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sured motorist policy, subject to the limits of the policy. The assumption that the settlement exhausts the liability policy will avoid making the amount of the insurer's liability dependent upon the amount of the settlement the insured accepts. It will also aid the settlement process and thereby benefit both the injured person and the tortfeasor's liability insurer.

The court held that in the present case the estate could recover from National the amount which the actual damages exceeded Bunse's \$100,000 liability policy, subject to the \$20,000 underinsured motorist policy limit. The court remanded the case to the district court to determine the estate's actual damages.

The Dissent

The dissent, written by Justice Carter with two justices joining, argued that insurance policies should be enforced unless they conflict with statutory provisions. Justice Carter found no such conflict between the exhaustion requirement and the statute that requires underinsured motorist coverage. He also found nothing unreasonable in the underinsured motorist policy's provision requiring exhaustion of the liability policy. The dissent added that if the injured party settles before trial for less than the liability policy limits, the settlement amount indicates the real worth of the claim. The injured party may receive the underinsured motorist benefits, notwithstanding the exhaustion requirements, merely by fully litigating the claim.

Stephen Kirkwood

Minnesota's Consumer Protection Act Includes Residential Leases, But Florida's Consumer Protection Act Excludes Real Estate Sales

Minnesota and Florida enacted consumer protection acts in order to protect consumers from deceptive, unfair and discriminating practices of any trade, commerce or business. The Minnesota Court of Appeals in *Love v. Amsler*, 441 N.W.2d 555 (Minn.App. 1989), construed its act broadly and held that deceptive landlord practices as related to residential leases violated the Minnesota Prevention of Consumer Fraud Act. Minn. Stat. §§ 325F.68-325F.70 (1988). The Florida District Court of Appeals in *Kingswharf v. Kranz*, 545 So. 2d 276 (Fla.App. 3 Dist. 1989), however, interpreted its act narrowly and held that real estate sales were not included in the Florida Deceptive and Unfair Trade Practices Act. Fla. Stat. §§ 501.201. - 501.213. (1988).

Love v. Amsler

In 1986, Boyd Amsler ("Amsler") rented a house to Marsha Love ("Love") for \$385.00 per month plus utilities. Amsler kept the water service in his name and required Love to pay him directly for the water bills he received. However, Amsler never showed Love a bill nor gave her a receipt for the payments she made.

After renting for nine months, Love withheld \$113.00 from her rent payment. Amsler filed a suit against her for unpaid rent and water bills and for attorney's fees. He claimed \$275.97 for unpaid water bills incurred over seven months. Love and Amsler settled their dispute and Love planned to vacate the house. Four days before Love moved out, Amsler filed a pro se action claiming \$1,341.00 for unpaid rent and costs of cleaning the house. This time he claimed that Love owed him \$460.98 for the water bills over the same seven month period. Love filed suit against Amsler in the Minnesota

District Court of Appeals for the Third District for breach of the covenant of habitability and violation of the Minnesota Prevention of Consumer Fraud Act ("Minnesota Act"). Minn. Stat. §§ 325F.68 - 325F.70 (1988). Amsler's action was joined as a counterclaim to Love's suit.

The Minnesota District Court's Decision: Landlord Violated the Consumer Protection Act

At trial, a housing inspector testified that numerous hazards existed in the property Amsler rented to Love. The gas space heater which provided the only heating source was declared unsafe by the inspector. The house walls were covered with soot. The gas water heater was not properly ventilated and as a result potentially lethal fumes backed up into the living room. The house also had dangerous electrical and structural defects, serious flooding problems, poor drainage, defective insulation and a defective roof. Additionally, Love presented evidence that Amsler had previously made claims for over \$27,000.00 in various courts against 32 other tenants. In his suits, Amsler usually claimed unpaid water bills and cleaning costs. Amsler also requested attorney's fees although he pursued the cases on his own behalf.

The trial court found that Amsler had violated the Minnesota Act. That court held that Amsler's pattern of requiring tenants to pay unsubstantiated water bills, cleaning costs, and nonexistent attorney fees constituted unfair and deceptive trade practices. Additionally, the court held that because Amsler had breached the covenant of habitability, Love could recover a portion of her previous rent payments as damages. Amsler appealed.

The Court of Appeals of Minnesota Affirms

The appellate court noted that Minnesota courts had not determined whether the Minnesota Act applied to leased housing, although other states had included leased

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Consumer Protection Act (from page 25)

housing within their consumer protection acts. The Minnesota Act prohibits

[t]he act [or] use . . . by any person of any . . . deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise whether or not any person has in fact been misled, deceived, or damaged thereby . . .

Minn. Stat. § 325F.69 subd. 1 (1988). The court readily noted that Amsler fit within the statutory definition of a person and that residential real estate was within the statutory definition of merchandise. The key issue before the court was whether the term "sale" included residential leases. The statutory definition of a "sale" neither explicitly included nor excluded leases.

After examining Minnesota and other states' case law, the court held that the Minnesota Act did apply to residential leases. Minnesota case law acknowledged that a lease transaction has a dual nature, exhibiting characteristics of both a sale of land and a contract. Traditionally, the Minnesota courts have held that a lease is a transfer of real property, for a limited period, in exchange for rent.

In addition to case law, the court examined the Minnesota legislature's intent to determine whether the Minnesota Act applied to a lease. In designing the state anti-fraud legislation, the legislature intended to give sellers and consumers equal bargaining power in the marketplace. The court stated that the inadequate supply of affordable housing and the unequal bargaining power between landlords and tenants weighed in favor of including residential leases in the Minnesota Act. The court noted that real estate sales were protected by the Minnesota Act and that it would be unreasonable to exclude the lease of real estate.

Finally, the court noted that the Minnesota Attorney General had consistently applied the Minnesota Act to leases and landlord conduct. For these reasons the appellate court affirmed the trial court's decision to apply the Minnesota Act to landlords' deceptive practices in residential leases.

Kingswharf v. Kranz

A Florida developer, Kingswharf, Ltd. ("Kingswharf"), developed a community of townhouses called L'Hermitage. Scott Kranz ("Kranz") paid Kingswharf \$355,000.00 for property and a house at L'Hermitage. After closing the transaction and taking possession of the home, Kranz discovered numerous construction defects.

The Florida Jury's Decision: Real Estate Sale Violated the Consumer Protection Act

Kranz filed suit against Kingswharf alleging breach of contract, breach of express warranty and breach of the Florida Deceptive and Unfair Trade Practices Act ("Florida Act" or "Act"), Fla. Stat. §§ 501.201. - 501.213. (1988). The jury returned a verdict for Kranz and awarded him a total of \$275,000.

The Court of Appeals Decision: Statutory Definition of A Consumer Transaction Does Not Include the Sale of Real Estate

Kingswharf argued the Florida Act does not apply to real estate transactions. The appellate court agreed. The Florida Act was intended to apply to consumer sale practices. The Act defines a "consumer transaction" as "... a sale, lease, assignment . . . or other disposition of an item of goods, a consumer service or an intangible . . ." Fla. Stat. § 501.204.(1) (1988). The court noted that the statute does not expressly include real estate sales. Kranz argued that the broad language of Section 501.204(1), which states that "unfair or deceptive acts . . . of any trade or commerce are . . . unlaw-

ful," evinces the legislature's intent that the Act apply to real estate transactions. The court noted that although the broad language of this subsection would seem to include real estate sales, the legislature did not expressly include real estate sales in the definition of a consumer transaction, and the court was not willing to add to the definition.

Kranz cited *Anden v. Litinsky*, 472 So. 2d 825 (Fla. App. 4th Dist. 1985), as support for his argument. In *Anden*, the plaintiff claimed the corporate officer violated the Florida Act by falsely claiming that he was qualified to supervise the building of a house. The court in the present case distinguished *Anden* on the basis that the supervision of construction is a service. The Florida Act expressly includes services provided for primarily personal, family, or household purposes within the definition of a "consumer transaction." In contrast to the defendant in *Anden*, Kingswharf was involved in a real estate sale which is not considered a consumer transaction under the Florida Act.

Therefore, the appellate court reversed the jury's verdict against Kingswharf for violating the Florida Act and instructed the trial court to direct a verdict for Kingswharf.

Cathleen R. Martwick