

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1044

KILN, PLC, d/b/a LLOYD'S UNDERWRITERS, and
QBE INTERNATIONAL INSURANCE, LTD.,
collectively d/b/a LLOYD'S OF LONDON,

Petitioners,

v.

ADVANTAGE GENERAL INSURANCE CO., LTD.,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF
THE FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND THE FACTS

Advantage General Insurance Company, Ltd. (“Advantage”), a British Virgin Islands corporation, provided insurance coverage for Air Sunshine, Inc. (“Air Sunshine”), a Florida corporation. Advantage Gen. Ins. Co., Ltd. v. KILN/QBE Int’l, No. 4D08-1944, slip op. at 1 (Fla. 4th DCA Apr. 9, 2009). In order to minimize its risk for insuring Air Sunshine, Advantage acquired personal accident reinsurance coverage from two Lloyds syndicates, Petitioners, KILN, Plc. (“KILN”), and QBE International Insurance, Ltd. (“QBE”). Id. Following an accident involving an Air Sunshine airplane, a dispute arose as to the reinsurance. Id. Thereafter, Advantage, as insurer of Air Sunshine, filed suit against KILN and QBE. Id. KILN and QBE moved to dismiss the suit, asserting that Advantage is barred from bringing suit in a Florida court under section 626.903, Florida Statutes (2007).¹ Id. The trial court agreed that Advantage was statutorily barred from bringing the suit and dismissed Advantage’s suit with prejudice. Id.

Advantage appealed the trial court’s final order to the Fourth District Court of Appeal. Id. The Fourth District reversed the trial court’s order, stating that the trial court erred by dismissing Advantage’s suit because the lawsuit filed by

1. Section 626.903, Florida Statutes (titled “Suits by unauthorized insurers prohibited”), provides, “As to transactions not permitted under s. 624.402, no unauthorized insurer shall institute, file, or maintain, or cause to be instituted, filed, or maintained, any suit, action, or proceeding in this state to enforce any right, claim, or demand arising out of any insurance transaction in this state.”

Advantage against KILN and QBE “did not arise out of an unauthorized insurance transaction by Advantage.” Id. The Fourth District found that the lawsuit filed by Advantage arose out of Advantage’s contract with KILN and QBE, not out of Advantage’s decision to insure Air Sunshine. Id. at 2. In coming to its decision, the Fourth District relied upon arbitration case law to conclude that the phrase “arising out of” in section 626.903 is to be given a narrow construction. Id. The Fourth District concluded its analysis by stating that “[b]ecause section 626.903 has the effect of barring access to the courts, we see no valid policy reason for engaging in a broad and expansive interpretation of its terms, especially where the statutory scheme itself does not suggest that we do so.” Id.

SUMMARY OF THE ARGUMENT

The Fourth District’s decision expressly and directly conflicts with this Court’s decisions in Government Employees Insurance Company v. Novak, 453 So. 2d 1116 (Fla. 1984), and Blish v. Atlanta Casualty Company, 736 So. 2d 1151 (Fla. 1999). In Novak and Blish, this Court decided that the phrase “arising out of” is to be given a broad interpretation when interpreting the Florida insurance code. In the instant case, the Fourth District decided that the phrase “arising out of” is to be given a narrow interpretation when interpreting the insurance code. For this reason, this Court has conflict jurisdiction.

Not only does the Fourth District’s decision conflict with Blish and Novak, but it also is contrary to the plain language of section 626.903 and fails to effectuate the Legislature’s intent. Indeed, the Legislature utilized the word “any” three times in one sentence to articulate that the statute should be interpreted broadly; however, the Fourth District concluded that the statute should be interpreted narrowly. Furthermore, the purpose of the statute was to preclude insurers who fail to follow Florida law, such as Advantage, from utilizing the precious resources of the Florida judiciary. The Fourth District’s decision flies in the face of the Legislature’s intent.

For these reasons, this Court should exercise its discretion by accepting jurisdiction of this case.

ARGUMENT

I. THERE IS EXPRESS AND DIRECT CONFLICT.

This Court has discretionary jurisdiction to review an express and direct conflict between a district court’s decision and a decision from this Court. Art. V, § 3(b)(3), Fla. Const. To trigger this Court’s discretionary jurisdiction under the theory of express and direct conflict, the conflict “must appear within the four corners” of the district court’s decision. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). As discussed below, there is express and direct conflict between the Fourth District’s decision and two decisions of this Court.

In Government Employees Insurance Company v. Novak, 453 So. 2d 1116 (Fla. 1984), one of the issues confronted by this Court was how to interpret the phrase “arising out of” in the context of the Florida insurance code. In Novak, the insured was sitting in her car and about to drive away from her residence when she was approached by a stranger. 453 So. 2d at 1117. The stranger asked the insured for a ride, but the insured refused. Id. Thereafter, the stranger shot the insured, pulled her from the car, got in the car, and drove away. Id. Several months later, the insured died from the gunshot injury that she sustained. Id. The trial court granted summary judgment brought on behalf on the insurer on the basis that the injury did not arise out of the ownership, maintenance, or use of the insured motor vehicle. Id. The district court of appeal then reversed, finding a sufficient connection between the automobile and the injury. Id. This Court accepted jurisdiction and addressed whether section 627.736(1), Florida Statutes, required the insurer to provide personal injury protection (“PIP”) benefits for the insured’s injury. Id. at 1118-19. Under section 627.736(1), automobile insurance policies provide PIP benefits for any “loss sustained . . . as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle.” (Emphasis added). In determining the applicability of section 627.736(1) to the facts, this Court was confronted with two issues: (1) the meaning the term “accident” and (2) the meaning of the clause “arising out of the

ownership, maintenance, or use of a motor vehicle.” Novak, 453 So. 2d at 1118.

With respect to issue (2), this Court stated that “[c]onstruction of the clause ‘arising out of the use of a motor vehicle’ is an easier matter. It is well settled that ‘arising out of’ does not mean “proximately caused by,” but has a much broader meaning. All that is required is some nexus between the motor vehicle and the injury.” Id. at 1119 (emphasis added). This Court went on to explain that the phrase “arising out of” should be given a liberal construction in order to effectuate legislative intent to extend coverage broadly. Id. This Court ultimately affirmed the district court’s decision by concluding that the PIP benefits must be paid out by the insurer to the insured’s estate. Id.

Subsequent to Novak, in Blish v. Atlanta Casualty Company, 736 So. 2d 1151 (Fla. 1999), this Court was again confronted with how to interpret the phrase “arising out of” in the context of the insurance code. In Blish, the insured was driving his truck home when one of his tires blew out. 736 So. 2d at 1152. As he was changing the tire, he was attacked from behind by several assailants. Id. The men choked and beat the insured and stole money from his pocket. Id. After the attack, the insured finished changing the tire and drove home. Id. A week later, he went to the hospital after experiencing severe abdominal pain. Id. The insured was diagnosed with a ruptured spleen, which the doctors removed. Id. The insured filed a claim for benefits under his PIP portion of his auto insurance policy.

Id. After the county court granted summary judgment, the circuit court reversed, finding a sufficient nexus between the insured's use of the truck and his injuries.

Id. at 1152-53. The district court of appeal then reversed, concluding that the attackers did not attempt to possess or use the insured's truck. Id. at 1153.

Relying on Novak, this Court reversed the district court's decision by broadly interpreting the phrase "arising out of" contained in section 627.736(1). Id. at 1153-55. This Court concluded that the insured's injuries were covered under the PIP coverage because they "aris[e] out of the ownership, maintenance, or use of a motor vehicle." Id. at 1155.

Rather than giving the phrase "arising out of" a broad interpretation—as this Court did in Novak and Blish—the Fourth District in the instant case determined that "arising out of" is to be given a narrow interpretation when interpreting the insurance code. See Advantage Gen. Ins. Co., 4D08-1944, slip op. at 2. Notably, the Fourth District makes no reference to Novak or Blish in its opinion; instead, it mistakenly relied upon arbitration case law for guidance on how to interpret the phrase "arising out of" when interpreting the insurance code. See id. (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999)). Because the Fourth District gave the phrase "arising out of" a narrow construction when this Court had previously given the same phrase a broad interpretation when interpreting the insurance code, there is express and direct conflict.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION BY ACCEPTING JURISDICTION OF THIS CASE.

The Fourth District's decision is contrary to the plain language of section 626.903. Furthermore, the decision does not effectuate the intent of the Florida Legislature, which was to preclude insurers that violate Florida law from filing certain claims in Florida courts. Each will be addressed in turn.

The relevant statute in this case, section 626.903, provides, "As to transactions not permitted under s. 624.402, no unauthorized insurer shall institute, file, or maintain, or cause to be instituted, filed, or maintained, any suit, action, or proceeding in this state to enforce any right, claim, or demand arising out of any insurance transaction in this state." (Emphasis added). Despite the Legislature's decision to draft a broad statute by utilizing the word "any" three times, the Fourth District concluded its analysis by stating that "[b]ecause section 626.903 has the effect of barring access to the courts, we see no valid policy reason for engaging in a broad and expansive interpretation of its terms, especially where the statutory scheme itself does not suggest that we do so." See Advantage Gen. Ins. Co., 4D08-1944, slip op. at 2 (emphasis added). In essence, under the Fourth District's interpretation, the statute applies only when an insurer provides insurance coverage to an insured and then the insurer seeks to enforce rights against the insured (e.g., payment). However, if the Legislature wanted to say something so simple and straightforward, it certainly would have done so without resorting to such a broadly

worded statute. By construing the phrase “arising out of” narrowly, the Fourth District’s decision severely limits the reach of section 626.903, thwarts the legislative purpose, and directly conflicts with Novak and Blish.

Under the Fourth District’s decision, an insurer that violates Florida law by not registering with the Florida Department of Financial Services—like the Respondent in this case—will be allowed to utilize the precious resources of the Florida court system to pursue its claims arising out of its original decision to issue an insurance policy in Florida. For example, the instant case involves an insurer that provided coverage to an insured and then immediately sought reinsurance coverage (i.e., having someone else share the liability) from a reinsurer. Of course, if the insurer did not provide coverage in the first place, the insurer would never have obtained reinsurance from the reinsurer (hence, the reinsurance “arises out of” the original decision to insure). This case is about whether an insurer should be free to violate Florida law by not registering with the State of Florida (so that the State can better regulate the insurance industry) and still be allowed to utilize the limited resources of the Florida courts to pursue claims against a reinsurer. The plain language of section 626.903 and the trial court’s decision would preclude this; the Fourth District’s decision would condone this.

This Court should exercise its discretion by granting review of this case because the Fourth District’s decision is contrary to the plain language of section

626.903 and frustrates the Legislature's intent of preventing insurers that fail to follow the law from utilizing the Florida court system.

CONCLUSION

Based on the foregoing, this Court should accept jurisdiction of this case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. First Class Mail to: Robert Rivas, Esq. and Leonard Wilder, Esq., SACHS SAX & CAPLAN, P.L., 310 W. College Ave. 3d Floor, Tallahassee, FL 32301, on this _____ day of June 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2).

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