[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13338

VFS LEASING CO.,

Plaintiff-Appellee,

versus

MARKEL INSURANCE COMPANY,

Defendant,

MARKEL AMERICAN INSURANCE COMPANY,

Defendant-Appellant.

2213338

available to VFS, as a party that should have received payment on a negotiable instrument, was to sue the bank for conversion rather than sue the issuer for breach of contract. Markel American also asserted that there was nothing in the Policy's language requiring it to take additional actions beyond what it did, nor to physically monitor what happens with settlement payments after they properly issue. In other words, Markel American argued that it was not responsible for either the wrongdoing or conversion of a check by a payee or the negligence of a financial institution.

VFS opposed Markel American's motion for summary judgment and filed its own cross-motion. VFS asserted that Markel American breached its insurance contract to pay VFS, which was an intended third-party beneficiary of that contract, as an additional

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We have repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered. Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004) (quoting Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994)). But there is a difference between raising new issues and making new arguments on appeal. In re Home Depot, Inc., 931 F.3d 1065, 1086 (11th Cir. 2019). "When an issue has been properly presented, a party can make any argument in support of that [is-

argued: Florida law again held that if a settlement check, after being issued, is subject to forgery or conversion but is cashed, it is the bank that cashes it that is responsible to the victim that did not receive the funds—not the maker of the check—and there is ample

some persuasive indication that the state's highest court would decide the issue otherwise." *Id.* (quoting *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1254, 1262 (11th Cir. 2014)).

Here, we must interpret and apply chapter 673 of the Florida Statutes, which corresponds to Article 3 of the UCC. *See Warren Fin., Inc. v. Barnett Bank of Jacksonville, N.A.*, 552 So. 2d 194, 196 n.2 (Fla. 1989) (noting that Florida has adopted the provisions of the UCC). In interpreting the UCC, both this Court and Florida courts

accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained. Markel American argues that this provision is dispositive in its favor. Section 673.1101(4), on the other hand, states that "where an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged or enforced only by all of them."[5] Id. VFS argues that this provision, on which the district court relied, carries the day in its favor.

The district court found that there was a split of authority as to whether the drawer's obligation on a draft is discharged when a joint payee unilaterally and improperly cashes a party's check accepted by the drawee bank. We survey the relevant case law as to each theory.

Markel American contends that we should adopt the Seventh Circuit's approach in Thirteen Inv. Co. v. Foremost Ins. Co. Grand Rapids Mich., 67 F.4th 389 (7th Cir. 2023), only one of our sister

[5] Comment 4 to § 673.1101 provides, in part:

> If an instrument is payable to X and Y, neither X nor Y acting

circuits to have directly addressed this issue. In Thirteen Investment Co., the plaintiff's building suffered fire damages covered by the defendant insurance company's policy. Id.

defendant's bank. *Id.* at 393. The Seventh Circuit also noted that its interpretation aligned with the two Illinois state courts to address the same (or similar) issue. *See* 893 F.3d at 394; *see also Affiliated Health Grp., Ltd. v. Devon Bank*, 258 N.E.3d 772, 777 (Ill. App. Ct. 2016) ("[W]e agree with the Insurers that because the drafts were accepted by the banks, the Insureds' obligation to pay for the medical services performed by Affiliated was discharged pursuant to section 3-414(c).").

In contrast, the approach primarily relied on by the district court adopts the reasoning in *McAllen Hospitals, L.P. v. State Farm County Mutual Insurance Co. of Texas*, 433 S.W.3d 535 (Tex. 2014). *McAllen* dealt with a Texas hospital lien statute under which a release of the lien required that "the Hospital charges were paid . . . to the extent of any full and true consideration paid to the individuals." *Id.* at 538. Two individuals were involved in a car accident with a third individual who was insured by State Farm. *Id.* at 537. The first two individuals were treated by the plaintiff hospital,

granted summary judgment in favor of State Farm, and the state appellate court affirmed. *Id.* But the Texas Supreme Court reversed.

State Farm argued that by issuing settlement checks to the patients and the Hospital as payees, and delivering those checks to the patients, State Farm made a good faith effort to pay the Hospital's charges to the extent of any full and true consideration paid to the individuals. *Id.* at 538. Thus, State Farm contended, it effectively paid the hospital, even though the Hospital was never notified that the claims had been settled, never endorsed the

State Farm was not discharged of its underlying obligations. Id. at 541.

Turning to the Florida UCC, we note that there is some tension between the two provisions that the parties urge us to apply. Section 673.1101(4) states that joint payees act together, such that discharge of the obligation can only occur by all of them. In contrast, § 673.4141(3) states that the drawer's obligation is discharged upon acceptance by a bank. At first blush, it appears difficult to reconcile these two statutory mandates.

Ultimately, we agree with the Seventh Circuit's analysis in Thirteen Investment Company and conclude that § 673.4141(3) controls the outcome here. It is true that, for a check with alternative co-payees, § 673.1101(4) states that a single co-payee, acting alone, cannot be the holder of the instrument and that an instru-

payment for negotiated claims. It did not, however, agree to assume responsibility for the bank's lack of diligence in paying a draft.

To be clear, a party in VFS's position is not without recourse. As the Seventh Circuit noted in