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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs. CASE NO. 66,342

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,

ON CERTIFIED CONFLICT FROM THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

On October 9, 1980, Terri Gant and Lisa Gant were struck by an automoible which was driven by Rolland E. Slatzer. (Exhibit A) (A. 85, 140)[1] As a result of this accident, Terri Gant was seriously injured and Lisa Gant was killed. (Exhibit "A") These two children were sisters and lived with their parents, Jack Gant and Donna Gant, in Naples, Florida. (A. 3, 7) For purposes of this litigation, both the Plaintiffs and State Farm agree that this accident was caused by the negligence of Mr. Slatzer and that he was underinsured at the time of the accident.[2] (Exhibit A) (A. 86, 140)

At the time of the accident, the children's father, Jack L. Gant, had two motor vehicle liability insurance policies with State Farm. The first policy, policy number 306-1274-59C, provided both bodily injury liability coverage and uninsured

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1 All references to facts contained within the Court's opinion will be indicated by a citation to that opinion as an appended exhibit to this brief. This appeal was presented to the Second District Court of Appeal pursuant to Rule 9.130. Thus, there is no record prepared by the Circuit Court Clerk. All references to the appendix filed by State Farm in that Court will be indicated by the Symbol "A." followed by the appropriate page from State Farm's appendix in the Second District.

2 The Petitioner/Appellant/Defendant, State Farm Mutual Automobile Insurance Company will be referred to herein as "State Farm". The Plaintiffs/Appellees/Respondents, Terri Gant, a minor by and through her next friends, parents and natural guardians, Jack L. Gant and Donna Gant; and Jack L. Gant and Donna Gant, individually; and Jack L. Gant and Donna Gant, as Personal Reprentatives of the Estate of Lisa V. Gant, deceased, will be referred to herein as either the "Plaintiffs" or by their individual names.

motorist coverage with coverage limits of $50,000.00 per person and $100,000.00 per accident. (Exhibit "A") (A. 51) That policy insured one automobile.

(A. 34) The second policy, policy number 329-1687-59A also provided bodily injury liability limits of $50,000.00 per person and $100,000.00 per accident on one automobile. That policy, however, was issued with lower uninsured motorist coverage in the amount of $15,000.00 per person and $30,00.00 per accident. (A. 4, 34) It is undisputed that both of these policies were in effect prior to October 1, 1980. (A. 125)

State Farm voluntarily paid its full limits of underinsured motorist coverage under the larger policy to the Plaintiffs. (A. 131-138)[3]

The Plaintiffs maintain that they are entitled to stack the underinsured motorist coverage provided by the two State Farm policies because the accident happened after October 1, 1980. Effective October 1, 1980, Section 627.4132, Florida Statutes was amended so that stacking of coverages was no longer prohibited concerning uninsured motorist coverage. Chapter 80-364, Laws of Florida. (Exhibit "D") State Farm maintains that this statutory amendment can only apply to policies issued or renewed after October 1, 1980.

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[3] These settlements reflect a setoff of $12,500.00 from the full face value of the policy in light of a payment in that amount of Mr. Slatzer's liability policy. This setoff from underinsured motorist coverage was authorized by Section 627.727(1), Florida Statutes (1979).

Additionally, the Plaintiffs maintain that Mr. Gant did not knowingly select lower limits of uninsured motorist coverage on his second motor vehicle.

As a result of these disputes, the Plaintiffs filed an action for declaratory relief against State Farm in Collier County Circuit Court in the summer of 1982. That Complaint attempts to establish both that: 1) the Plaintiffs are entitled to stack the two insurance policies, and 2) the Plaintiffs are entitled to uninsured motorist limits on the second policy which equal the bodily injury liability limits of that policy. (A. 3-6) Under the first theory, the Plaintiffs would establish an additional $30,000.00 in coverage for the two claims. Under the second theory, the Plaintiffs would establish an additional $100,000.00 in coverage.

After State Farm had filed its answer disputing both of the Plaintiffs' positions (A. 7), the case was eventually decided by the circuit court on motions for summary judgment. (A. 127-130) The lower court granted a summary judgment in favor of the Plaintiffs on both theories. (A. 1) State Farm then appealed this case to the Second District Court of Appeal. (A. 139)[4] The

[4] The order which was appealed granted the Plaintiff's motion for partial summary judgment but did not expressly state that it was a partial summary judgment on the issue of liability. Since the parties agreed that Mr. Slatzer was negligent and that additional coverage would be owing if it existed, the Second District temporarily relinquished its jurisdiction to the trial court on November 10, 1983 for the entry of a partial summary judgment on the issue of liability which would clearly be appealable pursuant to Rule 9.130(a)(3)(C)(iv), Florida Rules of Appellate Procedure. Such a partial summary judgment was entered on November 16, 1983. These pleadings should be in the record forwarded to this Court by the Second District Court of Appeal.

Second District Court of Appeal reversed the Circuit Court summary judgment on the issue of whether Mr. Gant knowingly rejected uninsured motorist coverage. Under the frequently cited guidelines of Holl v. Talcott, 191 So.2d 40 (Fla. 1966), the Court ruled that this issue involved a genuine issue of material fact which could not be resolved on a motion for summary judgment. (Exhibit "A")

The Second District, however, affirmed the lower court's determination that the statutory amendment could alter the coverage available under the pre-existing insurance contract. The Court ruled that this application of the statute to the contract was constitutional under both the Florida and U.S. Constitutions and further ruled that this application was not a "retroactive application of the statute." (Appendix "A")

State Farm filed a motion for rehearing which brought to the attention of the court the Fifth District's decision in Metropolitan Property and Liability Insurance Co. v. Gray, 446 So.2d 216 (Fla. 5th DCA 1984). That case had been issued by the Fifth District after the oral argument in the Second District. In the Gray decision, the Fifth District had expressly ruled that the statutory amendment to Section 627.4132 could not constitutionally apply to a pre-existing insurance policy. (Exhibit "B") The Second District refused to follow the Fifth District's decision in Gray, but did certify that its decision was in direct conflict with the Fifth District's decision. Thus, State Farm invoked this Court's jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure.

POINT ON APPEAL

WHETHER SECTION 627.4132, FLORIDA STATUTES (1980), AS A STATUTORY AMENDMENT ENACTED SUBSEQUENT TO THE EXECUTION OF THIS INSURANCE CONTRACT, CAN LEGALLY CREATE NEW RIGHTS AND OBLIGATIONS UNDER THE PRE-EXISTING INSURANCE CONTRACT.

ARGUMENT

SECTION 627.4132, FLORIDA STATUTES (1980), AS A STATUTORY AMENDMENT ENACTED SUBSEQUENT TO THE EXECUTION OF THIS INSURANCE CONTRACT, DOES NOT CREATE NEW RIGHTS AND OBLIGATIONS UNDER THE PRE-EXISTING INSURANCE CONTRACT.

A. Without An Express an Unequivocal Statement By The Legislature That This Statutory Amendment Should Apply To Pre-Existing Contracts, It Cannot Alter Pre-Existing Contracts.

Prior to 1980, the legal community was often confused about the application of newly-enacted legislation to existing contracts. This confusion often manifested itself in the area of insurance contracts. For example, when the legislature first created uninsured motorist coverage, the new statutory provision stated:

> "This act shall take effect July 1, 1961."
>
> Chapter 61-176, §2, Laws of Florida.

The Insurance Commissioner for the State of Florida did not know whether this new enactment would apply to policies issued prior to July 1, 1961 which had effective dates of coverage subsequent to July 1, 1961. Thus, he requested an opinion from the Attorney General. 1961 Op. Att'y. Gen. Fla. 061-101 (June 19, 1961). The Attorney General noted that:

> "It is also well settled that laws are not to be given a retrospective application unless there is clearly a legislative intent that they be so applied. State ex rel Riverside Bank v. Green, 101 So.2d 805; Larson v. Independent Life & Accident Ins.

> Co., 29 So.2d 448, 158 Fla. 623; State ex rel Bayless v. Lee, 23 So.2d 575, 156 Fla. 494."

The Attorney General found no clear legislative intent that the new uninsured motorist statute should apply to pre-existing contracts and thus ruled that the new statute did not apply to policies issued or delivered prior to July 1, 1961 even though the policies may become effective subsequent to that date.

When the legislature amended Section 627.4132 in 1980 to provide that the anti-stacking statute should not apply to uninsured motorist coverage, the legislature used a format concerning the law's effective date which is identical to the format which they had used in 1961 to create uninsured motorist coverage. Chapter 80-364, §2, Laws of Florida, states:

> "This act shall take effect October 1, 1980."

By 1980, the legislature had legal instructions concerning the effective dates of legislation from a source far more authoritative than the Attorney General. This Court in Fleeman v. Case, 342 So.2d 815 (Fla. 1976) squarely held that the courts would not divine legislative intent for an issue as important as the retroactive operation of the statute. This Court stated:

> "We can restrict the debate on a legislative 'intent' for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislation under review." 342 So.2d at 817

In the Fleeman case, the Court found "no express and unequivocal statement" in the legislation that it was intended to apply to pre-existing leases and management contracts. Thus, as a matter of statutory construction - - rather than as a matter of constitutional law, this Court held that the statute was inapplicable to alter the provisions of pre-existing contracts.

The Fleeman decision culminated a long line of decisions which created a well-established rule of statutory construction. A law is presumed to act prospectively in the absence of a clear legislative intent to the contrary. 49 Fla.Jur.2d "Statutes", §107, pp. 137-138 (1984); McCarthy v. Havis, 23 Fla. 508, 2 So. 819 (Fla. 1887); Larson v. Independent Life & Accident Insurance Co., 158 Fla. 623, 29 So.2d 448 (Fla. 1947).

Since this Court's decision in Fleeman, the district courts and this Court have repeatedly pointed out that a statute is presumed to be prospective unless the legislature clearly manifests a contrary intention. Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); Cove Club Investors Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983); Lewis v. Creative Developers, Ltd., 350 So.2d 828 (Fla. 1st DCA 1977); Seitz v. Duval County School Board, 366 So.2d 119 (Fla. 1st DCA 1979).

In Dade County School Board v. Miami Herald Publishing Company, 443 So.2d 268 (Fla. 3d DCA 1983), the Third District held that 1983 changes to statutes governing access to public records were not to be applied retroactively to personnel files

compiled prior to the effective date of the statute. In ruling that the legislature had not provided an express intention for the new law to be retroactive, the Court noted that no such intention was indicated by the clause creating that statute's effective date. The clause used by the legislature in that enactment was identical to the format used in the 1980 amendment to the anti-stacking statute.

Thus, in 1980 when the legislature enacted Chapter 80-364, Laws of Florida, it knew that the courts of this state would not apply the statute to pre-existing insurance contracts in the absence of express and unequivocal language to that effect. The legislature, of course, is presumed to know existing legal precedent and its effect upon their enactments. Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964) Thus, this Court should be able to reverse the Second District's decision without reaching the constitutional question.

It should be noted that the law which created Section 627.4132, Florida Statutes had a different clause concerning its effectiveness. Chapter 76-266, Laws of Florida created the anti-stacking statute in Section 10. Section 16, the provision describing the effect of the act, states:

> "This act shall take effect October 1, 1976, and shall apply to all claims arising out of accidents occurring on or after said date."

Thus, in the 1976 enactment, the legislature clearly and unequivocally attempted to alter contracts of insurance which existed on October 1, 1976.

In Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978), this Court confirmed that the legislature had intended retroactive application of the statute by the above-referenced provision concerning the law's effectiveness. This Court, however, held that the statute would be unconstitutional as applied because it would impair the obligations of the insurance contract in violation of Article I, Section 10, Florida Constitution. This constitutional argument will be discussed in Section B of this brief.

In Carter v. GEICO, 377 So.2d 242 (Fla. 1st DCA 1979), cert. den., 389 So.2d 1108 (Fla. 1980) the First District held that a 1979 amendment to the uninsured motorist statutes could not be applied to an insurance contract issued prior to the effective date of the amendment. In that case, the amendment would have helped the insured and harmed the insurance company -- a result similar to this case. The First District noted that:

> "It is a well-settled proposition of law that contracts are made in legal contemplation of the existing applicable law. [cites omitted] . . . This substantially changes the contractual obligations anticipated by the parties at the time of contracting. To retroactively apply this statute to an insurance contract entered into before its enactment would be an unconstitutional impairment of contract. Dewberry v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978)."

The First District further recognized that the statutory provision did not expressly indicate its intention to apply retroactively. In fact, Chapter 79-241, §4, Laws of Florida used the same format as the 1980 amendment in describing the effective date. Thus, in a virtually identical situtation, the First District has refused to apply an uninsured motorist amendment to a pre-existing contract. This appears to have been done both for reasons of statutory construction and constitutional law.

Likewise, in Lumbermens Mutual Casualty Company v. Ceballos, 440 So.2d 612 (Fla. 3d DCA 1983), the Third District refused to provide the insured with a benefit under the no-fault statutes because the benefit was created by a statutory amendment subsequent to the issuance of his insurance policy. That Court again followed the "well-settled" rule that an insurance contract is governed by the statutes in effect at the time the contract is executed. The case relies primarily upon a constitutional analysis. It should be noted, however, that the amendment in question was created by Chapter 77-468, §37, Laws of Florida and was governed by an effective date similar to the format used in the 1980 amendment to the anti-stacking statute. Chapter 77-468, §45, Laws of Florida.

The Second District's decision in this case attempts to avoid the constitutional and statutory issue of retroactivity by stating:

> "First, we observe that the question is not retroactive application of the statute, but current application to an existing contract." (Exhibit "A")

The Second District cites no precedent for this proposition. This proposition clearly conflicts with the numerous, above-cited cases which hold that an insurance contract must be applied under the law existing at the time the contract was created rather than at the date the contract is interpreted. In footnote 1 to the opinion, the Second District distinguishes this Court's decision in Dewberry because Dewberry involved a situation where the new statute "would have diminished the value of his contract". Although the Second District denies that such a situation exists in this case, it is obvious that it does. State Farm entered into a contract for a given consideration to provide non-stackable uninsured motorist coverage. The Second District's decision eliminates State Farm's right to prevent stacking under its insurance contract and diminishes the value of the contract from State Farm's perspective by adding at least $30,000.00 of additional coverage.[5]

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[5] The insurance policy at issue specifically contains a provision to comply with Section 627.4132, Florida Statutes (1979). That provision states:

> "If two or more motor vehicle policies providing uninsured motor vehicle coverage issued by us to you apply to the same accident, the total limits of liability under all such policies shall not exceed that

Perhaps the Second District became confused because a claim under an uninsured motorist contract is invoked by a tort involving a third-party. Statutory changes which occur prior to torts typically apply to the tort. In this case, however, the tort is merely a condition precedent to a claim under an insurance contract with pre-existing rights and obligations upon the part of both parties.

In addition to cases involving insurance contracts, this Court has recognized that a statute is applied retroactively to a contract even if the controversy involves a dispute arising subseqeuent to the enactment of the statute. For example, in the leading case, Fleeman v. Case, 342 So.2d 815 (Fla. 1976), the Court would not remove an escalation clause from a lease which was created prior to the effective date of a statute prohibiting such escalation clauses. It is clear that the attempted escalation, apparently based upon the issuance of a new consumer price index, occurred after the effective date of the statute. Thus, the Second District's analysis of retroactivity in this case clearly conflicts with this Court's analysis of the same subject in Fleeman.

As long ago as 1887, this Court refused to provide a "current application" of an existing mechanic's lien law to a contract which pre-existed the statute. This Court held that such an application of the statute to the contract would allow it to operate retrospectively. McCarthy v. Havis, 23 Fla. 508, 2

So. 819 (Fla. 1887). Thus, the Second District's analysis conflicts with law which has been established for nearly a century.

Relying upon the definition in Black's Law Dictionary, the First District defines a "retroactive" or "retrospective" law in Heberle v. P.R.O. Liquidating Co., 186 So.2d 280 (Fla. 1st DCA 1966). That Court states:

> "A law is retroactive or retrospective if it takes away or impairs vested rights acquired under existing laws, or if it creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." 186 So.2d at 282

In this case, State Farm had a vested right to provide uninsured motorist coverage under only one of its two policies. The "current" application of the statutory amendment by the Second District took this contractual right away from State Farm. The Second District's analysis created a new obligation for State Farm and a new duty to provide an additional $30,000.00 or more in insurance coverage under a pre-existing policy which had been issued for valid consideration.

The Second District in this case and perhaps the Fifth District in Metropolitan Property & Liability Insurance Co. v. Gray, 446 So.2d 216 (Fla. 5th DCA 1984) reached a constitutional issue which does not actually need to be reached. The concept of "retroactivity" has frequently involved both a matter of statutory construction and constitutional issues. Nevertheless, this Court has repeatedly stated that it will not consider a

constitutional issue if it can dispose of a case on a non-constitutional ground. Metropolitan Dade County Transit Authority v. State Department of Highway Safety, 283 So.2d 99 (Fla. 1973); Fleeman v. Case, 342 So.2d 815 (Fla. 1976). As a matter of statutory construction, this Court should simply hold that the legislature has not expressly and unequivocally created a statutory requirement which would apply retroactively to pre-existing insurance contracts. That holding would avoid a constitutional analysis and would eliminate any consideration of the following issue.

B. Even If The Legislature Had Intended This Statutory Amendment To Alter Pre-Existing Contracts, Such An Application Of This Statutory Amendment Would Unconstitutionally Impair Existing Contractual Rights.

The constitutional analysis of the Second District in this case is very brief. In its entirety, that portion of the Second District's opinion states:

> "The legislature is free to enact such a law applicable to an existing contract unless the effect of the application is a denial of rights under the federal or Florida constitutions. The Supreme Court of the United States found no constitutional impediment to the application of a forum state's law permitting stacking to insurance policies written and issued in a neighboring state which prohibited stacking, where the policies obviously contemplated that they would not be stacked. Allstate Insurance Co. v. Hague, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). Accordingly, we find that section 627.4132, as amended October 1, 1980, may constitutionally be applied to the State Farm policies issued to the plaintiffs. We hold that the trial judge was correct in

> ruling that the uninsured motorist coverage under the two policies may be stacked in this case."

This brief analysis is unusual in at least two respects. First, the U.S. Supreme Court's decision in the Hague case does not discuss impairment of contractual obligations under Article I, Section 10 of the Constitution of the United States and does not discuss Article I, Section 10 of the Florida Constitution. The case is totally unrelated to this constitutional issue.

In the Hague decision, the U.S. Supreme Court ruled that Minnesota could apply its own choice-of-law rule in order to apply a Minnesota stacking statute to a policy of uninsured motorist coverage issued and delivered in the State of Wisconsin. The issue before the U.S. Supreme Court was whether this unusual choice-of-law decision violated the Due Process Clause or the Full Faith and Credit Clause of the U.S. Constitution. 450 U.S. at 307-308 and 101 S.Ct. at 637. Apparently, Minnesota law allowed stacking on the date that the policy was issued in Wisconsin - - a state which prohibits stacking.[6] Ironically, Florida probably would not have made the choice-of-law decision which raised this constitutional question. Generally, Florida requires an insurance contract to be interpreted under the laws of the state in which the policy is issued and delivered. Allstate Insurance Company v. Clendening, 289 So.2d 704 (Fla.

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[6] Since the decision did not relate to this issue, the facts are a little obscure. Footnote 22 to the decision, however, discusses the fact that stacking was the majority rule in this country "at the time the policy was issued". 101 S.Ct. at 642; 450 U.S. at 317.

1974); Andrews v. Continental Insurance Co., 444 So.2d 479 (Fla. 5th DCA 1984), rev. den'd., 451 So.2d 847 (Fla. 1984); cf., Gillen v. United States Auto Association, 300 So.2d 3 (Fla. 1974).

Even on the choice-of-law issue which is unrelated to the constitutional question presented in this case, the Hague decision is merely a plurality decision. Thus, the Second District's sole reliance upon this case to resolve a constitutional question under Article I, Section 10 of the Florida Constitution and its counterpart in the U.S. Constitution is baffling.

Secondly, the Second District's decision makes no attempt to analyze the factors discussed by this Court in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979) and Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975). These cases essentially establish the framework by which Florida courts are required to analyze the constitutional question of infringement of contracts under Article I, Section 10, of the Florida Constitution.

It has long been the rule in Florida that virtually no degree of contract impairment can be tolerated under the Florida Constitution. Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975). The Supreme Court relied upon that analysis in Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077, 1080 (Fla. 1978) in ruling that this same statutory provision, Section 627.4132, Florida Statutes could not be retroactively enforced at the time of its creation.

After the Dewberry decision, this Court expanded upon the Yamaha Parts' analysis in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979). This Court did not abandon the analysis of Yamaha Parts but merely created an analysis under which to evaluate whether the small degree of permissible contract impairment exists. In the Pomponio case, this Court held that a statute concerning payment of rents into the registry of the courts could not constitutionally impair pre-existing condominium contracts.

Since the Pomponio decision, this Court has reiterated that generally all forms of contract impairment are prohibited in this State. State, etc. v. Edward M. Chadbourne, Inc., 382 So.2d 293 (Fla. 1980) (declaring retroactive use of a price-adjustment formula to be unconstitutional). In Park Benziger & Co., Inc. v. Southern Wine & Spirits, Inc., 391 So.2d 681 (Fla. 1980), this Court held a regulation concerning alcoholic beverages to be unconstitutional as applied retroactively to existing contracts. This Court stated:

> "Both the United States and the Florida Constitutions provide that no law impairing the obligation of contracts shall be past. Exceptions have been made to the strict application of these provisions when there was an overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state. Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975).

> "We are unable to discern in this statute a public purpose of sufficient need to authorize an impairment of existing contractual agreements." 391 So.2d at 683

Thus, in beginning any constitutional analysis of this question it must be recognized that a presumption exists that impairment of contracts is inappropriate. The available factors must weigh heavily in favor of retroactive state regulation before such regulation has any hope to pass the strict constitutional test.

The test which was developed in the Pomponio case, is based upon the U.S. Supreme Court's analysis in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d. 727 (1978):

> "In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." 378 So.2d at 779.

In this case, it is clear that the contractual obligation has not been minimally altered. In this particular case, State Farm's obligation has increased from $100,000.00 to a minimum of $130,000.00. This one case involves at least a $30,00.00 expense for State Farm. This Court, of course, is well aware that State Farm has thousands of automobile liability

insurance policies in the State of Florida. Its annual exposure for automobile losses is very sizeable. A retroactive application of Section 627.4132, Florida Statutes (1980) effectively eliminates a clause within its uninsured motorist coverage and substantially increases the underwritten risk. Such a change affects a large percentage of their policies for a time period between six months and a year. There can be no question that the retroactive application of this statute is a severe impairment to State Farm rather than a minimal alteration.[7]

In light of this severe impairment, the Pomponio guidelines require a careful examination of the nature and purpose of the state legislation. In providing this careful examination, several factors are to be considered among others. As identified by the U.S. Supreme Court in Spannaus and adopted by this Court in Pomponio, these factors include:

> (a) Was the law enacted to deal with a broad, generalized economic or social problem?
> (b) 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?
> (c) 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?

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[7] Obviously, the impact of a retroactive application of this statute affects all of the insurance carriers who provide automobile liability insurance in the State of Florida.

These factors are considered separately at this time:

1. This statutory amendment which excludes uninsured motorist coverage from the anit-stacking statute does not deal with a broad, generalized economic or social problem.

The stacking of uninsured motorist coverage is a relatively narrow specific economic question. This is an issue upon which it is more important to have an established rule, than to have any specific rule. If insureds and insurance carriers know that stacking is permitted, insureds can purchase coverage so that the stacked limit is appropriate for their needs. Likewise, the insurance carriers can establish underwriting guidelines appropriate for such a risk. On the other hand, if stacking is prohibited, the insureds can purchase uninsured motorist coverage under that system which is appropriate for their needs and the insurance carriers can also structure their underwriting accordingly.

Interestingly, both this Court and the Florida Legislature have waivered on the advisibility of stacking uninsured motorist coverage. This Court initially prohibited stacking. Morrison Assurance Co. v. Polak, 230 So.2d 6 (Fla. 1969). A few years later, this Court decided to permit stacking. Tucker v. GEICO, 288 So.2d 238 (Fla. 1973). Likewise, the legislature first decided to generally prohibit stacking of uninsured coverage when it created Section 627.4132, Florida

Statutes in 1976. Chapter 76-266, Laws of Florida. Four years later, the legislature changed its mind. Chapter 80-364, Laws of Florida.

No one would suggest that Florida did not have a strong public policy promoting uninsured motorist coverage. That is not the question. In balancing the propriety of this specific contractual impairment, the question is whether the narrow issue of stacking is a sufficiently important issue to require constitutional impairment of insurance contracts. State Farm submits that this factor weighs in its favor.

2. Insurance contracts have long been subject to state regulation.

State Farm readily concedes that the insurance industry was subjected to state regulation for many years prior to 1980. USF&G v. Department of Insurance, 453 So.2d 1355 (Fla. 1984). State Farm would observe, however, that the State of Florida does have statutory regulations which regulate excess profits by insurance carriers. Indeed, it was these requirements which were upheld in USF&G v. Department of Insurance, 453 So.2d 1355 (Fla. 1984. On the other hand, State Farm is unaware of any regulations allowing it to change its premium on existing policies because the legislature is increasing underwriting risks by enacting retroactive laws. Thus, the regulatory structure tends to protect the public from unfair insurance premiums, but provides the insurance carriers with little protection from increased and unexpected risks retroactively established by the

legislature. Thus, this regulatory structure does not provide any substantial weight to place on the scale in favor of the plaintiffs.

3. The law effects a substantial and immediate change in the relationship between the parties. This is a permanent change which might be regarded as "temporary" only because the contracts have bi-annual or annual expiration dates.

The change provided by this statutory amendment is clearly an immediate change. On every multiple-car family auto policy, this statutory provision results in a doubling or tripling of uninsured motorist coverage. This results in a substantial increase in the underwritten risk. Although the statutory change is permanent, the retroactive impact of this statute lasts for a period of about six months to one year. This is true because most insurance policies are issued or renewed within those time periods.

In balancing these factors it is significant to point out that the insured is on legal notice of the statutory change on October 1, 1980. Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978). There is nothing to prevent the insured from arranging a change in his insurance policy on or after that date if he desires it.

Likewise, in this case the insurance carriers had legal notice that comparable enactments in the past with comparable effective dates had not been interpreted to be retroactive. Thus, the insurance carriers had no reason to anticipate this immediate change in their insurance policies.

In Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978), this Court obviously did not utilize the Pomponio analysis because Pomponio was not yet in existence. Nevertheless, this Court found that the impairment to the insureds contract was sufficiently significant to render retroactive enforcement of the statute unconstitutional. To permit the second statutory enactment to apply retroactively merely because it harms the insuror rather than the insured does not recognize the mutuality of contractual obligations or the equality of citizens under the law.

This Court should not need to reach the constitutional issue. In the event the issue is reached, however, the balance of factors weighs in favor of State Farm. The strong showing which is required to overcome the constitutional prohibition against impairment of contracts simply does not exist in this case.

C. Comments Concerning Alternative Grounds For This Court's Jurisdiction.

This Court's jurisdiction has been invoked by virtue of the Second District's certification of direct conflict. Thus, this Court's jurisdiction is initially invoked pursuant to Rule 9.030(a)(2)(A)(vi). The Petitioner would point out, however, that three other proper grounds for jurisdiction also exist.

First, even in the absence of the certification, there is direct conflict between the Second District's decision and the Fifth District's decision in Metropolitan Property and Liability Insurance Co. v. Gray, 446 So.2d 216 (Fla. 5th DCA 1984). As discussed in Section A of this brief, the Second District's ruling that this case does not involve "retroactive application of the statute, but current application to an existing contract" conflicts with this Court's decision in Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978) as well as the District Court decisions in Carter v. GEICO, 377 So.2d 242 (Fla. 1st DCA 1979), cert. den., 389 So.2d 1108 (Fla. 1980) and Lumbermens Mutual Casualty Co. v. Ceballos, 440 So.2d 612 (Fla. 3d DCA 1983). Thus, this Court also has jurisdiction pursuant to Rule 9.030(a)(2)(A)(IV).

As a third grounds, this decision expressly declares the statute to be valid in the light of a constitutional attack. This creates jurisdiction pursuant to Rule 9.030(a)(2)(A)(i).

Finally, the opinion expressly construes the U.S. and Florida Constitutions. Thus, this Court should also have jurisdiction pursuant to Rule 9.030(a)(2)(A)(ii).

CONCLUSION

The Second District's decision in this case should be reversed. This Court should rule, as a matter of statutory construction, that the 1980 amendment to Section 627.4132, Florida Statutes, was not expressly and unequivocally intended by the legislature to have retroactive effect. In the alternative, this Court should reach the constitutional issue and should rule that a retroactive application of the 1980 amendment violates Article I Section 10 of the Florida Constitution. Since either ruling will eliminate the remaining issues pending before the circuit court, such a ruling should allow the circuit court to enter judgment in favor of State Farm on all issues arising out the declaratory action.[8]

Respectfully submitted,

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[8] This resolution would, of course, also reopen the Second District's award of attorneys' fees to the plaintiffs under Section 627.428, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 8th day of February, 1985 to Richard A. Kupfer, Esquire, Cone, Wagner, Nugent, Johnson, Hazouri & Roth, P.A., Servico Center East, Suite 400, 1601 Belvedere Road, West Palm Beach, Florida 33402.

ATTORNEY