IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Appellant,

vs. DOCKET NO. 67,598

TIMOTHY L. MATHEWS, et. al.,

Appellees.
_____/

ON PETITION FOR DISCRETIONARY REVIEW TO THE
SUPREME COURT OF FLORIDA

RESPONDENTS' REPLY BRIEF TO PETITIONER'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

To the extent that Petitioners presented argument outside jurisdictional issues, Respondents necessarily felt a need to reply. Otherwise, Respondents adopt the Statement of the Case and Facts of Petitioner's Brief.

ARGUMENT

I. THE SUBROGATION PRIVILEGES OF BLUE CROSS/BLUE SHIELD ARE DERIVATIVE OF ITS MEMBER'S RIGHTS AND THEREFORE CONTROLLED BY THIS COURT'S DECISION IN PURDY V. GULF BREEZE ENTERPRISES, INC., 403 So.2d 1325 (Fla. 1981)

BLUE CROSS/BLUE SHIELD claims it has suffered an unconstitutional deprivation of its "access to the courts" to enforce the following provision of a contract its Alabama affiliate had with a Florida corporation, more particularly identified as TIECO, INC.:

> §XI - SUBROGATION
>
> In the event of payment or provision otherwise by the Company of any benefits under this Contract, the Company shall to the extent thereof, be subrogated and shall succeed to all rights of recovery (whether in contract, tort, or otherwise) which the Member or any other person has against any person or organization and shall be subrogated and succeed to the proceeds of any settlement or judgment that may result from the exercise of any such rights of recovery. Upon payment or provision by the Company of any such benefits, the Member or any other person having any rights of recovery or proceeds

> therefrom shall execute and deliver such proceeds or such instruments or papers and do whatsoever else is necessary to secure to the Company such rights of recovery and proceeds and shall do nothing to prejudice such rights.
> (Appendix to Appellant's Reply Brief at Page 20)

The above provision sustinctly provides that Blue Cross shall succeed, through the concept of subrogation to all rights of recovery which the Member has against any other person. The very language of its own policy restricts the rights of Blue Cross to only those rights its members have.

The "Member" contemplated by the above quoted subrogation provision falls within the same public classification as the injured plaintiff in Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981), which this Court has already proclaimed as not being denied access to the courts of this State.

The very nature of subrogation reveals it to be an equitable doctrine, springing out of the right to contribution and having as its objective a prevention of injustice. It is not a matter of strict right, nor does it necessarily rest on contract, but is purely equitable in nature, and will not be enforced when it would work an injustice to the rights of those having equal equities. Appleman, Insurance Law and

Practice, §6502 (1944); 16 Couch on Insurance §61.20 (2nd Edition, 1983); USF&G v. Bennett, 119 So. 394 (1928).

A party claiming through subrogation is required to claim through a derivative right, which presupposes an original right. For a right to be subrogated to another, such right must exist in the person from whom it is taken. The party for whose benefit the doctrine of subrogation was exercised is deemed to acquire no greater rights than those of the party from whom he was substituted. Appleman, Insurance Law and Practice, §6505.

If, therefore, the rights of Blue Cross are derivative as contemplated by the very concept of subrogation and specifically by its own written subrogation provision, it logically follows that Blue Cross gains no rights greater than its insured. The Purdy decision is, therefore, controlling.

II. THE CONCEPT OF SUBROGATION IS NOT A "CONSTITUTIONAL RIGHT" BUT RATHER AN EQUITABLE PRIVILEGE

If through an indepth analysis, this Court finds that the rights of Blue Cross are not derivative wherein the appellant "stands in the shoes" of its subrogor member, the next hurdle Blue Cross encounters in its constitutional argument involves the need to elevate a common law equitable principle to the status of a "right" which has become a part

of the common law of the State pursuant to Florida Statutes §2.01, F.S.A. Obviously, the concept of subrogation is not guaranteed by the Declaration of Rights of the Constitution of the State of Florida and neither is it protected by statute. Therefore, is it a common law right or simply an equitable principle or privilege condoned by the common law?

In this regard, it must be recognized that subrogation is nothing more than a derivative offshoot of the much broader concept of insurance. As such, its existence and utility changes as society needs change in the utilization of insurance in general. The expansion, or more amply explosion of insurance coverages to fulfill the needs of our society has resulted in both legislative and judicial modification of out-dated principles which have lost their original utility. The concept of pure subrogation is one such principle which has, and is undergoing a metamorphosis of its legal and equitable utility.

This Court can take judicial knowledge of the overall impact of insurance and insurance companies on the citizens of this state by simply acknowledging the volumes of State Statute and governmental regulations dealing with insurance matters. So important is the concept of insurance, that a separate cabinet official is elected periodically to

oversee and regulate insurance companies doing business in the State of Florida.

Out of this backdrop comes Blue Cross asking that this Court declare Florida Statute 627.7372 and 627.736(3), unconstitutional. Petitioner has cited no legal authority which elevates the equitable principle of subrogation to the quality of a "constitutional right" as contemplated by this Court in the Kluger v. White, 281 So.2d 1 (Fla. 1973), decision. To the contrary, this Court's decision in Purdy, supra, followed by the District Court opinions of Molyett v. Society National Life 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) and ending more recently with the First District's decision in the case at bar to-wit: Blue Cross/Blue Shield of Florida, Inc. v. Mathews, et. al., Docket Number BD-67, have uniformly upheld the validity and constitutionality of the heretofore cited anti-collateral source statutes. (FSA §627.736(3)); (FSA §627.7372).

III. THE ENACTMENT OF FLORIDA STATUTES §627.7273 and 627.736(3) STEMS FROM THE LEGISLATURE'S ATTEMPT TO SATISFY AN "OVERWHELMING PUBLIC NEED," AND IS THEREFORE, CONSTITUTIONAL.

Even if the equitable privilege of subrogation was

elevated to a common law right, this Court in Kluger declared that the legislature could abolish a right upon a showing that overwhelming public necessity called for such abolishment. Kluger, supra.

The legislature of this State, by its constant refinement of the no-fault concept of automobile insurance has spoken plainly that "public policy transcends in-fighting" within the insurance industry. Faced with skyrocketing automobile insurance rates, health costs and personal injury claims, our legislature has set its goal at lowering these public expenses. One such effort was to eliminate collateral and double recoveries by tort victims. This Court in Purdy has up-held this concept as constitutional. Blue Cross argues that since it is not an automobile insurance writer, it has no alternative remedy or advantage. However, a close analysis of this position reveals otherwise. Blue Cross is lumped in the same classification as all other health care providers doing business in the State of Florida. "Collateral Sources" are defined under Florida Statutes §627.7372(b) as "any health, sickness or income disability insurance..." Blue Cross, therefore, is left with the same competitive advantage as before enactment of the statutes in question since it applies uniformly throughout the health insurance indus-

try. Although Blue Cross has failed to provide statistics comparing benefits paid in automobile accident cases to situations of injury and illness where subrogation does not exist, Respondents strongly suggest to this Court that subrogation recoveries, especially in view of equitable distribution principles, play a very small part of Petitioner's overall rate structure. Finally, if this Court were to reinstate the right of subrogation to health care providers, the practical effect would be to require the automobile industry to pay additional damages under its liability coverage. These, in turn, would necessarily be passed back to the insurance buying public in the form of additional premiums. Hence, the circle would be complete and the goal of the legislature to reduce insurance rates would be circumvented.

The First District Court of Appeal in Alterman Transport Lines, Inc. v. State, 405 So.2d 456 (Fla. 1st DCA 1981), has ruled in a similar case involving an attempt by members of the trucking industry to declare the Florida Sunshine Act unconstitutional that:

> It is our view that the deprivation of Appellant's privilege to be immune from competition is not the type of injury protected by Kruger and its progeny. Appellants have not been denied entry into the market, nor have they been prohibited from exercising their competitive rights. Their 'injury', if any, is competition in the market place. Id. at 459.

As to the issue of standing, the Court held

> Appellant carriers also argue that the repeal of Chapter 323 unconstituionally deprives Florida consumers of their access to the courts to bring suit to stop the abandonment of unprofitable routes or to challenge the setting of motor carrier rates. However, carriers previously regulated by Chapter 323 had no standing to raise such issues. See State v. Phillips, 70 Fla. 340, 349, 70 So. 367 (1915). Therefore, they cannot claim to have been deprived of a right to access which they never had. Id. at 459.

It is well established that, to raise a constitutional question, one must show that the Statute deprives him of a constitutional right. 16 Am.Jur. 2d, Constitutional Law §189. Further, the constitutionality of a Statute which removes one's right to reimbursement or other relief from a second party cannot be contested by a third party whose right, if any, is derivative or indirect. Hanson v. Raliegh, 63 N.E.2d 851; Alterman Transport Lines, Inc., supra; Acme Moving and Storage Company of Jacksonville v. Mason, 167 So.2d 555 (Fla. 1964); State v. Phillips, 70 So.2d 367, (Fla. 1915).

Constitutional challenges to state statutes on equal protection grounds must show that the statutes create a classification in which one class receives discriminatory treatment. Sections 627.736(3) and 627.7372, Florida Statutes, do not on their face create a classification of insur-

ers. The statutes apply to all insurers. Assuming, arguendo, that as applied, these statutes do create a classification in which Blue Cross and other health insurers receive discriminatory treatment, it does not necessarily follow that there is an equal protection violation. The rationale basis test must be applied. Since this class is not "suspect" (such as one based on race or sex) strict scrutiny is not required. After a thorough review of equal protection cases, the First District Court of Appeal determined that the proper standard of the rational basis test be used for purposes of minimal scrutiny is the "some reasonable basis" standard. Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983). This Court stated:

> We now turn to the proper method of employing the rational basis test by use of the "some reasonable basis" standard. Generally, as long as the classification scheme chosen by the legislature rationally advances a legitimate governmental objective, courts will disregard the methods used in achieving the objective, and the challenged enactment will be upheld. Citations Omitted. Id. at 216.

The "rational basis" test obviously involves considerable deference to the legislature branch, and prohibits the judiciary from substituting this judgment as to whether the legislature has chosen the "right" classifications. As the Supreme Court stated in Northridge General Hospital v. City of

Oakland Park, 374 So.2d 461, 464-465 (Fla. 1979):

> The Legislature has wide discretion in creating statutory classifications. There is a presumption in favor of the validity of a statute which treats some persons or things differently from others.
>
> (I)f any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts. The deference due to the legislative judgment in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the able ground for believing that there were public considerations justifying the particular classification and distinction made.
>
> (Emphasis added).

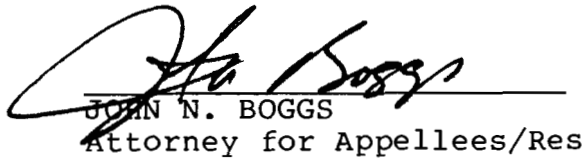
The avoidance of collateral recoveries eliminates double recoveries, inter-insurance company claims disbursements, claims expenses and litigation. These reductions along with a reduction of automobile insurance premiums are clearly legitimate legislative goals. Since §627.736(3) and 627.7372, Florida Statutes, are legislative attempts to reach that legislative goal, they should be held constitutional and not violative of equal protection.

SUMMARY

Three related grounds exist for denying Petitioner's jurisdiction to attack the constitutionality of Florida Statutes §§627.736(3) and 627.7273. Quite simply the constitutional guarantees of "access to the courts" and "equal pro-

tection" do not extend to the equitable, derivative privilege of subrogation in the face of overwhelming public need.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties, to-wit: Edward Nickinson, Edward C. Rood, Clifford J. Schott and William W. Tharpe, Jr., with copies of the within and foregoing by depositing same in the United States mail in a properly addressed envelope with adequate postage thereon.

This the 30th day of September, 1985.

JOHN N. BOGGS