Supreme Court

of the

State of Florida

Case No. SC12-323
Lower Tribunal Case No. 10-14714

WASHINGTON NATIONAL INSURANCE CORPORATION,
Successor in Interest to Pioneer Life Insurance Company,

Appellant,

– v. –

SYDELLE RUDERMAN, by and through her Attorney-in-fact, Bonnie Schwartz, SYLVIA POWERS, by and through her Attorney-in-fact, Les Powers, individually and on behalf of all others similarly situated, KATE KOLBER, ROBERT SCHWARZ, BLUMA SCHWARZ,

Appellees.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT IN CASE NO. 11-11416

APPELLANT'S INITIAL BRIEF ON MERITS

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STATEMENT OF THE CASE

This appeal concerns a Limited Benefit Home Health Care Coverage Policy (the "Policy") issued to Sydelle Ruderman ("Ruderman"), Sylvia Powers ("Powers"), and other class members by WNIC's predecessor, Pioneer Life Insurance Company. The Policy is straightforward. It provides limited home health care ("HHC") benefits. The Policies were generally sold to persons in their 50's and 60's, and were designed to pay benefits when the insureds aged, became sick or injured, and needed caregivers to provide services (such as bathing, dressing, feeding, etc.) in their residences.

The Policy provides, at the highest level of coverage, a "Daily Benefit" of $180/day. The Policy expressly increases the Daily Benefit by 8% a year. As a result of the increase, the Daily Benefit would grow over time to more than $500/day. The 8% escalator provided insureds with the ability to obtain "24/7" care when they got older, became sick or injured, and required extensive care.

The Policy contains two "caps" on the amount of Daily Benefits the insureds can obtain during the life of the Policy. *First*, there is a "per occurrence" cap on the Daily Benefits of $150,000. That is, if an insured becomes injured or ill and needs benefits, the insured's coverage for that specific occurrence or condition will be limited to $150,000. *Second*, there is a "lifetime maximum cap" on the Daily Benefits of $250,000.

Plaintiffs alleged that the 8% increase to the Daily Benefit also increased the two caps on the Daily Benefits. Although it is undisputed that the Policy itself expressly applies the 8% increase only to the Daily Benefit, Plaintiffs contend that the Certificate Schedule attached to the Policy, read in isolation from the remainder of the Policy, was ambiguous on this point. Under the Plaintiffs' interpretation, the "limited" HHC Policy with caps of $150,000 and $250,000 is really a limitless HHC policy because the caps quadruple over 20 years when subjected to an 8% escalator, providing an essentially unlimited amount of coverage.

Two previous decisions from federal district courts (in Florida and Georgia) held that the Policy was unambiguous and that the 8% increase did not apply to the caps on Benefits, but only the Daily Benefit. This time around, the district court held that the Policy was ambiguous. After that ruling, WNIC amassed a mountain of unchallenged extrinsic evidence demonstrating that WNIC and the Policyholders (as well as the Florida insurance regulators that approved these policies) understood that the caps on the Daily Benefits would not increase. Every document, from the Actuarial Memoranda submitted by WNIC to Florida's regulators that approved the product, forms and brochures, to letters written many years later by the Plaintiffs, reflects the understanding that the 8% increase did not apply to the caps.

The district court ruled, however, that under Florida law the court could not consider extrinsic evidence in interpreting an ambiguous insurance contract. Rather, the district court held that, under Florida law, a court must disregard extrinsic evidence and automatically construe any policy in favor of the insured, even if that means interpreting the policy in a manner that contrary to both the insured's and insurer's understanding of the policy. The district court thus entered summary judgment in favor of Plaintiffs and a class of Policyholders despite being aware that its decision would force WNIC to provide coverage in excess of the policyholders' expectations.

WNIC appealed the district court's decision to the Eleventh Circuit, arguing *first*, that the Policy is unambiguous, and *second*, that if it is ambiguous the unchallenged extrinsic evidence precluded Plaintiffs from obtaining summary judgment. The Eleventh Circuit certified all issues in the case to this Court, including whether the Policies are ambiguous and whether Florida law allows consideration of extrinsic evidence to clarify an ambiguous insurance contract.

STATEMENT OF FACTS

The Policies. Plaintiffs purchased "Limited Benefit" HHC Policies from WNIC in the early 1990's. DE-159-4; DE-159-5. The Policies provide for reimbursement of certain qualified HHC expenses. The Policies provide a "Home

Health Care Daily Benefit" of $180/day. DE-159-4 at 5; DE-159-5 at 4. The Daily Benefit is the only benefit available under the Policies.

There are two caps on benefits available under the Policies. The Policies provide that the "Home Health Care Daily Benefit" "*will be limited* to the Per Occurrence Maximum Benefit for each injury or sicknesses and the Lifetime Maximum Benefit Amount for ALL injuries and sicknesses which are shown in the certificate schedule." DE-159-4 at 7; DE-159-6 at 6 (p. 5 of Policy) (emphasis added). The "Per Occurrence" and "Lifetime" "Maximums" therefore represent the "limit" on the "Home Health Care Daily Benefit" payable under the Policy.

The Policy contains a feature known as the "Automatic Daily Benefit Increase." Page 6 of the Policy states:

> **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.

DE-159-4 at 8; DE-159-5 at 7 (emphasis added). Hence, the Automatic Benefit Increase Percentage serves to increase the Home Health Care Daily Benefit.

Each Policy contains a Certificate Schedule that identifies the Daily Benefit, the Per Occurrence Cap, the Lifetime Cap and the Automatic Daily Benefit Increase. The insureds could purchase Policies with different Daily Benefits and caps. *See* DE-159-19 ¶ 11. Under the terms of the Certificate Schedule, most

insureds had a "Home Health Care Daily Benefit" of $180/day, a Per Occurrence cap of $150,000, and a Lifetime Maximum cap of $250,000. On the Certificate Schedule, it states that the "Automatic Benefit Increase Percentage" means that "Benefits Increase by 8% each year." The phrase "Automatic Benefit Increase Percentage" is expressly defined in the text of the Policy as only serving to increase the Daily Benefit, making it clear that what increases by 8% each year is the Daily Benefit.

In addition to clearly stating that the 8% increase applies to the Daily Benefit, the Policy nowhere states that the 8% increase applies to the Per Occurrence or Lifetime Maximum limits. Plaintiffs nonetheless contend that the 8% increase applies not only to the Daily Benefit, as expressly set forth in the Policies, but also to the Per Occurrence and Lifetime Maximum caps set forth in the Policies.

Plaintiffs' entire case hinges on an alleged ambiguity on the Certificate Schedule attached to the Policy. According to Plaintiffs, DE-30 ¶ 15, DE-58 at 6, the use of the term "Benefits" in the plural (rather than the singular "Benefit") in the phrase "Automatic Benefit Increase Percentage . . . Benefit*s* increase by 8% each year" means that the caps on the Daily Benefits are subject to the 8% increase as well, even though the Policy form itself makes clear that all WNIC will do is "increase *the Home Health Care Daily Benefit* payable under this policy *by the*

Automatic Benefit Increase Percentage shown on the schedule page." DE-159-4 at 8; DE-159-5 at 7.

Prior Litigation Over The Policies. Two other district courts (including, a previous decision by Judge Cohn, the district judge in this case) have, contrary to the decision of the district court here, ruled that the Policy is unambiguous and that the 8% increase does not apply to the Policy caps, but only to the Daily Benefit.[1] The Eleventh Circuit initially reversed one of these cases, *Gradinger I*. *See Gradinger v. Wash. Nat'l Ins. Co.*, 250 F. App'x 271 (11th Cir. 2007) (hereinafter "*Gradinger II*") (DE-30 at 40–49). However, before a mandate issued, this Court vacated and withdrew its opinion. *Gradinger*, Case No. 06-16164-BB (11th Cir. Nov. 27, 2007) (hereinafter "*Gradinger III*") (DE 18-4).

The Federal Decisions In This Case. In a short decision in which the district court did not address a single case cited by WNIC, the court held that the undisputed evidence of the parties' intent was irrelevant. The district court held that "Defendant cites a significant number of cases from both Florida and other jurisdictions" that allow courts to consider extrinsic evidence to interpret ambiguous insurance contracts and that "Defendant's argument is both well-researched and persuasive." DE-171 at 6. Nonetheless, the district court granted

[1] *Rountree v. Wash. Nat'l Ins. Co.*, No. 607CV014, 2007 WL 1500293, at *4 (S.D. Ga. May 21, 2007); *Gradinger v. Wash. Nat'l Ins. Co.*, Case No. 06-60227-CIV-COHN (S.D. Fla. Oct. 30, 2006), at 7 (hereinafter "*Gradinger I*") (DE-18-3).

Plaintiffs' motion for summary judgment "adopt[ing] the Eleventh Circuit's reasoning set forth in *Gradinger II*" rather than independently analyzing Florida law. *See Id.*

On appeal, the Eleventh Circuit ignored its earlier withdrawn opinion in *Gradinger II* and determined that this case presented an "unsettled question of Florida law." *Ruderman v. Wash. Nat'l Ins. Corp.*, 671 F.3d 1208, 1212 (11th Cir. 2012). "[T]o avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law," the Eleventh Circuit certified the question of whether the Automatic Benefit Increase Percentage applied to the Lifetime Maximum Benefit Amount and the Per Occurrence Maximum Benefit. *Id.* The Eleventh Circuit specifically recognized that to resolve this question, this Court would have to determine whether the policy was ambiguous and, if so, whether courts should first attempt to resolve the ambiguity through the examination of extrinsic evidence. *Id.*

SUMMARY OF THE ARGUMENT

The Policy is not ambiguous. The Policy is absolutely clear that the 8% escalator only applies to the Daily Benefit, and not to the two separate caps on the Daily Benefits.

Assuming an ambiguity, however, the district court erred in refusing to consider extrinsic evidence and granting summary judgment to the class. The

district court held that, under Florida law, courts may not consider extrinsic evidence in cases involving ambiguous insurance contracts. According to the district court, the insured necessarily wins every case involving ambiguities in insurance policies because under the *contra proferentem* rule all ambiguities must be construed in favor of the insured. That is not the law of Florida. Settled principles of Florida law and insurance law generally establish that *contra proferentem* is a doctrine of last resort, used only as a tie-breaker when extrinsic evidence fails to resolve the ambiguity.

ARGUMENT

I. THIS COURT SHOULD ANSWER CERTIFIED QUESTIONS 1(A) AND (C) BY HOLDING THAT THE POLICY UNAMBIGUOUSLY ESTABLISHES THAT THE 8% INCREASE DOES NOT APPLY TO THE POLICY CAPS

An insurance contract must be construed in its entirety, striving to give every provision meaning and effect. *See Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 941 (Fla. 1979). If the policy is unambiguous, it governs. *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986). The Policy here is clear. The Automatic Benefits Increase Percentage (*i.e.*, the 8% escalator) is expressly only applicable to the Home Health Care Daily Benefit, as follows:

> **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*.

DE-159-4 at 8, DE-159-5 at 7 (emphasis added).

The Policy contains no similar provision that would extend the Automatic Benefit Increase Percentage to the Per Occurrence Maximum and the Lifetime Maximum Benefit. To the contrary, the Policy is clear that the Home Health Care Daily Benefit "*will be limited*" by the Per Occurrence Maximum and the Lifetime Maximum caps. DE-159-4 at 7; DE-159-5 at 6 (emphasis added). That is, the Per

Occurrence Maximum and Lifetime Maximum are caps on benefits, not benefits themselves. The only benefit under the policy is the Daily Benefit.

Plaintiffs allege that the Schedule provides for an escalation of the Lifetime Maximum Benefit and the Per Occurrence Maximum Benefit. Plaintiffs contend the clause in the Schedule, "AUTOMATIC BENEFITS INCREASE PERCENTAGE Benefits increase by 8% each year," means that the two caps on the Daily Benefits increase along with the Daily Benefit. But that is wrong.

The clause in the certificate, "AUTOMATIC BENEFITS INCREASE PERCENTAGE Benefits increase by 8% each year," must be read in conjunction with the remainder of the Policy, and in particular, the specific definitions described above. *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003). Those definitions expressly apply the Automatic Benefit Increase Percentage to the Home Health Care Daily Benefit, *not* to the Lifetime Maximum Benefit or the Per Occurrence Maximum Benefit. In fact, the term "Automatic Benefits Increase Percentage" is used *just once* in the Policy, and that is in connection with the Daily Benefit. DE-159-4 at 8, DE-159-5 at 7. The federal courts have found an ambiguity by improperly focusing solely on the certificate and ignoring the remainder of the Policy; when read in totality, it is clear that the 8% escalator does not apply to the caps. *Swire Pacific Holdings, Inc.*, 845 So. 2d

at 165 (courts should "avoid simply concentrating on certain limited provisions to the exclusion of the totality of others").

In any event, because the Daily Benefit *is* expressly subject to the automatic benefits increase while the Lifetime Maximum Benefit and Per Occurrence Maximum Benefit *are not*, the Policy cannot be read to apply the increase to both. *See Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996); *Shumrak v. Broken Sound Club, Inc.*, 898 So. 2d 1018, 1020 (Fla. 4th DCA 2005); *In re Celotex Corp.*, 487 F.3d 1320, 1334 (11th Cir. 2007).[2]

Plaintiffs make much of the fact that the phrase, "Automatic Benefit Increase Percentage: Benefits increase by 8% each year" uses the plural "Benefits". But it does so for an obvious reason. The plural of "Daily Benefit" is "Daily Benefits." The word "Benefits" simply refers to multiple days (plural) of receiving the "Daily Benefit." There is no "Dailies Benefit" or anything like that.

[2] Further, the Schedule is designed to supplement, not supplant, the specific definitions of the benefits in the Policy. A "schedule" provides a more detailed showing of matters that are referred to in a document, but does not change a document's terms. *See* BLACK'S LAW DICTIONARY 1346 (7th ed. 1999). A schedule in an insurance policy must be read in conjunction with the rest of the policy. *See Fabricant v. Kemper Indep. Ins. Co.*, 474 F. Supp. 2d 1328, 1332–33 (S.D. Fla. 2007). The Schedule here "fills in" the specific amounts of benefits and limitations that are more fully described in the Benefits section of the Policy. But it does not *alter* the Policy terms.

This construction also makes sense when considering that the only benefit under the Policy is the Daily Benefit.[3]

Of course, the Certificate could have been written differently, even better. But insurance policies do not have to be perfect in order to be unambiguous, and the fact that they could have been written differently is of no moment. *Swire Pac. Holdings, Inc.*, 845 So. 2d at 166; *Pridgen*, 498 So. 2d at 1248. Far from trying to find an ambiguity, the Court should try to reconcile any apparent inconsistencies before declaring a policy ambiguous. *Excelsior Ins. Co.*, 369 So. 2d at 941. "[T]he policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties - not a strained, forced or unrealistic construction." *Siegle v. Progessive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) (citing *Gen. Accident Fire & Life Assur. Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249 (Fla. 4th DCA 1972). The district court's focus on the "s" in benefits to conclude that the Policy is ambiguous, thus transforming it into a lifetime HHC benefits policy, is unreasonable, strained and unrealistic.

Although the Policies should be enforced according to their plain language, it is important to understand *why* the Policies were written the way they were,

[3] What's more, the absence of the negative statement, "the Automatic Benefit Increase Percentage does *not* apply to …" does not create an ambiguity. Contracts rarely contain such negative statements. The Policy language that the escalator applies to the Daily Benefit is not ambiguous by the absence of language saying it does not apply to the caps.

namely, to provide an increase to the Daily Benefit but not the caps on the Daily Benefits. According to the unchallenged testimony of Mr. Weinberg, who sold hundreds of these policies in Florida (including to several of the plaintiffs), the actual selling point of the Policies was that "[t]he 8% escalation of the Home Health Care Daily Benefit ensured that the maximum amount of daily benefits reimbursable under the Policy would be sufficient to cover expenses for 24 hour care, if the insured ever needed such coverage." DE-159-20 ¶ 5. That is, the escalation of the Daily Benefit allowed the insureds to accelerate the maximum coverage under the Policy so that, if they needed around-the-clock care, they would be able to obtain it. Mr. Weinberg made the extent of this Policy feature clear to his clients. *Id.* at ¶ 15 ("[m]y clients consistently recognize and understand that the maximum policy limits are not subject to the 8% cost of living increase").

This is confirmed by Dawn Helwig, the actuary who prepared the actuarial memorandum submitted to Florida regulators to have the Policy approved. As explained by Ms. Helwig, the average policyholder was only expected to receive benefits for 6 to 7 months. DE-159-19 at ¶ 17. If the daily benefit was capped at $180, the average policyholder would only receive $30,000 - $40,000 in benefits under the Policy. By increasing the daily benefit by 8% per year, the daily benefit would increase to over $500/day when the insureds got older and would need benefits, thus doubling or even tripling the benefits available to policyholders

when they needed them. *Id*. Other policies in the market at the time either did not provide for an escalation of the daily benefit, or it was only available for a substantial additional premium. DE-159-20 ¶ 6.[4]

The 8% escalator was never designed to increase the caps from $150,000 and $250,000 to over $1,000,000 each, and it is entirely inappropriate to interpret the Policy to accomplish that result. If a Policyholder purchased the Policy at age 55, by the time he or she turned 80 the per occurrence cap would, if the escalator applied, skyrocket to $1,027,271, and the lifetime maximum cap would balloon to $1,712,188. Assuming that "24/7" care costs $400/day, the Policy would provide 4,280 days – nearly 12 years -- of "24/7" care. That is a massive amount of coverage, beyond what any Policyholder would ever need, and the premiums on these Policies were not designed to absorb such massive payouts to insureds.

[4] Similarly, other policies at the time measured benefits simply in terms of days (*e.g.*, 180 days of coverage at a maximum of $150/day), so that if an insured spent $50 on HHC, an entire day's worth of coverage was lost. DE-159-19 at ¶ 16The selling point of these Policies was twofold: (1) the Daily Benefit would increase to maximize the benefits available to policyholders during the limited period of time when benefits would be needed, so they could obtain "24/7" care; and (2) the total amount of coverage would not be measured by "days" the policyholder received coverage, but by a total dollar amount that would provide the policyholder with the flexibility of using HHC on a limited basis without losing a full day's worth of coverage. *Id*.

II. THIS COURT SHOULD ANSWER CERIFIED QUESTION 1(B) BY REAFFIRMING THE BASIC PRINCIPLE OF FLORIDA LAW THAT THE GOAL OF CONTRACT CONSTRUCTION IS TO IMPLEMENT THE INTENT OF THE PARTIES

In its decision, the Eleventh Circuit suggested that there was a conflict between this Court's decision in *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000) and *Excelsior Ins. Co.*, 369 So. 2d at 938. *Ruderman*, 671 F.3d at 1211. The court described *Anderson* as standing for the general proposition that ambiguities should automatically be construed against the insurer, while *Excelsior* stood for the proposition that courts may consider extrinsic evidence to clarify an ambiguous insurance contract. *Id.*

The Eleventh Circuit's decision was surprising. Prior to this case, the Eleventh Circuit and district courts within Florida *routinely* held that federal courts applying Florida law should consider available extrinsic evidence to resolve ambiguities in insurance policies.[5] Just recently, in fact, the Eleventh Circuit

[5] *See Burlington Ins. Co. v. Indus. Steel Fabricators, Inc.*, 387 F. App'x 900, 902 (11th Cir. 2010) ("But if the relevant policy language is ambiguous then extrinsic evidence of the parties' intentions may be introduced to explain the ambiguity"); *Phila. Am. Life Ins. Co. v. Buckles*, 350 F. App'x 376, 380 (11th Cir. 2009) ("We find [the policy] clear and unambiguous. As a result, we are precluded from considering extrinsic evidence" (emphasis added)); *Essex Ins. Co. v. Zota*, 466 F.3d 981, 987 (11th Cir. 2006) ("The court may look to parol evidence in interpreting an insurance contract only if there is an ambiguity"); *Vencor Hosps. v. Blue Cross Blue Shield of R.I.*, 284 F.3d 1174, 1180 (11th Cir. 2002) ("Because there exists no ambiguity in the contract language, neither the Outline of Coverage nor the promotional brochure may be consulted for aid in interpreting the contract"); *Fireman's Fund Ins. Co. v. Tropical Shipping and Constr. Co., Ltd.*,

unequivocally held: "[the insured's] argument that extrinsic evidence is not admissible to resolve ambiguities in an insurance contract is without merit." *Estevez v. Northern Assur. Co. of Am.*, 428 F. App'x 966, 967 n.1 (11th Cir. 2011).[6] What is more, the *same district court* here that refused to consider

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254 F.3d 987, 1003 (11th Cir. 2001) ("[I]n the absence of ambiguous language, a court may not look to parol evidence in ascertaining the intent of the parties to an insurance contract"); *Adams v. Thiokol Corp.*, 231 F.3d 837, 844 (11th Cir. 2000); *Mizner Grand Condo. Ass'n, Inc. v. Travelers Prop. Casualty Co. of Am.*, No. 09-82280-CIV, 2010 WL 2162902, at *3 (S.D. Fla. May 26, 2010) ("[W]hen a phrase in a contract is ambiguous . . . a trial court may admit parol evidence to explain the words used in the contract and to understand how the contracting parties intended for those words to be interpreted"); *Monticello Ins. Co. v. City of Miami Beach*, No. 06-20459-CIV, 2009 WL 667454, at *10 (S.D. Fla. Mar. 11, 2009) ("Florida district courts have . . . found it appropriate to admit extrinsic evidence to resolve the ambiguity in insurance policies"); *Great Am. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 574 F. Supp. 2d 1294, 1299 (S.D. Fla. 2008); *Northside Marina Ventures, LLC v. Lexington Ins. Co.*, No. 06-14205-CIV, 2007 WL 2316502, at *4 (S.D. Fla. Aug. 9, 2007) ("[Parol] evidence . . . is admissible to show the parties' intent at the time they entered into the contract" (internal citations omitted)); *see also Larsen v. AirTran Airways, Inc.*, No. 8: 07-cv-00442-T-17-TBM, 2009 WL 1076035, at *10 (M.D. Fla. Apr. 21, 2009) ("Where an ambiguity exists, 'it is hornbook contract law' that parol evidence may be brought in to explain or clarify" (quoting *Ellinger v. United States*, 470 F.3d 1325, 1338 (11th Cir. 2006))); *West Am. Ins. Co. v. Band & Desenberg*, 925 F. Supp. 758, 761 (M.D. Fla. 1996); *Twin City Fire Ins. Co. v. Firemen's Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1277 (S.D. Fla. 2005); *Pac. Employers Ins. Co. v. Wassau Bus. Ins. Co.*, 508 F. Supp. 2d 1167, 1175 (M.D. Fla. 2007); *State Nat'l Ins. Co. v. City of Miami*, No. 09-23273-CIV, 2010 WL 3745005, at * 4 (S.D. Fla. Sept. 21, 2010). *In re Mirabilis Ventures, Inc.*, No. 6:08-bk-04327-KSJ, 2010 WL 2293068, at *1 n.4 (Bankr. M.D. Fla. June 2, 2010) ("Where a contract is ambiguous, courts may use parol evidence to discern the intent of the parties in making the agreement").

[6] Judge Edmondson sat on the panel in *Estevez* which held that extrinsic evidence can be considered, and also sat on the panel in this case. It is unclear why these two panels of the Eleventh Circuit approached the issue in such divergent ways.

WNIC's extrinsic evidence held in another case that such evidence *was* admissible to explain an ambiguous insurance contract. *State Nat'l Ins. Co. v. Lamberti*, No. 08-CV-60760, 2009 WL 764501, at *6 (S.D. Fla. Mar. 20, 2009) (Cohn, J.) ("The Court agrees . . . that if the policy is ambiguous, the Court will look to extrinsic evidence of the parties' intent in forming the contract and course of performance"). The decisions by the federal courts in this case are anomalies that cannot be squared with existing precedent.

In any event, the Eleventh Circuit, for whatever reason, believed in this case that the law was unsettled. It came to that conclusion by ignoring settled principles of Florida law articulated by this Court, Florida's appellate courts, and even its own precedent. As made clear below, there is no conflict in the law and the Eleventh Circuit made a fundamental error in conflating two distinct and complementary rules of law – the parol evidence rule and *contra proferentem*. This Court, respectfully, should reaffirm the basic principle of law that where, as here, extrinsic evidence exists it ought to be considered in construing an ambiguous insurance contract, but that where no extrinsic evidence exists the courts ought to resolve any ambiguities in favor of the insured.

A. Florida Courts Have Consistently Ruled That Extrinsic Evidence, Where Available, Ought To Be Considered In Interpreting Ambiguous Insurance Contracts.

This Court has *always* ruled that contracts, including insurance contracts, should be interpreted according to what the parties intended at contract formation. To this end, if a contract is ambiguous, extrinsic evidence is always admissible to discern the intent of parties.

This Court first addressed this issue in *L'Engle v. Scottish Union & Nat'l Fire Ins. Co.*, 37 So. 462, 467 (Fla. 1904), where the court adopted the reasoning of *Reed v. Merch. Mut. Ins. Co. of Balt.*, 95 U.S. 23 (1877), a seminal case establishing that extrinsic evidence is admissible to explain the meaning of an ambiguous insurance contract.[7] This Court ruled that:

> If a written [insurance] contract is ambiguous . . . , *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.*

L'Engle, 37 So. at 467 (citations omitted; emphasis added).

This Court again addressed this precise issue in *Price v. S. Home Ins. Co. of the Carolinas*, 129 So. 748 (Fla. 1930), where the issue was whether the phrase

[7] In *Reed*, the Supreme Court held that, in interpreting an ambiguous insurance contract, a court should look at "all the circumstances of the case . . . for the purpose of ascertaining the subject-matter and the stand-point of the parties in relation thereto," and that "[w]ithout some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument." *Id* at 30.

"additions" in a fire insurance policy included the insured's garage. This Court held that, "[a]n insurance policy, like other contracts, is interpreted to give effect to the intention of the parties ascertained from the language used in the instrument as a whole aided by extrinsic evidence of the situation of the parties at the time of executing the contract." *Id*. at 750. This Court ruled that "[e]vidence of the situation of the property and the parties, as well as other surrounding facts and circumstances at the time of the issuance of the policy, is admissible to aid the court in construing the word 'additions.'" *Id*. at 751.

This Court next addressed this issue in *Friedman v. Va. Metal Prods. Corp.*, 56 So. 2d 515, 517 (Fla. 1952). There, the court, as in *L'Engle*, reaffirmed the basic principle of law that extrinsic evidence is admissible to explain an ambiguous insurance contract. The court stated:

> Where either general language or particular words or phrases used in insurance contracts are 'ambiguous,' that is, doubtful as to meaning, or, in the light of other facts, reasonably capable of having more than one meaning so that the one applicable to the contract in question cannot be ascertained without outside aid, extrinsic evidence may be introduced to explain the ambiguity.

This Court next addressed the issue in *Excelsior Ins. Co.*, 369 So. 2d at 942. There, this Court expressly held that extrinsic evidence was admissible to explain an ambiguity in an insurance contract, because the goal of all contract law is to

ascertain the truth to implement the parties' intent, even in the realm of insurance. *Id.*

This Court again touched upon the use of extrinsic evidence in *Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1139 (Fla. 1998), where it held that "unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider the arguments pertaining to the drafting history of the pollution exclusion clause." *Id.* The court implied that if the policy language were ambiguous, it would be appropriate to consider such extrinsic evidence as the drafting history of the ambiguous provision.[8]

The lynchpin of all these cases is exactly the same: courts should allow extrinsic evidence to implement the intent of the parties. As this Court said in *Excelsior Ins.*, 369 So. 2d at 942, the chief concern and goal of contract law is to "give true effect to the intentions of the parties, which is the central concern of the law of contracts even in the realm of insurance where there are unique public policy considerations." *Id.* Thus, in construing insurance contracts courts cannot "add meaning that is not present, *or otherwise reach results contrary to the intentions of the parties*." *Id*. (emphasis added). Florida law, as articulated by this

[8] This Court reached the same result in *Dimmitt Chevrolet, Inc. v. Southeastern Fid. Ins. Co.*, 636 So. 2d 700, 705 (Fla. 1994). There, the parties offered extensive evidence concerning the drafting history of certain "pollution exclusion" clauses. *Id*. at 702-03. The court held that it could not consider the extrinsic evidence because the policy was unambiguous, implying that extrinsic evidence would be admissible were the policy ambiguous. *Id*. at 705.

Court in *L'Engle*, *Price*, *Friedman*, *Deni* and *Excelsior Ins.*, allows extrinsic evidence to construe an ambiguous insurance contract precisely because, without such evidence, there is no way to "give true effect to the intention of the parties."

Applying the law as articulated by this Court, Florida's appeal courts *always* permit extrinsic evidence to clarify ambiguous insurance contracts. The cases articulating this rule are legion.[9] *Mut. Fire, Marine and Inland Ins. Co.*, is strikingly similar to this case. There, the insurer issued a "claims made" policy to *X*, an independent testing laboratory. *Mut. Fire, Marine and Inland Ins. Co*, 511 So. 2d at 361. The insurer was subsequently asked to issue a new policy for *X's* affiliate, *Y*. *Id.* *X* and *Y* told the insurer that *Y* was going to be sued in connection

[9] *See, e.g.*, *Castillo v. State Farm Fla. Ins. Co.*, 971 So. 2d 820, 823 (Fla. 3d DCA 2007) ("[W]hen the terms of the contract are ambiguous [and] susceptible to different interpretations, parol evidence is admissible to explain, clarify or elucidate the ambiguous term." (quotations omitted; alterations in original); *Williams v. Essex Ins. Co.*, 712 So. 2d 1232, 1232 (Fla. 1st DCA 1998) ("[T]he parties are entitled to offer extrinsic evidence as to the intent of the insurer and the insured at the time the policy was purchased"); *Reinman, Inc. v. Preferred Mut. Ins. Co.*, 513 So. 2d 788, 788 (Fla. 3d DCA 1987) ("Where particular words or phrases used in insurance contracts are 'ambiguous,' . . . extrinsic evidence may be introduced to explain the ambiguity"); *Universal Underwriters Ins. Co. v. Steve Hull Chevrolet, Inc.*, 513 So. 2d 218, 219 (Fla. 1st DCA 1987) ("Where the terms of the [insurance policy] are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment"); *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001); *First State Ins. Co. v. Gen. Elec. Credit Auto Lease, Inc.*, 518 So. 2d 927, 927 (Fla. 3d DCA 1987); *Mut. Fire, Marine & Inland Ins. Co. v. Fla. Testing & Eng'g Co.*, 511 So. 2d 360, 362-63 (Fla. 5th DCA 1987); *Navy Mut. Aid Ass'n v. Barrs*, 732 So. 2d 345, 347 (Fla. 1st DCA 1999).

with soil tests *Y* performed for a county. *Id.* The insurer issued a new policy which listed *X* and *Y* each separately as a "Named Insured." *Id.* The policy also contained an exclusion for claims against the "Named Insured" as it "respects the Named Insured's work" for the county. *Id.*

The county then sued *X* and *Y*, not just *Y*, and the insurer denied coverage, citing the exclusion. *Id.* at 362. The court found that the phrase "respects the Named Insured's work" was ambiguous because "only the singular 'insured' is used" and the policy listed two insureds (plural). *Id*. at 362. Hence, the exclusion could relate to either insured, or both insureds; it was not clear. This ambiguity is similar in structure to the one alleged here -- the plural "benefits."

The court did not resolve the case based on *contra proferentem.* Rather, it examined the available "extrinsic or parol evidence … in order to properly interpret the instrument." *Id*. at 362-63. Included in this evidence was the testimony of the insured's insurance agent as well as correspondence between the parties. *Id*. The court, in short, strove to ascertain the true intent of the parties with the use of extrinsic evidence. That is what the district court was required, but failed, to do here.[10]

[10] *Navy Mut. Aid Ass'n* is another similar case. There, a Navy Commander purchased a life insurance policy in 1968, which was updated in 1994 with additional coverage. *Navy Mut.*, 732 So. 2d at 346. The 1994 certificate had a two-year suicide exclusion; the 1968 coverage did not. *Id.* At issue was whether certain language in the exclusion accompanying the 1994 certificate was

Florida's trial courts have reached the same result. *Gilman v. John Hancock Variable Life Insurance Co.*, No. 02-00051 AB, 2003 WL 23191098 (Fla. Cir. Ct. Oct. 20, 2003), is directly on point. There, Judge (now Justice) Labarga, citing *L'Engle*, denied plaintiff's motion to certify a class of insureds based in part on the need to examine extrinsic evidence to determine the meaning of an ambiguous insurance contract. *Id.* at *8 n.2.

B. In This Case, The Federal Courts Conflated The Parol Evidence Rule With *Contra Proferentem*.

The federal courts apparently conflated two separate doctrines. On one hand there is the established rule of law, as articulated in the many cases cited above which the district court ignored entirely, that extrinsic evidence is admissible to explain an ambiguous insurance contract. This is a basic rule of contract law – the parol evidence rule. When a contract is unclear, the parol evidence rule aids the

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ambiguous such that the two year exclusion would have run from 1968. *Id.* "The use of the indefinite article 'a' in the suicide-exclusion clause creates the ambiguity that the two-year suicide exclusion runs from the date of any benefit plan, including the 1968 master policy." *Id.* at 347. Again, like in this case, the alleged ambiguity arose from a grammatical construction of the policy. The court did not resolve the case through *contra proferentem*. Rather, the court held that, because of the alleged ambiguity, the court would have to examine "parol evidence of the dealings between [the insured] and the insurer." *Id.* The court considered, among other extrinsic evidence: reasons the insured obtained the 1994 coverage, direct conversations between the insured's widow and the insurance agent, and numerous promotional materials. *Id.*

court in determining the parties' intent by allowing the parties to demonstrate, through use of extrinsic evidence, what the parties actually intended.

On the other hand, there is the rule of law that ambiguous contracts, including insurance contracts, should be construed against the drafter (the rule of *contra proferentem*). *Contra proferentem* is not concerned with finding the truth or implementing the parties' intent (or even discerning it). Rather, *contra proferentem* is an arbitrary rule of interpretation used as a doctrine of last resort: when the parties' intent cannot be determined by extrinsic evidence, the party who drafted the agreement must bear the consequences of the ambiguity and accept a construction that favors the other party.

The district court interpreted these two strands of law incorrectly. It held that that parol evidence rule and *contra proferetem* were in conflict. It ruled that *contra proferentem* required the court to exclude extrinsic evidence and to blindly rule for the insured in all cases of an ambiguous insurance contract. While understanding in dozens of other cases that these two doctrines do not conflict, for some reason the federal courts here seemed to believe that they did.

There is no conflict. The two doctrines come into play at different parts of the contract interpretation process. *First*, courts examine a contract, aided by various rules of construction developed by the courts to interpret agreements, to determine if it is ambiguous; if it is not, the contract is enforced according to its

terms. *Second*, if a contract is unclear, under the parol evidence rule the parties are entitled to prove that their interpretation of the agreement is correct. The court here strives to fulfill its mandate under its own precedent to discover the parties' actual bargain, and to implement it. *Third*, if the extrinsic evidence is non-existent or inconclusive, as is often the case especially with insurance policies, *contra proferentem* operates to conclude the dispute by giving the non-draftsman the benefit of the ambiguity.

Significantly, this Court has repeatedly invoked both the parol evidence rule and *contra proferentem* at the same time, thus dispositively proving that the two rules complement each other and do not clash. In *L'Engle*, 37 So. at 467, for example, this Court ruled that extrinsic evidence is admissible to explain an ambiguous policy. This Court *also held* that ambiguous contracts "must be liberally construed in favor of the insured." *Id*. *See also Stuyvesant Ins. Co. v. Butler*, 314 So. 2d 567, 570 (Fla. 1975) (holding that "resort will not be made to extrinsic evidence" when "the meaning of the policy provision is clear and free from doubt" while simultaneously holding that insurance policies "should be construed against the insurer and in favor of the insured"). This Court did not in these cases make two diametrically opposed points. Rather, this Court noted both rules because they complement, not conflict with, each other. That is, *contra*

proferentum is the fallback rule where application of the parol evidence rule does not determine the winner.

Indeed, it is settled law in Florida and elsewhere that *contra proferentem* is a doctrine of last resort, used only where evidence of the parties' intent is inconclusive.[11] Indeed, the "adverse construction principle cannot prevail, *and indeed does not even come into play*, when, as here, the parties' actual intent has been otherwise conclusively determined." *Child v. Child*, 474 So. 2d 299, 301 (Fla. 3d DCA 1985) (emphasis added).[12] "The reason the rule is said to be one of last resort is that it does not really disclose anything about the intention of the

[11] *Emerald Pointe Prop. Owners' Ass'n, Inc. v. Commercial Constr. Indus., Inc.*, 978 So. 2d 873, 878 n.1 (Fla. 4th DCA 2008) ("[T]he rule of adverse construction is a 'secondary rule of interpretation' or a 'rule of last resort,' which should not be utilized if the parties' intent can otherwise be conclusively determined."); *DSL Internet Corp. v. TigerDirect, Inc.*, 907 So. 2d 1203, 1205 (Fla. 3d DCA 2005) ("The construction-against-the-drafter principle is a rule of last resort and is inapplicable when there is evidence of the parties' intent at the time they entered into the contract.").

[12] *See also Monticello Ins. Co. v. City of Miami Beach*, No. 06-20459-CIV, 2009 WL 667454, at *10 (S.D. Fla. Mar. 11, 2009) (the "construction-against-the-draftsman rule" is a doctrine of last resort, applied only as a tie-breaker "*when . . . extrinsic evidence on the ultimate intent issue is itself inconclusive*"); *Arriaga v. Fla. Pacific Farms, LLC*, 305 F.3d 1228, 1248 (11th Cir. 2002) ("When that intent does not clearly appear from the words of the contract itself – that is, when it is deemed 'ambiguous' – the against-the-drafter rule may be of some value *when the extrinsic evidence on the ultimate intent issue is itself inconclusive.*") (emphasis added) (citing *Child*, 474 So. 2d at 301).

parties to a contract,"[13] and contract law aims foremost to discover and implement the parties' intent under their contract, not to render judgment based upon arbitrary rules that not only ignore such intent, but in fact vitiate it.[14] Most states follow this rule[15] (*see, e.g.*, *Gilman*, 2003 WL 23191098, at *12, noting only "a few state courts refuse to consider extrinsic evidence" to clarify an ambiguous insurance contract), which is codified in the major treatises on the subject as well.[16]

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[13] *In re Avon Sec. Litig.*, No. 91 Civ. 2287 (LMM), 2004 WL 3761563, at *6 n.5 (S.D.N.Y. Mar. 29, 2004).

[14] *See Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 366 (7th Cir. 1990) (Posner, J.) (*contra proferentem* is only a "tie-breaker").

[15] *See, e.g.*, *Harbor Ins. Co.*, 922 F.2d at 366 ("If an insurance contract is ambiguous either party should be allowed to introduce evidence to disambiguate it."); *AGK Holdings, Inc. v. Essex Ins. Co.*, 142 Fed. App'x 889, 891 (6th Cir. 2005); *Fed. Deposit Ins. Corp. v. Conn. Nat'l Bank*, 916 F.2d 997, 1006 (5th Cir. 1990); *State Farm Fire & Casualty Co. v. Liberty Ins. Underwriters, Inc.*, 613 F. Supp. 2d 945, 954 (W.D. Mich. 2009); *Terese v. 1500 Lorene LLC*, No. 09-4342, 2010 WL 4668899, at *3 (E.D. La. Nov. 5, 2010); *Klebe v. Mitre Grp. Health Care Plan*, 894 F. Supp. 898, 905 (D. Md. 1995) ("the rule of contra proferentem is a rule of last resort, that a court's obligation is to construe ambiguous terms against the drafter *only if they are not clarified by extrinsic evidence of the parties' intent*") (emphasis in original); *State Farm Mut. Auto. Ins. Co. v. Wilson*, 782 P.2d 727, 734 (Ariz. 1989); *Travelers Indem. Co. v. Howard Elec. Co.*, 879 P.2d 431, 434-35 (Colo. App. 1994); *Playtex FP, Inc. v. Columbia Cas. Co.*, 609 A.2d 1087, 1092 (Del. Super. Ct. 1991); *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 124 (La. 2000) opinion corrected on reh'g, 782 So. 2d 573 (La. 2001); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1378 (Md. 1997); *State v. Home Indem. Co.*, 486 N.E.2d 827, 829 (N.Y. 1985); *Walle Mut. Ins. Co. v. Sweeney*, 419 N.W.2d 176, 179-80 (N.D. 1988); *Boso v. Erie Ins. Co.*, 669 N.E.2d 47, 51 (Ohio Ct. App. 1995); *DiFabio v. Centaur Ins. Co.*, 531 A.2d 1141, 1142-43 (Pa. Super. Ct. 1987).

[16] *See, e.g.*, 2 COUCH ON INSURANCE § 22:14 (3d ed. 2009) ("the rule that an insurance policy will be strictly construed against the insurer does not apply when the barrier against parol evidence has been removed by the ambiguity in the

The district court clearly erred in elevating the rule of *contra proferentem* above all other, more basic, principles of contract law. Significantly, the district court ignored this Court's extensive treatment of this subject in *Excelsior*. There, the insured asked this Court to apply *contra proferentem*. *Excelsior Ins.*, 369 So. 2d at 941. This Court refused to do so, noting that there are "important qualifications to the rule" of *contra proferentem*. *Id*. at 942.

The first qualification articulated by the Florida Supreme Court is that the *contra proferentem* rule applies only when the ambiguity cannot be determined by "resort to the ordinary rules of construction." *Id*. In Florida, the "ordinary rules of construction" include among other things: direct evidence of the parties' intent through their words and acts, circumstances surrounding the negotiation and execution of the contract, and the parties' course of dealing.[17] Under Florida's rules of construction, direct evidence of the parties' intent is not only relevant, it is

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contract, and the parties thereto, by their acts, have placed a construction on the contract showing what was in fact intended"); 1 STEMPEL ON INSURANCE CONTRACTS § 4.08 (3d ed. 2009) ("*contra proferentem* resides virtually at the bottom of the interpretive totem pole, just ahead of public policy and (sometimes) unconscionability").

[17] *See Holmes v. Kilgore*, 103 So. 825, 827 (Fla. 1925); *Herpich v. Estate of Herpich*, 994 So. 2d 1195, 1197-98 (Fla. 5th DCA 2008); *Huntington On The Green Condo. v. Lemon Tree 1-Condo.*, 874 So. 2d 1, 4-5 (Fla. 5th DCA 2004).

paramount. *See Turgman v. MM World Entm't, LLC*, 21 So. 3d 104, 105 (Fla. 3d DCA 2009).[18]

The second qualification articulated by this Court is that the *contra proferentem* rule "does not allow courts to . . . reach results contrary to the intentions of the parties" because to "give true effect to the intentions of the parties" is "the central concern of the law of contracts even in the realm of insurance where there are unique public policy considerations." *Excelsior Ins.*, 369 So. 2d at 942. That is, courts applying Florida law cannot do what the district court did: blindly apply *contra proferentem* to achieve a result that not only ignores the parties' intent, but actually perverts it.

The district court ignored theses "important qualifications" to the *contra proferentem* rule. *Id.* It bypassed completely the ordinary rules of construction, which required the court to consider evidence of the parties' intent and course of

[18] Indeed, Florida law does not permit a court to construe a contract as a matter of law (on the basis of *contra proferentem*, or any other "rule") if there is any extrinsic evidence of intent, because such evidence creates a triable issue of fact for the jury. *See id*. at 104-05; *see also Palm Beach Pain Mgmt., Inc. v. Carroll*, 7 So. 3d 1144, 1146 (Fla. 4th DCA 2009) ("[w]hen a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties") (citations and quotations omitted); *Land O'Sun Realty Ltd. v. REWJB Gas Invs.*, 685 So. 2d 870, 872 n.3 (Fla. 3d DCA 1997) ("Contract interpretation is for the court as a matter of law, rather than the trier of fact, only when the agreement is totally unambiguous, or when any ambiguity may be resolved by applying the rules of construction to situations *in which the parol evidence of the parties' intentions is undisputed or non-existent.*") (emphasis added) (citations omitted).

dealing, and then proceeded to interpret the Policy in a manner it knew from the extrinsic evidence offered by WNIC was *directly contrary* to the parties' intent.

On appeal, the Eleventh Circuit suggested the possibility that *Excelsior* was no longer good law and may have been reversed by *Anderson*.[19] But, respectfully, that is meritless. The Eleventh Circuit noted that *Anderson* "says nothing about this attempt-to-resolve position" (Order at 8), but that is only because no party was offering extrinsic evidence and hence there was no reason for this Court to articulate Florida law concerning the use of extrinsic evidence to clarify ambiguities. Appeals courts usually refrain from issuing wide-ranging advisory opinions on matters not before them. For that reason, and others, inferring truth from a court's silence on an issue is a dangerous game. In any event, *Anderson's* "silence" on the issue was not some secret overturning of *Excelsior*, as imagined by the Eleventh Circuit, but merely a reflection of the fact that the issue of extrinsic evidence, settled for a century since *L'Engle*, was not before this Court in the first place. Indeed, far from overturning *Excelsior*, this Court cited it with approval. *Anderson*, 756 So. 2d at 34.[20]

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[19] The Eleventh Circuit, without explanation, referred to *Anderson* as the "chief case" of this Court on interpreting ambiguous insurance contracts, but that is hardly true. The case is cited most often as precedent in "stacking" cases. This Court's discussion of interpreting ambiguous insurance contracts in *Excelsior* is far more detailed and thoroughgoing than in *Anderson*.

[20] Nonetheless, *Anderson* is interesting for this point: in ruling for the insured, this Court did not rely solely on *contra proferentem* (which would have been consistent

Moreover, Florida's appeals courts have, since *Anderson*, repeatedly cited *Excelsior* for the proposition that *contra proferentem* only applies where the ordinary rules of construction fail to pick a winner.[21] There was no basis for the Eleventh Circuit to question whether *Excelsior* and the many cases that preceded it and subsequently cite it remain good law.

The Eleventh Circuit also referred to *Anderson* as a "recent" decision of this Court (Order at 8), but there are more recent ones the Eleventh Circuit ignored. For example, this Court in *Swire Pacific Holdings, Inc.*, 845 So. 2d at 165, articulated the *contra proferetem* rule but pointed out that "[o]nly when a genuine inconsistency, uncertainty, or ambiguity in the meaning remains after resort to the ordinary rules of construction is the rule apposite. It does not allow courts to . . . reach results contrary to the intentions of the parties." (citing *Excelsior*, 369 So.2d

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with precedent as there was no extrinsic evidence), but instead also relied upon "established custom and usage in the insurance industry" as proven by extrinsic evidence consisting of clauses in other policies. *Id*. at 36. *Anderson* thus reaffirms that extrinsic evidence, where available, ought to be considered.

[21] *See e.g., Am. Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d DCA 2006) (adding that the court ought to consider "not only [the insurer's] contract form, but also [the insured's] knowledge and understanding as a layman and his normal expectation of the extent of coverage of the policy") (citation omitted). Other courts have used the articulation of the rule from *Excelsior* without citing the case directly. *See also, State Farm Mut. Auto. Ins. Co. v. Fischer*, 16 So. 3d 1028, 1032 (Fla. 2d DCA 2009*); Liebel v. Nationwide Ins. Co. of Fla.*, 22 So. 3d 111, 115 (Fla. 4th DCA 2009).

at 942). This Court in *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005), cited the exact same portions of *Excelsior*.

Significantly, WNIC introduced a mountain of unquestioned and uncontradicted extrinsic evidence demonstrating that the insureds knew that the 8% escalator applied only to the Daily Benefit, and not to the policy caps. This included: (i) insurance agent testimony concerning contemporaneous discussions and customary business practices of providing coverage information (*see, e.g.*, DE-159-20; DE-159-21)[22]; (ii) brochures and other marketing materials (*see, e.g.*, DE-159-15)[23]; (iii) communications between policyholders and their insurance

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[22] The most common form of extrinsic evidence is the parties' statements before the policy was purchased. This is true even where the forms are standardized, because the insured must make choices about the extent of coverage which is often reflected on endorsements or certificates (as was the case here). Courts routinely consider such evidence because it is often the best way to discern the parties' intent when the policy is ambiguous. *See, e.g.*, *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 398 (Ariz. 1984); *Celley v. Mut. Benefit Health & Acc. Ass'n*, 324 A.2d 430, 435-36 (Pa. Super. Ct. 1974). Moreover, Florida courts will consider an agent's usual customary business practice in insurance cases as evidence that the insured was informed, and hence aware, of the extent of his coverage. *See Nationwide Mut. Ins. Co. v. Jones*, 414 So. 2d 1169 (Fla. 5th DCA 1982).

[23] Brochures and other marketing materials are deemed competent extrinsic evidence. *See, e.g., Vencor Hosps. v. Blue Cross Blue Shield of R.I.*, 284 F.3d 1174, 1180 (11th Cir. 2002) ("Because there exists no ambiguity in the contract language, neither the Outline of Coverage nor the promotional brochure may be consulted for aid in interpreting the contract."); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *2 (S.D. Fla. Feb. 3, 1995) ("extrinsic or parol evidence" of a "sales brochure" would be "allowed if one or more of the terms found in the Contract [] were ambiguous"); 1 STEMPEL ON

agents during the course of the Policy (*see, e.g.*, DE-159-20 ¶¶ 10–16; DE-159-21 ¶¶ 14–17); (iv) communications between policyholders and/or their representatives and WNIC during the course of the Policy (*see, e.g.*, DE-159-6; DE 159-7; 159-8; 159-9); (v) the parties' course of dealings during the Policies (*see, e.g.*, DE-159-2 pp. 63:14–63:19, 64:2–64:16, 68:25–69:24, 73:13–73:20; DE-159-3 p. 104:12–104:24)[24]; and (vi) WNIC's filings with the Florida Department of Insurance containing the relevant actuarial memoranda for these Policies (*see* DE-159-17; DE-159-19 Ex. A).[25] Plaintiffs never put forth any of their own extrinsic evidence supporting the idea that even a *single insured* believed that the Policy caps would increase because there is none. There is no basis in Florida law to ignore this compelling extrinsic evidence, let alone to do so and then apply a strained

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INSURANCE CONTRACTS § 4.03[E] (3d ed. 2009) ("[A]dvertising brochures [may be] part of the contract," or "evidence of the meaning of a contract term.").

[24] Extrinsic evidence "of the parties' practice with respect to the insurance policy after its formation" is relevant. *See* 17A COUCH ON INSURANCE § 253:100 (3d ed. 2009); *see also In re Prudential Lines, Inc.*, 170 B.R. 222, 238 (S.D.N.Y. 1994) ("the parties' practical construction should be given great, if not, controlling weight in the construction of the contract") (citations and quotations omitted). Courts routinely admit such evidence; *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1503 (S.D.N.Y. 1983) *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984); *Darner Motor Sales*, 682 P.2d at 398.

[25] *See* 1 STEMPEL ON INSURANCE CONTRACTS § 4.05[A] (3d ed. 2009) ("[S]tate[] procedures for reviewing and approving policy forms and language . . . provide a rich source of information potentially shedding light on disputed insurance policy terms. . . . [U]sed properly, these materials should be part of the coverage decision process in difficult cases.").

interpretation to a certificate schedule and morph a limited HHC policy into a limitless one.

Plaintiffs will no doubt contend that "public policy considerations" support an "insured automatically wins" rule. But the *Excelsior* court made clear that the primary policy goal is to implement the true intent of the parties, "even in the realm of insurance." *Excelsior Ins. Co.*, 369 So. 2d at 942.[26] And, no "public policy" is served by forcing WNIC to provide HHC benefits the insureds know they are not entitled to.

III. TO THE EXTENT THE DISTRICT COURT APPLIED THE SO-CALLED PATENT/LATENT DISTINCTION IN AWARDING PLAINTIFFS SUMMARY JUDGMENT, THAT TOO WAS ERROR

Earlier in this case, in certifying a class of Policyholders, the district court held that it would not consider extrinsic evidence because the alleged ambiguity was "patent" rather than "latent." *Ruderman v. Wash. Nat'l Ins. Co.*, 263 F.R.D. 670, 679-80 (S.D. Fla. 2010). However, the district court made no mention of the so-called patent-latent distinction in its summary judgment decision. The Eleventh

[26] Moreover, this is not, contrary to Plaintiffs' suggestion, a case where the insurer is claiming its own policy is ambiguous and that it ought to be clarified with evidence of the insurer's intent. Indeed, the Policy, and its marketing materials, were all approved by state regulators. AF(2)-(DE159-19)-11; AF(2)-(DE-159-13); AF(2)-DE-(159-17) (References to "AF" are to the Accordion Folders transmitted by the Clerk of the District Court with the Record)**.** WNIC maintains that the Policy, as approved by regulators, is unambiguous, and seeks to introduce evidence *of the insureds' intent* to demonstrate that *both parties* understood the Policy to mean the *same thing*.

Circuit also made no mention of the purported distinction. Nonetheless, we assume that the Plaintiffs will argue here that extrinsic evidence was properly disregarded because the alleged ambiguity was "patent." Whether Plaintiffs do so or not, this Court ought to take this opportunity to declare that the "distinction" no longer exists.

A. The Patent/Latent Distinction -- Origins

Lord Francis Bacon originated the patent/latent distinction about the year 1596, and it was further developed in Sir James Wigram's treatise on the interpretation of wills. *See* Charles A. Graves, *Extrinsic Evidence in Respect to Written Instruments*, 2 Va. L. Rev. 338, 366 (1914). In the early 1900s, Florida cases concerning *wills and deeds* adhered to the distinction. Florida courts did not, during this era, apply the distinction at all in cases involving ordinary contracts.[27]

A patent ambiguity was considered one that was obvious on the face of the deed. *See Perkins v. O'Donald*, 82 So. 401, 404 (Fla. 1919) ("words create a patent ambiguity-that is to say, if the will is uncertain or unintelligible upon its face"). Upon finding a patent ambiguity, the court would *strike the will or deed as void*.[28]

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[27] *See Jacobs v. Parodi*, 39 So. 833, 837 (Fla. 1905) (interpreting a patently ambiguous contract by considering extrinsic evidence); *Whitfield v. Webb*, 131 So. 786, 788 (Fla. 1931); *Marion Mortg. Co. v. Howard*, 131 So. 529, 531 (Fla. 1930);.

[28] *Perkins*, 82 So. at 404 (when "words create a patent ambiguity . . . it is as if no will had been made"); *see also Carson v. Palmer*, 190 So. 720, 722 (Fla. 1939)

A different rule existed for latent ambiguities. A latent ambiguity was an ambiguity that was not obvious on the face of the contract or deed, but became obvious in light of extrinsic evidence that showed that "there are two subjects or things which answer the description in the will." *Perkins*, 82 So. at 404–05.[29] In cases of latent ambiguity, instead of striking the will or deed as invalid, the courts reasoned that because the ambiguity arose from extrinsic evidence, extrinsic evidence could be admitted to resolve the ambiguity. *Id.* ("when a latent ambiguity is disclosed by matter [outside] the will, it may be explained or removed by extrinsic evidence"). This doctrine arose in the wills and deeds context because by the time a conflict arose, the testator or grantor would not be available to explain or present evidence on his or her intent.[30]

("where there is nothing in the instrument to show the grantors' intention as to which lot was to be conveyed, the courts are powerless and can do nought but declare the instrument a nullity"); *Connelly v. Smith*, 97 So. 2d 865, 868 (Fla. 3d DCA 1957) (because description in a deed was insufficient to identify a piece of land, the attempted conveyance was "void for uncertainty").

[29] For example, if a will left a piece of land to William Smith, but extrinsic evidence revealed that the testator had both a son and a brother named William Smith, a latent ambiguity would exist in the will.

[30] *Perkins*, 82 So. at 405 (reasoning that "wills [should not be] reformed [nor] new ones made for deceased persons"); *see also Carson*, 190 So. at 721.

B. The Patent/Latent Distinction Is Eroded And Abrogated In The Context Of Wills And Deeds

Lord Bacon's maxim was rejected by leading scholars as confusing and unworkable as early as the 1800s.[31] The drastic difference in outcomes depending on whether an ambiguity was classified as latent (extrinsic evidence admitted) or patent (no extrinsic evidence admitted and provision voided) was generally frowned upon in the early 1900s.[32] There was an inherent unfairness and arbitrariness in voiding certain instruments based on this distinction, and hence Florida's courts relaxed the rule, and then eventually abrogated it. As one court explained, "this 'patent ambiguity' doctrine has been continually eroded by the courts since 1939 so as to now be virtually nonexistent." *Hutchinson Island Realty, Inc. v. Babcock Ventures, Inc.*, 867 So. 2d 528, 532–33 (Fla. 5th DCA 2004) ("parol evidence is held admissible to explain an ambiguity whether latent or patent") (citations and quotations omitted).[33] The last time this Court utilized the

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[31] *See Graves*, 2 Va. L. Rev. at 368–70 (noting "no real difference in the rules of law governing patent and latent ambiguities" and that even Sir Wigram's treatise rejected the distinction in 1831); *Samuel March Phillips, et al., A Treatise on the Law of Evidence* 314–15 (New York, Banks, Gould, & Co. 1849).

[32] *See, e.g.*, *Whitfield*, 131 So. at 788 (noting that the traditional rule is "now somewhat relaxed"); *see also* 22 C.J. Evidence § 1507 (1920) (noting that the rule has been "subjected to much criticism").

[33] *See also Bajrangi v. Magnethel Enters., Inc.*, 589 So. 2d 416, 419 n.5 (Fla. 5th DCA 1991); *Campbell v. Campbell*, 489 So. 2d 774, 777–78 (Fla. 3d DCA 1986) ("*In the circumstance of patent or latent ambiguity, extrinsic evidence which bears upon the testator's intent is admissible.*").

distinction at all was in 1939, in a case involving a will. *Allen v. Fisher*, 190 So. 264 (Fla. 1939). Sixty years later, in *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 643 (Fla. 1999), this Court held that extrinsic evidence may be admitted to clarify any ambiguity, even a so-called "patent" one.

C. Some Lower Florida Courts Erroneously Grafted The Patent/Latent Distinction Doctrine Onto The Law Of Contracts

After the 1930's, the distinction was barely mentioned in case law. Courts began to dismantle the distinction in the area of wills and deeds, so that today the distinction no longer applies there. Then, in 1974, a Florida appeals court discussed the distinction in a case involving a sales contract.

In *Ace Elec. Supply Co. v. Terra Nova Elec., Inc.*, 288 So. 2d 544 (Fla. 1st DCA 1974), plaintiff claimed that the terms of a guarantee in a sales contract were ambiguous. Relying on two cases from the 1930's -- both dealing with a deed -- the court invoked the patent/latent distinction. *Id*. at 547. The court apparently did not understand that the patent/latent distinction was inapplicable because the case did not involve a will or deed, and that cases from the 1930's utilizing abandoned legal doctrines had no place in interpreting a modern sales contract.

Unable to find a useful definition of the so-called distinction in Florida case law outside of the area of wills and deeds, the court turned to a legal dictionary. *Id*. The court held that a patent ambiguity appears on the face of the instrument

"and arises from the defective, obscure, or insensible language used." *Id*. Prior to this case, no Florida court had ever defined a patent ambiguity in this way.

While the ambiguity in *Ace Electric* arose from the face of the guaranty, the court held that the ambiguity could not really be patent because there was no "defective, obscure or insensible" language. *Id*. Yet, the ambiguity arose from the face of the guaranty and not matters outside of it, and hence, was not classically latent either. *Id*. The court, realizing the distinction was useless because such a simple purported ambiguity evaded either definition, then held that "a latent ambiguity may exist from the terms of the instrument itself, as, for example, where as [sic] writing is capable of two constructions, both of which are in harmony with the language used." *Id*. (citing 32A C.J.S. *Evidence* § 961). In other words, a latent ambiguity is a patent ambiguity without the obscure language.

The court also ruled it could be considered an "intermediate" ambiguity, which arises where "the words all are sensible and have a settled meaning, but at the same time consistently admit of two interpretations according to the subject matter in the contemplation of the parties." *Id*. This was new law.[34] Under these definitions, an intermediate ambiguity and a latent ambiguity are basically the

[34] The court's only authority for this statement is 22 C.J. *Evidence* § 1596, and our research reveals no Florida case before *Ace Electric* discussing an "intermediate ambiguity."

same thing: an ordinary ambiguity not occasioned by "defective, obscure, or insensible language," whatever that even means.

The entire discussion of the patent/latent distinction in *Ace Electric* was unnecessary and misplaced. The court seemed to think, incorrectly, that the archaic distinction, utilized long ago in cases involving wills and deeds but long abandoned in that realm, applied in modern times to ordinary contract law. After invoking the outdated and abandoned doctrine, it then sought to diminish it by adopting entirely new definitions of patent, latent and intermediate ambiguities which allowed for extrinsic evidence in any kind of ambiguity except those arising from the use of nonsensical language -- something that rarely happens.

The court's analysis was totally unnecessary, in addition to being incorrect. All the court had to do was invoke the parol evidence rule, declare the guaranty ambiguous and admit the parol evidence. Indeed, the court ultimately did just that.[35]

[35] *Id*. at 548-49. Following its confusing discussion of C.J. *Evidence's* treatment of the patent/latent distinction, the court invoked the parol evidence rule in footnote 1, and then took a dive into relevant Florida Supreme Court cases making clear that -- without any reference to patent or latent ambiguities -- parties are always allowed under the parol evidence rule to introduce extrinsic evidence to explain ambiguous contractual terms. *Id*. at 548.

Ace Electric received little notice in the years after it was decided.[36] However, starting in the 1980's a few courts, citing *Ace Electric*, began to again articulate the patent/latent distinction. These cases generally cited *Ace Electric* as authority for the distinction, without engaging in any independent analysis of the law. The *Ace Electric* mistake was then repeated, and even made worse.

Significantly, however, courts invoking the distinction never decided any case based upon it. In every case discussing it, the courts actually found that either (1) the contract was unambiguous, in which case no extrinsic evidence would be admissible under the parol evidence rule, or (2) the ambiguity was latent, thus allowing extrinsic evidence. That is, no court (before the decision below in this case) ever precluded a party from offering extrinsic evidence based on the distinction. Thus, like *Ace Electric* itself, cases after 1974 applying the distinction noted it, but then ignored or avoided it but failed to recognize that the distinction was inapplicable in the first place.

D. The Lower Courts' Misapplied Revival Of The Distinction Creates Doctrinal Chaos

The error committed by a few courts in improperly grafting the abandoned "patent/latent" distinction applied long ago to the law of wills and deeds, onto the

[36] Indeed, the Third District Court of Appeal cited *Ace Electric* later in 1974 for the unremarkable proposition that extrinsic evidence is admissible to clarify an ambiguity. *Rothenberg v. Mellow Music, Inc.*, 291 So. 2d 234, 236 (Fla. 3d DCA 1974).

modern law of contracts has created no small degree of chaos in Florida. On the one hand, there is established law from this Court and numerous other courts making clear that extrinsic evidence is admissible to explain an ambiguous insurance contract. *See* Point II, *supra*. On the other hand, there are a number of cases acknowledging the patent/latent distinction and even trying to apply it. State and federal courts applying Florida law have dealt with this inconsistency in a number of interesting ways.

First, most courts have, appropriately, completely ignored the distinction and simply rely upon the parol evidence rule to allow extrinsic evidence to explain any ambiguity. *Second*, some courts have paid lip service to the doctrine, but have then ignored it entirely to consider extrinsic evidence to effectuate the intent of the parties.[37] On occasion, courts have expressly stated that they are bending the law, classifying one type of ambiguity as another, to reach a desired result.[38]

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[37] *N. Am. Clearing, Inc. v. Brokerage Computer Sys. Inc.*, 395 F. App'x 563 (11th Cir. 2010), is illustrative. There, the court held that "even if the term 'prevailing party' were patently ambiguous," the court would consider extrinsic evidence because courts should not "reach results contrary to the intention of the parties" and the court "will not adopt a one-sided interpretation" of an agreement "without any evidence that such an asymmetry was intended." *Id*. at 567. In other words, patent or not, there is no basis to construe a contract contrary to the parties' intent. That is precisely WNIC's point here.

[38] In *Drisdom v. Guarantee Trust Life Ins. Co.*, 371 So. 2d 690, 693 n.3 (Fla. 3d DCA 1979), applying *Ace Electric*, the court held that the term "school" in a policy was "obscurely defined" -- a patent ambiguity -- but then said it would treat the ambiguity as "latent" to give the insured the "benefit of the doubt" so that it could consider extrinsic evidence of the insured's intent. This is an example of how far-

Third, a number of courts have acknowledged the doctrine and erroneously concluded that it represented Florida law, but then proceeded to bend over backwards to call an ambiguity that seems to be "patent" under the ancient definition a latent ambiguity, thus paving the way for the admission of extrinsic evidence. For example, in *Crown Mgmt Corp. v. Goodman*, 452 So. 2d 49, 52 (Fla. 2d DCA 1984), the Court found that a contract containing two conflicting sentences -- a classic "patent" ambiguity -- contained a latent ambiguity. *See also Schwartz v. Greico*, 901 So. 2d 297, 300 (Fla. 2d DCA 2005) (stating that ambiguities caused by "contradictory language" or an "undefined term" that could have more than one meaning are latent ambiguities).[39] By this logic, the language in the Policy at issue here is not patently ambiguous, either. In any event, little is gained by paying lip service to a dead doctrine and then avoiding it through semantic gymnastics.

Fourth, a number of Florida's appellate courts have erroneously stated that the doctrine once existed in the realm of ordinary contract law (that is erroneous because this Court has never endorsed this view) but have ruled that it has been

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fetched and unprincipled decisions can become when trying to apply meaningless and unworkable distinctions.

[39] In a recent case, a court found that the term "release" presented a latent ambiguity. *Barnwell v. Miami-Dade County School Board*, 48 So. 3d 144 (Fla. 1st DCA 2010). This illustrates how far courts will go to comply with a distinction they erroneously believe exists in the law but recognize makes no sense and would work injustices by forcing arbitrary results.

abrogated, or is unworkable and thus ought to be avoided.[40] These courts deserve credit for refusing to apply a meaningless and discredited doctrine, but have failed to see the larger point, namely, that the patent/latent distinction never really existed in Florida law outside of the context of wills and deeds and that the doctrine has been officially laid to rest.

Fifth, following *Ace Electric's* cribbing *CJS*, a few courts have latched on to the "intermediate" ambiguity concept, *i.e.*, an ambiguity that has both patent and latent characteristics such that it is "both facially problematic and is somewhat obscured by circumstances beyond the face of the contract."[41] Where an intermediate ambiguity is present, courts consider extrinsic evidence. *Ace Elec.*

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[40] Indeed, the Fifth District Court of Appeal has expressly held that extrinsic evidence is admissible to clarify a patent ambiguity. *Island Club W. Dev. v. Mid-State Paving Co., Inc.*, 864 So. 2d 1191, 1192 (Fla. 5th DCA 2004). The Third District Court of Appeal, for its part, has criticized the distinction as "ancient" and "essentially meaningless" and no longer applies it. *Indep. Mortg. & Fin., Inc. v. Deater*, 814 So. 2d 1224, 1225 (Fla. 3d DCA 2002). The Second District Court of Appeal found the distinction unworkable because courts sometimes "have considerable difficulty in perceiving the difference between patent and latent ambiguities." *Crown Mgmt.*, 452 So. 2d at 52; *see also* 32A C.J.S. Evidence § 1518 (2010) ("[T]he broad general statement that a patent ambiguity cannot be explained by parol evidence has been subjected to much criticism, on the ground that it is too general, too broad, and not of universal application, and it has never been acted on in its widest extent, at least where the word 'ambiguity' is taken in its broad sense of doubtfulness, uncertainty, or double meaning" (citations omitted)).

[41] *Royal Cont'l Hotels, Inc. v. Broward Vending, Inc.*, 404 So. 2d 782, 784 (Fla. 4th DCA 1981); *Provident Bank v. Taylor Creek Enterprises, LLC*, No. 3:09cv36, 2010 WL 298300, at *4 n.6 (N.D. Fla. Jan. 19, 2010).

Supply Co., 288 So. 2d at 547. This Court has never endorsed this approach, but courts nonetheless apply it to harmonize chaos.

Sixth, a number of courts have totally redefined the classic definition of a latent ambiguity to expressly include ambiguities arising from the face of a contract, which is the definition of a patent ambiguity.[42] This follows *Ace Electric's* confusing description of a latent ambiguity: "[A] latent ambiguity may exist from the terms of the instrument itself, as, for example, where a writing is capable of two constructions, both of which are in harmony with the language used." *Ace Elec.*, 288 So.2d at 547 (quotations omitted). But that is a patent ambiguity under the ancient distinction.

Courts, predictably, have struggled to articulate a reasoned basis for applying the distinction. The court in *Emergency Assocs of Tampa, P.A. v. Sassano*, 664 So. 2d 1000, 1002 (Fla. 2d DCA 1995) strained to justify the distinction by saying that allowing extrinsic evidence in the case of a patent ambiguity "would be to give a trial court free reign to modify a contract by supplying information the contracting parties did not choose to include." But,

[42] *See also Ocean Reef Club, Inc. v. UOP, Inc.*, 554 F. Supp. 123, 128 (S.D. Fla. 1982) ("if the writing in the contract in question is susceptible of either of the divergent meanings contended for by the parties it presents a latent ambiguity"); *Drisdom v. Guar. Trust Life Ins. Co.*, 371 So. 2d 690, 692–93 (Fla. 3d DCA 1979) (because the term "actual individual school" in insurance policy "is susceptible to at least two different interpretations," ambiguity was "latent" and hence trial court properly admitted parol evidence at trial).;

respectfully, that is backwards. If a contract is ambiguous, and the court does not allow extrinsic evidence to determine the parties' true intent, then how is the court to construe the ambiguous term? Flip a coin? Eeny, meeny, miny, moe? The surest way to give a court "free reign" to modify a contract is to preclude the parties from proving, through the tested adversarial process, the correctness of their interpretation from evidence of the parties' acts and words, and for the court to then "construe" the contract in a vacuum. *Reed v. Merch. Mut. Ins. Co. Balt.*, 95 U.S. 23, 30 (1877).[43]

The last time this Court referred to the distinction is *Deni*. As explained above, *Deni* supports WNIC generally, because the Court implied that extrinsic evidence would be admissible to explain an ambiguous policy term. *Deni*, 711 So. 2d at 1139. The Court's discussion of latent ambiguities was in the context of explaining why the court "cannot agree" with an appellate judge's concurring and dissenting opinion that coverage under the policy could be expanded based upon a so-called latent ambiguity. *Id.* In explaining why the concurring opinion was erroneous, this Court cited its previous opinion in *Perkins v. O'Donald*, 82 So. 401, 404 (Fla. 1919), a case involving a will. In quoting *Perkins*, the *Deni* court

[43] Moreover, the fundamental object of contract law is to discern and do justice to the parties' intent. *Excelsior Ins.*, 369 So. 2d at 942. But, in the case of an ambiguity, it is *not possible* to implement the parties' intent without knowing what that is. While the "patent ambiguity" doctrine makes theoretical sense if applying that label results in *voiding* the contract (this obviating the need to discern intent), it simply makes no sense at all if the court is going to proceed to try to construe it.

emphasized with italics that the doctrine applied historically to the "*words* of the *will*." *Deni*, 711 So. 2d at 1139 (emphasis in original), citing *Perkins*, 82 So. at 404. This Court, emphasizing those particular words, strongly implied that the appellate court's concurring opinion was misplaced because the latent ambiguity doctrine, which may have once applied to wills, did not apply to insurance contracts.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court's grant of summary judgment to Plaintiffs.

Dated: May 2, 2012

Respectfully submitted,

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Certificate of Service

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Certificate of Compliance

Pursuant to Fla. R. App. P. 9.210(a)(2), the undersigned certifies that this brief was typed using 14 point Times New Roman font.

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