SUPREME COURT OF FLORIDA

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CASE NO. 67,385

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FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

-vs-

GEORGE POHLMAN and LUCY POHLMAN,

Respondents.

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**BRIEF OF RESPONDENTS**

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## SUMMARY OF ARGUMENT

The principles of statutory construction urged by petitioner should not be applied in this case. Initially, the statutory construction argument was not raised by petitioner below, and should not be considered. Secondly, the presumption against retroactive application of a statute or amendment is not applicable where the legislation is remedial in nature.

The 1980 amendment to section 627.4132 which excluded uninsured motorist coverage from the operation of the statute prohibiting stacking of coverages is clearly remedial in nature. A remedial statute is one "designed to correct an existing law, or introduce regulations conducive to the public good." Adams v. Wright, 403 So.2d 391, 394 (Fla. 1981). Since no vested rights are affected and no new obligation has been created, retrospective application of this remedial amendment is permissible.

The application of the law in effect on the date of the accident on this case does not constitute an unconstitutional impairment of the contract between the parties. Initially, there can be no finding of a technical impairment in this case since the carrier had an opportunity to re-evaluate the risk on an annual basis and change the premiums accordingly. FIREMAN'S FUND in fact re-rated the insurance contract in this case after the statutory change and altered the premium. Even assuming, arguendo, the existance of a technical impairment, such impairment is outweighed by the importance of the state's objective and does not rise to the level of unconstitutionality.

In any event, there were material changes to the policy post-dating the statutory amendment to which changes constituted the issuance of a new policy. It is undisputed that a new vehicle was added to the policy after October 1, 1980 for which an additional premium was charged.

## STATEMENT OF THE CASE AND FACTS[1]

Respondents do not substantially dispute petitioner's Statement of the Case and Facts since major portions of it are identical to this respondents' Statement of the Case and Facts filed in the Third District Court of Appeal. Respondents do note that the third and fourth paragraphs of petitioner's statement are totally irrelevant to the issues raised on appeal and should not be considered.

Respondents add the following facts. Respondents, as appellants before the Third District, raised the following points: (1) the trial court erred in determining there was no uninsured motorist coverage since the accident occurred after Section 627.4132 was amended, and the exclusion relied on by the insurer was invalid; (2) alternatively, the insurer's policy was materially changed after the effective date of amended Florida Statute §627.4132; the changed policy was a new and separate contract with an effective date post-dating section 627.4132 as amended; (3) an endorsement which post-dated amended section 627.4132 added as an additional vehicle to the policy and constituted a new and severable contract of insurance; therefore, the exclusion relied on by the insurer was invalid as to the added vehicle.

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[1]/ In this brief, petitioner will be referred to as FIREMAN'S FUND, and respondents will be referred to as POHLMANS. The symbol "R" will stand for the record on appeal, and the symbol "AA" will stand for petitioner's appendix; the symbol "A" will stand for respondents' appendix.

In support of the last two arguments, the record showed that the policy was re-rated on February 27, 1981 to charge an increased premium of $3,669 (R. 172). On that same date an endorsement added coverage for a 1980 Chevrolet Custom Van with an additional premium of $246 (A. 19.; R. 171).[2] A "general purpose" endorsement provided:

NAMED INSURED
DBA: GEORGE POHLMAN SHELL SERVICE & INDUSTRIAL PARK SHELL

SEQUENTIAL ENDORSEMENT NUMBER
EFF 3-1-81 9
EXP 3-1-82

IT IS AGREED THAT THE POLICY IDENTIFIED ABOVE TO WHICH THIS ENDORSEMENT APPLIES IS AMENDED IN ACCORDANCE WITH THE DECLARATIONS ATTACHED HERETO UNLESS OTHERWISE STATED AS FOLLOWS: IN ACCORDANE WITH THE RULES AND RATING PLANS IN USE BY THE COMPANY, ANNUAL RERATING OF AUTOMOBILE & GARAGE COVERAGE AT EACH ANNIVERSARY IS REQUIRED. IT IS UNDERSTOOD AND AGREED THAT THE FOLLOWING ADDITIONAL PREMIUM IS DUE FOR THE PERIOD OF 3-1-81 TO 3-1-82.

| SECTION | DECLARATIONS FORM AND PAGE NUMBER AND ENDORSEMENT NUMBER IF APPLICABLE | EFFECTIVE DATE | PREMIUM ADDITIONAL | PREMIUM RETURN |
|---|---|---|---|---|
| ☐ | GENERAL DECLARATIONS, 5951-(A) | | | |
| ☐ | TENTATIVE PREMIUM PROVISION | | | |
| ☐ | PROPERTY DECLARATIONS 5951-(B) | | $ | $ |
| | | | $ | $ |
| | | | $ | $ |
| ☐ | GENERAL LIABILITY DECLARATIONS 5951-(C) | | $ | $ |
| | | | $ | $ |
| | | | $ | $ |
| ☐ | OPTIONAL COVERAGES | | $ | $ |
| ☒ | AUTOMOBILE/GARAGE/TRUCKERS | | $ 3669 | $ |

DUE (DATE) FIRST ANNIVERSARY $

DUE (DATE) SECOND ANNIVERSARY $

TOTAL. ADDITIONAL $ 3669 A/P
RETURN $

COUNTERSIGNATURE

DATE
2-27-81 BC (10-15-82LR)

AGENCY
COMMERCIAL INS AGCY - POMPANO BCH FL

---

2/ The chevy van was not a substituted vehicle. A Ford vehicle had been deleted from the policy eight months earlier on April 16, 1980. The chevy van was not added to the policy until February 27, 1981 (A. 4, 17; R. 171).

The Third District only addressed the first issue and in footnote 2 to the decision expressly found it unnecessary to reach the additional issues raised since it found in favor of POHLMANS on the first issue (AA. 29).[3]

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[3]/ Petitioner is patently wrong when it states in the argument portion of its brief that the Third District "implicitly rejected" the claim of POHLMANS that the changes and endorsements to the contract after October 1, 1980 constituted the issuance of a new insurance contract. Brief of Petitioner, page 17.

## ISSUE PRESENTED FOR REVIEW

WHETHER FLORIDA STATUTE §627.4132 (1980) IMPAIRS THE CONTRACTUAL OBLIGATIONS BETWEEN THE PARTIES IN VIOLATION OF ARTICLE I, §10 OF THE FLORIDA CONSTITUTION.

## A R G U M E N T

FLORIDA STATUTE §627.4132 (1980) DOES NOT IMPAIR THE CONTRACTUAL OBLIGATIONS BETWEEN THE PARTIES IN VIOLATION OF ARTICLE I, §10 OF THE FLORIDA CONSTITUTION.

I. STATUTORY CONSTRUCTION -- THE AMENDED STATUTE IS NOT BEING APPLIED RETROACTIVELY.

Petitioner argues that principles of statutory construction preclude the application of amended section 627.4132 (effective October 1, 1980) to determine the rights of the parties on February, 1982--the date of the accident. However, petitioner's Point on Appeal limits itself to review of the constitutional issue of whether the application of the amended statute impairs the contractual rights of the parties in violation of Article I, §10 of the Florida Constitution. Petitioner did not properly raise the statutory construction argument, and it should not be considered. Truxell v. Truxell, 259 So.2d 766, 768 (Fla. 1st DCA 1972). See also Lynch v. Tennyson, 443 So.2d 1017, 1019 (Fla. 5th DCA 1984).

In any event, the statutory construction argument is without merit because the amended statute is not being applied retroactively. As the FIREMAN'S FUND's brief notes, chapter 80-364, §2, Laws of Florida states: "This act shall take effect October 1, 1980." The accident occurred in February, 1982, and at that time, there was no prohibition against stacking uninsured motorist coverages, and the exclusion relied upon by FIREMAN'S FUND was, again, against public policy.

The exclusion relied on by FIREMAN'S FUND was previously held invalid by this Court. Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971). This Court held the exclusion was contrary to the public policy expressed in the Financial Responsibility laws and Uninsured Motorist statute of this state. Similarly, several Florida decisions were rendered which held invalid policy provisions which prohibited stacking of uninsured motorist benefits as against public policy. See, e.g., Tucker v. GEICO, 288 So.2d 238 (Fla. 1973); Sellers v. U.S.F.&G., 185 So.2d 689 (Fla. 1966); Moreno v. Fidelity & Casualty Company, 385 So.2d 127 (Fla. 3d DCA 1980).

In 1976, however, the legislature enacted Section 627.4132 which validated the type of policy exclusion involved in this case and also prohibited the stacking of coverages in certain circumstances. New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983). After the date of the initial issuance of the FIREMAN'S FUND policy and before the date of the accident causing injury to POHLMAN, section 627.4132 was amended to remove uninsured motorist coverage from the statutory prohibition on stacking. As a recent Second District opinion notes:

> The Florida Legislature intended for the amendment to once again put into effect the prior public policy regarding stacking of uninsured motorist benefits ... Staff of House Comm. on Insurance, 1980 Fla. Legislature, Reg. Sees., Report on Stacking of Uninsured Motor Vehicles, at 2 (April 28, 1980).

Auto-Owners Insurance Co. v. Prough, ___ So.2d ___ (Fla. 2d DCA 1980), 10 FLW DCA 175, 176.

Against this backdrop, the Third District Court of Appeal found that since this case involves "only ... a statutory change that again renders unenforceable as against public policy a provision of an insurance contract," the law in effect on the date of the accident properly governed the POHLMAN'S rights in this case (AA. 29).

Implicit in the holding of the court below is a finding that the 1980 deletion of uninsured motorist coverage from the operation of Section 627.4132 was remedial in nature, and therefore excluded from the general prohibition against the retroactive application of statutes. Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d DCA 1984). A remedial statute is "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." Adams v. Wright, 403 So.2d 391, 394 (Fla. 1981).

In Adams, this Court held that Section 768.043, Florida Statutes (1977) relating to additur and remittitur in motor vehicle accident cases was remedial in nature. In making this determination, the court looked to the legislative intent expressed in subsection (3) of the statute where the legislature declared that review by the courts of awards made in motor vehicle accident cases was "in the best interests of the citizens of Florida." 403 So.2d at 394. The statute was held to be remedial in nature because it was "designed to protect the substantive rights of litigants in motor vehicle related suits." Id.

The amendment to Section 627.4132 removing uninsured motorist coverages from its operation was similarly remedial in nature. In Mullis, this Court recognized that

> The public policy of the uninsured motorist statute (Section 627.0851) is to provide uniform and specific insurance benefits to members of the public to cover damages for bodily injury caused by the negligence of insolvent or uninsured motorists and such statutorily fixed and prescribed protection is not reducible by insurers' policy exclusions and exceptions ...[emphasis in original].

252 So.2d at 233-234. See also Tucker v. Government Employees Insurance Co., 288 So.2d 238 (Fla. 1973). The 1980 amendment simply removed a legislative bar to the enforcement of the existing substantive rights of Florida's insureds entitled to recover damages from uninsured motorists; to wit, the right to receive "the reciprocal or mutual equivalent" of bodily injury protection to the extent of the coverages purchased. Id.; Mullis, supra. There is no question that the 1980 amendment to section 627.4132 was designed to reinstate important judicially declared public policy which is "conducive to the public good."

A remedial statute may be applied retrospectively as long as the statute or amendment does not affect vested rights or create any new obligations. Senfeld v. Bank of Nova Scotia Trust Co., supra. In this case there are no "vested rights" which would be impaired by allowing the law in effect on the date of the accident to govern the coverage determination. Similarly, the 1980 amendment creates no additional duty or obligation. The reinstated judicially declared public policy simply renders a provision in an insurance contract again unenforceable.

Finally, POHLMANS do not seek to "apply" the amended statute retroactively to govern the rights of the parties in this case. Effective October 1, 1980, the statute by its terms was not applicable to uninsured motorist coverage, and questions regarding uninsured motorist coverage were governed again by Mullis and its progeny. FIREMAN'S FUND in this case seeks to extend the operation of the unamended section 627.4132 beyond the time that it was "repealed" to the extent that it governed uninsured motorist coverage. On the date of the accident in this case, as far as uninsured motorist coverage was concerned, section 627.4132 was a nullity.

Petitioner's reliance upon Fleeman v. Case, 342 So.2d 815 (Fla. 1976) is misplaced. The statutory construction principles set forth in that case have no application in a case such as this where the statutory change is remedial in nature. Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157, 1164-65 (Fla. 3d DCA 1984). In addition, in Fleeman, substantive rights were affected, and the statute could not constitutionally be applied retroactively.

The Third District Court of Appeal properly determined that the law in effect on the date of the accident governs the enforceability of the exclusion relied upon by FIREMAN'S FUND, and the right of POHLMAN to stack his coverages.

## II. THE STATUTORY CHANGE DID NOT CONSTITUTIONALLY IMPAIR THE FIREMAN'S FUND POLICY.

The application of the post-Mullis, pre-1976 law in this particular case does not violate Article I, Section 10 of the Florida Constitution for two distinct reasons. Initially, FIREMAN'S FUND cannot complain that the insurance contract has been impaired because the carrier had an opportunity to re-evaluate the risk on an annual basis and to change the premium accordingly. Secondly, under the "balancing test" adopted by this Court in Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980), assuming arguendo, the presence of a technical impairment of the contract, such an impairment does not rise to the level of unconstitutionality.

Under the peculiar facts of this case, there can be no finding of an unconstitutional impairment of FIREMAN'S FUND's contract. The policy in this case was initially issued for a policy period of three years. However, FIREMAN'S FUND had an opportunity to re-evaluate the risk annually and change the premium accordingly. The record reflects that the carrier in fact re-rated the policy after the 1980 statutory change and adjusted the annual premium (A. 16). Since the carrier had written into the policy a provision allowing it to re-evaluate the risk on a periodic basis, the company had an opportunity to adjust the premium each year based on, inter alia, any statutory changes which may materially affect the risk. As a result, there can be no finding of a technical impairment of the contract.

Petitioner's reliance upon Dewberry v. Auto Owners Insurance Company, 363 So.2d 1077 (Fla. 1978) is misplaced. The strict Dewberry rule has been replaced by a more flexible test for determining whether there has been an unconstitutional impairment of contract. Under the Pomponio approach, there has been no such impairment in th is case. Additionally, the rationale behind the Dewberry decision is not controlling in this case. The Dewberry case involved different facts and different public policy considerations, and is therefore distinguishable.

The test espoused by this Court in Pomponio requires courts to balance the extent of the technical impairment of the contract against the importance of the state's objective. This Court found that an approach similar to that used by the United States Supreme Court "is the one most likely to yield results consonant with the basic purpose of the constitutional prohibition." 378 So.2d at 780.

In Pomponio, this Court noted three factors to be considered in applying the balancing test used by the United States Supreme Court:

> (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?

378 So.2d at 779, citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

Applying this approach to the case at hand leads to the conclusion that no unconstitutional impairment has taken place.

It is clear that the 1980 amendment to section 627.4132 was enacted to deal with a "broad, generalized economic or social problem." The importance of the public policy supporting this amendment was fully set forth in Mullis v. State Farm Mutual Automobile Insurance Co., supra, and needs no further explanation. Secondly, it is equally clear that the amendment operates in an area already subject to state regulation. Florida's insurance industry has long been the subject of the state's exercise of its police power. The insurance code is amended frequently, and regular changes are clearly foreseeable by the carrier when it sells a policy of insurance. Finally, it is clear that the amendment in this case does not work a severe, permanent and immediate change in the contractual relationship. As stated above, the carrier in this case had an opportunity to re-evaluate the risk under the policy after the amendment in this case and to adjust the premium charged in light of the statutory changes.

On the balance, the exercise of the state's police power in reinstating the public policy of the state as expressed in Mullis and its progeny substantially outweighs the preservation of the contract in this case. There has been no unconstitutional impairment of the insurance contract.

In any event, petitioner's statutory and constitutional arguments have no application here because endorsements and changes to the insurance contract after October 1, 1980 constituted the issuance of a new policy which incorporated the statutory amendment to Section 627.4132 effective October 1, 1980. It is undisputed that the original policy in this case was issued on March 1, 1979 (R. 51-52). It is also undisputed that on February 27, 1981, an endorsement to the policy was issued bearing an effective date of December 1, 1980 (R. 171). This endorsement added coverage for a 1980 Chevrolet Custom Van, and imposed an additional premium (R. 171). These changes were not written into the earlier policy and were material changes.

The change in premium for the entire policy and the new provision requiring annual re-rating changed the terms of the policy. Therefore, a new contract was created. In Hartford Accident and Indemnity Company v. Sheffield, 375 So.2d 598 (Fla. 3d DCA 1979), the Third District addressed an analogous situation in determining whether a succeeding policy constituted a separate contract or a renewal. The court determined that the succeeding policy was a new contract because the terms of the policy were changed. The court noted that a change in consideration (the premium) constituted a "significant change" in the policy.

Likewise, in this case the change in premium in addition to the added endorsement were significant changes to the terms of the contract. Since the changes occurred after October 1, 1980, the exclusion relied on by FIREMAN'S is invalid, and uninsured motorist coverage under the stated limits of the

policy is $75,000 per person; $25,000 uninsured motorist coverage on each of the three vehicles is stacked for a total of $75,000 in uninsured motorist coverage.[4]

In any event, even if the court determines that the contract applicable to this accident went into effect March 1, 1979 rather than March 1, 1981, there is no question that the endorsement which added coverage for a 1980 Chevrolet effective December 1, 1980 constituted a new and severable contract of insurance. United States Fire Insurance Co. v. Van Iderstyne, 347 So.2d 672 (Fla. 4th DCA 1977), cited in Hartford Accident and Indemnity Company v. Sheffield, supra.

In Van Iderstyne, the court determined that the addition of an automobile to an existing policy along with an additional premium constituted a separate and severable contract issued on the date of the endorsement. The court determined that Section 627.727, Florida Statutes which went into effect after delivery of the original policy and prior to the endorsement would be written into the new contract of insurance. Id. at 673.

In reaching this conclusion the court adopted the reasoning of the trial court that there were three possible interpretations of the effect of the endorsement:

> "a. The endorsement relates back to the date of the issuance of the original policy ...

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[4]/ The issue raised in the complaint of whether there was a knowing rejection of uninsured motorist limits equal to the $500,000 liability limits remains. If plaintiffs did not knowingly reject the higher uninsured motorist coverage, they would be entitled to $500,000 uninsured motorist coverage for each of the three cars listed on the policy.

> b. Issuance of the endorsement constitutes a reissuance or redelivery of the entire policy ...
>
> c. Issuance of the endorsement constitutes issuance of a severable and separate contract of insurance ... ."

Id. The Van Iderstyne court held that the third alternative was the proper interpretation. Under indistinguishable facts, the trial court in the instant case ruled that the endorsement adding an additional vehicle at an additional premium did not constitute a new contract (R. 184). This holding is clearly contrary to the holding in Van Iderstyne, and should be reversed.

The issuance of the endorsement on February 27, 1981 which added coverage for an additional vehicle and imposed an additional premium constituted the issuance of a separate and severable contract under Van Iderstyne, supra. As a result, the law in effect on the date of the issuance of the endorsement must be written into the policy of insurance. Alleson v. Imperial Casualty and Indemnity Co., 222 So.2d 254 (Fla. 4th DCA 1969). Since the endorsement went into effect after 627.4132 was amended, the exclusion relied on by defendants is invalid as to the added 1980 Chevrolet. Therefore, at minimum $25,000 per person in uninsured motorist coverage provided on that vehicle in the POHLMAN'S policy would be available for the February, 1982 accident.

The Third District was correct in determining that POHLMANS are entitled to uninsured motorist coverage for the February, 1982 accident.

## CONCLUSION

Since the 1980 amendment to section 627.4132, Florida Statutes was clearly remedial in nature, the Third District Court of Appeal properly held that the law in effect on the date of the accident governed the determination of the rights of the parties in this case. The application of the law in effect on the date of the accident does not unconstitutionally impair the rights of the parties in this case. Even assuming, arguendo, the presence of a technical impairment, the importance of the state's objective outweighs such an impairment, and there is no violation of the constitution.

This Court is respectfully requested to approve the decision of the Third District Court of Appeal and remand for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondents was mailed this 3rd day of September, 1985 to: FRED R. OBER, ESQ., Fifth Floor City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; JOSEPH LOWE, ESQ., 1428 Brickell Avenue, Miami, Florida 33131; and to WILLIAM C. MERRITT, ESQ., 111 Southeast 3rd Street, Miami, Florida 33130.

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