IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.

Appellant,

v. CASE NO. 67,598

TIMOTHY L. MATTHEWS,
et al.

Appellees.

_____/

ON PETITION FOR DISCRETIONARY REVIEW TO THE
SUPREME COURT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

The petitioner, Blue Cross and Blue Shield of Florida, Inc. was the appellant in the District Court of Appeal, First District, and sought leave to intervene in this action in the trial court. The respondent, or Paul C. Tyson, was the plaintiff in the trial court, and Timothy L. Matthews and J. N. Construction Company, were defendants in the trial court. The Florida Department of Insurance was permitted to participate in proceedings before the District Court of Appeal as Amicus Curiae. In this brief, the parties will be referred to as they stand before this Court and, alternatively, as "Blue Cross" or by the respective surnames of the respondents. The Symbol "A" shall stand for petitioner's appendix which accompanies this brief.

STATEMENT OF THE CASE AND FACTS

This is a petition for discretionary review of the decision of the First District Court of Appeal affirming a denial of Blue Cross' Motion for Leave to Intervene. Mr. Tyson was injured in an automobile accident allegedly caused by the negligence of Mr. Matthews, who was driving a vehicle owned by J. N. Construction Company. As a result of injuries sustained by Mr. Tyson in that accident, Blue Cross has paid $18,844.44 in medical and hospital benefits. After Mr. Tyson sued Mr. Matthews and J. N. Construction Company for damages arising from the accident, Blue Cross sought leave to intervene in the action for the purpose of claiming from the defendants its damages, to which it was entitled by common law right of subrogation, and by right of subrogation through contract with Mr. Tyson. The trial court denied Blue Cross' Motion for Leave to Intervene, holding that Blue Cross' right of recovery is abrogated by §§627.7372 and 627.736(3), Fla. Stat., and finding the statutes to be constitutional. (A - 1).

Blue Cross filed a timely appeal to the District Court of Appeal, First District, arguing that the above-cited statutes are unconstitutional as applied under the circumstances of this case. On August 9, 1985 the First District Court of Appeal affirmed the denial of Blue Cross' Motion for Leave to Intervene, holding that the statutes did not unconstitutionally restrict access to the

courts, and did not constitute a denial of equal protection of the law. (A - 2). In addition, the First District Court of Appeal held that the cited statutes are not preempted by the provisions of the Federal Employee Retirement Income Security Act (ERISA), 29 USC §§ 1001 et. seq. (A-5).

Blue Cross filed its notice to invoke the discretionary jurisdiction of this Court on September 6, 1985.

SUMMARY OF ARGUMENT

In this action Blue Cross challenges the constitutionality of §§ 627.7372 and 726.736(3), Fla. Stat. Those statutes provide than an injured party has no right to recover damages caused by a tortfeasor in an automobile accident to the extent an insurer has paid for those damages. The statutes have been construed here to prohibit Blue Cross, which has paid Tyson's medical bills resulting from an accident allegedly caused by Matthews' negligence, from seeking to recover those expenses from Matthews.

If these statutes are construed to prohibit Blue Cross from suing Matthews, then the statutes unconstitutionally restrict Blue Cross' access to the courts by abolishing a right of action available at common law without providing a reasonable alternative and without a showing of overwhelming public necessity.

Secondly, Blue Cross has been denied equal protection of the law in that insurers which provide automobile liability insurance coverage arguably receive some benefit from the subject statutes (so that the statutes might arguably be applied constitutionally to those insurers); insurers such as Blue Cross receive no such benefits, however, and are therefore simply denied their common law rights by the statutes.

Lastly, Blue Cross contends that because its subject policy is part of an employee benefits plan regulated by ERISA, state law is preempted by that federal statute.

ARGUMENT

In its appeal from the trial court's denial of its motion for leave to intervene in this action, Blue Cross contended that §§ 627.7372 and 627.736(3), which form the basis of the denial of leave to intervene, are unconstitutional as applied to Blue Cross under the facts of this case because (1) they deny access to the courts contrary to Article I, § 21 of the Florida Constitution and (2) as applied, they deny equal protection of the laws. In addition, Blue Cross contended the statutes were preempted by federal law, and thus were being applied contrary to Article VI of the Constitution of the United States. This Court may grant discretionary review because the District Court's decision

expressly declares valid a state statute.[1] Moreover, Blue Cross contends that the District Court's decision expressly and directly conflicts with Kluger v. White, 281 So.2d 1 (Fla. 1973).

Sections 627.7372 and 627.736(3) are construed by the District Court to abrogate an insurer's long-recognized right to recover from a tortfeasor money damages caused by the tortfeasor[2], and for which the insurer has paid as a result of its contract with its insured. An insurer's right to such a recovery from the tortfeasor has been recognized in Florida at least since Firestone Service Store, Inc. of Gainesville v. Wynn, 131 Fla. 94, 79 So. 175 (1938). See also Travelers Insurance Co. v. Rodriguez, 367 So.2d 687 (Fla. 3d DCA 1979), aff'd. 387 So.2d 341 (Fla. 1980).

In Kluger v. White, supra, this Court held that

> Where a right of access to the Courts for a particular injury has been provided by . . . the common law of the state . . ., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights 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.

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[1]Art. V, § 3(b)(3), Fla. Const.

[2]By their own terms, the statutes explicitly restrict the injured party's right to recover. The courts here have construed the statutes to restrict the insurer's right of subrogation as well.

281 So.2d at 4. These statutes have been held to abolish the right of an insurer to recover its losses from a tortfeasor without providing any reasonable alternative to protect insurer's rights. The statutes are thus unconstitutional as applied to Blue Cross.

This Court has previously considered a challenge to the constitutionality of §§ 627.7372 and 627.736(3) based upon a contention that an injured individual's right of access to the courts was unconstitutionally impaired insofar as the injured party is prevented from recovering from the tortfeasor damages which have been paid by "collateral sources." This Court found the statutes were not unconstitutional under those facts, because the statutes

> do not deprive persons injured in automobile accidents of their right of access to the courts. These sections merely prevent injured plaintiffs from recovering monies which, equitably speaking, belong to their insurers. Furthermore, there is nothing in the law which prevents injured persons from waiving their rights to receive insurance benefits and suing the tortfeasor for the full amount of their damages. Section 627.7372 sets off only those benefits which actually have been paid. Section 627.736(3) sets off benefits which are "paid or payable," which we interpret to include only those benefits a person is entitled to under his or her contract after he or she files a claim. Thus the right of access to the courts is left completely unimpaired.

Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1329 (Fla. 1981)(emphasis added).

It is important to note that Purdy held, correctly, that the statutes do not abrogate a person's right of action for medical expenses against the tortfeasor. Rather, the right to recover damages is restricted to the extent that person has received compensation for those items of damage from his or her own insurer (and thus no longer has suffered a loss to that extent). Until the insurer pays the injured party, the right of action (and right of recovery) against the tortfeasor remains viable.

Here, the First District Court of Appeal has ruled that Blue Cross has no claim for which access to the courts can be denied. The Court's rationale is that an insurer's right of subrogation is derivative to the insured's right to recover damages from the tortfeasor. Since payment by insurer to injured party abrogates the injured party's right to recover those expenses from the tortfeasor (by the terms of the statutes), the Court reasoned the insurer's right of recovery must be similarly restricted.

It would be difficult to construct a more perfect Catch-22 situation.[3] An insurer has no right of subrogation until it

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[3]In Joseph Heller's novel Catch-22, World War II bomber crews were faced with the dilemma of knowing they could avoid flying hazardous missions by proving they were crazy. Air Force authorities knew, however, that only a crazy man would go on such a mission; therefore, when a man applied for release from

makes payment for its insured's loss. National Surety Corp. v. Bimonte, 143 So.2d 709 (Fla. 3d DCA 1962). Payment to the insured is thus an essential element of the insurer's common-law cause of action against the tortfeasor. According to the District Court's logic, however, that very act of payment abrogates the right of action by destroying the insured's right of recovery of those damages from the tortfeasor.

That result would make sense if Blue Cross were seeking to recover damages from its insured. At least three Florida courts have considered that situation. Zielinski v. Progressive American Insurance Company, 453 So.2d 487 (Fla. 2d DCA 1984); Molyett v. Society National Life Insurance Company, 452 So.2d 1114 (Fla. 2d DCA 1984); Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983). In each of those cases, the insurer which paid medical expenses sought recovery of those expenses from its own insured, which had settled with the tortfeasor. Each of those courts reasoned, correctly, that the insurer could not obtain recovery from its own insured, since the subject statutes prevented the insured from having received any money damages from the tortfeasor which represented those expenses paid by the collateral source.

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such service on the basis that he was crazy, his very act of applying for the exemption proved that he was not crazy, so that he could not quality for the exemption.

The situation here is very different: Blue Cross seeks to recover its damages from the tortfeasor, not from its own insured. Here, there is no reason to believe a recovery by Blue Cross will reduce the insured's ability to recover any damages due him. Under the District Court's decision, Matthews may be held liable for Tyson's medical expenses until Blue Cross pays them. Once that happens, Purdy provides that Tyson may not recover those damages from Matthews. Here, however, the District Court went further to say that Blue Cross, which is without fault and has been damaged by Matthews' alleged negligence, is prohibited from exercising its common-law right for action against Matthews precisely because Blue Cross has paid for the damage Matthews caused.

Although not mentioned in the District Court's opinion, it has been suggested that insurers are provided reasonable alternatives for protection of their rights under these statutes. The suggestion is that, while insurers which pay for medical expenses may not recover these expenses as subrogation, they will likewise not be subject to subrogation claims by other insurance companies. This argument makes sense when applied to automobile insurance carriers which may be on both the paying and receiving ends of subrogation suits. It does not apply to Blue Cross, which is prevented from recovering its subrogated claims, but will never be in a situation where the statute prevents

someone else from recovering from Blue Cross. The Fifth District opinion in Prince, supra, recognized this anomaly in a footnote:

> We must admit to difficulty in understanding the economic or social purpose of the collateral source rule. In circumstances such as these, the tortfeasor's insurance carrier escapes liability and the injured party's carrier pays. Even more incomprehensible would be the case where the health or medical policy had no connection whatever with the automobile coverage.

431 So.2d at 272.

The District Court's opinion is an exercise in sophistry. The Court held that Blue Cross' access to the courts is not denied because its common law cause of action is abrogated by the very act necessary to the existence of the cause of action. The District Court then relies, for constitutionality of this result, upon Purdy, which is based on entirely different principles. Purdy holds that the injured party is denied access to the courts only to the extent he seeks to recover the same damages twice.[4] Because Purdy holds the injured party cannot recover his medical bills twice, the First District Court reasons that the insurer cannot recover them once. Holding the statutes constitutional in denying Blue Cross a right of recovery because Purdy holds them constitutional in denying the injured party a

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[4] "These sections merely prevent injured plaintiffs from recovering monies which, equitably speaking, belong to their insurers." Purdy, 403 So.2d at 1329.

right of double recovery is the height of absurdity. Blue Cross seeks not double recovery, but only recovery of what it has lost as a result of the tortfeasor's negligence. The common law of this state provided Blue Cross a right to that recovery. These two statutes are held to have abrogated that right, without providing Blue Cross any reasonable alternative for protection of its rights. The statutes are thus unconstitutional as applied in the circumstances of this case, and the decision conflicts with Kluger v. White, supra.

CONCLUSION

The exercise of this court's jurisdiction is appropriate and necessary to consider the merits of this case. Sections 627.7372 and 627.736(3) are unconstitutional as applied to Blue Cross. The decision of the District Court upholding the statutes not only conflicts with the guarantee of access to the courts in the Florida Constitution, but also conflicts with Kluger v. White, supra. The statutes are preempted by ERISA, 29 U.S.C. §§ 1001 et seq. Blue Cross respectfully requests this court to exercise its jurisdiction to consider the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John N. Boggs, Esq., 209 E. Fourth Street, Panama City, Florida 32402; Clifford J. Schott, Esq., 726 S. Missouri Avenue, Lakeland, Florida 33801; Edward C. Rood, Esq., 200 Pierce Street, Tampa, Florida 33601 and to William W. Tharpe, Jr., Esq., Department of Insurance, 413-B Larson Building, Tallahassee, Florida 32301, by U. S. Mail this the 16th day of September, 1985.

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