-Owners*.

[5] 671 F.3d at 1211.

grasp the substance of the actual claims and defenses made. When all the allowed pleadings are analyzed, it appears that the insured sued the defendant on two separate theories.

The first theory was what we would today define as simply an action on the policy; an insured claims a breach by the insurer and demands policy benefits. The second theory, however, can and should fairly be read to be in the nature of a claim for breach of an agreement to provide particular fire insurance coverage. Today this second theory would be akin to a claim against an insurance agent for failing to procure/provide the coverage specified by the client.[6]

On the claim for benefits under the policy, this Court made clear that in reading the entire policy itself there is an unavoidable ambiguity. The body of the policy states that it is void if there is other insurance on the same property unless the company has otherwise so endorsed the policy itself. But a rider (apparently not deemed an "endorsement" on the face of the policy) specifies "$2,500 total concurrent insurance permitted." The company pleaded that the insurance was

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[6] *See e.g. First Nat. Ins. Agency Inc. v. Leesburg Transfer & Storage Inc*., 139 So.2d 476 (Fla. 2d DCA 1962) (complaint stated cause of action for breach of oral contract to provide additional insurance coverage on insured's building; valued policy insurance statutes do not apply to the claim because it is not an action on the policy but rather an action for damages arising from breach of an executory contract to procure/provide insurance); *see* COUCH ON INSURANCE, § 46:46 (party who agreed to procure/provide insurance for another is liable if as a result of failure to perform contract plaintiff suffers loss from lack of insurance coverage specified by agreement). *L'Engle* treats both theories as legally sufficient.

void because there is no endorsement on the face of the policy specifically permitting other insurance on the same property. Plaintiff's demurrer to that plea was overruled and resulted in judgment against him.

This Court explained that all provisions of the policy must be read together and harmonized if possible. But the provision voiding the entire policy if other insurance was not endorsed on the face could not be harmonized with the rider stating "$2,500 total concurrent insurance permitted." This Court expounded thus:

> "By the terms of the policy it was to be void, unless otherwise provided by agreement indorsed thereon or added thereto, if the insured then had or should thereafter make or procure any other contract of insurance, etc. The clause quoted from the endorsement slip purports to give the insurer's consent to or permission for insurance. It has direct reference to the provision against other insurance, and can have no reference to any other provision in the policy. It was inserted at the time the policy was written, for it appears upon the endorsement slip along with the description of the property insured, which bears the same date and the signature of the same agent as the policy itself. It purports clearly and definitely to give the insurer's consent or permission for '$2,500 total concurrent insurance.' Unless other or additional concurrent insurance was intended, then the clause means nothing more than that the insured is permitted to take out and carry this particular policy, which is absurd, for no such permission was within the contemplation of the parties, or required by the terms of the policy. The use of the word 'permitted,' shows that the insurer intended to give its consent to something that was prohibited by the policy. As the prohibition extends only to other insurance, and not to the insurance then written, we must apply the permission to the kind of insurance prohibited, viz., other insurance, for the conclusion is irresistible that the parties so intended it. … Therefore the term 'concurrent insurance,' used in granting permission for insurance, cannot be construed as embracing the one amount covered by the one policy in which the permission is granted,

> but necessarily embraces another amount or another policy, though it might, under some circumstances, include the former; otherwise we have an amount or a policy concurrent with itself alone, which is an impossibility under any definition of the word."

37 So. at 465. The Court then explained its application of the ambiguity principle:

> "It may be admitted that the language is somewhat ambiguous, but under well-settled rules for the interpretation of contracts the conclusion we reach is correct. Thus *the different provisions of the contract must be so construed, if it can reasonably be done, as to give effect to each*. Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail. If one interpretation, looking to the other provisions of the contract and to its general object and scope, would lead to an absurd conclusion, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability. *In all cases the policy must be liberally construed in favor of the insured*, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance it was his object to secure. *When the words are without violence susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss must, in preference, be adopted*." [e.s.]

37 So. at 465-66.

This final sentence plainly adopts an unqualified ambiguity principle. This Court explicitly stated that the interpretive principle it employed to resolve the ambiguity in this case "must, in preference, be adopted" and that it applies "in all cases." "Must" is mandatory. The words "in preference" obviously mean that the adopted principle is preferred over all other interpretive principles—therefore plainly excluding any theory of extrinsic evidence. If any doubt lingered about that unqualified application, the words "in all cases" surely removes it.

Having resolved the policy ambiguity and therefore sustaining plaintiff's direct action on the policy, the Court then turned to the alternative theory. It said:

> "We have thus far considered the question of interpretation from a consideration of the language of the policy alone, without the aid of extraneous circumstances. *The second count alleges* that the plaintiff 'applied to the defendant to issue a policy of insurance for $2,500 on said property against loss or damage by fire, and directed said defendant to provide in said policy for $2,500 additional insurance upon said property. And thereafter, in compliance with said request and direction, the said defendant did issue and deliver to the plaintiff, in consideration of the sum of $56.25 to it then paid by the plaintiff, its policy of insurance, which said policy permitted $2,500 other and additional insurance.' The third count contains the same allegations, except that it alleges that the policy issued 'permitted $2,500 total concurrent insurance.' The pleas do not deny that the plaintiff directed the defendant to provide in its policy for $2,500 additional insurance, and, if the clause we have been considering was inserted in response to such a direction, can it be doubted that the proper construction of the clause authorizes $2,500 additional or other concurrent insurance? … 'If a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received to enable the court to make a proper interpretation of the instrument.' This rule has been approved in this state." [e.s.]

37 So. at 466-67.

The only logical reading of this second part of *L'Engle* is that the admission of extrinsic evidence addresses just the second theory applying only to noninsurance contracts exclusively—not to insurance policies. This second theory was based on general contract law, not on the law unique to insurance policies.

General contract law on ambiguity may begin by searching for the actual meaning the contracting parties had in mind. On the other hand, general contract law may also instead eschew any search for actual meaning. Then the law simply imposes a duty of clarity on one of the parties and always interprets ambiguity against that party. *L'Engle* simply made the point on the second theory that a lack of clarity in a contract to procure/provide a specific kind of insurance may be explained by "extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received." *Id*.

L'Engle, however, had just upheld the principal theory on the interpretation of the policy itself, so the second theory about the general contract claim was meant to be didactic even though not controlling on the outcome. The general contract claim for breach of an agreement to procure/provide specific insurance was a moot point because the policy actually delivered the benefits he was seeking. The Court's exposition on admitting extrinsic evidence to resolve an ambiguity in a suit for breach of contract to provide a certain kind of insurance is in the nature of *obiter dictum*, as it certainly does not represent the essential holding in *L'Engle*.

So, the certified question is conclusively answered by *L'Engle*'s holding that the ambiguity principle "must in preference be adopted" and applied to insurance policies "in all cases" without prior consideration of extrinsic evidence to clarify or

resolve an ambiguity. While some extrinsic evidence might be admissible to clarify an ordinary contract to procure/provide an insurance policy with specific coverage, nothing in *L'Engle* can reasonably be read to authorize such evidence to resolve an ambiguity in the policy itself. Petitioner misreads *L'Engle* and misled the Eleventh Circuit.

This conclusion was placed beyond doubt a few years later in the very first case citing *L'Engle*, where this Court applied an unqualified ambiguity principle by once again holding: "When the words are without violence susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss *must in preference be adopted*." [e.s.] *Caledonian Insurance Co. v. Smith*, 62 So. 595, 596 (Fla. 1913). *Caledonian* makes no mention of the possibility of extrinsic evidence to resolve the ambiguity. To the contrary, *Caledonian* repeated that the ambiguity principle "***must in preference*** be adopted" to resolve the lack of clarity in the policy. From *Caledonian* on, this Court has consistently applied that unqualified ambiguity principle in all of its ensuing decisions on the subject—including *Excelsior*.

Only four years after *Caledonian*, this Court applied the unconditional ambiguity principle in three separate cases. *Queen Ins. Co. v. Patterson Drug. Co.*, 74 So. 807, 812, 814 (Fla. 1917) (citing *L'Engle* and holding "conditions in a policy of insurance limiting or avoiding liability will be strictly construed against

the insurer and liberally in favor of the insured"); and *National Surety Co. v. Williams*, 77 So. 212, 220 (Fla. 1917) (holding and applying ambiguity principle, stating that contracts of insurer drawn by itself are, if there is ambiguity in the language employed, to be resolved "most strongly" against it, citing *L'Engle*).

In *Palatine Insurance Company v. Whitfield*, 74 So. 869, 873 (Fla. 1917), this Court stated that the construction of the policy urged by an insurer "would reverse *the* ***well-settled*** *rules* of this and other states that the provisions of a policy limiting or avoiding liability are strictly construed against the insurer, and liberally in favor of the insured." [e.s.] Thus before the end of the First World War the unqualified ambiguity principle had become "well-settled" in this State.

In the decade following that war, this Court continued following the holding in *L'Engle*. In *Elliott v. Belt Automobile Association*, 100 So. 797 (Fla. 1924), the principle was applied by the Court to reject an insurer's contention that the words "actual loss sustained" by a judgment against the insured meant that the insured must first pay the judgment before the insurer could be liable under the policy, quoting *L'Engle*.

In the very next case, the court found no ambiguity in *Aetna Casualty and Surety Company v. Cartmel*, 100 So. 802, 803 (Fla. 1924), where a vehicle struck a "portion of the roadbed" and the policy excluded coverage for damage caused by striking the roadbed. But *Aetna* is significant for its admonition that insurance

contracts are subject to the same rules for ascertaining plain meaning generally used with all contracts: language should be given its "popular and usual significance unless the context requires a different construction." *Aetna* has been frequently cited by this Court in the ensuing years.

In the next decade, this Court held, without citation, that "When doubts arise in the interpretation of an insurance policy, they should be resolved in favor of the insured." *Sovereign Camp of the Woodmen of the World v. Lee*, 171 So. 526 (Fla. 1937). In that same year, in *New England Mutual Life Insurance Company v. Huckins*, 173 So. 696 (Fla. 1937), this Court again applied the unqualified ambiguity principle, also without citation.

In *Franklin Life Ins. Co. v. Tharpe*, 178 So. 300 (Fla. 1938), this Court held that where there are conflicting clauses in an insurance policy, the clause which affords an insured the most protection will prevail, again without citing any prior precedent. That same year, in *Poole v. Travelers Insurance Company*, 179 So. 138 (Fla. 1938), this Court resolved a coverage ambiguity between trailers and semi-trailers in favor of coverage, citing *Queen*, *National Surety* and *Elliott*.

This Court's decision in *New York Life Insurance v. Kincaid*, 186 So. 675, 677 (Fla. 1939), is noteworthy for its explanation. That case involved a disability benefit policy and the issue concerned a latent ambiguity in calculating the amount due. Citing *L'Engle*, *Queen*, *National Surety*, and *Aetna*, this Court held the policy

ambiguous and said:

> "It is a ***well-recognized*** *rule of construction and interpretation of contracts for insurance that the contract or policy must be liberally construed in favor of the insured* so as not to defeat, without plain necessity, his claim to the indemnity which, in making the contract of insurance, it was his purpose and intention to obtain. *Likewise ambiguous terms, conditions or provisions in a contract of insurance are to be fairly construed in favor of the insured*. In the case of *L'Engle*, this Court held that in construing the different provisions of a contract of insurance, all must be so construed, if it can reasonably be done, as to give effect to each. *Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail*. If one interpretation looking to the other provisions of the contract and to its general object and scope would lead to an absurd conclusion, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability. ***In all cases*** *the policy must be liberally construed in favor of the insured*." [e.s., c.o.]

186 So. at 677. Once again, this Court used clear wording—*in all cases*—to eliminate any possibility of extrinsic evidence as a possible method of resolving ambiguity. Indeed, after denying rehearing later in the opinion, this Court added even more clarity on this point:

> "In the original opinion it was pointed out that *the contract of insurance then being considered, was one controlled by the decisions of this court* and not the common law of England. *The company selected the terms, provisions and conditions of the contract*, and the words by which to express the same, delivered the same, received payments from the assured, and no fault was found with its provisions until a right of action accrued or a liability developed. *In construing written instruments it is fundamental, when doubtful or ambiguous meanings occur, that the same shall be construed against the draftsmen*. [e.s.]"

186 So. at 678.[7] Here this Court made absolutely clear that there is no search for meaning when a contract is wholly drafted by one party—in which case "it is fundamental" that it be construed against the party drafting it. When the duty of clarity is imposed on a contracting party who was the sole drafter of the agreement, the admission of extrinsic evidence would conflict with that duty of clarity imposed by law on the drafter and purpose behind the default principle.

Later that same term, in *Inter-Ocean Casualty Insurance Company v. Hunt*, 189 So. 240, 242 (Fla. 1939), this Court rejected the insurer's "narrow interpretation," applying the ambiguity principle and once again quoting *L'Engle*. Shortly after that, this Court reached the same holding in *National Casualty Co. v. Zmijewski*, 196 So. 587 (Fla. 1940), citing *National Surety*, *New England Mutual*, *Franklin*

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[7] For similar reasoning by another state supreme court, *see Penn. Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146 (Del. 1997):

> "It is the obligation of the insurer to state clearly the terms of the policy, just as it is the obligation of the issuer of securities to make the terms of the operative document understandable to a reasonable investor whose rights are affected by the document. Thus, if the contract in such a setting is ambiguous, the principle of *contra proferentem* dictates that the contract must be construed against the drafter.
>
> The policy behind this principle is that the insurer or the issuer, as the case may be, is the entity in control of the process of articulating the terms. The other party, whether it be the ordinary insured or the investor, usually has very little say about those terms except to take them or leave them or to select from limited options offered by the insurer or issuer. Therefore, it is incumbent upon the dominant party to make terms clear. Convoluted or confusing terms are the problem of the insurer or issuer-not the insured or investor." [c.o.]

695 A.2d at 1149-50. Even when the ambiguity principle is stated in Latin, extrinsic evidence is still excluded.

Life, and *Aetna*. Then in the midst of World War II, in *New York Life Insurance v. Bird*, 12 So.2d 454, 457 (Fla. 1943), this Court applied the ambiguity principle, citing *Queen* and *National Surety* (but, strangely, not *New England Mutual* which involved the identical coverage issue).

The next apparent case to involve the ambiguity principle came five years after World War II (and just before the onset of the Korean War). In *Firemans Fund Insurance Company of San Francisco v. Boyd*, 45 So.2d 499 (Fla. 1950), this Court exclaimed that it was "*committed to the rule* [e.s.] that a contract of insurance prepared and phrased by the insurer is to be construed liberally in favor of the insured and strictly against the insurer, where the meaning of the language used is doubtful, uncertain or ambiguous." 45 So.2d at 501 (citing *Franklin Life*, *National Casualty*, *Inter-Ocean* and *Kincaid*).

The next case[8] came after the Korean War armistice. In *Rigel v. National Casualty Company*, 76 So.2d 285, 286 (Fla. 1954), this Court applied the rule of construction against the drafter/insurer where it held that the policy rider excluding coverage for "carcinoma or any disease of the breasts" did not exclude coverage for cancer to another part of the body, citing *Aetna* and *New England Mutual*.

Two years after that in *The Praetorians v. Fisher*, 89 So.2d 329 (Fla. 1956), this

[8] *Friedman v. Virginia Metal Products Corp*., 56 So.2d 515 (Fla. 1952), is not within the *L'Engle* chain and is therefore inapplicable because it does not involve any controversy involving an insurance contract.

Court observed that:

> "Life insurance policies are prepared by experts in this complex field, and the interplay of their various provisions is intricate and difficult for the layman to understand. For this reason, *the public interest requires that a policy be interpreted by the courts in the manner most favorable to the insured*, and also that statutes governing insurance contracts be liberally construed so as to protect the public." [e.s.]

89 So.2d at 333 [citing *New England Mutual* and *Sovereign Camp*]). Once again, the rationale makes any use of extrinsic evidence incoherent with the duty behind the default rule of construction against the drafter.

The very next year, in *Gulf Life Ins. Co. v. Nash*, 97 So.2d 4, 10 (Fla. 1957), this Court said: "The *principle of law is firmly imbedded in the jurisprudence of this State* that contracts of insurance should be construed most favorably to the insured." [e.s.] Nearly a decade later in *Hartnett v. Southern Insurance Company*, 181 So.2d 524 (Fla. 1965), this Court stated the reasons behind the ambiguity principle thus:

> "There is no reason why such policies cannot be phrased so that the average person can clearly understand what he is buying. *And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions*." [e.s.]

181 So.2d at 528. Once again, this Court's rationale for this principle makes extrinsic evidence inappropriate to its function.

Two years after that in *Continental Casualty Company v. Gold*, 194 So.2d 272, 276 (Fla. 1967), this Court quoted a standard legal encyclopedia for the proposition that in "the general rule that ambiguous or uncertain provisions will be construed most favorably to the insured is applied" but cited no Florida cases. Another two years later in *DaCosta v. General Guaranty Insurance Company of Florida*, 226 So.2d 104 (Fla. 1969), this Court relied on the rule that where two interpretations equally fair may be given, that which provides the greater indemnity will prevail, citing *Elliott*.

In *Harris v. Carolina Life Insurance Company*, 233 So.2d 833, 834 (Fla. 1970), this Court was "mindful of the rule requiring that ambiguous provisions of an insurance policy be liberally construed in favor of the insured" but once again cited none of the many cases discussed above. Then in *Stuyvesant Insurance Company v. Butler*, 314 So.2d 567, 570 (Fla. 1975), this Court held that it "has consistently adhered to the principle that … if uncertainty is present in a policy, it should be construed against the insurer and in favor of the insured." 314 So.2d at 570 (citing *Continental Casualty*, *Harris* and *Aetna*).

In this extended history of the insurance ambiguity principle, one must note the several decisions making clear that any admission of extrinsic evidence to resolve an ambiguity in an insurance policy would be incompatible with the rationale for the rule. The Court will therefore consequently also note the utter absence thus far

of any holding that the ambiguity principle must first give way to the admission of extrinsic evidence to resolve an ambiguity apparent in the policy. For three quarters of a century this Court's cases had made no holding that could possibly be read to require that extrinsic evidence be first admitted to resolve an ambiguity in an insurance policy. And so we come at last to *Excelsior Insurance Company v. Pomona Park Bar and Package Store*, 369 So.2d 938 (Fla. 1979), the Eleventh Circuit's candidate for that proposition. The question is whether *Excelsior* did so.

The first thing to understand about the policy in *Excelsior* is that it was *not* ambiguous. *Excelsior* specifically held that the exclusion *unambiguously* barred any coverage for the suit against the licensees. The insured had failed to demonstrate any lack of clarity in the exclusion. The opinion leaves no doubt that the ambiguity principle had no effect on the holding. So any discussion within the opinion about admitting evidence to resolve an ambiguity would be the purest—the most unadulterated—form of *obiter dictum* imaginable. That is, it *would* be *if* there had been such a discussion within *Excelsior*.

But there is not. This Court rejected the insured's argument that, because the whole business of the insured involved the sale of intoxicating beverages, the exclusion effectively barred *all* coverage under the policy. This Court held that the exclusion plainly disclaimed coverage *only for suits against the licensee claiming a violation of liquor laws that actually caused injury*. Therefore the policy actually

provided coverage for other kinds of claims against the licensee, such as slip-and-fall, or even a liquor law violation not causing injury—contrary to the insured's contention. As this Court explained:

> "*Neither does it avail [the insured] that ambiguities and inconsistencies in a contract are to be interpreted against the draftsman* or, as started in the context of insurance law, construed in favor of the insured. There are important qualifications to the rule *that prohibit its application here. Only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite*. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties. Moreover, even were we to find that the policy is ambiguous, that is susceptible of both [the insured's] and Excelsior's interpretations, we would still have to prefer Excelsior's interpretation because it maintains the widest range of coverage and is therefore actually the more favorable to the insured." [e.s., c.o.]

369 So.2d at 942. This Court clearly held that the ambiguity principle was did not govern the outcome; indeed the policy provided more coverage than the *insured* had argued.

Because the plain meaning of the policy was clear, no inconsistent meanings needed to be resolved. There is not a single word within *Excelsior* distinctly capable of being read to hold that extrinsic evidence should be considered to clarify or resolve an ambiguity before an actual ambiguity may properly be determined. In fact there is nothing in the *Excelsior* opinion that even uses the words "extrinsic evidence". The Eleventh Circuit's interpretation of *Excelsior*—

urged upon it by adept counsel—rests only on counsel's advocacy and finds utterly no textual support within *Excelsior*.

To be sure, *Excelsior* did make the point about ascertaining ambiguity first made by this Court in *Aetna* and repeated several times since. It has to do with the methodology for properly determining whether there is a true ambiguity in the policy.[9] An ambiguity exists only when there is a genuine lack of clarity in policy text *after* ordinary interpretive tools have been employed to reconcile what may seem to be inconsistent textual provisions. The teaching here is that there are interpretive rules and linguistic guides generally used to determine the plain meaning of a writing, and they must be employed if necessary before the policy may be deemed ambiguous.[10] Genuine ambiguity can be found to exist only when

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[9] 369 So.2d at 941 ("Every provision in a contract should be given meaning and effect, and apparent inconsistencies reconciled if possible"); *Aetna*, 100 So. at 803 ("contracts are subject to the same rules of construction applied to other contracts, and language used in a "*policy of insurance is to be given its popular and usual significance*, unless the context requires a different construction.")

[10] In this, the Court refers primarily to context, the rules of grammar and the linguistic canons. The linguistic canons are widely employed in many disciplines to find the plain meaning of a writing:

> "A linguistic canon of construction reflects the nature or use of language generally. It does not depend on the legislative character of the enactment in question, nor indeed on its quality as a legal pronouncement. It applies in much the same way to all forms of language … Linguistic canons of construction are not confined to statutes, or even to the field of law. They are based on the rules of logic, grammar, syntax and punctuation; and the use of language as a medium of communication generally."

Francis Bennio, STATUTORY INTERPRETATION 805 (2d ed. 1992). On the other hand, because the *substantive* canons may involve doctrinal, public policy values,

every effort within these ordinary interpretive concepts fails to explain text argued to be unclear.

Properly analyzed *Excelsior* makes the use of extrinsic evidence for insurance ambiguities absurd. If the ambiguity principle rests on the duty of clarity imposed on insurance companies to draft their standard form policies to be clear in every way, what is the rationale for resolving the lack of clarity by outside evidence of meaning? Why consider hearing extrinsic evidence when the insurer has failed in a duty imposed by law to draft clearly? Conceptually the admission of extrinsic evidence is simply incoherent with the legal duty imposed. Indeed it would actually encourage deliberate indifference to clarity by allowing the carrier to rely on the second chance to explain what it wants the policy to mean.

We reiterate. Apart from the fact that the discussion of extrinsic evidence is immaterial to the result in *Excelsior* because of the lack of ambiguity, there is nothing in *Excelsior* retreating from the rule that originated in *L'Engle*. Nor is there any statement or *holding* in *Excelsior* that before the policy may construed in favor of the insured the court must first consider extrinsic evidence from the insurer for any purpose. When properly understood, the *Excelsior* text relied on by the Eleventh Circuit merely directs courts first to reconcile apparent

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and other subjective considerations, they may be generally inappropriate to find the intent of parties to a contract and, under the ambiguity principle, are thus categorically unavailable to interpret (or for the *construction* of) insurance policies.

inconsistencies in policy text before settling on an ambiguity. Nothing even remotely suggests that the insurer can be relieved of its duty of clarity in policy text by adducing evidence—and after a claim has been made at that!—indicating some meaning contrary to coverage reasonably found within the policy.

After *Excelsior*, all the cases are the same. The very next is *State Farm Mutual Automobile Insurance Company v. Pridgen*, 498 So.2d 1245, 1248 (Fla. 1986), where notwithstanding the absence of ambiguity, *Pridgen* quoted the principle and actually cited *Excelsior* as authority for it.[11] Indeed, if the Eleventh Circuit had read only *Pridgen* it might have wondered how it could be said *Excelsior* had qualified it in any way.

Next in *Prudential Property and Casualty Insurance Company v. Swindal*, 622 So.2d 467, 470 (Fla. 1993), this Court applied the ambiguity principle to construe an intentional injury exclusion in a homeowner's policy in favor of insured; citing *Gulf Life*, *Stuyvesant* and *Poole*. Four years later, in *Berkshire Life Insurance Company v. Adelberg*, 698 So.2d 828 (Fla. 1997), this Court lucidly stated:

> "*It has long* ***been a tenet of Florida insurance law*** *that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer*. … In construing this policy, we simply give the term 'your occupation' the meaning that an average buyer of an insurance policy would give to the term. *Berkshire's contention that 'your*

[11] This, the case that the Eleventh Circuit and petitioner think stands for extrinsic evidence!

> *occupation' should be read to mean any sales position rather than the sales position Adelberg held at the time he was injured is not a distinction made by Berkshire in writing its policy. If this was Berkshire's intent, the company should have so stated in unambiguous language*.
> …
> The principle of the law is *firmly imbedded in the jurisprudence of this State* that contracts of insurance should be construed most favorably to the insured. … " [e.s.]

698 So.2d at 830. Again, as against this clear statement, how could *Excelsior* be so misunderstood? Moreover, in *Container Corp. of America v. Maryland Casualty Company*, 707 So.2d 733, 736 (Fla. 1998), decided the next year, this Court determined that the "additional insured" clause had to be construed in favor of the insured, citing *Rigel*.

The next decision is important on its own. *Deni Associates of Florida Inc. v. State Farm Fire and Casualty Insurance Company*, 711 So.2d 1135 (Fla. 1998), is relevant here for the first of its two holdings. In this first holding, this Court found no ambiguity in an absolute pollution exclusion, quoting *Pridgen*'s statement that:

> "provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy. *See Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla.1979). However, '[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.' "[12]

[12] *Deni*, 711 So.2d at 1138; *Pridgen*, 498 So.2d at 1248.

At that point, this Court rejected an argument for admitting extrinsic evidence under the "latent ambiguity" doctrine originating in probate contests about the meaning of a last will and testament. This court flatly asserted that the "latent ambiguity" doctrine "*could **never** serve* [e.s.] as a means for circumventing the plain language of the pollution exclusion clause." 711 So.2d at 1139. Obviously its holding and rationale on the latent argument are equally pertinent to any other ambiguity in an insurance policy. Sometimes *never* really does mean *never*.

Another case from that year is *State Farm Fire and Casualty Company v. CTC Development Corp.*, 720 So.2d 1072, 1076 (Fla. 1998), where the undefined term "accident" in a contractor's liability policy was reasonably subject to differing interpretations and construed in favor of the insured, this Court citing *Container Corp.* and *Pridgen*. That was followed two years later by *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000), acknowledged by the Eleventh Circuit as holding foursquare for the ambiguity principle.

Swire Pacific Holdings Inc. v. Zurich Insurance Company, 845 So.2d 161 (Fla. 2003), applied the ambiguity principle (cited *Auto-Owners*, *Prudential* and *Pridgen*), adding that "simply because a provision is complex and requires analysis for application, it is not automatically rendered ambiguous." That is the same point previously made in *Aetna* and *Excelsior*.

In nearly successive years came *Travelers Indemnity Company v. PCR Inc.*, 889

So.2d 779, 785-86 (Fla. 2004), *Taurus Holdings Inc. v. U.S. Fidelity and Guaranty Company*, 913 So.2d 528, 532 (Fla. 2005), and *Garcia v. Federal Insurance Company*, 969 So.2d 288, 291, 291-92 (Fla. 2007). *Travelers* held in favor of the insured, finding an inconsistency between a coverage clause and an exclusionary clause, citing *Swire* and *Auto-Owners*. *Taurus* held that the policy was not ambiguous, stating the ambiguity principle and citing *Swire*, *Auto-Owners* and *Deni*, but stressed that the policy must actually be ambiguous, again citing *Excelsior* and *Pridgen*. *Garcia* also held there was no ambiguity after stating the ambiguity principle, adding an important principle relating to ascertaining plain meaning, namely that "we may consult references commonly relied upon to supply the accepted meanings of words." 969 So.2d 288 at 291-92.

In *U.S. Fire Insurance Company v. J.S.U.B., Inc.*, 979 So.2d 871, 877 (Fla. 2007), this Court found no ambiguity between the coverage and exclusions in a general contractor's CGL policy providing both products and completed operations coverage for an occurrence. The opinion states the ambiguity principle, citing *Taurus*, but adds that courts must read coverage and exclusions together, citing *Auto-Owners* and *CTC*. Only two years ago in *Penzer v. Transportation Insurance Company*, 29 So.3d 1000 (Fla. 2010), this Court held there was an ambiguity and stated the ambiguity principle, citing *U.S. Fire*, *Taurus*, *Garcia*, and *Auto-Owners*. *Penzer* contains a discussion of a linguistic canon (the last antecedent) in

ascertaining plain meaning.

Finally, there were two cases only last year: *State Farm Mutual Automobile Insurance Company v. Menendez*, 70 So.3d 566, 570 (Fla. 2011), and *Chandler v. Geico Indemnity Company*, 78 So.3d 1293, 1299-1300 (Fla. 2011). *Menendez* held there was no ambiguity and that the household exclusion unambiguously barred the passenger's claim, citing *Travelers*. *Chandler*, too, found no ambiguity and cited *Auto-Owners*, *Swire*, *Penzer* and *Garcia*.

So there we have it. Perhaps an exhaustive listing and examination of all this Court's insurance cases involving the ambiguity principle.[13] It demonstrates with utter clarity that there is no conflict in holdings anywhere along the line. For more than a century, this Court has unrelentingly applied the unqualified ambiguity principle first found in *L'Engle* in 1904, from which it has not receded or changed in any direct, express holding since then. The Court has also made clear in so doing that any reliance on extrinsic evidence would be entirely incompatible with the rationale behind the principle.

It is therefore inescapable that the Eleventh Circuit's view that *Auto-Owners* and *Excelsior* are in conflict requires reading *Excelsior* to contain an unspoken decision to *silently* recede from the entire *L'Engle* line of cases. There is not a

[13] We think it "exhaustive" but even with electronic research it is possible to overlook some case that should have been included. Maybe "nearly exhaustive" is better.

single word in the cases since *L'Engle* in favor of a new rule allowing an insurer to "clarify" or resolve a genuine ambiguity by adducing extrinsic evidence after a policy has been issued and claim has been made, thereby avoiding a construction in favor of the insured. That is to say, even though *Excelsior* manifestly contains no such direct holding, the Eleventh Circuit conceived that this Court nonetheless covertly meant to cancel 100 years of holdings to the contrary.

This kind of interpretive methodology, though popular among some academics—not to mention some judges and lawyers—is at odds with the stated doctrine of this Court about overruling itself. In *Puryear v. State*, 810 So.2d 901 (Fla. 2002), this Court has made clear that it does not overrule its previous direct holdings *sub silentio* by implication or indirection. 810 So.2d at 905-06. Under *Puryear* only an express holding by this Court that it is receding from a prior precedent will create such a change in law arising from the Court's opinions. No words in *Excelsior* even remotely approach an express abandonment or contradiction of the century-old *L'Engle* principle—which this Court actually applied just a few months ago in *Chandler*.[14]

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[14] *See* 78 So.3d at 1299-1300 ("The conflict in this case is based on the interpretation of an insurance contract upon application of well-established Florida law. Accordingly, we must first review the principles applicable to the interpretation of a contract of insurance. First, the contract must be construed 'in accordance with the plain language.' Where the policy language 'is susceptible to more than one reasonable interpretation, one providing coverage and ... another limiting coverage, the insurance policy is considered ambiguous. The *ambiguous*

B. Is the policy ambiguous in describing three different types of benefits and stating on the declarations page that "benefits shall increase each year" by a specified percentage, while another part of the policy states only that the "daily benefit" increases, thereby requiring that the policy must be construed so that the other two types of benefits covered must increase annually as well?

The legal question in this case was whether the automatic 8% increase in benefits in the policy applies just to the $180 daily benefit or also to the $250,000 lifetime maximum benefit amount and the $150,000 per-occurrence maximum benefit. If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the policy is ambiguous as a matter of law. *Auto-Owners Insurance Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). The policy in suit meets all the requirements for ambiguity.[15]

The Certificate Schedule on each policy detailed the amount of coverage as follows:

Home Health Care Benefit	$180/Day
Lifetime Maximum Benefit Amount	$250,000
Per Occurrence Maximum Benefit	$150,000/Illness

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language is then construed 'against the drafter and in favor of the insured' and 'exclusionary clauses are construed even more strictly against the insurer than coverage clauses.'" [e.s.] *Chandler* cites *Auto-Owners* for the ambiguity principle.

[15] *See also State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So.3d 566 (Fla. 2011) ("Policy language is considered to be ambiguous ... if the language 'is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.' (quoting *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779, 785 (Fla. 2004) and *Swire Pac. Holdings v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla. 2003)).

Automatic Benefit Increase Percentage Benefits increase by 8% each year

The policy provides three types of benefits: the $180 daily home health care benefit, the $250,000 lifetime maximum benefit, and the $150,000 per occurrence maximum benefit. Immediately after listing all these benefits, the policy provides for an automatic benefit increase percentage and specifies that the "benefits increase each year." (Emphasis added). If one looked at nothing more, one could conclude fairly that all these benefits did, of course, automatically increase by 8% each year. But things are not so clear because the body of the policy states the following:

> *Home Health Care*: We will pay 100% of the usual and customary charges for Home Health Care expenses if the care was pre-authorized. If the care was not pre-authorized we will pay 75% of the usual and customary charges for Home Health Care expenses incurred, up to 75% of the Daily Benefit Amount shown in the schedule. These benefits will be paid up to the Home Health Care Daily benefit shown in the schedule. All benefits will be limited to the Per Occurrence Maximum Benefit for each injury or sickness and the Lifetime Maximum Benefit Amount for ALL injuries and sicknesses which are shown in the certificate schedule. (Emphasis added in in bold).
>
> B. *Automatic Daily Benefit Increase*: *On each policy anniversary, we will increase the Home Health Care Daily Benefit* payable under this policy by the Automatic Benefit Increase Percentage shown on the schedule page. (Emphasis added).
>
> …
>
> E. *Per Occurrence Maximum Benefit*: no further benefits will be payable for a sickness or injury when the total sum of Home Health Care or Adult Day Care benefits paid for that occurrence equals the amount shown in the schedule for the Per Occurrence Maximum Benefit. Successive confinement due to the same or related cause not

> separated by at least 6 months of normal daily living will be considered as the same occurrence. (Emphasis added).
> F. *Lifetime Maximum Benefit*: This coverage shall terminate and no further benefits will be payable when the total sum of Home Health Care or Adult Day Care benefits paid equals the amount shown in the schedule for the Lifetime Maximum Benefit Amount. Any premium paid for a period after termination will be refunded. (Emphasis added).

Paragraph B specifically states that "[o]n each policy anniversary, [Washington National] will increase the Home Health Care Daily Benefit payable under this policy by the Automatic Benefit Increase Percentage shown on the schedule page." One notes that the insurer placed no provision in the body of the policy expressly stating that it will ***not*** increase the lifetime maximum benefit and per occurrence maximum benefit by 8% each year. To the contrary, the policy states that: "All benefits will be limited to the *Per Occurrence Maximum Benefit* for each injury or sickness and the Lifetime Maximum Benefit Amount for *all* injuries and sicknesses which are shown in the certificate schedule." [e.s.]

Paragraph B also refers to the schedule page. Paragraphs E and F specifically state that the per occurrence maximum benefit and the lifetime maximum benefit will terminate when the benefits "equal the amount shown in the schedule" for those benefits. Thus, even the body of the policy, upon which petitioner relies, refers to the schedule four times and twice incorporates text providing that *all* three benefits (the daily benefit, the lifetime benefit, and the per occurrence benefit)

increase by 8% each year.

In sum, the policy provides in one place (the schedule) that *all* benefits (the daily benefit, the lifetime benefit, and the per occurrence benefit) increase by 8% each year, but states elsewhere (in the body of the policy) only that the daily benefit increases by 8% each year. Yet the body of the policy refers to the schedule four times without specifying that the lifetime benefit and the per occurrence benefit do not increase annually as does the daily benefit. There is nothing unfair or unreasonable about a conclusion that the policy is patently ambiguous as to whether all benefits increase or only one of them does.

And so the federal trial court concluded that there was, in fact, an ambiguity in the policy, stating on plaintiff's motion for summary judgment that the court "has already determined that the Policies contain an ambiguity." Because the relevant policy language is susceptible to more than one reasonable interpretation, one providing for an increase of all benefits, and the other limiting the increase to only one benefit, both federal courts accurately applied Florida law in finding the ambiguity. *See Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000) (holding that per-occurrence $750,000 limit purporting to fix total damages was inconsistent with separate declarations of coverage for each vehicle involved in accident); *Berkshire Life Ins. Co. v. Adelberg*, 698 So.2d 828, 830 (Fla. 1997) (rejecting insurer's argument that policy term "your occupation" should be read to

mean "any occupation" where policy failed to express that distinction); *Rigel v. National Cas. Co.*, 76 So.2d 285, 286 (Fla. 1954) (resorting to rule of construction unfavorable to insurer where policy rider excluding coverage for "carcinoma or any disease of the breasts" did not state that it excluded cancer to other parts of the body); *Franklin Life Ins. Co. v. Tharpe*, 178 So. 300 (Fla. 1938) (with conflicting provisions, clause affording insured most protection will prevail); *Caledonian Ins. Co. v. Smith*, 62 So. 595, 596 (Fla. 1913) ("When the words are without violence susceptible of two interpretations, that which will sustain the claim of the insured and cover his loss must in preference be adopted"; *L'Engle v. Scottish Union and National Fire Insurance Company*, 37 So. 462, 466 (Fla. 1904) (where two interpretations fairly may be given, that which gives greater indemnity prevails and court "must" choose interpretation sustaining claim of insured).

The federal courts were well within this Court's holdings on the ambiguity principle in holding that the policy in this case presented a classic ambiguity as to the benefits increase provision. This Court should answer the Eleventh Circuit with a positive response on this issue—that the policy in suit falls well within Florida case law for ambiguous coverage provisions.

C. *Should Florida abandon the century-old ambiguity principle governing interpretation of insurance policies in favor of a new standard allowing the insurer to resolve any ambiguities by extrinsic evidence?*

Petitioner asks this Court to discard a century of unified jurisprudence on insurance policy interpretation employing an unqualified ambiguity principle. The insurance carrier wants this Court instead to allow insurers to restate a meaning by extrinsic evidence adduced long after the policy was purchased and delivered and the dispute arose. Before such an inveterate principle may be thus cast aside, it seems important to repeat several of this Court's declarations over the years about the strength of its dedication to this dominant feature of insurance law.

Almost a half century after *L'Engle*'s adoption, this Court proclaimed in *Firemans Fund Insurance Company of San Francisco v. Boyd*, 45 So.2d 499 (Fla. 1950), that it "*is committed to the rule* that a contract of insurance prepared and phrased by the insurer is to be construed liberally in favor of the insured and strictly against the insurer, where the meaning of the language used is doubtful, uncertain or ambiguous." [e.s.] 45 So.2d at 501. After all these years, an insurer urges that the commitment be abandoned merely because this insurer failed to state clearly which of its benefits increase yearly and which do not.

In *The Praetorians v. Fisher*, 89 So.2d 329 (Fla. 1956), this Court stated that:

> "Life insurance policies are prepared by experts in this complex field, and the interplay of their various provisions is intricate and difficult for the layman to understand. For this reason, *the public interest requires that a policy be interpreted by the courts in the manner most favorable to the insured*, and also that statutes governing insurance contracts be liberally construed so as to protect the public." [e.s.]

89 So.2d at 333. When those words were written, the public interest had not weakened after more than a half-century under the rule laid down in *L'Engle*. Because insurance of many kinds is now pervasive throughout all of civil society, that public interest has since been massively intensified.

In *Gulf Life Insurance Company v. Nash*, 97 So.2d 4, 10 (Fla. 1957), this Court assured Floridians that the ambiguity principle "*is firmly imbedded in the jurisprudence of this State* that contracts of insurance should be construed most favorably to the insured." [e.s.] One wonders how firmly embedded it is if a case with the present facts could lead to its demise.

In *Hartnett v. Southern Ins. Co.*, 181 So.2d 524, 528 (Fla. 1965), this Court promised:

> "There is no reason why such policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts *should* ***and will*** *construe* them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions." [e.s.]

With these words, this Court covenanted that this important principle of consumer protection would be and remain permanent.

In *Stuyvesant Insurance Company v. Butler*, 314 So.2d 567, 570 (Fla. 1975), this Court emphatically asserted that it has "*consistently adhered to the principle* [e.s.] that contracts of insurance should be construed so as to give effect to the

intent of the parties and if uncertainty is present in a policy, it should be construed against the insurer and in favor of the insured," citing *Continental Casualty*, *Harris*, *Hartnet* and *Aetna*. But according to petitioner, now this consistent adherence should become forever lost like words on an "Etch-a-Sketch".

Finally and more recently, in *Berkshire Life Insurance Company v. Adelberg*, 698 So.2d 828, 830 (Fla. 1997), this Court decreed that it has "*long been a tenet of Florida insurance law* that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer." [e.s.] Tenets are principles closely and firmly held. If law is to be reliable and predictable, its tenets should not shift and change in each new wind.

So in sum we have this Court's solemn declaration of constancy, avowing that "the public interest *requires*" the ambiguity principle. This Court "*is committed*" to the rule. This rule is "*firmly embedded in the jurisprudence*" of Florida. This rule has "*long been a tenet* of Florida insurance law." This rule "*should and will continue*." By these declarations this Court has given the world to understand that the very length, purpose and assiduous, consistent application of the ambiguity principle invests it with something approaching a structural quality, almost akin to bedrock—maybe even quasi-constitutional status. Yet this Court is now being urged to tear down this pillar of our insurance law just because an insurance

company failed in one of its standard form policies to say clearly that only one of its three benefits increases yearly.

The best response to petitioner's request may be simply to recall what this Court said only a few months ago about the meaning of standing by its decisions:

> "In Florida, the 'presumption in favor of stare decisis is strong.' 'Our adherence to stare decisis, however, is not unwavering. The doctrine of stare decisis bends where there has been a significant change in circumstances since the adoption of the legal rule or where there has been an error in legal analysis.'
>
> Stare decisis does not yield just because a precedent is merely erroneous; the 'gravity of the error and the impact of departing from precedent must be carefully assessed,' guided by the following factors:
>
> > In deciding whether to depart from a prior decision, one relevant consideration is whether the decision is 'unsound in principle.' Another is whether it is 'unworkable in practice.' *Ibid*. And, of course, reliance interests are of particular relevance because '[a]dherence to precedent promotes stability, predictability, and respect for judicial authority.'
>
> …
>
> We have recognized that the circumstance that 'the prior decision proved unworkable due to reliance on an impractical legal 'fiction' militates in favor of departing from a precedent. *We have also recognized that the prospect of 'serious injustice to those who have relied on' a precedent militates against departing from that precedent*." [e.s., c.o.]

Brown v. Nagelhout, --- So.3d ---, 2012 WL 851033 *4, 37 Fla. L. Weekly S225, S226 (Fla. Mar. 15, 2012). Under this imposing standard, this Court may abandon such a long-established, and so frequently and steadfastly applied rule of decision, only when these relevant considerations virtually demand such change.

Which none of them do. With the ambiguity principle, there is no denying that the reliance interests are king-sized, deep-seated and long-standing. And it would be strikingly irrational to find "serious interpretive error" in this principle, for it is really a doctrinal preference—balancing the relative interests and the unequal abilities of insurer and insured to protect those interests. Casting this principle aside in spite of its compelling history could even weaken judicial credibility.

Then too, it would necessarily involve this Court in public policy decisions and adjustments left with the Legislature. By explicitly empowering the Department of Insurance to disapprove standard policy forms that are ambiguous, the Legislature has integrated this Court's unqualified ambiguity principle into its statutory control over the content of insurance policies generally.[16]

But finally and most telling, in the second part of its holding in *Deni Associates of Florida v. State Farm Fire and Casualty Insurance Company*, 711 So.2d 1135 (Fla. 1998), this Court was asked to abandon *the very **same** ambiguity principle* and adopt a new interpretive standard for insurance policies called the "doctrine of reasonable expectations." This Court responded by stating compelling reasons to apply *stare decisis* to this very same ambiguity principle while rejecting an

[16] *See e.g*. § 627.411 Fla. Stat. (2011) (requiring Department to disapprove ambiguous insurance policy forms); 627.412, Fla. Stat. (2011) (specifying standard contract provisions required by law); § 627.413, Fla. Stat. (2011) (specifying subjects that must be included in every policy); § 627.414, Fla. Stat. (2011) (specifying additional policy contents that may be included); § 627.419, Fla. Stat. (2011) (stating some rules for construction of policies).

indistinguishable extrinsic evidence rule.

Firmly rejecting change, *Deni* instead staunchly reaffirmed that "in Florida ambiguities are construed against the insurer."[17] This Court spoke of significant uncertainty resulting from the adoption of any extrinsic evidence theory and its application to insurance policy ambiguities. The Court predicted that construing policies based on a determination as to whether the insured's subjective expectations are reasonable "can only lead to uncertainty and unnecessary litigation."[18]

Adopting petitioner's extrinsic evidence argument in this case is certain to lead to exactly this identical, unintended consequence—only on a considerably more drastic scale. The extrinsic evidence that *insurers* would adduce (as they did here) will undoubtedly be their own variety of *reasonable expectations*. They will try in every case to show what their underwriters *reasonably expected* to be the meaning and application of the text at issue. The nature and extent of the consequent litigation this Court presciently avoided in *Deni* will fade into a microscopic trifle should these multi-state insurance companies with their built-in law departments and their *pro hac vice* lawyers be thereby unleashed in most cases to insist on

[17] 711 So.2d at 1140.

[18] 711 So.2d at 1140 (quoting *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 803 (Utah 1992) ("Today, after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application")).

proving how their expectations are always the very quintessence of reason itself.

Receding from the ambiguity principle would be exceedingly unjust and unwise. It is an idea whose time should never be.

Conclusion

If it please the Court, respondents urge the Court to answer the issues thus:

A. NO.

B. YES.

C. NO.

Certificate of Service

I hereby certify that I served all persons named on the service list below with a true copy of this Answer Brief by electronic mail and by USPS, first class postage prepaid, this _____ day of June, 2012.

Certificate of Font Compliance

I have set this brief in MS Word 2010, Times New Roman, 14 point font.

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