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IN THE SUPREME COURT OF FLORIDA

THIRD DISTRICT COURT CASE NO: 91-1240

SUPREME COURT CASE NO: 80,115

FILED
SID J. WHITE
MAY 18 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

INTERNATIONAL INSURANCE COMPANY,
a foreign corporation,

Petitioner,

v.

METROPOLITAN PROPERTY AND
LIABILITY INSURANCE COMPANY,
a Florida corporation,

Respondent.

PETITIONER'S REPLY BRIEF ON MERITS

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ARGUMENT

Significantly, Metropolitan has failed to point to a single case interpreting the version of the uninsured motorist statute in question here, i.e. Fla. Stat. 627.727 (1984), in a similar context, which supports Metropolitan's position. In other words, Metropolitan has failed to point to any case where an appellate court in the state of Florida in interpreting the subject statute has determined that a resident relative of a named insured is entitled as a matter of law to uninsured motorist coverage under the named insured's policy for injuries sustained while occupying his own vehicle even if he would have been excluded from liability and uninsured motorist coverage for the same accident under the express terms of the named insured's policy. In fact, as we emphasized in our Initial Brief, apart from the Third District's decision in this case, the appellate courts of the state of Florida have uniformly ruled that §627.727 Fla. Stat. (1984) legitimizes such uninsured motorist coverage exclusions.

We reiterate that there is no question that the legislature amended §627.727 in 1984 to reflect the law existing prior to 1980 in the sense that the legislature once again limited the applicability of uninsured motorist coverage to policies insuring specific vehicles. The court need only to look at the language of the amendment to reach this conclusion. As a copy of Chapter 84-41 indicates (App. 1-3), the legislature substituted the term "specifically insured or identified motor vehicle" for the blanket term "any motor vehicle" in subsection 1 and in addition, further indicated in subsection 2 that:

> [T]he limits set forth in this subsection, and the provisions of subsection (1) which require uninsured motorist coverage to be provided in every motor vehicle policy delivered or issued for delivery in the state, do not apply to any policy which does not provide primary liability insurance that includes coverage for liabilities arising from the maintenance, operation, or use of a specifically insured motor vehicle. (App. 3). emphasis supplied.

The thrust of the aforementioned version of the statute is clear-uninsured motorist coverage must be provided with respect to a particular accident only to those persons who would have been covered for the same accident under the liability provisions of the automobile policy in question. Valiant Insurance Company v. Webster, 597 So.2d 408 (Fla. 1990). Section §627.727 Fla. Stat. (1984) in other words, essentially mirrored the provisions of §627.4132 (Fla. Stat. 1986) which was in effect between 1976 and 1980 and which limited an insured to the coverage contained in the policy covering the vehicle involved in the accident. Accordingly, those cases interpreting the version of §627.4132 in effect between 1976 and 1980 are certainly analogous as are those cases which have held that an exclusion from uninsured motorist coverage for bodily injury suffered by an insured while operating a motor vehicle which he or she owned but which was not insured under the liability provisions of the policy on which the claim made is valid. E.g. New Hampshire Insurance Group v. Harbach, 439 So.2d 1383 (Fla. 1983); Indomenico v. State Farm Mutual Automobile Insurance Company, 388 So.2d 29 (Fla. 3rd DCA 1980); France v. Liberty Mutual Insurance Company, 380 So.2d 1155 (Fla. 3rd DCA 1980); and State Farm Mutual Automobile Insurance Company v. Wimpee, 376 So.2d 20 (Fla. 2nd DCA 1979) cert. denied. 385 So.2d 762 (Fla. 1980). As Harbach emphasizes, one of the purposes of §627.4132 was to limit an insured to the coverage contained in the policy covering the vehicle involved in the accident. The same result was achieved under the amendment to ss. 2 of §627.727 in 1984-i.e. limiting mandatorily required uninsured motorist coverage only to those policies which provide liability insurance with respect to the specific motor vehicle involved in the incident which serves as the basis for the claim.

The cases cited by Metropolitan on page 15 of its brief for the assertion that appellate courts have agreed with their position are easily distinguishable from the case at bar. For

example, Devine v. Prudential Property and Casualty Company, 18 Fla. L. Weekly D642 (Fla. 5th DCA March 5, 1993) and Nationwide Mutual Fire Insurance Company v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992) interpret the present version of the statute which now requires a specific signed acceptance of limitations on uninsured motorist coverage such as the exclusion in question here. Lewis v. Cincinnati Insurance Company, 503 So.2d 908 (Fla. 5th DCA 1987); Nationwide Mutual Fire Insurance Company v. Kauffman, 495 So.2d 1184 (Fla. 4th DCA 1986) and Automobile Insurance Company of Hartford v. Beem, 469 So.2d 138 (Fla. 3rd DCA 1986) dealt with the version of §627.727 in effect between 1980-1984 which prohibited exclusions to uninsured motorist coverage barring coverage when the vehicle involved in the accident was not covered by the insurance policy under which the uninsured motorist claim was made. The final two cases, Incardona v. Auto Owners Insurance Company, 494 So.2d 513 (Fla. 2nd DCA 1986) and Auto Owners Insurance Company v. Bennett, 466 So.2d 242 (Fla. 2nd DCA 1984) dealt with a situation wherein a claimant was driving his own separately insured vehicle at the time of the accident but was held not to be precluded from uninsured motorist coverage under a resident relative's policy since the claimant was insured under the liability coverage of the resident relative's policy. Under these circumstances, even the version of the statute in question in this case prohibits such an exclusion from uninsured motorist coverage since liability coverage was otherwise provided by the same policy for the same accident.

This, of course, is not the situation posed by the International policy and the case at bar. As we emphasized in our Initial Brief, the cases which have interpreted a similar exclusion in the context of the statute in question here have concluded that coverage is not warranted on the basis that the exclusion is contrary to public policy as expressed in the statute. Government Employees Insurance Company v. Wright, 543 So.2d 1320 (Fla. 4th DCA 1989); Bolin v. Massachusetts Bay Insurance Company, 518 So.2d 393 (Fla. 2nd DCA 1987) and Dairyland Insurance Company v. Kriz, 495 So.2d 892 (Fla. 1st DCA 1986). See also DeLuna v. Valiant

Insurance Company, 792 F.Supp. 790 (M.D. Fla. 1992) and Progressive American Insurance Company v. Hunter, 603 So.2d 1301 (Fla. 4th DCA 1992).

Finally, Metropolitan places considerable emphasis on a recent Fourth District opinion Welker v. Worldwide Underwriters Insurance Company, 601 So.2d 572 (Fla. 4th DCA 1992). In Welker the claimant while fitting the general description of an insured under the liability provisions of the policy was nonetheless excluded by the terms of the policy from liability coverage because he was occupying a vehicle which was not insured under the policy. The Fourth District framed the issue as to whether or not the claimant was entitled to basic liability coverage under the automobile policy as a resident family member such that he was also entitled to the protection of uninsured motorist coverage afforded by the policy. Despite the clear exclusion to liability coverage, the Fourth District nonetheless concluded that the exclusion was in effect inapplicable and thus a similar exclusion in the uninsured motorist coverage was unenforceable such that the claimant was entitled to recover. In so ruling, the court distinguished the situation wherein an individual is named as an insured under the liability provisions of the policy but is later excluded from coverage under the same policy because he is operating a nonowned vehicle, from those situations where an individual does simply not fit the description of an insured because he is operating a nonowned vehicle.

We submit, with all due respect to the panel of the Fourth District that decided Welker that the court's reasoning in that case is bizarre. As this court recognized in Valiant the key issue is whether or not liability coverage is afforded to an individual for a particular accident such that uninsured motorist coverage is mandated. Why in the world should it make any difference that there is an exclusion in the liability provisions based on the fact that the vehicle involved in the accident was not insured under the policy as opposed to a situation where an individual does not become an insured under the terms of the liability policy when he is occupying a non-insured vehicle. Such reasoning of the Fourth District is hypertechnical and

elevates, to a considerable extent, form over substance. As the statute in question here emphasizes, the provisions of subsection 1 of §627.727 requiring uninsured motorist coverage to be provided do not apply to any policy which does not provide primary liability insurance for the use of a specific vehicle. We submit that the key question is whether or not liability coverage is available for a specific vehicle in a specific accident to a specific individual and it makes no difference whether or not that individual is barred from liability coverage because of a liability exclusion or because he is simply not an "insured" under the policy because he is operating a certain vehicle.

In any event, a recent decision out of the Fourth District implicitly overrules Welker and supports our position. In Grant v. State Farm Fire & Casualty Company, 18 F.L.W.(D) 905 (4th DCA 1993), the named insured was involved in an accident while operating a vehicle owned by him but which was not insured under his uninsured motorist policy with State Farm. State Farm denied uninsured motorist coverage based on an express exclusion in the uninsured motorist policy disallowing claims arising from the operation of motor vehicles owned by the insured but not listed in the policy. There is no question that in that case the claimant Grant was an insured and that the court nonetheless gave effect to the uninsured motorist exclusion. The Fourth District's conclusion in Grant directly refutes the earlier decision in Welker to the extent that Welker indicates that once an individual fits within the definition of an insured under the liability provisions, any exclusion from uninsured motorist coverage based on the operation of a vehicle not insured under the policy is invalid.

In sum, as this court correctly indicated in Valiant Insurance Company v. Webster, supra, we believe that it is clear that if the liability portions of an insurance policy would be applicable to a particular accident, uninsured motorist coverage is mandated. Parenthetically, if the liability provisions, as here, do not apply to a given accident, the uninsured motorist provisions of that policy would also not apply and uninsured motorist coverage is otherwise

statutorily not mandated. It should be emphasized that in reaching this conclusion in Valiant this court was dealing with the identical statute in question here, §627.727 (Fla. Stat. 1984) which was in effect between 1984 and 1987. The court should therefore take this opportunity to reaffirm its reasoning in Valiant while overruling the Third District's opinion below. In so doing the court will go along way towards clarifying the hazy state of the law resulting from the Third District's conclusion.

CONCLUSION

For the reasons set forth above, the Third District Court's opinion should be quashed with directions to enter judgment for International.

Respectfully submitted,

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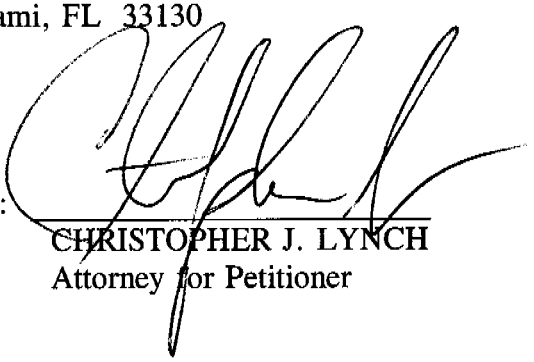

BY: _____
CHRISTOPHER J. LYNCH
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 10th day of May, 1993 mailed to the attorney for the appellee, Gerald Bedford, Esq., Bedford & Kray, 66 West Flagler Street, Suite 300, Miami, Florida 33130.

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BY: _____
CHRISTOPHER LYNCH
Attorneys for Appellant

due and payable only to the extent that contributions, with increments thereon, actually collected and credited to the fund and not otherwise appropriated or allocated, are available therefor. The state undertakes the administration of such fund without any liability on the part of the state beyond the amount of moneys received from the said Bureau of Employment Security or other federal agency.

(2) Any interest required to be paid on advances under Title XII of the Social Security Act shall be paid in a timely manner and shall not be paid, directly or indirectly by an equivalent reduction in state unemployment taxes or otherwise, from amounts in the Unemployment Compensation Trust Fund.

Section 4. This act shall take effect upon becoming a law, except that sections 1 and 3 of this act shall operate retroactively to April 1, 1984, and section 2 of this act shall take effect January 1, 1985.

Approved by the Governor May 21, 1984.

Filed in Office Secretary of State May 22, 1984.

CHAPTER 84-41

Committee Substitute for House Bill No. 319

An act relating to insurance; amending s. 627.727, F.S., providing that uninsured motorist coverage is over and above any motor vehicle liability coverage; prohibiting setoffs; limiting applicability to policies insuring specific vehicles; requiring coverage to be provided in renewal or replacement policies with different bodily injury liability limits; requiring rejections to be on forms approved by the Insurance Commission with certain disclosures; changing the maximum limits of coverage that must be offered; deleting the requirement that an insurer make available excess underinsured motor vehicle coverage; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1) and (2) of section 627.727, Florida Statutes, are amended to read:

627.727 Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.--

(1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto 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. However, the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy rejects the coverage in writing. When a

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(2)(a) The limi
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motor vehicle is leased for a period of 1 year or longer and the lessor of such vehicle, by the terms of the lease contract, provides liability coverage on the leased vehicle ~~in--a--policy--wherein--the lessee--is--a--named--insured--or-on-a-certificate-of-a-master-policy issued-to-the-lessor~~, the lessee of such vehicle shall have the sole privilege to reject uninsured motorist coverage or to select lower limits than the bodily injury liability limits. Unless the named insured, or lessee having the privilege of rejecting uninsured motorist coverage, requests such coverage or requests higher uninsured motorist limits in writing, the coverage or such higher uninsured motorist limits need not be provided in or supplemental to any other policy which renews, extends, changes, supersedes, or replaces an existing policy with the same bodily injury liability limits ~~issued--to-him-by-the-same-insurer~~, when the named insured or lessee had rejected the coverage ~~in--connection--with--a--policy previously-issued-to-him-by-the-same-insurer~~. When the named insured or lessee has initially selected limits of uninsured motorist coverage lower than his bodily injury liability limits, higher limits of uninsured motorist coverage need not be provided in or supplemental to any other policy which renews, extends, changes, supersedes, or replaces an existing policy with the same bodily injury liability limits unless the named insured requests higher uninsured motorist coverage in writing. The rejection or selection of lower limits shall be on a form approved by the Insurance Commissioner. The form shall fully advise the applicant of the nature of the coverage and shall state that the coverage is equal to bodily injury liability limits unless lower limits are requested or the coverage is rejected. The heading of the form shall be in 12-point bold type and shall state: "You are electing not to purchase certain valuable coverage which protects you and your family or you are purchasing uninsured motorist limits less than your bodily injury liability limits when you sign this form. Please read carefully." If this form is signed by a named insured it shall be a conclusive presumption that there was an informed, knowing rejection of coverage or election of lower limits. Each insurer shall at least annually notify the named insured of his options as to 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 a manner approved by the department. The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under automobile medical expense coverages; under any motor vehicle liability insurance coverages; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident; and shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. The amount of coverage available under this section shall not be reduced by a setoff against any coverage, including liability insurance. ~~Only--the--underinsured-motorist's automobile-liability-insurance-shall-be-set-off-against--underinsured motorist--coverage.~~ Such coverage shall not inure directly or indirectly to the benefit of any workers' compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workers' compensation or disability benefits law or similar law.

(2)~~(a)~~ The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased

by the named insured, or such lower limit complying with the rating plan of the company as may be selected by the named insured. The limits set forth in this subsection and the provisions of subsection (1) requiring uninsured motorist coverage to be provided in every motor vehicle policy delivered or issued for delivery in this state, shall not apply to any policy which does not provide primary liability insurance which includes coverage for liabilities arising from the maintenance, operation, or use of a specifically insured motor vehicle. However, the insurer issuing such policies shall make available as a part of the application, and at the written request of the insured, limits up to the bodily injury liability limits contained in such policies; ~~but in any event the insurer shall make available, at the written request of the insured, limits up to $100,000 each person and $300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the rating plan of the company.~~

~~(b) In addition, the insurer shall make available, at the written request of the insured, excess underinsured motor vehicle coverage, providing coverage for an insured motor vehicle when the other person's liability insurer has provided limits of bodily injury liability for its insured which are less than the damages of the injured person purchasing such excess underinsured motor vehicle coverage. Such excess coverage shall provide the same coverage as the uninsured motor vehicle coverage provided in subsection (1), except that the excess coverage shall also be over and above, but shall not duplicate, the benefits available under the other person's liability coverage. The amount of such excess coverage shall not be reduced by a setoff against any coverage, including liability insurance. An insurer shall not provide both uninsured motor vehicle coverage and excess underinsured motor vehicle coverage in the same policy.~~

Section 2. This act shall take effect October 1, 1984, and shall apply to new and renewal policies with an effective date on or after such date.

Approved by the Governor May 21, 1984.

Filed in Office Secretary of State May 22, 1984.

CHAPTER 84-42

Committee Substitute for House Bill No. 795

An act relating to banking; creating s. 658.295, F.S.; creating the "Regional Reciprocal Banking Act of 1984"; providing definitions; authorizing bank holding companies whose operations are principally conducted in certain states to acquire banks and bank holding companies located in Florida; providing certain conditions and limitations; requiring divestiture in certain circumstances; providing applicable law and regulatory supervision; providing for nonseverability of provisions; amending s. 658.73, F.S.; providing for an application fee; providing for conditional repeal; providing for sunset review and repeal; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Sec

658.295 Region

(1) TITLE.--Th
Banking Act of 198

(2) DEFINITIONS

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(d) "Bank holdir
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as amended, 12 U.S.C.

(e) "Control" has
federal Bank Holding
1841.