IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 07-15721 CA 27

JUDGE VICTORIA PLATZER

ARTHUR BLEICH and GLORIS ELDER, individually and on behalf of all others similarly situated,,

Plaintiff,

vs.

CHICAGO TITLE INSURANCE COMPANY, a foreign corporation,

Defendant.

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**ORDER GRANTING CHICAGO TITLE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came on for consideration on February 9, 2012, on motions for summary judgment filed by both the Plaintiffs Class and Chicago Title Insurance Company. Both motions seek summary judgment on the nature of the duty owed by a title insurance company with respect to charging and collecting insurance premiums on loan policies of title insurance issued in refinancing transactions.



**The Higgins Decision**

On February 7, 2011 in *Commonwealth Land Title Insurance Company v. Higgins,* 58 So.3d 280 (Fla. 1st DCA 2011) that court affirmed orders granting class certification in cases that are substantially identical to the case before the court here. In *Higgins*, the court stated that the reissue rate cases before it "turn on an interpretation of the appellant's duty under Florida law, which must be resolved first and may be examined on a class wide basis." *Id.* at 282. The

First District further held that the legal duty of a title insurance company in charging and collecting title insurance premiums on loan policies in refinance transactions "will likely be answered in summary judgment." *Id.* at 283. The decision of the First DCA in *Higgins* is binding on this Court as there is no inter-district conflict with respect to its opinion that the nature to the insurer's duty may be decided at summary judgment. *Pardo v. State of Florida*, 596 So.2d 665, 666 (Fla. 1992) at 666.

**Rule 69O-186.0032(b)(3) Establishes the Parameters for Reissue Rate Premiums**

Rule 69O-186.0032(b)(3), Florida Administrative Code (the "Rate Rule"), and its predecessor, Fla. Stat. §627.7825 (the "Rate Statute") establish the circumstances under which title insurance premiums may be charged at reissue rates:

> Provided a previous owner's policy was issued insuring the seller or the mortgagor in the current transaction and that both the reissuing agent and the reissuing underwriter retain for their respective files copies of the prior owner's policy, the reissue premium rates in paragraph (a) shall apply to ... mortgage policies issued in refinancing of property insured by an original owner's policy which insured the title of the current mortgagor.

A companion statute makes clear insurers may only charge the rates as specifically described in the Rate Rule:

> **627.780. Illegal dealings in premium**
>
> (1) A person may not knowingly quote, charge, accept, collect or receive a premium for title insurance other than the premium adopted by the commission....

The parties agree that the Rate Rule is not ambiguous. This Court likewise, determines that the Rate Rule is not ambiguous.

**The Parties' Contentions**

Chicago Title contends that the duty to charge reissue rates in refinancing transactions is confined to the duties outlined in the Rate Rule which requires a title insurance underwriter to charge and collect premiums at reissue rate only where a previous owner's policy was issued insuring the mortgagor/borrower in the refinancing transaction and "that both the reissuing agent and the reissuing underwriter retain for their respective files copies of the prior owner's policy."

Initially Plaintiffs contended that Chicago Title had the duty to charge reissue rates on loan policies issued in every refinancing transaction: "[T]he Reissue Rate discount *must* be provided to all Florida consumers who *refinance* their mortgages (i.e. owner-borrowers)" (Memo in Support of Plaintiffs' Motion for Summary Judgment, pp. 6-7) (emphasis in original).

In subsequent filings, Plaintiffs revised the duty which they contend Chicago Title has:

> CTIC [Chicago Title] would be charged with instituting methods and procedures, presumably subject to audit or other reasonable oversight, to insure that its own employees and its agents (a) provide notice to owners explaining their likely entitlement to the discounted rate, (b) accept (and retain) any tendered pre-existing Owner's policies, (c) engage in reasonable review of available records, such as CTIC's computer systems and those of its "sister" companies, to determine if borrowers have qualifying pre-existing Owner's policies and (d) charge the Reissue Rate to qualifying homeowners." (Plaintiffs Opposition to Chicago Title's Motion and Memorandum in Support of Summary Judgment, pp. 45-46).

**Judicial Standards for Statutory Interpretation**

The Reissue Rate was initially established in statutory form by the Florida Legislature and was subsequently adopted as a rule by the former Department of Insurance. The standards for judicial interpretation of statutes and administrative rules are the same. *See, e.g., Grueiro v. Liberty Mailing, Inc.*, 43 So. 3d 826, 827 (Fla. 1st DCA 2010) ("[s]tatutory construction rules require first that the statute, or the rule, as the case may be, be given its plain meaning"); *Gar-Con Devel, Inc. v. State Dep't of Envtl. and Reg.*, 468 So.2d 413, 415 (Fla. 1st DCA 1985) ("in

interpreting rules or statutes, words should be given their plain and ordinary meaning."); accord *Hawkins v. Ford Motor Co.,* 748, So.2d 993, 1000 (Fla. 1999) (noting that a court is "compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful"). The standards for the judicial interpretation of statutory enactments were recently reiterated in *Krause v. Textron Financial Corporation,* 59 So.3d 1085 (Fla. 2011).

> "It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." *Knowles v. Beverly Enterprises-Fla., Inc.*, 898 So.2d 1, 5 (Fla. 2004). To discern legislative intent, we first look to the statute's plain language. *See Borden v. E.-European Ins. Co.,* 921 So.2d 587, 595 (Fla. 2006). "When the statute is clear and unambiguous, 'there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Saleeby v. Rocky Elsen Constr, Inc.*, 3 S.3d 1078, 1082 (Fla. 2009) (quoting *Holly v. Auld,* 450 So.2d 217, 219 (Fla. 1984)). "Further we are 'without power to construe an unambiguous statute in a way which would extend, modify or limit, its express terms or its reasonable and obvious implications." *Valez v. Miami-Dade County Policy Dep't,* 934 So.2d 1162, 1164-65 (Fla. 2006) (quoting *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla. 1998)).

*Id.* at 1089.

Applying this standard to the Rate Rule, the Court finds that the duty to charge and collect Reissue Rates is permitted and required only when a prior Owner's policy was issued insuring the borrower in a refinancing transaction, and both the reissuing agent and the reissuing title insurance company retain for their respective files a copy of the borrower/owner's policy. Moreover, the Rate Rule does not impose additional duties on insurers to search for prior policies or to disclose the availability of reissue rates to borrowers. While such duties might be good policy and helpful to consumers, the court is not authorized to depart from the plain language of the Rate Rule and extend or modify its express terms. As the Florida Supreme Court has held, "[t]o do so would be an abrogation of legislative power." *Bennett v. St. Vincent's Medical*

*Center*, 71 So. 3d 828, 838 (Fla. 2011) (quoting *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998)).

Although Reissue Rate cases against title insurance companies were originally filed in Florida in 2004, no Florida appellate court has defined the duty of a title insurance company with respect to charging and collecting premiums on loan policies issued in refinancing transactions. The only case brought to the attention of the court where the duty to charge and collect premiums under the Rate Rule was the subject of consideration is *Adams v. Nat'l Real Estate Info. Servs., Inc.*, No. 07-CA-2933-15-W (Fla. 18th Cir. Ct. Apr. 28, 2010). In *Adams*, the court granted summary judgment in favor of the defendant title agent, finding that the Rate Rule imposed no duty to locate a prior policy. Judge Dickey reasoned that:

> There's got to be a duty in the law. Clearly, the legislative history of a number of these statutes was, as the defense argues, to help the insurance companies financially. And the legislature is well able, if they want to pass a consumer protection law . . . , and a good example is 627.985 to do that. This regulation does not create a duty in any one other than to charge the Reissue Rate, and that duty is so ... weakened by the fact that there is no requirement that anybody keep the original policy. So what the regulation says is, if you want to charge the Reissue Rate, you can only do it if both... the reissuing agent and the reissuing underwriter retain in their files the copies of the prior Owners' policy and that is a regulation which is designed to prevent charging lower rates rather than higher rates, which is exactly what the defense has argued here .... so this is not a regulation that requires the charging of a lower premium. It's a regulation which regulates the circumstances under which you can do it.

The order granting summary judgment in *Adams* was not appealed to the 5th DCA. However, the statements by Judge Dickey in *Adams* mirror this Court's determination and decision that the duty of the insurer under the Rate Rule is to charge the Reissue Rate only when the circumstances outlined in the Rate Rule are met.

**Applicable Rules of Statutory Construction Support the Court's Interpretation**

While it is not necessary to go further given that the Court has concluded the Rate Rule is unambiguous, the Court finds that well-established rules of statutory construction also support the conclusion that the Rate Rule does not impose the additional duties Plaintiffs ask this Court to find.

**The Absence of Language Imposing a Duty Evidences a Legislative Intent not to Oppose that Duty**

The absence of language in the Rate Statute imposing a duty, where the Legislature imposed duties elsewhere in the same statutory scheme, indicates a legislative intent not to impose that duty. *See Horowitz v. Plantation Gen. Hosp. Ltd. P'ship,* 959 So.2d 176, 185 (Fla. 2007) (statute did not impose alleged duty on hospital in light of other express duties imposed in the same statutory scheme); *see also Rollins v. Pizzarelli*, 761 So. 2d 294, 298-99 (Fla. 2000) (specific provision of set-offs for future benefits in one section supported not reading future benefit set-offs into another section that did not specifically provide for them); *Cason v. Florida Dept. of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla. 2006) (specific inclusion of state in one statute of limitations indicated that legislature did not intend to include the state in another limitations provision that did not specifically include it, saying "we have pointed to language in other statutes to show that the legislature knows how to accomplish what it omitted in the statute in question.").

The statutory scheme of which Fla. Stat. §627.7825 was a part, prior to its sunset and replacement by the Rate Rule, expressly imposed duties on title insurers in other sections, including both duties to search for something and to disclose something. For example, in Fla. Stat. §627.7845(1) the Legislature explicitly requires title insurers to conduct a *search* for title records, saying they must perform "a reasonable title search or a search of the records of a

Uniform Commercial Code filing office" before issuing any title policy. And in Fla. Stat. §627.798 the Legislature explicitly requires title insurers to provide a *disclosure* form "to provide notice to a purchaser-mortgagor that the purchaser-mortgagor is not protected by the title policy of the mortgagee."

The absence of any duty in the Rate Rule other than to charge the reissue rate when the conditions of that rule are specifically met (i.e. that a prior policy exists and a copy of that prior owner's policy is in the files of the reissuing agent and reissuing underwriter) in the face of other duties imposed elsewhere in the title insurance statutory scheme evidences that neither the Legislature nor the former Department of Insurance, intended for the Rate Statute or the Rate Rule to include any duties other than the duties expressed.

**The Legislative History of the Rate Rule Supports the Court's Conclusion**

The legislative history of the Rate Rule also supports Judge Dickey's finding in *Adams* that the Rate Rule is not a "consumer protection measure" but is an "insurer protection measure."[1] The Legislature's concern was clearly with insurer solvency and preventing unlawful discounting, rather than with imposing duties on insurers to assist consumers in identifying or securing potentially available discounts.

In 1992 Florida's title insurance statutes underwent significant reform. *See Fla. H.R. Comm. on Ins.,SB* 170-H(1992) Bill Analysis And Economic Impact Statement at 33-34 (final July 8, 1992). In that analysis, it was noted that "the experience of title insurers in recent years has raised concerns about the financial stability of the title insurance industry." *Id. at* 33. That report also noted that "in what is generally regarded as an effort to protect the solvency of the

[1] Plaintiffs contend that the Rate Rule, although not ambiguous, should be given an interpretation "that exceeds the literal language of the statute" and cites to Byrd v. Richardson-Greenfield Securities, Inc. 552 So. 2d 1099, 1101 (Fla. 1989) to support that claim. Under those circumstances it is proper to consider recognized legislative interpretation principles, such as legislative history, to determine or confirm legislative intent.

title industry, the Department of Insurance amended Rule-4-21.003, Title Insurance Rates, in 1990 by significantly increasing risk premium rates." *Id.* at p.34. The Florida Supreme Court examined the legislative intent behind those 1992 amendments in *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210, 1217 (Fla. 2000), and noted "that the Legislature expressly attempted to reduce the risk of insurer insolvency in its 1992 amendments to the Insurance Code."

In the 1999 amendments to the title insurance statutes the Legislature enacted §627.7825 which established certain title insurance rates, including the Reissue Rate that is now included in the Rate Rule. *See* Laws of Fla. Ch. 1999-286, §12. That statute remained in effect until it expired of its own terms in 2002 to be replaced by the Rate Rule. The "whereas" clause of the 1999 bill specifically recited that the "Legislature finds that the regulation of insurance... promotes the public health, safety and welfare by assuring the solvency and soundness of insurers." Enrolled bill, CS/HB 403.

The historical evolution of the Rate Rule and its predecessor, the Rate Statute, demonstrate clear legislative intent to protect the public welfare by ensuring that tile insurers collect adequate premiums, avoid unlawful discounting, and maintain sufficient reserves so that insurers preserve the ability to pay any claims on policies that they issue. Nothing in the legislative or administrative history of the Rate Statute or Rate Rule suggests any legislative or regulatory intent to require title insurers to charge the Reissue Rate where no prior policy was located and retained in the files of the reissuing agent and reissuing title insurance underwriter.

**Individual Statutes Within a Statutory Scheme Must be Harmonized**

An additional requirement of judicial interpretation of Legislative acts requires harmonization of all portions of a single statutory scheme. *See, School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So.3d 1220, 1234 (Fla. 2007) (stating "because we

are dealing with an entire statutory scheme . . . we do not look at only one portion of the statute in isolation but we review the entire statute to determine intent."). This tenant of statutory interpretation is in accord with the principle that courts "give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." *Id.* at 1234.

The statutory scheme for title insurance is contained in Part XIII of Chapter 627, Fla. Stat. The Rate Statute, prior to repeal, was contained in that part of Chapter 627. §627.7845(1), also found in Part XIII of Fla. Stat. §627, requires that a title insurance company make a determination of insurability of title prior to the issuance of a title insurance policy. Section 627.7845(2) requires the evidence of the determination of insurability to be "preserved and retained" in the insurance company's or its agents' files for seven years and the agent or insurer "must produce the evidence required to be maintained by this subsection . . . upon the demand of the Office [of Insurance Regulation]."

The clear purpose of the requirement of Section 627.7845 to retain evidence of determination of insurability and to produce that evidence to representatives of the Office of Insurance Regulation upon demand is to permit representatives of that office the opportunity to examine the basis for an insurance company's determination of insurability and ascertain that that determination was made in the manner required by that statutory provision. Likewise, the provision of the Rate Rule, and its predecessor the Rate Statute, that the "reissuing agent and the reissuing underwriter retain for the respective files copies of the prior owner's policy" serves the same purpose – to allow examiners from the Office of Insurance Regulation to ascertain whether reissue rate premiums were charged *only* when the prior owner's policy is in the files of the reissuing agent and reissuing underwriter.

The retention requirement in both the Rate Rule and §627.7845 provides additional support for the conclusion that the sole duty of a title insurer in connection with charging premium at Reissue Rate is the retention of a qualifying prior owner's policy in its files and the files of its agent. The purpose for that retention is to enable auditors from the Office of Insurance Regulation to determine that a title insurer is not assuming more risk than the Rate Rule allows by charging Reissue Rate when a prior owner's policy is not in the file.

**The Additional Duties Alleged by Plaintiffs Are Not Supported By Principles of Legislative Interpretation**

Plaintiffs cite to *Byrd v. Richardson-Greenshields Secur., Inc.*, 552 So.2d 1099, 1102 (Fla. 1989) to support their argument that this court may interpret the Rate Rule in a manner "that exceeds the literal language of the statute." The *Byrd* court attributed that language to its earlier decision in *State v. Webb*, 398 So.2d 820 (Fla. 1981). The *Webb* court was confronted with a criminal prosecution resulting from a stop and frisk by police officers based on a "reasonable belief," when the stop and frisk statute provided that the officers must have "probable cause." The *Webb* court cited to prior precedent authorizing a statute's title to be considered as a judicially acceptable source for statutory interpretation. *Id.* at 825. The *Webb* court, in examining the title to the stop and frisk statute found that the title contained words which made it clear that the Legislative intent was to allow a stop and frisk based upon "reasonable belief."

While the *Byrd* court cited to *Webb* as authority for interpreting a statute "to honor the obvious Legislative intent" even where that "exceeds the literal language of the statute," the *Byrd* court, in fact, did not extend the statute in question there. Neither *Byrd* nor *Webb* give a court carte blanche to insert into any statute being subjected to judicial interpretation any provision or duty which the considering court deems to be "nice" or "good public policy." Both *Byrd* and

*Webb* demonstrate that any extension of the requirements of a statute beyond the words chosen by the Legislature must be tethered to some recognized judicial statutory interpretation tool, such as analysis of the language actually used in a statute, including its title.

Plaintiffs also suggest that an interpretation of the Rate Rule that would not require Chicago Title to disclose the availability of the reissue rate to borrowers or perform searches for prior policies "would lead to an unreasonable or ridiculous conclusion." *See, Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984); *Patry v. Capps*, 633 So.2d 9 (Fla. 1994); *City of Boca Raton v. Gidman*, 440 So.2d 1277, 1281 (Fla. 1983).

In *Holly*, the court, in spite of recognizing that it was not free to interpret a statute in a fashion that would be "unreasonable or ridiculous," held that the statute in question should be given its plain meaning. The *Holly* court did, however, place limitations on that tool of legislative interpretation (there must be "cogent reasons for believing that the letter [of the law] does not accurately disclose the [Legislative] intent." *Id.* at 219. And "it is not the court's duty or prerogative to modify or shade clearly expressed Legislative intent in order to uphold a policy favored by the court." *Id.* at 220. Instead, the *Holly* court held that it "must assume that the Legislature balanced the potential detriment" posed by the statute and drafted the language of the statute with that detriment in mind. The *Holly* court concluded that "it is precisely this sort of policy judgment which is exclusively the province of the Legislature rather than the courts." *Id.* at 220.

The Florida Supreme Court in *Patry* and in *City of Boca Raton*[2] did interpret a statute so as not to arrive at an "unreasonable or ridiculous conclusion." However, in doing so, each of those courts tied their interpretation to a recognized principle of judicial interpretation of

[2] The *City of Boca Raton* court also found the ordinance under review "sufficiently ambiguous to warrant an interpretation of its probable intent." *Id.* at 279-80.

legislative acts. In *City of Boca Raton*, the court's interpretation of the statute in question was based on harmonizing that statute with statutes that covered the same general field and in *Patry*, the court's interpretation of the statute under review was predicated upon a requirement that such interpretation must be based upon a "review of the statutory scheme as a whole." *Id.* at 12. The harmonizing interpretation by the Supreme Court in *Patry* and *City of Boca Raton* was tied to the statutory interpretation principle that when dealing with a statutory scheme the court does not look at "one portion . . . in isolation" but looks at the "entire [scheme] to determine intent." *See, School Board of Palm Beach County* at 1234.

Plaintiffs request this court to impose on Chicago Title a duty to institute methods and procedures to find a prior policy, to provide notice to borrowers explaining circumstances that might entitle premiums charged at reissue rate, to search its own records and the records of other title insurers under common ownership with it to find a prior owner's policy, to make inquiry of other title insurance companies and agents regarding the existence of a prior insurance policy and to audit or provide other reasonable oversight to insure compliance with these alleged duties. However, there is nothing in the wording of the Rate Rule itself which states these duties are imposed, nor are there any recognized principles of statutory construction that would permit the Court to impose them. In effect, to find such duties are imposed, the Court would be required to substitute its judgment for the judgment of the Legislature. This court is not at liberty to "modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court." *Holly* at 210.

**Plaintiffs' Reliance on the Senter Letter is Unavailing**

Plaintiffs rely on a 1999 letter sent by Wallace Senter, a former employee of the former Department of Insurance to a title insurance company in which Mr. Senter stated: "In

determining whether or not the reissue rate applies, I think the agent or insurer should determine if there is a prior policy." Plaintiffs argue that this court should give deference to Mr. Senter's letter as an agency's interpretation of the statutes or rules which it regulates.

Florida courts that have afforded deference to administrative agency interpretations of statutes and rules have typically done so when the administrative agency has stated its interpretation in formal opinions, administrative actions, rulemaking processes, or through testimony. *See e.g. GTC, Inc. v Edgar*, 967 So. 2d 781, 794 (Fla. 2007); *Department of Revenue v. First Union Nat'l Bank of Fla.*, 513 So. 2d 114, 119 (Fla. 1987); *American Ass'n. of People with Disabilities v. Hood*, 278 F. Supp. 2d 1337, 1342-43 (M.D. Fla. 2003).

While Mr. Senter was the title insurance coordinator for the Department of Insurance at the time of his letter, his job title did not vest him with the authority to bind the Department of Insurance to an interpretation of the Rate Rule through one informal communication with a single title insurer which, at the time of that communication, was unaffiliated with Chicago Title. Plaintiffs have presented no evidence that Mr. Senter's letter was adopted by the former Department of Insurance or its successor, the Florida Department of Financial Services, Office of Insurance Regulation, in the form of a formal order, a statement of policy, rule making process or other formal action that could conceivably be entitled to deference by this Court in determining the meaning of the Rate Rule. Nor would this court defer to the letter's interpretation in any event because, for the reasons set forth above, the letter does not offer a reasonable interpretation of the Rate Rule's plain language that is consistent with applicable rules of statutory construction.

## Conclusion

Plaintiffs are requesting an order interpreting the Rate Rule to include a requirement that Chicago Title must determine whether a prior owner's policy exists in connection with a loan policy issued in a refinancing transaction and use reasonable efforts to locate such a policy and place it in the files of Chicago Title and its reissuing agent. Chicago Title is seeking an order holding that, in order for the reissue rate to apply, the title agent and title insurer must have a copy of a qualifying prior owner's policy in their respective files and further, that the Rate Rule does not impose a duty on Chicago Title to search for and find a prior qualifying owner's policy or prove that no such qualifying owner's policy exists before it may charge the original rate for a loan policy issued in a refinancing transaction.

Based on the foregoing **IT IS ORDERED:**

1. Plaintiffs' Motion for Partial Summary Judgment seeking an order requiring Chicago Title to conduct a search for a qualifying prior policy and notification to borrowers in refinance transactions of the availability of a lower rate if a prior owner's policy is produced is DENIED.

2. Chicago Title's Motion for Summary Judgment seeking an order that the Reissue Rate applies only when a qualifying prior owner's policy is retained in the files of the title agent and title insurer, and that the Rate Rule does not impose a duty on Chicago Title to search for and find a prior qualifying owner's policy or to notify borrowers in refinance transactions of the availability of the lower reissue rate if a qualifying owner's policy is produced, is GRANTED.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 03/07/12 4:48 PM.

VICTORIA PLATZER
CIRCUIT COURT JUDGE

The movant shall, using any method(s) mandated by the Florida Rules of Civil Procedure, serve all parties/counsel of record with a true and correct copy of this Order IMMEDIATELY and file proof of service with the Clerk.

Signed and stamped original Order shall be sent to court file by Judge Platzer's staff. Electronic copy furnished ONLY to any below listed recipient(s) by facsimile whose facsimile number(s) is/are CORRECTLY FORMATTED and listed herein.

**Copies furnished to:**
[Fax:Marc Wites@1-954-354-0205]
[Fax:Jerry Linscott@1-407-841-0168]