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IN THE SUPREME COURT OF FLORIDA

THIRD DISTRICT COURT OF APPEAL CASE No. 91-1240

SUPREME COURT OF FLORIDA CASE No. 81,115

INTERNATIONAL INSURANCE COMPANY,
a foreign corporation,

Petitioner,

v.

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,
a Florida corporation,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

MESSER, VICKERS, CAPARELLO, MADSEN,
LEWIS, GOLDMAN & METZ, P.A.
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STATEMENT OF THE CASE AND THE FACTS

Metropolitan adopts International's statement of the case and facts, except to the extent it interprets the decisional law relied on by the lower courts to support its position herein, and with the addition of the following.

It is undisputed that International's policy specifically included resident relatives, referred to as "family members" within the definition of "covered persons" for the purpose of its general statement of liability coverage:

> DEFINITIONS . . . "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household . . .
>
> Part A . . . LIABILITY COVERAGE . . . "We will pay damages for bodily injury...for which any covered person becomes legally responsible because of an auto accident . . . ."
>
> "Covered person" as used in this Part means: You or any family member for the ownership, maintenance or any family member for the ownership, maintenance or use of any auto or trailer.

R-45 (emphasis supplied).

Consequently, the policy excludes from liability coverage "the ownership, maintenance or use of any vehicle, other than your covered auto, which is owned by . . . any family member." R- 45 (emphasis supplied).

The International Policy also affords uninsured motorist coverage to resident relatives:

> PART C . . . UNINSURED MOTORISTS COVERAGE . . . We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person and caused by an accident . . .

"Covered person" as used in this Part means: . . .

1. You or any family member . . . ." (R. 46).

Later, however, the same policy states:

> EXCLUSIONS: We do not provide Uninsured Motorists Coverage for bodily injury sustained by any person: While occupying . . . any motor vehicle . . . owned by . . . any family member which is not insured for coverage under this policy. (R. 47).

There is no question in this case that the claimant was a "family member" or resident relative within the definition of "covered person" quoted above from the basic liability provisions of the International policy. R-45. It is likewise undisputed that the injuries giving rise to claimant's damages were caused by an accident involving an uninsured motorist. R-22. Finally, the facts are that at the time of the accident, this resident relative happened to be occupying his own vehicle. R-36.

The Third District Court of Appeal initially per curiam affirmed per curiam the trial court's summary judgment in favor of Metropolitan, citing Allstate Ins. Co., v. Dairyland Ins. Co., 271 So. 2d 457 (Fla. 1973); Sellers v. United States Fidelity & Guarantee Co., 185 So. 2d 689 (Fla. 1966); Nationwide Mutual Fire

Ins. Co. v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992). R-82.[1]

In its request for certification to this Court, International framed the issue as turning on the validity and enforceability of the uninsured motorist exclusion as applied to a "class I" insured. International argued that if an insured could not recover for damages arising out of the particular accident because of an exclusion from the liability coverage, then uninsured motorist coverage was not required, citing Progressive American Insurance Company v. Hunter, 603 So. 2d 1301 (Fla. 4th DCA 1992); Government Employees Insurance Company v. Wright, 543 So. 2d 1320 (Fla. 4th DCA 1989), rev. denied, 551 So. 2d 464 (Fla. 1989); Bolin v. Massachusetts Bay Insurance Company, 518 So. 2d 393 (Fla. 2d DCA 1987); Dairyland Insurance Company v. Kriz, 495 So. 2d 892 (Fla. 1st DCA 1986); and DeLuna v. Valiant Insurance Company, 792 F. Supp. 790 (M.D. Fla. 1992).

International recognized that this position was contradicted in Nationwide v. Phillips, which held that under Mullis UM coverage protected people, not accidents. A class I insured such as a resident relative is entitled to uninsured motorist protection and insurers may not restrict or reduce uninsured motorist coverage,

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[1] The issue litigated in the trial court and before the Third District was whether International's "excess insurance" provisions were void as applied to uninsured motorist coverage thus requiring proration of the two available UM policies. R-59. International now concedes that "excess insurance" clauses are void and unenforceable as to uninsured motorist coverage, but argues against the availability of uninsured motorist coverage under the terms of its policy in this case. Petitioner's Brief on Merits, at 4. International agrees that if uninsured motorist coverage is available under both its and Metropolitan's policies, then it is appropriate to prorate the coverages. Id.

whether through particular limits on liability coverage, or otherwise. Nationwide Mutual Fire Ins. Co. v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992).

The Third District maintained its affirmance of the judgment in favor of Metropolitan but certified its decision to this Court, finding express and direct conflict with Progressive American Insurance Company v. Hunter; Government Employees Insurance Company v. Wright; Bolin v. Massachusetts Bay Insurance Company; and Dairyland Insurance Company v. Kriz. On that basis International sought to invoke the discretionary jurisdiction of this Court. Pet. Br. on Merits, at 4.

On 27 January 1993, this Court entered its order postponing a decision on jurisdiction and requesting briefs on the merits. These proceedings follow.

SUMMARY OF ARGUMENT

Uninsured motorist coverage is an integral part of Florida's no-fault automobile insurance law. This statutorily mandated coverage cannot be altered or reduced by insurers except as authorized by statute. From the outset the UM statute has enumerated exactly when and under what circumstances this compulsory coverage could be limited, subject always to mandatory notice requirements. The statute's intent is to provide coverage to every insured "person" to the extent he or she would have been able to recover if the tortfeasor had been insured.

Uninsured motorist coverage was created for the protection of insureds. The named insured and family members are entitled to

this protection without regard to their location or the particular vehicle occupied at the time of injury. Public policy prohibits an insurer from limiting the provision of uninsured motorist coverage for named insureds and family members through policy exclusions based on the particular vehicle involved in the accident; such exclusions are void and unenforceable. Mullis v. State Farm Mutual Automobile Ins. Co., 252 So. 2d 229 (Fla. 1971)(hereinafter referred to as "Mullis").

This case reflects the continued efforts of insurers to restrict uninsured motorist coverage. In an effort to avoid the rule in Mullis carriers argue that restrictions on liability for particular accidents to class I insureds deprive those persons of "insured" status entitled to protection under the uninsured motorist statute. See, e.g., DeLuna v. Valiant Ins. Co. 792 F. Supp. 790 (M.D. Fla. 1992); Progressive v. American Ins. Co. v. Hunter, 603 So. 2d 1301 (Fla. 4th DCA 1992).

No justification exists to permit this circumvention of Florida law. See, e.g., Divine v. Prudential Property & Casualty Inc. Co., 18 Fla. L. Weekly D642 (Fla. 5th DCA Mar. 5, 1993); Nationwide Mutual Fire Ins. Co. v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992); Welker v. World Wide Underwriters Inc. Co., 601 So. 2d 572 (Fla. 4th DCA 1992). The decisions relied upon by International are distinguishable on their facts or wrongly decided. The confusion stems largely from the over generalization that "uninsured motorist coverage follows liability coverage." This is accurate in the sense that where there is no liability

coverage at all, uninsured motorist is not required. Valiant Ins. Co. v. Webster, 567 So. 2d 408, 411 (Fla. 1990) ("Mullis specifically holds that [section 627.727] requires only that uninsured motorist coverage must be provided to those covered for liability."). UM coverage has also been equated with liability coverage because it substitutes for liability insurance the tortfeasor would have had if properly insured. Once, however, an automobile liability policy is issued that affords liability coverage to persons identified as resident relatives, then uninsured motorist coverage is mandatory and not subject to restriction, other than as contemplated by statute.

Claimant in this case is a family member or resident relative of the named insured. International must provide UM coverage to this resident relative, as required by law. It cannot deprive this insured individual of the benefits of UM protection by restricting the circumstances under which the injuries caused by the uninsured tortfeasor occurred, i.e. by excluding coverage where the injuries occurred in claimant's own vehicle.

ARGUMENT

A CLASS I INSURED UNDER A POLICY OF MOTOR VEHICLE INSURANCE MAY NOT BE DENIED UNINSURED MOTORIST COVERAGE BY POLICY EXCLUSIONS WHICH LIMIT COVERAGE BASED ON THE VEHICLE IN WHICH THE INJURIES OCCURRED

Mullis is properly recognized as the "polestar" in determining the extent of UM coverage required under Florida law. Valiant Ins. Co. v. Webster, 567 So. 2d 408, 411 (Fla. 1990). Even today, over twenty years after Mullis, the validity of exclusions

purporting to limit UM coverage must be evaluated in light of the policies and holding in Mullis. Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So. 2d 1385, 1387 (Fla. 5th DCA 1992).

The facts in Mullis are strikingly similar to those at bar. In that case claimant's minor son was injured in an accident with an uninsured motorist while riding a motorcycle. State Farm had issued policies of insurance to the mother which covered resident relatives. There was no dispute that the injured party was a resident relative. The policies did contain, however, provisions which excluded UM coverage for injuries sustained by resident relatives if the accident occurred in a vehicle owned by the resident relative unless the vehicle was otherwise insured under the policy. Mullis, at 231-231. Since the motorcycle being driven at the time of the accident was not a covered vehicle under the policies, the exclusion, if valid, defeated coverage.

Both the trial court and the lower appellate court gave effect to the exclusion and denied UM coverage. Id. at 232. On certiorari, this Court quashed, holding the exclusion contrary to the uninsured motorist protection contemplated by the statute. Mullis, at 232. For purposes of analysis, the Court identified two categories, or classes, of insureds under the UM statute. The named insured, spouse and resident relatives ("class I insureds") were "given the same protection in case of bodily injury as if the uninsured motorist had purchased automobile liability insurance in compliance with the financial responsibility law." Id. at 233. The other category ("class II insureds") were "other persons

potentially covered who . . . are protected only if they receive bodily injury due to the negligence of an uninsured motorist while they occupy the insured automobile of the named insured with his permission or consent." Id.

Mullis first looked to the statute to find that uninsured motorist coverage is intended to provide an insured person with at least the same amount of protection as he would have been provided if the tort-feasor was legally insured, e.g., had complied with the financial responsibility law. Mullis, at 232-33. Accord Carguillo v. State Farm Mutual Automobile Ins. Co., 529 So. 2d 276 (Fla. 1988).

As "persons insured [under the policy] who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ." under the statute, the class I insureds were entitled to UM coverage "whenever or wherever" the accident occurred, as long as the bodily injury was inflicted by an uninsured motorist. Mullis, at 252.

Exclusions or reductions in this UM coverage for class I insureds is prohibited, except as authorized by law:

> Insurers or carriers writing automobile liability insurance and reciprocal uninsured motorist insurance are not permitted by law to insert provisions in the policies they issue that exclude or reduce the liability coverage prescribed by law for the class of persons insured thereunder who are legally entitled to recover damages from owners or operators of motor vehicles because of bodily injury.

Mullis, at 234.

The uninsured motorist statute applicable to this case is equally clear that the coverage is required for the protection of "persons insured" under the terms of the liability policy:

> No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered . . . in this state unless uninsured motor vehicle coverage is provided therein . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury . . . resulting therefrom.

§ 627.727(1), Fla. Stat. (1985).

The predecessor statute, construed in Mullis to the same effect, contained identical language with respect to the reason for providing the coverage:

> (1) No automobile liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than limits described in § 324.021(7), under provisions filed with and approved by the insurance commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom;

§ 627.0851(1), Fla. Stat. (1967)(Emphasis supplied).

The pertinent statutory provisions reflecting the intent and the purpose of uninsured motorist coverage are unchanged. The only two changes to the quoted section pertain to the type of automobile liability policy to which the statute applies, and the substitution of "uninsured motor vehicle coverage" for compliance

with the financial responsibility law. Neither change alters the stated intent of the statute to protect insured persons.

International argues that the 1984 amendments inserting the phrase "specifically insured or identified" evidences a legislative intent to permit uninsured motorists exclusions based on whether the vehicle involved in the accident was covered under the policy. Pet. Br. on Merits, at 14-16. Compare Automobile Ins. Co. v. Beem, 469 So. 2d 138 (Fla. 3d DCA 1985) and Nationwide Ins. Co. v. Kauffman, 495 So. 2d 1184 (Fla. 4th DCA 1986). This misconstrues the plain meaning of the statute as amended. Where, as in this case, the liability policy insures specifically described vehicles, the statute is triggered in its entirety, just as it was previously applied, in its entirety, to all automobile liability policies.

Nor is this construction supported by the legislative history of the amendments.[2] The statute was amended in part to restrict its application to automobile liability policies that "specifically insured or identified" motor vehicles in order to exempt general liability polices customarily sold to businesses from having to provide uninsured motorist coverage. Staff of Fla. H.R. Comm. on Com., CS/HB 319 (1984) Staff Analysis 1, 3 (final Jun. 21, 1984) (on file at Florida State Archives, series 19, carton 1306)

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[2] No court has construed these amendments in this context. Cf. Ellsworth v. Insurance Co. of N. Am., 508 So. 2d 395 (Fla. 1st DCA 1987) (refusing to consider the effects of this language); Automobile Ins. Co. of Hartford, Conn. v. Beem, 469 So. 2d 138 (Fla. 3d DCA 1985) (refusing to consider this 1984 amendment).

[hereinafter Staff Analysis]. Accordingly, the Staff Analysis stated that

> The present statute does not specifically address the type of general liability policy usually issued to a business, which covers many types of legal liability, including motor vehicle liability, but which policy does not refer to specific vehicles. Nor does the statute specifically address umbrella or excess policies which provide liability coverage in excess of the primary coverage for a fleet of vehicles owned or used by a business. In these situations it has generally been held that if uninsured motorist coverage is not rejected in writing, such coverage is deemed to be provided up to the limits of bodily injury liability purchased.

Id. at 2.

> The bill limits the applicability of the uninsured motorist requirements to liability policies covering specifically insured or identified motor vehicles. This would exempt from the statute's requirements comprehensive general liability policies or special multi-peril policies which provide coverage for many types of liability of an insured (usually a business) but which do not specifically identify vehicles that are covered.

Id. at 3 (emphasis added). Nothing in this analysis permits the construction advanced by International.

Uninsured motorist coverage requirements are legislatively created and cannot be restricted or altered except as specifically authorized by statute. There are several ways in which uninsured motorist coverage can be limited as to amount or restricted in scope. See § 627.727(1), (9)(a-e), Fla. Stat. The procedures for valid rejections of otherwise applicable limits have consistently been present in the statutes. In 1987 the Legislature created five statutorily authorized policy exclusions restricting the scope of coverage. § 627.727(1)(a)(a)-(e), Fla. Stat. One of the

exclusions now permitted by statute is virtually identical to the one at issue here:[3]

> Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the department, establishing that if the insured accepts this offer: . . . The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing in his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.

§ 627.727(9)(d), Fla. Stat. In order for this exclusion to be effective, however, the insurer must first comply with every aspect of the statute, including the reporting and stringent notice requirements. § 627.727(9), Fla. Stat. Failure to follow the statutory requirements renders the exclusion unenforceable under both the statute and Mullis. Nationwide v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992); Charbonell v. Auto Ins. Co. of Hartford Conn., 562 So. 2d 437 (Fla. 3d DCA 1990).

This legislatively authorized exclusion was not in effect at the time the International policy was issued or at the time of this accident in 1985. It may be considered, however, by this Court in construing and interpreting the uninsured motorist statute at issue. See Ivy v. Chicago Ins. Co., 410 So. 2d 494 (Fla. 1982). Mullis had previously construed the statute to prohibit limitations on UM for class I insureds based on the vehicle occupied at the time of the accident. The legislature, having mandated the coverage in the first instance, has now provided for specific

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[3] This exclusion was not added until 1987. 1987 Fla. Laws ch. 87-212.

exclusions, to be given effect under carefully circumscribed safeguards. This reflects the process as it should work. Efforts to narrow or avoid UM coverage by including various degrees of exclusionary language in the policies is not. See Nationwide v Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992).

The legislature also now requires an insurer wishing to offer this type of limited uninsured motorist coverage to file revised premium rates reflecting at least a 20% reduction in the premium rate as a result of the limited coverage. § 627.727(9), Fla. Stat. This too confirms the Mullis rule. An insured who purchases liability coverage which includes family members, purchases and pays a premium for uninsured motorist coverage for those class I insureds whenever and wherever injured by an uninsured motorist, e.g., without regard to the particular vehicle involved in the accident. See Mullis, at 238. If the breadth of such coverage is limited, as by exclusion, premiums should be reduced. See also Sellers v. United States Fidelity & Casualty Co., 185 So. 2d 689 (Fla. 1966) (automobile liability carrier that has accepted premium for providing coverage against injury by an uninsured motorist in accordance when the statute may not deny coverage on the basis of "excess over," "excess escape," or other provisions attempting to limit insurer's liability).

Mullis continues to stand for the proposition that, to achieve the public policy goals of the uninsured motorist provisions of Florida law, a class I insured "is covered by uninsured motorist liability protection [under the statute] whenever or wherever

bodily injury is inflicted . . . by the negligence of an uninsured motorist. Mullis, at 238.

> He would be covered thereby whenever he is injured while walking, or while riding in motor vehicles, or in public conveyances, including uninsured motor vehicles (including Honda motorcycles) owned by a member of the first class of insureds. Neither can an insured family member be excluded from such protection because of age, sex, or color of hair. Any other conclusion would be inconsistent with the intention of [the statute]. It was enacted to provide relief to innocent persons who are injured through the negligence of an uninsured motorist; it is not to be "whittled away" by exclusions and exceptions.

Id.

The Mullis prohibition against restrictions on uninsured motorist coverage available to class I insureds has been cited by this Court in recent years as having continued vitality. See e.g., Florida Farm Bureau v. Hurtado, 587 So. 2d 1314, 1318 (Fla. 1991)("Class I insureds are covered regardless of their location when they are injured by an uninsured motorist."); Coleman v. Fla. Ins. Guar. Ass'n, Inc., 517 So. 2d 686, 689 (Fla. 1988)("Uninsured motorist protection does not inure to a particular motor vehicle, but instead protects the named insured or insured members of his family against bodily injury inflicted by the negligence of any uninsured motorist under whatever conditions, locations, or circumstances any such insureds happen to be in at the time").

Mullis noted that beginning in 1964, various and sundry types of UM coverage exclusions contrary to the intent of the statute were invalidated by the appellate courts of this state. Id. at 234-236. Any vacillation from strict adherence to the unencumbered provision of UM to class I insureds was prohibited. Id. The type

of exclusion varied, but not the result. Id.; see also Sellers, Allstate (invalidating excess insurance clauses based on the mandatory provisions of the statute). Since Mullis, most but not all appellate courts have demonstrated equal resolve. See, e.g., Divine v. Prudential Property & Casualty Inc. Co., 18 Fla. L. Weekly D642 (Fla. 5th DCA Mar. 5, 1993); Nationwide Mutual Fire Ins. Co. v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992); Lewis v. Cincinnati Ins. Co., 503 So. 2d 908 (Fla. 5th DCA 1987); Nationwide Mutual Fire Ins. Co. v. Kauffman, 495 So. 2d 1184 (Fla. 4th DCA 1986); Incardona v. Auto-Owners Ins. Co., 494 So. 2d 513 (Fla. 2d DCA 1986); Automobile Ins. Co. of Hartford, Conn v. Beem, 469 So. 2d 138 (Fla. 3d DCA 1986); Auto-Owners Ins. Co. v. Bennett, 466 So. 2d 242 (Fla. 2d DCA 1984).

Efforts to circumvent UM coverage appear to be a continuous process of drafting exclusionary language. The most recent permutation is that advanced in this case. To a large extent, these efforts are based on the misapplication of the over-generalized statement that UM coverage follows liability coverage. This statement is true to the extent that protection under the UM statute is invoked by a liability policy. It is also true that a person must be an insured under the liability policy in order to receive the benefits of the statute. Valiant Ins. Co. v. Webster, supra. Finally, that insured person is entitled to benefits that equate those he or she would have received if the tortfeasor had been insured. Mullis. Nothing in the statute or Mullis, however,

authorizes an accident specific liability as a means of avoiding UM coverage altogether.

In fact, Mullis seems to have considered a similar argument and rejected it. One of the cases cited with approval invalidated a driver exclusion endorsement that excluded from coverage any injuries occurring while the insured's son was driving. Butts v. State Farm Mutual Automobile Ins. Co., 207 So. 2d 73 (Fla. 3d DCA 1968). Mullis quoted from the district court opinion "The driver exclusion endorsement is not an attempt to exclude [the son] from the definition of "insured", since it is uncontested that he would be covered if he were a passenger in an automobile being driven by . . . the named insured. The endorsement must then be a nonliability clause aimed at narrowing the company's obligations under the policy . . . as regards uninsured motorist or family protection coverage, this cannot be done." Mullis, at 235 (emphasis supplied). This was found analogous to the Mullis facts.

Several recent district court decisions with substantially similar facts and issues support Metropolitan's position in this regard. In Nationwide Mutual Fire Insurance Co. v. Phillips, 609 So. 2d 1385 (Fla. 5th DCA 1992), the insured's spouse was injured by an uninsured motorist while driving a motorcycle that was not covered under the policy. The policy provided resident relative coverage for damages arising out of the use of covered autos, and the UM provision contained a similar exclusion. Id. at 1386. Nationwide denied coverage, alleging that the spouse was not insured under the policy because he was injured while operating a

vehicle owned by him and not covered under the policy. The Second DCA agreed with the trial court that the spouse was a class I insured under the policy at the time of the accident and was therefore entitled to UM coverage based on Mullis. The Court in Nationwide confronted virtually all of the arguments advanced by International in this case, and soundly refuted them.

In Divine v. Prudential Property & Cas. Ins. Co., 18 Fla. L. Weekly D642 (Fla. 5th DCA Mar. 5, 1993), the same court was confronted with an attempt to avoid the rule of Mullis by the simple expedience of moving exclusionary language into the definition of who is "insured." "The attempt is a disingenuous misapplication of the maxim that UM coverage follows liability coverage and we will not validate it." Id. at 643.

The Fourth District Court of Appeal has recently faced these issues as well in Welker v. World Wide Underwriters Ins. Co., 601 So. 2d 572 (Fla. 4th DCA 1992). Welker is literally "on point" with this case, even to the extent that the language and relative placement of the exclusions in the liability and the UM sections of the subject policies are identical. See id. at 572-574. Welker was a resident relative of his mother when he was injured by an uninsured motorist while driving his own car. The Court relied on the rule in Mullis to permit recovery despite the exclusionary language: "The burden is squarely on the insurance companies to draft their automobile policies so as not to run afoul of Mullis, which has been the law of this state for over twenty years. In purporting to provide basic liability coverage to Welker's mother

and all resident family members, World Wide could not, in a later section, restrict both liability and uninsured motorist coverage." Id. at 574. See also State Farm Fire & Casualty Co. v. Polgar, 551 So. 2d 549 (Fla. 4th DCA 1989)(named insureds cannot be excluded from UM coverage).

A prior decision in the Third District is also consistent with the ruling presently under review. In Automobile Insurance Co. of Hartford v. Beem, 469 So. 2d 138 (Fla. 3d DCA 1985), the insured's son, a resident relative and class I insured, sought UM benefits under his father's policy. The insurer denied coverage based on an exclusion for family members operating an owned vehicle not insured under the policy. The Court cited the statute and Mullis to invalidate the exclusion.

The insurer in Beem argued, as does International in this case, that the public policy behind Mullis was changed with the passage of the "anti-stacking statute" in 1976 as subsequently amended in 1980. § 627.4132, Fla. Stat. (Supp. 1980).[4] The anti-stacking statute initially limited the insured to both liability and UM coverage "only to the extent of the coverage he has on the vehicle involved in the accident." § 627.4132 Fla. Stat. (Supp. 1976). In 1980, however, the Legislature deleted the reference to UM coverage in the language restricting coverage to accidents involving "covered autos" and included a new sentence that the section did not include UM coverage. See 1980 Laws of Fla. ch. 80-

[4] The statutory construction argument was not addressed in Beem because of the date of the accident.

364, § 1 (amending § 627.4132, Fla. Stat. (1979). Neither of these legislative changes to the anti-stacking statute justify disregarding the Mullis rule that UM protection under section 627.727(1) follows people, not vehicles.[5]

The history of the anti-stacking statute and of its relationship to the Mullis distinction between class I and class II insureds is discussed in Florida Farm Bureau Casualty Co. v. Hurtado, 587 So. 2d 1314 (Fla. 1991). This Court rejected the argument that the changes to the anti-stacking statute signaled a legislative intent to eliminate the Mullis classifications in the context of stacking uninsured motorist coverage. Id. at 1319; but see Barkett and Kogan, J. J., concurring in part and dissenting in part, at 1320-1322. In so holding, this Court reaffirmed the very principle advanced by Metropolitan in this case:

> The distinction between class-one and class-two insureds has been firmly entrenched in Florida law for more than twenty-five years. Moreover, there is logic in permitting the stacking of uninsured motorist coverage for class I insureds but not for class-two insureds. Class-one insureds are covered regardless of their location when they are injured by an uninsured motorist. Therefore, while the payment of another premium on a second vehicle would ensure coverage for that vehicle, it would be of no benefit to an injured class-one insured unless the coverage were stacked. On the other hand, coverage for class-two insureds is limited to occupancy in the insured vehicle. In that case, the extra premium pays for coverage which would not otherwise be available.

Id. at 1318-19 (citation omitted)(emphasis supplied).

The facts of this case are closely analogous to Mullis, and virtually identical to Phillips and Welker. The effect of the

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[5] See discussion at p. 10-11, supra.

attempted exclusions is the same, i.e. to whittle away otherwise mandatory UM coverage. The arguments advanced by International in favor of its position do not provide this court with any public policy or authority for departing from Mullis. As set forth below, the cases primarily relied upon by International do not dictate this result.

Even International agrees that where UM coverage is required under section 627.727, Mullis does not permit restrictions on that coverage other than as contemplated in the statute. Pet. Br. on Merits, at 4. Instead, International contends that Mullis has been modified by implication in Valiant Ins. Co. v. Webster, 567 So. 2d 408 (Fla. 1990), so that an insured is not entitled to UM coverage if the particular accident is not covered by the liability portion of the policy. Tying UM coverage for class I insureds to a particular accident would constitute a drastic departure from the longstanding and repeatedly justified rule of law set forth in Mullis. Furthermore, any such restrictions on the applicability of the UM statute would be the legislature's prerogative, one that it has indeed exercised. See discussion, supra at 11-12, (regarding § 627.727(9)(a-e), Florida Statutes and permitting UM exclusion for class I insureds injured in own auto, but only upon proper compliance with statutorily mandated notice requirements).

Metropolitan respectfully suggests that this Court did not intend to overrule or modify Mullis in Valiant, and that any language in the latter decision to the contrary is dicta. The issue in Valiant was whether a father whose son was killed in an

accident with an uninsured motorist was entitled to collect UM benefits under the father's policy. The father's claim arose solely as a survivor under Florida's Wrongful Death Statute. The deceased was not a class I insured nor a resident relative, nor any other type of insured under the terms of the father's liability policy. This Court held that the survivor in a wrongful death action does not have a claim against the survivor's UM carrier when the person who suffered the bodily injury was not an insured under the policy. Id. at 411.

Unfortunately, the majority decision contains language to the effect that if the liability provisions do not apply to a given accident, the uninsured motorist provisions of that policy would not apply. Id. at 410. The reference to a particular accident is not necessary to the holding in the case, and, as pointed out in the dissent, and argued above, is unsupported by caselaw. Valiant at 412 3 (Shaw, C.J., dissenting). The holding in Valiant is consistent with Mullis and the statute, neither of which requires UM coverage where the person injured by the uninsured motorist is not an insured person. Salas v. Liberty Mut. Ins. Co., 272 So. 2d 1 (Fla. 1972); Davis v. United States Fidelity & Guar. Co., 172 So. 2d 485 (Fla. 1st DCA 1965).

Some district courts have held that if the liability policy excludes coverage for a particular accident, then UM coverage need not apply and policy exclusions are enforceable. See Progressive Am. Ins. Co. v. Hunter, 603 So. 2d 1301 (Fla. 4th DCA 1992); Government Employees Ins. Co. v. Wright, 543 So. 2d 1320 (Fla. 4th

DCA 1989); Bolin v. Massachusetts Bay Ins. Co., 518 So. 2d 393 (Fla. 2d DCA 1987); Dairyland Ins. Co. v. Kriz, 495 So. 2d 892 (Fla. 1st DCA 1986).

The policies at issue in Wright and Bolin merely divided their "persons insured" sections into "owned" and "non-owned" automobiles and did not extend liability insurance to resident family members. 543 So. 2d at 1321-22; 518 So. 2d at 394. Under those policies the resident family members were not class I insureds and could be excluded from coverage. Welker at 573. Progressive and Dairyland are simply wrongly decided and impermissibly depart from Mullis and the statute. It is also true that Valiant has recently been relied on to circumvent UM coverage outside the wrongful death context. DeLuna v. Valiant Ins. Co., 792 F. Supp. 790 (M.D. Fla. 1992). DeLuna interpreted Valiant as limiting the scope of Mullis and denied a class I insured UM coverage because she would not have been entitled to liability coverage for the particular accident involved. Id. at 792. This too misapplies Florida law.

If this construction is valid, and UM protection is dependent on a particular accident, then UM coverage would no longer apply to class I insureds injured when they happen to be pedestrians or while using public conveyances. Standard automobile liability policies do not provide liability coverage for those types of accidents, which do not involve the covered auto. Yet such events are covered by UM under Mullis and Coleman. See Nationwide v. Phillips, 609 So. 2d at 1389 (discussing these principles).

Nothing whatsoever in the record, the statute or the decisional law of this state justified International's position in this case.

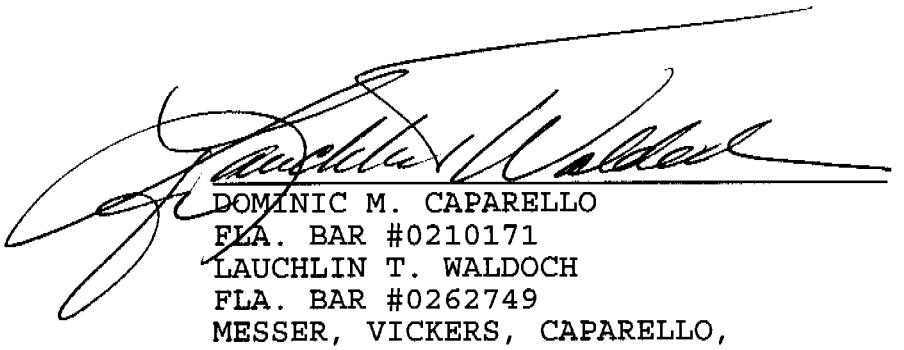
CONCLUSION

Metropolitan respectfully submits that Florida law continues to afford UM coverage for the benefit of persons insured under automobile liability policies in this State. Public policy prohibits insurers from carving out exceptions in an effort to deny class I insureds UM coverage based on the happenstance of the insured's whereabouts at the time of injury. The only exceptions to this rule are delineated in the statute and even those are only valid upon compliance with the statute. Valiant does not overrule or modify this longstanding and well-established principle, nor are there any public policy considerations that support departing from Mullis' construction of the statute..

Claimant was entitled to UM coverage under International's policy in this case and cannot be deprived of that protection by exclusions of certain types of accidents.

Based on the foregoing arguments and recitation of authority, it is respectfully suggested that the decision of the Third District Court of Appeal be approved.

Respectfully submitted,



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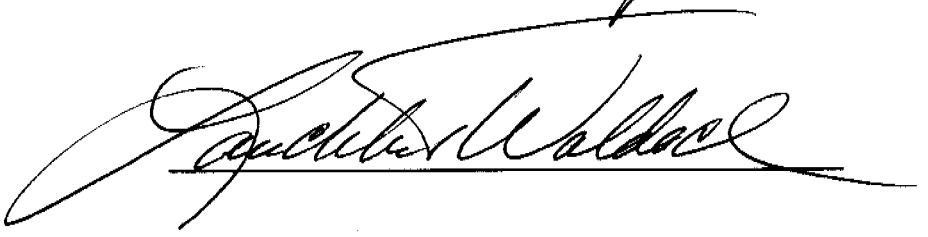
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to CHRISTOPHER LYNCH, Angones, Hunter, McClure, Lynch & Williams, P.A., 9th Floor, Concord Bldg., 66 West Flagler Street, Miami, Florida 33130, this 14 day of April, 1993.



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