IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

CASE NO. 98-00965

WORLDWIDE AERONAUTICAL INDUSTRIES, INC., AIRLIFT OPERATIONS II, LTD. and ALO III, LTD.,

Plaintiffs / Appellants;

vs.

LLOYD'S UNDERWRITERS, LONDON,

Defendant / Appellee.
_____ /

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT, WORLDWIDE AERONAUTICAL INDUSTRIES, INC.

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STATEMENT OF THE CASE AND FACTS

On July 11, 1988, CZX PRODUCTIONS, INC., ("CZX") purchased from the plaintiff WORLDWIDE AERONAUTICAL INDUSTRIES, INC., ("Worldwide"), a Lockheed C-130 Hercules aircraft. At the time this transaction was made, the parties executed a purchase and sale agreement (R. 131; App. 1.) requiring CZX to pay to Worldwide One Million Three-Hundred Thirty Thousand dollars ($1,330,000.00) and included a purchase money mortgage security interest in the aircraft retained by Worldwide. (R. 135; App. 5.) The Purchase and Sale agreement included a provision that required the purchaser, CZX, to obtain and maintain hull insurance on the subject aircraft for the benefit of the seller, Worldwide, and naming it as an additional insured on all policies pursuant to "long form" loss payable endorsements. (R. 138, 139; App. 8, 9.)[1] Worldwide then perfected its security interest in the aircraft pursuant to the requirements of 42 U.S.C. 1403 by the filing of a lien with the Federal Aviation Administration dated August 19, 1988. (R. 142.)

On June 10, 1991, the subject aircraft crashed on takeoff from the airport at Luanda, Angola, and was totally destroyed. (R. 124; 204.)[2] No issue was raised below

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[1] For the purpose of this appeal it is undisputed by Lloyd's that the contracts with the various plaintiffs "required CZX to obtain whatever coverage the lien holders contend they are entitled to." (R. 2881, fn.6.)

[2] The Angola crash spawned numerous lawsuits and appeals, including *CZX Productions, Inc. v. Snellgrove*, No. 93-03447, *Underwriters at Lloyd's, London v. CZX Productions, Inc.*, No. 94-02885, *CZX Productions, Inc. v. Underwriters at Lloyd's, London,* Consolidated No. 94-03761/94-03906 and *Underwriters at Lloyd's, London v. CZX Productions, Inc.*, 95-04693, all in this court.

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that the cause of the accident was anything other than a result of normal "Flight risks." The aircraft was insured for three million dollars under an "All Risks Hull Insurance" policy issued by defendants, Lloyd's Underwriters, London. (R. 145-153; App. 11-19.)

The London Insurance Market

The hull insurance covering the aircraft in this case was procured on the London Insurance Market. In that market, insurance is underwritten by various underwriters, some of whom maintain space on the floor at Lloyd's in London, England. Only Lloyd's brokers, who have been approved by the Committee of Lloyd's, have access to the underwriters. (R. 1132; 2681.) A Lloyd's broker receives a request to place a particular piece of insurance business and prepares a "broker's slip" containing details of the risk. (R. 1133.) The Lloyd's broker then physically takes the slip to various underwriters within the London Market, who may refuse, agree, or agree on different terms to underwrite all or part of the risk. (R. 1133, 1134.)

Once the Lloyd's broker obtains commitments to 100% of the risk, he prepares what is known as a "cover note." (R. 1134.) The cover note is a document which details the specific terms and conditions of the coverage to which the underwriters have agreed. (Id.) The cover note serves as evidence of coverage in lieu of a formal policy, and is considered a binding contract. (Id.)

Procurement of the Coverage

It was undisputed below that the various contracts entered into by CZX with Worldwide required CZX to obtain and maintain Hull Insurance in Worldwide's favor as

a condition of the purchase and sale agreement between the parties. (R. 138, 139; 2881.)

Initially, CZX contacted its agent, Robert Shamberger, of S&L insurance in Ft. Meyers, Florida, seeking to insure the aircraft. (R. 526.) Shamberger then contacted Ian Greenway of London International Group, Inc., in St. Petersburg, Florida, and requested that Greenway obtain the coverage. (R. 526; 2682.) Greenway was an insurance broker, licensed as a Florida surplus lines agent, which meant that he was able to obtain insurance from foreign insurers, including those in the London Market. (R. 518.) Greenway, in turn, contacted Citicorp in London, England, the Lloyd's broker who ultimately placed the risk with the several underwriters and insurance companies in the London Market on behalf of CZX.[3] (R. 398, 399.) During the negotiations pertaining to the placement of the coverage at issue, Ian Greenway, the broker in St. Petersburg, sent a telefax dated February 20, 1990, to Mr. Christopher Hamilton-Cox, an employee of Lloyd's broker, Citicorp. (R. 2688.). That telefax stated that "The insured is inquiring about Breach of Warrenty [sic] cover, can you quote that?" (R. 2736; App. 20.) Mr. Hamilton-Cox, the Lloyd's broker, responded by telefax back to Mr. Greenway the following day stating that "Breach of Warranty is included." (R. 2692, 2737; App. 21.) Mr. Greenway then transmitted to Mr. Robert Shamberger, CZX's agent in Ft. Meyers, a telefax indicating that the requested coverage was included at no extra cost. (R. 2694, 2695; 2738; App. 22.)

The Coverage

It was undisputed below that no formal policy of insurance was ever delivered by

[3] Only Lloyd's brokers, who have been approved by the Committee of Lloyd's, have access to the underwriters. (R. 1132; 2681.)

the defendant, Lloyd's. Rather, the coverage was evidenced by the broker's slips subscribed to by the various underwriters and companies on the risk (R. 426-437; R. 2750-2752.) and two cover notes numbered K00852 (C) and K00852 (L) (hereinafter referred to singularly as "Citicorp cover note")[4], which were issued by Lloyd's broker, Citicorp on June 20, 1990. (R. 144-153; App. 11-19.) The Citicorp cover note provided "Aircraft All Risks Hull and Aviation Liability Insurance" to CZX for a twelve-month period commencing June 13, 1990. (R. 144-153; App. 11-19.) The cover note states in pertinent part:

ASSURED	CZX PRODUCTIONS, or to be agreed by Underwriters.
INTEREST	Hull All Risks - Flight, Taxying, Ground including Breach of Warranty as required and Liabilities arising out of the Assured's Aviation operations of aircraft as per schedule:-

SCHEDULE OF AIRCRAFT

MAKE/MODEL	REGISTRATION NUMBER	AGREED VALUE	PASSENGER SEATS	ATTACHMENT DATE
LOCKHEED HERCULES C-133	N-9724V	$3,000,000.00	Not Applicable	Inception

After reciting certain other terms not germane to this appeal, the cover note further recites as follows:

GEOGRAPHICAL LIMITS	Worldwide excluding Lebanon/Iran/Iraq/Sudan/ Ethiopia/Liberia/ Angola/Mozambique

[4] The Lloyd's broker issued two separate cover notes on this risk. The first, No. K00852(L) evidences the interests of the various syndicates. The second, K00852(C) reflects the interests of the insurance companies on the risk. The cover notes evidence the same risk and are otherwise identical in all respects, and will be referred to in the singular for ease of reference.

CONDITIONS Deductible: (Excluding Total Loss/Constructive Total Loss/ Arranged Total Loss)

Flight, Taxying	) US$200,000
Ingestion	)
Ground	) each and every loss

Automatic additional assureds, hold harmless agreements, waivers of subrogation rights, loss payees and other contractual agreements as required.

(R.144 -153; App. 11-19.)

It is undisputed that the plaintiffs are not specifically named within the Citicorp cover note. It is further undisputed that Worldwide Aeronautical Industries, Inc., was in fact named as an "Additional Insured" on an "Addendum" dated August 4, 1988 to the original "Aviation Cover Note" provided by Mr. Robert Shamberger to CZX Productions, Inc. (R.857, 858.) Additionally, it is undisputed that Worldwide was named "co- insurer" [sic] on all subsequent binders transmitted by CZX to Worldwide as evidence of coverage for the dates in question. (R. 855, 856; 862; 865.)

The Lawsuit

The second amended complaint in the lawsuit below was filed by Worldwide and the ALO parties as original parties plaintiff, each alleging a cause of action founded upon a theory of Breach of Warranty based upon the written terms contained in the Citicorp cover note substituting for the insurance policy. (R. 122-173.) The Citicorp cover note at issue in this case was first revealed to the plaintiffs herein when it was filed, along with an affidavit of Christopher Hamilton-Cox, in defense of a motion for summary judgment filed by Plaintiff and Intervenors in *CZX Productions, Inc., et al v. Underwriters at Lloyd's London*, case no. 93-129-CI, Sixth Judicial Circuit, Pinellas

County, Florida. (R. 195-202.) The affidavit of Mr. Hamilton-Cox stated, inter alia, that Citicorp is not an insurer, and has no authority to issue cover notes binding coverage absent authority from underwriters (R. 198); that Citicorp did place the coverage and issue the cover notes (R. 197); and that the cover note reflects the terms of the risk to which the underwriters agreed to be bound and that the cover note provides insurance as specified therein. (R. 198.)

Following the filing of the action in the trial court, discovery was commenced, and thereafter the plaintiffs herein filed their motions for summary judgment (R. 364-367.) and memoranda of law with the trial court. Defendants filed a cross motion for summary judgment, (R. 1922-1930) together with various affidavits and memoranda, including the affidavit of William F. Willer, a Miami based surplus lines agent and purported "expert" on the inner workings of the London Insurance Market. (R.1130-1145.) Plaintiffs then filed motions to strike the affidavits filed by Lloyd's as well as a motion to strike Lloyd's implied defense of agency together with brief memoranda of law on those issues. (R. 2783; 2786-2788.) The motions for summary judgment and the various motions regarding the affidavits and the agency defense were heard by the trial court on October 23, 1997. (T. 1-161.) The trial court denied Plaintiffs' motions to strike the Willer affidavit. (T. 41.) The trial court did not rule on the motion to strike the defense of agency. Thereafter, on February 5, 1998, the trial court issued its ruling which stated "the record establishes that the cover note is unambiguous," (R. 3558; App. 27.) and granted Defendant's motion for summary judgment and denied Plaintiffs' motion for summary judgment. (R. 3552-3558.) The trial court thereafter granted final judgment for

the Defendants on February 6, 1998. (R. 3560.) This appeal ensued upon the rendition of the final judgment February 15, 1998.

The following symbols will be used herein:

"R. xx." Record on Appeal

"App. xx." Appendix to Appellant's Initial Brief

"T. xx." Transcript of Proceedings upon cross Motions for Summary Judgment, October 23, 1997

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment for Defendant / Appellee and denying summary judgment for Plaintiff / Appellants where Defendant / Appellee, Lloyd's, issued "Aircraft All Risks Hull and Liability Insurance" to CZX Productions, Inc., which was evidenced solely by broker's slips and cover notes generated by Lloyd's broker, Citicorp Aviation Services. The cover notes unambiguously state that Breach of Warranty coverage is included as an "interest." The cover notes also unambiguously state "Automatic additional assureds, loss payees, waivers of subrogation and other contractual obligations as required." Such provisions, when assigned the meaning that would be attached to them by an ordinary person of average understanding, clearly mean that lien holders, as the only possible beneficiaries of such provisions, are afforded coverage under

the terms of the policy even where they are not named on the face of the cover note, and therefore, as a matter of law, can sue Defendant in their own name.

The trial court further erred in admitting extrinsic evidence submitted by Defendant / Appellant for the purpose of explaining the terms of the cover note where the trial court found that the cover note was unambiguous on its face.

The trial court also erred in failing to strike Defendant / Appellee's theory of agency as a defense to Plaintiff / Appellee's Motion for Summary Judgment where no affirmative defense or avoidance alleging such "agency" had been filed in any responsive pleading prior to the hearing on the motion.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT UPON A THEORY OF BREACH OF WARRANTY FINDING THAT BECAUSE THE PLAINTIFFS WERE UNNAMED, THE PLAINTIFFS LACKED STANDING TO MAINTAIN THEIR ACTION AGAINST THE INSURER WHERE THE COVER NOTE EVIDENCING COVERAGE SPECIFICALLY STATED "INCLUDING BREACH OF WARRANTY AS REQUIRED" AND "AUTOMATIC ADDITIONAL ASSUREDS, LOSS PAYEES . . .AND OTHER CONTRACTUAL OBLIGATIONS AS REQUIRED."

The facts of this case and the applicable law are relatively straightforward. The

decision as to this coverage dispute rests entirely upon the interpretation as to whether the cover note, which is undisputedly the only writing evidencing the coverage provided by the insurer in this case, extends coverage to lien holders not specifically named therein. The cover note itself is uncomplicated and unambiguous. A cover note is considered a "proper contract of insurance," John Birds, *Modern Insurance Law* 75 (3d ed. 1993), and "remains in force until the policy is issued so that any claim arising in the period prior to its issue will be determined in accordance with the terms of the cover note." Christopher Henly, *The Law of Insurance Broking,* 95 (1990). Consequently, it is the cover note that is the operative contract of insurance, unless the cover note has been superceded by a policy, which was not the situation in this case. Thus, the entire dispute centers around the meaning of the contractual language of the cover note setting forth the terms:

INTEREST	Hull All Risks - Flight, Taxying, Ground including Breach of Warranty as required and Liabilities arising out of the Assured's Aviation operations of aircraft as per schedule:-
and	
CONDITIONS	Deductible: (Excluding Total Loss/Constructive Total Loss/ Arranged Total Loss) Flight, Taxying) US$200,000 Ingestion) Ground) each and every loss Automatic additional assureds, hold harmless agreements, waivers of subrogation rights, loss payees and other contractual agreements as required. (emphasis supplied.)

There is no exclusionary language in the cover note which pertains to either of the clauses set forth above.

Worldwide, as a perfected lien holder to CZX, retains an insurable interest in the subject of the insurance. Fla.Stat. 672.501(2), (1991). A mortgagee of real or personal property has an insurable interest in the property mortgaged. *Rutherford v. Pearl Assurance Co.*, 164 So. 2d 213 (Fla. 1st DCA 1964).

The courts in Florida are unanimous in their opinion that questions regarding the extent of coverage with regard to insurance disputes are generally a question of law for the court. *Jones v. Utica Mutual Ins. Co.*, 463 So. 2d 1153 (Fla. 1985); *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310 (Fla. 2nd DCA 1994); *Marr Investments v. Greco*, 621 So. 2d 447 (Fla. 4th DCA 1993). Furthermore, the appellate court stands on equal footing with the trial court in interpreting insurance contracts. *Steuart Petroleum Co. v. Certain Underwriters at Lloyd's, London*, 696 So. 2d 376 (Fla. 1st DCA, 1997).

In this case, the court is asked to determine whether the terms "Including Breach of Warranty as Required" and "Automatic additional assureds, loss payees, waivers of subrogation and other contractual agreements as required" allow lien holders / mortgagees not specifically identified on the cover note to claim their loss as "Additional assureds" or under the Breach of Warranty provision of the policy. Under the limited circumstances presented, these clauses do, as a matter of law, provide coverage for the lien holders / mortgagees in this case.

A Breach of Warranty clause precludes a lien holder from being denied coverage for an act [or] neglect of the mortgagor. *Security Insurance Co. v. Commercial Credit*

Equipment, 399 So. 2d 31 (Fla. 3rd DCA 1981) citing to 5 A.J. Appleman *Insurance Law and Practice* 3401 at 293; *Shelby Mutual Ins. Co. v. Crain Press, Inc.*, 481 So. 2d 501 (Fla. 2nd DCA 1985). A Breach of Warranty clause gives a lien holder separate and distinct contractual status with the insurer so that the lien holder can recover his loss under circumstances that would defeat recovery by the insured. *Underwriters at Lloyd's v. American Aviation Service*, 421 So. 2d 12 (Fla. 3rd DCA 1982); *Glenn Falls Insurance Co. v. Porter*, 44 Fla. 568, 33 So. 473 (1902); *Airvac, Inc. v. Ranger Insurance Co.*, 266 So. 2d 178 (Fla. 4th DCA 1972); *National Casualty Co. v. General Motors Acceptance Corp.*, 161 So. 2d 848 (Fla. 1st DCA 1964); *Americas Aviation and Marine Ins. Co. v. Beverly Bank*, 229 So. 2d 314 (Fla. 1st DCA 1970). The court in *Glens Falls*, supra, a case involving the construction of a fire insurance policy with a standard or "union" mortgage clause, set forth its holding as follows:

> " From the authorities cited, and others that we have read, we have come to the conclusion that, while the standard or union mortgage clause in a policy of insurance does not create in favor of the mortgagee a contract wholly independent, separate, and distinct from that created by such policy in favor of the mortgagor or owner, yet that such mortgage clause does give to the mortgagee such a separate and independent contractual status towards the insurer as that he can recover the amount provided by the policy under circumstances and conditions that would defeat a recovery by the mortgagor or owner. By the express terms of such mortgage clause the insurer agrees that, as to the interest of the mortgagee the insurance effected by the policy in his favor should not be invalidated by any act or neglect of the mortgagor or owner of the property insured. *Glenn Falls Insurance Co. v. Porter*, 44 Fla. 568, 33 So. 473 at 478.

In the case at bar, the insurer, Lloyd's and its various underwriters, assert that they are not liable to pay the claim to any of the parties to this litigation because the accident

and destruction of the aircraft occurred within a country that was expressly listed in the cover notes as an excluded territory. This position, however, has no merit where the loss was occasioned by an act or omission on the part of the named insured, the mortgagor, CZX Productions, Inc. It is undisputed that the plaintiff, Worldwide Aeronautical Industries, who was the mortgagee and lien holder against CZX, had no control over the movements of the subject aircraft.

This case is strikingly similar to *Americas Aviation and Marine Ins. Co. v. Beverly Bank*, supra. In *Americas*, the lien holder sued for recovery of the proceeds of a claim which the insurer had denied because the loss to that aircraft occurred outside of the territorial limits contained in the policy. The policy in *Americas* contained a more restrictive breach of warranty clause than appears in this case. The *Americas* court affirmed summary judgment for the lien holder based upon its finding that the territorial exclusion in that case could not be applied against the lien holder.[5]

In the case at hand, Lloyd's asserts, and the trial court found, that because the lien holders are not specifically named as additional assureds or loss payees, that the coverage for Breach of Warranty cannot apply to them.

The first issue for the court's determination is whether the terms of the policy are ambiguous. It is well settled that constructions of ambiguities in insurance policies are

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[5] The lien holder clause in the policy in *Americas* also contained a subrogation clause which allowed the insurer to become subrogated to the rights of the lien holder against the insured upon the payment of the lien holder's claim. *Americas* at 315, 316. In the case at hand, the cover note contains a waiver of subrogation rights in the "Conditions" section. If, as Lloyd's asserts, there is no obligation on the part of the insurer to the lien holders under the Breach of Warranty clause or as additional assureds, there could be no right of subrogation to waive.

questions of law. *Deni Associates of Florida v. State Farm Fire & Casualty Ins. Co.,* 23 F.L.W. S59 (Fla. 1998). *Jones v. Utica Mutual Ins. Co.*, 463 So.2d 1153 (Fla. 1985). Under Florida law, an insurance contract is ambiguous if it is susceptible to two or more reasonable interpretations that can be fairly made. *Dahl-Eimers v. Mutual of Omaha*, 986 F.2d 1379 (11th Cir. 1993); *Herring v. First South Ins. Co.*, 522 So.2d 1066, (Fla. 1st DCA 1988). When one of these interpretations results in coverage and another results in exclusion, ambiguity exists in the insurance policy. *Weldon v. All American Life Insurance Co.*, 605 So. 2nd 911 (Fla. 2d DCA 1992); *Gulf Tampa Drydock v. Great Atlantic Ins. Co.*, 757 F.2d 1172 (11th Cir. 1985).

Where the language in an insurance policy is ambiguous, the courts must strictly construe the agreement against the insurer and in favor of coverage. *Deni Associates of Florida v. State Farm Fire & Casualty Ins.,* supra; *State Farm v. Pridgen*, 498 So.2d 1245 (Fla. 1986); *Harnett v. Southern Ins. Co.*, 181 So.2d 524 (Fla. 1965); *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310 (Fla. 2nd DCA 1994); *Shelby Mutual Ins. Co. v. Lamarche*, 371 So. 2d 198 (Fla. 2nd DCA 1979); *Florida Power and Light v. Penn Am. Ins. Co.*, 654 So.2d 276 (Fla. 4th DCA 1995); *Sterling v. City of West Palm Beach*, 595 So.2d 284 (Fla. 4th DCA 1992); *Old Dominion Ins. Co. v. Elysee*, Inc., 601 So.2d 1243 (Fla. 1st DCA 1992). Exclusionary clauses are construed more strictly than coverage clauses. *Triano v. State Farm Ins*. Co., 565 So.2d 748 (Fla. 3rd DCA 1990).

In interpreting language contained in the policy, ordinary rules of construction require the court to first assess the natural or plain meaning of the words in the policy language. *Dahl-Eimers v. Mutual of Omaha Ins. Co.*, 986 F.2d 1379 (11th Cir. 1993).

Where language in a policy is plain and unambiguous, there is no special construction or interpretation required, and the plain language of the contract is to be given the meaning which it clearly expresses. *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310 (Fla. 2nd DCA 1994); *Weldon v. All American Life Ins. Co.*, 605 So. 2d 911 (Fla. 2nd DCA 1992); *Jefferson Ins. Co. v. Sea World of Florida, Inc.*, 586 So.2d 95 (Fla. 5th DCA 1991); *United States Liability Ins. Co. v. Bove*, 347 So. 2d 678 (Fla. 3rd DCA 1977). The court is bound to assign to contract provisions the meaning that would be attached to them by an ordinary person of average understanding. *Steuart Petroleum Co. v. Certain Underwriters at Lloyd's, London*, 696 So. 2d 376 (Fla. 1st DCA, 1997); *Thomas v. Prudential,* 673 So. 2d 141 (Fla. 5th DCA 1996); *Nugget Oil, Inc. v. Universal Security Insurance Co.*, 584 So.2d 1068, 1070 (Fla. 1st DCA 1991), citing *United States Fidelity & Guaranty Co. v. Rood Investments, Inc.*, 410 So.2d 1373, 1374 (Fla. 5th DCA 1982). Unless the context of the policy makes it clear that the parties mean to use a term in a technical or peculiar sense, the court must accord the language used in the policy its natural meaning and enforce the contract as written. *Aetna Casualty & Surety Co. v. Cartmel*, 87 Fla. 495, 100 So. 802 (1924).

In this case, the term contained in the Citicorp cover note " . . . *Including* Breach of Warranty as required" (emphasis supplied) is a blanket statement of coverage contained within the four corners of the "INTERESTS" section of the cover note. The words are found in the same section as, and directly adjacent to, the other "interests" covered by the policy, these being "Hull All Risks- Flight, Taxying, Ground [Including Breach of Warranty as Required] and Liabilities arising out of the Assured's Aviation operations of

aircraft as per schedule."

The word "include" is defined in *Black's Law Dictionary*, Revised Fourth Edition, 1968 as "To confine within, hold as in an inclosure, take in, attain, shut up, contain, inclose, comprise, comprehend, embrace, involve. Including may, according to context, express an enlargement and have the meaning and or in addition to, or merely specify a particular thing already included within general words theretofore used." (Emphasis in the original).

The use of the word "Including" in the phrase referring to Breach of Warranty in the section of the cover note denoting "INTERESTS"can have no meaning other than the obvious intent to "express an enlargement" of the policy and have the meaning "and or in addition to*"* the other interests set forth therein. Id. If the word is to be given any meaning at all, it means that the policy shall "take in, attain, contain, comprise, comprehend, embrace, involve" Breach of Warranty coverage as an "interest" covered. It is difficult to imagine how the "ordinary person of average understanding," *Steuart Petroleum*, supra, could read this document any other way. Further, the phrase "Automatic additional assureds, loss payees, waivers of subrogation and other contractual agreements required" appears as a general blanket statement in the "CONDITIONS" section of the cover note. The word "Automatic" is defined in *The Oxford English Dictionary*, Second Edition, 1989, as "1. *lit*. Self acting, having power of motion or action within itself. 2.a. Self-acting under conditions fixed for it, going of itself." *Black's Law Dictionary,* Revised Fourth Edition, 1968, defines "Automatic" as "Having inherent power of action or motion; self acting or self regulating; mechanical." Clearly, the clause "Automatic additional assureds,

loss payees, waivers of subrogation and other contractual obligations as required," if it is to have any meaning at all, sets forth that the clause is "self acting," "having inherent power of action" and therefore no particular action is required on the part of the lien holder to become an "assured" or "loss payee" or beneficiary of "other contractual obligations" under the terms of the policy.

Every insurance contract must be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended or modified by any application for coverage, rider or indorsement. Fla. Stat. 627.419(1) (1997). The clause "Including Breach of Warranty as Required" cannot be read outside of the context of the rest of the policy, specifically the clause "Automatic additional assureds, loss payees waivers of subrogation and other contractual obligations as required." All relevant individual terms should be considered in connection with the interpretation of the entire contract and no term should be considered surplusage. *Price v. Southern Home Insurance Co.*, 100 Fla. 338, 129 So. 748 (1930); *Supreme International Corp. v. Home Insurance Co.* 428 So. 2d 295 (Fla. 3rd DCA 1983). An insurer may not, by failing to define terms or to include any additional qualifying or exclusionary language, insist upon a narrow restrictive interpretation of the coverage provided. *National Merchandise Company v. United Service Automobile Association*, 400 So.2d 526 (Fla. 1st DCA 1981). In this case, the cover note includes no qualifying language, such as "Breach of Warranty coverage provided to lien holders as set forth and named herein." Nor does the cover note contain exclusionary language such as "No coverage under the Breach of Warranty clause unless fully named and set forth on the face of this cover note."

It is beyond question that Breach of Warranty coverage is "Included" in the policy. The modifying term "as required" must then be read along with the clause "Automatic additional assureds, loss payees and other contractual obligations as required." Each of these clauses, standing alone, would suffice to extend coverage as a matter of law to the lien holders under the terms of this particular cover note. Without question then, the plaintiffs, although not specifically named in the cover note as loss payees under the Breach of Warranty clause or as additional assureds, but who have specific "contractual requirements" with the named insured to procure Breach of Warranty coverage for their benefit, may claim under the policy which by its terms includes Breach of Warranty as required and automatically extends coverage for additional assureds and other contractual obligations "as required."

STANDING

In its Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment the trial court held that the Plaintiffs lacked the requisite standing to maintain their action against Defendants and stated that "As a matter of law, that the record conclusively establishes that the Plaintiffs and Intervenors cannot recover as named insureds nor third party beneficiaries." (R. 3552.) The trial court grounded its finding on the fact that " . . .at the time the cover notes were written, neither the Plaintiffs nor the Intervenors were listed as named insureds." (R. 3553.) The court clearly erred in so holding.

A Breach of Warranty clause, like the standard or "union" mortgage clause, operates as a promise on the part of the insurer to pay to the lien holders / mortgagees their loss

despite any act or omission on the part of the named insured which would defeat coverage for the named insured. *Underwriters at Lloyd's v. American Aviation Service*, 421 So. 2d. 12 (Fla. 3rd DCA 1982); *Glenn Falls Insurance Co. v. Porter*, 44 Fla. 568, 33 So. 473 (1902); *Airvac, Inc. v. Ranger Insurance Co.*, 266 So. 2d 178 (Fla. 4th DCA 1972); *National Casualty Co. v. General Motors Acceptance Corp*., 161 So. 2d 848 (Fla. 1st DCA 1964); *Americas Aviation and Marine Ins. Co. v. Beverly Bank*, 229 So. 2d 314 (Fla. 1st DCA 1970). Similarly, the inclusion of a lender as an "Additional Assured" protects the lender's claim under a hull insurance policy, which is not therefor affected by a breach of an exclusionary clause by the named insured. *Florida Marine Towing, Inc. v. United National Ins. Co.*, 686 So. 2d 711 (Fla. 3rd DCA 1997); *Community Bank of Homestead v. American States Insurance Co.*, 524 So. 2d 1154 (Fla. 3rd DCA 1988).

In determining that the plaintiffs lacked standing to maintain their action against the insurers in this case, the trial court stated: "The record conclusively establishes that CZX did not intend to confer the right to primarily and directly benefit the Plaintiffs and Intervenors since CZX did not notify the Defendants of their status as lien holders on the insured airplane." (R. 3554.) The record, however, conclusively shows the intent of CZX was, in fact, to benefit the lien holder Worldwide in procuring the coverage. Not only did the purchase and sale agreement between Worldwide and CZX require CZX to procure mortgagee insurance for the benefit of Worldwide, but during the inception of the coverage on this aircraft, and continuing through the policy period in question, Worldwide is

specifically named in the coverage binders issued to CZX as "co-insurer."[6] Further, CZX provided Mr. Robert Shamberger numerous documents describing Worldwide and its interest in the aircraft concurrent with its request to place Worldwide onto the policy. (R. 632-634; 649-651.) Additionally, in his deposition taken on February 28, 1995, in referring to how these particular documents related to CZX's "request to document Worldwide Aeronautical Industries and their request to place them as an additional loss payee on th[e] policy," Mr. Shamberger unequivocally states "There is absolutely no doubt that they wanted Worldwide to be there." (R. 634). Also, the record reflects that CZX transmitted (R. 775) numerous documents back to Worldwide during the coverage period which specifically named Worldwide as either "Additional Assured" or "co - insurer."[6] (R. 842 - 865.) Thus it may be seen that the trial court erred in determining factually that "CZX did not intend to confer the right to directly and primarily benefit Worldwide" and that "CZX's sole interest was to protect itself." This factual issue alone would likely be sufficient to raise a material fact in dispute precluding summary judgment in favor of Lloyd's, were it not so clearly erroneous on the part of the trial court. See *Thompson v. Gallo*, 680 So.2d 441 (Fla. 1st DCA 1996), (Summary judgment is improper if, viewing the record in the light most favorable to the party against whom summary judgment has been entered, 'the record raises the slightest doubt that material issues could be present.') *Id*. at 443

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[6] The term "co-insurer" is in error. The deposition of Robert Shamberger, taken August 20, 1997, reveals that the term was "supposed to be additional insureds". (R. 910)

In *Hagen v. Scottish Union and National Insurance Company*, 186 U.S. 423, 22 S.Ct. 862, 46 L.Ed. 1229 (1902), the Court analyzed a marine insurance policy on a tugboat issued by Scottish National to Peter Hagen and Company "for the account of whom it may concern." After the insurance was in place, Hagen sold a one-half interest in the tug boat to one Edward Martin, but did not notify the insurer of Mr. Martin's interest. The tug boat was then destroyed by fire. The insurer denied liability for the loss. The Court held otherwise, and in analyzing the language "to whom it may concern," the Court stated:

> "We concur in the view that by virtue of the language contained in the policy 'on a account of whom it may concern' it is not necessary that the person who takes out such a policy should have at that time any specific individual in mind. If he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured that would be enough. In *Hooper v. Robinson*, 98 U.S. 528 25 L.Ed. 219, it was said that a policy upon a cargo in the name of A on account of whom it may concern, will enure to the interest of the party for whom it was intended by A, provided he at the time of effecting the insurance had the requisite authority from such party or the latter subsequently adopted it. The facts in that case differ materially from those presented by this record, but the meaning of the language 'on account of whom it may concern' is stated in the opinion of the Court and authorities are therein cited which show that it is not necessary at the time of effecting the insurance, the person taking it out should intend it for the benefit of some then known and particular individual, but that it would cover the case of one having an insurable interest at the time of the happening of the loss and who is intended to be protected at the time the party took out the insurance." *Id* at 865.

Not only did CZX have Worldwide's authority to obtain the coverage in question, CZX was undisputedly bound by its contract with Worldwide to do so.

The *Hagen* Court then reviewed the English authorities on the matter and quoted to *Duer, Marine Insurance*, page 28, as follows:

"In England the policy in it's usual and almost invariable form contains a

> general clause the terms of which are sufficiently comprehensive to embrace all persons who have an insurable interest in the property and a lawful right to be insured. The insurance is expressed to be 'in the name of A.B. (the person effecting the policy), as well as in his own as for in the name(s) (without specification) of all and every other person and persons to whom this same (the property insured) doth, may, or shall appurtain, in part or in all. In the United States, as on the continent of Europe, the general clause is framed in various forms of expression, and the construction necessarily varies, as the terms used are more or less extensive in their application." *Id*, at 865.

The "English form" referred to in *Duer,* supra, is nothing more or less than an archaic rendition of the more modern and less rigidly formal phrase "as required." Neither phrase alters the status of the individual or entity named as primary insured. Neither phrase deletes the necessity that the third party have an insurable interest in the property insured. Neither phrase abrogates the necessity that the named insured have intended that the coverages enure to the benefit of the vendee / lien holder. Thus, even without considering the phrase "as required" in the context of the additional language setting forth "automatic additional assured, loss payees, waivers of subrogation and other contractual obligations as required" it is apparent from the face of the cover note that Breach of Warranty coverage was "included" and that the phrase "as required" extends that coverage "for and in the name(s) (without specification) of all and every other person to whom (the property insured) doth, may, or shall appertain, in part or in all." *Hagen* at 865.

In a case arising out of Florida, the court, in *Miami Jockey Club v. Union Assurance Society*, 82 F.2d. 588 (5th Circuit 1936) held that a policy issued by Union Assurance to Rolf Armored Truck could be enforced by Jockey Club where Rolf was the named insured "for account of whom it may concern." Jockey Club, who was unnamed in the policy, had

transported money by way of Rolf, who apparently lost it. The court, citing to *Hagen*, supra, stated:

> "We are of the opinion that the plaintiff, a shipper, is entitled to enforce the policy in its own name if the carrier has become liable to it for loss or damage to shippers goods within the policy provisions. Had the insurance read to the carrier alone, the contrary would be true, as we held in *Mitchell v. American Fire and Casualty Company*, 82 F. 2d. 583. But here, not by any inadvertence in the use of a printed form, but by type written insertion in it, the insurance is plainly made for the account of "whom it may concern." It assuredly concerns those whose goods have been lost or damaged in the carriers hands...though unnamed they also are beneficiaries of the insurance." *Id*. at 589

See also: *Commercial Trading v. Hartford Ins. Co.*, 326 F. Supp. 900 (M. Dist. Fla. 1971); *Chrysler Sales v. Spencer*, 9 F. 2d. 674 at 680 (1st Circuit 1925); *The John Russell*, 68 F. 2d. 901 at 902 (2nd Circuit 1934); *Atlas Assurance v. Harper Robinson Ship Company*, 508 F. 2d. 1381 (9th Circuit 1975) at 1385, 1386; *Grain Processing Corp. v. Continental Insurance Company*, 726 F. 2d. 403 at 404 (8th Circuit 1984).

Florida courts have also ruled that unnamed owners and mortgagees had standing to recover as unnamed third party beneficiaries on mortgagee clauses contained in casualty policies. The court in *Ran Investments Inc., v. Indiana Ins. Co.*, 379 So. 2d 991 (Fla. 5th DCA 1980), held that an unnamed owner could recover in his own name as a third party beneficiary of the mortgagee's loss payable clause on a fire insurance policy. In that case, the trial court had dismissed the plaintiff's complaint stating; ". . .there is no reference to Plaintiff in the policy, either expressly or impliedly, and further since there is nothing in the policy to show that the parties intended in any way to benefit Plaintiff, Plaintiff is precluded from maintaining a cause of action on the policy against Defendant INDIANA

INSURANCE COMPANY."[7] In reversing the trial court, the *Ran Investments* court cited to *Schlehuber v. Norfolk & Dedham Mutual Fire Insurance Co.*, 281 So.2d 373 (Fla. 3rd DCA 1973). There, the Schlehubers purchased a dwelling from the Cannons. Prior to the sale of the house, the Cannons had insured the property against loss by fire. The policy in the Schlenhuber case contained a loss payable clause naming two mortgagees as their interest may appear.[8] After the closing of the sale, the property was damaged by fire but the mortgagees refused to sue on the policy. The Schlehubers were not named as insureds on the policy and had not paid a pro rata portion of the premium; however, they demanded payment under the policy as third party beneficiaries. The company refused payment. In holding that the Schlehubers[9] could recover, the court stated:

> F.S. s 627.405, F.S.A., sets out by way of negative statement the proposition that a contract of insurance of property may be enforced for the benefit of persons having an insurable interest in the property. Further, the term insurable interest is defined as an "economic interest in the safety or preservation of the subject" at the time of the loss. It is apparent, therefore, that at the time of the loss appellant had an insurable interest and that he has a right to enforce the policy as it was written and in force at that time. We conclude that the language of the mortgagee payment clause which was a part of that policy represents a promise by the insurance company to pay to the mortgagees the extent of their loss as their interests appear. This promise

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[7] The trial court's order in this case is couched very similar terms.

[8] Interestingly, the *Schlehuber* mortgagee clause contained specific language in it that stated "This entire clause is void unless the name of the mortgagee or trustee is inserted on the first page of this policy in space provided under this caption." 281 So. 2d 373, 374. No such limiting language is found in the cover note evidencing the coverage herein.

[9] The *Ran Investments* court apparently misnamed the Schlehubers in citing to that case in it's opinion, referring to them as the Cannons, who were the non-party vendors in that case.

> may be enforced by the appellant as a third party beneficiary even though he possessed no policy in his name. See *Shingleton v. Bussey*, Fla.1969, 223 So.2d 713; *Maxwell v. Southern American Fire Insurance Company*, Fla.App. 1970, 235 So.2d 768. Cf. *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972). 281 So.2d 375. (Emphasis supplied.)

Fla. Stat. 627.405, cited by the *Schelhuber* court, still stands in full force and effect.

The courts in Florida have also been receptive to unnamed mortgagees recovering on fire policies where the buyer, as sole named insured on the policy had contractually agreed with the seller / mortgagee to procure fire coverage for the mortgagees benefit. When the buyer procured fire coverage solely for his own benefit with no loss payee clause at all, the court in *Sumlin v. Colonial Fire Underwriters*, 27 So. 2d 730 (Fla. 1946), held that the mortgagee had an equitable lien on the proceeds of the policy. See also *Atwell v. Western Fire Ins. Co.*, 120 Fla. 694, 163 So. 27 (1935); *Langford v. Wauchula State Bank*, 148 Fla. 236, 4 So.2d 10 (1941).

While a pure equitable lien theory would avail Plaintiffs in this case nothing because their recovery would be a derivative of the right of the named insured to recover and the named insured was precluded from recovery by virtue of the territorial exclusion, the cases do demonstrate that the concept of providing for coverage for unnamed lien holders, where there is a contractual obligation on the part of the named insured to provide coverage for the benefit of the lien holder / mortgagee, has a significant history in the jurisprudence of this state.

In the case sub judice, the trial court relied heavily on *Cigna Fire Underwriters v. Leonard*, 645 So. 2d 28 (Fla. 4th DCA 1994) for the proposition that an unnamed mortgagee

is not a third party beneficiary of a contract of insurance where the lessee, by arson, intentionally caused the destruction of the property upon which lessee was named as sole insured. The trial court's reliance on *Leonard*, however, is misplaced. *Leonard* hinges upon the issue of whether the unnamed mortgagee would be a third party beneficiary of an "open" mortgage clause, rather than a "standard" or "union" mortgage clause[10] that would allow the lien holder to recover his loss under circumstances that would defeat recovery by the named insured.

The *Leonard* court stated: "This case is distinguishable from *Everglades Marina Inc. v. American Eastern Development Corp*., 374 So. 2d 517 (Fla. 1979) and *Beta Eta House Corp. v. Gregory*, 230 So. 2nd 163 (Fla. 1970) since it does not involve a "liability contract of insurance, which, by its very nature, is intended to benefit third parties." 645 So. 2d at 29.

In the case sub judice, the policy in question, although not a "liability" policy, is, by its very nature (and the terms therein), intended to benefit third parties. The *Leonard* court recited the rule regarding third party beneficiaries as found in *Security Mutual Casualty Co. v. Pacura*, 402 So. 2d 1266 (Fla. 3rd DCA 1981):

> "The right of a third party beneficiary to sue on a contract is recognized in Florida, but that right is limited to those situations where the provisions of the contract clearly show an intention to primarily and directly benefit the

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[10] The *Leonard* case may, in fact, relate to a situation where, as in *Southeastern Fidelity Ins. Co. v. Suwannee Lumber Mfg. Co.*, Inc.,411 So. 2d 950 (Fla. 1st DCA 1982), infra, there is simply no mortgagee coverage at all. The *Leonard* court found that the plaintiff's right to the proceeds would be derivative of the right of the named insured, and found that those rights were barred because of an arson exclusion. *Leonard* at 30. That would not be the case under a standard mortgage clause.

individual bringing the suit or to a class of persons to which he claims to belong as a third party beneficiary" 645 So. 2d at 30.

See also, *Schaffer v. Wells Fargo*, 528 So. 2d (Fla. 3rd DCA 1988); *Carretta Trucking v. Cheoy Lee Shipyards*, 647 So. 2d 1028 (Fla. 4th DCA 1995); *Technicable Video v. Americable*, 479 So. 2d 810 (Fla. 3rd DCA 1985).

In this case we are dealing with "Breach of Warranty" coverage. Just as in the case of "standard' or "union" mortgagee coverage, Breach of Warranty coverage is coverage which by its very nature is intended to benefit third parties. See *Security Insurance Co. v. Commercial Credit,* 339 So. 2d 391 at 34 (Fla. 3rd DCA 1981). Because Breach of Warranty coverage extends only to lien holders, and not the named insured, the coverage cannot, by definition, extend to anyone other than third parties. Consequently, plaintiff Worldwide, as a secured lien holder, is specifically a member of that "class of persons to which he claims to belong as a third party beneficiary."*Security Mutual v. Pacura,* supra at 30. Worldwide claims as a secured lien holder. Secured lien holders are the particular class of persons to whom breach of warranty runs. Therefore, Worldwide is, indeed, a third party beneficiary of the contract of insurance, because it is, in fact, the <u>insured</u> under the Breach of Warranty or Automatic additional assureds clauses of this policy.

The issue of standing to maintain an action by the lender as third party beneficiary where the lender was named as "additional insured" was dealt with in *Community Bank of Homestead v. American States Insurance Co.*, 524 So. 2d 1154 (Fla. 3rd DCA 1988). In that case, the court held "[T]hat this aircraft insurance policy providing, inter alia, coverage to the bank as an 'additional insured' under certain portions of the policy, afforded the bank

the right to maintain an independent action as an intended third party beneficiary." *Id*. at 1154. Where, as in this case, the policy plainly states, "Automatic additional assureds, loss payees, waivers of subrogation and other contractual obligations as required," the plaintiffs need not be specifically named therein to claim as third party beneficiaries. To require the plaintiffs to have taken further action to become specifically named in the policy to allow them third party beneficiary status would render the policy language of "Automatic" utterly meaningless, especially in view of the requirement that the court is bound to assign to contract provisions the meaning that would be attached to them by an ordinary person of average understanding. *Steuart Petroleum Co. v. Certain Underwriters at Lloyd's, London,* supra.

The extent of the trial court's misapplication of the facts to the law in this case can be seen in the court's Order Granting Final Summary Judgment wherein the court stated:

> "Plaintiff argues, citing *Schaffer v. Wells Fargo*, 528 So. 2d (Fla. 3rd DCA 1988), that '[a] third party beneficiary need not be specifically named if he is a member of a limited class intended to benefit from the contract.' However *Schaffer* dealt with a bank employee who was assaulted in the bank by another bank employee. *Id*. The bank had a contract with Wells Fargo that provided that Wells Fargo would help provide the [bank] with a system of protection for its assets and employees against certain hazzards.' See *Id*. This case is drastically different than the case at bar. In *Schaffer*, the plaintiff was a named employee of the bank. The bank clearly knew of the class of employees and that Schaffer was in that class. In contrast, in the case at bar, CZX had no knowledge of the class of lienholders or that the Plaintiffs and Intervenors were in that class."

The error here is patent. The record clearly and obviously supports the fact that CZX not only knew of the class of lien holders, but just as obviously knew that Plaintiffs and Intervenor were in that particular class. CZX created the very class of lien holders

which the trial court believed it was unaware of by entering into contractual agreements with all of the Plaintiffs and Intervenors below to purchase and finance the refurbishment of the aircraft. The CZX contract with Worldwide by its very terms granted Worldwide a purchase money security interest in the aircraft. (R. 135.) Consequently, it may be clearly seen that, like the bank in *Schaffer*, CZX was aware of the class of lien holders and that Worldwide was a member of that class.

The court further erred in applying the case of *Southeastern Fidelity Ins. Co. v. Suwannee Lumber Mfg. Co., Inc*., 411 So. 2d 950 (Fla. 1st DCA 1982). A close reading of the *Suwannee* case reveals that while the mortgagee therein was referenced on the face of the policy, there was simply no mortgagee coverage or loss payee provision whatsoever on the policy and therefore the lien holder therein could not have been a third party beneficiary. That case is simply the opposite of the case herein. In this case, Breach of Warranty is included. So is an "Automatic additional assureds, loss payees, waivers of subrogation and other contractual obligations as required" clause. The lien holders in this case are not specifically named on the face of the cover note, but because of the unambiguous terms contained in this particular policy, they do not need to be specifically "named" in order to be intended as third party beneficiaries. See *Hagen*, supra.

II. THE TRIAL COURT ERRED IN ADMITTING THE AFFIDAVIT OF WILLIAM WILLER INTO EVIDENCE TO DETERMINE THE MEANING OF THE TERMS OF THE COVER

NOTE WHERE THE TRIAL COURT FOUND THE COVER NOTE ITSELF TO BE UNAMBIGUOUS, AND WHERE THE AFFIDAVIT FAILED TO SHOW THAT THE WITNESS WAS COMPETENT TO TESTIFY TO THE MATTERS CONTAINED THEREIN.

Defendant, Lloyd's, in defense of the Plaintiff's motion for summary judgement submitted a fifteen-page affidavit of William F. Willer, a surplus lines insurance agent from Miami, Florida. (R. 1130-1144.) In that Affidavit, Mr. Willer asserts that the language "including Breach of Warranty is required" and "automatic additional assureds hold harmless agreements, waivers of subrogation rights, loss payees, and other contractual obligations as required," as found on the cover note, is essentially a result of the unusual structure of the London insurance market and it's particular problem regarding communicating changes in the risk between Lloyd's brokers and the various Underwriter's and insurance companies at Lloyd's. The affidavit asserts in paragraph twenty-three (23); "by normal custom and practice in the London insurance market such language in a slip indicates that, if the broker returns to the lead underwriter requesting any of these coverages or agreements from underwriters the lead underwriter alone will have the ability, if he so chooses, to agree on behalf of the subscribing underwriters to provide the requested coverage or to require the approval of only the first four underwriters as well as the discretion whether or not to charge an additional premium therefore, depending on the circumstances." (R. 1137-1138.)

Before extrinsic matters may be considered by a court in interpreting a contract, the words used on the face of the contract must be ambiguous or unclear. *Hurt v. Leatherby Insurance Company*, 380 So. 2d. 432 (Fla. 1980). In the absence of an ambiguity on the

face of the contract, it is well settled that the actual language used in the contract is the best evidence of the intent of the parties and the plain meaning of that language controls. *Carefree Villages, Inc. v. Keating Properties, Inc.*, 489 So. 2d. 99 (Fla. 2nd DCA 1986), and *Acceleration National Service Corp. v. Brickell Financial Services*, 541 So. 2d. 738 (Fla. 3rd DCA 1989). In order to have this extrinsic evidence seeking to explain of the terms contract admitted by way of affidavit, Lloyd's must show that the language of the cover notes is, in fact, ambiguous. This "ambiguity," which does not appear on the face of the contract, is in fact injected into the cover notes by the very affidavit which seeks to explain it by setting forth an explanation that cannot, in and of itself be read into the terms contained in the contract.

The trial court denied Plaintiff's motion to strike that affidavit (T. 41.), and subsequently recited a risk analysis rationale very similar to one contained in that affidavit in its Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. (R. 3553.)

Parol or extrinsic evidence is admissible only to interpret a contract of insurance the terms of which are ambiguous. Before extrinsic matters may be considered by a court in interpreting a contract, the words used on the face of the contract must be ambiguous or unclear. Similarly, where, as here, no ambiguity or lack of clarity appears on the face of a written contract, the parole evidence rule prohibits admission of extrinsic evidence such as the Willer affidavit. *Carlon, Inc. v. Southland Diversified Co.*, 381 So. 2d 291, 293 (Fla. 4th DCA 1980); *Margolis v. City Nat'l Bank of Hallandale*, 436 So. 2d 438 (Fla. 4th DCA 1983), *rev. denied*, 447 So. 2d 885 (Fla. 1984); *Shell Dev. Corp. v. Ann Ford, Inc.*, 443 So.

2d 409 (Fla. 4th DCA 1984).

Extrinsic evidence is inadmissible to determine the meaning of unambiguous language in a policy. See *Tavormina v. Timmeny,* 561 So. 2d 681, 683 (Fla. 3rd DCA 1990) ("the contract is clear on its face, and there is no reason to resort to extrinsic evidence"); *Acceleration Nat'l. Svc. Corp. v. Brickell Financial Svc. Motor Club, Inc.,* 541 So. 2d 738, 739 (Fla. 3rd DCA) (extrinsic matters may not be considered by a court in interpreting an unambiguous contract), *rev. denied,* 548 So. 3d 662 (Fla. 1989)*:* see also *Certain British Underwriters at Lloyd's of London v. Jet Charter Svc. Inc.,* 789 F.2d 1534, 1535 ("It is a well-settled rule of Florida law that parole or extrinsic evidence may not be introduced for the purpose of construing written contract terms which are plain and unambiguous.") *Deni Associates of Florida v. State Farm Fire & Casualty Ins. Co.,* 23 F.L.W. S59 (Fla. 1998). In the present case, however, the trial court found the cover note clear and unambiguous. (R. 3555, 3556.). Consequently, the Willer affidavit and its convoluted interpretation that the cover note language really means that as a matter of internal business procedure that "lead" underwriters in London need not obtain the permission of "following" underwriters to effect changes in the policy is not only dubious, but is extrinsic evidence which the court may not consider.

Not only is Willer's affidavit inadmissible extrinsic evidence, but is also incompetent to establish the meaning of the contract of insurance. Willer was not a party to the insurance contract. He was not privy to what the parties intended, and has no personal knowledge of the facts or circumstances involved in the making of the contract. Willer has not been a Lloyd's broker, nor has he ever worked on the floor of Lloyd's or the

Institute of London Underwriters. Consequently, his affidavit purporting to state what the parties intended is incompetent, irrelevant, and inadmissible. *Airborne Freight Corp. v. Fleming Int'l Airways, Inc.,* 423 So. 2d 921, 922 (Fla. 3rd DCA 1983), *rev. dismissed,* 430 So. 2d 450 (Fla. 1983).

Only that evidence admissible at trial may be considered in support of a motion for summary judgment. In ruling on a motion for summary judgment the trial judge may not consider facts that would be inadmissible in evidence. *Palmer v. Liberty Nat'l Life Ins. Co.,* 499 So. 2d 903 (Fla. 1st DCA 1986), *rev. denied,* 508 So. 2d 15 (Fla. 1987); *Pollock v. Kelly,* 125 So. 2d 109 (Fla. 1961). The court may consider forms of evidence, such as affidavits, which would normally be inadmissible at trial, *Baskin v. Griffith,* 127 So. 2d 467 (Fla. 1961), but the facts set forth in the affidavit must themselves be admissible. Additionally, the usual objections to admissibility may be raised. Thus the court may not consider irrelevant evidence in ruling on a motion for summary judgment. *Holl v. Talcott,* 191 So. 2d 40 (Fla. 1966); *Food Fair Stores, Inc. v. Trussell,* 131 So. 2d 730 (Fla. 1961).

As can be plainly seen, the trial court erred in allowing into evidence and considering the Willer affidavit.

III. THE TRIAL COURT ERRED IN FAILING TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSE OF AGENCY WHERE NO RESPONSIVE PLEADING EVER WAS FILED SETTING FORTH FACTS SUFFICIENT TO RAISE THE ISSUE.

Lloyd's filed affidavits in defense of Plaintiff's Motion For Summary Judgment from William F. Willer, a Miami surplus line's insurance agent, (R. 1130-1144.) and Christopher Hamilton-Cox, the corporate representative and director of Citicorp, Lloyd's brokers in London, who issued the cover notes in the instant case. (R. 1179-1180.) In both the affidavit of Mr. Willer, and Christopher Hamilton-Cox, (R. 1724, 1725) there appear assertions that Citicorp was in fact not the agent of Lloyd's Underwriter's at London, but was in fact the agent of CZX Productions, Inc., for the purpose of procuring this coverage.

Counsel for Lloyd's filed a Memorandum of Law below, in which counsel reasserted Mr. Willer's statement that, "through long standing custom and practice on the London insurance market Lloyd's brokers are considered the agents of their clients or potential clients for the purposes of procurement of the coverage and hence the agents of the insured." (R. 1133.) The Defendant below asserted in argument that because the disputed language was prepared by the broker, who is the agent of the insured, the rule of construction that an insurance policy is to be construed against the insurer has no application in this case. (R. 2890-2892.) Defendants further asserted a lengthy argument contending that Citicorp was acting in fact as the broker for the named insured CZX rather than the broker for Lloyd's, and therefore CZX and its lien holders, including plaintiffs herein, are responsible for the language contained in the cover note, and therefore the underwriter's are relieved of liability from coverage. (Id.) However, at no time prior to the filing of the memorandum of law did Lloyd's assert any affirmative defense or avoidance in any responsive pleading alleging an agency issue.

Affirmative defenses are required to be set forth in responsive pleadings. Florida

R. Civ. P. 1.110(d). Failure to raise an affirmative defense or avoidance prior to a plaintiff's Motion For Summary Judgment constitutes a waiver of that defense. *Kissimee Telephone Authority v. Better Plastics*, 526 So. 2d. 46 (Fla. 1988); *Wyman v. Robins*, 513 So. 2d. 230 (Fla. 1st DCA 1987), *Dallas v. First Bank of Marianna*, 457 So. 2d. 582 (Fla. 1st DCA 1984), and *Goldberger v. Regency Highland Condominium Association*, 452. So. 2d. 583 (Fla. 4th DCA 1984).

In arguing to the court below against Plaintiff's Motion for Summary Judgment, the Defendants asserted that under the doctrine of contra proferentem, the language of the cover note could not be held against the insurer because, they allege, the document was prepared by Citicorp. Lloyd's further asserted through the affidavit of Mr. Willer that Citicorp, although undeniably a Lloyd's broker, was, "By long custom and usage in the London Market the agent of the insured." Although this argument ignores the fact that all of the underwriters and insurance companies on this risk signed the broker's slips (which were set forth in the identical language as the cover notes), and thus were bound by their terms, it is unnecessary to reach that issue because no affirmative defense or avoidance alleging that the document was prepared by "CZX's agent" has been set forth in any responsive pleading in this case. The Defendants failure to raise such an affirmative defense or avoidance prior to Plaintiff's Motion For Summary Judgment constitutes a waiver of that defense and therefore any defense of agency should have been stricken by the trial court.

CONCLUSION

Because the language "Including Breach of Warranty as Required" and "Automatic additional assureds, loss payees, waivers of subrogation and other contractual obligations as required." can only be construed to mean that lien holders, even though unnamed in the cover note, are able to recover on the policy in the circumstances presented herein, the trial court erred in granting summary judgment for Defendant, Lloyd's.

Because the record discloses that there are no material facts in dispute as they relate to Plaintiffs' motions for summary judgment and because the unambiguous language of the cover notes extends coverage for the lien holders herein, the trial court erred in denying Plaintiff's motions for summary judgment.

For all of the forgoing reasons, Appellant requests this court reverse the trial court's granting of summary judgment for the Appellee with directions to vacate the Final Judgment and enter summary final judgment in Appellant's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Appellant, Worldwide Aeronautical Industries, Inc., has been transmitted by U.S. Mail this _____ day of July 1998, to the following service list:

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_____

_____NATHANIEL B. KIDDER

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

CASE NO. 98-00965

WORLDWIDE AERONAUTICAL INDUSTRIES, INC., AIRLIFT OPERATIONS II, LTD. and ALO III, LTD.,

Plaintiffs / Appellants;

vs.

LLOYD'S UNDERWRITERS, LONDON,

Defendant / Appellee.
_____ /

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

APPENDIX TO THE RECORD ON APPEAL
