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SUPPREME COURT OF FLORIDA

September 10, 1991

GEORGIA INSURERS INSOLVENCY POOL,

Petitioner,

Case No. 78,415

v.

District Court of Appeal,
1st District - No. 90-2867

RICHARD BREWER, et al.,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ELIZABETH C. WHEELER
Johnson and Bussey, P. A.
P. O. Box 531086
Orlando, FL 32853-1086
(407)423-7287
Florida Bar No: 374210
Attorneys for Petitioner,
GEORGIA INSURERS INSOLVENCY POOL

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PRELIMINARY STATEMENT

The Petitioner, Georgia Insurers Insolvency Pool, shall be referred to by proper name or as "GIIP." The Appellees, Johnny L. Bentley, et al., will be referred to by proper names or as the "Plaintiffs." References to the Appendix filed in the District Court will be indicated as (A.___). References to the Appendix filed in this court will be indicated as (AA.____).

STATEMENT OF THE CASE

Plaintiffs filed a third amended complaint against Richard Brewer and J. D. Ray Company, a Georgia corporation. (A.1) The action arose out of a motor vehicle accident which resulted in the death of Sandra M. Bentley and injuries to her children. At the time of the accident, Richard Brewer was operating a tractor-trailer owned by him and leased to J. D. Ray Company. (A.3)

J. D. Ray Company, Inc. moved for summary judgment in its favor. (A.2) As grounds, Ray asserted that Brewer was an independent contractor at the time of the accident, and Ray could not be held vicariously liable for Brewer's alleged negligence in the operation and maintenance of his motor vehicle. The trial judge determined there was no issue of material fact and entered final summary judgment in favor of J. D. Ray Company, Inc. (A.3) No appeal was taken from that judgment.

The case proceeded to trial against Richard Brewer. The jury returned a verdict in favor of the Plaintiffs. (A.4) An amended final judgment was entered on August 2, 1989. (A.5) After applying certain offsets, the amended final judgment awarded damages as follows:

The Estate of Sandra M. Bentley	$67,061.24

Johnny L. Bentley, as survivor of Sandra M. Bentley	$217,000.00
Johnny L. Bentley, III, as survivor of Sandra M. Bentley	$217,000.00
Jeremy L. Bentley, III, as survivor of Sandra M. Bentley	$217,000.00
Joseph L. Bentley, as survivor of Sandra M. Bentley	$217,000.00
Johnny L. Bentley, III	$1,247.35.
Jeremy L. Bentley	$2,228.52
Joseph L. Bentley	$1,688.92

The Plaintiffs thereafter filed a motion for leave to add the Florida Insurance Guaranty Association (FIGA), the Georgia Insurers Insolvency Pool, and Allied Fidelity Insurance Company as parties defendant. (A.6) Joinder was sought pursuant to Section 627.7262, Florida Statutes. (A.6) The court denied Plaintiffs' motion to add Allied Fidelity and granted the motion to add FIGA.

The trial court entered judgment against FIGA, holding that the estate and each survivor of Sandra M. Bentley had a separate covered claim for up to $300,000.00 under the FIGA Act. (AA.6) FIGA appealed that order. The First District determined that multiple survivors under the wrongful death act suing for the death of a single person had only a single covered claim under the FIGA Act. (AA.6)

After considering memoranda of law addressing the issue whether the Court could obtain jurisdiction over the person of

GIIP, the trial court entered its order granting Plaintiffs' motion to also add GIIP as a party defendant. (AA.16) GIIP appealed that order to the First District Court of Appeal. On July 17, 1991, the First District rendered its opinion affirming the trial court's order. (AA.1)

Recognizing that its decision necessarily subjected to liability the insurance guaranty association of a sovereign sister state, the First District certified the following question as being of great public importance:

> WHETHER THE CONDUCT OF AN INSOLVENT INSURER DOING BUSINESS IN FLORIDA MAY BE SHIFTED TO GEORGIA INSURERS INSOLVENCY POOL SO AS TO SATISFY THE MINIMUM CONTACTS REQUIREMENT OF THE DUE PROCESS CLAUSE AND VEST JURISDICTION BY THE FLORIDA COURTS OVER THE GEORGIA INSOLVENCY POOL UNDER SECTION 48.193, FLORIDA STATUTES.

GIIP filed a timely notice to invoke the discretionary jurisdiction of this Court. On August 16, 1991, this Court entered an order postponing its decision on jurisdiction and directing GIIP to serve its brief on the merits on or before September 10, 1991.

STATEMENT OF FACTS

Prior to November 15, 1985, Allied Fidelity Insurance Company issued a truckers' liability insurance policy to J. D. Ray Company. (A.18) The policy provided liability insurance with combined single limits of $1,000,000.00 for any one accident or loss. (A.18) The named insured on the policy was J. D. Ray Company. (A.18) The policy provided liability coverage for persons operating vehicles hired by the named insured. (A.18)

J. D. Ray Company was a Georgia corporation, and its office was located in Americus, Georgia. (A.19) J. D. Ray, the president of the company, purchased the insurance through Bill Plemons, an insurance agent in Jackson, Georgia. (A.19) Richard Brewer played no part in selecting Allied Fidelity as the liability insurance carrier for J. D. Ray Company. (A.20)

At the time of the accident involving the plaintiffs, Richard Brewer was operating as a contract hauler for J. D. Ray Company. (A.19) He owned the truck and trailer he was operating. (A.20) He leased the rig to J. D. Ray Company on August 14, 1985, two months after the inception date of the Allied Fidelity policy. (A.21) Brewer initiated the contact with J. D. Ray which led to execution of the lease. (A.19) The lease between Brewer and J. D. Ray Company was entered into in Georgia. (A.21)

The Plaintiffs resided in Florida. (A.1) Brewer resided in Florida. (A.20) The accident occurred in Florida. (A.1)

Allied Fidelity was an Indiana corporation. (A.18) The company was adjudicated insolvent by the Marion Circuit Court, State of Indiana, on July 15, 1986. (A.23) An ancillary receiver was appointed in Florida for the purpose of liquidating the insurer's assets and the estate. (A.24)

Additional reference to the facts will be made during the Argument.

SUMMARY OF THE ARGUMENT

The First District's opinion clearly presents a question of great public importance. The First District erroneously determined that the statutorily created insurance guaranty association of a sister state is subject to personal jurisdiction in Florida without any necessity that due process requirements be satisfied. Without reference to any constitutional, statutory, or judicial precedent, the court determined that jurisdiction could be established over a foreign guaranty association by virtue of activities carried on within this state by insolvent insurance carriers who happened to have done business in both Florida and the other state. There is no legal basis for the First District's decision.

Numerous cases in both the United States Supreme Court and the courts in this state have held that the activities of the defendant and not those of a third party must be examined to determine whether the defendant has sufficient minimum contacts to satisfy due process requirements. Due process requires that the defendant has purposefully availed itself of the privilege of conducting activities within the forum state before it can be subjected to the jurisdiction of that state. The focus of the due process inquiry is the relationship among the defendant, the forum, and the litigation.

The purpose of the instant litigation was to determine the extent of GIIP's liability for payment of the damages awarded by the amended final judgment. The question is thus not whether Allied Fidelity's policy covered the damages, but the extent to which the plaintiffs have covered claims for which GIIP may be liable. The question must be decided under Georgia law, under which GIIP was created and by which its obligations are determined. Florida has no interest in interpreting the guaranty association laws of another state.

The jurisdictional issue similarly cannot be determined on the basis of any interest Florida might have in protecting the rights of the plaintiffs. Because Allied Fidelity was doing business in Florida and both the Plaintiffs and Richard Brewer were residents of Florida at the time of the accident, the Plaintiffs had "covered claims" against the Florida Insurance Guaranty Association. The Plaintiffs were thus protected against Allied Fidelity's insolvency by the FIGA Act, and it was not necessary for them to travel outside the State of Florida to seek a remedy for their damages.

In the only case involving a similar issue in this state, the Fifth District determined that a foreign insurance guaranty association had insufficient contacts with the State of Florida to subject it to in personam jurisdiction of the courts of this state. The facts in South Carolina Insurance Guaranty Association v. Underwood, 527 So.2d 931 (Fla. 5th DCA 1988),

were almost identical to those in the instant case. Although the insurer in Underwood had not conducted any activities within Florida, nothing in Underwood suggests that the Fifth District would have reached a different conclusion if the insurer had availed itself of the privilege of conducting activities within Florida. To the contrary, the Fifth District's due process analysis suggested that its holding would have been the same even if the insolvent insurer had conducted business activities in Florida.

Other Florida cases have recognized that Florida's statutory insurance guaranty association is not a successor in all regards to an insolvent insurer. The First District's determination that GIIP "stood in the shoes" of Allied Fidelity places a broader interpretation upon the Georgia Code than has been placed upon Florida Statutes in interpreting the FIGA Act. Nothing in the Georgia Code suggests that the Georgia General Assembly intended such a broad expanse of liability for GIIP.

Because there is no constitutional, statutory, or judicial precedent supporting the First District's opinion subjecting the statutory creature of a sister state to jurisdiction of the courts of this state, and GIIP did not purposefully avail itself of the privilege of conducting activities in Florida, the certified question should be answered in the negative. The

decision of the First District should be quashed and the order of the trial court reversed.

ARGUMENT

THE CONDUCT OF AN INSOLVENT INSURER DOING BUSINESS IN FLORIDA MAY NOT BE SHIFTED TO GEORGIA INSURERS INSOLVENCY POOL AND DOES NOT SATISFY THE DUE PROCESS REQUIREMENT THAT GEORGIA INSURERS INSOLVENCY POOL HAVE MINIMUM CONTACTS WITH THIS STATE SO AS TO VEST JURISDICTION BY FLORIDA COURTS UNDER SECTION 48.193, FLORIDA STATUTES.

The First District and the trial court erred in determining that personal jurisdiction could be established over the Georgia Insurers Insolvency Pool by virtue of the business activities of Allied Fidelity, the insolvent insurer. Due Process requires that the defendant have meaningful contacts, ties, or relations with a foreign state before that defendant can be subject to a binding judgment of the forum. International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). With business entities, activities sufficient to satisfy the demands of due process must be carried on by persons who are authorized to act for the entity. 326 U.S. at 316. At no time was Allied Fidelity authorized to act on behalf of GIIP.

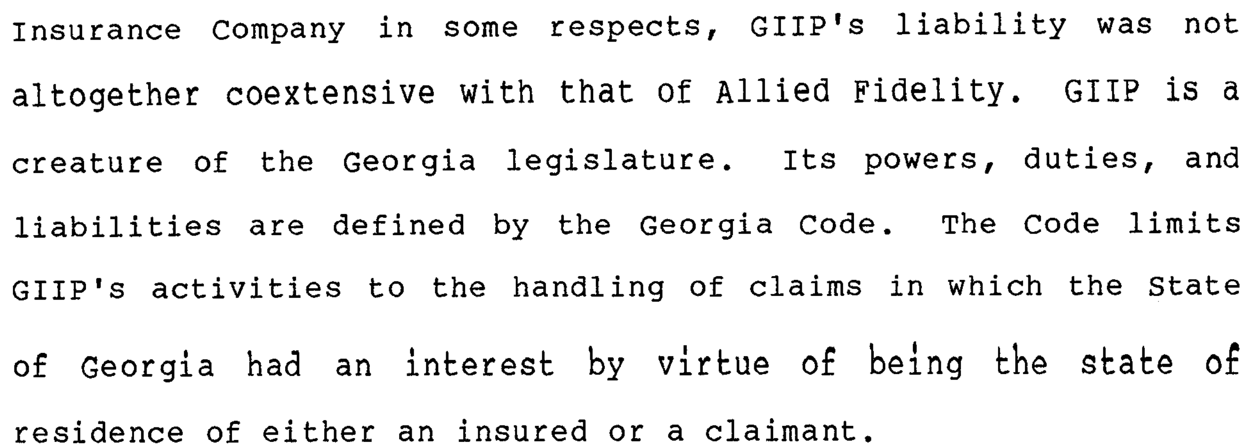
Due process requires that the defendant has purposefully availed itself of the privilege of conducting activities within the forum state before it can be subjected to the jurisdiction of that state. Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958). The "purposeful availment" requirement ensures that a defendant will not be haled into a

jurisdiction solely as a result of the "unilateral activity of another party or a third person." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 80 L.Ed.2d 404, 104 S.Ct. 1868 (1984). The defendant's conduct in connection with the forum state must be such that he should reasonably anticipate being called into court there. Worldwide Volkswagen Corp. v. Woodson, 44 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980). The focus of the inquiry is the relationship among the defendant, the forum, and the litigation. Shaffer v. Heitner, 433 U.S. 186, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977).

The First District essentially held that foreign insurance guaranty associations have no due process rights at all with respect to the exercise of *in personam* jurisdiction by courts in the State of Florida. While apparently conceding that GIIP did not purposefully avail itself of the privilege of conducting any activities in Florida, the Court held that GIIP was subject to jurisdiction in Florida because the insolvent insurer had business contacts with Florida. The Court ignored the myriad cases holding that the activities of *the defendant* and not those of a third party must be examined to determine whether *the defendant* has sufficient minimum contacts to satisfy the due process requirement. *E. g.*, Rush v. Savchuk, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980) (jurisdiction over liability insurer is not sufficient to establish jurisdiction over an insured who has no forum

contacts; requirements of International Shoe must be met as to each defendant over whom a state court exercises jurisdiction); Kulko v. Superior Court of California, 436 U.S. 84, 56 L.Ed.2d 132, 98 S.Ct. 1690 (1978) (jurisdiction over one parent is not sufficient to establish jurisdiction over the other parent where the cause of action arises from personal, domestic relations and the controvery arises from a separation that occurred in another state); Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958) (jurisdiction over the settlor, appointees and beneficiaries of a trust does not establish jurisdiction over a non-resident trustee); Consolidated Textile Corp. v. Gregory, 289 U.S. 85, 77 L.Ed. 1047, 53 S.Ct. 529 (1933) (jurisdiction over a controlled subsidiary does not establish jurisdiction over the parent corporation); Kennedy v. Reed, 533 So.2d 1202 (Fla. 2d DCA 1988) (jurisdiction does not lie over an individual because of acts performed in his capacity as agent for another); American Credit Card Telephone Co. v. National Pay Telephone Corp., 504 So.2d 486 (Fla. 1st DCA 1987) (officers of corporation doing business in Florida are not subject to jurisdiction under Section 48.193(1)(a) or (b)).

The activities of Allied Fidelity cannot satisfy due process requirements which would permit Florida courts to exercise in personam jurisdiction over GIIP. Although the Georgia Insurers Insolvency Pool succeeded Allied Fidelity


Insurance Company in some respects, GIIP's liability was not altogether coextensive with that of Allied Fidelity. GIIP is a creature of the Georgia legislature. Its powers, duties, and liabilities are defined by the Georgia Code. The Code limits GIIP's activities to the handling of claims in which the State of Georgia had an interest by virtue of being the state of residence of either an insured or a claimant.

The Georgia Insurers Insolvency Pool was created to provide a remedy for covered claims under property and casualty insurance policies when the insurer has become insolvent and is unable to perform its contractual obligations. Georgia Code Section 33-36-2. Every insurer authorized to write property or casualty insurance policies <u>in Georgia</u> is required to be a member of the insolvency pool and is liable for assessments necessary to secure funds for the payment of covered claims and reasonable costs to administer the pool. Georgia Code Section 33-36-5. Assessments are based on the proportion that each insurer's net direct written premiums <u>in Georgia</u> bear to the total of the net direct written premiums received <u>in Georgia</u> by all such insurers for the preceding calendar year for the particular kind of insurance for which the assessment is made. Georgia Code Section 33-36-7.

GIIP succeeded to the obligations and liabilities of Allied Fidelity only to the extent that GIIP became responsible for the investigation, adjustment, compromise, settlement, and

payment of covered claims; and for the investigation, handling, and denial of non-covered claims. Georgia Code Section 33-36-2. "Covered claims" are defined by Georgia Code Section 33-36-3 as those claims which arise out of a property or casualty insurance policy issued by an insurer authorized to do business in Georgia either at the time the policy was issued or when the insured event occurred and which fall within one of the enumerated classes of claims set forth in Section 33-36-3(2)(B). Those classes are as follows:

> (i) An unearned premium claim of a policyholder who at the time of the insolvency was a resident of [Georgia];
>
> (ii) An unearned premium claim of a policyholder under a policy affording coverage for property permanently situated in [Georgia];
>
> (iii) The claim of a policyholder or insured who at the time of the insured event was a resident of [Georgia];
>
> (iv) The claim of a person having an insurable interest in or related to property which was permanently situated in [Georgia]; or
>
> (v) A claim under a liability or worker's compensation insurance policy when either the insured or third party claimant was a resident of [Georgia] at the time of the insured event.

Section 33-36-3(e) further limits GIIP's liability on covered claims of third parties under liability policies to the applicable limits provided in the policy or $100,000.00, whichever is less.

The purpose of the instant litigation against GIIP was to determine the extent of GIIP's liability for payment of the

damages awarded by the amended final judgment. As with FIGA, the Plaintiffs sought to establish that each survivor of the decedent had a separate covered claim under the GIIP Act. Focusing on the relationship among GIIP, Florida, and this litigation fails to show any basis upon which Florida can exercise in personam jurisdiction over GIIP based on the unilateral activities of Allied Fidelity.

The question involved in this litigation is not whether Allied Fidelity's policy covered the damages awarded by the amended final judgment, but the extent to which the plaintiffs have covered claims for which GIIP may be liable. The question must be decided under Georgia law, under which GIIP was created and by which its obligations are determined. The question cannot be decided on the basis of any activities of Allied Fidelity within the State of Florida.

The jurisdictional issue similarly cannot be determined on the basis of any interest Florida might have in protecting the rights of the plaintiffs. Richard Brewer was covered as an additional insured under the Allied Fidelity policy. Because Allied Fidelity was doing business in Florida and both Richard Brewer and the Plaintiffs were residents of Florida at the time of the accident, the Plaintiffs had "covered claims" against FIGA. The Plaintiffs were protected against Allied Fidelity's insolvency by the FIGA Act.

In Kulko v. Superior Court of California, 436 U.S. 84, 56 Led. 2d 132, 98 S.Ct. 1690 (1978), the Supreme Court recognized that a state's legitimate interest in insuring the rights of its citizens is diminished when the merits of the controversy can be adjudicated without either party's having to leave his own state. In Kulko, both New York and California participated in the Uniform Reciprocal Enforcement of Support Act. Therefore, a California resident claiming support from a New York resident could file a petition in California and have the merits adjudicated in New York without either party having to leave his or her own state. While the FIGA Act is obviously different from the uniform act involved in Kulko, it nevertheless provides a similar remedy to the plaintiffs and avoids the necessity of their having to leave the State of Florida to obtain a remedy for their damages.

In South Carolina Insurance Guaranty Association v. Underwood, 527 So.2d 931 (Fla. 5th DCA 1988), the Fifth District determined that a foreign insurance guaranty association had insufficient contacts with the State of Florida to subject it to in personam jurisdiction of the courts of this state. The facts in Underwood were almost identical to those in the instant case. The plaintiff in Underwood had obtained a judgment against a South Carolina resident, Louise Goodwin, in an action arising out of an automobile accident which occurred in Florida. Goodwin was insured by Standard Fire Insurance

Company of Alabama at the time of the accident. Standard Fire thereafter became insolvent, and South Carolina Insurance Guaranty Association (SCIGA) undertook defense of Standard Fire's insured. After entry of the judgment, plaintiff's counsel sought to proceed against SCIGA on allegations that the plaintiff was a third party beneficiary under the terms of the SCIGA Act. The Fifth District held that SCIGA had not conducted any activities within the State of Florida which would subject it to the jurisdiction of Florida courts.

The First District in the instant case apparently interpreted Underwood as holding that Florida did not have jurisdiction over SCIGA because the insolvent insurer in that case had not conducted any activities within Florida. The First District stated that the Underwood court considered the conduct of the insolvent carrier in negotiating the contract and inquired whether the company, rather than the guaranty association, had availed itself of the privilege of conducting business activities in Florida. Since GIIP conceded that Allied Fidelity was conducting business in Florida, the First District contended that Underwood supported its decision that GIIP was subject to in personam jurisdiction in this state because personal jurisdiction could be established over Allied under Section 48.193(1)(a), Florida Statutes. This analysis belies the point that the Fifth District actually concluded that neither SCIGA nor Standard Fire availed itself of the

privilege of conducting activities in Florida. 527 So.2d at 935.

The Fifth District's conclusion surely does not establish that Florida could have exercised personal jurisdiction over SCIGA if Standard Fire had availed itself of the privilege of conducting activities within Florida. Moreover, the Fifth District's due process analysis suggested that the result in that case would have been the same even if Standard Fire had conducted activities in Florida sufficient to satisfy minimum due process requirementsas to it:

> To satisfy the minimum contacts test, it is necessary that the defendant's conduct in connection with a foreign state be such that the defendant should reasonably anticipate being haled into court there. . . . The defendant must purposely avail itself of the privilege of conducting activities within the foreign state, thereby invoking the benefits and protections of the laws of that state. . . . "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposely established 'minimum contacts' in the foreign state."

Id. (Citations omitted; emphasis supplied.) The Fifth District clearly recognized the necessity that SCIGA itself must have purposefully availed itself of the privilege of conducting business in Florida before it could be subjected to jurisdiction of the courts of this state.

Contrary to the First District's determination that GIIP "stood in the shoes" of Allied Fidelity, other Florida courts have held that a statutory insurance guaranty association is

not a successor in all regards to an insolvent insurer. This issue was addressed by the Fifth District in Williams v. Florida Insurance Guaranty Association, 549 So.2d 253 (Fla. 5th DCA 1989). The Williams Court held that FIGA was not liable for the alleged negligence of an agent of the insolvent insurer in failing to advise the insureds that their automobile policy did not provide uninsured motorist coverage.

The Williams court noted that the full gamut of a defunct insurance company's liabilities was not intended to be shifted onto FIGA. 549 So.2d at 254. FIGA's liability was limited to covered claims as defined in the Statute. Id. Additionally, FIGA was not responsible for penalties and interest. Id. Finding that the legislature limited both the amount and the substance of covered claims so that the claims preserved for payment would be manageable and not bankrupt FIGA's funding and payment mechanism, the Williams court observed that the limiting language would not have been necessary if FIGA had been intended to be a successor in all regards to an insolvent insurer's obligations and liabilities. Id. See also O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9 (Fla. 1971) (FIGA is a statutory creature designed to provide a mechanism for payment of covered claims under certain classes of insurance policies); Fernandez v. Florida Insurance Guaranty Association, 383 So.2d 974 (Fla. 3d DCA 1980) (the legislature

carefully restricted FIGA's potential liability concerning its vicarious responsibility for the acts of companies it succeeds).

GIIP's scope of liability is similarly limited by provisions of the Georgia Code. In determining that the Code made GIIP, in effect, the "insurer," in this case, the First District has more broadly interpreted the Georgia Code than Florida courts have interpreted Florida Statutes pertaining to FIGA. No doubt recognizing the expansive consequences attendant to its decision on an issue as sensitive as personal jurisdiction over a statutory entity created under the laws of another state, the First District certified the question to this court as being one of great public importance.

GIIP's statutory obligations do not envision any purposeful availment by GIIP of the privilege of conducting activities in any other state. At most, GIIP's extraterritorial obligations are limited to <u>defending</u> actions brought in other states against persons insured by insolvent carriers. GIIP's statutory obligations themselves are not triggered by any purposeful activity on the part of GIIP, but by fortuitous circumstances relating to the occurrence of an accident for which an insolvent insurance carrier doing business in Georgia provided coverage.

GIIP had no privity of contract with Allied or with its insureds. It did not transact business within the State of

Florida, nor did it contract to supply any goods or services within this state. GIIP has not subjected itself to the protection of this state for the purposes of transacting business, nor has it purposefully availed itself of the privilege of conducting any activities within Florida. GIIP does not derive any economic benefit from Florida since all of its funding is from assessments against insurance companies doing business in Georgia, which assessments are based on the amount of premiums written in Georgia. Its activities within Florida are limited to those rare occasions when, as in this case, it is called upon to defend a claim against a Georgia resident when the claim is made in Florida. In this case the Georgia insured was not legally responsible for any of Plaintiffs' damages.

Without doubt, the First District's opinion raises a question of great public importance. The opinion subjects a statutory entity created under the laws of a sister state to personal jurisdiction of the courts in this state when there is no indication that that state intended or expected its guaranty association to be called into court in Florida. The First District's opinion subjects that statutory creature to jurisdiction of the courts of this state without any requirement that minimum due process requirements be met as it. The First District's opinion in effect holds that the statutory creature of a sister state is not entitled to the

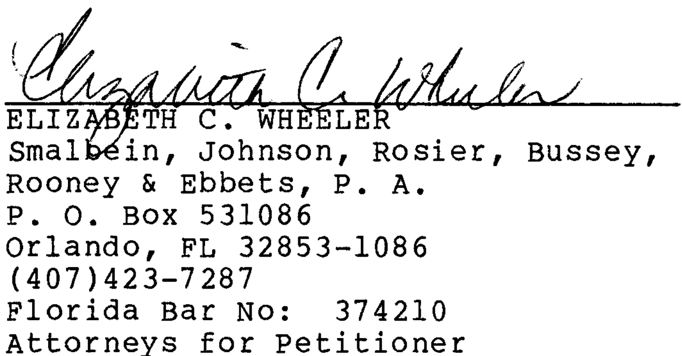
same constitutional guaranties as other persons and organizations. The First District's decision is not supported by any constitutional, statutory, or judicial precedent.

The certified question should be answered in the negative, the decision of the First District quashed, and the order of the trial court reversed.

CONCLUSION

Because there is no constitutional, statutory, or judicial precedent supporting the First District's opinion subjecting the statutory creature of a sister state to jurisdiction of the courts of this state, and GIIP did not purposefully avail itself of the privilege of conducting activities in Florida, the certified question should be answered in the negative. The decision of the First District should be quashed and the order of the trial court reversed.

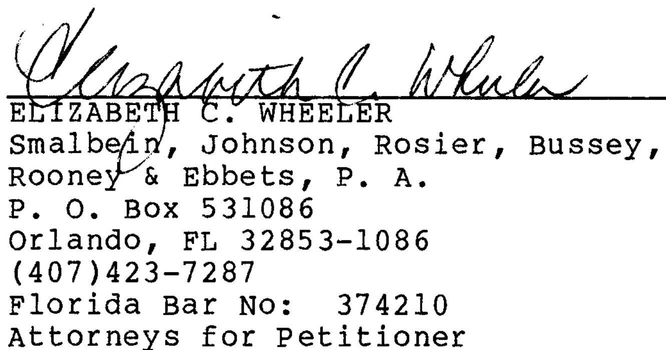
Respectfully submitted,



ELIZABETH C. WHEELER
Smalbein, Johnson, Rosier, Bussey,
Rooney & Ebbets, P. A.
P. O. Box 531086
Orlando, FL 32853-1086
(407)423-7287
Florida Bar No: 374210
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of foregoing has been mailed this 10th day of September 1991 to David C. Glicken, Esquire, 120 East Robinson Street, Orlando, FL 32801; J. Cheney Mason, Esquire, One DuPont Centre, 390 North Orange Avenue, Suite 2100, Orlando, FL 32801; Douglass E. Myers, Esquire, P. O. Box 41222, Jacksonville, FL 32203; and Roland A. Sutcliffe, Jr., Esquire, P. O. Box 3000, Orlando, FL 32802.



ELIZABETH C. WHEELER
Smalbein, Johnson, Rosier, Bussey,
Rooney & Ebbets, P. A.
P. O. Box 531086
Orlando, FL 32853-1086
(407)423-7287
Florida Bar No: 374210
Attorneys for Petitioner