O/a 6-4-86

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IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Petitioner,

vs.

TIMOTHY L. MATTHEWS,
ET AL.,

Respondents.

_____/

Case No: 67,598

BRIEF OF AMICUS CURIAE
THE FLORIDA DEPARTMENT OF INSURANCE

WILLIAM W. THARPE, JR.
LISA S. SANTUCCI
Department of Insurance
413-B Larson Building
Tallahassee, Florida 32301
(904) 488-4540

Attorneys for Amicus Curiae
The Florida Department of
Insurance

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PRELIMINARY STATEMENT

It is not the purpose or intent of this brief to attack or otherwise comment upon the position of the Blue Cross and Blue Shield of Florida, Inc. (hereinafter Blue Cross) except as the Department of Insurance particularly believes is necessary in order to advance its positions and arguments in support of Section 627.7372, Florida Statutes. Likewise, it is not the purpose or intent of this brief to disparage any health insurance company, or insurance companies in general. The Department of Insurance's intent in filing this brief is solely to present to this Court its views, position and arguments in support of the collateral source statute which it believes to be an accurate statement of the issues and the law. The Department of Insurance further believes that, in addition to the positions taken and the statements made in this brief, the statute under attack should be upheld for public policy reasons because the effect of the statute in question is to reduce litigation and thereby control automobile insurance premiums for the benefit of the insurance buying public and that such a goal is a legitimate state interest.

STATEMENT OF THE CASE AND FACTS

The Department of Insurance adopts the statement of the case and facts as set forth in the brief of the Petitioner, Blue Cross.

ARGUMENT

I. SECTION 627.7372, FLORIDA STATUTES IS NOT UNCONSTITUTIONAL AS APPLIED TO BLUE CROSS AND BLUE SHIELD

The first major issue in this appeal is whether or not Section 627.7372, Florida Statutes is unconstitutional as applied to Blue Cross. The argument advanced by Blue Cross is that the statute violates a health insurer's right of access to courts as set forth in Kluger v. White, 281 So.2d 1 (Fla. 1973) and guaranteed by the Florida Constitution. Art. I, §21, Fla. Const. Before responding to this argument in more detail, a review of the Florida cases which have applied this provision is necessary.

A. Cases construing Section 627.7372, Florida Statutes

Sections 627.7372 and 627.736(3)[1], Florida Statutes were analyzed by the Florida Supreme Court for violations of the Florida Constitution in Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981). The Court ruled that Sections 627.736(3) and 627.7372, Florida Statutes do not violate either the right of access to courts or the right to equal protection.

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[1]Section 627.736(3), Florida Statutes relates only to personal injury protection benefits. Such benefits may only be provided by automobile liability insurers and therefor this section is not applicable here since Blue Cross is a health insurer and did not provide such benefits to its insured.

The decision in Purdy was followed in Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983); Purdy and Prince were followed in Molyett v. Society National Insurance Company, 452 So.2d 1114 (Fla. 2d DCA 1984); Prince and Molyett were followed in Zielinski v. Progressive American Insurance Company, 453 So.2d 487 (Fla. 2d DCA 1984). More recently the Purdy decision was followed and these statutes were upheld in Blue Cross & Blue Shield of Florida, Inc. v. Ryder Truck Rental, Inc., 472 So. 2d 1373 (Fla. 3d DCA 1985); Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985); and Blue Cross & Blue Shield of Florida, Inc. v. King, 479 So.2d 278 (Fla. 2nd DCA 1985).

In Purdy, supra, Mr. Purdy had been injured in an automobile accident and had received personal injury protection (PIP) benefits from his own insurance company. In the subsequent civil action against the tortfeasor the trial judge reduced the jury award to Mr. Purdy by the amount he had received from his insurance company in PIP benefits. On appeal Mr. Purdy argued that the trial judge's application of Sections 627.736(3) and 627.7372, Florida Statutes denied him his constitutional right of access to courts for redress of an injury and equal protection. The Supreme Court held that these statutes do not unconstitutionally deny access to courts since they did not abolish any previous right of access to courts. It was further held that these statutes do not violate the equal protection clause because the

classification created by the statutes (making a distinction between plaintiffs injured in automobile accidents and plaintiffs injured in other types of accidents) bears a reasonable relation to the legislative goal of reducing suits among automobile insurance carriers. In Purdy it was the injured plaintiff who sought to hold these two statutes unconstitutional. In the next three district courts of appeal cases which subsequently applied Sections 627.736(3) and 627.7372, Florida Statutes the insurers who had paid benefits to their insured sought reimbursement of those benefits when the insured subsequently settled with the tortfeasor.

In Prince v. American Indemnity Company, supra, Mrs. Prince was injured in a motor vehicle collision and, in accordance with her insurance policy, American Indemnity paid her $1,000 in medical benefits. Subsequently Mrs. Prince settled her claim with the tortfeasor and his liability insurance carrier for $15,000. The tortfeasor's liability insurance carrier (State Farm) sent one check to Mrs. Prince for $14,000 and another check to her for $1,000 payable to her and her insurer American Indemnity. In a declaratory judgement a circuit judge ruled that American Indemnity was entitled to assert its subrogation (reimbursement) rights to a portion of Mrs. Prince's settlement. On Appeal the Fifth District Court of Appeal reversed based on Purdy, supra and stated:

> Once Mrs. Prince was paid the $1,000 in medical benefits from American Indemnity,

> she had no right to collect this same sum from the tortfeasor. It follows that the tortfeasor's insurance carrier would not have paid this claim and the $1,000 payment from State Farm must represent something other than recovery for the medical benefits already paid by American Indemnity. As Mrs. Prince does not have the "right to recover" from another the medical benefits already paid by American Indemnity, nor has American Indemnity established that she actually recovered this amount, American Indemnity is not entitled to assert its right of subrogation or reimbursement.

431 So.2d at 271-272 (footnote omitted).

In Molyett v. Society National Life Insurance Company, supra, Kay Molyett and her son were insured under a group major medical health insurance policy. When her son was injured in an automobile accident, the health insurer, Society National paid $7,338.95 of his medical bills. Subsequently Mrs. Molyett's son settled his civil action against the tortfeasor and his liability insurance carrier for $10,726.96. Society National then filed suit against Mrs. Molyett and her son for reimbursement of the $7,338.95 paid for the son's medical bills based upon a "subrogation assignment" previously executed by Mrs. Molyett. The circuit court rendered a judgement in favor of the insurer and Mrs. Molyett appealed. After noting the effect of §627.7372, Fla. Stat. on an insurer's subrogation rights the Second District Court of Appeal stated the issue to be whether or not Mrs. Molyett's son had a legal right to recover from the tortfeasor and his insurer under Section 627.7372, Florida Statutes. Following the decision in Prince, supra, the Court held that

since Molyett's son was not entitled to recover from the tortfeasor those damages previously paid to him by Society National, Society National was not entitled to reimbursement for the monies paid on behalf of Molyett's son. 452 So.2d at 1115, 1116.

In Zielinski v. Progressive American Insurance Company, supra, the insurer (Progressive American) sought reimbursement of medical benefit payments made to its insured injured in an automobile accident after the insured settled with the tortfeasor and his liability insurer. The trial court ruled that Progressive American was entitled to reimbursement. On appeal the Second District Court of Appeal, citing both Molyett and Prince, reversed and held the insurer was not entitled to subrogation or reimbursement. 453 So.2d at 488.

The next three district courts of appeal cases involve attempts by Blue Cross to enforce its subrogation "rights" against alleged automobile tortfeasors and/or their liability carriers. In Blue Cross & Blue Shield of Florida, Inc. v. Ryder Truck Rentals, Inc., supra, Blue Cross filed a civil action against Ryder seeking recovery of benefits paid to one of its (Blue Cross's) insureds injured in an automobile accident allegedly caused by the negligence of Ryder. The trial court dismissed Blue Cross's complaint on the grounds that it was barred from recovery through subrogation or indemnification by the Florida Motor Vehicle No-Fault Law. On appeal the Third

District Court of Appeal affirmed and held that the common law did not recognize a right of indemnification and therefore there was no denial of access to courts. It further held that an insurer who has paid benefits to an injured party has no right of subrogation against a wrongdoer where the injured party is precluded by the collateral source rule from recovering these sums from the wrongdoer. Id. at 1375.

In Blue Cross & Blue Shield of Florida, Inc. v. Matthews, supra, Blue Cross, the Petitioner in this appeal, argued that Sections 627.736(3) and 626.7372, Florida Statutes unconstitutional violated its right of access to courts and equal protection. The First District Court of Appeal, relying on Purdy, and Molyett, supra held that these statutes, which were designed to curb litigation and encourage settlements in the area of automobile insurance, do not violate the constitution and that the limitations on an insured's right of recovery applies to the insurer seeking subrogation.

In Blue Cross & Blue Shield of Florida, Inc. v. King, supra, Blue Cross again sued an alleged tortfeasor and his insurance carrier to recover for medical expenses it had paid under its policy to an insured injured in an automobile accident caused by King. In its appeal from an order dismissing its action, Blue Cross argued that the collateral source statute violates its right of access to courts guaranteed by Article I, Section 21, of the Florida Constitution. The Second District Court of Appeal

affirmed the trial courts order based on Prince, Ryder Truck Rentals and Matthews.

The foregoing cases which have construed and applied the collateral source statute can be roughly divided into three groups. Purdy addressed the application of this statute to an injured plaintiff. Prince, Molyett and Zielinski involved actions by insurers against their own insureds for reimbursement. The three Blue Cross cases, Ryder Truck Rentals, Matthews and King, each involve attempts by the health insurer, through subrogation, to recover from the alleged tortfeasor (and/or his liability insurer) benefits paid under its health insurance policy.

In each of these cases Section 627.7372, Florida Statutes, was correctly applied by the appellate courts. When the focus is on an injured plaintiff seeking recovery from a tortfeasor and his liability insurer the statute prevents a double recovery. When the focus is on an insurer seeking recovery through reimbursement or subrogation the statute operates to prohibit such recoveries. Both of these results are in keeping with the Legislature's legitimate goal of overall regulation of automobile insurance, a major goal of which is the control of premiums.

B. Access to Courts

Blue Cross argues that Section 627.7372, Florida Statutes violates Article I, Section 21, Florida Constitution guaranteeing

access to courts for redress of any injury. In support of this argument Blue Cross relies on Kluger v. White, 281 So.2d 1 (Fla. 1973) which summarized this issue:

> [w]here a right to access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. §2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. at 4.

Blue Cross asserts that Section 627.7372, Florida Statutes has abolished its common law right to subrogation and that no reasonable alternative has been provided by the Legislature as required by the rule in Kluger.

The Department of Insurance is not convinced that an insurer's right to a subrogation action is necessarily of the character of rights intended to be protected by Article I, Section 21, Florida Constitution and the rule established in Kluger. In any event, subrogation claims are by their very nature, derivative and rise no higher than the rights of the claimant. Appleman, Insurance Law and Practice, §5196.25 (1981);

Atlantic Coast Line R. Co. v. Campbell, 139 So. 886 (Fla. 1932).

If, according to the Purdy decision, Sections 627.736(3) and 627.7372, Florida Statutes do not deprive injured plaintiffs of their right of access to courts, then neither do they deprive the subrogated insurer of the right of access to courts since subrogation "rights", if any, are totally derived from the rights of their insured. Even if it were established that Blue Cross had a common law right within the intended protection of Article I, Section 21, Florida Constitution, and that the Florida Motor Vehicle No-Fault law completely abrogated that right, it does not necessarily follow that it is unconstitutional pursuant to the rule of Kluger v. White, supra. That rule provides that such rights may be taken away without providing an alternative remedy if based upon an overpowering public necessity. 281 So.2d at p.4. The state of affairs which required the Legislature to enact the Florida Automobile Reparations Reform Act in 1971 constitutes such a public necessity. One of the several goals of the Act was to reduce litigation which affects automobile insurance premiums. Lee and Polk, Insurance 31 U. Miami L Rev. (1977); Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974); Williams v. Gateway Insurance Company, 331 So.2d 301 (Fla. 1976).

In the years that followed the enactment of the Florida Automobile Reparations Reform Act in 1971 it was discovered that

further changes were needed in order to reach the various goals of this program. It was determined that the insurer's right to reimbursement (or "equitable distribution") in Section 627.736(3) was resulting in a great deal of litigation. Purdy at 1329. Consequently in 1976 the Legislature amended that section to prevent insurers from obtaining reimbursement of personal injury protection benefits paid to its insured. §627.736(3), Fla. Stat. (1977); Purdy at 1329. The next year Section 627.7372, Florida Statutes was enacted. These subsequent changes in Florida's Motor Vehicle No-Fault Law indicate the Legislature's continuing effort to regulate the automobile insurance field for the purpose of controlling automobile insurance premiums through the reduction of litigation. The need for this form of regulation constitutes an overpowering public necessity. Consequently, the loss of subrogation rights, if any, in this case does not violate the right of access to courts or the rule of Kluger v. White, supra.

C. Direct Cause of Action By Insurers

The alternative argument offered by Blue Cross is that, despite the several court decisions to the contrary, Section 627.7372, Florida Statutes should be construed to allow insurers a separate and direct cause of action against automobile tortfeasors. In support of this argument Blue Cross repeatedly states that it had a common law right of recovery based on the theory of subrogation. Of course, insurers never had an

independent right to sue. All they ever had was the option to enforce the rights of an insured to whom they had paid money under a contract. As indicated previously, this right is derived totally from the right of the insured.

In support of its request for this Court to recognize this independent cause of action, Blue Cross relies on the case of Holyoke Mutual Insurance Company In Salem v. Concrete Equipment, Inc., 394 So.2d 193 (Fla. 3d DCA), pet. for rev. den., 402 So.2d 609 (Fla. 1981). That decision held that a subrogated insurer could sue a negligent party in its own name or in the name of the subrogor, even though its subrogor became involuntarily dissolved as a corporation. This case primarily dealt with the real party in interest issue and should not be read to hold that an insurer is entitled to collect damages which its own insured could not receive - especially in the face of a statute designed to prevent the recovery.

II. SECTION 627.7372, FLORIDA STATUES IS NOT PREEMPTED BY 29 U.S.C. §1001 et. seq. (ERISA)

Blue Cross's second major argument in this appeal is that Section 627.7372, Florida Statutes should not prevent it from seeking subrogation in the civil action below because it is claimed that the plan, of which Mr. Tyson is a member, is an ERISA plan pursuant to 29 U.S.C. §1001 et seq. However, Blue Cross and has not demonstrated that its policy is part of a plan entitled to be considered within the purview of ERISA. Blue Cross and Blue Shield of Florida, Inc. is a mutual insurance company operating under the provisions of the Florida Insurance Code. The Record on Appeal from the court below lacks sufficient evidence that the insurance policy issued by Blue Cross to Mr. Tyson's employer, Tieco, Inc., is anything more than a group health insurance policy issued to an employer covering specified members of the group which would probably include employees and their dependants. As such, it is not entitled to be called an employee benefit plan subject to ERISA preemption. The definition of an employee welfare benefit plan which is found at 29 U.S.C. §1002(1) requires that the plan be "established or maintained by an employer or employee organization". There is no evidence in the Record on Appeal that there is in fact a plan that was so established or maintained.

The Department of Insurance contends that this threshold issue to the preemption question has not been met because the

Record on Appeal does not establish that an employee welfare benefit plan in fact exists.

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, et seq., is a detailed regulatory framework which sets out standards for welfare and pension plan reporting and disclosure, fiduciary responsibility, administration and enforcement. A welfare plan includes coverage for medical, hospitalization and disability benefits. Although an ERISA objective is welfare plan regulation, pension plans are the main subject of congressional concern and are the focus of the statutory scheme. ERISA does not provide for the substantive regulation of benefit requirements for welfare plans. 4 U. Dayton L. Rev. 177 (1979)

Assuming, arguendo, that the policy issued to Tieco, Inc. by Blue Cross is a part of an employee welfare benefit plan as defined by ERISA, it does not automatically follow that any state law which affects an ERISA plan will be preempted. In order to fully address the issue of preemption of a state law by ERISA the pertinent portions of 29 U.S.C. §1144 should be considered:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975. . . .
>
> (b)(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any

> person from any law of any State which regulates insurance, banking, or securities.
>
> (b)(2)(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or to the insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. . . .
>
> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

§1144(a) which in pertinent part provides that this law "shall supersede any and all State law insofar as they relate to any employee benefit plan. . ." is referred to as the "relate to" clause; §1144(b)(2)(A) which in pertinent part provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . ." is referred to as the "savings clause"; §1144(b)(2)(B) which in pertinent part provides that an employee benefit plan shall not "be deemed to be an insurance company. . . or to be engaged in the business of insurance. . . for the purposes of any law of any State purporting to regulate insurance companies. . ." is referred to as the "deemer" clause.

Additionally it should be noted that §1144(d) provides that "[N]othing in this law shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States. . ." 4 U. Dayton L. Rev. 177 (1979).

The McCarran-Ferguson Act provides that "no act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . unless such act specifically relates to the business of insurance." 15 U.S.C. §1012(a). ERISA's "savings clause" and McCarran-Ferguson both serve the same national policy and utilize the same terminology to define that which is left to the states: laws that "regulate insurance" under ERISA and laws "regulating the business of insurance" under McCarran-Ferguson.

In the case of Wadsworth v. Whaland, 562 F.2d 70 (1st cir. 1977) the Court was concerned with a New Hampshire law which regulated the content of group insurance policies. The particular state statute in question required issuers of group health insurance policies to require coverage for the treatment of mental illness and emotional disorders. The administrators of the health and welfare funds (which did not provide such coverage to its members), sought to have this requirement ruled to be preempted by ERISA.

The Court first acknowledged that the state statute did relate to the plan and that all state laws which "relate to"

employee benefit plans are superseded. It went on to say however, that the sweeping language of the "relate to" clause is modified by the "savings clause" which reaffirms the authority of the states to regulate insurance. According to the Court, any possible conflict between the states' regulation of insurance and the regulatory provisions of ERISA must be resolved by the application of the "deemer" clause. The plan administrators argued that the deemer provision forbids states from indirectly affecting employee benefit plans by regulating group insurance. The Court stated at p.78:

> "We are unable to accept plaintiff's contention that the deemer provision forbids the states from indirectly affecting employee benefit plans by regulating group insurance. In order to accept plaintiff's construction, we would have to construe [§1144] without the saving clause pertaining to state regulation of insurance. This we cannot do; we must interpret the statute as written. Congress was fully aware of the functions and scope of employee benefit plans and, nontheless, exempted state laws regulating insurance from preemption.
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> * * *
>
> Our interpretation of the deemer provision comports with the national policy of state primacy in the regulation of insurance announced by congress in the McCarran-Ferguson Act. Under that Act, the only congressional enactment which may "invalidate, impair, or supersede" any state insurance law is an act which "specifically relates to the business of insurance. . ." This national policy is twice reaffirmed by ERISA in [§1144]: first with the saving clause, and again with subsection(d).

In Metropolitan Life Insurance Company v. Whaland, 410 A.2d 635 (N.H. 1979) the Supreme Court of New Hampshire considered the issue of ERISA preemption of a New Hampshire state statute requiring specific benefits to be provided by group insurance carriers. After a review of the various clauses found in 29 U.S.C. §1144, and in particular the savings and deemer clauses, the Court stated:

> [A] holding that the states cannot regulate benefits granted by group insurers of ERISA welfare benefit plans would leave a void in the regulation of that area because ERISA subjects welfare benefit plans to reporting and fiduciary standards only. Regulation of insurance benefits has been the domain of the states. (cite omitted). For the above reasons, we therefore hold that Congress in its enactment of ERISA has not manifested a clear and manifest purpose to preempt historic police powers of the states to regulate the contents of group insurance contracts. . .

Id. at 640 (emphasis added). In Eversole v. Metropolitan Life Ins. Co., Inc. 500 F. Supp. 1162 (C.D. Cal. 1980) an employee-member of an employee welfare benefit plan filed suit against the plan in California state court alleging among other things that the plan was guilty of bad faith in the denial of the employee-member's claim for medical benefits under the plan's insurance policy. The defendants removed the case to federal district court. First the Court devoted a considerable amount of time determining that the insurance coverage was indeed part of an ERISA plan. Then the Court reviewed and considered the various provisions of 29 U.S.C. §1144. The Court discussed the

"savings" and "deemer" clauses and the case law interpreting them including Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir. 1978) cert. denied, 439 U.S. 831 (1978). In its holding that the employee-member's claim against the plan was not preempted, the court in Eversole held:

> The rule that emerges from these cases is that a law directly regulating an employee benefit plan is preempted, but laws regulating an insurance company or policy purchased from an insurance company are saved from preemption.

500 F.2d at 1170.

The pivotal point in these cases is that the challenged state laws were not intended to control or regulate employee benefit plans. The state laws were directed at regulating an area within the state's power to regulate -- the business of insurance. Therefore, the fact that the law as enforced relates to employee benefit plans is incidental. Under the reasoning of Wadsworth v. Whaland, supra, and the cases following its reasoning, state laws regulating the benefits an employee receives under a group insurance plan will be upheld even though the result infringes on employee welfare benefit plans. Under the Wadsworth rationale, indirect regulation of employee welfare benefit plans is appropriate and permissible if the state's intent is to regulate the business of insurance. 4 U. Dayton L. Rev. 177 (1979).

Other cases upholding state regulations in the face of arguments for preemption by ERISA include, Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. 921 (D. Minn. 1976) (Minnesota

requirement that all insurers issue health insurance policies to provide a minimum level of benefits); McLaughlin v. Connecticut General Life Insurance Company, 565 F. Supp. 434 (N.D. Cal 1983) (California rules for construing insurance contract and implied covenant of good faith and fair dealing were state laws which "regulated insurance" and were exempt from preemption); American Progressive Life and Health Insurance Company of New York v. Corcoran, 715 F.2d 784 (2nd Cir. 1983) (New York regulation of maximum commission for life insurance salesmen selling to ERISA plans fell within the savings clause).

More recently the United States Supreme Court has rendered an opinion on this subject in Metropolitan Life Insurance Company v. Massachusetts, 471 U.S. _____, 105 S.Ct 2380, 85 L.Ed.2d 728 (1985). This decision held that a Massachusetts insurance statute regulating the content of general health insurance policies was not preempted by ERISA. The United States Supreme Court, observed:

> By exempting from the saving clause laws regulating insurance contracts that apply directly to benefit plans, the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause. Unless Congress intended to include laws regulating insurance contracts within the scope of the insurance saving clause, it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are applied directly to benefit plans.

105 S.Ct. at 2390.

The Petitioner cites two cases in which subrogation clauses in contracts under ERISA plans were enforced despite a state's statutory or common law prohibiting it. Davis v. Line Construction Benefit Fund, 589 F. Supp. 146 (W.D. Mo. 1984); Hunt v. Sherman, 345 N.W. 2d 750 (Minn. 1984). Neither of these cases however appear to involve subrogation for benefits paid for injury arising out of an automobile accident and the state's subrogation law in those cases was not an integral part of a comprehensive automobile no-fault law such as Florida's.

The First DCA decision from which this appeal is taken considered the foregoing cases and the intent of ERISA. The Court found that Sections 627.7372 and 627.736(3), Florida Statutes indirectly regulate the terms of insurance contracts but were not intended to apply directly to a purported welfare benefit plan. The Court then correctly concluded that ERISA's "deemer clause is inapplicable and the savings clause would exempt the state law from preemption." Blue Cross & Blue Shield v. Matthews at 836.

The regulation of insurance is clearly within the state's power as codified in the McCarran-Ferguson Act. The fact that Section 627.7372, Florida Statutes has an effect on the subrogation clause of a health insurance contract is incidental. Section 627.7372, Florida Statutes is a part of Florida's more general statutory framework intended to regulate the business of automobile insurance. It is not intended to regulate employee welfare benefit

plans. Accordingly, this Court should hold that Section 627.7372, Florida Statues is not preempted by ERISA.

CONCLUSION

Section 627.7372, Florida Statutes is an integral and vital part of the Florida Motor Vehicle No-Fault Law which has as two of its major goals the reduction of litigation arising from automobile accidents and the lowering of automobile insurance premiums. These are certainly legitimate state interests. Both facially and as applied in this case this statute does not deny access to courts, and therefore should be held constitutional. To allow Blue Cross and other collateral source insurers the independent cause of action they have asked for would be contrary to the overall legislative goal of reduction of litigation arising out of automobile accidents. Additionally, the policy issued by Blue Cross in this case is probably not part of an ERISA welfare benefit plan. Even if this case involved a legitimate employee welfare benefit plan under the regulation of ERISA, this Florida statute should not be preempted by ERISA because it is not intended to regulate employee welfare benefit plans, but rather to regulate the business of automobile insurance.

Respectfully submitted,

William W. Tharpe, Jr.
WILLIAM W. THARPE, JR.

Lisa S. Santucci
LISA S. SANTUCCI

Department of Insurance
Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished by U.S. Mail to: John N. Boggs, Esquire 209 E. Fourth Street, Panama City, Florida 32402; Clifford J. Schott, Esquire, 726 S. Missouri Avenue, Lakeland, Florida 33801; Edward C. Rood, Esquire 200, Pierce Street, Tampa, Florida 33602; Edward P. Nickinson, Esquire, 200 E. Government Street, Pensacola, Florida 32582; Alan C. Sundberg, Esquire, First Florida Bank Building, Post Office Drawer 190, Tallahassee, Florida 32302; Andrew Needle, Esquire, Suite 300, Grove Professional Building, 2950 S.W. 27th Avenue, Miami, Florida 33133; H. Lawrence Hardy, Esquire, 2121 Ponce de Leon Blvd., Suite 650, Coral Gables, Florida 33134; Mitch Franks, Esquire, Department of Legal Affairs, Suite 1501, The Capitol, Tallahassee, Florida 32301 and Raymond T. Elligett, Jr., Esquire, Post Office Box 3324, Tampa, Florida 33601 this 18th day of April, 1986.

William W. Tharpe, Jr.

WILLIAM W. THARPE, JR.
413-B Larson Building
Tallahassee, Florida 32301
(904) 488-4540