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Eleventh Circuit Concludes Significant Litigation Involving Surplus Lines Carrier

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On January 18, 2011, the Eleventh Circuit Court of Appeals in *Essex Insurance Co. v. Zota* (.pdf) brought an end to seven years of litigation and four appellate proceedings, when it affirmed a final declaratory judgment entered in favor of a surplus lines insurer, Essex Insurance Company, following a jury trial. Although the Eleventh Circuit's decision is brief and unpublished, the Court's decision and the earlier appeals in the case established certain significant precedent for surplus lines insurers doing business in the State of Florida on issues relating to policy form filing, policy delivery, and the reach of Chapter 627, Florida Statutes to surplus lines carriers.

BACKGROUND

Mercedes Zota was injured when she fell while painting a mural on the second-story ceiling of a "spec" home under construction in Lighthouse Point, Florida. After the incident, Zota and her husband brought a negligence action against Lighthouse Intracoastal, Inc.; Broward Executive Builders, Inc., the general contractor for the project; and Jack Farji, a 50% shareholder of Lighthouse and the owner of Broward Executive. Lighthouse's insurer, Essex, then sought declaratory relief in federal district court regarding its obligations with respect to the defendants in the negligence action. After the district court narrowed the issues for trial during summary judgment proceedings, the case proceeded to trial on the two remaining factual issues arising from the policy exclusion at issue: (1) Whether Lighthouse was a contractor at the time of the construction; and (2) Whether Lighthouse was a builder at the time of the construction. Because the jury found that Lighthouse was a builder, the Essex policy did not provide coverage and final judgment was entered in Essex's favor.

POLICY FORM FILING

In the district court, the insured and the injured claimant both argued that the surplus lines insurer's failure to file its policy forms with the Florida Office of Insurance Regulation (OIR) estopped it from denying coverage based on a policy exclusion. The district court found that while § 627.410 applies to surplus lines insurers and it was violated, there was no express penalty for the violation and selectively voiding the exclusion "would raise grave constitutional concerns." *Zota SJ Order (.pdf)* (reported at 607 F. Supp. 2d 1340).

On Appeal

On appeal following the declaratory jury trial which concluded in favor of Essex, the insured and injured claimant again raised this issue before the Eleventh Circuit, relying on a 2008 unpublished decision of the Eleventh Circuit, *see CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co*., 2008 WL 3823898 (11th Cir. 2008), which rested on a 1968 Florida intermediate appellate decision. *See Am. Mut. Fire Ins. Co. v. Illingworth*, 213 So. 2d 747, 749 (Fla. 2d DCA 1968). Essex raised a host of arguments which militated against

reversal on this issue which were directed at both whether § 627.410 even applied to surplus lines carriers, and, if so, what the proper remedy was.

On the threshold application issue, Essex argued:

- § 627.410 is trumped by a more specific provision in § 626.923;
- the OIR has never required surplus lines carriers to file and obtain approval of their policy forms;
- not a single state requires surplus lines insurers to file their policy forms with the state regulatory agency for approval; and
- the Florida Surplus Lines Law and the Florida legislature's intent support the inapplicability of § 627.410 to surplus lines carriers.

On the remedy issue, Essex argued:

- appellants' two cases rely on outdated precedent, conflict with present Florida law which holds that coverage cannot be created by estoppel, and never reached the ultimate issue before the court;
- noncompliance with § 627.410 would require the voidance of the *entire* policy or, at the very least, rescission, since the statute is a condition precedent to forming an insurance contract in Florida;
- creating coverage as a result of noncompliance with § 627.410 would constitute an unconstitutional impairment of contracts and a taking of property without due process of law;
- Chapter 627 lacks any provision or penalty for noncompliance;
- the majority of jurisdictions addressing this issue have concluded that the failure to file the policy or endorsement does not render it void; and
- § 627.418 requires the court to assume that a policy provision is valid despite noncompliance with the Florida Insurance Code.

May 15, 2009: The Line in the Sand for Policy Form Filing

The Eleventh Circuit affirmed the final declaratory judgment without expounding on its bases. Therefore, for lawsuits filed before May 15, 2009, it can be argued that the Court adopted the district court's reasoning (*i.e.*, § 627.410 applies to surplus lines insurers but contains no penalty for a violation). It is not clear, however, whether the Court adopted Essex's position on appeal (*i.e.*, § 627.410 does not apply to surplus lines carriers). Nevertheless, Florida law provides clear guidance that the form filing requirement does not apply to lawsuits filed *after* May 15, 2009. See § 626.913, Fla. Stat. (2010) (enacted by Ch. 2009-166, § 7, Laws of Fla.).

DELIVERY OF SURPLUS LINES POLICIES

The significant ruling handed down by the Florida Supreme Court *Essex Insurance Co. v. Zota (.pdf)* (*reported at* 985 So. 2d 1036)—based on five questions certified to it by the Eleventh Circuit *Essex Insurance Co. v. Zota (.pdf)* (*reported at* 466 F.3d 981)—related to whether surplus lines insurers were required to *directly* deliver a

surplus lines policy to its insured. The Florida Supreme Court answered this question in the negative, finding that neither § 626.922 nor § 627.421, Florida Statutes required such a result. The Court found that these two statutes did *not* alter the well-established common law presumption that delivery of a policy to an insured's agent constitutes delivery to the insured. The Court therefore held that delivery of a surplus lines policy to the insured's independent broker-representative constitutes delivery to the insured.

APPLICATION OF CHAPTER 627 TO SURPLUS LINES INSURERS

Until the Florida Supreme Court's decision, there was some confusion as to whether Chapter 627 of the Florida Statutes which generally regulates admitted carriers applies in whole, or, in part, to surplus lines insurers who are permitted to do business in the state under Chapter 626, Florida Statutes but are not considered "admitted" carriers. The Court held that both § 627.428, Florida Statutues, which grants fees to a prevailing insured, and § 627.421, Florida Statutes, which regulates the timing of policy delivery, apply to surplus lines insurers. As discussed above, it is still unsettled whether the filing of policy forms as required by § 627.410 applies to surplus lines carriers in cases *not* controlled by the relatively new statute on this issue—§ 626.913, Florida Statutes (2010).