IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

CASE NO. 5D14-1522

MID-CONTINENT CASUALTY COMPANY,

Appellant/ Cross-Appellee,

vs.

LT NO. CA-06-0815

JAMES T. TREACE and ANGELINE G. TREACE,

Appellees/ Cross-Appellants.
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MID-CONTINENT CASUALTY COMPANY'S MOTION FOR REHEARING, REHEARING EN BANC, CLARIFICATION AND CERTIFICATION

The appellant/cross-appellee Mid-Continent Casualty Company ("Mid-Continent") moves for rehearing, clarification of the Court's written opinion, and certification of conflict, pursuant to Florida Rule of Appellate Procedure 9.330(a). Alternatively, Mid-Continent moves for rehearing *en banc* pursuant to Florida Rule of Appellate Procedure 9.331. As set forth below, the panel's December 31, 2015 opinion overlooked or misapprehended salient points of fact and law and conflicts with precedent of the Florida Supreme Court as well as this Court. Moreover, Mid-Continent submits that clarification without reversal as to one issue raised below would afford a basis for Florida Supreme Court review as it would directly conflict with precedent from the Supreme Court. Finally, rehearing *en banc* is warranted due

to a conflict with this Court's precedent and the existence of two issues of great public importance.

I. FACTUAL BACKGROUND

This action involves a coverage dispute in a garnishment proceeding following a jury trial and verdict in favor of appellees/ cross-appellants James T. and Angeline G. Treace (the "Treaces") (R III: 559; SR VI: 24-27, 53, 60-61, 92; SR XI: 876-78). The Treaces' sued Stevenson Design & Development of Jacksonville, Inc. ("Stevenson Design") and others seeking to recover damages resulting from faulty construction of their home (R III: 559). Mid-Continent defended its insured, Stevenson Design, pursuant to a reservation of rights in the Treaces' suit (RII: 201; SR XVI: 14-26, 37-54). After obtaining a judgment against Mid-Continent's insureds, the Treaces sought to garnish several commercial general liability ("CGL") policies Mid-Continent issued to Stevenson Design (SR VI: 53-55). The trial court entered judgment in the garnishment proceeding following a bench trial (R III: 558-83).

In this appeal, Mid-Continent challenged coverage for the Treaces' judgment on several grounds including that the policy's broad fungus, mildew and mold ("fungus") exclusion precludes any recovery (Initial Brief at 22-5; Reply Brief at 10-12). During the trial, the court permitted Mid-Continent to amend its answer to conform to the evidence and add an affirmative defense that the fungus exclusion

precludes any recovery under the policy (R III: 575; R V: 872-75). In opposition to Mid-Continent's pretrial motions in limine and at trial, the Treaces argued Mid-Continent was estopped from denying coverage by application of Florida's Claims Administration Statute, § 627.426 (R I: 71-74; R V: 819). MCC explained in response that the statute was inapplicable to a policy exclusion (R V: 824, 886). Following the verdict, the trial court ruled that Mid-Continent could not rely on the fungus exclusion by virtue of Florida's Claims Administration Statute (R III: 574-76). In the December 31 opinion, this Court affirmed that ruling, without any discussion of the fungus exclusion. *See* Slip Op. at 2.

Regarding attorney's fees, the trial court ruled that the Mid-Continent policies do not provide coverage for the Treaces' attorney's fees incurred in the suit against Stevenson Design (R I: 196-98). In reaching that conclusion the trial court relied on this Court's precedent in *Scottsdale Ins. Co. v. Haynes*, 793 So. 2d 1006 (Fla. 5th DCA 2001) (R I: 197-98). Before the trial court, the Treaces argued the fees constitute damages and alternatively argued fees constitute taxable costs under the policy's supplementary payments provision (SR XVI: 21-22). In the December 31 opinion, this Court discussed the supplementary payments provision, looked to precedent regarding statutory fees and fees awarded as a sanction under a procedural rule, and concluded that attorney's fees constitute "costs taxed against the insured." *See* Slip Op. at 2-3.

II. MOTION FOR REHEARING, CLARIFICATION AND CERTIFICATION OF CONFLICT

On December 31 this Court issued an opinion affirming, without discussion, the trial court's ruling that the fungus exclusion cannot apply. This Court reversed the trial court's denial of coverage for the Treaces' fees incurred in the suit against Stevenson Design holding that such fees constitute taxable costs under the policy's supplementary payments provision. Mid-Continent submits that, in reaching these conclusions, the panel overlooked or misapprehended salient points of law and fact warranting rehearing. *See* Fla. R. App. P. 9.300(a).

A. Rehearing and/or Clarification Is Appropriate Regarding Application of the Policy's Fungus Exclusion and Certification of Conflict to the Extent this Court Is Applying Florida's Claims Administration Statute to Preclude Reliance on a Policy Exclusion

The trial court exercised its discretion in permitting Mid-Continent to amend its affirmative defenses to conform with the evidence and assert application of the policy's fungus exclusion. The fungus exclusion is written very broadly and precludes coverage, in part, for "property damage' "arising out of, resulting from, caused by, contributed to, attributed to, or in any way related to any fungus, mildew, mold, or resulting allergens" (R II: 236). The exclusion also precludes recovery for "[a]ny costs or expense associated, in any way," with abatement, mitigation, remediation and the like (R II: 236). Courts applying Florida law consistently enforce fungus exclusions like the one at issue here. *See, e.g.*,

Residences at Ocean Grande, Inc. v. Allianz Global Risks U.S. Ins. Co., 07-22656-CIV, 2009 WL 7020044, at *13-14 (S.D. Fla. Sept. 9, 2009) *aff'd,* 379 Fed.Appx. 879 (11th Cir. 2010) ("[p]ursuant to the plain and unambiguous language of the Fungi Exclusion, any costs incurred to clean, remove, and correct the mold growth, and *any* costs incurred to test for, monitor, or assess the existence, concentration or effects of mold are excluded from coverage."); *cf. Hathaway Dev. Co., Inc. v. Illinois Union Ins. Co.,* 274 Fed.Appx. 787, 792 (11th Cir. 2008) (enforcing mold/fungus exclusion under Georgia law). Those holdings comport with Florida Supreme Court precedent which requires adherence to the policy's plain language and a broad construction of the term "arising out of." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 539 (Fla. 2005) ("The term 'arising out of' is broader in meaning than the term 'caused by' and means 'originating from,' 'having its origin in,' 'growing out of,' 'flowing from,' 'incident to' or 'having a connection with.").

At trial, the Treaces' own expert testified that the wood rot would not have occurred without the existence of both water and fungus (R V: 868-69). As a result all of the "property damage" falls squarely within the fungus exclusion. Having permitted amendment to assert this exclusion, the trial court, in the final judgment, ruled that Florida's Claims Administration Statute precludes application

of the exclusion. That ruling contravenes decades of Florida precedent and is nothing short of finding coverage by estoppel.

In 1987, the Florida Supreme Court issued its opinion in *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660 (Fla. 1987). In *McBride*, the Court held that "estoppel may be used defensively to prevent a forfeiture of insurance coverage, ***but not affirmatively to create or extend coverage***." 517 So. 2d at 661 (e.s.). The Court further recognized a very limited exception and held that promissory estoppel may be used to create coverage solely in the circumstance "where to refuse to do so would sanction fraud or other injustice." *Id.* at 662. Neither promissory estoppel nor fraud or injustice was ever argued below. Thus there can be no basis for applying it here.

Following *McBride*, in 1989 the Supreme Court penned the seminal case of *AIU Ins. Co. v. Block Marine Invest., Inc.*, 544 So. 2d 998 (Fla. 1989). *AUI* squarely held the Claims Administration Statute had no application to a policy exclusion. 544 So. 2d at 998. The Court offered the following cogent analysis:

> We do not believe that the legislature intended, by the enactment of section 627.426(2), to give an insured coverage which is expressly excluded from the policy or to resurrect coverage under a policy or an endorsement which is no longer in effect, simply because an insurer fails to comply with the terms of the aforementioned statute.

Id. at 999. Simply put, the statute cannot be used to create coverage which is expressly excluded under the policy. *Id.* at 999-1000. This Court has recognized as

much on more than one occasion. *See, e.g., Blue Cross & Blue Shield of Fla., Inc. v. Ming*, 579 So. 2d 771, 772 (Fla. 5th DCA 1991) (citing *AIU* and the "general rule that, while the doctrine of estoppel may be used to prevent a forfeiture of insurance coverage, the doctrine may not be used to create or extend coverage"); *see also U.S. Aviation Underwriters, Inc. v. Sunray Airline, Inc.*, 543 So. 2d 1309, 1312 (Fla. 5th DCA 1989) (recognizing the AIU holding with respect to 627.426(2) in the context of considering a different statutory provision). As the AIU Court made clear:

> Construing the term 'coverage defense' to include a disclaimer of liability based on an express coverage exclusion has the effect of rewriting an insurance policy when section 627.426(2) is not complied with, thus placing upon the insurer a financial burden which it specifically declined to accept. Such a construction presents grave constitutional questions, the impairment of contracts, and the taking of property without due process of law.

544 So. 2d at 1000.

More recently, the Supreme Court reiterated the preclusion of coverage by estoppel in *QBE Ins. Corp. v. Chalfonte Condo. Apt Ass'n, Inc.*, 94 So. 3d 541, 554 (Fla. 2012). "'Voidance of exclusion to an insurance policy is a severe penalty which alters the very terms of the deal between the parties. It requires the insurer to provide coverage for uncontracted risk, coverage for which the insured has not paid.'" *Id.* (quoting *Fed. Deposit Ins. Corp. v. Am. Cas. Co. of Reading, Pa.*, 975 F.2d 677, 683 (10th Cir. 1992), and also citing *AIU*).

Ignoring the Supreme Court's clear admonitions, the trial court here improperly used the Claims Administration Statute to create coverage that was not ever bargained for under the policy. Fungus was expressly excluded by separate endorsement. Affirmance of that holding contravenes precedent from this District as well as the Florida Supreme Court and every other District Court of Appeal in the State. *Danny's Backhoe Serv., LLC v. Auto Owners Ins. Co.*, 116 So. 3d 508, 511 (Fla. 1st DCA 2013) (recognizing, §627.426 does not apply where insurer claims a complete lack of coverage based upon policy exclusion); *Nationwide Mut. Fire Ins. Co. v. Voigt*, 971 So. 2d 239, 242 (Fla. 2d DCA 2008) (discussing the "well established" law that "that equitable principles such as estoppel may not generally be used affirmatively against an insurer to create or extend coverage otherwise lacking in the policy"); *Almendral v. Sec. Nat. Ins. Co.*, 704 So. 2d 728, 730 (Fla. 3d DCA 1998) (quoting *AIU* extensively and acknowledging the established concept that § 627.426(2) is inapplicable to denial based upon complete lack of coverage); *State Farm Mut. Auto. Ins. Co. v. Hinestrosa*, 614 So. 2d 633, 635 (Fla. 4th DCA 1993) (reaffirming its own precedent that the carrier's argument is not a "coverage defense" when there is no coverage).

Mid-Continent respectfully requests that this Court grant rehearing and clarify its ruling with respect to application of the Claims Administration Statute and the fungus exclusion and to remand this case to the trial court with instructions

to enter judgment in favor of Mid-Continent based upon the evidence during the trial that all of the resulting damages from the insured's defective work was caused by fungus, mildew, or mold.

B. Rehearing Is Proper Because the Award of Fees as "Costs Taxed Against the Insured" Contravenes Supreme Court Precedent and the Plain Policy Language

In the December 31 opinion, this Court found that the Treaces' attorney's fees in prosecuting the suit against Stevenson Design fell with the supplementary payments provision of the CGL policies. *See* Slip Op. at 2. Specifically, this Court ruled that such fees constituted "costs taxed against the insured" in the Treaces' suit. *Id.* Mid-Continent respectfully submits that holding cannot stand in light of Florida Supreme Court precedent and consideration of the entire supplementary payments provision.

The "supplementary payments" policy provision identifies what Mid-Continent will pay "with respect to any claim we investigate or settle, or any 'suit' against an insured we defend." (R II: 215-16). The subsection addressing defense of an insured identifies several specific categories of expenses that it covers such as costs for bonds (R II: 215-16). The Treaces invoked the subsection requiring Mid-Continent to pay "[a]ll costs taxed against the insured in the 'suit'." (R II: 216). In the second subsection of the supplementary payments provision, the policy sets forth what Mid-Continent will pay with respect to an indemnitee of the

insured (R II: 216). Notably, that subsection expressly identifies where it will afford coverage for attorney's fees, incurred by Mid-Continent, related to the defense of the indemnitee (R II: 216). Tellingly, such language does not appear anywhere in the first subsection regarding payments to the insured, the subsection upon which the Treaces rely(R II: 215-16). Reading this subsection as a whole, which the court must do, establishes that it does not cover attorney's fees. *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 166 (Fla. 2003) ("[W]e have consistently held that "in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.").

In concluding that fees fall within the Mid-Continent policy, this Court looked to two Florida District Court of Appeals opinions, *GEICO Ins. Co. v. Hollingsworth*, 157 So. 3d 365 (Fla. 5th DCA 2015), and *GEICO Gen. Ins. Co. v. Rodriguez*, 155 So. 3d 1163 (Fla. 3D DCA 2014). *Slip Op.* at 2-3. In *Rodriguez*, the Third District Court of Appeal held that court awarded sanctions constitute costs under the supplementary payments provision of an automobile policy. 155 So. 3d at 1172. Sanctions in the form of fees and costs were imposed under Florida Rule of Civil Procedure 1.380 due to the insured's misrepresentations during his deposition. 155 So. 3d at 1165-66, 1172. The court was influenced, in part, by the failure of the policy to define the term "court costs." *Id.* After first noting that the policy language

was unambiguous, the court erroneously went on to interpret this policy provision liberally in favor of coverage. *Id.* To the contrary, the Supreme Court has clearly and consistently ruled that the policy's plain language governs and such liberal interpretation only applies where there is an ambiguity in the policy. *See, e.g.*, *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) ("Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be ambiguous."); *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla.1986) (emphasizing policies must be construed by plain meaning absent genuine inconsistency, uncertainly, or ambiguity). Taking that false premise, the *Rodriguez* court found it significant that the sanctions were imposed as part of a lawsuit that was covered by the GEICO policy. *Id.* at 1172.

In *Hollingsworth*, this Court considered whether a supplementary payments provision afforded coverage for fees awarded pursuant to Florida's offer of judgment statute, § 768.79. 157 So. 3d at 368. This Court looked to *Rodriguez*, concluded that the statutorily imposed fees were no different than fees awarded as a sanctions, and concluded the failure to define "court costs" in the policy made the policy ambiguous and concluded the term include fees. *Id. Hollingsworth* also involved an automobile policy and a fee award that was tied directly to actions taken during the litigation, i.e., service and failure of acceptance of a proposal for

settlement. *Id.* Mid-Continent recognizes that at least one other opinion concludes that fees imposed as a sanction constitute taxable costs. *Tri-State Ins. Co. of Minn. v. Fitzgerald*, 593 So. 2d 1118, 1119 (Fla. 3d DCA 1992) (finding fees imposed under Florida Rule of Civil Procedure 1.380(a)(4) constitute costs under policy issued to marine engine manufacturer, cited by the Treaces). *Fitzgerald* likewise involved the situation where specific conduct during the litigation resulting in the fee award as a court imposed sanction. *Id.* at 1119. Notably, the Treaces never argued that the supplementary payments provision at issue here is ambiguous.

Mid-Continent respectfully submits that these cases cannot properly guide the result here. First, in stark contrast to *Hollingsworth*, *Rodriguez*, and *Fitzgerald*, the fees awarded to the Treaces were solely based on the contract between Stevenson Design and the Treaces; they were not statutory fees nor fees awarded pursuant to a court procedural rule. Both § 768.79, the statute at issue in *Hollingsworth*, and Rule 1.380, the rule at issue in *Rodriguez* and *Fitzgerald*, contain language regarding fees ***and*** costs. In contrast, the prevailing party fee provision under which the Treaces recovered their fees makes ***no*** mention of costs. Additionally, the actions that led to the sanctions awards and the proposal for settlement at issue in those three suit were all actions that occurred ***after*** the litigation commenced. The contract with the fee provision was entered into by the Treaces and Stevenson Design years ***before*** the underlying lawsuit was filed.

Undoubtedly, an insurer can be deemed to be aware of provisions expressly treating fees as costs where this information is clearly set forth in a published state statute or procedural rule. However, it would not be reasonable to read into the insurance contract additional, unbargained for, coverage premised upon a private contractual agreement to which the insurer is not a party. Yet, that is the result of the December 31 ruling.

Second, and more importantly, the Florida Supreme Court has long held that, absent a clear enunciation in the rule, contract or statute to the contrary, attorney's fees do not constitute costs taxed against an insured. *See, e.g., Florida Patient's Compensation Fund v. Moxley*, 557 So. 2d 863, 864 (Fla. 1990) (holding attorney's fees do not fall within policy's supplementary payments provision affording coverage for "all costs taxed against the named insured in any suit defended by the company"); *Spiegel v. Williams*, 545 So. 2d 1360, 1362 (Fla. 1989) ("The policy requires it to pay the costs of defending a suit as well as specified portions of interest on any judgment-nothing more, nothing less. It does not cover the payment of the plaintiff's attorneys' fees."). In *Spiegel,* the Court explained:

> While a policy could no doubt be written specifically to cover court-awarded attorneys' fees, liability insurers are normally only responsible for the payment of the plaintiff's attorneys' fees where bad faith is involved or the insured prevails in a direct action against the company. 8A J. Appleman, Insurance Law and Practice § 4894.65 (1981); § 627.428, Fla.Stat. (1987). On the other hand, liability insurers have usually been responsible for the payment of taxable costs over and above the policy limits. 8A J. Appleman, Insurance

> Law and Practice § 4894 (1981); 15A M. Rhodes, Couch Cyclopedia of Insurance Law §§ 56:10, 56:16 (rev. ed. 1983). Therefore, the result reached by the district court of appeal would be justified if the award of the plaintiff's attorneys' fees could be considered as a species of taxable costs. Yet, ever since this Court's decision in *State ex rel. Royal Insurance Co. v. Barrs*, 87 Fla. 168, 99 So. 668 (1924), attorneys' fees recoverable by statute are regarded as "costs" only when specified as such by the statute which authorizes their recovery. *Accord Prudential Ins. Co. of America v. Lamm*, 218 So.2d 219 (Fla. 3d DCA), cert. denied, 225 So.2d 529 (1969). Indeed, there are some statutes which provide for an award of attorneys' fees to be taxed as costs. E.g., § 713.29, Fla.Stat. (1987).

545 So. 2d at 1361-62. Because the statute at issue there did not specify attorney's fees as costs, fees fell outside the supplementary payments provision. *Id.* at 1362.

At least one other Florida District Court of Appeal has ruled consistently with *Moxley* and *Spiegel*, concluding that an automobile policy supplementary payments provision did not cover attorney's fees assessed pursuant to § 768.79. *Steele v. Kinsey*, 801 So. 2d 297, 300 (Fla. 2d DCA 2001) (provision for "other reasonable expenses incurred at [the insurer's] request" did not cover fees assessed under offer of judgment statute). The *Steele* court expressly rejected the argument that the insurer's decision not to settle forced the litigation to continue and thus should be deemed costs. *Id.* The court reasoned that to shift fees to the insurer would be an improper rewriting of the insurance contract. *Id.*

The reasoning of *Moxley*, *Spiegel*, and *Steele* is also consistent with the Florida Supreme Court's uniform guidelines as to taxable costs as well as precedent regarding damages generally under insurance contracts. *See, e.g., In re*

Amendments to Uniform Guidelines for Taxation of Costs, 915 So. 2d 612, 614, 616-17 (Fla. 2005) (recognizing the policy of reducing costs and refusing to shift costs for travel and other expenses while also outlining what Court deems taxable costs that "should," "may," and "should not" be taxed); *Cheek v. McGowan Elec. Supply*, 511 So. 2d 977, 979 (Fla. 1987) (noting contractual fee provision is not part of the substantive claim and thus not considered damages); *Scottsdale Ins. Co. v. Haynes*, 793 So. 2d 1006, 1009 (Fla. 5th DCA 2001) (relying on *Cheek* for conclusion that fees are not damages under policy); *First Spec. Ins. Co. v. Caliber One Indem. Co.*, 988 So. 2d 708, 714 (Fla. 2d DCA 2008) (fees are ancillary and not damages under insurance contract).

In *Haynes*, this Court ruled that a policy provision affording coverage for "damages because of injury to which this insurance applies" did not encompass attorney's fees. 793 So. 2d at 1009. The Court then looked to the statute under which fees were sought and concluded there was no statutory language it could incorporate into the policy to expand coverage beyond the plain policy text. *Id.* As in *Haynes*, it would be improper here to read additional language into the policy to expand coverage.[1]

[1] To the extent the Treaces relied upon *Assurance Co. of Am. v. Lucas Waterproofing Co., Inc.*, 581 F. Supp. 2d 1201 (S.D. Fla. 2008), such reliance is misplaced. First, that decision rejects this Court's precedent in *Haynes*. *Lucas*, 581 F. Supp. 2d at 1212-13. Second, the *Lucas* ruling was called into question in a concurring opinion in *GEICO Gen. Ins. Co. v.*

Moreover, this Court need look no further than the Treaces' own motions filed with the trial court where they clearly address fees and costs as ***separate*** items (SR VI: 29-33, 40-51; SR XI: 754-61). In those filings, the Treaces spell out what "costs" they seek, citing the Uniform Guidelines, and they separately argue that they are entitled to recover their attorney's fees pursuant to the construction contract between themselves and Stevenson Design (SR VI: 29-33, 40-51; SR XI: 754-61). Likewise, the trial court's order awarding fees and costs separates these two distinct concepts, enunciating the basis and reasonable amount of each (SR XI: 793-97). Lastly, the contractual provision under which they recovered the fees is solely a fee provision – "the prevailing party in such litigation shall be entitled to recover their reasonable attorneys fees" - it makes no mention whatsoever of court costs (SR XI: 794). Each and every filing by the Treaces and the trial court treats fees and costs as entirely distinct – and so does Florida law.

Comparing the Treaces' filings with the policy provision at issue here leads to the singular conclusion that contractual prevailing party attorney's fees do not constitute taxable costs. To conclude otherwise is contrary to both the plain policy language and Florida Supreme Court precedent. Respectfully, it appears that the Court overlooked or misapprehended that the policy language as compared to the

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Williams, 111 So. 3d 240, 248 (Fla. 4th DCA 2013) (Gross, J. concurring) (stating disagreement with the *Lucas* holding "since it does not accurately reflect the state of Florida law").

contractual fee provision, the Treaces' filings, and Florida precedent, precludes any coverage for the Treaces' fee judgment against Stevenson Design.

WHEREFORE, Mid-Continent respectfully requests that this Court grant rehearing and affirm the trial court's finding that there is no coverage for the Treaces' attorney's fees award.

III. MOTION FOR CERTIFICATION OF CONFLICT

A. Request for Certification of Conflict on the Application of Florida's Claims Administration Statute and the Fungus Exclusion

As explained in Section II.A above, Mid-Continent respectfully submits the finding that Florida's Claims Administration Statute precludes Mid-Continent's reliance on the policy's fungus exclusion directly conflicts with Florida Supreme Court precedent as well as precedent from this Circuit and every other District Court of Appeal. In the event the Court does not grant rehearing and revise or clarify its ruling on the fungus exclusion, Mid-Continent requests this Court certify conflict with *AIU Ins. Co. v. Block Marine Invest., Inc.*, 544 So. 2d 998 (Fla. 1989), *Danny's Backhoe Serv., LLC v. Auto Owners Ins. Co.*, 116 So. 3d 508, 511 (Fla. 1st DCA 2013), *Nationwide Mut. Fire Ins. Co. v. Voigt*, 971 So. 2d 239, 242 (Fla. 2d DCA 2008), *Almendral v. Sec. Nat. Ins. Co.*, 704 So. 2d 728, 730 (Fla. 3d DCA 1998), and *State Farm Mut. Auto. Ins. Co. v. Hinestrosa*, 614 So. 2d 633, 635 (Fla. 4th DCA 1993). Each of those cases held that the statute cannot be used to create or extend coverage.

B. Request for Certification of Conflict on the Attorney's Fees Ruling

As explained in Section II.B above, Mid-Continent respectfully submits the finding that attorney's fees constitute taxable costs under the policy's supplementary payments provision directly contradicts Florida Supreme Court

precedent as well as precedent from this Circuit on this issue. In the event the Court does not grant rehearing and revise its conclusion as to such coverage, Mid-Continent requests that this Court certify conflict with *Florida Patient's Compensation Fund v. Moxley*, 557 So. 2d 863, 864 (Fla. 1990), and *Spiegel v. Williams*, 545 So. 2d 1360, 1362 (Fla. 1989). Both of those cases hold that attorney's fees do not constitute costs taxed against the insured under a supplementary payments provision.

IV. MOTION FOR REHEARING *EN BANC*

Rehearing en banc is proper where the case is of exceptional importance or "such consideration is necessary to maintain uniformity in the court's decisions." Fla. R. App. P. 9.331(d)(1). First, *en banc* consideration is appropriate as the affirmance as to the fungus exclusion directly conflicts with this Court's ruling in *Blue Cross & Blue Shield of Fla., Inc. v. Ming*, 579 So. 2d 771, 772 (Fla. 5th DCA 1991). Second, the case is of exceptional importance in that the panel appears to have misconstrued Florida law and applied the Claims Administration Statute so as to create or extend coverage under the policy. Additionally, as to the attorney's fees issue, the potential impact of a finding that contractual fee provisions constitute taxable costs under a supplementary payments provision likewise extends coverage beyond what was bargained for in the insurance contract, placing a very substantial burden upon all insurers doing business in Florida with policies containing similar supplementary payments language.

A. *En Banc* Consideration is Proper to Maintain Uniformity with Respect to the Fungus Exclusion and Application of the Claims Administration Statute

In 1991, this Court recognized the unequivocal ruling in *AIU* - that the Claims Administration Statute cannot be used to extend coverage. *Ming*, 579 So. 2d at 772. In direct contravention of that law, the trial court extended coverage beyond the policy and precluded application of the fungus exclusion. This Court's affirmance

represents a tacit rejection of its own precedent. Mid-Continent respectfully submits that rehearing *en banc* is necessary to maintain uniformity of this Court's opinions.

WHEREFORE, Mid-Continent Casualty Company respectfully requests that this Court grant rehearing *en banc*, reverse the trial court's ruling, and remand with instruction to find that the policy's fungus exclusion precludes any recovery under the Mid-Continent policies.

B. The Case Is of Exceptional Importance with Respect to the Fungus Exclusion

For over twenty year Florida courts have consistently followed the Supreme Court's precedent in *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998, 999-1000 (Fla. 1989). Each and every District Court of Appeal has ruled that a policy exclusion cannot be ignored simply because an insurer fails to comply with the Claims Administration Statute. In plain terms, estoppel can result in a forfeiture of coverage but it cannot extend or create coverage. The trial court's ruling, which this Court affirmed, did precisely that and extended coverage for fungus, a loss clearly excluded and one for which no premium was paid. If left as is, the panel's decision creates a new rule of law in this District. That, in and of itself, makes this a question of exceptional importance as the evils the *AIU* court warned against will now come to be, i.e. placing financial burdens that insurers specifically declined, impairing the right to contract and effectively result in a taking without due process of law. 544 So. 2d at 1000.

The panel's decision is directly contrary to established Florida law on an issue raised almost daily in Florida courts. The case is of exceptional importance warranting *en banc* consideration as this decision is likely to impact cases filed daily in this District.

WHEREFORE, Mid-Continent Casualty Company respectfully requests that this Court grant rehearing *en banc*, reverse the trial court's ruling, and remand for application of the policy's fungus exclusion to preclude any recovery under the policies.

C. The Case Is of Exceptional Importance with Respect to the Attorney's Fees Holding

The Florida Supreme Court has long held that attorney's fees do not constitute taxable costs under a supplementary payments provision. *See, e.g., Florida Patient's Compensation Fund v. Moxley*, 557 So. 2d 863, 864 (Fla. 1990); *Spiegel v. Williams*, 545 So. 2d 1360, 1362 (Fla. 1989). The panel's decision is directly contrary to those rulings and is already being raised in other suits pending in trial courts in the state. Fee-shifting provisions are commonplace in construction contracts. Thus, in every construction action, an insurer now faces liability for unbargained for attorney's fees, that its insured agreed to in the construction contract, on top of the insurer's liability limit. In this case alone, that exposure was nearly $400,000. Thousands of cases involving similar supplementary payments

provisions could be impacted. The case is of exceptional importance warranting *en banc* consideration.

WHEREFORE, Mid-Continent Casualty Company respectfully requests that this Court grant rehearing *en banc*, and affirm the trial court's ruling that attorney's fees are not covered under the Mid-Continent policies.

CONCLUSION

As set forth above, appellant/cross-appellee, Mid-Continent Casualty Company, respectfully requests that this Court enter an order granting the motion for rehearing and reverse the trial court's ruling with respect to application of the policy's fungus exclusion and the ruling as to attorney's fees. Alternatively, Mid-Continent requests clarification as to the Court's ruling on application of the fungus exclusion and certification as to its ruling on that exclusion as well as certification on the issue of attorney's fees. Lastly, Mid-Continent Casualty Company respectfully requests that this Court grant the motion for rehearing *en banc* as to both the fungus and fees issues.

Respectfully submitted,
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STATEMENT OF COUNSEL

I express a belief, based upon a reasonable and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because affirmance of the trial court's ruling as to inapplicability of the fungus exclusion for alleged violation of Florida's Claims Administration Statute is in direct conflict with the Supreme Court's opinion in *AIU Ins. Co. v. Block Marine Invest., Inc.*, 544 So. 2d 998 (Fla. 1989).

I express a belief, based upon a reasonable and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because the panel's finding that attorney's fees fall within the policy's supplementary payments provision is in direct conflict with the *Florida Patient's Compensation Fund v. Moxley*, 557 So. 2d 863, 864 (Fla. 1990), and *Spiegel v. Williams*, 545 So. 2d 1360, 1362 (Fla. 1989).

I express a belief, based on a reasoned and studied professional judgment, that the panel decision with respect to application of the fungus exclusion is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: *Blue Cross & Blue Shield of Fla., Inc. v. Ming*, 579 So. 2d 771, 772 (Fla. 5th DCA 1991).

I also express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance as to both application of the fungus exclusion and interpretation of the policy's supplementary payments provision.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail on January 25, 2016, to:

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