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CLARENCE MADDOX
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LORETTA FABRICANT, on behalf of herself and all others similarly situated,

Plaintiffs,

vs.

SEARS ROEBUCK, et al.

Defendants.
_____/

Case No. 98-1281-CIV-MORENO
(formerly 98-1281-CIV-NESBITT)

ORDER DENYING MOTION FOR RECONSIDERATION

This cause comes before the Court upon the Sears and Allstate Defendants' Motion for Reconsideration of the Court's dismissal of the counterclaim alleging unjust enrichment. The motion to reconsider is denied because the Court finds that the contract terms are contrary to public policy and thus void.

BACKGROUND

This case concerns the Defendants' practice of marketing a package of credit life, disability, unemployment and leave of absence insurance coverage in connection with the Sears Credit Card called the Sears Credit Protection Plan ("SCPP"). Count III of Plaintiffs' Complaint alleges the following violations of Florida statutes regulating the sale of insurance: (1) Defendants failed to make specific disclosures and obtain written acknowledgment of those disclosures required by § 627.679; (2) Defendants failed to submit applications for SCPP credit insurance with the Florida Department of Insurance as required by § 627.682; (3) Defendants failed to comply with the licensing requirements of § 626.321. See Second

Amended Class Action Complaint ¶ 50-61. As a result of these violations of Florida law, Plaintiffs contend that the SCPP "insurance contracts between Defendants and Plaintiffs are illegal and unenforceable." Id. at ¶ 58. As innocent parties to these illegal contracts, Plaintiffs request restitution in the form of disgorgement of all premiums paid under these allegedly illegal contracts.

Defendants Sears National Bank ("Sears"), Allstate Life Insurance Company and Allstate Insurance Company (collectively "Allstate") each asserted "conditional" counterclaims. See Sears Roebuck & Co.'s and Sears National Bank's Amended Answer, Affirmative Defenses and Counterclaims (D.E. # 288); Allstate Life Insurance Company's and Allstate Insurance Company's Amended Answer, Affirmative Defenses and Counterclaims (D.E. #177). This Court dismissed all three counterclaims filed by Sears and both counterclaims filed by Allstate. See Order on Motion to Dismiss Counterclaims (D.E. # 410).

Both Sears and Allstate seek reconsideration of the Court's Order dismissing one of these conditional counterclaims. The counterclaim at issue alleges that "in the event the Court ... finds that the SCPP insurance policies are unenforceable or voidable, [Defendants] bring a conditional counterclaim against members of the class who have been unjustly enriched by receiving the benefit of the ... SCPP insurance package." Sears' Third Counterclaim ¶ 1;

Allstate's Third Counterclaim ¶ 1. Defendants allege that class members received unjust enrichment in the form of both "peace of mind and claims paid to class members[1] due to their enrollment in SCPP." Id. at ¶ 4. Defendants seek reconsideration of the order dismissing this counterclaim, contending that the Court erred in construing their counterclaim as seeking unjust enrichment due to void, rather than, as they assert, **voidable** contracts.

DISCUSSION

Reconsideration of a prior order is proper when the moving party establishes (1) an intervening change in controlling law, (2) availability of new evidence, (3) the need to correct manifest errors of law or fact, or (4) patent misunderstanding by the Court of the party's arguments. Z.K. Marine, Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992). The motion is not to be used "as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." Brogodon v. National Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000). The rationale for this rule prevents a litigant from having "two bites at the apple." American Home Assurance Co. v. Glenn Estess & Assocs., 763 F.2d 1237, 1239 (11th Cir. 1985). Defendants state that this motion proceeds under the third and

[1] Persons who received monetary benefits in excess of the premiums paid are excluded from this class.

fourth prongs. Accordingly, the Court will address only those arguments which attempt to correct alleged manifest errors of law and arguments addressing the Court's "misunderstanding" of the Defendants' arguments.

The central contention by Defendants of the Court's misunderstanding or manifest error of law is the premise of this conditional counterclaim - the effect of the Court finding the insurance policies "unenforceable." The condition precedent for the Court finding the policies "unenforceable" would be for the Plaintiffs to prove that the contracts violated the Florida statutes enumerated in Count III of the Complaint. If Plaintiffs prove the insurance contracts violated Florida law, then Defendants claim that the contracts become **voidable**, not void as Plaintiffs claim.[2]

The sole authority cited by Defendants for the proposition that these insurance contracts may only become **voidable** is Justice Breyer's concurrence in Oubre v. Entergy Operations, Inc., 522 U.S. 422, 431-432 (1998) (Breyer, J. concurring). In Oubre, Justice Breyer, relying primarily on the Restatement (Second) of Contracts, explained the difference between voidable versus void contracts. Id. Justice Breyer concluded that the agreement at issue was only voidable, not void, because the statute impacting the validity of the contract reflected concerns about the conditions surrounding the

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[2] Defendants' motion for reconsideration essentially claims that Plaintiff's improperly pled Count III by seeking the wrong remedy.

formation, rather than the contract's substantive terms. Id. at 432. From this general statement, Defendants derive the argument that because the Florida Insurance Code does not absolutely prohibit the sale of credit insurance, the subject matter is not illegal and the contracts, therefore, are not void.

The analysis of unenforceable contracts is not as simplistic as Defendants contend. Generally, "***an illegal contract is, as a rule, void - not merely voidable*** - and can be the basis of no judicial proceeding." Schaal v. Race, 135 So. 2d 252, 256 (Fla. 2d Dist. Ct. App. 1961) (quoting Pomeroy's Specific Performance of Contracts § 280, at 642) (emphasis added)). The Restatement acknowledges that the common characterization for such promises is to describe them as "illegal," although the more precise description is "unenforceable on grounds of public policy." Restatement (Second) of Contracts at Introductory Note to Unenforceability in General. Thus, Count III of Plaintiff's Complaint alleges that these insurance contracts are "unenforceable on grounds of public policy" due to the alleged statutory violations and seeks restitution for payments made on such contracts.

Section 178 of the Restatement explains how to determine "[w]hen a term is unenforceable on grounds of public policy." Restatement (Second) of Contracts § 178. A promise or term of an agreement is unenforceable if the interest in its enforcement is clearly outweighed by a public policy against enforcement. Id. §

178(1). This requires a balancing of interests between the parties' interest in enforcement and the public policy against enforcement. Id. at comment b. The public policy may be based on either (1) legislation[3] or (2) the need to protect some aspect of public welfare. Restatement (Second) of Contracts § 179. Legislation is used "in the broadest sense to include any fixed text enacted by a body with authority to promulgate rules, including not only statutes, but constitutions and local ordinances, as well as administrative regulations pursuant to them." Id. § 178 at comment

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[3] Defendants assert that the statute must specifically provide that the contract is void. Numerous Florida cases have found contracts or their terms void based on statutes that do not so provide expressly. As the Restatement itself explains, "only infrequently does legislation, on grounds of public policy, provide that a term is unenforceable." Restatement (Second) of Contracts § 178 at comment b. First, a statute is unnecessary to find the source of public policy; a Court may rely on its own perception of a need to protect some aspect of the public welfare. Id. Alternatively, a court may rely on relevant legislation "although [the statute] says nothing explicitly about unenforceability." Id. (emphasis added).

In contrast to Defendants' assertion, the opposite is presumed. The Supreme Court of Wisconsin explained this basic principle over a hundred and forty years ago: "It is not necessary that the law should expressly say that a contract in violation of it shall be void. It is sufficient for [the statute] to prohibit and its invalidity follows as a legal consequence." Aetna Ins. Co. v. Harvey, 11 Wis. 394 (1860). This principle remains true today: "[W]here the legislative intent is uncertain or cannot be determined and when the statute is silent and does not provide to the contrary, a contract in contravention of [the statute] is void." Beard v. American Agency Life Ins. Co., 550 A.2d 677, 687 (Md. 1988) (finding an insurance contract void based on a statute that did not expressly provide that contracts in violation were void). Accordingly, if Defendants' insurance contracts contravene the statutory law of Florida, they may be deemed void.

a (emphasis added); see also id. § 179 at comment b (explaining the term legislation is the same for § 178 and § 179); 11 Fla. Jur. 2d § 112 (explaining that a contract "in contravention of a statute ... although not immoral, is equally invalid as with one that is malum in se").[4] Therefore, Florida statutes governing the sale and marketing of insurance are an appropriate source of public policy.

The insurance statutes upon which violations are alleged fall into three categories: (1) substantive deficiencies of the insurance contracts which failed to make the appropriate disclosures and obtain the requisite written acknowledgments mandated by Florida law, (2) failure to obtain the necessary approval by the Department of Insurance to ensure that the forms complied with Florida law, and (3) violation of licensing provisions, including the sale of insurance by unlicensed individuals. The public policy behind each of these statutes is clear. Regulation of the business of insurance is largely left in the hands of the states. See Humana, Inc. v.

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[4] For the first time, Defendants cite § 627.418(1) in support of its position that insurance policies may not be rendered void unless expressly so provided by statute. A motion for reconsideration exists to correct manifest errors of law or fact or present newly discovered evidence, not to present authorities available at the time of the first argument to provide litigants a second "bite at the apple" by attempting to persuade the court through a different tact once the party discover the first set of arguments did not persuade. See Marine, Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1562 (S.D. Fla. 1992). Moreover, this statute does not address Defendants' counterclaim, but the viability of Plaintiff's claim in Count III; nor does it suggest that the insurance contracts would be voidable, rather than void.

Forsyth, 525 U.S. 299, 306 (1999) (explaining that the McCarran-Ferguson Act was left largely in the hands of the states and federal law applies only when the federal law does not directly conflict with state regulation or would when the federal law would not frustrate any declared state policy or interfere with a state's administrative regime). Thus, the State of Florida has a strong interest in enacting regulations governing the sale of insurance within its borders.

The disclosures and acknowledgments mandated by § 627.679 consist of substantive regulations of insurance by requiring certain information to be conveyed about the policy. Likewise, § 624.605 requires an insurance company to file and seek approval of insurance applications by the Department of Insurance to ensure compliance with the Florida insurance laws. While § 624.605 appears procedural, it provide substantive protection to the public by enabling the Department of Insurance to review, monitor and ensure that an insurance company's policies and forms comply with the applicable statutes. Finally, the licensing requirements control who is allowed to sell insurance by indirectly ensuring compliance with substantive provisions - by requiring those selling insurance comply with the regulations or face the threat of loss of livelihood for failure to abide by those regulations. Each of these statutes serve to provide important protections for the public regarding the sale of insurance in this state.

Defendants contend that the purpose, or performance, of the contract must be criminal in order for the contract to be void, rather than merely voidable. See Defendant's Brief at 6. In contrast, Florida law is clear that if a contract's "formation **or** its performance is criminal, tortious **or** opposed to public policy, the contract or bargain is illegal." Thomas v. Ratiner, 462 So. 2d 1157, 1159 (Fla. 3d Dist. Ct. App. 1984) (bold emphasis added). The Ratiner court determined that where the formation of the contract violated a statute regulating solicitation, the entire agreement was void *ab initio*. Id.; see also Spence Payne Masington & Grossman, P.A. v. Philip M. Gerson, P.A., 483 So. 2d 775, 776, 777 (Fla. 3d Dist. Ct. App. 1986) (same).[5] Similarly, sections 627.679 and 624.605 regulate the formation of insurance contracts: insurers must provide certain disclosures and obtain certain acknowledgments from the insureds and must file application forms and use forms approved by the Department of Insurance in order to issue a valid insurance policy.

Numerous decisions construing insurance contracts have held that public policy is violated by an insurance policy that defeats the purpose and intent of an insurance statute and such provisions

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[5] Likewise, this principle is neither new nor unique. Nearly a century and a half ago, the Supreme Court of Wisconsin similarly declared an insurance policy void where an insurance company had failed to comply with the provisions of the statute requiring the making of a contract in a manner specified by the statute. Aetna Ins. Co. v. Harvey, 11 Wis. 394, 394 (1860).

are nugatory and void. Government Employees Ins. Co. v. Farmer, 330 So. 2d 236, 237 (Fla. 1st Dist. Ct. App. 1976); e.g. Green v. Life & Health of America, 704 So. 2d 1386, 1389 (Fla. 1998) (quoting King v. Allstate Ins. Co., 906 F.2d 1537, 1540 (11th Cir. 1990) (explaining that the statutory provisions of the insurance code can serve to void the contrary provisions of the policy)). As the Florida Court of Appeal explained forty years ago, "it would serve no purpose to pass such regulatory acts if parties could with impunity violate them." Schaal, 135 So. 2d at 257. If the insurance policies here failed to comply with the applicable insurance statutes governing the formation of insurance contracts, these policies are subject to the general rule regarding illegal contracts - they are void.

Another court in this district recently determined that the disclosures and written consent mandated by § 627.679 served the important "stated purpose of protecting borrowers from 'duplication or overlapping of insurance coyerage.'" London v. Chase Manhattan Bank, No. 99-1298-CIV-UNGARO-BENAGES, slip. op. at 24 (S.D. Fla. Aug. 9, 2001). The London court concluded that defendants' violation of § 627.679 entitled plaintiffs to restitution of paid premiums for selling credit life and disability insurance in violation of that statute. Id. at 25. Other states have likewise concluded that failure to comply with formation requirements of the insurance code requiring written consent renders the entire policy

void ab initio. E.g. Hilfiger v. Transamerica Occidental Life Ins. Co., 505 S.E.2d 190, 193 (Va. 1998) (finding that failure to obtain written consent in compliance with the statute made the policy void *ab initio*); Time Ins. Co. v. Lamar, 393 S.E.2d 734, 735 (Ga. App. 1990) (finding that a contract violating the statutory requirement of written consent is void *ab initio*); see Dukes v. Household Finance Corp., 224 S.E.2d 107, 108 (Ga. App. 1976) (explaining that failure to provide a written itemized statement as required by Georgia law would void the group credit life and disability insurance contract); Schaal, 135 So. 2d at 257 (finding oral contract for plaintiff's advertising services void based on statute requiring written authorization of expenditures for political campaigns). Accordingly, if this Court concludes that these Defendants violated § 627.679 by failing to make the requisite disclosures or obtain appropriate written consent in connection with the sale of the SCPP, then the insurance is properly considered void.

The Florida Court of Appeal has made clear that failure to file insurance forms with and have the forms approved by the Department of Insurance renders the policy null and void. American Mutual Fire Ins. Co. v. Illingworth, 213 So.2d 747, 749 (Fla. 2d Dist. Ct. App. 1968); see also Hawkins Chemical, Inc. v. Westchester Fire Ins. Co., 159 F.3d 348, 352 (8th Cir. 1998) (explaining that an insurance policy or exclusion not filed with the Commissioner of Insurance is

unenforceable under Minnesota law). The Illingworth court construed Florida Statute 627.01091 [now § 627.410(1)],[6] which prohibited the delivery or issuance of any insurance policy, annuity contract, application form, printed rider, endorsement form or form of renewal certificate unless filed with and approved by the commissioner. Id. The insurance company attempted to refuse coverage based on an exclusionary endorsement form that the insurance company had failed to file the with the insurance commissioner as the statute required. Id. at 747, 750. The Florida Court of Appeal determined that "any endorsement written on the unapproved form must be rendered void." Id. at 750. This Court is asked to interpret § 627.682, which

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[6] At the time of Illingworth, § 627.01091 provided:

No basic insurance policy or annuity contract form, or application form where written application is required and is to be made a part of the policy or contract, or group certificates issued under master contracts delivered in this state, or Printed rider or endorsement form or form of renewal certificate, shall be delivered or issued for delivery in this state, unless the form has been filed with and approved by the commissioner. This provision shall not apply to surety bonds, or to specially rated inland marine risks, nor to policies, riders, Endorsements, or forms of unique character designed for and used with relation to insurance upon a particular subject (other than as to disability insurance), or which relate to the manner of distribution of benefits or to the reservation of rights and benefits under life or disability insurance policies and are used at the request of the individual policyholder, contract holder, or certificate holder. As to group insurance policies effectuated and delivered outside this state but covering persons resident in this state, the group certificates to be delivered or issued for delivery in this state shall be filed with the commissioner for information purposes only at his request.

Id. In 1971, this section was renumbered as § 627.410.

similarly requires that "[a]ll forms of policies, certificatess of insurance, statements of insurance, applications for insurance ... of credit life or disability insurance shall be filed with an approved by the department before use as provided in §§ 627.410 and 627.411." Fla. Stat. Ann. § 627.682. Section 627.682 does not merely employ a similar statutory scheme as the one at issue in Illingworth, it expressly refers to the same statute at issue in Illingworth and requires filing and approval "as provided in" § 627.410. As Illingworth held that failure to file and obtain approval of the form rendered the policy on an unapproved form void, Illingworth, 213 So.2d at 749, then a violation of § 627.682 likewise renders the policy based on an unapproved form void. Accordingly, if Defendants violated § 627.682 by failing to file and obtain approval of the SCPP forms, then the insurance is void.

Florida law is well-settled that failure to obtain the requisite licenses to conduct business renders the contracts made by the unlicensed to perform licensed services illegal and void. Vista Designs v. Silverman, 774 So. 2d 884, 885 (Fla. Dist. Ct. App. 2001) (requiring unlicensed attorney to disgorge the funds received from client through a contract that was void ab initio due to illegality); Steinberg v. Brickell Station Towers, 625 So. 2d 848, 849 (Fla. Dist. Ct. App. 1993) (finding contract by unlicensed mortgage broker illegal and void); see also In re Ripon City, 102 F. 176, 183 (5th Cir. 1900) ("any contract which undertakes ... to

put in charge ... any unlicensed person -- no matter how well qualified otherwise ... -- ought to be held void"). See generally Annot., Recovery Back of Money Paid to Unlicensed Person Required by Law to Have Occupational or Business License or Permit to Make Contract, 74 A.L.R.3d 637 (1976).

> The broad basis for the doctrine that contracts of certain unlicensed persons are unenforceable is that the courts should not lend their aid to the enforcement of contracts where performance would tend to deprive the public of the benefits of regulatory measures.

Cooper v. Paris, 413 So. 2d 772, 773 (Fla. Dist. Ct. App. 1982) (citing Williston on Contracts, § 1765, p. 247). Likewise, the Restatement advises that a party's failure to comply with a licensing requirement may support a finding of unenforceability on grounds of public policy. Restatement (Second) of Contracts § 181. A licensing requirement designed to protect public welfare provides greater weight to a finding of "illegality." Id. at comment c. The licensing of insurance agents, like the licensing of attorneys, doctors and mortgage brokers, is designed to protect the public from being victimized by incompetent or unethical professionals. Management Compensation Group v. United Security Employee Programs, Inc., 389 S.E.2d 525, 527 (Ga. App. 1989) (finding that contracts made in violation of statutes requiring life insurance agents to be licensed were void and the violating party could not recover); see also McLamb v. Phillips, 129 S.E. 570, 570 (Ga. App. 1925) (explaining that where the license is not imposed only for revenue

purposes, but to protect the public from improper, incompetent, or irresponsible persons, violating the licensing statute renders the contract void and unenforceable).[7] Accordingly, if the sale of SCPP insurance package violated § 626.321, it may serve as a basis for declaring the contract void.

Defendants contend that a determination that the Plaintiffs' coverage is void will somehow void the coverage of non-class members - presumably those who choose to opt-out or those excluded from the class - and therefore, such a result demands a determination that the policies are only voidable if they violate Florida law. This argument is a chimera. Once again, this Court applies the basic principles of contract law to insurance. Generally, a party may not seek restitution for performance rendered under an illegal contract. Fabricant v. Sears Roebuck & Co., 202 F.R.D. 306, 309 (S.D. Fla. 2001) (citing Restatement (Second) of Contracts § 197). Plaintiffs proceed under an exception to this general rule - that they are innocent parties to the illegal contract - that allows them to seek restitution. Id. The insured party is entitled to seek restitution when they are not in pari delicto with the insurer and are the party for whose protection the statute was enacted. Latham Mercantile & Commercial Co. v. Harrod, 81 P.2d 214, 216 (Kan. 1905). The basic

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[7] Again for the first time, Defendants suggest that § 626.141 would prevent recovery based on violations of § 626.321. Even if this is true, this only attacks the viability of Plaintiff's claim; it does not suggest that if that the insurance contracts would be merely voidable, rather than void.

rationale is one of fairness and efficiency based on the different positions of the parties:

> [T]he party insured cannot, without great difficulty, discover whether the insurer has complied with all the statutory requirements or not ... it would be unreasonable to require every person to whom a corporate insurer offers a contract of insurance should make an exhaustive investigation in order to discover whether his co-contractor has been fully qualified to make the agreement that is proposed ... [T]he insured has the right to presume that the insurer has complied with all the requirements of law.

Robinson v. Life Co., 79 S.E. 681, 684 (N.C. 1913) (quoting Vance's Treatise on Insurance); see also Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 215 S.E.2d 162, 166 (N.C. App. 1975) (quoting and relying on the soundness of this rationale). In contrast, these counterclaims state no exception to the general rule that would permit Defendants a valid claim for restitution.

More importantly, the exception under which the Plaintiff Class proceeds is not available to the Defendants against the insureds whether members of this class or not. If a non-class member chooses not to allege a claim against Defendants based on these violations, then in order for that policy to be declared void, Defendants would have to claim that the contract is illegal in an attempt to avoid coverage. Not surprisingly, other courts have addressed the situation of an insurance company attempting to avoid payment based on the insurance company's own failure to comply with a statute. The same rationale allowing the insured's recovery does not apply to allow the insurer to avoid coverage based on its "own infraction

of the law." Id. For nearly a hundred years, "the great weight of authority" has precluded insurance companies from seeking to avoid payment for coverage based on their own violation of the law. Id.; Winston-Norris Co. v. King, 249 P. 319, 321 (Ok. 1926) (citing Phenix Ins. Co. v. Pennsylvania Co., 33 N.E. 970 (Ind. 1893)); see Hyde Ins. Agency, 215 S.E.2d at 166 (concluding that this "rationale is sound" and finding that where insured did not knowingly engage in conduct by statute, insurer could not plead illegality to benefit from own wrongdoing). An insurer is thus estopped from pleading illegality to escape liability. Id. (quoting Robinson, 79 S.E. at 784). As applied here, Defendants are estopped from utilizing the illegality of these contracts based on their own infractions to the detriment of the policy holders. Estoppel not only prevents Defendants from seeking restitution from class members based upon Defendants' own violations of these Florida statutes, but also prevents Defendants from denying coverage to those insured parties who are not part of this action. Accordingly, these counterclaims were properly dismissed by Judge Nesbitt.

CONCLUSION

Accordingly, it is hereby **ORDERED and ADJUDGED** that Defendants' Motion for Reconsideration (D.E. #412) is **DENIED**.

DONE and ORDERED, in Chambers, Miami, Florida, this 5th day of March, 2002.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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