SUPREME COURT OF FLORIDA

ALFRED MARCHESANO and
DORIS MARCHESANO,

Petitioners,

VS.

NATIONWIDE PROPERTY AND
CASUALTY INSURANCE COMPANY,

Respondent.

CASE NO.: 68,397
APPEAL NO.: 85-694

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF RESPONDENT

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

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INTRODUCTION

Amicus Curiae, National Association of Independent Insurers ("NAII"), submits this brief in support of Respondent-Defendant, Nationwide Property and Casualty Insurance Company ("Nationwide").1/

The NAII is one of the largest insurance trade association in the United States. It is composed of over 500 insurance companies writing property and casualty insurance policies in all 50 states. Approximately 92 members of the NAII write automobile liability insurance in Florida. From January, 1984 through December, 1984, NAII members wrote approximately 36.65% (by premium volume) of the automobile insurance in Florida.

This appeal arises from the Second District Court of Appeal's certification of its construction of § 627.727, Florida Statutes (1982), regarding an insurer's duty to notify an insured of his options regarding uninsured motorists coverage at least annually as a question of great public importance. Section 627.727 imposes express requirements on the insurer members of the NAII with regard to uninsured motorist coverage in connection with such automobile liability policies which they

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1/ Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, the NAII has obtained the written consent of both Petitioners-Plaintiffs, Alfred and Doris Marchesano ("Petitioners"), and Nationwide to its filing and service of this amicus brief, copies of which are appended hereto as Exhibit A.

issue in Florida. The decision of the Second District Court of Appeal in construing that statute is of great importance to the members of the NAII. Reversal of the Second District's decision would adversely affect the members of the NAII.

STATEMENT OF THE CASE

The Second District Court of Appeal certified the following question to this Court:

> "When there has been a failure of an insurer to fulfill its statutory duty to obtain from an insured at the time of the purchase of a motor vehicle insurance policy a knowing rejection of uninsured motorist coverage limits higher than those specified in the purchased policy and equal to the policy's bodily injury liability limits, what is the effect, if any, of a subsequent notification sent by the insurer to the insured with a premium notice advising the insured of his options as to uninsured motorist coverage as required by Section 627.727(1), Florida Statutes (1982)?"

In the trial court, Petitioners claimed that Nationwide had failed to discharge two obligations under Section 627.727: (1) to provide uninsured motorist coverage with limits equal to the bodily injury liability limits in their automobile insurance policy because they had not rejected such coverage; and (2) to notify them annually of their options with regard to uninsured motorist coverage in connection with the renewal of their automobile insurance policy.

After a jury trial, the trial court entered Final Judgment incorporating the jury's findings that Nationwide "did provide notice at least annually to plaintiffs in a manner that complied with Section 627.727(1), Fla. Stat.," but that Nationwide had not offered Petitioners uninsured motorist coverage with limits equal to bodily injury liability limits at the time they

initially purchased the policy. Accordingly, that judgment declared that Petitioners were entitled to uninsured motorist coverage limits equal to their $100,000/$300,000 bodily injury liability limits.

The Second District Court of Appeal reversed the judgment. Because Nationwide had complied with its duty under Section 627.727(1) to provide Petitioners with annual notification of their options with regard to uninsured motorist coverage and the means to exercise their options, in the manner required by that statute and approved by the Florida Department of Insurance, the District Court held that this fulfilled Nationwide's statutory duty to offer Petitioners uninsured motorist coverage with limits up to their bodily injury liability limits. Because Petitioners never responded to Nationwide's notices, the District Court concluded, as a matter of law, that Petitioners had rejected such uninsured motorist coverage with higher limits.

STATEMENT OF FACTS

Amicus Curiae NAII adopts the Statement of Facts contained in the Respondent's Brief.

SUMMARY OF ARGUMENT

Section 627.727 clearly makes uninsured motorist coverage optional with the insured and gives the insured broad freedom to choose how much uninsured motorist coverage he will purchase.2/ When these decisions are made at the time insurance is purchased or renewed, the insurer can charge all of those desiring these coverages a premium sufficient to cover the losses which they are collectively likely to suffer. The issue in this case is when an insured should be entitled to purchase such coverage (at a nominal premium) retroactively, after suffering an accident. Because those who never suffer an accident will never pay a premium for this coverage, allowing such retroactive purchase effectively provides all of those given that option free uninsured motorist insurance (subject to a small deductible in the form of the premium they must pay for any retroactive purchase). Such a severe penalty ought not to be visited upon an insurer unless it has failed to provide the insured with the statutorily-required opportunity to accept or reject this coverage.

2/ Section 627.727(2)(a), Fla. Stat. (1982), allows the insured to purchase uninsured motorist coverage in amounts up to $100,000/300,000 regardless of his policy's bodily injury liability coverage limits. The same Section allows the insured to purchase uninsured motorist coverage with limits up to those of the policy's bodily injury liability limits, if higher than $100,000/300,000.

Where, as in the present case, an insured who has given the insurer a signed rejection of higher uninsured motorist coverage limits suffers an accident caused by an uninsured motorist, the insured almost always desires to make a retroactive purchase of uninsured motorist coverage. Under the rule urged by Petitioners and their supporting amicus curiae, the Academy of Florida Trial Lawyers, insureds would maximize their ability to make such retroactive purchases if they ignore all applications and other documents which they receive and sign when they purchase automobile insurance and ignore all subsequent notices from their insurers regarding uninsured motorist coverage options. They will thus avoid any possibility of being held responsible for their actions in failing to purchase uninsured motorist coverage when offered by the insurer in a manner complying with statutory requirements.

Petitioners would rob compliance with the 1980 amendment to Section 627.727, requiring annual notifications to all insured of their uninsured coverage options (accompanied by the means to exercise those options), of all substantive significance, reducing it to a requirement that insurers send "junk mail" to their policyholders, (Petitioners Brief at 17). In this case, the Second District Court of Appeal has rejected this absurd result and interpreted the amended Section 627.727 in a way which takes account of the entire 1980 amendatory statute. That statute reflects the legislature's effort to balance the competing interests of making uninsured motorist coverage

available to all Florida automobile insureds while affording insurers practical methods of operation without having to provide massive amounts of free insurance. The District Court simply recognized the Legislature's compromise between those interests: once an insurer has informed an insured of his options with regard to uninsured motorist coverage, whether at the time of application or upon subsequent renewals of the policy through state-approved notices, the insured must then bear his share of the responsibility--to give thoughtful consideration in advance to his insurance needs and desires--not to blindly ignore the specified terms of his policy and wait until after events have proven an unfortunate but actual need for coverage which was never purchased.

Accordingly, the decision of the Second District Court of Appeals should be affirmed.

ARGUMENT

The Second District Court of Appeal reversed the trial court's entry of judgment declaring that the petitioners had higher limits of uninsured motorist coverage, concluding:

> "That the declaratory judgment was erroneous because it attributed no significant meaning or purpose to the requirement of Section 627.727(1) that such notification be sent to the insured with a premium notice." 11 Fla.L.W. at 48.

Section 626.727 was first enacted in 1961 (originally denoted as Section 627.0851), and has since gone through 18 modifications, the last occurring in 1984.3/ This extended history of legislative modification and change is important to note because it reflects the regular and consistent level of attention given to uninsured motorist coverage by the Florida legislature. Yet, at no time during the last 25 years has the Florida legislature mandated that every Florida automobile insurance policy contain any amount of uninsured motorist coverage. It has only required such coverage to be provided if the insured does not reject it.

In 1980, the annual notification at issue in this appeal was added. See Fla. Laws ch. 80-396:

3/ Of course, the statutory version relevant to this case is the 1982 version, which was in effect at the time of Petitioners' February 26, 1984 accident. However, the annual notification requirement first added in 1980 remains in the latest statutory version which became effective on October 1, 1984.

> "Each insurer shall at least annually notify the named insured of his options as to [uninsured motorist] coverage required by this section. Such notice shall be part of the notice of premium, shall provide for a means to allow the insured to request such coverage, and shall be given in the manner approved by the [Department of Insurance]."

The District Court found itself obligated to "presume that the legislature has some purpose in requiring that type of notification and that compliance by an insurer with that requirement was to have some meaning." 11 Fla.L.W. at 48. Seeking to find "a rational and sensible meaning," it found that the most obvious meaning was

> "that the notification in this case meant what it was required by Section 627.727 to say, i.e. that the insured was given the option of uninsured motorist coverage with limits up to his bodily injury coverage limits. No purpose would be served by giving such an option to the insured unless there were some significance in his either exercising the option or not. After not exercising the option, the insured should not be entitled to receive what he could have had if he had exercised the option." Id.

The District Court's analysis conforms to the legislature's purpose as reflected by the 1980 amendatory statute. At the same time as it imposed the annual notification requirement, the Florida legislature also amended Section 626.727 to clarify the treatment of renewal policies. Prior to the 1980 amendment, Section 627.727 provided that uninsured motorist coverage "need not be provided in or supplemental to a renewal policy where the insured had previously rejected the coverage". However, extensive litigation about this language resulted in

conflicting determinations as to what constituted a "renewal policy."4/ Accordingly, Section 627.727 was amended to expressly extend this "renewal exception" to a include to "any other policy which extends, changes, supercedes or replaces an existing policy issued to him by the same insurer." 1980 Fla. Laws ch. 80-396.

Thus, that single amendment to Section 627.727, both expanded the "renewal exception" to the requirement that uninsured motorist coverage be provided in all automobile liability policies and imposed the annual notification requirement to be given at the same time the premium renewal was billed and collected. The effect of expanding the "renewal exception" was to clarify that an insurer did not have to obtain a new express rejection of uninsured motorist coverage with higher limits at each policy renewal. Construing the simultaneous addition of the annual notification requirement in light of this change discloses the legislature's intent to shift the burden away

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4/ See, e.g., Rhodes v. Aetna Casualty & Sur. Co., 437 So.2d 155 (Fla. 2d DCA 1983), petition for review denied, 447 So.2d 888 (Fla. 1984); Sentry Insurance Co. v. McGowan, 425 So.2d 98 (Fla. 5th DCA 1982), petition for review denied, 434 So.2d 888 (Fla. 1983); Spaulding v. American Fire & Indem. Co., 412 So.2d 367, (Fla. 4th DCA 1981), modified, 442 So.2d 206 (Fla. 1983); Maxwell v. United States Fidelity & Guar. Co., 399 So.2d 1051, 1053 (Fla. 1st DCA 1981); United States Fidelity and Guar. Co. v. Waln, 395 So.2d 1211 (Fla. 4th DCA 1981), petition for review denied, 407 So.2d 1106 (Fla. 1981); Hartford Accident & Indem. Co. v. Sheffield, 375 So.2d 598 (Fla. 3d DCA 1979); United States Fire Ins. Co. v. Van Iderstypne, 347 So.2d 672 (Fla. 4th DCA 1977).

from insurers in favor of placing some responsibility on insureds regarding the limits of uninsured motorist coverage in their renewal policies. As amended, Section 627.727 guaranteed that once an insurer had satisfied the notification requirement, the insured would have full knowledge available concerning the options available to him. As the District Court noted, this requirement of annual notification of options must be given meaning, meaning which can only be attributed to the notification by observing the insured's response. If he chooses to exercise his options, he will make an affirmative response to the notice. Likewise, his choice to not exercise the described options is reflected in his failure to respond.

This interpretation of the annual notification requirement of Section 626.727 gives meaning to the legislature's attempts in the 1980 amendment to define more limited and objectively provable means for insurers to satisfy their statutory duties. It is not inconsistent with Florida's recognized "public policy to require uninsured motorists protection . . . to afford to the public generally the same protection the public would have had if the uninsured motorists had carried public liability coverage." Liberty Mutual Insurance Co. v. Clay, 299 So.2d 95, 97 (Fla. 4th DCA 1974).

The District Court expressly acknowledged this public policy in its decision. 11 Fla.L.W. at 49. However, "this statutory provision [§ 627.727] . . . is only intended to impose a minimum area of coverage in an uninsured motorist tort

situation. . . . [S]uch limited coverage may not be extended except by clear and unambiguous provisions of a duly enacted statute or the insurance policy sued upon." Clay, supra, at 97. See also Golphin v. Home Indemnity Co, 284 So.2d 442, 444 (Fla. 1st DCA 1973); Insurance Co. of North America v. Strauss, 231 So.2d 548, 549 (Fla. 2nd DCA 1970). Here, there is no clear and unambiguous statutory provision which extends uninsured motorists coverage to an insured who never purchased it, when he was notified at least annually of his options to purchase such coverage in a manner required by statute and approved by the Florida Department of Insurance.

The impact of the annual notification requirement of Section 626.727 has already been recognized by other Florida courts. In at least two cases, where it had been determined that the insurer failed to comply with the annual notification requirement, it was held, as a matter of law, that the insureds had the maximum amount of uninsured motorist coverage available to them. See Ruiz v. Prudential Property & Casualty Insurance Co., 441 So.2d 681 (Fla. 3rd DCA 1983); Ferrigno v. Progressive American Insurance Co., 426 So.2d 1218 (Fla. 4th DCA 1983). This is the same result as those cases where the insurer was determined to have failed to offer uninsured motorists coverage at the time of application. See, e.g., Realin v. State Farm Fire and Casualty Co., 418 So.2d 431 (Fla. 3rd DCA 1982); General Accident Fire & Life Assurance Corp. v. MacKenzie, 410 So.2d 558 (Fla. 4th DCA), petition for review denied, 419 So.2d 1197 (Fla. 1982).

Since the "penalty" for an insurer's failure to provide the annual notification required by statute is equivalent to that imposed upon his failure to obtain a rejection of uninsured motorists coverage at the time of application, the insured's actions with regard to the annual notification must receive equal weight. Once the insurer has provided such notices as required by statute, nothing more remains for it to do. Thereafter, the action or inaction of the insured reflects his choice. The insured's treatment of the statutorily required annual notification is completely out of the control of the insurer. As such, it would be unreasonable to hold that such notification is without meaning except to impose liability upon an insurer to provide coverage which was never purchased. Rather, the insured's action or inaction must be deemed to reflect his choice.

Even before adoption of the annual notification requirement it was held that if such notices, if ignored, constitute a rejection by the insured of uninsured motorists coverage. In American Fire & Casualty Co. v. Bigger, 442 So.2d 1109 (Fla. 4th DCA 1983), the court considered the effect of annual notifications regarding available options concerning uninsured motorists coverage which were sent voluntarily by an insurer between 1975 and 1981.

> "Only last week, our Supreme Court in American Fire & Indemnity Co. v. Spaulding, 442 So.2d 206 (Fla. 1983), held that where an insured is aware of his right to obtain uninsured motorist cover-

> age equal in amount to liability coverage, and decides to maintain his uninsured motorist coverage at the lower limits, the insurance company does not have to offer such coverage at the exact moment of change in the policy. Thus, despite the absence here of an express offer by the company at the moment of the policy change, the insured was obviously aware of the right to higher U.M. coverage because of the repeated notices to that effect and Spaulding specifically holds that such awareness constitutes an election to continue the lower coverage limit." 442 So.2d at 1110.

The Second District Court of Appeal simply recognized this same principle here. Contrary to petitioners' assertions, this holding is fully consistent with prior case law. Many of the decisions relied upon by petitioners (and their supporting amicus) deal with problems completely different from the questions of offer by the insurer and action by the insured at issue here. Moreover, none of those decisions takes account of the legislative readjustment of the balance between insureds and insurers effectuated in the 1980 amendment, for all of them construe earlier versions of Section 627.727.5/

5/ The decisions in Hodges v. National Union Indemnity Co., 249 So.2d 679 (Fla. 1971); Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971); State Farm Mutual Automobile Insurance Co. v. Diem, 358 So.2d 39 (Fla. 3rd DCA 1978); and American Motorists Insurance Co. v. Weingarten, 355 So.2d 821 (Fla. 1st DCA 1978), themselves all predate the 1980 amendment to Section 627.727. While the other decisions cited post-date that amendment, none construes Section 627.727 after the 1980 amendment imposing the annual notification requirement. See Kimbrell v. Great American Insurance Co., 420 So.2d 1086 (Fla. 1982)(construing the 1975 version); American Fire & Casualty Co. v. Spaulding, 442 So.2d 206 (Fla. 1983)(construing the 1977 version); Zisook v. State Farm

(Footnote continued on following page)

Recognition of the competing public policies embodied in Section 627.727 was recently demonstrated in Bankers Insurance Co. v. Vasquez, 483 So.2d 440 (Fla. 4th DCA 1985) (en banc). The Court observed:

> "As the [Supreme Court] in Kimbrell remarked, Section 627.727, Florida Statute (1983), embodies a public policy for the protection of insureds so that UM coverage will be available under all automobile insurance policies unless rejected by the insured. 420 So.2d at 1088. It is obviously not intended that the insured is to always have UM coverage without paying for it, otherwise there would be no point in having a statutory provision outlining how to reject it." Id. at 442.

In Bankers, the court held that an insured could not disavow her written rejection of uninsured motorist coverage, by merely asserting that she did not understand and did not pay attention to the forms describing uninsured motorist coverage and explaining the available options.

> "If such a written rejection is not valid upon signature, one is left helpless to suggest how else an insurer can protect itself from providing coverage, for which it receives no premiums, unless the signature were to be sworn to acknowledging that the paragraph had been read and understood. . . . otherwise, as a practical mat-

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5/ (Footnote continued from previous page)

Automobile Insurance Co., 440 So.2d 452 (Fla. 3rd DCA 1983)(construing a 1977 application); Realin v. State Farm Fire & Casualty, 418 So.2d 431 (Fla. 3rd DCA 1982)(construing a 1977 application); Decker v. Great American Insurance Co., 392 So.2d 965 (Fla. 2nd DCA 1980), petition for review denied, 339 So.2d 1143 (Fla. 1981)(construing the 1979 version).

> ter, every written rejection would be worthless in that it would be obviated by convenient oral testimony within the circumstances and the case law." Id.

Similarly, the action or inaction by an insured with regard to the annual notification properly provided by an insurer must be given full meaning. The insured's choice to ignore such notices is beyond the control of the insurer, who had already complied to the fullest extent required by law. To attribute meaning to such notification only where the insured admits reading it would allow insureds to deprive that notification of all affect.

CONCLUSION

For all of the foregoing reasons, the holding of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

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Subscribed and sworn before me this
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Notary Public

My commission expires on 4-4-88