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,

_____/

ON PETITION FOR DISCRETIONARY REVIEW
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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INTRODUCTION

This reply brief will address the arguments raised in the brief of Respondent Matthews and the Florida Department of Insurance as amicus curiae. In summary, this brief will address:

I. The argument that section 627.7372, Fla. Stat. cannot be interpreted to allow Blue Cross, as a "collateral source," to bring an action in subrogation against a tortfeasor who has caused injury resulting in payment of medical bills by Blue Cross.

II. The arguments concerning constitutionality of section 627.7372 as construed by the lower courts, which are:

a. A contention that Blue Cross' subrogation rights are not protected by the constitutional principles stated in Kluger v. White, 281 So.2d 1 (Fla. 1973);

b. A contention that Blue Cross has an alternative remedy.

c. A contention that Blue Cross lacks standing to complain of the abrogation of its subrogation rights.

d. A contention that the statute is constitutional because it responds to an overpowering public necessary.

III. The argument that section 627.7372 is not preempted by the Employee Retirement Income Security Act (ERISA) because the Florida Statute "regulates insurance," and is preserved by the "savings clause" in ERISA.

ARGUMENT

I. STATUTORY INTERPRETATION

Neither Mr. Matthews nor the Department of Insurance has addressed directly Blue Cross' argument that section 627.7372, Fla. Stat. should be construed to allow insurers and other "collateral sources" to seek compensation in subrogation against tortfeasors. To the extent they did discuss this issue, they suggested such a construction is contrary to legislative intent.

Nothing in the statute supports a conclusion that the legislature intended for Section 627.7372 to eliminate subrogation claims. The statute says only that in a personal injury or wrongful death action arising out of the ownership, operation, use or maintenance of a motor vehicle, the jury shall deduct from the verdict the value of all benefits received by the claimant from any collateral source. If the legislature intended that each collateral source should be deprived of its ancient common-law right to recover damages from the tortfeasor in subrogation, the legislature could have said so.[1]

Allowing subrogation claims would not substantially impair the legislative intent of reducing insurance costs. First, the statute would still eliminate double recovery. Secondly, as Mr. Matthews points out (Resp. Brief, p. 7),

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[1]As Blue Cross will argue below, however, the legislature cannot constitutionally abrogate this right without providing an alternative remedy.

collateral source benefits frequently are not subject to subrogation recoveries. Under those circumstances, the statute still creates a savings for automobile insurance carriers. Thirdly, Mr. Matthews also suggests (Resp. Brief, p. 12) that the amounts of money recoverable by Blue Cross would be relatively insignificant, and without substantial effect on Blue Cross' rate base. If this is correct, those sums would likewise have no significant effect on the rate structures of automobile insurance carriers.

Thus, a construction of section 627.7372, Fla. Stat. to allow subrogation claims by collateral sources against tortfeasors would uphold the constitutionality of the statute without materially interfering with its purpose. Such a construction of the statute requires only that this Court hold the statute means exactly what it says, and that the statute will not be interpreted to mean more than it actually says.

ARGUMENT

II. CONSTITUTIONALITY: ACCESS TO COURTS
A. NATURE OF THE RIGHT OF ACTION EXTINGUISHED BY THE LOWER COURTS

Neither Mr. Matthews nor the Department of Insurance addresses the basic unfairness and illogic of their argument that Blue Cross had no right of action to be extinguished. As demonstrated in Blue Cross' initial brief, the right of recovery in subrogation has been recognized at common law since before the independence of this nation. Respondent and amicus do not dispute this, but argue that because the right is derivative, and because the statute deprives the injured party of a right of recovery, the subrogated collateral source cannot exercise its right of recovery. Neither Mr. Matthews nor the department has addressed the basic unfairness of this blind, mechanical application of their interpretation of the nature of derivative rights. If the lower courts' construction of the statute is allowed to stand, the very act which creates the right of action in subrogation destroys that right. The simple fact remains that before the adoption of this statute, collateral sources had, at common law, a right to recover damages caused by a tortfeasor, after the collateral source paid those damages as a matter of contract with the injured party. As the statute is construed here by the lower courts, that right no longer exists.

The statute was held to be constitutional in Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981),

because the court found that the injured party, having received compensation from the collateral source, actually lost nothing. That argument does not apply to health care insurers, who pay the money which makes the injured party whole.

The injured party retains a right of action against the tortfeasor for the full amount of his damages. As this Court recognized in Purdy, 403 So.2d at 1329,

> 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 . . .. Thus the right of access to the courts is left completely unimpaired.

The injured person, therefore, retains his right of recovery until the moment he is paid by a collateral source. That payment is, of course, a prerequisite for the collateral source's right to sue the tortfeasor in subrogation. There is simply no reason why the collateral source cannot "derive" its cause of action and right of recovery from its insured, who still held that right of action and recovery for his other damages.

B. ALTERNATIVE REMEDY

Mr. Matthews suggests (Resp. Brief, p. 11-12) that Blue Cross in fact has an "alternative remedy" because, since Blue Cross is treated no differently from all other health care providers doing business in the State of Florida, it has lost no competitive advantage by the application of section 627.7372. The argument is absurd.

First, the issue is not one of competitive advantage, the issue is whether Blue Cross had a right of action for compensation at common law which has been abrogated. If the legislature were to decree that all owners of taxicabs could not recover in tort for damages to their cabs resulting from collisions with other vehicles, automobile tort litigation would be reduced and, since all taxicab companies were treated equally, competitive position would be unaffected by the statute. No one would suggest, however, that these companies had not been deprived of a common law right of action for damages. Moreover, this argument is directed only to equal protection concerns with the statute, not access to the courts guaranteed by Article I, Section 21 which is the gravamen of petitioner's argument.

Likewise, Alterman Transport Lines, Inc. v. State, 405 So.2d 456 (Fla. 1st DCA 1981) has nothing to do with this case. There, intrastate motor carriers complained that the repeal of a regulatory statute eliminated an administrative forum in which they could complain of unfair competition. The Court of Appeal ruled that loss of a statutory immunity from competition was not an "injury" protected by the constitutional right of access to the courts. Blue Cross' claim in this case has nothing to do with competition. The lower courts have eliminated Blue Cross' common law right of action for damages caused by a tortfeasor. The cases could hardly be more different.[2]

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[2]There are other reasons Alterman is inapposite. First, the court found the motor carriers had other avenues for relief available. Secondly, although the opinion does not discuss the Footnote Continued

Even if it made any sense to conclude that Blue Cross has no injury if all health insurers are similarly injured, the premise of the argument is false. Not all insurers, or even all health insurers, are in the same position. Insurers who write automobile liability insurance coverage receive some benefit from the statute, in that they are relieved from paying claims for which they would be liable at common law. These carriers, which share the same loss of subrogation rights as Blue Cross, thus benefit from the statute. Blue Cross, which does not write automobile insurance, receives no benefit - just the injury.[3]

C. STANDING

Mr. Matthews' argument that Blue Cross lacks standing to challenge the constitutionality of a statute because its right of action is derivative is based upon either a misinterpretation of the cited cases or a misrepresentation of their holdings.

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issue, the petitioners in Alterman were not complaining of the loss of a common law right of action, but rather of an administrative remedy which was created by statute. Kluger v. White, 281 So.2d 1 (Fla. 1973), does not restrict the abrogation of statutorily created remedies.

[3]Thus, this courts' analysis in Purdy of the similar statute relating to personal injury protection insurance, 403 So.2d at 1329 does not apply. The court noted that section 627.736(3), Fla. Stat. prohibited PIP carriers from subrogating against tortfeasors. The court reasoned that although this statute primarily benefits the tortfeasor, "the benefits obtained by the tortfeasor will enure to their insurance carriers. Supposedly these benefits will eventually be shared by all carriers without the need of litigation." The analysis is correct when, as in the case of PIP coverage, all of the carriers involved are automobile insurance carriers. The analysis does not apply to non-automobile insurance carriers.

None of the cases cited by Mr. Matthews holds that a party cannot challenge the constitutionality of a statute because he claims a right which is derivative. In Alterman Transport Lines, supra, the motor carriers argued that abolition of the administrative remedy deprived consumers of a remedy for unfair practices by intrastate carriers. The court held the petitioning carriers had no standing to argue that other persons, not parties to the suit, might be injured. The motor carriers were not claiming any rights derived from rights of consumers (or indeed, any injury to themselves relating to the rights of consumers). Blue Cross is not, in this suit, claiming rights for any third parties. Acme Moving and Storage Co. of Jacksonville v. Mason, 167 So.2d 555 (Fla. 1964) and State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367 (1915) involve similar situations, holding that a person who is not himself affected by a statute cannot challenge its constitutionality on the basis that other persons might be affected.[4]

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[4]Hanson v. Raleigh, 391 Ill. 536, 63 NE 2d 851 (1945) involved a motorist who was injured by a fire chief on his way to a fire. The complaint was dismissed on the basis of an Illinois statute which provided tort immunity to any fireman who was operating a motor vehicle while engaged in the performance of his duties. One of the plaintiff's arguments was that the statute was unconstitutional because the Illinois constitution prohibits the legislature from releasing or extinguishing the liability of any individual to any municipality, and the statute has the effect of extinguishing a municipality's right of action for indemnity against a fireman. The Illinois Supreme Court held that the plaintiff had no standing to challenge this aspect of the statute, because extinction of the city's right of indemnity did not affect the plaintiff's rights in any way.

D. OVERPOWERING PUBLIC NECESSITY

Both Mr. Matthews and the Department of Insurance argue that the deprivation of Blue Cross' right of action without providing an alternative remedy is justified by an overpowering public necessity. The claimed overpowering public necessity appears to be a need to reduce automobile insurance premiums. It is this necessity, Respondents argue, which led initially to the adoption of the Florida Automobile Reparations Reform Act in 1971. Neither Mr. Matthews nor the department has suggested any reason the public necessity is more overpowering now than it was when this Court considered Kluger v. White, 281 So.2d 1 (Fla. 1973). In Kluger this court held that portion of the Florida Automobile Reparations Reform Act which abrogated a right of action for property damage of less that $550 to be unconstitutional, in that it denied access to the courts for redress of an injury recognized at common law. This court found no overwhelming public necessity to justify the statute then; nothing appears in this case to suggest such a public necessity should be found now.

Mr. Matthews suggests (Resp. Brief p. 13-14), that Blue Cross is attempting to "hang on" to an outmoded right of action which, for the public good, should be mercifully put to rest. A stronger argument could be made for eliminating as outmoded automobile property damage suits involving less than $550 in damages. Given the costs to the public in terms of court time, legal fees, and the like, such relatively insignificant suits

cannot be productive for the overall economy. Nevertheless, this court held in Kluger that the legislature could not abolish the common law rights of citizens of Florida to seek redress of such property damage without providing some alternative remedy.

In doing so, this Court exercised perhaps the most basic function of the judiciary under our system of government: to protect members of a minority of the citizenry from expropriation of rights or property by the legislative and executive branches of the government in the absence of constitutional authority.[5] Even if it were true that the world (or at least the economy of the State of Florida) would be better in the absence of subrogation claims, the legislature simply does not have constitutional authority to abolish those claims, which were recognized at common law, without providing an alternative remedy.

This is especially true where, as here, the legislature has not abolished those claims explicitly. The clear import of section 627.7372 is to eliminate double recovery by injured persons. Only by implication and the application of faulty logic have the lower courts construed the statute to eliminate subrogation claims by collateral sources. If this court cannot construe the statute to allow subrogation claims, the statute must be invalidated (at least insofar as it applies to collateral

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[5]See discussion in 1 C. Warren, The Supreme Court in United States History, 214-18 (Rev. ed. 1926).

sources which are not automobile insurance carriers) because it unconstitutionally denies access to the courts.

III. ERISA PREEMPTION

An introductory comment is required before discussion of the substantive issue concerning ERISA preemption. The Department of Insurance, which was not a party to the proceedings in the trial court, apparently still fails to grasp the procedural posture of this case. The department contends this court should not consider the issue of ERISA preemption because Blue Cross has failed to adduce proof that the contract under which it paid benefits to Mr. Tyson is, in fact, an ERISA employee benefit plan. That fact was pleaded in the proposed complaint Blue Cross proposed to file. The trial court denied Blue Cross' motion for leave to intervene in the action between Mr. Tyson and Mr. Matthews based upon a finding that assuming the contract is an employee benefit plan, ERISA does not preempt section 627.7372. No one questioned the sufficiency of the allegation at the trial court level; Blue Cross can hardly be expected to have adduced factual evidence of the various elements of a complaint which the court has refused to entertain.

The key to determination of the ERISA preemption issue is whether section 627.7372 "regulates insurance." If the statute regulates insurance, it is saved from preemption by 29 U.S.C. §1144(b)(2)(A). If it does not regulate insurance, it is preempted.

With this in mind, examine the statute:

> (1) In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, and that the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source.

The remainder of the statute simply defines "collateral sources," including not only a variety of insurance policies, but also the United States Social Security Act, any government disability act, any public program providing medical expenses or disability payments, and any non-insurance contracts to pay the costs of hospital, medical, dental or other health care services, or any private wage continuation plan, and exempting worker's compensation benefits from the definition of "collateral sources." The statute does not prescribe the contents of any insurance policy. It does not prescribe or proscribe any action or business practice of insurance companies or insurance agents. The statute regulates not insurance, but recovery in tort.

In Metropolitan Life Ins. Co. v. Massachusetts, ---U.S. ---, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985), the United States Supreme Court discussed the three-part test for determining whether a statute relates to the "business of insurance" under the McCarran-Ferguson Act: 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 insured; and third, whether the practice is limited to entities within the insurance industry. Blue Cross will not reiterate those portions of its initial brief which demonstrated that this statute does not satisfy any of the three criteria. Suffice it to say that section 627.7372 does not begin to "regulate insurance" under that standard.

The cases cited by the Department of Insurance, in which various state laws were held to be exempt from ERISA preemption, demonstrate why those laws "regulate insurance" in stark contrast to section 627.7372 which does not. Consider: Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977) (cert. den. 98 S.Ct. 1630 (1978) (statute requiring specific benefits in group insurance plans); Metropolitan Life Ins. Co. v. Whaland, 410 A.2d 635 (N.H. 1979) (statute requiring specific benefits in group insurance plans); Eversole v. Metropolitan Life Ins. Co., 500 F.Supp. 1162 (C.D. Cal. 1980) (state law allowing claim for bad faith in handling of insurance claims); Insurers' Action Counsel v. Heaton, 423 App.Supp.. 921 (D. Minn. 1976) (requirement of minimum benefits in health insurance policies); McLaughlin v. Connecticut General Life Ins. Co., 565 F.Supp. 434 (N.D. Cal. 1983) (state rules for construing insurance contract and implied covenant of good faith in insurance contracts); American Progressive Life and Health Ins. Co. of New York v. Corkeran, 715

F.2d 784 (2d Cir. 1983) (regulation of commissions for life insurance salesmen); Metropolitan Life Ins. Co. v. Massachusetts, supra (regulation of the content of health insurance policies). Each of these cases involves state law requirements for the contents of insurance policies or regulation of the activities of insurance companies, or both.

By contrast, the only cases involving state restriction of an ERISA plan's subrogation rights have held that ERISA preempts the state law prohibiting subrogation. Davis v. Line Construction Benefit Fund, 589 F. Supp. 146 (W.D. Mo. 1984); Hunt v. Sherman, 345 N.W. 2d 750 (Minn. 1984). The department attempts to distinguish these cases, in part because neither case clearly involves subrogation for benefits paid as a result of an automobile accident. The department suggests no reason however, why a subrogation right which arises from an automobile tort should be treated any differently from a subrogation right which arises from any other tort.

The department also argues that the state law prohibiting subrogation in those cases was not an integral part of a comprehensive automobile no-fault law. The department has failed to suggest, however, any reason to believe that Florida's no-fault scheme will fall apart if health care insurers are allowed to pursue subrogation claims. As noted above, Respondents have argued that the amount of money involved in subrogation claims would be insignificant in establishing rate

basis for health insurance (and presumably, for automobile insurance as well).

In short, nothing in the record or the legislative history of this statute suggests the legislature actually intended section 627.7372 as a regulation of insurance rather than as a regulation of tort recovery. By its terms, the statute does nothing to "regulate insurance." Accordingly, it is subject to the ERISA preemption.

CONCLUSION

This court has been extremely reluctant to construe a statute in such a fashion as to cause it to be imperiled on constitutional grounds. This is as it should be. To construe section 627.7372 as barring subrogation rights of a health care insurer such as petitioner surely brings the statute in collision with Kluger prinicples requiring its invalidation for violation of Article I, section 21, Florida Constitution. Hence, the court is urged to construe the plain language of the statute so as to not prevent subrogation rights of a collateral source payor. If the statute cannot be so construed then it must be held unconstitutional as violative of Article I, section 21.

Furthermore, regardless of the Court's ruling on the construction or constitutionality of section 627.7372, this case must be remanded to the trial court to permit petitioner to intervene to establish the evidentiary basis for preemption of the statute under the applicable provisions of ERISA.

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 33602 and to William W. Tharpe, Jr., Esq., Department of Insurance, 413-B Larson Building, Tallahassee, Florida 32301, by U. S. Mail this the 7th day of May, 1986.

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