IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Appellant,

v. DOCKET NO. 67,598

TIMOTHY L. MATTHEWS,
et al

Appellees,

_____/

PETITIONER'S BRIEF ON THE MERITS

EDWARD P. NICKINSON, III
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
200 East Government Street
Post Office Box 12426
Pensacola, Florida 32582
(904) 434-0142

ALAN C. SUNDBERG
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
First Florida Bank Building
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Appellants

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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 to 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.

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, Fla. Stat. (1985), and finding the statute to be constitutional.

Blue Cross filed a timely appeal to the District Court of Appeal, First District, arguing that the above-cited statute is 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 statute did not unconstitutionally restrict access to the courts, and did not constitute a denial of equal protection of the law. In addition, the First District Court of

appeal held that the cited statute is not preempted by the provisions of the Federal Employee Retirement Income Security Act (ERISA), 29 USC 1000 et. seq.

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, Fla. Stat. (1985), as construed by the lower courts. That statute provides that an injured party has no right to recover damages caused by a tortfeasor in an automobile accident to the extent an insurer or other "collateral source" has paid for those damages. The statute has 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.

Blue Cross argues initially that the statute may be construed to leave Blue Cross' right of action on its subrogated claims intact. If the statutory bar to the insured's double recovery is held to be an impediment personal to the insured, rather than an impediment to the cause of action, the statute will not abrogate subrogation actions. Such a construction is consistent with the long-recognized doctrine of subrogation, and avoids abrogation by implication of the right of action in subrogation by a statute which does not affect subrogation rights explicitly. Such a construction also eliminates the need to examine the constitutionality of the statute.

If this statute is construed to prohibit Blue Cross from suing Matthews, then the statute unconstitutionally restricts Blue Cross' access to the courts by abolishing a right of action available at common law without providing a reasonable

alternative remedy and without a showing of overwhelming public necessity.

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. ERISA explicitly preempts all state laws which affect employee benefit plans. A savings clause exempts from the general preemption any state law which regulates insurance. As construed,§627.7372 affects employee benefit plans by eliminating those plans' right of subrogation. The statute does not, however, regulate insurance because its stated purpose is to affect only the claims pending between injured party and tortfeasor; in addition, the statute affects not only insurance carriers, but also Social Security, Medicare, employer-supplied benefits and any other "collateral source."

ARGUMENT

I. AS CONSTRUED BY THE LOWER COURTS, SECTION 627.7372, FLA. STAT., (1985) IS UNCONSTITUTIONAL AS APPLIED.

The lower courts have construed §627.7372, Fla. Stat. (1985), as barring Blue Cross from seeking recovery of damages from Mr. Matthews flowing from his negligence which resulted in injury to Blue Cross' insured, Mr. Tyson. Initially, this brief will discuss the propriety of that statutory construction; the brief will then demonstrate that, if the statute is construed as the lower courts have construed it here, the statute unconstitutionally denies Blue Cross access to the courts of the State of Florida.

A. STATUTORY CONSTRUCTION.

The trial court and the First District Court of Appeal each held that Blue Cross could not pursue its claim against Mr. Matthews for damages caused by Mr. Matthews' negligence. Mr. Matthews negligently injured Mr. Tyson, Blue Cross' insured. That injury necessitated medical treatment, the expenses of which were substantially reimbursed by Blue Cross pursuant to its policy of insurance under which Mr. Tyson was a beneficiary. At common law, Blue Cross clearly is entitled, in subrogation to Mr. Tyson's right of action against Mr. Matthews for his negligence, to make a claim against Mr. Matthews for those portions of the

damage he caused which Blue Cross, by contract, became obligated to pay and did pay.

Here, the lower courts have ruled that Blue Cross cannot maintain its action because §627.7372 prohibits Mr. Tyson, as a plaintiff in an action based upon negligent operation of an automobile, from recovering from Mr. Matthews any sums for which Mr. Tyson has been reimbursed by any "collateral source" as that term is defined by the statute. The lower courts have reasoned as follows: (1) Blue Cross' right of action against Mr. Matthews is derivative; (2) the statute bars Mr. Tyson's right of action against Mr. Matthews for recovery of sums received by Mr. Tyson from collateral sources; therefore, (3) that bar necessarily extends to Blue Cross' right of action against Mr. Matthews.

In reaching this conclusion, the lower courts have relied on a series of cases construing the statute. The most important of these cases is Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981). In Purdy, this court found the statute was constitutional in the face of an attack by a plaintiff seeking damages from the party who negligently injured him. The court reasoned that the plaintiff was not denied access to the courts to seek compensation for his damages because his right of action for medical expenses was barred only to the extent he had already recovered them from his own insurers or other collateral sources.[1] Thus, under the facts of Purdy, the statute bars only

[1]The court noted the injured party retained the option of suing the tortfeasor for all damages by declining to obtain compensation from a "collateral source."

double recovery by the plaintiff, and does not prevent the plaintiff in any way from being made whole.

The Purdy decision has been applied in a number of cases involving insurers' claims for subrogation: Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983); Molyett v. Society National Insurance Company, 452 So.2d 1114 (Fla. 2d DCA 1984); and Zielinski v. Progressive American Insurance Company, 453 So.2d 487 (Fla. 2d DCA 1984). In each of these cases, an insurer which had reimbursed its insured for some portion of the insured's damages sought to recover those sums out of its own insured's recovery from the tortfeasor. In each case, the court denied the insurer's claim. Each of the courts properly reasoned that, since §627.7372 and Purdy prevented the insured/plaintiff from recovering from the tortfeasor any item of damage for which the insured/plaintiff had been reimbursed by a collateral source, the insured's recovery from the tortfeasor necessarily excluded those items of damage. Thus, the courts reasoned, it would be unfair to make the insured/plaintiff refund to the collateral source any portion of his recovery. The logic of these decisions is impeccable, and Blue Cross does not challenge them here. Blue Cross' only quarrel with these decisions is that the lower courts in this case have used them illogically to justify a decision barring Blue Cross from recovering its claim from the tortfeasor, not from its insured.

In this action, Blue Cross has not sought, and does not seek, to obtain any portion of Mr. Tyson's prospective recovery

from Mr. Matthews. Rather, Blue Cross seeks to enforce its common law right to recover from Mr. Matthews those damages which he has caused, and for which Blue Cross has become liable by contract. The decisions in Purdy, Prince, Molyett, and Zielinski have no application to this case. Blue Cross is not seeking to recover damages for which it will be reimbursed by some other source; nor is Blue Cross seeking to diminish its insured's recovery in any way.

Section I. B. of this brief demonstrates that the construction given §627.7372 by the lower courts necessitates a finding that the statute is unconstitutional as applied. In this section, Blue Cross suggests that finding of unconstitutionality can be avoided by a narrower construction of the statute. It is the duty of the court to construe statutes so as to uphold their validity and avoid a finding of unconstitutionality, if there is any reasonable basis for the construction. Dunedin v. Bense, 90 So.2d 300 (Fla. 1956); Miami v. Kayfetz, 92 So.2d 798 (Fla. 1957); Pinellas County v. Laumer, 94 So.2d 837 (Fla. 1957). Where provisions of the Constitution, as construed by earlier judgments of the courts, conflict with a statute, the statute "must yield to a construction which will harmonize with the Constitution." Stansell v. Martin, 153 Fla. 421, 14 So.2d 892, 893 (1943). Therefore, the language of a statute should not be given its broadest meaning if doing so would render the statute of doubtful constitutionality. Olds v. State ex rel. Cole, 101 Fla. 218, 133 So. 641 (1931). Moreover, courts will not pass on the

constitutionality of a statute if the case can be decided on nonconstitutional grounds. Maxcy v. Mayo, 103 Fla. 552, 139 So. 121 (1931); Armstrong v. Stone, 130 Fla. 615, 178 So. 294 (1938).

It remains to be seen whether, apart from the inapplicable holdings in the cases cited above, the statute must be construed to bar Blue Cross' right of subrogation against the tortfeasor.

At common law, an insurer's right to recover money damages from a tortfeasor who has injured the insured, and thus caused the insurer to pay some or all of the insured's damages under its contract, has been recognized in this state at least since Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. So.2d 886 (1931). Accord, Rosenthal v. Scott, 150 So.2d 433 (Fla. 1961); Rodriguez v. Travelers Ins. Co., 367 So.2d 687 (Fla. 3d DCA 1979), affirmed 387 So.2d 341 (Fla. 1980); Blue Cross of Florida Inc. v. O'Donnell, 230 So.2d 706 (Fla. 3d DCA 1970); Rebozo v. Royal Indem. Co., 369 So.2d 644 (Fla. 3d DCA 1979); State Farm Mutual Automobile Ins. Co. v. Robbins, 237 So. 2d (Fla. 4th DCA 1970); Morgan v. General Ins. Co. of America, 181 So.2d 175 (Fla. 1st DCA 1965).

The insurer's right of action is, however, subject to defenses which might be raised against the insured. Atlantic Coast Line R. Company v. Campbell, supra. It is on this basis the lower courts have held that §627.7372, Fla. Stat. (1985), prevents Blue Cross from suing Mr. Matthews. The statute bars Blue Cross' insured from recovering from the tortfeasor any damages for which he has been reimbursed by Blue Cross. The

lower courts have held that since the insured is barred from recovery, and the subrogated insurer can have no greater rights than the insured, the insurer is precluded from recovering as well.

Although this conclusion may seem logical, it is not the only possible interpretation of the statute. Not every defense which is available against the insured will bar the insurer from enforcing its subrogated claim.

In Holyoke Mutual Insurance Company v. Concrete Equipment, Inc., 394 So.2d 193 (Fla. 3d DCA 1981), pet. for rev. den., 402 So.2d 609 (Fla. 1981), the court held that the subrogee "inherits only an impediment to the cause of action . . ., not an impediment personal to the subrogor." 394 So.2d at 197 (citation omitted). The Holyoke court was faced with a "Catch-22" situation not unlike the present case. Holyoke sought to enforce a claim against Concrete Equipment as subrogee of its insured, ABC Pools, Inc. By the time the lawsuit was filed, ABC was no longer in existence as a corporation. Holyoke filed suit in its own name. The trial court dismissed the suit, on the erroneous ground that the suit could only be brought in the name of ABC. Holyoke amended its complaint to sue in the name of its insured, only to have the amended complaint dismissed on the ground that the dissolved corporation had no standing to sue. The Third District Court of Appeal held (1) Holyoke could sue in its own name; and (2) the disability of the dissolved corporation was not an impediment to Holyoke's action, because it was an impediment

personal to the subrogor.

Nothing in §627.7372 prevents a similar construction of that statute. Section §627.7372 does not, by its terms, prohibit an action by a subrogee. It merely prohibits double recovery by the injured party himself. The provisions of the statute do not constitute a bar inhering in the cause of action; this is demonstrated by the fact that the injured party has an absolute right to decline any benefits under his insurance policy or other collateral source and seek compensation, even for damages which might have been paid by a collateral source, from the tortfeasor. Purdy, supra, 403 So.2d at 1329. Thus, the bar of the statute can be construed to operate only as a personal impediment to double recovery by the injured party.

The Legislature did not explicitly abrogate Blue Cross' right of subrogation in §627.7372. Nothing in the statute indicates the Legislature intended a change in the law of subrogation when it adopted this statute intended to change the law of tort. In this case, Blue Cross' right of subrogation has been abrogated solely because the lower courts have construed a statute intended to affect one area of the law as having an effect in a very different area. The statute should be construed to have only its intended effect, and to leave subrogation rights unaffected.

Such a construction of the statute would preserve Blue Cross' right of action to enforce its subrogated claim against the tortfeasor. Any construction of the statute which does not

preserve Blue Cross' subrogated claim necessarily holds that the statute bars or abrogates that claim, requiring consideration of the constitutional issues relating to access to the courts. If the statute can be construed to preserve the subrogation claim, the constitutional issue need not be addressed.

B. AS CONSTRUED BY THE LOWER COURTS, §627.7372 FLA. STAT. (1985) UNCONSTITUTIONALLY RESTRICTS BLUE CROSS' ACCESS TO THE COURTS.

Section §627.7372, Fla. Stat. (1985), has been construed by the district court to abrogate an insurer's right to recover from a tortfeasor money damages caused by the tortfeasor, and for which the insurer has paid the injured party as a result of the insurer's contract. As noted above, this state has long recognized the right of an insurer to recover such damages from a tortfeasor. The holding below constitutes a denial of access to the courts guaranteed to Blue Cross by Article I, Section 21, Florida Constitution. Construing that section of the Constitution in Kluger v. White, 281 So.2d 1 (Fla. 1973), this court held that:

> Where a right of access to the courts for redress 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.

281 So.2d at 4.

As noted above, an insurer's right to recover its damages in subrogation against a tortfeasor have long been recognized by the courts of this state. Atlantic Coast Line R. Co. v. Campbell, supra. The doctrine of subrogation was part of the common law of England well before the United States declared independence. It is discussed at least as early as Lord Hardwicke's opinion in Randal v. Cochran, 1 Ves. Sen. 98 (1748), cited in 16 Halsbury's Laws 1438. Lord Hardwicke refers to an insurer's right to recover its subrogated claim against a tortfeasor as "the plainest equity that could be." Clearly the right of action for subrogation was a remedy available at common law before July 4, 1976, and thus adopted as the common law of Florida by §2.01, Fla. Stat. (1985). The holding of the lower courts here abrogates, without consideration of the constitutional consequences, this ancient right of action, recognized since before the existence of our state and nation. This court discussed the doctrine of subrogation at length in Dantzler Lumber Co. v. Columbia Gas Co., 115 Fla. 541, 156 So. 116 (1934). Quoting from older texts, the court said:

> The doctrine of subrogation is generally con itself borrowed, from the civil law, though some authorities regard the Roman Law as its source. However this may be, it has long been an established branch of equity jurisprudence. It does not owe its origin to statute or custom, but it is a creature of

> courts of equity, having for its basis the doing of complete and perfect justice between the parties without regard to form. It is a doctrine, therefore, which will be applied or not according to the dictates of equity and good conscience, and considerations of public policy, and will be allowed in all cases where the equities of the case demand it. It rests upon the maxim that no one shall be enriched by another's loss, and may be invoked wherever justice demands its application, in opposition to the technical rules of law which liberate, securities with the extinguishment of the original debt.

25 R.C.L. 1313, quoted in Dantzler, supra, 156 So. at 119. The court continued:

> On payment of a loss the insurer acquires the right to be subrogated pro tan to to any right of action which the insured may have against any third person whose wrongful act or neglect caused the loss. This right includes the subrogation of the insurer to against a carrier whose failure of duty caused the loss, as the carrier is primarily and the insurer only secondarily liable, and the insurer also is subrogated to the property owner's statutory right of recovery against a railroad company for setting out fire by the operation of its road.

14 R.C.L. 1404, quoted in Dantzler, supra, 156 So. at 120.

This court has previously considered a challenge to the

constitutionality of §627.7372 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 statute was 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). Thus, Purdy holds the statute is not unconstitutional as applied to the injured party because the injured party can recover all of his damages either from the tortfeasor or from a "collateral source." In either event, the injured party can be made whole. The statute operates only to

prevent the injured party from receiving a double recovery.

In the decision below, the district court of appeal bootstrapped the Purdy decision into an exercise in pure sophistry, concluding that §627.7372 does not deprive Blue Cross of any right of action at all. Beginning with the premise that Blue Cross, as subrogee, has only that right of action held by its insured, the court reasoned that because the statute bars the insured from suing the tortfeasor for those elements of damage compensated by his Blue Cross insurance, Blue Cross inherits its insured's disability to sue for those damages; ergo, Blue Cross has no right of action to lose. Further, the court reasoned, the Supreme Court held in Purdy that the deprivation of the insured's right of action was constitutional; therefore, deprivation of Blue Cross' right of action must be constitutional.

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 a "collateral source," and thus to that extent no longer has suffered a loss.

An insurer has no right of subrogation until it makes payment for its insured's loss. National Surety Corporation 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 insurer's right of action by barring the insured's right of recovery of those damages from the tortfeasor.[2]

The district court's conclusion that the statute does not deprive Blue Cross of a right of action is sheer nonsense. Before the adoption of §627.7372, Blue Cross had a well recognized right to obtain compensation from the tortfeasor for damages caused by

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[2]This is a classic "Catch-22" situation. Blue Cross can bring no action against the tortfeasor unless it pays the injured party; payment to the party then bars the action. Compare the original Catch-22:

> "Can't you ground someone who's crazy?" [asked Yossarian.]
> "Oh, sure, I have to. There's a rule saying I have to ground anyone who's crazy." [says Doc Daneeka.]
> . . .
> "Is Orr Crazy?"
> . . .
> "He has to be crazy to keep flying combat missions after all the close calls he's had. Sure I can ground Orr. But first he has to ask me to."
> . . .
> . .
> "And then you can ground him?" Yossarian asked.
> "No. Then I can't ground him."
> "You mean there's a catch?"
> "Sure there's a catch," Doc Daneeka replied.
> "Catch-22. Anyone who wants to get out of combat duty isn't really crazy."
> "That's some catch, that Catch-22."
> "It's the best there is." Doc Daneeka agreed.

J. Heller, Catch-22 46 (2d rev. ed. 1971).

that tortfeasor and for which Blue Cross had paid under its insurance contract. The district court has ruled that, because the statute bars Blue Cross' insured from seeking those elements of damage from the tortfeasor, Blue Cross is likewise barred. The only reason Blue Cross has been prevented from bringing a subrogation claim against Mr. Matthews is the operation (and court construction) of §627.7372. The fact that the district court was able to conclude, in the face of those facts, that the statute does not deprive Blue Cross of access to the courts merely demonstrates the logical bankruptcy of that court's opinion in this case.

Since the statute, as construed, deprives Blue Cross of "a right of access to the courts for a particular injury," it must be determined whether the legislature has provided "a reasonable alternative to protect the rights of the people of the state for redress for injuries," or whether there is "an over-powering public necessity for the abolishment" of the right.

Respondent has suggested that insurers are provided reasonable alternatives for protection of their rights under the statute. The suggestion is that, while insurers which pay their injured insureds for medical expenses may not recover those expenses as subrogated claims against the tortfeasors, the insurers will not be subject to subrogation claims of other insurers or "collateral sources." Those insurers which provide automobile liability insurance coverage may, in fact, be benefited or at least unaffected by the "wash out" of subrogation

claims. However, Blue Cross receives no benefit at all from the statute. As construed by the First District Court of Appeal, the statute prevents Blue Cross from recovering its subrogation claims. It is impossible to construct a factual situation, however, in which the statute provides any benefit to Blue Cross or prevents anyone from recovering anything from Blue Cross.

The Fifth District Court of Appeal recognized this anomaly in a footnote to its decision in Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983). Although it agreed that logic required denial of the insurer's attempt to obtain a portion of its insured's recovery from the tortfeasor (since that recovery could not, under the terms of the statute, include those elements paid by the insurer), the Fifth District said:

> 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. (emphasis added).

This very consideration, as expressed by the Fifth District, demonstrates the lack of an "overpowering public necessity" for preventing medical insurers from exercising their long recognized

right of subrogation. Nothing in the legislative history of §627.7372 suggests the legislature intended this result; as noted above, the statute does not, by its terms, abolish the subrogation rights of "collateral sources." The lower courts in this case have merely interpreted the statute as requiring abolition of those subrogation rights, as a logical result of the statute's bar to a portion of the injured party's right of action.

In its amicus curiae brief to the district court, the Department of Insurance contended that "the state of affairs which required the legislature to enact the Florida Automobile Reparations Reform Act in 1971 constitutes . . . a public necessity . . ." which would render the statute constitutional. The Department's argument was that the 1971 Act and subsequent legislation amending it, were necessary to reduce litigation. This argument is not nearly discrete enough to satisfy the imperative of Article I, Section 21. Further, this court rejected that argument in the initial challenge to the 1971 Act. In Kluger v. White, 281 So.2d 1 (Fla. 1973), this court held a portion of the 1971 Act (that portion which restricted the right to sue for property damage) unconstitutional because no overpowering public necessity for the abolition of such claims was shown, and the legislature had provided no reasonable alternative to an action in tort. The remaining portion of the act was found to be constitutional because an alternative remedy was provided, not because of overpowering public necessity. [3]

The clear, direct objective of §627.7372 is to prevent double recovery of claims for medical expenses or wage loss in automobile accident tort actions. If the statute is construed as depriving insurers, employers, governmental bodies, and anyone else providing a "collateral source" benefit from pursuing subrogation claims, even when those "collateral sources" have no connection with automobile insurance coverage, one effect may be to reduce automobile accident litigation. The result, however, is an economic benefit for automobile liability insurance carriers at the expense of medical insurers, employers, and other "collateral sources." Those medical insurers, employers and other "collateral sources" obtain no benefit at all. Nothing within or without the record in this case demonstrates an overpowering public necessity for that transfer of wealth. Nor does anything in the record demonstrate that the legislature could not have found a reasonable alternative method of meeting a goal of reducing litigation without abolishing the subrogation right of these "collateral sources." Collateral sources such as Blue Cross are deprived of a legal remedy for damages caused by the negligence of others, without obtaining any benefit or alternative remedy from the statute which has been construed to

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[3]In any event, no factual basis for the finding of an overpowering public necessity exists in this records. In the absence of any public necessity clearly appearing as part of the legislative history of the statute, Blue Cross should - at the very least - be allowed to bring its claims, leaving a determination of whether the statute can be salvaged by a showing of public necessity until evidence is produced to support such a determination.

deprive it of a recovery.

II. ERISA PREEMPTION.

Blue Cross also challenges §627.7372, Fla. Stat. (1985), on the ground that, as construed by the lower courts in this action, that statute impermissibly affects the Blue Cross contract with which this action is concerned. This challenge is based upon an allegation in the proposed complaint that the contract is an employee benefit plan under the Federal Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq., and the provisions of 29 U.S.C. §1144(a), which provides that all state laws which relate to any employee benefit plan are superseded.

In the court of appeal (though not before the trial court) respondents questioned whether Blue Cross has created a record adequate to preserve this challenge, in that no proof has been presented that the subject insurance contract is, in fact, an "employee benefit plan." The lack of a record is the result of the procedural posture of this action. Blue Cross has been denied leave to intervene in the action between the injured party, Mr. Tyson, and the alleged tortfeasor, Mr. Matthews. Having been denied leave to intervene, Blue Cross has not even been allowed to file its proposed complaint, much less adduce any proof of the allegations of the complaint. Blue Cross' understanding is that the trial court accepted as true for purposes of the motion for leave to intervene the allegations of the complaint (much as the court would do on a motion to dismiss), and found that, even if all allegations of the

complaint were true, Blue Cross was barred by the provisions of §627.7372 from maintaining its subrogation action. Having been denied leave to file its complaint, Blue Cross can hardly be faulted for failing to adduce proof that the allegations of the complaint are true.

Two provisions in 29 U.S.C. §1144 require attention. The first, mentioned above, provides that all state laws which "relate to any employee benefit plan" are superseded by federal law. The second provision is contained in §1144(b)(2)(A), which says: ". . . nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance . . .." ERISA thus preempts any state law which "relates to" an employee benefit plan, but exempts from that preemption any state law which "regulates insurance."

It is by no means clear, on the face of §627.7372, that the statute "relates to" an employee benefit plan. Indeed, if, as suggested above, the statute were construed so that it did not abrogate subrogation rights of "collateral sources," including employee benefit plans under ERISA, the statute almost certainly would not "relate to" employee benefit plans.

In Shaw v. Delta Airlines, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), the United States Supreme Court held that the preemption language of §1144(a) is to be construed broadly:

> The breadth of [§1144(a)]'s preemptive reach is apparent from that section's language. A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has

> a connection with or reference to such a plan.

103 S.Ct. at 2899-900 (footnotes omitted). The court specifically rejected a restrictive construction of the preemption language in §1144(a).[4]

> In fact, however, Congress used the words "relate to" in 514(a) in their broad sense. To interpret 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of 514. It would have been unnecessary to exempt generally applicable state criminal state statutes from preemption in 514(b), for example, if 514(a) applied only to state laws dealing specifically with ERISA plans. Nor, given the legislative history, can 514(a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA - reporting, disclosure, fiduciary responsibility, and the like. The bill that became ERISA originally contained a limited preemption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these revisions in favor of the present language, and indicated that the section's preemptive scope was as broad as its language.

103 S.Ct. at 2900-01 (footnote omitted).

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[4]References to 29 U.S.C. §1144 in the Supreme Court's opinion are to 514 of the Employee Retirement Income Security Act of 1974. Section 514 of the Act is, in fact, 1144 as codified in the United States Code.

Ironically, §627.7372, Fla. Stat. (1985), "relates to" this ERISA plan only because of the interpretation given the statute by the local courts. Construction of §627.7372 to prevent ERISA plans from exercising their common law right of subrogation against tortfeasors makes the connection between the statute and the plan. Absent that construction, it is questionable whether the statute would "relate to" a plan at all.

It remains to be seen whether §627.7372 is exempted from federal preemption by the operation of 29 U.S.C. §1144(b)(2)(A). Subsection (b)(2)(A) exempts from preemption any state law which "regulates insurance."

On its face, §627.7372 does not regulate insurance in any way. The statute does not prescribe or regulate terms of insurance policies; prescribe or regulate practices of insurers; or regulate in any way the relationship of insurer to insured. Indeed, as noted above, if a person injured in an accident declines to make a claim upon his own insurance policy, he is free to seek compensation for his medical expenses or lost wages from the tortfeasor, and the statute has no effect whatsoever. Clearly the purpose of the statute was not to regulate insurance, but rather (as argued by the Department of Insurance below) to reduce automobile accident litigation.

In Davis v. Line Construction Benefit Fund, 589 F.Supp. 146 (W.D. Mo. 1984), and Hunt v. Sherman, 345 N.W.2d 750 (Minn. 1984) two courts have stricken state laws interfering with subrogation rights when those statutes have been applied to restrict the

subrogation rights of an ERISA plan. In each case it was argued that the ERISA preemption did not apply because the statutes which purported to abrogate subrogation rights were statutes regulating insurance. For cases in other contexts invalidating state laws under the ERISA preemption, even though those laws related in some way to insurance, see also Stone and Webster Engineering Corporation v. Ilsley, 690 F.2d 323 (2d Cir. 1982); Hewlett-Packard Company v. Barnes, 571 F.2d 502 (9th Cir. 1978) cert. denied 439 U.S. 831 (1978); General Split Corporation v. Mitchell, 523 F.Supp. 427 (E.D. Wisc. 1981); St. Paul Electrical Workers Welfare Fund v. Markman , 490 F.Supp. 931 (D.Minn. 1980).

A number of cases have held that ERISA does not preempt state laws requiring particular benefits to be included within insurance policies, or regulating the sale of insurance. One of the most recent of these, involving the validity of a "mandated-benefit" statute, is Metropolitan Life Insurance Company v. Massachusetts, ___U.S.___ 105 S.Ct. 2380, 85 L. Ed.2d 728 (1985). There, the United States Supreme Court found that a mandated-benefit statute, requiring health insurers to provide a minimum level of mental health benefits in insurance policies, was not preempted by ERISA. Initially, the Metropolitan court found the Massachusetts statute clearly relates to employee benefit plans covered by ERISA, because it requires those plans to purchase the mental health benefits specified in the statute when they purchase a certain kind of insurance policy. Thus, the question was whether the statute was exempted from preemption

because it "regulates insurance." The Metropolitan court found that this statute, which regulates the substantive provisions of certain insurance contracts, clearly "regulates insurance."

In reaching that conclusion, the court considered cases interpreting the McCarran-Ferguson Act, 15 U.S.C. 1011 et seq. McCarran-Ferguson provides, in part:

> No act of Congress shall be construed to invalidate, impair, or supersede any law inacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance . . ..

15 U.S.C. 1012(b).

The Metropolitan Life Insurance court, discussing whether the Massachusetts statute fell within the saving clause of ERISA as a law which regulated insurance, found it appropriate to consider McCarran-Ferguson:

> Cases interpreting the scope of the McCarran-Ferguson Act have identified three criteria relevant to determining whether a particular practice falls within that Act's reference to the "business of insurance":
>
> "First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within

the insurance industry." Union Labor Life Insurance 119, 129 (1982)(emphasis in original)

105 S.Ct. at 2391.

The Metropolitan Life Insurance court found that the Massachusetts act, which regulated the substantive terms of insurance contracts, was a regulation of the "business of insurance" under this analysis. By comparison, §627.7372, Fla. Stat. (1985), does not satisfy any of the three criteria. The statute does not, in any conceivable way, transfer or spread a policyholder's risk. The statute creates no means whatsoever by which a policyholder has increased ability to obtain compensation for his losses or share his risk with others.

Secondly, §627.7372 does not regulate the policy relationship between insurer and insured. By its terms, the statute regulates the relationship of an insured (or anyone else who is a beneficiary of a non-insurance "collateral source") with a tortfeasor. As noted in Purdy, the statute does not prohibit an injured party from choosing not to make a claim on his own insurance, and claiming all of his damages from a tortfeasor, even though some or all of those damages could have been compensated by the injured party's own insurance or other "collateral source." Thus, the relationship between insured and insurer is unchanged by the statute. Even those cases which have construed the statute as preventing the insurer from claiming a subrogation interest in the insured's recovery affect the relationship between insurer and insured only indirectly, holding that the insurer cannot make a claim against the insured, because

the insured cannot, by law, have recovered from the tortfeasor those items of damage which were compensated by the insurer.

Thirdly, the coverage of the statute explicitly is not limited to entities within the insurance industry. By its terms, the statute defines as a "collateral source" not only private insurance, but also Social Security benefits, Medicare, any other federal, state or local income disability act, any other public program providing medical expenses or disability payments, any contract, such as between an employer and employee, to pay for or reimburse the costs of hospital and medical expenses, or any contractual wage continuation plan provided by employers or others.

Thus, under the three-part test applied under McCarran-Ferguson and, as shown by Metropolitan Life Insurance Company v. Massachusetts, supra, applied to ERISA preemption, §627.7372 meets none of the criteria for a statute which "regulates insurance." The plain language of the statute evidences no intent of the legislature to regulate insurance with §627.7372. Rather, the statute's effect on insurance is indirect and incidental, entirely as a result of construction of the statute by the courts.

CONCLUSION

Blue Cross requests the court to reverse the decisions of the lower courts, allowing Blue Cross to intervene in this action and to proceed with its claim. The reversal can be based on any of the following grounds:

(1) Section §627.7372 does not prevent a "collateral source" from enforcing its claim as subrogee of its beneficiary, against the tortfeasor. The bar to recovery stated in the statute is an impediment personal to the injured party, not an impediment inhering in the cause of action.

(2) Section §627.7372, if construed to bar a subrogation action, is unconstitutional in that it abrogates a right of action available at common law without providing a reasonable alternative remedy and without a showing of overpowering public necessity.

(3) As construed, Section §627.7372 is preempted by applicable provisions of the Federal Employee Retirement Income Security Act.

Respectfully submitted,

ALAN C. SUNDBERG
CARLTON, FIELDS, et al.
Post Office Drawer 190
Tallahassee, Florida 32302
(904)224-1585

EDWARD P. NICKINSON, III
CARLTON, FIELDS, et al.
Post Office Box 12426
Pensacola, Florida 32582
(904)434-0142

By: Alan C. Sundberg
ALAN C. SUNDBERG

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 33602 and to William W. Tharpe, Jr., Esq., Department of Insurance, 413-B Larson Building, Tallahassee, Florida 32301, by U. S. Mail this the 24th day of March, 1986.

EDWARD P. NICKINSON, III
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
200 East Government Street
Post Office Box 12426
Pensacola, Florida 32582
(904) 434-0142

ALAN C. SUNDBERG
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
First Florida Bank Building
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

By: Alan C. Sundberg
ALAN C. SUNDBERG