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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**No. 07-12706-DD**

CNL HOTELS & RESORTS, INC.

*Appellant,*

vs.

TWIN CITY FIRE INSURANCE COMPANY, HOUSTON CASUALTY  
COMPANY, and LANDMARK AMERICAN INSURANCE COMPANY,

*Appellees.*

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On Appeal from the Judgment of the United States District Court  
For the Middle District of Florida No. 6:06-cv-324-Orl-31-JGG

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**STATE OF FLORIDA, OFFICE OF INSURANCE REGULATION  
BRIEF OF AMICUS CURIAE IN SUPPORT OF  
APPELLEES' PETITION FOR PANEL REHEARING**

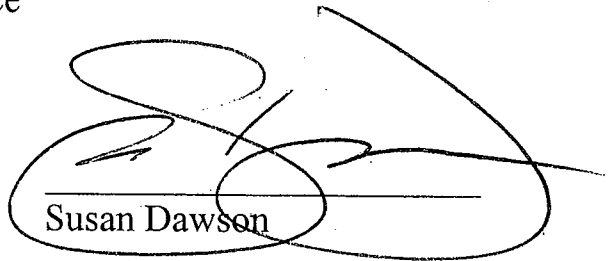
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**CERTIFICATE OF INTERESTD PERSONS**  
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I, Susan Dawson, Esquire, an attorney admitted to practice before the United States Court of Appeals for the Eleventh Circuit, and attorney for the Florida Office of Insurance Regulation, submits this list of additional persons that have an interest in the outcome of this review:

1. State of Florida, Office of Insurance Regulation (formerly known as The Department of Insurance).
2. Susan Dawson, Esq. (Deputy General Counsel for State of Florida, Office of Insurance Regulation).
3. Steven H. Parton, Esq. (General Counsel for the State of Florida, Office of Insurance Regulation).
4. Florida Surplus Lines Service Office

  
\_\_\_\_\_  
Susan Dawson

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## **INTRODUCTION**

The Florida Office of Insurance Regulation (formerly known as the Department of Insurance) (hereinafter the “Office”), pursuant to 11<sup>th</sup> Cir. R. 40-6, accordingly submits this Amicus Curiae brief to assist the Court on important issues related to statutory construction of the Florida Surplus Lines Law implicated by the appellate court’s ruling in the underlying case.

The Office is an agency of the State of Florida, with offices in Tallahassee, Florida and is responsible for all activities concerning insurers and other risk bearing entities, including licensing, rates, review and approval of policy forms, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements, premium financing, and administrative supervision, as outlined in the Florida Insurance Code.<sup>1</sup>

### **INTEREST OF THE AMICUS CURIAE IN THE CASE**

In Essex Insurance Company v. Zota<sup>2</sup>, the Florida Supreme Court held that under a full statutory analysis, §627.021(2) applies exclusively to *part I* (the ratings law) of Chapter 627, Florida Statutes, (citing Nat'l Corporacion Venezolana, S.A. v. M/V Manaure V, 511 So.2d 968, 970-71 (Fla.1987)), and that

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<sup>1</sup> Section 20.121(3)(a)(1), Fla. Stat.

<sup>2</sup> 985 So. 2d 1036 (Fla. 2008).

both §627.421, Florida Statutes, (“Delivery of Policy”) and §627.428, Florida Statutes, (“Attorney Fees”) apply to surplus-lines insurance because neither of those statutory sections appears in part I of Chapter 627. Rather, §§627.421 and 627.428, Florida Statutes, appear in Part II of Chapter 627, Florida Statutes.<sup>3</sup>

Relying on Essex, this Court has held that §627.410, Florida Statutes, (“Filing, Approval of Forms”), applies to surplus lines insurance.<sup>4</sup> The Office has a vital interest in this Court’s decision that surplus lines insurers are required to file their policy forms for approval with the Office, pursuant to §627.410, Florida Statutes,

No other state requires the review of the policy forms of surplus lines insurers. The Office does not now, nor has it ever, required surplus lines insurers to comply with the form filing requirements of §627.410(1), Florida Statutes, Section 626.916(1)(c), Florida Statutes, provides for only one situation in which a form is required by the Surplus Lines Law to be filed with the Office for review. There, coverage “may be exported under a unique form of policy designed for use with respect to a particular subject of insurance if a copy of such form is filed with the office by the surplus lines agent desiring to use the same and is subject to the disapproval of the office within 10 days of filing such form...”

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<sup>3</sup> Id. at 1044.

<sup>4</sup> CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company, 2008 US App. LEXIS 17686 (11<sup>th</sup> Cir. August 18, 2008).

The Office, reviews all property and casualty insurance form and rate filings submitted by insurance companies for use in the State of Florida. Each filing is reviewed to determine compliance with applicable actuarial standards, statutory provisions and administrative rules. In addition, the performance of this thorough review must be timely, that is performed within certain guidelines supplied by the National Association of Insurance Commissioners (NAIC). For form filings, the review time is 30 days with an additional 15 days possible.

Historically, the Office has only reviewed form filings made by licensed property and casualty insurance companies; companies who write insurance as surplus lines carriers have never been required to file for review the forms they use in the State of Florida. The Office has 11 employees directly responsible for reviewing form filings. The impact of this Court's decision to now require surplus lines insurers to submit their policy forms to the Office for review will have a dramatic and significant effect on our limited portion of the state's budget.

For the year August 1, 2007 to July 31, 2008, the Office received 5,033 form filings from 695 of the 889 property and casualty insurance companies actively licensed to conduct business in the State of Florida. Thus, 7.2 filings were received per company. Currently, there are 158 active surplus lines carriers licensed in the State. If surplus lines carriers will be required to comply with the same statutory standards as property and casualty insurance companies, the Office anticipates

receiving about 1,120 surplus lines carrier form filings next year. Since surplus lines carriers have never filed their contracts for review, initial filings will include complete policies each having 20-30 pages. Additionally, surplus lines policy forms, unlike those used by the admitted market, are not standardized, and the vast majority have not been drafted to meet all of the standards and requirements of those forms used by the admitted market. Based on the Office's knowledge of the Florida insurance market, this agency has concerns that should §627.410, Florida Statutes, be found to apply to surplus lines insurers, such insurers may exit the Florida market.

### **BACKGROUND**

In Florida, surplus lines insurance products are regulated by §§626.913 - 626.937, Florida Statutes, (the "Surplus Lines Law"). The Florida Legislature has declared that the stated purposes of the Surplus Lines Law are to (1) provide orderly access for the insuring public of this state to insurance coverages sold by unauthorized carriers that would not be otherwise available, and (2) to protect authorized insurers "who under the laws of this state must meet certain standards as to policy forms and rates, from unwarranted competition by unauthorized insurers who, in the absence of the Surplus Lines Law, would not be subject to similar requirements."<sup>5</sup> In enacting the Surplus Lines Law, the Florida Legislature clearly

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<sup>5</sup> Section 626.913(2), Fla. Stat.

recognized that surplus lines insurers were not subject to the same form and rate requirements applicable to authorized insurers.

The surplus lines industry is important because it provides a market for insurance for risks that are not written by admitted carriers, or that admitted carriers will write only on terms that do not adequately meet the needs of most insureds. There are three basic categories of surplus lines risks: (1) specialty risks that have unusual underwriting characteristics or underwriting characteristics that admitted insurers view as undesirable; (2) niche risks for which admitted carriers do not have a filed policy form or rate; and (3) capacity risks, i.e., risks where an insured needs higher coverage limits than those that are available in the admitted market.<sup>6</sup> In short, surplus lines insurers benefit the insurance buying public by accepting risks that admitted carriers decline for a variety of underwriting and market reasons. In some cases the ability to receive coverage from surplus lines insurers, allows many commercial insureds from having to forego coverage.

Surplus lines carriers are able to offer coverage when admitted carriers will not, in part, because surplus lines insurers are not subject to the form and rate restrictions that are imposed on admitted insurers.<sup>7</sup> Surplus lines insurers play an important role in today's commercial insurance marketplace. For the year 2007, the

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<sup>6</sup> Douglas R. Richmond, *Surplus Lines Insurance and Wholesale Brokers*, 25 No. 8, *Ins. Litig. Rep.* 261. May 16, 2003.

<sup>7</sup> Id.

Florida Surplus Lines Service Office reports that the top 5 areas of coverage with regard to surplus lines policies are: *Commercial Property* (over \$2 billion in premium reported); *Commercial General Liability* (over \$700 million in premium reported); *Commercial Package –Property and Casualty* (over \$257 million in premium reported); *Homeowners – HO-3* (over \$200 million in premium reported); and *Builders Risk* (over \$134 million in premium reported).<sup>8</sup> According to information received from the Florida Surplus Lines Service Office there are over **one million surplus lines policies** in force in Florida with 158 eligible surplus lines insurers. The insurance-buying public, the Office, and the entire surplus lines industry are impacted by this Court’s decision as almost all of these currently in-force policies were not filed with or approved by the Office and thus the validity of these policy forms and the regulatory duty of the Office is uncertain.

The Office’s brief is limited to issues pertaining to this Court’s conclusion that §627.410(1), Florida Statutes, (“Filing, Approval of Forms”) applies to surplus lines insurance.

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<sup>8</sup> Annual Report, Florida Surplus Lines Service Office, 2007.

## ARGUMENT

### **THE FLORIDA SURPLUS LINES LAW CONTAINS SPECIFIC PROVISIONS THAT DEMONSTRATE THE INAPPLICABILITY OF THE GENERAL PROVISIONS FOUND IN §627.410, FLORIDA STATUTES.**

The current conditions of the Florida insurance market highlight the need to keep this alternative market open to Florida's consumers. The purpose of the Surplus Lines Law is to enhance the availability of insurance for risks not accepted by, and not acceptable to, admitted, domestic insurers. To achieve this purpose, the Legislature has developed a less onerous regulatory regime applicable to the surplus lines market.

The Surplus Lines Law<sup>9</sup> allows, non-admitted, or unauthorized, carriers to sell insurance products in Florida if the carrier is deemed by the Office to be "eligible," and the insurance they seek to sell is "eligible for export."<sup>10</sup> In §626.915, the Legislature provided that if certain coverage cannot be procured from authorized, admitted insurers, then such coverage may be procured from unauthorized insurers, subject to the following conditions: (1) The insurance must be eligible for export under §626.916, Florida Statutes, or §626.917, Florida Statutes,.; (2) The insurer must be an eligible surplus lines insurer under §626.917, Florida Statutes, or §626.918, Florida Statutes,.; (3) The insurance must be so

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<sup>9</sup> Sections 626.913 - 626.937, Fla. Stat.

<sup>10</sup> Section 626.914(2), Fla. Stat.

placed through a licensed Florida surplus lines agent; and (4) The other applicable provisions of this Surplus Lines Law must be met.<sup>11</sup>

While admitted carriers must comply with a host of regulations set out in Chapter 627, Florida Statutes, surplus lines carriers need only assure they are "eligible" to export their insurance products, and that those insurance products are "eligible for export". What makes a policy "eligible for export" is explained in §626.916(1)(c), Florida Statutes, as follows:

The policy or contract form under which the insurance is exported shall **not be more favorable** to the insured as to the coverage or rate than under similar contracts on file and in actual current use in this state by the majority of authorized insurers actually writing similar coverages on similar risks: [Emphasis added].

And to this requirement an exception is stated:

[E]xcept that a coverage may be exported under a unique form of policy designed for use with respect to a particular subject of insurance....<sup>12</sup>

The Legislature recognizes that surplus lines policies are not, and may not be, issued on the same terms as policies offered by authorized insurers. Application of the same regulations to both admitted and surplus carriers would require the policies to be the same, as surplus lines policies could neither provide more nor less coverage than the policies of admitted carriers. The Legislature never intended the surplus line policy form to conform to the same requirements applied to the

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<sup>11</sup> Section 626.915, Fla. Stat.

<sup>12</sup> Section 626.916(1)(c), Fla. Stat.

policies of admitted carriers.

Pursuant to §626.921, Florida Statutes, the Legislature established the Florida Surplus Lines Office (“FSLSO”), a nonprofit association, and declared that this establishment of a surplus lines self-regulating organization is necessary to establish a system that will permit better access by consumers to approved unlicensed insurers.<sup>13</sup> This self-regulation was intended to promote the stated purposes of the Surplus Lines Law. Insurance products by admitted, domestic carriers are regulated in a far different manner than the way insurance products sold by surplus lines carriers are regulated.

In the analysis of the legislation creating the FSLSO,<sup>14</sup> the legislative staff explained the surplus line agent has the duty of confirming that a surplus lines policy complies with the statute:

Surplus lines agents currently play the key role in assuring compliance with the surplus lines laws. The agent must determine that the applicant qualifies for surplus lines coverage and that the surplus lines insurer is eligible.<sup>15</sup>

The analysis continued, by noting that there was no requirement that policy forms routinely be filed with the Department of Insurance:

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<sup>13</sup> Section 626.921(1), Fla. Stat.

<sup>14</sup> The FSLSO was created by HB 269 during the 1997 legislative session. The Senate companion bill was SB 908.

<sup>15</sup> See Bill Research and Economic Impact Statement prepared by the staff of the House of Representatives Committee on Governmental Operations dated April 16, 1997 at page 3.

There is no automatic filing requirement for the policy forms themselves, but an agent must file a copy of the form upon request of the department.<sup>16</sup>

A review of legislative staff analyses, interim project reports, and a decision from the Florida Division of Administrative Hearings<sup>17</sup> shows that there has not been a practice of review of forms used in surplus lines insurance. In 2000, a Senate Interim Project Report noted:

Surplus lines insurance is **not subject to Florida regulation of rates or forms** and there is no insurance guaranty fund protection if an insurer becomes insolvent.<sup>18</sup> (Emphasis added).

The report explained that surplus agents are required to submit specific information on each policy to the FLSO and that the primary purpose of such submissions is to “determine whether the agent has paid the appropriate surplus lines tax on each policy.”<sup>19</sup> Section 626.921(3)(a), Florida Statutes, requires the FLSO to “receive, record, and review surplus lines insurance policies or documents.” At the time of

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<sup>16</sup> See Bill Research and Economic Impact Statement prepared by the staff of the House of Representatives Committee on Governmental Operations dated April 16, 1997 at page 3.

<sup>17</sup> See Recommended Order in Ranger Insurance Company v. School Board of Broward County, Case No. 96-3669 (Florida Division of Administrative Hearings August 2, 1996) where a finding of fact states, “Unlike authorized insurers, unauthorized insurers do not have their rates and forms approved by the Department of Insurance [.]”

<sup>18</sup> See Florida Senate Interim Project Report 2001-028 dated September 2000 at page 3.

<sup>19</sup> See Florida Senate Interim Project Report 2001-028 dated September 2000 at page 4.

the 2000 Senate report, the Department of Insurance, not the FLSO, could request that entire policies be filed. The reason for such requests was not for form review:

Such information must be filed only upon request of the department, which is typically done only when the department is investigating an agent for a suspected violation, such as non-payment of the surplus lines tax, misappropriation of funds, or improper placement of business in the surplus lines market.<sup>20</sup>

The analyses of the 2001 legislation relating to a public records exemption for certain documents filed with the FLSO and giving the FLSO the ability to request certain policy forms are consistent with the proposition that no form review had ever been conducted by the Department of Insurance or the FSLO. In 2001, the Legislature amended section 626.923, Florida Statutes, to permit the FLSO to request copies of policies from surplus lines agents. Prior to this change, the department was able to request policies but not the FLSO.<sup>21</sup> There is no indication from the staff analysis relating to that statutory amendment that the legislative staff believed that the FLSO was required to engage in any review or regulation of forms:

Surplus lines insurance is not subject to Florida regulation of rates or forms and there is no insurance guaranty fund protection if an insurer becomes insolvent.<sup>22</sup>

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<sup>20</sup> See Florida Senate Interim Project Report 2001-028 dated September 2000 at page 4.

<sup>21</sup> See CS/HB 309 filed during the 2001 legislative session.

<sup>22</sup> See Senate Staff Analysis and Economic Impact Statement of SB 658, dated April 11, 1997 at page 2.

There is no indication that complete forms were to be filed with the FLSO or that the Department of Insurance was conducting complete form review. The Senate analysis restated the longstanding proposition that surplus insurance is not subject to form review.<sup>23</sup> The Senate Interim Project Report released in September 2005 once again restated this proposition.<sup>24</sup>

The information that insurers are required to file is limited by §626.931, Florida Statutes. Foreign insurers are required to file a verified report of all surplus lines insurance transacted by such insurer for insurance risks located in Florida during such calendar quarter and alien insurers are required to file a verified report of all surplus lines insurance transacted by such insurer for insurance risks located in Florida during the preceding calendar year unless the Department waives the filing requirements. If all policy forms were to be filed pursuant to §627.410, Florida Statutes, or some other provision of Chapter 627, Florida Statutes, §626.931, Florida Statutes, would be redundant.

The Surplus Lines Law, in §626.916(1)(c), Florida Statutes, provides for only one situation in which a form is required to be filed with the Office for review. There, coverage “may be exported under a unique form of policy designed for use with respect to a particular subject of insurance if a copy of such form is

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<sup>23</sup> See Senate Staff Analysis and Economic Impact Statement of SB 658 dated March 19, 2001 at page 2.

<sup>24</sup> See Florida Senate Interim Project Report 2006-203 dated September 2005 at page 3.

filed with the office by the surplus lines agent desiring to use the same and is subject to the disapproval of the office within 10 days of filing such form..." If the requirements of §627.410(1), Florida Statutes, were applicable, this provision would be unnecessary.

In a recent enactment, the Legislature, in House Bill 601 in the 2008 Regular Session, added a second situation in which surplus lines carriers would be required to file a form with the Office. That is, if a surplus lines insurer wishes to issue a group insurance policy covering condominium associations, the policy form and rate would be required to be filed with the Office. If the Legislature believed that forms were already subject to approval by the Office, there would have been no need to enact HB 601. It should be noted that the oral argument in the Essex<sup>25</sup> case occurred in November 2007, before HB 601 had been enacted.

The Florida Supreme Court did not address the specific applicability of other provisions of Chapter 627, Florida Statutes, to surplus lines insurers. The specific holding of Essex is that no language in §626.922, Florida Statutes, and §627.421, Florida Statutes, precludes a surplus lines insurer from delivering a copy of the coverage documents to the insured's agent instead of directly to the insured. The Florida Supreme Court further held that §627.428, Florida Statutes, an attorney fee statute, is applicable in the dispute between Essex and the insureds in that case (in

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<sup>25</sup> 985 So. 2d 1036 (Fla. 2008).

the instant case this specific analysis to surplus lines law would not be applicable because the court did not opine that parties could not contract away the attorney fee issue).

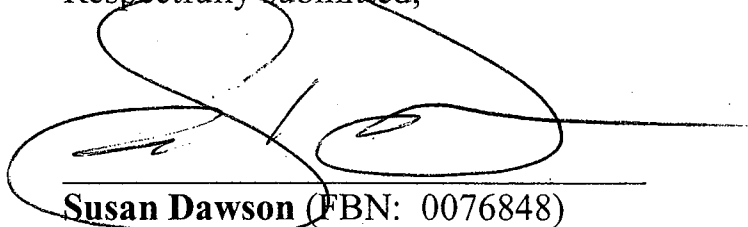
The case is silent on the applicability of other specific statutory provisions to surplus lines insurers. The court did **not specifically hold that §627.410**, Florida Statutes, (“Filing, Approval of Forms”) or any other provision of Chapter 627, Florida Statutes, is applicable to surplus lines insurers.

In summary, the legislative intent of the Surplus Lines Law does not require form review by the Office. Nothing in the history of surplus lines legislation or the FLSO legislation requires that the Office or the FLSO conduct form review of surplus lines insurance. The legislative history is consistent with the longstanding practice of the Department of Insurance, the Office, and the FLSO. These entities have not conducted form review of surplus lines insurance or otherwise applied the requirements of Chapter 627, Florida Statutes, to surplus lines insurance.

**CONCLUSION**

For the foregoing reasons, the Office urges the Court to accept the arguments set forth above and vacate the Court's decision requiring surplus lines carriers to comply with the form-filing and approval requirements of Chapter 627, Florida Statutes, of the Florida Insurance Code or, in the alternative, the question of the applicability of §627.410, Florida Statutes, to surplus lines insurers, be certified to the Florida Supreme Court.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be "Susan Dawson", is written over a horizontal line. The signature is highly cursive and loops around the line.

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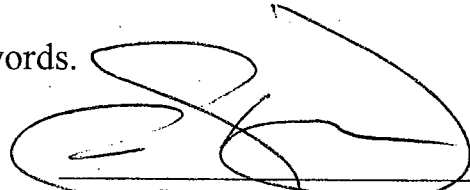
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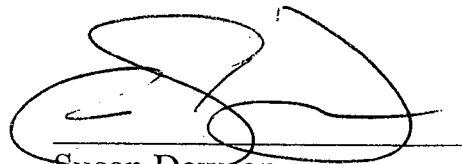
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Susan Dawson

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Susan Dawson

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 12<sup>th</sup> day of September 2008, I have served a copy of the foregoing upon all counsel of record by placing a copy of same in the United States mail, first class postage prepaid and addressed as follows:

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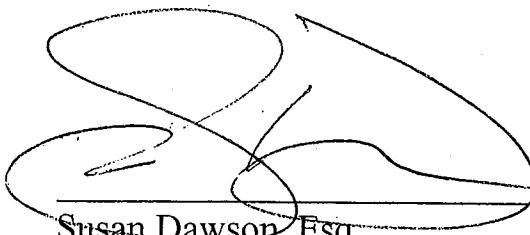
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