IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

WILLIAM SUMMERS,

Plaintiff,

v. Case No.: 2007 CA 5232 WS/H

SCOTTSDALE INSURANCE COMPANY,

Defendant.
_____/

PLAINTIFF'S OPPOSITION TO SCOTTSDALE'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND AFFIRMATIVE DEFENSES

Plaintiff, William Summers ("Mr. Summers"), by and through his undersigned counsel, respectfully submits this Opposition to Scottsdale's Motion for Leave to File Amended Answer and Affirmative Defenses and states as follows:

1. On June 27, 2008, Mr. Summers served his Motion for Partial Summary Judgment in this matter.

2. On July 26, 2008, the Florida Supreme Court issued its opinion in Essex Ins. Co. v. Zota, 2008 Fla. LEXIS 1112 (Fla. 2008).

3. On July 25, 2008, Plaintiff filed a Notice of Filing Additional Authority in Support of His Motion for Partial Summary Judgment which attached as Exhibit A a copy of the Essex opinion.

4. Previously, Defendant filed a Motion to Stay Action and stated within that motion that the "[M]ost critical issue in this case is whether Chapter 627 of the Florida Statutes applies to surplus lines carriers. This is a question of law that will be answered by the Florida Supreme Court in Essex." See Defendant's Motion to Stay Action at ¶9. The Defendant went on in its

Motion to state that the "[O]utcome in Essex will be dispositive of the issue in this case and substantially affect the outcome of the case." See Id. at ¶10.

5. Even though it made prior representations to this Court about the dispositive nature of the Essex opinion when it was seeking affirmative relief from this Court, Scottsdale Insurance Company ("Scottsdale") has not acted consistent with its prior representations concerning the dispositive nature of the Essex opinion because the Essex opinion was not favorable to it.

6. Rather, the Florida Supreme Court in Essex found that Chapter 627, Florida Statutes, applies to Surplus Lines Carriers, with the exception of the first part of the chapter which addresses ratings. All other parts of the Chapter, including Fla. Stat. §627.706 and Fla. Stat. §627.428 apply to Surplus Lines Carries issuing policies of insurance to the insureds in this State. The Florida Supreme Court specifically held that the word "chapter" in Fla. Stat. §627.021(2)[1] does not refer to the entire Chapter 627. Instead, the word "chapter" actually means "part" and refers only to the first part of the chapter dealing with ratings. Therefore, with the exception of the first part of the chapter concerning ratings, the remainder of Chapter 627 applies to Surplus Lines Carriers issuing policies of insurance in this State.

7. Consistent with the Florida Supreme Court's decision in Essex and its prior representations to this Court concerning the dispositive effect of the Essex decision on the issue in this case, Scottsdale withdrew its seventh and eighth affirmative defenses which stated that based on the use of the word "chapter" in Fla. Stat. §627.021, Scottsdale was not subject to either Fla. Stat. §627.428 (affirmative defense 7) or Fla. Stat. §627.706 (affirmative defense 8).

[1] Fla. Stat. §627.01(2) states, in pertinent part, that "This chapter does not apply to (e) Surplus lines insurance placed under the provisions of §§626.913-626.937.

8. However, inconsistent with the Florida Supreme Court's decision in Essex and inconsistent with its own prior representations to this Court concerning the dispositive effect of the Essex opinion on the issue in this case, Defendant filed a Motion for Leave to File Amended Answer and Affirmative Defenses which seeks to assert that it is an "unauthorized" insurer and, therefore, not "authorized" as that word is used in Fla. Stat. §627.706. Fla. Stat. §627.706 states, in pertinent part, that "Every insurer authorized to transact property insurance in this state shall provide coverage for a catastrophic ground cover collapse and shall make available, for an appropriate additional premium, coverage for sinkhole losses on any structure . . ." Fla. Stat. §627.706(1).

9. There are laws in this State which prevent unauthorized insurers, and their representatives, from selling insurance to residents of this State. If it is truly Scottsdale's position that it is an unauthorized insurer in this State, then Fla. Stat. §626.910 requires that a civil penalty be imposed against it of not more than $1,000 for each nonwillful violation, or not more than $10,000 for each willful violation. Here, Scottsdale's violation of Fla. Stat. §626.910 is willful because Scottsdale admitted in its answer to the complaint that it issued a homeowner's policy of insurance to the Plaintiff covering property within this State. See Scottsdale's answer to the complaint at ¶4. Further, Scottsdale has affirmatively represented to this Court that it is an unauthorized insurer in this State and is seeking affirmative relief from this Court based on that representation.

10. Fla. Stat. §626.902 further provides that in addition to the monetary penalties expressed in Fla. Stat. §626.910, it is also a felony of the second degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084, for an unauthorized insurer, or anyone aiding or representing it, to sell insurance to the residents of this State.

11. Fla. Stat. §626.901, which states that representing or aiding an unauthorized insurer is prohibited, also states that the section does not apply to "Surplus lines insurance written pursuant to the Surplus Lines Law, ss. 626.913-626.937." Fla. Stat. §626.901(4)(b). Therefore, while Surplus Lines insurers are per se "unauthorized" insurers, they become authorized insurers by complying with Fla. Stat. §§626.913-626.937, thus exempting themselves from the civil and criminal penalties set forth in Fla. Stat. §626.910 and §626.902.

12. Please find attached as Exhibit A a copy of a certificate received from the Office of Insurance Regulation confirming that Scottsdale Insurance Company is an eligible (i.e. authorized) Surplus Lines insurer in this State.

13. Additionally, this claim was denied because Scottsdale excluded sinkhole coverage from its policy and took the position that as a Surplus Lines Carrier, Fla. Stat. §627.021 exempted it from complying with Fla. Stat. Chptr. 627, including Fla. Stat. §627.706, which requires insurers to add sinkhole coverage to the policy by way of endorsement for the residents of this State. Scottsdale is now trying to add an additional reason for denying this claim, namely that it is an "unauthorized" insurer and therefore not subject to Fla. Stat. 627.706. In addition to the reasons stated above, Scottsdale should be prevented from changing is reason for denying this claim based on the doctrine of "Mend the Hold." "Mend the Hold" is a form of estoppel, and it finds that an insurer cannot raise additional issues after litigation commences in order to justify its prior conduct. As explained by the United State Supreme Court:

> Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by settled principle of law.

Railway Co. v. McCarthy, 96 U.S. 258, 267-68 (1877); *Trans Ocean Container Corp. v. Yorkshire Ins. Co., Ltd., "C" Account*, 81 F. Supp. 2d 1340, 1347 (S.D. Fla. 1999). The doctrine of "mend the hold" has been found especially applicable to insurance companies that change their reasons for refusing to pay a claim. *Harbour Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363-64 (7th Cir. 1990).

14. It is quite clear that Scottsdale is not only estopped from raising new reasons for denial of this claim, but it is also an "authorized" insurer in this State, at least according to the Office of Insurance Regulation. Therefore, it is subject to Fla. Stat. Chpt. 627, with the exception of part 1 related to ratings, as provided by the Florida Supreme Court in Essex. The only way it falls outside of the Essex opinion is to proceed with its current argument that it is an "unauthorized" insurer selling insurance to the residents of this State, including the Plaintiff, which subjects it, and its representatives, to both civil and criminal penalties as set forth above.

WHEREFORE, for all of the foregoing reasons, Plaintiff, William Summers, respectfully requests that this Court deny Defendant's Motion for Leave to File Amended Answer and Affirmative Defenses.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Gerald T. Albrecht, Esq. and Christina M. Fears, Esq.,** Butler Pappas Weihmuller Katz Craig, L.L.P., 777 S. Harbour Island Blvd., Suite 500, Tampa, FL 33602 on this _____ day of August, 2008.

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Attorney