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1. Wash. Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943

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Wash. Nat'l Ins. Corp. v. Ruderman

Supreme Court of Florida
July 3, 2013, Decided
No. SC12-323

Reporter: 117 So. 3d 943; 2013 Fla. LEXIS 1388; 38 Fla. L. Weekly S 511; 2013 WL 3333059

WASHINGTON NATIONAL INSURANCE CORPORATION, etc., Appellant, vs. SYDELLE RUDERMAN, etc., et al., Appellee.

Subsequent History: As Corrected August 29, 2013.

On remand at, Decision reached on appeal by Ruderman v. Wash. Nat'l Ins. Corp., 731 F.3d 1188, 2013 U.S. App. LEXIS 19496 (11th Cir. Fla., Sept. 24, 2013)

Prior History: **[**1]** Certified Question of Law from the United States Court of Appeals for the Eleventh Circuit - Case No. 10-14714.

Ruderman v. Wash. Nat'l Ins. Corp., 671 F.3d 1208, 2012 U.S. App. LEXIS 3262 (11th Cir. Fla., 2012)

Case Summary

Procedural Posture

In an action brought by appellee insureds against appellant insurer, the United States Court of Appeals for the Eleventh Circuit certified the question of whether a home health care insurance policy's automatic benefit increase percentage applied to the dollar values of the lifetime maximum benefit amount and the per occurrence maximum benefit.

Overview

The insureds brought a class action against the insurer concerning insurance policies that provided for reimbursement of certain home health care expenses. The district court granted summary judgment for the insureds based on its understanding that Florida law required that an ambiguous policy must be construed against the insurer and in favor of coverage. The Court of Appeals certified the question of whether the policy's automatic benefit increase percentage applied to the dollar values of the lifetime maximum benefit amount and the per occurrence maximum benefit. On review, the court found that the policy was ambiguous, with one reasonable interpretation being that the automatic benefit increase percentage by which benefits increased by eight percent each year applied to all the benefit categories set forth on the certificate schedule. Hence, the policy had to be construed against the insurer and in favor of coverage without resort to consideration of extrinsic evidence. Thus, the policy's automatic benefit increase applied to the daily benefit, the lifetime maximum benefit, and the per occurrence maximum benefit.

Outcome

The court held that the policy's automatic benefit increase percentage applied to the dollar values of the lifetime maximum benefit amount and the per occurrence maximum benefit. The court conditionally granted the insureds' motion for appellate attorney fees, but left to the Court of Appeals to determine the procedure by which the amount should be set. The case was remanded to the Court of Appeals.

Counsel: Daniel J. Koleos of Koleos Rosenberg, P. A., Plantation, Florida; Adam J. Kaiser and Jeffrey J. Amato of Winston & Strawn LLP, New York, New York, for Appellant.

Gary M. Farmer, Sr., Steven R. Jaffe, and Mark S. Fistos of Farmer Jaffe Weissing Edwards Fistos & Lehrman, P. L., Fort Lauderdale, Florida; Neil Rose of Bernstein, Chackman, Liss & Rose, Hollywood, Florida; and Steven M. Dunn of Dunn & Johnson, P.A., Bay Harbor Islands, Florida, for Appellees.

Laura A. Foggan of Wiley Rein LLP, Washington, DC; William D. Horgan of Banker Lopez Gassler, Tallahassee, Florida, for Amicus Curiae Complex Insurance Claims Litigation Association.

Bard D. Rockenbach of Burlington & Rockenbach, P.A., West Palm, Florida, Amicus

Curiae, Florida Justice Association.
Jason S. Mazer and Benjamin C. Hassebrock of Ver Ploeg & Lumpkin, P.A., Miami, Florida, for Amicus Curiae United Policyholders.
Judges: LABARGA, J. PARIENTE and PERRY, JJ., concur. LEWIS, J., concurs in result. POLSTON, C.J., dissents with an opinion, in which QUINCE and CANADY, JJ., concur.
Opinion by: LABARGA

Opinion

[*945] LABARGA, J.

This case is before the Court for review **[**2]** of a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit that is determinative of a cause pending in that court and for which that court has indicated there appears to be no controlling precedent. We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const. In *Ruderman ex rel. Schwartz v. Washington National Insurance Corp.*, 671 F.3d 1208 (11th Cir. 2012), the Eleventh Circuit certified the following multi-part question:

> I. IN THIS CASE, DOES THE POLICY'S "AUTOMATIC BENEFIT INCREASE PERCENTAGE" APPLY TO THE DOLLAR VALUES OF THE "LIFETIME MAXIMUM BENEFIT AMOUNT" AND THE "PER OCCURRENCE MAXIMUM BENEFIT"?

Id. at 1212. The Eleventh Circuit further explained that answering this question might include answering the three following sub-questions:

> A. Does an ambiguity exist about whether the Policy's "Automatic Benefit Increase Percentage" applies only to the "Home Health Care Daily Benefit" or whether it also applies to the "Lifetime Maximum Benefit Amount" and the "Per Occurrence Maximum Benefit"?
>
> B. If an ambiguity exists in this insurance policy—as we understand that it does—should courts first attempt to resolve the ambiguity by examining available **[**3]** extrinsic evidence?
>
> C. Applying the Florida law principles of policy construction, does the Policy's "Automatic Benefit Increase Percentage" apply to the "Lifetime Maximum Benefit Amount" and to the "Per Occurrence Maximum Benefit" or does it apply only to the "Home Health Care Daily Benefit"?

Id. For the reasons set forth below we answer the main certified question in the affirmative, sub-question A in the affirmative, sub-question B in the negative, and sub-question C in the affirmative. We hold that under Florida law applicable to construction of insurance policies, because the policy is ambiguous it must be construed against the insurer and in favor of coverage without resort to consideration of extrinsic evidence. Thus, when so construed, the policy's automatic benefit increase applies to the daily benefit, the lifetime maximum benefit, and the per occurrence maximum benefit.[1]

BACKGROUND AND FACTS

This case arose when Sydelle Ruderman, Sylvia Powers, and other Florida insureds filed a class action in the United States District Court for the Southern District of Florida against Pioneer Life Insurance Company, later succeeded by appellant Washington National Insurance **[*946]** Corporation ("Washington National"), concerning insurance policies that provide for reimbursement of certain home

[1] The "policy" referred to by the Eleventh Circuit and by this Court is a "Limited Benefit Home Health Care Coverage Certificate of Insurance" which was issued to the policyholder as evidence of insurance under a group policy. Within each policy is a "Certificate Schedule" which sets forth the policy's daily **[**4]** benefit amount, the per occurrence maximum benefit amount, and the lifetime maximum benefit amount. The Certificate Schedule also sets forth the automatic benefit increase percentage at issue in this case.

health care expenses.[2] The controversy concerned whether the "Automatic Benefit Increase Percentage" ("automatic increase") provision contained in the insureds' limited benefit home health care coverage insurance policies applies only to the daily benefit amount or also applies to the per occurrence maximum benefit amount and the lifetime maximum benefit amount. Each policy contains essentially identical language concerning the automatic increase and each policy includes a "Certificate Schedule" that sets forth the coverage amounts for each of the insureds. The policies provide coverage **[**5]** through a maximum daily benefit, called the "Home Health Care Daily Benefit." The policy coverage is limited by a "Per Occurrence Maximum Benefit" for each illness and a "Lifetime Maximum Benefit" for all injuries and sicknesses during the life of the Policy. *See* *Ruderman*, 671 F.3d at 1210. The policies at issue, under the heading "Benefits," provide as follows:

> A. HOME HEALTH CARE: We will pay 100% of the usual and customary charges for Home Health Care expenses if the care was pre-authorized. If the care was not pre-authorized we will pay 75% of the usual and customary charges for Home Health Care expenses incurred, up to 75% of the Daily Benefit Amount shown in the schedule. These benefits will be paid up to the Home Health Care Daily Benefit shown in the schedule. All benefits will be limited to the Per Occurrence Maximum Benefit for each injury or sickness and the Lifetime Maximum Benefit Amount for ALL injuries and sicknesses which are shown in the certificate schedule.

The policies also provide:

> B. AUTOMATIC DAILY BENEFIT INCREASE: On each policy anniversary, we will increase the Home Health Care Daily Benefit payable under this policy by the Automatic Benefit Increase Percentage **[**6]** shown on the schedule page.
>
> . . . .
>
> E. PER OCCURRENCE MAXIMUM BENEFIT: No further benefits will be payable for a sickness or injury when the total sum of Home Health Care or Adult Day Care benefits paid for that occurrence equals the amount shown in the schedule for the Per Occurrence Maximum Benefit. Successive confinement due to the same or related cause not separated by at least 6 months of normal daily living will be considered as the same occurrence.
>
> F. LIFETIME MAXIMUM BENEFIT: This coverage shall terminate and no further benefits will be payable when the total sum of Home Health Care or Adult Day Care benefits paid equals the amount shown in the schedule for the Lifetime Maximum Benefit Amount. Any premium paid for a period after termination will be refunded.

The certificate schedule which is contained in each policy states the following:

> CERTIFICATE SCHEDULE
>
> HOME HEALTH CARE DAILY BENEFIT $180 / Day
>
> LIFETIME MAXIMUM BENEFIT AMOUNT $250,000
>
> PER OCCURRENCE MAXIMUM BENEFIT $150,000 / Illness
>
> AUTOMATIC BENEFIT

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[2] "Florida Insureds" is defined in the motion for class certification as individuals named as insureds **[**7]** in the insurer's policy or the attorney-in-fact for such individuals, where the insured individuals currently reside in Florida and whose policies were issued to them in Florida. The class period ran from December 1, 2003, to the date of issuance of the summary judgment on September 8, 2010.

> INCREASE PERCENTAGE Benefits increase by 8% each year

[*947] *See* *Ruderman*, 671 F.3d at 1210.

The district court concluded that the various provisions in the policy, including the certificate schedule, demonstrated an ambiguity concerning whether the automatic increase applied only to the daily benefit or also applied to the lifetime maximum benefit amount and the per occurrence maximum benefit amount. The district court granted summary judgment for the insureds based on the court's understanding that Florida law requires that an ambiguous policy must be construed against the insurer and in favor of coverage. On appeal to the Eleventh Circuit, the appeals court stated:

> We agree with the District Court's conclusion that the Policy is ambiguous about whether the Lifetime Cap and Per Occurrence Cap increase each year or whether only the Daily Benefit increases each year. The way the "Benefits" section of the Policy and the Certificate are drafted, it is reasonable to read the Certificate language **[**8]** "Benefits increase by 8% each year" as applying solely to the Daily Benefit; but it is also reasonable to read the Certificate language to mean that all the amounts listed within the Policy's "Benefits" section—including the "Per Occurrence Maximum Benefit" and the "Lifetime Maximum Benefit"—increase annually. Under Florida law, because "the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and [] another limiting coverage, the insurance policy is considered ambiguous."

Ruderman, 671 F.3d at 1211 (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). The Eleventh Circuit recognized that this Court held in *Anderson* that "[a]mbiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Ruderman*, 671 F.3d at 1211 (quoting *Anderson*, 756 So. 2d at 34). However, the Eleventh Circuit concluded that "the correct approach under Florida law in resolving the ambiguity in the Policy is unclear." *Ruderman*, 671 F.3d at 1211. The basis for this perceived lack of clarity was said to be the decision in *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938 (Fla. 1979), **[**9]** which predated *Anderson*.

Although the Eleventh Circuit recognized that *Anderson* held ambiguous insurance policy provisions are to be construed against the insurer, the court expressed concern that *Excelsior* "qualified the longstanding rule of construing an ambiguity against the drafter, [by] stating that '[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite.'" *Ruderman*, 671 F.3d at 1211 (quoting *Excelsior*, 369 So. 2d at 942). The Eleventh Circuit was uncertain whether this language would require that the court consider extrinsic evidence concerning the terms of the policy before finally concluding that the policy provisions were ambiguous and subject to being construed in favor of coverage and against the insurer.

Whether Florida law allows resort to extrinsic evidence to clarify an ambiguity in an insurance policy was significant in this case, as the Eleventh Circuit explained:

> Washington National offered in the District Court extensive extrinsic evidence to explain the marketing of the Policy and to show the understanding of various of the insureds—both when the Policy was purchased **[**10]** and during the life of the Policy—about what benefits in the Policy increased annually. There is at **[*948]** least a colorable position that Washington National's proffered extrinsic evidence would resolve any ambiguity in the Policy about what benefits increase annually and would

> support Washington National's position that only the Daily Benefit increases annually.

Ruderman, 671 F.3d at 1211-12. The Eleventh Circuit then concluded that the proper approach to take concerning admission of extrinsic evidence and resolution of ambiguity in insurance policies is an "unsettled question of Florida law" and certified the above-stated main question and sub-questions to this Court. *Id.* at 1212.

ANALYSIS

The issue in this case concerns construction of an insurance policy which is a question of law subject to de novo review. *See Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005). Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written. *See State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569-70 (Fla. 2011). In construing insurance contracts, "courts **[**11]** should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007) (quoting *Anderson*, 756 So. 2d at 34); *see also Swire Pac. Holdings v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003) (same). Courts should "avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Id.* at 165. However, "[p]olicy language is considered to be ambiguous . . . if the language 'is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.'" *Menendez*, 70 So. 3d at 570 (quoting *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785 (Fla. 2004) (quoting *Swire*, 845 So. 2d at 165)).

We have attempted to read the policy at issue in this case as a whole, and have endeavored to give meaning to every provision. In doing so, however, we are constrained to conclude, as did the federal district court and the Eleventh Circuit, that the policy is ambiguous. The policy states in paragraph B of the "Benefits" section that the daily benefit will increase on each policy anniversary "by the Automatic Benefit Increase **[**12]** Percentage shown on the schedule page." Other portions of the policy also rely on and incorporate the certificate schedule to define the scope of the coverage. Paragraph E of the "Benefits" section of the policy, titled "Per Occurrence Maximum Benefit," states that "[n]o further benefits will be payable for a sickness or injury when the total sum of Home Health Care or Adult Day Care benefits paid for that occurrence equals the amount shown in the schedule for the Per Occurrence Maximum Benefit." Thus, the policy relies on the certificate schedule to set forth the maximum amount of coverage at which no further benefits will be payable for an occurrence.

Similarly, paragraph F of the "Benefits" section of the policy, titled "Lifetime Maximum Benefit," states that "[t]his coverage shall terminate and no further benefits will be payable when the total sum of Home Health Care or Adult Day Care benefits paid equals the amount shown in the schedule for the Lifetime Maximum Benefit Amount." Again, the policy leaves it to the certificate schedule to indicate at what amount the policy will be terminated due to reaching a maximum lifetime benefit. The certificate schedule provides that "Benefits **[**13]** increase by 8% each year." This automatic increase provision in the certificate schedule is not expressly limited to the daily benefit and, further, is immediately **[*949]** preceded by reference to the "HOME HEALTH CARE DAILY BENEFIT," the "LIFETIME MAXIMUM BENEFIT AMOUNT," and the "PER OCCURRENCE MAXIMUM BENEFIT." Even though the policy can be reasonably read in a way that limits the automatic increase to the daily benefit, it can also reasonably be read to apply the automatic percentage increase to all the "benefits" listed on the certificate schedule—benefits that include the per occurrence maximum benefit and the lifetime maximum benefit.

For these same reasons, the federal district court found the policy to be ambiguous and, in so doing, relied on the reasoning and conclusions in an earlier decision of the Eleventh Circuit, *Gradinger v. Washington National*

Insurance Co., 250 F. App'x 271 (11th Cir. 2007), a decision which was withdrawn due to settlement. In *Gradinger*, the Eleventh Circuit had concluded that a home health care policy with benefits and automatic increase language identical to that in this case was ambiguous because it was susceptible to more than one reasonable interpretation. **[**14]** In so holding, the Eleventh Circuit noted that the policy did not clearly state that the 8% automatic increase did not apply to the per occurrence maximum benefit and the lifetime maximum benefit. *Gradinger*, 250 F. App'x at 274. The *Gradinger* court also characterized the Lifetime Maximum Benefit and the Per Occurrence Maximum Benefit as two of "three benefits" set forth on the certificate. *Id*. at 274-75. The court noted that "[c]onsidering the grouping of the benefits and the alternate uses of the singular and plural forms of the word benefit, nothing in the schedule indicates that the Automatic Benefit Increase only applies to the first of three benefits listed." *Id*. at 275. Relying on its understanding of Florida law governing the interpretation of insurance policies, the *Gradinger* court then determined that the ambiguous policy must be interpreted liberally in favor of the insured and strictly against the drafter of the policy. *Id*. at 275.

The Eleventh Circuit in the instant case did not rely on its reasoning in the *Gradinger* decision and, further, now expresses doubt that Florida law is settled on whether an ambiguous insurance policy should be strictly construed against the insurer **[**15]** or whether extrinsic evidence must first be allowed in an attempt to clarify any potential ambiguity. As noted earlier, the Eleventh Circuit based its uncertainty on this Court's statement in *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938 (Fla. 1979), a decision which substantially pre-dated our decision in *Anderson*. The statement in *Excelsior* which caused the Eleventh Circuit's concern—a statement referring to the rule requiring construction of ambiguous policy language against the drafter of the policy—was as follows: "Only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite." *Excelsior*, 369 So. 2d at 942. We now make clear that nothing in *Excelsior* expressly holds that extrinsic evidence must be considered in determining if an ambiguity exists. Further, nothing in *Excelsior* constitutes an implicit declaration that resort must be made to consideration of extrinsic evidence before an insurance policy is found to be ambiguous and construed against the insurer.

Moreover, since *Excelsior*, this Court has held many times, including in *Anderson* and thereafter, that where **[**16]** the provisions of an insurance policy are at issue, any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning **[*950]** and operative effect must be liberally construed in favor of coverage and strictly against the insurer. *See, e.g., Menendez*, 70 So. 3d at 570; *J.S.U.B., Inc.*, 979 So. 2d at 877; *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007); *Fayad*, 899 So. 2d at 1086; *Swire Pac. Holdings*, 845 So. 2d at 165; *Anderson*, 756 So. 2d at 34; *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998); *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993); *Deni Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998); *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986).

As we stated in *Berkshire Life Insurance Co. v. Adelberg*, 698 So. 2d 828 (Fla. 1997), "[i]t has long been a tenet of Florida insurance law that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer." *Id*. at 830. Thus where, as here, **[**17]** one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted. We reiterated this special rule for construction of insurance contracts in *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528 (Fla. 2005), where we stated:

> Under Florida law, insurance contracts are construed according to their plain meaning. Ambiguities are construed against the insurer and in favor of coverage. As we recently said:

> [W]e must follow the guiding principle that this Court has consistently applied that insurance contracts must be construed in accordance with the plain language of the policy. Further, we consider that "[i]f the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous." An ambiguous provision is construed in favor of the insured and strictly against the drafter.

Taurus Holdings, 913 So. 2d at 532 (quoting *Swire*, 845 So. 2d at 165 (citations omitted) (quoting *Anderson*, 756 So. 2d at 34.)).[3]

In 2008, the Eleventh Circuit recognized this same principle in *Penzer v. Transportation Insurance Co.*, 545 F.3d 1303, 1306 (11th Cir. 2008), when it cited our decision in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998), for the principle that "[a]mbiguities are construed against the insurer." As recently as 2011, this Court again voiced the longstanding tenet of Florida law that "[w]here the policy language 'is **[*951]** susceptible to more than one reasonable interpretation, one providing coverage and . . . another limiting coverage, the insurance policy is considered ambiguous'" and must be "'construed against the drafter and in favor of the insured.'" *Chandler v. Geico Indem. Co.*, 78 So. 3d 1293, 1300 (Fla. 2011) (quoting *Anderson*, 756 So. 2d at 34).

The certificate schedule, as the Eleventh Circuit noted, "sets forth the exact coverage amounts specific to each of the insureds and provides a level of differentiation between each Policy." *Ruderman*, 671 F.3d at 1210. For this reason, greater reliance may be placed by the insured on the provisions of the **[**20]** certificate schedule. Thus, the certificate schedule should make perfectly clear to which benefits the automatic percentage increase will apply.[4] This is not a matter which the insured may learn for certain only after years of paying premiums and after utilizing home health care services for which required payment has been incurred.

As we noted in *Hartnett v. Southern Insurance Co.*, 181 So. 2d 524, 528 (Fla. 1965), where an insurance policy is "drawn in such a manner

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[3] Because this Court's precedent has long set forth special rules regarding construction of insurance contracts, **[**18]** Florida case law cited by Washington National that allows extrinsic evidence to clarify latent ambiguity in contracts other than contracts of insurance does not govern the resolution of the question now before this Court. Moreover, the ambiguity in this case is patent rather than latent, in that it appears on the face of the contract. We are aware that several district courts of appeal in Florida have allowed extrinsic evidence in cases involving construction of insurance contracts. *See, e.g., Kiln PLC v. Advantage Gen. Ins. Co., Ltd.*, 80 So. 3d 429, 432 (Fla. 4th DCA 2012) (allowing consideration of extrinsic evidence in part because there was a factual dispute as to which party chose the language of the policy); *Castillo v. State Farm Florida Ins. Co.*, 971 So. 2d 820, 823 (Fla. 3d DCA 2007) (allowing consideration of State Farm's internal operating guidelines to assist in defining terms in insurance contract). However, district court decisions such as these and others that have allowed consideration of extrinsic evidence in an attempt to explain, clarify, or resolve an ambiguity in an insurance contract do not alter this Court's established precedent that ambiguous contracts of insurance **[**19]** are to be construed against the insurer as drafter of the policy, as was the insurer in this case.

[4] The Fourth District Court of Appeal held in *Rucks v. Old Republic Life Insurance Co.*, 345 So. 2d 795 (Fla. 4th DCA 1977), that under group life insurance policies, ambiguities or conflicts between the certificate of insurance and the master policy must be resolved so as to provide the broadest coverage. The court in *Rucks* then stated, "Where the representations in an insurance certificate indicate broader coverage than that provided by the master policy, the insurer is bound by the terms of the certificate." *Id.* at 797 (quoting *Evans v. Holly Corp.*, 15 Cal.App.3d 1020, 1023, 93 Cal. Rptr. 712 (4th Dist. 1971)). While not strictly on point here because the question in this case concerns ambiguity between language in the certificate *schedule*, which is tailored to the insured's individual coverage, and language in the remainder of the certificate of insurance rather than the **[**21]** group master policy, similar concerns would still militate in favor of the greater coverage suggested in the certificate schedule.

that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions." We recognize that "[u]nless restricted by statute or public policy, insurance companies have the same right as individuals to limit their liability and impose conditions upon their obligations." *Canal Ins. Co. v. Giesenschlag*, 454 So. 2d 88, 89 (Fla. 2d DCA 1984). However, the insurance company has a duty to do so clearly and unambiguously. Similarly, the insurer has the burden to make clear the circumstances under which the policy coverage will terminate after reaching the maximums set forth in the certificate schedule. The certificate schedule in this case does not do so and, thus, under our long-established rules of construction **[**22]** of insurance contracts, the ambiguous policy must be strictly construed against the insurer.

CONCLUSION

For the reasons set forth above, we find the limited home health care policy at issue is ambiguous, with one reasonable interpretation being that the "Automatic Benefit Increase Percentage" by which "benefits increase by 8% each year" applies to all the benefit categories set forth on the certificate schedule. We further hold, consistent with our precedent, that where a contract of insurance is ambiguous, it is to be liberally construed in favor of coverage and strictly against the insurer. Based on these holdings, we answer the main certified question in the affirmative, sub-question A in the affirmative, **[*952]** sub-question B in the negative, and sub-question C in the affirmative. Under Florida law, because the policy is ambiguous it must be construed against the insurer and in favor of coverage without resort to consideration of extrinsic evidence. Thus, the policy's automatic benefit increase applies to the daily benefit, the lifetime maximum benefit, and the per occurrence maximum benefit.

We conditionally grant the appellees' motion for appellate attorneys' fees under section 627.428, Florida Statutes **[**23]** (2012), for proceedings in this Court in which the appellees prevail, but leave to the Eleventh Circuit Court of Appeals to determine the procedure by which that amount shall be set.[5] Having answered the certified questions, we return this case to the United States Court of Appeals for the Eleventh Circuit.

It is so ordered.

PARIENTE and PERRY, JJ., concur.

LEWIS, J., concurs in result.

POLSTON, C.J., dissents with an opinion, in which QUINCE and CANADY, JJ., concur.

Dissent by: POLSTON

Dissent

POLSTON, C.J., dissenting.

I respectfully dissent. The insurance policy is not ambiguous. It means what it plainly **[**24]** says, that the insurer "will increase *the Home Health Care Daily Benefit* payable under this policy by the Automatic Benefit Increase Percentage shown on the schedule page." (Emphasis added.) No reference is made to increasing the Per Occurrence Maximum Benefit and the Lifetime Maximum Benefit Amount, which are both defined without reference to the automatic increase and listed separately as line items on the schedule page. Moreover, if the policy was ambiguous, our precedent requires allowing the admission of extrinsic evidence to determine the policy's meaning.

I. The Policy Is Not Ambiguous

Based on the plain language of the policy, the 8% automatic increase applies solely to the daily

[5] Section 627.428(1), Florida Statutes (2012), provides that "[u]pon the rendition of a judgment or decree by any of the courts of the state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court, or in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."

benefit.[6] *See* State Farm Mut. Auto. Ins. Co. v. Menendez, 70 So. 3d 566, 569-70 (Fla. 2011) ("In interpreting an insurance contract, we are bound by the plain meaning of the contract's text."). Specifically, the policy expressly defines the automatic increase as applying only to the daily benefit:

> B. AUTOMATIC DAILY BENEFIT INCREASE: On each policy anniversary, we will increase the Home Health Care Daily Benefit payable under this policy by the Automatic Benefit Increase Percentage shown on the schedule **[**25]** page.

Consistent with this language, the certificate schedule identifies the "Automatic Benefit Increase Percentage" as 8%. Therefore, on every policy anniversary, the daily home health care benefit limit increases by 8%.

Nowhere does the policy provide for an increase to the Per Occurrence Maximum Benefit and the Lifetime Maximum Benefit Amount, which the majority correctly **[*953]** recognizes are caps on the total amount of daily benefits payable under the policy. *See* majority op. at 3-4. Moreover, the benefits section describes these to be caps, not benefits. The Home Health Care Benefits section of the policy states: "These benefits will be paid up to the Home Health Care Daily Benefit shown in the schedule. All benefits will be limited to the Per Occurrence Maximum Benefit for each injury or sickness and the Lifetime Maximum Benefit Amount for ALL injuries and sicknesses which are shown in the certificate schedule." This Benefits section does not include within its definitional scope the caps provided by the Per Occurrence Maximum Benefit and the Lifetime Maximum Benefit **[**26]** Amount as benefits. Had it done so, the policy would have applied the automatic benefit increase to the caps as well as to the daily benefit. But instead, the policy definition explicitly makes the benefits subject to, *not including*, the limits of those caps.

Moreover, the certificate schedule separately lists these items rather than mixing them together, and shows the amounts of coverage provided by the policy:

CERTIFICATE SCHEDULE

HOME HEALTH CARE DAILY BENEFIT	$180 / Day
LIFETIME MAXIMUM BMOUNT	$250,000
PER OCCURRENCE MAXIMUM BENEFIT	$150,000 / Illness
AUTOMATIC BENEFIT INCREASE PERCENTAGE	Benefits increase by 8% each year

In interpreting the contract, the majority acknowledges, but fails to apply, the rule that the certificate schedule must be read together with the entire policy. *See* majority op. at 8; *see also* Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003) ("[W]hen analyzing an insurance contract, it is necessary to examine the contract in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others."); Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000) (recognizing that **[**27]** for an ambiguity to exist in an insurance policy the language must be susceptible of more than one reasonable interpretation after the policy is read as a whole). When the policy is read as a whole, it is clear that the scope of what is included within the increase percentage is limited to what is expressly defined as the Home Health Care Daily Benefit, while the certificate schedule sets the amount of the daily benefit, sets the amount of the per occurrence and lifetime caps, and identifies the amount of the increase percentage (just as the policy's definition of Automatic Daily Benefit Increase said it would), without expanding the scope of what the policy defined as being subject to the increase percentage. *See Black's Law Dictionary* 1462 (9th ed. 2009) (defining a "schedule" as "a statement that is attached to a document and that gives a detailed

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[6] Whether the policy is ambiguous is a legal question. *See* Friedman v. Va. Metal Prods. Corp., 56 So. 2d 515, 516 (Fla. 1952).

showing of the matters referred to in the document").

By concluding that the schedule functions to increase the caps higher than the policy actually says they are, the majority improperly rewrites the parties' contract to provide coverage for which the parties did not bargain and the insureds did not pay.[7] *See* *Excelsior Ins. Co. v. Pomona* **[*954]** *Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979) **[**28]** (explaining that, in interpreting insurance contracts, courts are not permitted to "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties"). The majority rewrites the policy to state: "On each policy anniversary, we will increase the Home Health Care Daily Benefit, *the Per Occurrence Maximum Benefit, and the Lifetime Maximum Benefit Amount* payable under the policy by the Automatic Benefit Increase Percentage shown on the schedule page."

I would give effect to the policy as it is written by applying the automatic increase solely to the daily benefit. Accordingly, I would answer the main certified question in the negative.

II. If the Policy Was Ambiguous, Extrinsic Evidence Should Be Considered

Moreover, even if the contract was ambiguous (which it is not), it is well-settled Florida law that parties may attempt to resolve an ambiguity through available extrinsic evidence before applying the last-resort principle of construction against the drafter. To reach the opposite conclusion, the majority misconstrues the certified question and improperly recedes from our precedent.

In reaching its holding, the majority concludes that our precedent does not require "that extrinsic evidence must be considered in determining *if* an ambiguity exists." Majority op. at 11 (emphasis added). I agree. Our precedent is clear that a contract must be ambiguous *before* extrinsic evidence may be introduced. *See, e.g.,* *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700, 705 (Fla. 1993) ("Because we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining **[**30]** to the drafting history of the [clause]."). But significantly, this is beside the point, and the majority widely misses the mark by answering a question that the Eleventh Circuit has not asked. The Eleventh Circuit did not ask whether Florida law allows the use of extrinsic evidence to render a clear contract ambiguous. Instead, with sub-question B, the Eleventh Circuit asked: "If an ambiguity exists in this insurance policy—as we understand that it does—should courts first attempt to resolve the ambiguity by examining available extrinsic evidence?" *Ruderman ex rel. Schwartz v. Wash. Nat'l Ins. Corp.*, 671 F.3d 1208, 1212 (11th Cir. 2012).

As discussed below, our precedent requires answering this question in the affirmative because our precedent provides that an ambiguous contract is construed against the insurer only as a last resort, meaning only after all available construction aids, including extrinsic evidence, fail to resolve the ambiguity.

Under Florida law, "the rights and obligations of the parties under an insurance policy are governed by contract law since they arose out of an insurance contract." *Lumbermens Mut. Cas. Co. v. August*, 530 So. 2d 293, 295 (Fla. 1988). Whether **[**31]** any contract is ambiguous is a legal question. *See* *DEC Elec., Inc. v. Raphael Constr. Corp.*, 558 So. 2d 427, 428

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[7] As the appellant explains in its initial brief without challenge by the appellees, the insureds paid premiums for coverage with $150,000 per occurrence and $250,000 lifetime caps, and

> [t]he 8% escalator was never designed to increase the caps from $150,000 and $250,000 to over $1,000,000 each, and it is entirely inappropriate to interpret the Policy to accomplish that result. If a Policyholder purchased the Policy at age 55, by the time he or she turned 80 the per occurrence cap would, if the escalator applied, skyrocket to $1,027,271, and the lifetime maximum cap would balloon to $1,712,188. Assuming that "24/7" care costs $400/day, the policy would provide 4,280 days—nearly 12 years—of **[**29]** "24/7" care.

(Fla. 1990). If a contract is unambiguous, it must be enforced pursuant to its plain language. *See* Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 785 (Fla. 2004). If, and only if, a contract is ambiguous should the court **[*955]** construe it in order to determine the parties' intent. *See* Se. Fire Ins. Co. v. Lehrman, 443 So. 2d 408, 408-09 (Fla. 4th DCA 1984) ("Courts should resort to complex rules of construction to determine coverage or the applicability of exclusions only when the language used in the policy is ambiguous or otherwise susceptible of more than one meaning."). If all available construction tools, including extrinsic evidence, fail to resolve the ambiguity, only then is the contract construed against the drafter, under the theory that "having chosen the language employed and being responsible for the alleged uncertainty and ambiguity," the drafter "must suffer the result of having such [ambiguous] language construed against [it]." *W. Yellow Pine Co. v. Sinclair*, 83 Fla. 118, 90 So. 828, 831 (Fla. 1922) (concluding that the rule of construing an ambiguous contract against its **[**32]** drafter "is not to be resorted to unless necessary" and "[w]here satisfactory results can be reached by other rules of analysis and construction, it may not be invoked"); *see also Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1247-48 (11th Cir. 2002) (recognizing that, under Florida law, construction against the drafter is a rule of last resort that is to be applied only if all other aids of construction, including the use of extrinsic evidence, fail to resolve the ambiguity) (citing *Excelsior*, 369 So. 2d at 942); *DSL Internet Corp. v. TigerDirect, Inc.*, 907 So. 2d 1203, 1205 (Fla. 3d DCA 2005) ("The construction-against-the-drafter principle is a rule of last resort and is inapplicable when there is evidence of the parties' intent at the time they entered into the contract.").

Florida insurance law has long adhered to this traditional contract analysis framework. In *Excelsior*, 369 So. 2d at 942 (emphasis added), we recognized that determining the parties' intent "is the central concern of the law of contracts *even* in the realm of insurance." Accordingly, we held that ambiguous insurance contracts should be construed against the insurer as the drafter in the same circumstance that **[**33]** general contract law authorizes this result, namely "[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains *after resort to the ordinary rules of construction*." *Id*. (emphasis added).

Excelsior's "ordinary rules of construction" include the use of extrinsic evidence, which is defined as "[e]vidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement." *Black's Law Dictionary* 637 (9th ed. 2009). For example, over 100 years ago, this Court explained that

> [i]f a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received to enable the court to make a proper interpretation of the instrument.

L'Engle v. Scottish Union & Nat'l Fire Ins. Co., 48 Fla. 82, 37 So. 462, 467 (Fla. 1904) (quoting 9 Cyc. 772).

Many times since then, we have **[**34]** recognized the role that extrinsic evidence plays in the construction of ambiguous insurance contracts:

> Where either general language or particular words or phrases used in insurance contracts are 'ambiguous,' that is, doubtful as to meaning, or, in the light of other facts, reasonably capable of having more than one meaning so that the one applicable to the contract in question **[*956]** cannot be ascertained without outside aid, extrinsic evidence may be introduced to explain the ambiguity.

Friedman, 56 So. 2d at 517; *see also* *Stuyvesant Ins. Co. v. Butler*, 314 So. 2d 567, 570-71 (Fla. 1975) (approving reliance on extrinsic evidence to resolve a liability policy's ambiguous use of the word "minor"); *Price v. S. Home Ins. Co. of the Carolinas*, 100 Fla. 338, 129 So. 748, 751 (Fla. 1930) ("Evidence of the situation of the property and the parties, as well as other surrounding facts and circumstances at the time of the issuance of the policy, [wa]s admissible to aid the court in construing the word 'additions.'"); 30B Fla. Jur. 2d *Insurance* § 1590 (2d ed. 2013) (explaining that, "[i]n the case of an ambiguous insurance contract provision," Florida courts "should consider extrinsic evidence to give effect to the **[**35]** parties' intention").

Moreover, since *Excelsior*, we have recognized that, in appropriate circumstances, extrinsic evidence may be considered to clarify the parties' intent if an insurance contract is ambiguous. *See* *Anderson*, 756 So. 2d at 36 (recognizing that a court "may consider established custom and usage in the insurance industry") (citing *Nat'l Merch. Co. v. United Serv. Auto. Ass'n*, 400 So. 2d 526, 530 (Fla. 1st DCA 1981)); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1139 (Fla. 1998) (concluding that "it would be inappropriate" to consider extrinsic evidence concerning the policy's drafting history unless the Court first found the policy ambiguous); *Dimmitt*, 636 So. 2d at 705 (same).

Likewise, our district courts allow the use of extrinsic evidence to resolve ambiguities in insurance contracts. *See, e.g.*, *Kiln PLC v. Advantage Gen. Ins. Co., Ltd.*, 80 So. 3d 429, 432 (Fla. 4th DCA 2012) ("In the case of an ambiguous insurance policy, where extrinsic evidence is available, consideration of that evidence may be appropriate."); *Castillo v. State Farm Fla. Ins. Co.*, 971 So. 2d 820, 823 (Fla. 3d DCA 2007) (holding that the insurance company's internal **[**36]** operating guideline was "both instructive and admissible as parole evidence" to explain an ambiguous provision in an insurance contract); *Williams v. Essex Ins. Co.*, 712 So. 2d 1232, 1232 (Fla. 1st DCA 1998) (concluding that the parties were "entitled to offer extrinsic evidence as to the intent of the insurer and the insured at the time the policy was purchased" to resolve an ambiguity regarding the policy's coverage); *Mut. Fire, Marine & Inland Ins. Co. v. Fla. Testing & Eng'g Co.*, 511 So. 2d 360, 363 (Fla. 5th DCA 1987) (concluding that the trial court correctly relied on extrinsic evidence to resolve an ambiguity in an insurance contract).

Federal courts have also recognized that Florida law allows the use of extrinsic evidence to clarify ambiguous insurance contracts. *See, e.g.*, *Estevez v. N. Assurance Co. of Am.*, 428 F. App'x 966, 967 n.1 (11th Cir. 2011) ("[The insured's] argument that extrinsic evidence is not admissible to resolve ambiguities in an insurance contract is without merit" under Florida law.); *Burlington Ins. Co. v. Indus. Steel Fabricators, Inc.*, 387 F. App'x 900, 902 (11th Cir. 2010) (recognizing that, under Florida law, "if the relevant policy language is ambiguous **[**37]** then extrinsic evidence of the parties' intentions may be introduced to explain the ambiguity"); *Monticello Ins. Co. v. City of Miami Beach*, 2009 U.S. Dist. LEXIS 19181, 2009 WL 667454 at *10 (S.D. Fla. 2009) (explaining that federal courts applying Florida law "have also found it appropriate to admit extrinsic evidence to resolve the ambiguity in insurance policies"); *Great Am. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 574 F. Supp. 2d 1294, 1299 (S.D. Fla. 2008) (quoting *Friedman*, 56 **[*957]** So. 2d at 517, for the proposition that where an insurance contract is ambiguous and, therefore, its meaning "cannot be ascertained without outside aid, extrinsic evidence may be introduced to explain the meaning").

These decisions are in accord with insurance treatises explaining that contract law traditionally allows the use of extrinsic evidence to attempt to resolve an ambiguous insurance contract instead of simply construing it against the drafter. For example, *Couch on Insurance* provides that the

> rule of strict construction of an ambiguous policy against [the] insurer

> is a rule of last resort, and not to be permitted to frustrate [the] parties' expressed intention if such intention could be otherwise ascertained, **[**38]** where there is extrinsic evidence of [the] parties' intention, which is pro[f]ferred and admissible, and which resolved [the] ambiguity, albeit in favor of noncoverage, the rule of strict construction need not be applied.

2 Steven Plitt, Daniel Maldonado, and Joshua D. Rogers, *Couch on Insurance* § 22:16 (3d ed. 2012) (footnote omitted); *see also* 1 Barbara O'Donnell, *Law and Practice of Insurance Coverage Litigation* § 1:6 (2012) (explaining that, under "traditional contract interpretation analysis," the rule of construing the ambiguity against the insurer is a "rule of last resort" applicable only where other construction aids, including the use of extrinsic evidence, fail); 2 Allan D. Windt, *Insurance Claims and Disputes* 5th § 6:2 (2012) ("[I]f a policy term is ambiguous, the court should consider extrinsic evidence in an attempt to resolve the ambiguity to reflect the parties actual intent."); Robert H. Jerry, II & Douglas R. Richmond, *Understanding Insurance Law* 129 (5th ed. 2012) (recognizing that where a contract is unclear within its four corners "evidence extrinsic to the writing can be examined for the purpose of determining a document's meaning"); 1-5 Jeffrey E. Thomas, *New* **[**39]** *Appleman on Insurance Law Library Edition* § 5.04 (2012) (explaining that "[u]nder the contract law approach to ambiguity" finding an insurance policy ambiguous "opens the matter to extrinsic evidence").

Accordingly, if extrinsic evidence resolves the ambiguity, the policy is enforced pursuant to its clarified meaning. Because the ambiguity has been resolved, there is no justification for applying the last-resort rule of construction against the drafter. *See* *Excelsior*, 369 So. 2d at 942 (holding that the rule of construction against the drafter is inapplicable because it may be applied "[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction").

While some states have moved away from attempting to discern the parties' intent using the ordinary rules of contract construction (particularly extrinsic evidence) in favor of a pro-insured rule that automatically construes an ambiguous insurance contract against the insurer, until today, Florida has not. *See* 1 Barbara O'Donnell, *Law and Practice of Insurance Coverage Litigation* § 1:11 (2012) (noting that New Jersey, Indiana, and Texas subscribe to the rule that "any **[**40]** ambiguity in the relevant policy language is automatically construed in favor of coverage" while other states, including Florida, construe an ambiguity against an insurer "only after exhausting efforts to discern the meaning of disputed language through reference to extrinsic evidence") (footnotes omitted).

None of the decisions the majority cites[8] justifies its departure from our established **[*958]** framework for construing insurance contracts, under which "[t]he central concern . . . is the intent of the parties," just as it is with any contract. *Travelers Ins. Co. v. Bartoszewicz*, 404 So. 2d 1053, 1054 (Fla. 1981) (citing *Excelsior*, 369 So. 2d at 942). To the contrary, as discussed above, two of them indicate that extrinsic evidence may be considered in appropriate circumstances. *See* *Deni*, 711 So. 2d at 1139; *Anderson*, 756 So. 2d at 36. The others are unhelpful in answering the certified question concerning extrinsic evidence because they either find no ambiguity or simply recite the general last-resort rule that an ambiguous insurance contract is to be construed against the insurer without indicating whether the parties attempted to resolve the ambiguity with extrinsic evidence. Because **[**41]** we do not silently overturn our precedent, it is inappropriate to read a prohibition against extrinsic evidence into general statements of law from cases that, for

[8] *See* majority op. at 12-15.

all we know, had nothing to do with extrinsic evidence.[9] *See* *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("[T]his Court does not intentionally overrule itself sub silentio."). Accordingly, by applying the rule that ambiguities are construed against the insurer other than as a rule of last resort, the majority recedes from precedent and prematurely abandons the search for the parties' intent.

III. Conclusion

Because the majority ignores **[**42]** the plain language of the contract and our binding precedent, I respectfully dissent. I would answer the main certified question and sub-questions A and C in the negative because the policy plainly limits the automatic increase to the daily benefit that does not include the caps. In addition, I would answer sub-question B in the affirmative because well-settled Florida law allows the use of available extrinsic evidence to construe an ambiguous insurance contract, and no justification has been given for receding from our precedent.

QUINCE and CANADY, JJ., concur.

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[9] As the appellant noted in its reply brief, it is likely that many of our insurance cases discuss the rule of construing ambiguous contracts against the insurer without explaining the role that extrinsic evidence plays in construction because extrinsic evidence of the parties' intent is rarely available to resolve the types of ambiguities that arise in insurance contracts. But in this case, Washington National desires to introduce extrinsic evidence explaining how the automatic increase applies, such as marketing evidence and evidence of the insureds' understanding.