IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

TERRI GANT, a minor, etc., and JACK L. GANT and DONNA GANT, individually and as Personal Representatives of the Estate of Lisa S. Gant, deceased,

Respondents.

CASE NO. 66,342

RESPONDENTS' BRIEF ON THE MERITS

On Certified Conflict From the Florida District Court of Appeal, Second District

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PREFACE

Petitioner, State Farm, was the defendant before the trial court in this declaratory judgment action to determine the limits of all applicable UM coverage, and was the Appellant before the Second DCA. Respondents, the Gants, were the Plaintiffs and named insureds under the policies, and the Appellees before the Second DCA. Herein the parties will be referred to as the plaintiffs (or the insureds) and the carrier (or State Farm).

This Court has directed the District Court to transmit the Record on Appeal, however, since the Second DCA proceeding was an interlocutory appeal, the "record" consists of the Appendices filed with the Second DCA. We shall use the following symbols for reference to the Record:

"App." - Appendix to the carrier's (Appellant's) Initial Brief before the Second DCA

"Our App." - Appendix to the Insured's (Appellees') Answer Brief before the Second DCA.

QUESTION PRESENTED (RESTATED)

WHETHER THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL ERRED IN PERMITTING THE STACKING OF TWO UNINSURED MOTORIST POLICIES WHEN THE ACCIDENT OCCURRED AFTER OCTOBER 1, 1980 (WHEN THE ANTI-STACKING STATUTE WAS AMENDED) BUT THE POLICIES WERE RENEWED BEFORE OCTOBER 1, 1980?

STATEMENT OF THE CASE AND FACTS

We do not disagree with the facts as stated in State Farm's brief. However, the facts pertinent to the issue before this Court can be more succintly stated as follows.

This is a declaratory judgment action to determine the combined limits of first party UM coverage under two policies with State Farm. This action arises out of a tragic hit and run accident when an underinsured motorist ran over a group of four little girls who were playing off to the side of the street, killing three of them and severely injuring the fourth. This action involves two of the little girls who were sisters, Lisa Gant, deceased, and Terri Gant who was severely injured. (App. 3-6).

The childrens' father, Jack Gant, had two applicable auto policies with State Farm providing UM coverage. Both policies carried 50/100 liability limits. One policy (#3061274-59C) insured a Chevy Caprice and admittedly carried 50/100 UM limits, the same as the liability limits. State Farm has paid the $100,000 limits under that policy minus a $12,500 set off which is the amount available to the two Gant girls from the tortfeasor's liability insurance. (App. 131-138). (The tortfeasor had $25,000 liability coverage which was apportioned equally to each of the four girls.) The other State Farm policy (#3291 687-59A), also issued to Jack Gant, insured a Chevy Nova and purported on the declarations sheet to only provide 15/30 UM coverage.

State Farm took the position that the second UM policy (#3291 687-59A) could not be stacked, and even if it could, it only provides another $30,000 in UM benefits. The insured's position was that the second policy could be stacked since the accident occurred after the 1980 amendment to the anti-stacking statute; and that the second policy provides UM coverage in the same $100,000 amount as the liability limits since the insured was never affirmatively offered and never knowingly rejected the higher UM limits equal to liability limits. (See App. 3-6; 87-91).

Both parties filed cross motions for summary judgment. (App. 127-218, 129-130).

The trial court granted the insureds'/plaintiffs' motion for summary judgment (App. 1) and denied the carrier's motion. (App. 2). The interlocutory order determined all issues of liability in favor of the insured and was appealed by the carrier pursuant to Fla.R.App.P. 9.130 (a)(3)(c)(iv).

On appeal the Second DCA reversed the trial court's partial summary judgment on the "knowing rejection" issue, holding that there were issues of material fact to resolve on that portion of the litigation. On the stacking question, a pure question of law, the Second DCA affirmed and held that since the accident occurred after the effective date of the 1980 amendment to the anti-stacking statute, the amended statute applied and did not unconstitutionally impair the obligations of an existing contract. Thus, the two policies could be stacked. On rehearing, the Second DCA certified

that its opinion on the stacking issue was in apparent conflict with the opinion of the Fifth DCA in Metropolitan Property & Liability Insurance Co. v Gray, 446 So.2d 216 (Fla. 5th DCA 1984).[1]

SUMMARY OF ARGUMENT

A. The argument presented by State Farm at pages 6-15 of its brief, suggesting that this Court should not reach the constitutional issue which the District Court below reached and on which this Court's conflict jurisdiction is based, but instead should take an entirely new approach based on statutory construction and legislative intent, is not preserved since no such position has ever been taken before in this entire litigation by State Farm and it is even contrary to State Farm's own stipulation below in the Second District.

Apart from failing to preserve this argument, it also has no merit. There are other examples (cited in the text, infra) where the legislature has intended that an amendment to the uninsured motorist statute only apply to insurance policies issued or renewed after the effective date of the amendment and has expressly stated this in the amendment it-

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1. It might be noted that the opinion in Metropolitan v Gray, supra, was actually only the opinion of one judge on the three judge panel. Judge Dauksch concurred in the conclusion only and Judge Sharp dissented.

self; unlike the language of this amendment which clearly applies to all accidents that occur after the effective date.

B. Before the anti-stacking statute in 1976, stacking of UM benefits was recognized by this Court as a matter of public policy which was then considered so strong that it would override any contrary provisions in the insurance policy no matter when the policy was written. In 1976 the enactment of the anti-stacking statute changed the law in that regard, however, beginning October 1, 1980, the legislature after a four year experience with anti-stacking, decided to revert back to pre-1976 law and public policy. The accident here occurred after the October 1, 1980, amendment.

The Dewberry case is factually opposite to this case and raised different policy issues; and was decided at a time when this Court took a strict and inflexible approach to impairment of contracts. Two years after the Dewberry case this Court in the Pomponio case, infra, held that it would no longer follow the inflexible rule exemplified by cases such as Dewberry, but instead would adopt the same flexible balancing approach adopted recently by the United States Supreme Court for analysis of contract impairment under the United States Constitution. No longer is every law affecting or impairing an existing contract necessarily unconstitutional.

Under the new constitutional test adopted in Pomponio, to determine how much impairment is tolerable the Courts must consider how severely contract rights are impaired, and

for how long, and weigh that against the policy of the new law and the evil sought to be remedied by it.

Pomponio sets forth areas of inquiry as guidelines and affirmative answers to the following questions weighs in favor of finding the degree of contract impairment constitutionally tolerable:

(1) Was the law enacted to deal with a broad generalized economic or social problem? (Yes)

(2) Does the law operate in an area which was already subject to State regulation when the parties' contractual obligations were originally undertaken? (Yes)

(3) Does the law effect only a temporary alteration of the contractual relationship? (Yes)

Here the 1980 amendment was meant to serve an important remedial public purpose to revert back to pre-1976 stacking law, when the public policy overrode the importance of freedom of contract. Legislative history and documents specifically reflect that the 1980 legislature expressly intended this.

The 1980 amendment operates in an area which was already subject to strict state regulation (the Auto No-Fault Act) and an area which is amended in some way practically every year, as every auto liability carrier knows. Moreover, the 1980 amendment merely brings about a temporary alteration of the contractual relationship for the duration of the six month policy period until the policy is again renewed.

The carrier here did not charge a premium based on the expectation that UM coverages could not be stacked since the

carrier, even after 1980 and up to this time, has failed to increase its own premium for UM coverage, in fact it now actually charges less for UM than it did under the anti-stacking statute. This says something about the degree of impairment. The insured here had apparently always been paying for stacked coverage, even though he was not receiving it prior to October 1, 1980. Moreover, the State Farm policy itself contains a liberalization clause conforming the policy to the requirements of law.

This Court has previously held that Florida UM statutes reflecting public policy will be read even into an insurance policy issued in another state where the parties did not contract with reference to Florida law but the accident occurred in Florida; for example, stacking of UM coverage will apply even though the foreign insurance policy excluded stacking under the law of another state. Moreover, the United States Supreme Court recently held that a state may do this without unconstitutionally impairing the obligations of an existing contract.

The 1980 amendment, effective October 1, 1980, to all accidents occurring thereafter, is properly applicable to this case without any constitutional infirmity.

ARGUMENT

WHETHER THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL ERRED IN PERMITTING THE STACKING OF TWO UNINSURED MOTORIST POLICIES WHEN THE ACCIDENT OCCURRED AFTER OCTOBER 1, 1980 (WHEN THE ANTI-STACKING STATUTE WAS AMENDED) BUT THE POLICIES WERE RENEWED BEFORE OCTOBER 1, 1980?

A. (STATUTORY CONSTRUCTION)

State Farm now presentes a new argument in Section "A" of its Brief, pages 6-15, which is not preserved since it was never urged to either the trial court or the District Court of Appeal. Both in the trial court and before the Second DCA, State Farm's sole argument on the stacking issue was that even though the accident post-dated October 1, 1980, the new amendment could not be constitutionally applied to impair the pre-existing insurance policy provision which prohibited stacking of separate policies. The carrier's sole argument, up until now, has been a constitutional challenge to the "retroactive" application of the statute, based on the rationale of Dewberry v Auto Owners Ins. Co., 363 So.2d 1077 (Fla. 1978). The carrier has never before in this litigation argued anything concerning "statutory interpretation," nor urged that, even aside from the constitutional issue, the Legislature itself did not intend for the statute to apply to a situation such as the one involved here. (See State Farm's Briefs filed with Second DCA and see App. 129-130).

In fact, State Farm (who was represented by a different attorney at trial and before the Second DCA) stipulated to the Second DCA that the legislature did intend for the 1980 amendment to be immediately operative (or "retroactive," to use its terminology). State Farm wrote in its Initial Second DCA Brief, at page 13:

> "It is clear that the 1980 amendment to the anti-stacking statute was retroactively applied by the trial court. This is because the legislature intended such an application by stating that '[t]his act shall take effect October 1, 1980.' See Ch. 80-364, §2, Laws of Fla.; and Dewberry v Auto-Owners Insurance Company, at 1079."

State Farm stated again in its Reply Brief before the Second DCA, at page 4:

> "The present case is not, as Appellees suggest, Dewberry 'in reverse,' but rather the same as Dewberry. In both cases the legislature enacted laws which were intended to apply retroactively."

However, State Farm now argues in Section "A" of its brief to this Court that this Court should reverse the Second DCA "as a matter of statutory construction --- rather than as a matter of constitutional law" (Brief at p. 8), and "without reaching the constitutional question" (Brief at p. 9). State Farm now argues that the Legislature itself obviously did not intend for the 1980 amendment to apply immediately to existing insurance policies (Brief at p. 9) and that both the Second DCA in this case and the Fifth DCA in Metropolitan v Gray, supra, reached a constitutional issue which does not actually need to be reached. (Brief at p. 14).

The reason why the Second DCA (and the trial court) here reached the constitutional issue is because it was the only argument State Farm had presented. State Farm now suggests this Court often avoids reaching constitutional issues when it can dispose of a case on a non-constitutional ground. (Brief at 14-15). That may be so when multiple grounds have been preserved, however, State Farm cites no case where this Court ever avoided reaching a constitutional issue by addressing a non-constitutional ground which had never been raised by either party until the case first reached the Supreme Court. We presume this Court would not be inclined to quash the Second DCA based on a ground that had never been raised before that Court (let alone, stipulated not to exist as an issue); nor to resolve a conflict between the Second and Fifth DCA based on a ground that neither court had been asked to address. If the conflict is to be resolved it must be on the constitutional basis that both District Courts used. Otherwise, the conflict will not have been resolved.

Apart from failing to preserve this argument, it also clearly has no merit. The legislature obviously intended for the 1980 amendment to become immediately effective on October 1, 1980, since the legislature stated in the House Bill, "This Act shall take effect October 1, 1980." Ch. 80-364, §2, Laws of Fla. The accident in the present case occurred on October 9, 1980. State Farm argues that the legislature did not intend for this statute to apply unless

the insurance policy was renewed after October 1, 1980, and the accident occurred after October 1, 1980. If the Legislature had intended that, it would have expressly so stated. For example, in 1984 the legislature enacted Ch. 84-41, Laws of Fla., which amended the uninsured motorist statute in various other ways, and the Legislature expressly provided for the effective date to read as follows:

> "This act shall take effect October 1, 1984, and shall apply to new and renewal policies with an effective date on or after such date."
> (See Appendix at the back of this brief).

Evidently, when this is what the legislature intends it knows how to express such an intent in no uncertain terms.

The Second DCA correctly discerned that the constitutional issue involved here is an impairment to contract issue rather than the separate issue of retroactive impairment of an already vested property right; which is a due process issue.[2] State Farm never argued any due process issue; nor did the Second DCA here or the Fifth DCA in Gray, supra, or

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2. See for example Dewberry v Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978), involving a similar issue which this Court recognized only as an impairment of contract issue. This Court has recognized that retroactive alteration of a vested property right is a challenge arising under the due process clause of the federal and state constitution. Village of El Portal v City of Miami Shores, 362 So.2d 275 (Fla. 1978).

this Court in Dewberry, supra, address such an issue, nor is such an issue involved in this case since no property rights became "vested" until the accident occurred which was after the effective date of the 1980 amendment.

It is elementary that in an insurance contract, which is an "aleatory" contract unlike most other types of contracts, the parties' rights and obligations remain contingent until the happening of an uncertain event, and neither party has a vested property right against the other until the happening of the contingency. See "Aleatory Contract" in Black's Law Dictionary, 5th Ed. (1979), and cases cited therein. See also Restatement of Contracts, §291; and 1 Couch Cyclopedia of Insurance Law §1:5 (1984). Until the accident occurred in this case, the contract rights existed in an incohate state. Upon the happening of the accident, the rights and obligations then became vested. Clearly there was no UM claim here until there was an uninsured negligent motorist who caused injury to an insured. That is when property rights vested, and while impairment of contracts is a legitimate issue which has been preserved, the issue of legislative intent and statutory construction is not.

State Farm, at pages 6-15 of its brief, is arguing a "false" issue. We will pick up the argument now beginning at page 15 of State Farm's brief.

B. (Unconstitutional Impairment of Contract Rights)

Until the enactment of the anti-stacking statute in

1976, stacking of UM benefits was recognized by the Courts as a matter of public policy and it was held that when separate premiums were charged for UM coverage on separate vehicles the insured was entitled to aggregate or stack the coverage provided for each vehicle notwithstanding any contrary provisions in the insurance policy against stacking. Tucker v G.E.I.Co., 288 So.2d 238 (Fla. 1973); Sellers v U.S.F.&G. Co., 185 So.2d 689 (Fla. 1966); Moreno v Fidelity & Casualty Co. of N.Y., 385 So.2d 127 (Fla. 3d DCA 1980).

Effective October 1, 1976, the anti-stacking statute, section 627.4132, provided that, in a situation such as the one here where the insured was injured while he was a pedestrian, UM coverage from his own personal policy is available to him only to the extent of coverage on any one of his own vehicles with applicable coverage and the UM coverage on any other of his own vehicles could not be stacked. The anti-stacking statute used to apply to stacking of UM and various other types of auto coverages and, admittedly, if the accident here had occurred under the anti-stacking statute before its 1980 amendment, there would be no right to stack the two State Farm policies insuring Jack Gant.

However, effective October 1, 1980, the anti-stacking statute was amended by Ch. 80-364, §1, Laws of Fla., to expressly state that the statute does not apply to prohibit stacking of UM coverage, although it still prohibits stacking of other types of auto coverages. Thus, as for UM

coverage, the older case law predating the 1976 anti-stacking statute is once again controlling. The 1980 amendment was signed by the Governor on July 3, 1980, and states that it shall take effect October 1, 1980. See Ch. 80-364, Laws of Fla.

Here, the carrier argued that the 1980 amendment cannot constitutionally be applied to this case because, even though the accident happened nine days after the October 1, effective date, the auto policies were last renewed before the effective date and to apply the 1980 amendment here would unconstitutionally impair contract rights. The carrier relied on Dewberry v Auto Owners Ins. Co., 363 So.2d 1077 (Fla. 1978) which was the exact opposite situation as the present case.

In Dewberry the insured renewed his policy in August, 1976. Beginning October 1, 1976, the anti-stacking statute eliminated stacking of UM benefits on multiple autos and the accident in Dewberry occurred in December, 1976. The carrier argued that the anti-stacking statute applied. Dewberry argued, and this Court held, that to apply the anti-stacking statute to preclude the insured's pre-existing entitlement to stack UM coverage would violate the constitutional prohibition against legislation impairing the obligations of existing contracts.

Here, the carrier characterized the present case as being "Dewberry in reverse" so that the 1980 amendment cannot be applied and UM benefits cannot be stacked. The

Fifth DCA in Metropolitan v Gray case, supra, embraced that argument and it does have a superficial appeal to it, until it is closely examined (as it was by the Second DCA below).

The primary fallacy to the carrier's argument is that it fails to recognize that stacking of UM benefits before the anti-stacking statute, and now again after the 1980 amendment, is a creature of this Court's declaration of public policy in this state and the underlying purpose of UM coverage. See Tucker v G.E.I.Co., supra; Sellers v U.S. F.&G.Co., supra; Moreno v Fidelity & Casualty Co. of N.Y., supra. Therefore, both in the Dewberry case and in the present case public policy is in favor of the insured and favors the allowance of stacking. With this in mind, now analyze the constitutional argument regarding impairment of contract rights. (The carrier's brief still couches the issue here as retroactive application of the 1980 amendment, but there is clearly no retroactive application since the cause of action accrued after the effective date and the lawsuit was filed after the effective date. The real issue here is one of impairment of existing contract rights rather than retroactive application of a statute.)

Not every law which affects an existing contract is an unconstitutional impairment of that contract, and not every law impairing a contract is necessarily an unconstitutional impairment. Under the U.S. Constitution, the U.S. Supreme Court has recently held that a law which impairs the obligation of a private contract may still be constitutional if it

is reasonable and necessary to serve an important public purpose. United States Trust Co. of N.Y. v New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). Similarly, this Court has followed suit and has now adopted a more flexible approach in applying the impairment of contracts clause in the Florida Constitution Art. I, Sec. 10.

In Pomponio v Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980) this Court adopted a new test which requires the trial courts to balance the nature and extent of impairment of the contract against the importance of the state's objective. This Court stated that finding a technical impairment of a contract is merely a preliminary step in resolving the more difficult question whether that impairment is unconstitutional.

When this Court decided Dewberry in 1978, it was following the older absolute rule that, "any conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the constitution." Dewberry at 1080. The Dewberry court expressly relied on Yamaha Parts Distributors, Inc. v Ehrman, 316 So.2d 557 (Fla. 1975). However, the following year this Court in the Pomponio case departed from that rule. The Pomponio court noted its own earlier position in the Yamaha Parts Dist., Inc., case "which applied the well-accepted principle that virtually no degree of contract impairment is tolerable in this state." However the Pomponio court declined to perpetuate it and stated, "[. . . we now choose to adopt an

approach to contract clause analysis similar to that of the United States Supreme Court." Pomponio at 780.[3]

Accordingly, the present case is not controlled by Dewberry, supra, because (1) the absolute approach taken in Dewberry is no longer followed in this state after Pomponio, supra; (2) the facts here are different than Dewberry, in fact the reverse situation of Dewberry, and thus bring different public policy considerations into play.

Under the new Supreme Court test stated in Pomponio, in order to determine how much impairment is tolerable the courts must consider how severely contract rights have been impaired and weigh that against the basis and source of authority for the new law which impairs contract rights and the evil sought to be remedied by the new law. Pomponio, supra at 780. Accord, Yellow Cab Co. of Dade County v Dade County, Florida, 412 So.2d 395 (Fla. 3d DCA 1982). Cf. State of Fla. D.O.T. v Knowles, 402 So.2d 1155 (Fla. 1981).

As State Farm acknowledges at page 20 of its brief, the Pomponio opinion sets forth the following areas of inquiry as guidelines in helping to resolve the question of whether the degree of contract impairment is constitutionally tolerable:

1. Was the law enacted to deal with a broad, generalized economic or social problem?

3. To the extent State Farm implies at page 18 of its brief that Pomponio has been later modified, their position is inaccurate. In fact, in the very cases State Farm cites this Court reaffirmed Pomponio and used the balancing analysis.

2. Does the law operate in an area which was already subject to State regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the State?

3. Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships - - - irrevocably and retroactively?

Here, the 1980 amendment which allows UM coverage to be stacked as it used to be before 1976 was meant to serve an important remedial public purpose. Considering the public policy behind requiring UM coverage on every auto (unless rejected) so that the insured can be fully compensated for loss caused by an uninsured or underinsured motorist, and considering the fact that the named insured is paying separate premiums for UM coverage on each car both of which purport to cover him wherever he may be injured by an uninsured motorist, and in a situation where the insured would not be over-compensated for his injuries even if stacking was allowed, the Legislature, after a four year experience with anti-stacking, has now returned to the more equitable pre-1976 law. The Legislature has done so for the reasons explained by this Court in Tucker v G.E.I.Co., supra, in 1973 when it held on grounds of public policy that UM coverages could be stacked to effectuate the purpose of UM coverage so long as there was no actual double recovery or over-compensation of injuries. This public policy was then

so strong that stacking was allowed despite any contrary exclusionary clause in the policy; in other words, the public policy of stacking overrode the importance of freedom of contract. Tucker, supra; Moreno, supra. The Tucker case in 1973 allowing stacking was applicable to existing policies of insurance and was not merely a prospective opinion. It overrode an existing anti-stacking clause in the policy and that was not deemed an unconstitutional impairment of the carrier's contract rights because of the strong public policy reason for stacking.

Very recently another panel on the Second DCA held that after the October, 1980, amendment to the anti-stacking statute, the pre-1976 law applies once again and a policy provision prohibiting stacking is, once again, contrary to public policy. Auto-Owners Ins. Co. v Prough, 10 FLW 175 (Fla. 2d DCA, Jan. 9, 1985). The Second DCA considered certain legislative documents reflecting legislative history, such as House and Senate Committee staff reports and analyses, and the Court noted how these documents reflect that the legislature specifically intended to revert back to pre-1976 caselaw and public policy when it amended the anti-stacking statute in 1980.

The overall extent that the 1980 amendment impairs existing auto policies is not substantial when balanced against the important public policy objective to be achieved. Assuming a technical impairment, this is only the beginning of the inquiry. Now ask, "Is the impairment

constitutionally tolerable?"

Here, the contract rights of the carrier have not been so severely and unexpectedly impaired by the 1980 stacking amendment. The amendment operates in an area which was already subject to state regulation when the insurance policy was written and renewed and this area of regulation (the auto no-fault act) is frequently amended as every auto carrier knows. The 1980 amendment, as applicable to an existing policy on October 1, 1980, merely brings about a temporary alteration of the contractual relationship for the duration of that policy period since the policy is renewable every six months. The burden on the carrier is not palpably unjust. The public interest outweighs the severity of impairment to the carrier, if any.

The carrier can only argue that its contract rights are impaired because it charged a premium based on the expectation that UM could not be stacked and now it finds that expectation frustrated by intervening legislation. However, even this argument is unavailing in this case because the carrier is charging the same premium for UM coverage both before and after the 1980 amendment. In fact, it is now actually charging less for UM coverage after the anti-stacking statute than it did during the anti-

stacking statute.[4]

This is again an important distinction between this case and Dewberry. In Dewberry the insured had been charged and paid a premium for stacked coverage and suddenly the legislature said he could not have stacked coverage even though he paid for it. That was considered to be an unconstitutional impairment of his contract rights. But here the converse is not true because the carrier is charging the same premium for UM coverage with or without stacking. State Farm has not considered the 1980 amendment to be substantial enough to warrant an increase in premium structure. If the carrier finds the new law tolerable without a rise in premium then surely it is constitutionally tolerable to

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4. In this regard see the Appendices filed with the Second DCA. On the policy involved here (#3291 687-59A) insuring the Chevy Nova, the carrier charged $5.78 for 15/30 UM coverage for the six month period from 11/27/78 to 6/17/79. (Carrier's App., A-72). This was during the anti-stacking statute. After October 1, 1980, when UM can be stacked, one would expect, from the carrier's argument, the UM premium would increase. However, when this same policy (#3291 687-59A) on the Chevy Nova was renewed for six months on 12/17/80 to 6/17/81, the carrier charged only $4.20 for the same 15/30 UM coverage. (See our App., "A"). When the same policy came up again for renewal for the next six months from 6/17/81 to 12/17/81, the carrier again charged $4.20 for the same 15/30 UM coverage. (See our App. "B" or carrier's App. 122).

Similarly, on the other State Farm policy (#3061 274-59B) insuring the Chevy Caprice, the carrier charged $10.60 for 50/100 UM coverage for the six month period from 4/16/80 to 10/16/80. (See our App. "C"). That was written while the anti-stacking statute still applied to UM coverage. When that policy was renewed again on 10/24/80 for the next six months, instead of charging more for UM coverage the carrier charged only $10.13 for the same 50/100 UM limits. (See our App. "D").

apply to its existing policies for all accidents after October 1, 1980.

Moreover, the 1980 amendment did not sneak up unexpectedly on State Farm. The 1980 legislation was signed by the governor on July 3, 1980, to become effective three months later on October 1, 1980; thus giving the carrier due notice and opportunity to adjust its UM premium rate structure, if deemed necessary, by hiking rates on new policies and amending by endorsement existing policies which would not come up for renewal before October 1, 1980. Here the carrier did not deem either course of action necessary, which says something about the degree of impairment of its contract.[5]

Unlike other private contracts, auto insurance policies

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5. The carrier did not respond to this in the trial court nor before the Second DCA. State Farm now mentions in its brief (at p. 22) that it knows of no regulation which would allow it to change its premium on existing policies about to be affected by a new statute. However, State Farm cites no law, and we are aware of none, that would have prohibited it from contacting its insureds and advising that the law beginning October 1, 1980, provides for stacking of UM coverages and, unless the insureds now wanted to reject UM coverage, a pro rata increase in the premium would be charged for the availability of stackable coverage. State Farm never even considered hiking the UM premium on policies coming up for renewal after the 1980 amendment. They clearly could have done that if they deemed their contracts to be so substantially impaired by the 1980 amendment. The insured here apparently had always been paying for stacked coverage, even though he was not receiving it prior to October 1, 1980. This again distinguishes the Dewberry case, supra.

are strictly regulated and statutory requirements reflecting public policy are, by statute, to be read into the policy notwithstanding any contrary language in the policy. See §627.418 (1), Fla. Stat. (1979). Under Section 627.418, the public policy reflected in the no-fault act statutes are actually read into the policy and become part of the contract itself; therefore it is not an impairment of the contract since the new statute becomes part of the contract. Section 627.418 is not a new statute and the carrier knows that when the no-fault act is amended it automatically becomes part of the insurance policy regardless of whether the policy is amended to conform to the new law. Section 627.418 does not only speak in terms of statutes in existence when the policy is issued or renewed, as opposed to intervening statutory amendments.

Moreover, the State Farm policy itself contains a liberalization clause conforming the policy to the requirements of law. On page 6 the policy so provides whenever the policy is certified to prove financial responsibility, and on page 17 the policy provides that it may be revised to give broader coverage without an extra charge and without issuance of a new policy. (See our App. E). In light of Section 627.418 (1), a liberalization clause is not even necessary since an intervening statutory amendment reflecting a public policy requirement will be read into the policy and is not an unconstitutional impairment of the contract.

In other contexts, Florida UM insurance statutes

reflecting public policy are automatically read into an insurance policy, even a policy issued in another state when the parties did not contract with reference to Florida law but the accident occurred in Florida. See eg. Gillen v United States Auto Ass'n., 300 So.2d 3 (Fla. 1974) (held: due to the public policy favoring aggregating UM coverage, Florida stacking law will apply to Florida accident notwithstanding the insurance policy issued out of state where the parties contracted with reference to foreign law and excluded stacking.) The U.S. Supreme Court recently held that it is not unconstitutional for a state to apply its own public policy allowing stacking of UM coverage to a policy that purports to exclude stacking and was issued in a different state that does not recognize stacking; this does not unconstitutionally frustrate the contracting parties' reasonable expectations. Allstate Ins. Co. v Hague, 101 S.Ct. 633 (1981).

Applying the factors mentioned in the carrier's brief at page 20, which would weigh in favor of finding the degree of impairment constitutionally tolerable: (1) was the law enacted to deal with a broad generalized economic or social problem? (Yes); (2) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken? (Yes): (3) Does the law effect only a temporary alteration of the contractual relationship? (Yes).

The carrier argues (at page 15 of its brief) that the

Second DCA below wrote only a very brief analysis of the constitutional issue in its opinion. However, the Fifth DCA in the Metropolitan v Gray case, supra, does not engage in any analysis at all under the Pomponio balancing approach to the issue; nor does the Fifth DCA even mention that it was made aware of the Pomponio case or the Allstate Ins. Co. v Hague case from the United States Supreme Court.

Aside from the Second DCA below and the trial court in this case, several other circuit courts in Florida which have considered the issue involved here have held that the 1980 amendment to the anti-stacking statute can be applied, as it was intended, for accidents occurring after October 1, 1980, without unconstitutionally impairing an insurance contract issued or renewed before October 1, 1980. (See our Appendix F). It is not necessary to declare the 1980 legislation to be an unconstitutional impairment of contract. The 1980 amendment, effective October 1, 1980, is properly applicable to this case without any constitutional infirmity.

CONCLUSION

The opinion of the Second District Court of Appeal below should be approved and that of the Fifth DCA in Metropolitan v Gray, supra, should be disapproved.

Moreover, this Court should grant Respondents'/Insureds' separately filed motion for appellate attorney's fees pursuant to Section 627.428, Fla. Stat. (1979), as did the Second District Court of Appeal below, and remand to the trial court for assessment.

Respectfully submitted,

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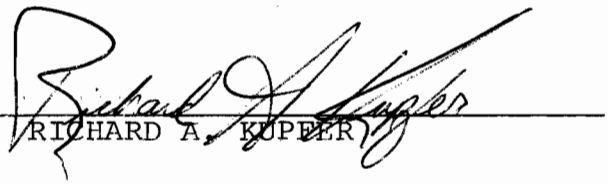
By 
RICHARD A. KUPFER

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 27th day of February, 1985, to: CHRIS W. ALTENBERND, ESQ., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P. O. Box 1438, Tampa, FL 33601.

By _____
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