

No. 12-15866-EE

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

**COMPOSITE STRUCTURES, INC. DBA
MARLOW MARINE SALES,**

Appellant,

v.

THE CONTINENTAL INSURANCE COMPANY,

Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

APPELLEE'S MOTION TO PUBLISH OPINION

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Dated: April 4, 2014

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-1 and FRAP 26.1, I certify that the following persons, firms, partnerships or corporations have an interest in the outcome of this case:

Backer, William A., Esquire

Boyle, Gentile, Leonard Crockett, P.A.

Boyle, Mark A., Esquire

Cannova, Michael

CNA Financial Corporation – publicly held company – ticker symbol “CNA”

Colliau Carluccio Keener Morrow Peterson & Parsons

Composite Structures, Inc. dba Marlow Marine Sales

Continental Casualty Company

Crockett, Debbie Sines, Esquire

Elenius Frost & Walsh

Frost, Kathryn M., Esquire

Loews Corporation – publicly held company – ticker symbol “L”

Marlow-Cannova Group, Inc.

Marlow, David E.

Marlow Marine Sales, Inc.

Marlow Marine Service, Inc.

Marlow Yachts Limited, Inc.

Pach, Lisa A., Esquire

The Continental Corporation

The Continental Insurance Company

Whittemore, Honorable James D., United States District Judge

Respectfully submitted,

s/ Kathryn M. Frost

Kathryn M. Frost

Attorney for Appellee

GROUND AND RELIEF SOUGHT

Appellee, The Continental Insurance Company (“Continental”), by and through the undersigned counsel, pursuant to 11th Cir. R. 36-3, respectfully moves for publication of this Court’s Opinion issued March 20, 2014 in this matter, and in support of this motion, Continental states the following:

1. On March 20, 2014, this Court issued its unpublished Opinion in the above-styled appeal, affirming the ruling of the District Court for the Middle District of Florida. This Court concluded that Continental had no duty to defend or indemnify Composite Structures, Inc. d/b/a Marlow Marine Sales (“Marlow”) in an underlying lawsuit filed against Marlow.

2. The Opinion recognized an exception to the general rule under Florida law that the duty to defend is determined solely from the allegations of the complaint by finding that a court can look outside the four corners of complaint when the undisputed facts would not normally be alleged in the complaint. (Opinion, pp. 7-8, 10.) This Court found this exception applicable in determining whether all conditions to the exception to the pollution exclusion had been met. (*Id.*, pp. 8, 10-11.)

3. The Opinion also recognized that an insurance carrier is not required to prosecute a successful declaratory judgment action in order to rely on facts

outside of the underlying complaint as a basis for denial. (*Id.*, pp. 11-12.)

3. This exception to the general duty to defend rule has been recognized by the Florida Supreme Court in footnote 2 of its 2005 opinion in *Higgins v. State Farm Fire and Cas. Co.*, 894 So.2d 5, 10, n.2 (Fla.2005) and by the Florida appellate court in *Acosta, Inc. v. Nat'l Union Fire ins. Co.*, 39. 3d 565 (Fla. 1st DCA 2010). However, the recognition of this exception is one of first impression for this Circuit and weighs strongly in the favor of publication. *See Bank of Am., N.A. v. F.D.I.C.*, 244 F.3d 1309, 1311 (11th Cir. 2001) (“We publish this opinion . . . because our decision turns to some extent upon a[n] . . . issue of first impression in this circuit which may arise in other administrative law cases in the future.”); *United States v. Rivera*, 884 F.2d 544, 545 (11th Cir. 1989) (“In this opinion, which we publish because it adds to this circuit’s precedent. . .); *see also* IOP-Cir.Rule 36(6) (“Opinions that the panel believes to have no precedential value are not published.”).

4. The issues addressed in this appeal are reoccurring issues in this Circuit. Publication of this Court’s Opinion will provide better guidance to lower courts and counsel in future cases, which will save time and expense of re-litigating the issues presented in this case. *See Bank of Am.*, 244 F.3d at 1311 (“We publish this opinion explaining our decision because the same regulatory

issue may come up between the FDIC and other banks. . . “); *Fla. Progress Corp. v. United States*, 264 F.3d 1313, 1313 (11th Cir. 2001) (granting request to publish a previously unpublished opinion “in order to provide guidance” on an issue).

5. Publication is further appropriate to ensure uniform interpretation of the duty to defend standard under Florida law, which courts in this Circuit routinely address. This published opinion clarifies an issue often addressed in this Circuit - under what circumstances an insurer may consider extrinsic evidence when determining its duty to defend. Only a published opinion can guarantee that the exception to the general duty to defend standard under Florida law is uniformly applied in the Eleventh Circuit. Uniform application of the general duty to defend standard is necessary to guide the expectations of policyholders and insurers alike.

6. Lastly, the Opinion has all the virtues of a published opinion. Apart from deciding and providing guidance on new issues in this Circuit, the Opinion is written, clearly, persuasively, and succinctly. *See* IOP- Cir.Rule 36(5) (“Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.”) And the exception to the general duty to defend rule and the appropriate actions which must be taken by insurance carriers has the support of the Florida Supreme Court. *See Higgins*, 894 So.2d 5, 10, n.2 (Fla.2005).

WHEREFORE, for the reasons stated above, Appellee Continental respectfully requests this Court grant this motion to publish this Court's March 20, 2014 Opinion and issue an order directing its publication.

Respectfully submitted,

s/ Kathryn M. Frost

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Certificate Of Service

I certify that on April 4, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the below listed counsel.

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