IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 06-10617

LANCER INSURANCE COMPANY,

Plaintiff/Appellee

v.

RHONDA SHELTON, Individually and as next friend of Ashley Lynn Pavelko; DON STOUT, Individually and as next friend of James Nichols Stout; JOAN STOUT, Individually and as next friend of James Nichols Stout; CHUCK FOSTER, Individually and as next friend of Christina Foster; JERRY GUY SHAFER, Individually and as next friend of Spencer Stoyer; GUY SHAFER, Individually and as next friend of Kathleen Shafer and Tyler Shafer; MARY SHAFER, Individually and as next friends of Kathleen Safer and Tyler Shafer; DARRELL BLAKEY, Individually and as next friend of Lauren Blakely; DARLENE BLAKEY, Individually and as next friend of Lauren Blakely; LAURA GROSSE, Individually and as next friend of Marshall Thomason; BETH JENKINS, Individually and as next friend of Kristen Grubbs; BILL BERTHELOT, Individually and as next friend of Billy Berthelot; ANITA BERTHELOT, Individually and as next friend of Billy Berthelot; CARY WATKINS, Individually and as next friends of Kim Watkins and Jonathan Watkins; TERESA WATKINS, Individually and as next friends of Kim Watkins and Jonathan Wakins; MATT ALDAS; LARRY LIKE, Individually and as next friend of Joshua Like; CHARLETON YOUNKING; SHAUN BUTTERWORTH, Individually and as next friend of Stephen Butterworth; KIM BUTTERWORTH, Individually and as next friend of Stephen Butterworth; MELISSA LIKE, Individually and as next friend of Joshua Like,

Defendants/Appellants

Appeal from the United States District Court
For the Northern District of Texas

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Lancer Insurance Co. v. Rhonda Shelton, et. al, Case No. 06-10617

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants state that oral argument would be helpful in the instant case because the facts before the District Court were fairly complex and because Appellants have never been afforded an opportunity to orally argue their position since the summary judgment motions and Objections to the Magistrate's Findings were decided without oral argument.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this dispute under 28 U.S.C. § 1332 because there was complete diversity of citizenship among the parties and the amount in controversy exceeded $75,000. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The Judgment appealed from was signed on May 16, 2006 and Defendants/Appellants filed their Notices of Appeal on May 24 and May 26, 2006. According to correspondence from the Court dated September 26, 2006, this Brief is due to be filed by no later than November 6, 2006. This appeal is from a final judgment disposing of all claims and all parties.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding that the 2001 Policy was cancelled effective November 25, 2001 despite Lancer's unquestioned failure to give written notice of cancellation to the various state agencies with which it stated it had filed the policy as required by the Policy and state law.

2. Whether the District Court erred in finding that Lancer's failure to comply with the notice provisions of the 2001 Policy did not prevent cancellation of the policy because Rockmore allegedly procured replacement insurance and there was supposedly no gap in coverage.

3. Whether the District Court erred in granting Lancer's motion for summary judgment.

4. Whether the District Court erred in denying Appellants' motion for summary judgment.

STATEMENT OF THE CASE

The underlying case was filed by Lancer Insurance Company ("Lancer") as a declaratory judgment action seeking a judicial declaration that neither Lancer's 1999 policy nor its 2001 policy provided coverage for a horrific bus crash involving Rockmore, its insured, in which several children were killed or injured. In the underlying suit, Lancer sued Rockmore as well as the families who had sued Rockmore for his responsibility for the bus crash. Appellants' claims against Rockmore went to trial in August 2004 in state district court and Appellants obtained a $66 million judgment against Rockmore after a three-week jury trial.

Thereafter, in the underlying case, Lancer filed its Motion for Summary Judgment on April 22, 2005. Defendants/Appellants filed their Response and Cross-Motion for Summary Judgment on May 24, 2005. On October 14, 2005, Magistrate Judge Jeff Kaplan filed his Findings and Recommendations in which he recommended that the summary judgment motion of Lancer be granted and the competing motion of Appellants be denied.

Defendants/Appellants filed their Objections to the Magistrate's Findings and Recommendations on October 27, 2005. Lancer filed a Response to the Objections on November 9, 2005. Defendants/Appellants thereafter filed a Motion for Oral

Argument seeking oral argument on their Objections. Apparently rejecting the Motion for Oral Argument, the District Court issued an Order accepting the Magistrate's Findings and Recommendations on March 7, 2006. On May 16, 2006, the District Court entered a Final Judgment in favor of Lancer and against Defendants/Appellants. Defendants/Appellants filed their Notices of Appeal on May 24 and May 26, 2006.

STATEMENT OF FACTS

At all relevant times, Eric Rockmore operated a bus company under the name Rockmore's Discovery Coaches and Tours. ROA 1:26 at ¶2.[1] In July 2001, Mr. Rockmore's company was a for-hire motor carrier of passengers.

Lancer issued to Rockmore a Business Auto Liability Policy, policy number BA146814 with a policy period of July 15, 2001 to July 15, 2002 (the "2001 Policy"). ROA 1:30 at ¶20. Lancer identified the named insured as "Rockmore Discovery Coaches & Tours Unlimited, Inc.," with an address in Milwaukee, Wisconsin. ROA 3:714. Under the terms of the Policy, Lancer was obligated to, *inter alia*, "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" ROA 3:728. The Policy provided coverage of $5 million. ROA 3:715, 719, 727-28.

[1] References are to the Record on Appeal ("ROA") by volume and page number.

Although Lancer attempted to cancel the 2001 Policy for non-payment of premiums, it admits that it never sent a notice of cancellation to the Texas or Wisconsin authorities as required by Endorsement F of the Policy. Moreover, no notice of cancellation was ever sent to the other states with which Lancer stated it had filed its Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of Insurance (the "Certificate") as required by Endorsement F of the Policy. *See* ROA 4:775 (at Request Nos. 26-43). Finally, Lancer failed to comply with the statutory cancellation requirements of the states with which it stated it had filed the Certificate.

On June 24, 2002, a date within the initial, one-year term of the 2001 Policy, Ernest Carter was hired by Defendant Rockmore to drive his bus to transport children from the Metro Church of Garland, Texas, to a church camp in Ruston, Louisiana. ROA 1:189 at ¶ 1. On June 24, 2002, while Ernest Carter was driving, the Bus drifted off the highway and slammed into a concrete pillar supporting an overpass (the "Accident"). ROA 1:189 at ¶ 1; ROA 1:30 at ¶22. Several children were killed. Defendants/Appellants, children on the bus and their parents, were injured as a result of the Accident and later brought suit against Rockmore.

Lancer's internal claim notes indicate that it learned of the bus crash on June 25, 2002. That day, someone posted in Lancer's computerized claims file:

> STAY AWAY. RISK INVOLVED IN HUGE TEXAS BUS CRASH & IS PROBABLY WITHOUT INSURANCE. AT THIS POINT, IT

> APPEARS COVERAGE MAY LIE WITH GREENS TRANSPORTATION OUT OF DALLAS AS THEY SUB-CONTRACTED THIS TRIP TO DISCOVERY.
>
> I HAVE SET UP A THIRD FILE FOR THE TEXAS PORTION WHICH CONTAINS ALL ARTICLES AS IT RELATES TO CRASH AND INSURANCE.

ROA 4:834-35. The next day, the same claims file reiterated "STAY AWAY FROM THIS AT ALL COSTS." ROA 1:30.

In July 2002, various parties filed suit against Rockmore in the 14th District Court of Dallas County, Texas in Cause No. 02-06189 (the "State Court Lawsuit"). In early January 2004, various parties began to make settlement demands on Lancer, after having just learned of the existence of the Lancer policy. ROA 4:837, 839, 842. Lancer rejected each of these demands because it contended its policy had been cancelled before the bus crash. ROA 4:838, 853-55 ("Lancer has denied and continues to deny that it owed any defense or indemnity to Rockmore in connection with this or any other suits arising out of the Accident. . . . As the Lancer policy was cancelled prior to the date of loss at issue, it does not provide coverage to Rockmore for the Accident.").

The State Court Lawsuit was not called to trial until August 23, 2004, more than eight months after Lancer learned of the suit. On September 16, 2004, the jury rendered a verdict finding that Rockmore was negligent and that Rockmore's negligence proximately caused the injuries of the Appellants herein. The jury

awarded the injured children and their families more than $70 million in damages. After hearing the arguments of counsel, the State Court entered a Final Judgment against Rockmore on October 25, 2004. ROA 4:806. As set forth in the Final Judgment, the children and their families were awarded more than $60 million in actual damages as well as punitive damages, prejudgment interest, post-judgment interest, ad litem fees and costs of court.

On August 23, 2004, Lancer commenced this civil action against its insureds -- Eric Rockmore and his companies -- and the children and their families who had sued Rockmore seeking a declaratory judgment that it has no duty to indemnify Rockmore from any claims arising out of the Accident. ROA 1:24, 30, 31. Thereafter, Lancer and Appellants filed competing summary judgment motions. After considering the pleadings of the parties, the Magistrate Judge recommended that Lancer's summary judgment motion be granted and Appellants' motion be denied. ROA 5:1033. Appellants objected to the Magistrate's Findings and Recommendations. ROA 5:1046. Appellants also filed a motion seeking oral argument on their objections. ROA 5:1081. Despite Appellants' objections, the District Court entered an Order accepting the Magistrate's findings. ROA 5:1106. The District Court thereafter entered a Final Judgment granting summary judgment in favor of Lancer on May 16, 2006. ROA 5:1107. Appellants timely filed their Notices of Appeal on May 24 and May 26, 2006. ROA 5:1111-16.

SUMMARY OF THE ARGUMENT

In this insurance coverage dispute, Lancer asserted that it properly canceled its 2001 Policy with Eric Rockmore prior to a tragic bus accident on June 24, 2002 in which several children, Defendants herein, were severely and permanently injured and several other children were killed. This assertion is flawed for numerous reasons. First, it is unquestioned that Lancer did not send a notice of cancellation to the Texas or Wisconsin authorities as required by Endorsement F of the 2001 Policy. Second, no notice of cancellation was ever sent to the other states with which Lancer stated it had filed its Liability Certificate of Insurance as required by Endorsement F of the 2001 Policy. Finally, Lancer failed to comply with the statutory cancellation requirements of Texas and Wisconsin and the other states with which it stated it had filed the Certificate. The 2001 Policy therefore remained in effect at the time of the Accident under the terms of the Policy and state law. The District Court erred in finding to the contrary.

The District Court's error can best be seen by taking three simple conclusions stated in its opinion and carrying them to their logical conclusion:

1. "Lancer contends that the 2001 Policy was canceled effective November 25, 2001 . . . . . In order to obtain summary judgment on this ground, Lancer must conclusively establish that it strictly complied with the cancellation provisions of the policy and Texas law."

2. "The reverse side of the Form F endorsement indicates that certificates of insurance were filed with transportation authorities in Arkansas, Florida, Minnesota, Missouri, Nebraska, Ohio, Tennessee, Texas and Wisconsin.

> Therefore, in order to cancel the endorsement, Lancer must give at least 30 days written notice to each of those states."
>
> 3. "Lancer also sent a notice of cancellation to federal transportation authorities. However, no such notice was sent to any of the states listed in the Form F endorsement."

ROA 5:1039-1041. Thus, the District Court effectively concluded that:

1. Lancer was required to strictly comply with the cancellation provisions of the 2001 Policy;

2. Lancer was required under Endorsement F of the 2001 Policy to give 30 days' written notice to each of the states with which it stated it had filed certificates of insurance; and

3. Lancer gave no notice to any of the states listed in Endorsement F.

The unmistakable conclusion to be drawn from these holdings is that Lancer was not entitled to summary judgment in its favor because it failed to demonstrate that it strictly complied with the cancellation requirements of the 2001 Policy.

In addition to erring in finding that the 2001 Policy was properly cancelled according to its terms, the District Court also erred in finding that any failure to give the cancellation notice required by the Policy was immaterial because Rockmore obtained replacement coverage and there was no gap in coverage. Such a finding essentially allowed state statutes relating to minimum coverage to trump the explicit cancellation requirements of the 2001 Policy and conflicted with the District Court's holding that Lancer was required to comply with the cancellation requirements of Texas law as well as the cancellation terms of the Policy itself. It is also flawed

because, as set forth below, there was no evidence that Rockmore obtained "replacement insurance" as that term is defined by the relevant statutes and the uncontroverted evidence demonstrated that there was in fact a gap in coverage.

ARGUMENT AND AUTHORITIES

I. Standard of Review.

Lancer and Appellants filed competing summary judgment motions before the District Court. After considering the pleadings of the parties, the Magistrate Judge recommended that Lancer's summary judgment motion be granted and Appellants' motion be denied. The District Court thereafter entered a Final Judgment granting summary judgment in favor of Lancer. The District Court's Final Judgment is therefore reviewable by this Court de novo. *EMCASCO Ins. Co. v. American Intern. Specialty Lines Ins. Co.*, 438 F.3d 519, 523 (5th Cir. 2006) ("We review a summary judgment *de novo*, applying the same standard as did the district court.").

II. The District Court erred in finding that Lancer complied with the cancellation requirements of the 2001 Policy.

"Both Wisconsin and Texas law require strict compliance with the cancellation provisions of an insurance policy . . ." *Republic Western Ins. Co. v. Rockmore*, No. 3-02-CV-1569-K, 2005 WL 57284 at * 5 (N.D. Tex. Jan. 10, 1995); *see also Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 748 (Tex. App.--Corpus Christi 2001, pet. denied per curiam) ("Specific policy provisions for cancellation of coverage must be strictly construed and complied with."); *Olson v. Hardware Dealers Mut. Fire Ins. Co.*, 173

N.W.2d 599, 601, n.2 (Wisc. 1970) ("When an insurer pleads the defense of cancellation of the policy . . . it has the burden of proving a strict compliance with the cancellation provision."). Under Texas law, "cancellation is an affirmative defense which must be proved by the insurer at trial." *Republic Western Ins. Co.*, 2005 WL 57284 at * 6; *Shaller v. Commercial Standard Ins. Co.*, 158 Tex. 143, 309 S.W.2d 59, 66 (Tex.1958). Therefore, to prevail on its summary judgment motion, Lancer was required to conclusively establish that it complied with the 2001 Policy's cancellation requirements by sending a cancellation notice to both Rockmore and the appropriate state agencies.

The 2001 Policy contained an Endorsement F confirming the $5,000,000 limits of Rockmore's coverage. Endorsement F to the Policy stated:

> This endorsement may not be cancelled without cancellation of the policy to which it is attached. Such cancellation may be effected by the company or the insured giving thirty (30) days' notice in writing to the State Commission with which such Certificate has been filed, such thirty (30) days' written notice to commence to run from the date the notice is actually received in the office of such Commission.

ROA 4:756 (emphasis added). Thus, as the Magistrate Judge recognized and the District Court accepted, "in order to cancel the endorsement, Lancer must give at least 30 days written notice to each of those states." ROA 5:1041. It is unquestioned that Lancer failed to give such notice. ROA 5:1041 ("Lancer also sent a notice of cancellation to federal transportation authorities. However, no such notice was sent to any of the states listed in the Form F endorsement.").

Rather than challenge the fact that it did not give written notice to the nine states with which it stated it had filed the Certificate of Insurance, Lancer asserted that it was not required to provide such notice because it had not actually filed the certificate as it represented it had. ROA 2:401 ("[b]ecause no certificate or contract was on file with the WDT, no notice to the agency of cancellation of the policy was required."). But in Endorsement F of the 2001 Policy, Lancer clearly and unambiguously stated that "[i]t is agreed that" the Liability Certificate of Insurance (the "Certificate") "has been filed" with the state agencies indicated in the Policy and that it could not cancel the Policy without giving such agencies thirty days' written notice of cancellation:

FORM F
UNIFORM MOTOR CARRIER BODILY INJURY AND PROPERTY DAMAGE LIABILITY INSURANCE ENDORSEMENT

It is agreed that:

1. The certification of the policy, as proof of financial responsibility under the provisions of any State motor carrier law or regulations promulgated by any State Commission having jurisdiction with respect thereto, amends the policy to provide insurance for automobile bodily injury and property damage liability in accordance with the provisions of such law or regulations to the extent of the coverage and limits of liability required thereby; provided only that the insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except by reason of the obligation assumed in making such certification.
2. The Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of Insurance has been filed with the State Commissions indicated on the reverse side hereof.
3. This endorsement may not be canceled without cancellation of the policy to which it is attached. Such cancellation may be effected by the company or the insured giving thirty (30) days' notice in writing to the State Commission with which such Certificate has been filed, such thirty (30) days' notice to commence to run from the date the notice is actually received in the office of such Commission.

ROA 4:756. The next page contained a chart indicating the states with which the Certificate "HAS BEEN FILED:"

X = INDICATES STATE COMMISSIONS WITH WHOM UNIFORM MOTOR CARRIER BODILY INJURY AND PROPERTY DAMAGE LIABILITY CERTIFICATE OF INSURANCE HAS BEEN FILED							
ALABAMA	☐	ILLINOIS	☐	MONTANA	☐	RHODE ISLAND	☐
ALASKA	☐	INDIANA	☐	NEBRASKA	☒	SOUTH CAROLINA	☐
ARIZONA	☐	IOWA	☐	NEVADA	☐	SOUTH DAKOTA	☐
ARKANSAS	☒	KANSAS	☐	NEW HAMPSHIRE	☐	TENNESSEE	☒
CALIFORNIA	☐	KENTUCKY	☐	NEW JERSEY	☐	TEXAS	☒
COLORADO	☐	LOUISIANA	☐	NEW MEXICO	☐	UTAH	☐
CONNECTICUT	☐	MAINE	☐	NEW YORK	☐	VERMONT	☐
DELAWARE	☐	MARYLAND	☐	NORTH CAROLINA	☐	VIRGINIA	☐
DIST. OF COLUMBIA	☐	MASSACHUSETTS	☐	NORTH DAKOTA	☐	WASHINGTON	☐
FLORIDA	☒	MICHIGAN	☐	OHIO	☒	WEST VIRGINIA	☐
GEORGIA	☐	MINNESOTA	☒	OKLAHOMA	☐	WISCONSIN	☒
HAWAII	☐	MISSISSIPPI	☐	OREGON	☐	WYOMING	☐
IDAHO	☐	MISSOURI	☒	PENNSYLVANIA	☐		

ROA 4:755. Among the states indicated were Wisconsin and Texas. This same information was confirmed in a separate page filled out by hand. ROA 4:764.

Lancer admits that the Form F Endorsement was part of its agreement with Rockmore and formed a part of the contract between Lancer and Rockmore. ROA 4:883 at p. 106; ROA 4:891 at p. 139. And it admits that the phrase "has been filed" indicates that the filing had already occurred at the time the representation was made in the Form F Endorsement. ROA 4:896 at p. 158. Despite these affirmative statements of fact, Lancer now states that it had not filed the Certificate with the listed state agencies and knew that it was not going to file the Certificate at the time it made this representation to Rockmore. ROA 4:896-97 at pp. 160-61; ROA 4:910-11 at pp. 215-17. In other words, Lancer admits its affirmative statement of fact was false at the time it was made. ROA 4:896-97 at pp. 160-61. Even worse, it asserts that its failure to file the Certificate as represented excuses its subsequent failure to file a Notice of Cancellation of the Policy with the respective state agencies. As set forth

below, however, Lancer is barred from challenging the fact that the Certificate was filed with the listed state agencies under well-recognized principles of Texas law. Its unexcused failure to give notice to the appropriate state agencies in the nine listed states therefore prevented Lancer from effectively cancelling the 2001 Policy, which remained in effect at the time of the Accident.

A. Lancer is barred by the parol evidence rule from denying it filed the Certificate.

Lancer conceded that the 2001 Policy is not ambiguous. ROA 4:947 at p. 120; ROA 4:950 at p. 132. It also specifically conceded that the language in Endorsement F stating that the Certificate "has been filed" is not ambiguous and clearly indicated that the filing had already occurred at the time the policy was issued. ROA 4:896 at pp. 158-60. Because the foregoing contractual representations are unambiguous, parol evidence is not admissible to vary their meaning under Texas law:

> Initially, we note that we interpret insurance policies in Texas according to the rules of contract interpretation. In *CBI*, we set forth guidelines courts are to follow when interpreting insurance contracts:
>
> The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Parol evidence is not admissible for the purpose of creating an ambiguity.

Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462, 464 (Tex. 1998) (citations omitted). In other words, "[i]f a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Parol evidence is

not admissible for the purpose of creating an ambiguity." *National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Industries, Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). Nor is parol evidence admissible to amend or modify the Policy's terms. ROA 3:737 ("This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.").

Although Lancer attempted in its discovery responses and its summary judgment motion to deny that it filed the Certificate with the listed state agencies, it stated unambiguously in the Policy that the Certificate "has been filed" with such agencies. ROA 4:755-56. This statement of fact, as opposed to a statement of future intention, is not subject to interpretation, modification or variance under the terms of the Policy and well-established principles of Texas law.[2] Thus, for purposes of the competing summary judgment motions, the District Court was required to assume that the Certificate was filed with the nine indicated state agencies as unambiguously stated in Endorsement F of the 2001 Policy.

[2] Even if Lancer could somehow show that these statements in the Policy were ambiguous, under Texas law, "insurance policies are construed in favor of coverage" *Jones*, 59 S.W.3d at 748; *Gonzalez v. Mission American Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990) ("Where an insurance policy's provisions are ambiguous . . . then that construction that affords coverage will be the one adopted.").

B. Lancer is barred by the doctrines of waiver and estoppel from denying it filed the Certificate.

Lancer is also barred by the doctrines of waiver and estoppel from denying that the Certificate was filed with the listed state agencies. Under Texas law, the doctrine of promissory estoppel requires: (1) a promise, (2) that it be foreseeable to the promissor that the promisee would rely on the promise, and (3) the promisee does substantially rely on the promise to his detriment. *English v. Fischer,* 660 S.W.2d 521, 524 (Tex.1983). Here, each of the elements was met. First, Lancer promised through the representations in Endorsement F of the policy that it had filed the Certificate with the listed state agencies, although it now admits that this statement was a misrepresentation. ROA 4:895 at p. 156; ROA 4:949 at pp. 126-27; ROA 4:950 at p. 130. Lancer admits that it was foreseeable that Rockmore would rely on these representations. ROA 4:880 at pp. 93-96. And it is uncontested that Rockmore relied on these representations to his detriment by entering into the insurance contract with Lancer only to be told later that Lancer had not filed the Certificate with the required state agencies.

As for waiver, "[w]aiver may be proved by intentional conduct on the part of the insurance company which is inconsistent with its initial claim of the right of cancellation." *Mid Century Ins. Co. v. H&H Meat Products Co., Inc.*, 842 S.W.2d 747, 749 (Tex. App.--Corpus Christi 1992, no writ). Here, the statement in the insurance contract that the Certificate "has been filed" is inconsistent with Lancer's

alleged right to cancel the policy without giving written notice of cancellation to the authorities in Texas and Wisconsin and the other listed states. For these reasons, Lancer cannot now disclaim the terms of the Policy by claiming that it did not file the Certificate.

C. Lancer's breach of contract in failing to file the Certificate excused any failure of a condition precedent.

Lancer argues that because it did not file the Certificate with Texas and Wisconsin, as it unequivocally stated in the Policy it had done, it had no duty to file the Notice of Cancellation with Texas and Wisconsin or the other states listed in Endorsement F. ROA 2:401. In other words, Lancer argues that the filing of the Certificate was a condition precedent to its duty to file a Notice of Cancellation and that this condition precedent did not occur. Under well-established principles of Texas law, however, a party cannot use the failure of a condition precedent to excuse its own performance when it has caused the failure by its own wrongful conduct. *See, e.g., II Deerfield Ltd. P'ship. v. Henry Building Inc.*, 41 S.W.3d 259, 265 (Tex. App.--San Antonio 2001, pet. denied) ("It is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance."); *Dorset v. Cross*, 106 S.W.3d 213, 217 (Tex. App.--Houston [1st Dist.] 2003, pet. denied) ("When the obligation of a party to a contract depends upon a certain condition being performed, and the fulfillment of the condition is prevented by the act of the other

party, the condition is considered fulfilled."). In fact, Lancer has admitted that its breach of the 2001 Policy through its failure to file the Certificate does not excuse its subsequent failure to file the required Notice of Cancellation. ROA 4:953 at pp. 141-42. For this additional reason, the District Court erred in granting summary judgment in favor of Lancer.

D. The District Court agreed with Appellants that Lancer was required to give notice of cancellation to the states with which it stated it had filed the Certificate of Insurance.

Before the District Court, Appellants argued that cancellation of the Policy could not be effected without giving notice to the states with which Lancer stated it had filed the Certificate of Insurance. Lancer, to the contrary, argued that the evidence showed that it did not actually file the Certificate with the nine states indicated in Endorsement F and that it therefore had no duty to provide a notice of cancellation to those states. Appellants responded that the affidavit testimony supposedly showing the Certificate was not filed with the nine listed states was an attempt to vary the terms of the Policy and was prohibited by the parol evidence rule and other procedural rules and doctrines. The District Court appears to have sided with Appellants on this important point:

> The reverse side of the Form F endorsement indicates that certificates of insurance were filed with transportation authorities in Arkansas, Florida, Minnesota, Missouri, Nebraska, Ohio, Tennessee, Texas and Wisconsin. Therefore, in order to cancel the endorsement, Lancer must give at least 30 days written notice to each of those states.

ROA 5:1039. Nowhere did the District Court accept Lancer's proposition that notice to the listed states was not required. Instead, it clearly held to the contrary.

E. Because Lancer failed to comply with the 2001 Policy's cancellation requirements, the Policy remained in effect.

Because Lancer represented that the Certificate had been filed with the nine listed state agencies, to cancel the Policy, it was required by the Policy's unambiguous terms to "giv[e] thirty (30) days written notice in writing to the State Commission with which such Certificate has been filed. . . ." ROA 4:756. It has admitted that it failed to provide such notice to any of the nine state agencies -- including Texas and Wisconsin --within thirty days or at any time. ROA 4:782-88 (Request Nos. 26-43). As such, as a matter of law, its attempted cancellation of the Policy was ineffective and the Policy therefore remained in place on the date of the Accident.

The District Court's erroneous conclusion that the 2001 Policy itself was properly cancelled (ROA 5:1041 ("Lancer complied with the general cancellation requirements of the policy")) may perhaps be explained by its confusion regarding certain language of Endorsement F. Specifically, the District Court appears to have interpreted certain language of the Endorsement as relating solely to cancellation of the Endorsement itself rather than cancellation of the 2001 Policy as a whole. But the operative language of Endorsement F to the Policy states:

> This endorsement may not be cancelled without cancellation of the policy to which it is attached. Such cancellation may be effected by the company or the insured giving thirty (30) days' notice in writing to the

> State Commission with which such Certificate has been filed, such thirty (30) days' written notice to commence to run from the date the notice is actually received in the office of such Commission.

ROA 4:756 (emphasis added). The District Court appears to have assumed that the term "such cancellation" applies only to cancellation of Endorsement F and not to cancellation of the 2001 Policy. This interpretation, however, conflicts with applicable case law. *See, e.g., Lang v. Kurtz*, 301 N.W.2d 262, 265 (Wisc. Ct. App. 1980) (failure to comply with ten-day notice provision under financial responsibility statute estopped insurance company "from asserting there was no policy in effect" at the time of the accident); *Progressive Preferred Ins. Co. v. Ramirez*, 588 S.E.2d 751 (Ga. 2003) ("The insured's liability to a third party injured by the insured is based on the policy itself as opposed to liability based on the minimum coverage imposed by law."). It also conflicts with well-accepted rules of grammatical construction as well as rules of contract construction pertaining specifically to insurance contracts.

It is well established that "[o]ne of the basic rules of grammatical construction is the doctrine of last antecedent. That doctrine provides that relative and qualifying phrases are to be applied to the words or phrases immediately preceding them, unless to do so would impair the meaning of the sentence." *Stewman Ranch, Inc. v. Double M. Ranch, Ltd.*, 192 S.W.3d 808, 812 (Tex. App.—Eastland 2006, pet. denied); *see also City of Corsicana v. Willmann*, 216 S.W.2d 175, 176 (Tex. 1949) ("In support of its contention petitioner invokes the doctrine of Last Antecedent. Under that canon of

statutory construction a qualifying phrase must be confined to the words and phrases immediately preceding it to which it may be applied without impairing the meaning of the sentence."). Here, the phrase "cancellation of the policy to which it is attached" immediately precedes the phrase "such cancellation" and is certainly in closer proximity to that phrase than the phrase "[t]his endorsement may not be cancelled." Under well-established rules of grammatical construction, the phrase "such cancellation may be effected" modifies the phrase "cancellation of the policy," meaning written notice to the listed states was required not just to cancel the Endorsement, but to cancel the 2001 Policy itself. This interpretation is also sensible in light of the fact that the second sentence quoted above uses the phrase "such cancellation" when the immediately preceding sentence used the word "cancellation" specifically to refer to cancellation of the Policy rather than the Endorsement.

The interpretation of the Endorsement to mean that "such cancellation" refers to cancellation of the Policy rather than cancellation of the Endorsement is also consistent with established principles of contract construction. Under Texas law, "insurance policies are construed in favor of coverage" *Jones*, 59 S.W.3d at 748; *Gonzalez v. Mission American Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990) ("Where an insurance policy's provisions are ambiguous . . . then that construction that affords coverage will be the one adopted."). Moreover, under Texas law, "if a contract of insurance is susceptible of more than one reasonable interpretation, [courts] must

resolve the uncertainty by adopting the construction that most favors the insured." *National Union Fire Ins. Co. v. Hudson Energy Co.,* 811 S.W.2d 552, 555 (Tex.1991); *see also Barnett v. Aetna Life Ins.,* 723 S.W.2d 663, 666 (Tex.1987). ("[insurance] policies should be construed strictly against the insurer and liberally in favor of the insured."). Here, the interpretation that results in coverage and thus favors the insured is the interpretation posited by Appellants. The District Court erred by rejecting this interpretation.

III. Lancer's Attempted Cancellation of the 2001 Policy Was Unauthorized and Void Under the Applicable State Statutes and the District Court Erred in Concluding Otherwise.

A. Lancer's failure to provide notice of cancellation to the appropriate Texas state agencies rendered its attempted cancellation ineffective.

As the District Court held, to obtain summary judgment, Lancer was required to "conclusively establish that it strictly complied with the cancellation provisions of the policy and Texas law." ROA 5:1039. It is unquestioned that Lancer did not file a Notice of Cancellation with the Texas Department of Transportation. ROA 5:1034 ("no such notice was sent to the Wisconsin Department of Insurance or the Texas Department of Transportation"). And under applicable Texas law, such notice was required for Lancer to effectively cancel the 2001 Policy:

> (f) . . . . no insurance coverage, surety, bond, or letter of credit shall be cancelled or withdrawn until 30 days notice has been given to the department by the insurance or surety company.

43 Tex. Admin. Code Ann. § 18.16 (f) (cited by the Magistrate Judge at ROA 5:1042). Because Lancer unquestionably failed to provide the notice required by Section 18.16, its attempted cancellation of the 2001 Policy was ineffective as a matter of law.

Lancer also failed to comply with Section 643.101 of the Texas Transportation Code (cited by the Magistrate at ROA 5:1041), which states that "[a]n insurer may not terminate coverage to a motor carrier registered under Subchapter B unless the insurer provides the department with notice at least 30 days before the date the termination takes effect." Tex. Transp. Code § 643.104 (Vernon 2005). Again, it is unquestioned that Lancer gave no such notice to the Texas Department of Transportation. Lancer's failure to provide the required notice of cancellation prevented its attempted cancellation from becoming effective. *See, e.g., Ranger Ins. Co. v. Ward*, 107 S.W.2d 820 (Tex. App.--Texarkana 2003, pet. denied) (failure to give required notice prevented effective cancellation of policy insuring commercial pesticide sprayer); *Trinity Universal Ins. Co. v. Fidelity & Casualty Co. of New York*, 837 S.W.2d 202 (Tex. App.--Dallas 1992, no writ) (attempted cancellation of insurance policy covering restaurant was ineffective due to failure to notify insured).

B. Lancer's failure to provide notice of cancellation to the appropriate Wisconsin authorities rendered its attempted cancellation ineffective.

Lancer not only failed to comply with the 2001 Policy's cancellation provisions and with Texas law, it also failed to comply with Wisconsin's statutory cancellation

requirements. Wis. Stat. Ann. § 194.41 (2) ("No certificate or other contract filed under this section . . . may be terminated at any time prior to its expiration for any reason whatever, unless there has been filed with the department by the insurer a notice thereof at least 30 days prior to the date of termination or cancellation."). It is uncontested that Lancer failed to give the required notice of cancellation to the Wisconsin Department of Transportation or the Wisconsin Department of Insurance. ROA 5:393 ("No notice of cancellation was sent to the WDT."); ROA 5:1034 ("no such notice was sent to the Wisconsin Department of Insurance"). By failing to comply with this mandatory statute applicable to common carriers such as Rockmore, Lancer failed to properly cancel the 2001 Policy, which therefore remained in effect at the time of the Accident. *See, e.g., Lang v. Kurtz*, 301 N.W.2d 262, 265 (Wisc. Ct. App. 1980) (failure to comply with ten-day notice provision estopped insurance company from asserting there was no policy in effect at time of accident); *Milwaukee Ins. Co. v. Hurd*, 568 N.W.2d 39 (Wisc. Ct. App. 1997) ("Once the insurance required under § 194.41 is provided to a common or contract carrier, it remains in effect until thirty days after the insurer files a cancellation notice with the DOT."). The District Court erred by holding to the contrary.

C. Lancer's failure to provide notice of cancellation to the other state agencies rendered its attempted cancellation ineffective.

The District Court conceded that Lancer did not file a Notice of Cancellation with any of the nine states listed in Endorsement F of the 2001 Policy. ROA 5:1041. Such failure was not only a violation of the cancellation requirements of the 2001 Policy, it was a violation of the statutory cancellation requirements of the other states in which Lancer stated it had filed the Certificate. *See, e.g.,* Ohio R.C. 4919-78 (1993) ("Each liability insurance certificate or surety bond shall provide that prior to cancellation thirty days' notice in writing shall be given by the insurer or surety to the commission and the motor carrier."); Minn. St. Ann. § 221.141(1)(a) ("Insurance, bonds, endorsements, certificates, and other evidence of financial responsibility issued to satisfy the requirements of this section may be canceled on not less than 30 days' written notice to the insured and to the commissioner."); Fla. St. Ann. § 320.02(e) ("The liability insurance policy or surety bond may not be cancelled on less than 30 days' written notice by the insurer to the department"); Mo. Code Regs. Ann. Tit. 4, §§ 240-110.030(5) ("An insurer under the provisions of this rule shall give the Commission not less than thirty (30) days' notice of the cancellation of motor carrier bodily injury and property damage liability insurance"); Tenn. Code. Ann. § 55-12-123 ("When an insurance carrier has certified a motor vehicle liability policy under § 55-12-120, insurance so certified shall not be cancelled or terminated until at least ten (10) days after notice of cancellation or termination of the insurance so certified shall

be filed with the commissioner."); Ark St. Ann. § 19.10.300 ("A policy of insurance, surety bond, or other form of security may not be canceled on less than 30 days' written notice to the department."); Nebr. Public Service Comm. Title 291 NAC Chapter 3-006.02 ("All motor carrier insurance required to be filed with the Commission will be continuous in nature, subject to cancellation by the insurer or the insured within thirty (30) days written notice to the Commission.").

Lancer's failure to provide the written notice of cancellation required by these other states' statutes caused the policy to remain in effect under the laws of each of those states. *See, e.g., Ins. Co. of North America v. B&E Trucking*, 665 F.Supp. 764, (W.D. Mo. 1987) (insurance company not entitled to summary judgment finding cancellation of policy where it failed to give required notice to Public Service Commission); *Brisker v. Abrahim*, 502 N.E.2d 679, 681 (Ohio Ct. App. 1985) (Nationwide Insurance could not deny coverage where it failed to provide statutorily required notice of cancellation to Registrar of Motor Vehicles); *Great West Casualty Co. v. Christenson*, 450 N.W.2d 153, 156 (Minn. Ct. App. 1990) (because insurance company failed to properly cancel Form E relating to trucking company, policy remained in effect); *Daniels v. Allstate Indemnity Co.*, 624 N.W.2d 636, 642 (Neb. 2001) ("where statutory provisions require notice to a government agency in order to effect cancellation of a policy, such notice must be given to effect a cancellation, and conversely, there is no cancellation where notice is given merely in accordance with

the provisions of the policy."). For this additional reason, the District Court erred in granting summary judgment in favor of Lancer and in failing to grant Appellants' motion.

IV. The District Court also erred in finding that Lancer's failure to adhere to the cancellation requirements of the 2001 Policy was somehow excused by Rockmore's supposed procurement of replacement insurance and the alleged lack of any gap in coverage.

The District Court's Final Judgment held that any failure by Lancer to comply with the cancellation requirements of the 2001 Policy was somehow excused because Rockmore allegedly obtained "replacement insurance" and because there was supposedly "no gap in coverage" following the attempted cancellation of the 2001 Lancer policy. ROA 5:1108. This holding flatly contradicted the Court's recognition that, in order to effectively cancel the 2001 Policy, Lancer was required to comply both with applicable state law and with the terms of the policy itself:

> Lancer contends that the 2001 Policy was canceled effective November 25, 2001 . . . . . In order to obtain summary judgment on this ground, Lancer must conclusively establish that it strictly complied with the cancellation provisions of the policy and Texas law.

ROA 5:1060.

Nowhere in the 2001 Policy is there any language supporting the notion that its cancellation requirements can be ignored so long as the insured acquires replacement insurance and there is no gap in coverage. Pointedly, the Magistrate Judge's discussion of this point contains not a single reference to the Policy itself; rather, it

relies on various state and federal statutes and cases interpreting them. ROA 5:1062-1065. Such reliance ignores the Court's prior holding that cancellation of the 2001 Policy required compliance with both state law and the terms of the policy itself. Simply put, state statutes dealing with automatic cancellation of endorsements cannot excuse the failure of an insurer to comply with the written cancellation requirements of its policy. *See, e.g., Republic Western Ins. Co. v. Rockmore,* No. 3-02-CV-1569-K, 2005 WL 57284 at * 5 (N.D. Tex. Jan. 10, 1995) ("Both Wisconsin and Texas law require strict compliance with the cancellation provisions of an insurance policy . . ."). The District Court erred in concluding otherwise.

In the Magistrate's Findings and Recommendations, accepted and adopted by the District Court, the Magistrate cited the case of *Truck Ins. Exchange v. E.H. Martin, Inc.*, 876 S.W.2d 200, 203 (Tex. App.—Waco 1994, writ denied) for the proposition that an insurer need not comply with the cancellation provisions of a Form F endorsement if another insurance company has provided a common carrier with replacement coverage. ROA 5:1042-1043. The court in that case, however, clearly held that a failure to comply with applicable notice provisions in cancelling the coverage of a common carrier is excused only if replacement insurance is obtained that is acceptable to the appropriate state commission and that is filed with that commission:

> Under this Railroad Commission rule, the thirty days' notice of cancellation requirement does not apply when a certificate of insurance

> is replaced by another acceptable policy or certificate of insurance, thus triggering termination of endorsement Form F as soon as the Commission accepted Harco's replacement policy. Rule 5.185 excuses the thirty-day notice requirement once replacement coverage becomes effective, assuming ultimate approval by the Railroad Commission; . . .
>
> Charles E. Miller, Supervisor of the Insurance Section of the Railroad Commission, established that the Commission had accepted Harco's certificate of insurance effective June 20, 1991. He testified that the Railroad Commission records reflect that Harco's certificate of insurance was in effect on July 13, 1991, the date of the accident. He also testified that the purpose of Rule 5.185 is to allow an insurance company which overlooked sending a Form K cancellation notice to the Commission to "get out" of the thirty-day notice requirement as long as the new insurance carrier had filed evidence of its coverage with the Commission.

Id. at 204-05 (emphasis added). Here, there is no evidence that the Republic Western policy the District Court viewed as replacement insurance was ever filed with, or was accepted by, any Texas commission, department or agency.

In order to operate as "replacement insurance" under the applicable Texas statutes, the policy referenced by the District Court would have to satisfy 43 Tex. Admin. Code Ann. § 18.16, which states:

> (f) Except when replaced by another acceptable form of insurance coverage or proof of financial responsibility approved by the department, no insurance coverage, surety, bond, or letter of credit shall be cancelled or withdrawn until 30 days notice has been given to the department by the insurance or surety company;
>
> (g) Replacement insurance filing. The department will consider a new insurance filing as the current record of financial responsibility required by this section if: (1) the new insurance filing is received by the department; and (2) a cancellation notice has not been received for previous insurance filings.

43 Tex. Admin. Code Ann. § 18.16 (f), (g) (emphasis added) (cited by the Magistrate Judge at ROA 5:1042). However, there was absolutely no evidence in the summary judgment record that the Republic Western policy the District Court viewed as "replacement insurance:"

1. Was acceptable to the Texas Department of Transportation.

2. Was ever approved by the Texas Department of Transportation.

3. Was ever received by the Texas Department of Transportation.

Without such evidence, the Republic Western policy could not operate as "replacement insurance" under Texas law.

Similarly, the Republic Western policy could not operate as replacement insurance under Wisconsin law. According to the applicable Wisconsin statute, "the 30-day notice may be waived if an acceptable replacement has been filed under this section." Wis. Stat. Ann. § 194.41(2)(2002) (cited by the Magistrate Judge at ROA 5:1042). In the instant case, there was absolutely no evidence in the summary judgment record that the Republic Western policy the District Court viewed as replacement insurance was acceptable to the Wisconsin Department of Insurance or was ever filed with the Wisconsin Department of Insurance. Without such evidence, the Republic Western policy could not operate as "replacement insurance" under the applicable Wisconsin statute.

In addition to the lack of evidence that the Republic Western policy qualified as "replacement insurance" under the applicable Texas and Wisconsin statutes, there was also a lack of proper, admissible evidence that such policy was in effect and provided coverage for the claims against Rockmore. While the Magistrate referenced his own prior findings and recommendations in a coverage lawsuit relating to the Republic Western policy, *see* ROA 5:1042, those findings and recommendations were outside the record in the underlying case and were never incorporated into a final judgment in the Republic Western case, which was dismissed by agreement of the parties.[3] For the foregoing reasons, the District Court committed reversible error in concluding that Rockmore obtained "replacement insurance" and that such insurance somehow excused Lancer's failure to comply with the cancellation terms of the 2001 Policy.

Finally, as stated above, the District Court's Final Judgment explicitly held that any failure by Lancer to comply with the cancellation requirements of the 2001 Policy was somehow excused by the supposed fact that there was "no gap in coverage" following the attempted cancellation of the 2001 Lancer policy. Record 5:1108. The District Court also erred because its conclusion that there was "no gap in coverage" was not supported -- and was actually flatly contradicted -- by the record. Lancer's attempted cancellation took place on November 25, 2001 and the Republic Western

[3] The Magistrate Judge also went outside the record in concluding, for purposes of his choice of law analysis, that Lancer did business in Texas. ROA 5:1038, n.5 (citing to a Texas Department of Insurance website).

policy was not effective until December 4, 2001. ROA 4:892-894, 902-03. Even the District Court apparently agreed: its Final Judgment stated unequivocally that "[t]he 2001 Lancer Insurance Company policy was cancelled effective November 25, 2001" and the Findings and Recommendations it adopted stated that the Republic Western policy "was effective from December 4, 2001 to December 4, 2002." ROA 5:1108, 5:1034. The District Court clearly erred when it concluded that there was no gap in coverage applying to Eric Rockmore and his companies.

CONCLUSION

Lancer was required by the terms of the 2001 Policy to give written notice to the nine states with which it stated it had filed Endorsement F in order to effectively cancel the Policy. It unquestionably failed to give such notice to any of the nine listed states. Even putting aside the language of the 2001 Policy itself, Lancer was required by Texas law, as well as the laws of Wisconsin and the other listed states, to provide written notice of cancellation to the appropriate state agency in order to effectively cancel the Policy. Again, it is uncontroverted that Lancer failed to give such notice. Finally, there was no evidence that the Republic Western insurance policy the District Court viewed as "replacement insurance" was ever filed with any state agency, thereby preventing its mere procurement from resulting in the automatic cancellation of Endorsement F under the applicable state statutes.

This Court should reverse the ruling of the District Court, enter summary judgment in favor of Appellants that the 2001 Lancer Policy was in effect at the time of the accident and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November ___, 2006, a true and correct copy of this pleading was served on all counsel of record in accordance with Rule 5 of the Federal Rules of Civil Procedure.

_____
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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This Brief contains 8065 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Eric D. Pearson

Dated: _____