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IN THE SUPREME COURT
STATE OF FLORIDA

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

vs.

SUSAN GAIL JENKINS,

Respondent.

Case No. 81,691

Original

On Review From The Distr
Fifth District

BRIEF OF AMICUS CURIAE NAII
(In support of position of Petitioner)

show law firm only. JB

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TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Cases

Federal Cases

Florida Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the National Association of Independent Insurers ("NAII"), adopts the Statement of the Case and Facts of Petitioner, Government Employees Insurance Company ("GEICO").

Briefly, the pertinent facts are that Susan Jenkins while residing with her father was involved in an automobile accident. She was driving a 1977 Toyota which she owned and which was not covered by an automobile insurance policy which had been issued by GEICO to her father. After settling her claim with the tortfeasor's liability insurer for $10,000, she sought uninsured motorist benefits under the GEICO policy issued to her father. GEICO denied coverage on the basis of an exclusion contained in the UM portion of the GEICO policy.

GEICO denied coverage because Respondent's vehicle was neither an "owned" nor a "non-owned" automobile under the policy, and she was therefore not an "insured" under the liability portion of the GEICO policy and properly could be excluded from UM coverage under the same policy.

The trial court held that the UM exclusion was invalid unless GEICO complied with section 627.727(9), Florida Statutes, which it did not in this case. GEICO argued that its exclusion was not applicable to this case and that the subject UM exclusion was valid under section 627.727(1) without regard to the procedure set forth in section 627.727(9). Citing *Nationwide Mutual Fire Insurance Co. v. Phillips*, 609 So. 2d 1385 (Fla. 5th DCA, 1992), *rev. granted* No. 80,986, the Fifth District per curiam affirmed without opinion.

The Court has accepted jurisdiction to review this case in light of the conflict of decisions among districts and because the case cited as authoritative by the Fifth District is presently pending before the Court for review.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal erred in holding that Petitioner owes Respondent uninsured motorist (UM) benefits pursuant to the policy issued to Respondent's father by petitioner. Although Respondent contends otherwise, the Florida UM statute does not require insurers to pay UM benefits to each and every resident relative of the named insured in each and every instance. Rather, the rule is that an insurer need only provide UM benefits to those persons who are insured by its policy for liability purposes under the circumstances. This rule is supported by both the UM statute and current Supreme Court case law.

First, since the Court stated in *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971) that UM benefits are "not to be 'whittled away' by exclusions and exceptions," the Court has recognized important exceptions. In *Reid v. State Farm Fire & Cas. Co.*, 352 So. 2d 1172 (Fla. 1977), for instance, the Court after noting *Mullis* nevertheless ruled that there were exceptions to *Mullis*, and that the UM statute could not permit a party to defeat a UM exclusion pertaining to the insured automobile where to defeat that exclusion would also completely nullify a valid liability provision in the same policy excluding family-household liability claims. In *Brixius v. Allstate Ins. Co*, 589 So. 2d 236

(Fla. 1991), the Court reaffirmed *Reid*, noting specifically that liability coverage would not have been available to the claimant under the circumstances of the subject incident. The Court further reiterated from *Reid* its rule that a valid liability provision excluding coverage under a particular circumstance should not be defeated by a claimant's plea that the UM statute applies.

Although it stated the rule differently, the Court in *Valiant Ins. Co. v. Webster*, 567 So. 2d 408, 410 (Fla. 1990) applied the concepts it had set forth in *Reid*. In *Valiant*, the Court held that when the decedent himself has no liability coverage under the subject policy, the UM statute does not require insureds to provide UM coverage for those who may be entitled to recover consequential damages as survivors. The Court reached this holding because it concluded that, since *Mullis*, court opinions had consistently followed the rule that if the liability provisions do not apply to a given accident, then the UM provisions of that policy also do not have to apply. Applying *Reid*, *Brixius*, and *Valiant* to the case at bar, this Court should quash the Fifth District decision.

The Fourth District in *Government Employees Ins. Co. v. Wright*, 543 So.2d 1320 (Fla. 4th DCA 1989) addressed facts identical to those at bar. The Fourth District properly concluded that the claimant there, even though a resident daughter of the named insured, could not seek the protection of section 627.727 because under her parent's policy she was injured while driving her own automobile that was neither an "owned" nor a "non-owned" automobile as defined by the policy. The court correctly noted

that a policy of insurance need not have to apply to all manner of unknown automobiles owned by relatives, for were it otherwise, the insurer could never determine its exposure so as to arrive at the appropriate premium to charge for that policy. That is, because the claimant could be, and was, validly excluded from the liability portion of the subject policy, GEICO owed no duty to provide claimant UM benefits.

In addition to *Reid*, *Brixius*, and *Valiant*, this Court should consider that the reasoning of *Mullis* which led to that portion of its ruling upon which Respondent and others have relied is now obsolete. An amendment to section 627.727 following *Mullis* removed that statute's reference to chapter 324 and thereby destroyed the underpinnings of the Court's conclusion in *Mullis* that those "persons insured thereunder" were intended by the legislature to be those persons required to be insured by chapter 324. A plain reading of today's UM statute supports only one rule: that UM benefits need only be provided to those who are covered under the liability portion of the same policy. As the relevant provision expresses: "No motor vehicle liability insurance policy shall be delivered . . . unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder. . . ." § 627.727, Fla. Stat. (1987).

Second, Respondent's contention that section 627.727(9) applies is misplaced. The only effect of the 1987 enactment of section 627.727(9) is to allow insurers to offer non-stacked (as opposed to stacked) UM coverage at a reduced premium. The legislative history

of section 627.727(9) supports this, and only this, position, as does a plain reading of the provision. The Fifth District Court of Appeal in *Nationwide Mutual Fire Insurance Co. v. Phillips*, 609 So. 2d 1385 (Fla. 5th DCA 1992), *review granted,* No. 80,986, erroneously segregated portions of section 627.727(9) from the entirety of that provision in order to reach the result it desired. This Court need only look to section 627.727(1) for authority in this instance. Section 627.727(9) is irrelevant here.

This Court should quash the decision below.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL HAS ERRED IN HOLDING UNDER SECTION 627.727(1) THAT A NAMED INSURED'S RESIDENT RELATIVE MAY ALWAYS RECOVER UNINSURED MOTORIST BENEFITS EVEN THOUGH SUCH RELATIVE WOULD NOT BE ENTITLED TO LIABILITY COVERAGE UNDER THE SUBJECT INSURANCE POLICY IF THE ACCIDENT IN QUESTION WAS HIS OR HER FAULT

The Fifth District Court of Appeal has erred in its recent reliance on *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971), in deciding that pursuant to section 627.727(1) a resident relative of a named insured may always recover uninsured motorist (UM) benefits under the named insured's policy even though that relative would not have recovered had the accident in question been his or her fault. *See, e.g., Government Employees Ins. Co. v. Jenkins*, -- So. 2d --, 18 Fla. L. Weekly D653 (Fla. 5th DCA Mar. 5, 1993), *review granted*, No. 81,691; *Nationwide Mut. Fire Ins. v. Phillips*, 609 So. 2d 1385 (Fla. 5th DCA 1992), *review granted*, No. 80,986.

Though the Court in *Mullis* adopted the general rule that UM coverage "is not to be 'whittled away' by exclusions and

exceptions," *Mullis*, 252 So. 2d at 238, this Court has since recognized that countervailing legislative policy must permit certain UM exclusions to stand.

In *Reid v. State Farm Fire & Cas. Co.*, 352 So. 2d 1172 (Fla. 1977), *Valiant Ins. Co. v. Webster*, 567 So. 2d 408, 410 (Fla. 1990), and *Brixius v. Allstate Ins. Co*, 589 So. 2d 236 (Fla. 1991), the Court affirmed a significant exception to *Mullis's* general rule. That exception applies in the instant case. It provides that where an insurer writes an UM exclusion so as to prevent an individual from defeating a valid, *i.e.* legally permitted, liability exclusion contained within the same policy, that insurer's UM exclusion must be respected. *Brixius*, 589 So. 2d at 237-38; *Reid*, 352 So. 2d at 1173-74. In other words, Florida's UM statute requires only that UM coverage be provided to those covered for liability under the same circumstances. *Valiant*, 567 So. 2d at 410-11.

For example, just five years after its decision in *Mullis*, this Court held that the rule in *Mullis* cannot operate to bar legitimately competing public policies. In *Reid v. State Farm Fire & Cas. Co.*, 352 So. 2d 1172 (Fla. 1977), the Court upheld a UM coverage exclusion providing that "an 'uninsured motor vehicle' could not be the vehicle defined in the policy as the insured motor vehicle." *Id.* at 1173. Dawn Reid, the petitioner therein, demanded insurance benefits from her father's automobile policy for injuries she received while a passenger in her father's car which was being driven by her sister. Because the Court first held that,

under the circumstances, the petitioner was barred from recovering benefits under the liability portion of her father's policy, which excluded claims against the policy by family-household members, petitioner contended secondly that she should recover under the UM portion of her father's policy pursuant to the UM statute, section 627.727(1), Florida Statutes (1975). *Id.* Acknowledging *Mullis*, the Court adopted the opinion of the Fourth District Court of Appeal and ruled as follows:

> We recognize, as a general rule, that an insurer may not limit the applicability of uninsured motorist protection. We believe, however, that the present case is factually distinguishable from previous cases and is an exception to the general rule. Here the family car, which is defined in the policy as the insured motor vehicle, is the same vehicle which [petitioner], under the uninsured motorist provision of the policy, claims to be an uninsured motor vehicle. We find no merit in [petitioner's] argument that this exclusion conflicts with Section 627.727, Florida Statutes (1975).
>
> . . . .
>
> The court in *Lee* [an opinion reviewed by *Reid*] appears to say that all restrictions on uninsured motorist coverage, without exception, are against public policy and are void. On the other hand, we say that the particular restriction on uninsured motorist coverage in the present case is not against public policy and is not void. To hold otherwise in this case would completely nullify the family-household exception.

Id. at 1173-74 (citations omitted) (emphasis added).

In short, this Court held that Dawn Reid, a resident relative who would have been insured against liability claims under her father's policy had she been the driver of her father's insured vehicle, could not claim UM benefits under that policy in light of the circumstances surrounding her accident--those circumstances being that Dawn Reid was injured while she was a passenger in her father's car being driven by her sister. *See id.* 1172-74.

The Court's statement that "[t]o hold otherwise in this case would completely nullify the family-household exception" points to the balance that it made between the UM statute and other Florida policy. To determine whether Dawn Reid should have been covered under the liability portion of her father's policy, the Court examined Florida's Financial Responsibility Law as well as the Florida Automobile Reparations Reform Act (since retitled the Florida Motor Vehicle No-Fault Law). §§ 627.730-.7405, Fla. Stat. (1975-91).

Reid held first that "in the absence of a statutory prohibition, . . . provisions of automobile liability insurance policies excluding from coverage members of the insured's family or household are valid." *Reid*, 352 So. 2d at 1173. Therefore, in response to petitioner's argument that Florida law prohibited a family-household exclusion even in the liability portion of a policy, the Court examined jointly Florida's Automobile Reparations Reform Act and Financial Responsibility Law. *See id.* Upon this examination, *Reid* concluded that "[a]lthough it [was] certainly within the power of the Legislature to prohibit all family-household exclusions . . . it did not do so by its enactment of the Florida Automobile Reparations Reform Act." *Id.* In light of this analysis the Court then properly dismissed petitioner's claim that the UM statute must apply to insure her because it reasoned that to hold otherwise would completely nullify a family-household liability exclusion that state policy permitted insurers to use. *See id.* at 1174, 1173.

More recently, this same analysis of the UM statute was applied by the Court in *Brixius v. Allstate Ins. Co*, 589 So. 2d 236 (Fla. 1991). In that case, the petitioner, Jill Brixius, sought to recover UM benefits for injuries she received while a passenger in a motor vehicle owned by her, but which was driven by an uninsured friend. *Id.* at 236-37. Discussing *Reid*, the Court again rejected a claimant's contention that section 627.727(1) barred a certain UM exclusion. Similar to *Reid*, that exclusion provided: "[A]n uninsured auto is not a vehicle defined as an insured auto under the liability portion of this policy." *Id.* at 237. The Court carefully noted that the legislature had not amended section 627.727(1) since *Reid* to require UM benefits when liability benefits are unavailable because of a valid liability exclusion within the same policy. It then reaffirmed the *Mullis* exception. The Court ruled that section 627.727(1) will not operate to bar a policy's UM exclusion "where allowing recovery of [UM] benefits would defeat a valid liability exclusion contained in the same policy." *Brixius*, 589 So. 2d at 237-38; *see also Hartland v. Allstate Ins. Co.*, 575 So. 2d 290, 291 (1st DCA), *approved*, 592 So. 2d 677 (Fla. 1991) (denying UM benefits to appellant under her parent's policy even though she was injured in her own car that was being driven by her uninsured friend, because to hold otherwise would defeat a valid liability exclusion); *Allstate Ins. Co. v. Baker*, 543 So. 2d 847 (4th DCA), *review denied*, 554 So. 2d 1167 (Fla. 1989).

Although it stated the rule with different language, the Court

quietly applied the concern of *Brixius* and *Reid* in *Valiant Ins. Co. v. Webster*, 567 So. 2d 408, 410 (Fla. 1990). Therein the Court held that a named insured could not claim UM benefits under the Wrongful Death Act for a death to the named insured's son where his son was neither an insured or a resident relative of an insured under the subject policy, given the circumstances of the son's accident. *Valiant*, 567 So. 2d at 410-11. As a passenger in the car operated and owned by a negligent uninsured motorist, Christopher Manniel was killed when the car left the road and struck a tree. *Id.* at 409. Clyde Manniel, Christopher's father, filed a claim against his automobile's policy alleging that he was entitled, as a survivor of his son's estate, to UM benefits for damages pursuant to Florida's Wrongful Death Act. *Id.* The trial court ruled that because Christopher did not reside with his father at the time of his accident, Christopher (and therefore his estate) was not covered under the UM provisions of the father's policy. The Court affirmed the trial court and quashed a decision of the Fifth District Court of Appeal. Regarding *Mullis*, this Court postured:

> Since our decision in *Mullis*, the courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a <u>particular accident</u>, the uninsured motorist provisions would likewise be applicable; whereas, if the liability provisions [of a policy] did not apply to a <u>given accident</u>, the uninsured motorist provisions of that policy would also not apply (except with respect to occupants of the insured automobile).

Id. at 410 (citations omitted) (emphasis added). In light of this rule, the Court held: "Because the liability coverage of Clyde

Manniel would not apply to the accident, Clyde Manniel is not entitled to claim uninsured motorist coverage for Christopher's death." *Id.*

The Fifth District Court of Appeal recently called these statements from *Valiant* "nonbinding dictum," ironically, so as to justify adhering to the overly broad statements of *Mullis* and to *Valiant's* dissent. In *Nationwide Mut. Fire Ins. v. Phillips*, 609 So. 2d 1385 (Fla. 5th DCA 1992), *review granted*, No. 80, 968, the Fifth District Court stated about the majority in *Valiant*:

> [T]he court in *Valiant* probably intended merely to restate the rule of law that where an individual is not an insured <u>for any purposes</u> under a liability policy, that individual will not be entitled to UM coverage.

Id. at 1389 (emphasis in original); *see also id.* at 1387.

Yet had the Court in *Valiant* applied the rule that the Fifth District advances, Christopher (and therefore Christopher's estate) would have been entitled to UM benefits for his death because Christopher was an "insured" under his father's liability policy for the purpose of driving <u>his father's insured automobile</u>. (Recall in *Mullis* the Court held that any person occupying the insured automobile with the insured owner's permission is an "insured" who is "protected by the policy from liability to others [for] their negligent operation of the insured owner's automobile." *Mullis*, 252 So. 2d 232 (defining those persons who must be insured thereunder pursuant to chapter 324, F.S)).[1]

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[1] Note also that in order to prevent liability claims against automobile owners, Florida's Motor Vehicle No-Fault Law (which was enacted in 1971 after the subject accident in *Mullis*) provided at the time of the subject accident in *Valiant*, and still provides

Furthermore, *Valiant* was obviously very careful not to hold under section 627.727 that in all circumstances, one cannot recover damages as a survivor under the wrongful death statute. Rather, the Court intentionally distinguished the facts before it from two 1965 opinions of the Third and First District Courts. In those cases, the courts permitted UM benefits for damages pursuant to the Wrongful Death Act. *See, e.g. Davis v. United States Fid. & Guar. Co.*, 172 So. 2d 485 (Fla. 1st DCA 1965). Having distinguished those cases, however, the Court held narrowly that the UM statute "does not require coverage for anyone who may be entitled to recover consequential damages as a survivor . . . when the decedent himself had neither liability nor uninsured motorist coverage under the policy." *Valiant*, 567 So. 2d at 411. As reasoned above parenthetically and by footnote, Christopher would have had liability coverage "under the policy" had he been driving his father's car. But he was not driving his father's car! Therefore, this Court reasoned that under the circumstances of the accident coverage did not exist and that Christopher's estate through Christopher could not recover UM benefits. Being a necessary part of the reasonings which led to the Court's holding, the statement concerning *Mullis* quoted above cannot be mere dictum, and the Fifth

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today, that every insurance policy insuring a motor vehicle of four or more wheels binds the insurer to pay up to $10,000 of personal injury protection benefits for accidental bodily injury sustained by any person not an owner or resident-relative (i.e., Christopher) while occupying the owner's motor vehicle, provided that person was not an owner of a vehicle himself for which security was required to be held. *See* Fla. Stat. §§ 627.732(1), 627.733, 627.736(1) & (4)(d)4. (1983-1991).

District Court erred in refusing to follow it.

To summarize, the Court has followed since *Mullis* one central rule limiting the bounds of that opinion, expressing that rule in two ways. First, section 627.727(1) does not operate to bar a policy's UM exclusion "where allowing recovery of [UM] benefits would defeat a valid liability exclusion contained in the same policy." *Brixius v. Allstate Ins. Co*, 589 So. 2d 236, 237-38 (Fla. 1991); *Reid v. State Farm Fire & Cas. Co.*, 352 So. 2d 1172, 1173-74 (Fla. 1977); *see also Fitzgibbon v. Government Employees Ins. Co.*, 583 So. 2d 1020 (Fla. 1991) (holding that wife of driver could not claim UM benefits because she was validly excluded from bodily injury coverage). Second, if the valid liability provisions of a policy do not apply to a given accident, the UM provisions of that policy also need not apply under Florida's UM statute. *Valiant Ins. Co. v. Webster*, 567 So. 2d 408, 410 (Fla. 1990). *Cf. Carguillo v. State Farm Mut. Auto Ins.*, 529 So. 2d 276 (Fla. 1988) (holding that a collision with an off-road vehicle while driving off-road could be excluded from UM coverage because the off-road vehicle under the circumstances of the subject incident was not a motor vehicle as defined by the financial responsibility law).

Applying this rule in the instant case, the Fifth District Court of Appeal's opinion below and its opinion in *Nationwide Mut. Fire Ins. v. Phillips*, 609 So. 2d 1385 (Fla. 5th DCA 1992), *review granted*, No. 80,986, must be quashed. The Fifth District Court of Appeal in *Phillips* mistakenly looked to a dissenting opinion of this Court to support a view of *Mullis* that is far too broad in

light of *Reid*, *Brixius*, and *Valiant*--three opinions which obviously refined the scope of section 627.727 by balancing that provision against countervailing legislative policy supporting necessary liability exclusions.

Here, Respondent Jenkins drove her own automobile at the time of her injuries, and therefore the subject GEICO policy, which only insured the two vehicles held by Respondent's father, provided no liability coverage for Respondent's incident. The Liability portion of that policy provided:

> PERSONS INSURED
> Who is covered.
> Section I applies to the following as insureds with regard to an owned auto:
>
> 1. You and your relatives;
> 2. Any other person using the auto with your permission. The actual use must be within the scope of that permission;
> 3. Any other person or organization for his or its liability because of its liability because of acts or omissions of an insured under one or two above.
>
> Section I applies to the following with regard to a non-owned auto:
>
> 1. You and your relatives, when using a private passenger auto or trailer. Such use must be with the permission, or reasonably believed to be with the permission, of the owner and within the scope of that permission;
> 2. A person or organization, not owning or hiring the auto, regarding his or its liability because of acts or omissions of an insured under One above.

The subject policy defined "owned" auto as the vehicles named in the policy and defined "non-owned" auto as an auto not owned by the named insured or any relatives. By definition, the GEICO policy did not provide liability coverage for incidents involving Respondent's Toyota because that car was neither an "owned" nor a

"non-owned" automobile under her father's policy.

GEICO's liability policy was, and is, consistent with Florida automobile insurance law. An insurer has the right to decide with its consumers which risks it will and will not insure against, so long as there is nothing void as to public policy or statutory law concerning their decision. *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990); *United States Aviation Underwriters, Inc. v. Sunray Airline, Inc.*, 543 So. 2d 1309, 1312 (Fla. 5th DCA 1989). In the absence of a statutory prohibition, an automobile liability insurance policy excluding certain coverage is generally valid, *see Reid*, 352 So. 2d at 1172; *France v. Liberty Mut., Ins. Co.*, 380 So. 2d 1155, 1156 (Fla. 3d DCA 1980), and an insurer is not obligated to provide liability coverage that its consumers have not agreed to purchase. *Florida Farm Bureau Ins. Co. v. Government Employees Ins. Co.*, 387 So. 2d 932, 934 (Fla. 1980) (following *Reid*).

Pursuant to a plain reading of the policy in the case at bar, Respondent's father did not purchase insurance for his daughter in the event her Toyota caused her liability. Moreover, as an owner of her own car, Respondent was bound by Florida's Motor Vehicle No-Fault Law to directly insure herself. *See*, §§ 627.730-.7405, Fla. Stat. (1987 & Supp. 1988).[2] Thus, it appears beyond contention

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[2] The Florida Motor Vehicle No-Fault Law became effective in 1971 subsequent to the scope of *Mullis's* opinion. The no-fault law provides that every owner of a vehicle of four or more wheels must maintain security by insuring that vehicle in a certain manner as set forth therein. *Id.* § 627.733. The purpose of no-fault insurance is to provide bodily injury benefits without respect to fault, to require motor vehicle insurance securing these benefits,

that GEICO's policy legally excluded Respondent from liability coverage under the circumstances of her accident.

Therefore, because GEICO's policy validly excluded Respondent from liability coverage, that same policy is not barred from excluding her from UM coverage under the same circumstances. *Valiant Ins. Co. v. Webster*, 567 So. 2d 408, 410 (Fla. 1990).

In other words, section 627.727(1) does not bar this exclusion because to remove that exclusion and permit Respondent to recover UM benefits would operate to defeat an otherwise valid liability exclusion for which GEICO and Respondent's father legally contracted. *See Brixius v. Allstate Ins. Co*, 589 So. 2d 236 (Fla. 1991); *Reid v. State Farm Fire & Cas. Co.*, 352 So. 2d 1172 (Fla. 1977). On these grounds, this Court must rule in favor of GEICO.

Moreover, in supplement to the Court's opinions since *Mullis*, opinions of four of our five district courts of appeal support Petitioner GEICO's position in this case. *See, e.g., Progressive Amer. Ins. Co. v. Hunter*, 603 So. 2d 1301 (Fla. 4th DCA 1992); *Government Employees Ins. Co. v. Wright*, 543 So. 2d 1320 (Fla. 4th

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and to limit liability claims for pain, suffering, mental anguish, and inconvenience. *Id.* § 627.731. Section 627.736 of the Florida Motor Vehicle No-Fault Law provides that a policy must offer the insured owner of a motor vehicle personal injury protection benefits for bodily injury sustained by a relative of the owner residing in the same household for injuries sustained in Florida while occupying any motor vehicle. *Id.* at 627.736(4)(d)1.-3. However, that protection need not be provided where the resident-relative owns her own vehicle which she herself is obligated to insure under the Florida Motor Vehicle No-Fault Law. *Id.* at 627.736(4)(d)3. Such is the case here with Respondent. Section 627.736, therefore, evidences the legislature's intent that every owner of a vehicle provide automobile insurance for themselves concerning the operation of that vehicle.

DCA), *review denied*, 551 So. 2d 464 (Fla. 1989); *Bolin v. Massachusetts Bay Ins. Co.*, 518 So. 2d 393 (Fla. 2d DCA 1988); *Dairyland Ins. Co. v. Kriz*, 495 So. 2d 892 (1st DCA 1986), *review denied*, 504 So. 2d 767 (Fla. 1987); *France v. Liberty Mutual Ins. Co.*, 380 So. 2d 1155 (Fla. 3d DCA 1980). *But see Nationwide Mut. Fire Ins. v. Phillips*, 609 So. 2d 1385 (Fla. 5th DCA 1992), *review granted*, No. 80,986. So also do the opinions of federal courts. *See, e.g., Deluna v. Dye Ins. Co.*, 792 F. Supp. 790 (M.D.Fla. 1992); *Anderson v. Allstate Ins. Co.*, 685 F.2d 1299 (11th Cir. 1982) (applying Alabama's UM law).

For example, the exact facts of this case were addressed by the Fourth District Court of Appeal in *Government Employees Ins. Co. v. Wright*, 543 So.2d 1320 (Fla. 4th DCA 1989). Therein, the Fourth District agreed with the position now asserted by GEICO (and asserted by GEICO therein) that a resident daughter if excluded is not covered for UM benefits under her parent's policy when she is injured while driving her own automobile that is neither an "owned" nor a "non-owned" automobile as defined by the liability portion of the policy. That is, because one is not covered under the liability provisions of the policy, the limitations on policy restrictions for UM coverage contained in *Mullis* do not apply, and a reciprocal UM exclusion is enforceable.

The Fourth District Court explained that the liability provisions of the GEICO policy expressly excluded Wright under the circumstances of her automobile accident because she was not injured in an "owned" or "nonowned" vehicle. That Court correctly

emphasized what only the Fifth District Court has lost sight of,[3] that a policy of insurance need not have to apply "to all manner of unknown automobiles owned by [one's] relatives. Were it otherwise, the insurer could never determine its exposure in order to arrive at the appropriate premium to charge for [the] policy." *Wright*, 543 So.2d at 1322 (emphasis added).

Not only is the Fourth District's decision a correct exposition of the law, it represents a public policy statement most consistent with legislative intent, Florida's UM statute and Motor Vehicle No-Fault Law.

In a more recent decision, *Welker v. World Wide Underwriters Ins. Co.*, 601 So. 2d 572 (Fla. 4th DCA 1992), *review granted*, No. 80, 478 the Fourth District properly recognized when and only when under *Mullis* and subsequent case law a policy exclusion must fail. The policy purchased in *Welker* provided bodily injury and property damage liability coverage to any **"covered person,"** and defined **"covered person"** to include the named insured "or any **family member** for the ownership, maintenance, or use of any auto or trailer." *Id.* at 572-73. Pursuant to the policy, a **"family member"** was any "person related to [the named insured] by blood, marriage or adoption who [was] a resident of [the named insured's] household." *Id.* at 573. Therefore, despite later attempts by the insurer in

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[3] For example, in *Jernigan v. Progressive Amer. Ins. Co.*, 501 So. 2d 748 (Fla. 5th DCA 1987) the Fifth District concluded that an insurer could not exclude from UM coverage incidents involving vehicles owned by the named insured or his relatives that were not listed with the insurer under the subject policy. *Jernigan*, however, was expressly disapproved of in *Brixius v. Allstate Ins. Co.*, 589 So. 2d 236 (Fla. 1991).

Welker's policy to exclude Welker from coverage entirely, the district court held that UM benefits were due, citing *Mullis, Auto-Owners Ins. Co.v. Bennett*, 466 So. 2d 242 (Fla. 2d DCA 1984), and *Lewis v. Cincinnati Ins. Co.*, 503 So. 2d 908 (5th DCA), *rev. denied*, 511 So. 2d 297 (Fla. 1987), and comparing those opinions to *Wright* and *Bolin v. Massachusetts Bay Ins. Co.*, 518 So. 2d 393 (Fla. 2d DCA 1988). The court stated:

> In *Mullis*, as in *Bennett, Lewis, and the instant case*, the policies contained broad language indicating the [sic] that the insurer would pay *all* damages for bodily injury and property damage for which the insured *or* his resident relatives became legally responsible because of an automobile accident.

Id. at 573 (emphasis in original). It held then that

> [w]hen an insurance company purports to provide basic liability coverage to the named insured and the insured's relatives, it cannot later exclude those relatives from uninsured motorist coverage. When the policy contains no such blanket inclusion, as in *Wright* and *Bolin*, resident family members *can* be excluded from coverage.

Id. at 574. (emphasis in original).

Welker and *Wright* together concluded then that while an insurer cannot validly exclude UM coverage to an insured, it can limit the definition of insured so as to exclude family members under the circumstances.

In comparing the facts of this case to *Wright* and *Welker*, note that the policy at bar is obviously unlike the policy in *Welker*. GEICO's policy here is identical to the policy reviewed in *Wright*. It does not pretend to insure "any family member for the ownership, maintenance or use of any auto." It intentionally leaves Respondent uninsured, expecting that had Respondent wanted coverage

with GEICO under her father's policy, she would have informed the insurer of this request and paid the additional costs this would have added to her father's premiums. Not an insured with GEICO, Respondent should not be permitted to now complain. In accord with *Wright* and *Bolin*, GEICO owes Respondent nothing, not even UM coverage. *See also Dairyland Ins. Co. v. Kriz*, 495 So. 2d 892 (1st DCA 1986), *review denied*, 504 So. 2d 767 (Fla. 1987); *France v. Liberty Mutual Ins. Co.*, 380 So. 2d 1155 (Fla. 3d DCA 1980) (both cases denying UM coverage and holding valid a definition of insured which covered resident relatives only so long as they did not own their own vehicle).

On the grounds advanced above, NAII requests the Court to quash the opinion of the Fifth District Court of Appeal in the present case, to disapprove *Nationwide*, to adopt the decisions of the Fourth District Court, and to direct the trial court to rule in GEICO's favor in the case below.

In the alternative and in addition to the grounds advanced above, NAII respectfully requests the Court to recognize that legislative amendments to Florida's UM statute make obsolete the reason for this Court's decision in *Mullis*.

Twenty-two years ago, in *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971), the Court held that section 627.0851(1) [amended and renumbered 627.727(1)], Florida Statutes, prohibited State Farm from applying a certain described uninsured motorist (UM) coverage exclusion against Richard Mullis, the resident son of Shelby Mullis who purchased the subject policy.

Mullis, 252 So. 2d at 231-32.[4]

A majority of the Court reached that conclusion because it recognized an expressed link between Florida's UM statute and Florida's Financial Responsibility Law. *See id.* at 232. Florida's UM statute directed the Court to chapter 324, stating in relevant part that:

> [n]o 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.

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[4] That clause provided in relevant part as follows:

> Insuring Agreement III [(an agreement which promised uninsured motorist coverage to each "insured")] does not apply:
>
> * * * * * *
>
> (b) to bodily injury to an insured while occupying or through being struck by a land motor vehicle owned by the named insured or any resident of the same household, if such vehicle is not an "insured automobile";

Id. at 231. The State Farm policy defined the unqualified word "insured" to mean:

> (1) the first person named in the declarations and while residents of his household, his spouse and the relative of either;
> (2) any other person while occupying an insured automobile; and
> (3) any person, with respect to damages he is entitled to recover because of bodily injury to which this coverage applies sustained by an insured under (1) or (2) above.

Id.

§ 627.0851(1), Fla. Stat. (1967) (emphasis added); *see Mullis*, 252 So. 2d at 232.

Applying section 627.0851's reference to section 324.021(7), the Court ruled that the phrase "persons insured thereunder," as used by the UM statute, referred to those persons who must be insured according to the mandated policy requirements of chapter 324. *Mullis*, 252 So. 2d at 232. Those persons were any persons operating a subject motor vehicle "with the express or implied permission of [its] owner." See, §§ 324.151(1)(a), 324.021(7),(8), Fla. Stat. Therefore, the Court concluded in *Mullis* as follows:

> The 'persons insured' thereunder in an automobile liability insurance policy as contemplated by F.S. chapter 324, F.S.A., the Financial Responsibility Law, ordinarily are: the owner or operator of an automobile, his spouse and other members of his family resident in his household and others occupying the insured automobile with the insured owner's permission. <u>These insureds are protected by the policy from liability to others due to injuries they inflict by their negligent operation of the insured owner's automobile. Reciprocally, this same class of insureds are protected by uninsured motorist coverage in the same policy from bodily injury caused by the negligence of uninsured motorists.</u>

Id. (emphasis added). As a result of this conclusion, *Mullis* "expressly [held] that uninsured motorist coverage <u>under our statutes</u> has made each member of a family an insured under each such policy purchased by any family member." *Id.* at 238 (emphasis added).

With all due respect, however, *Mullis* failed to recognize that the term "thereunder" as used by section 627.0851 may have referred to the subject policy and not to the requirements of chapter 324--a chapter which mandated certain liability coverage only after an

owner's first accident. *See*, §§ 324.051(2)(a)6., 324.151(2), Fla. Stat. (1967). At the time of Respondent's accident, section 627.0851(1), renumbered 627.727(1), provided that:

> [n]o 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.

§ 627.727(1), Fla. Stat. (1987).

In 1973, when the legislature substantially amended section 627.0851, the legislature, among other things, removed the law's reference to chapter 324. *See* 1973 Fla. Laws. 73-180 (1973). This amendment highlighted the argument this Court neglected to refute in *Mullis*: that "insureds" refers only to those insured by the liability portion of a policy. The Court's contention in *Mullis* regarding chapter 324, which caused it to hold expressly and broadly that "uninsured motorist coverage under our statutes has made each member of a family an insured under each such policy purchased by any family member," *Mullis*, 252 So. 2d at 238, cannot now stand in light of this change. A judicially-derived rule should not be permitted to linger by forgetting the statute and the reasoning that led to its origination.

Rather ironically, a plain reading of today's UM statute mirrors the views that have been expressed by this Court (with little concern to the statute) in *Reid*, *Brixius*, and *Valiant*: that UM coverage shall not defeat a valid liability exclusion and that,

therefore, UM coverage need only follow liability coverage under the same circumstances.

In addition, it must be noted that had the legislature now, or in the first instance, intended to require insurers to provide UM coverage to both an insured's spouse and his or her resident family members no matter the circumstance (as *Mullis* expressed), the legislature would have printed this absolute rule in section 627.727 rather than rely on the Court to make such a leap of construction. Any logical point to leap from, furthermore, is now removed from our statutes.

Therefore, in light of this change that seriously questions the continuing validity of *Mullis's* reasoning, NAII respectfully requests the Court to recede from *Mullis* to the extent necessary to bring that opinion and our state's case law in line with current legislative intent. Although our lower courts need firm direction on UM coverage issues, they do not need the judicial (and unnecessary) fiat of *Mullis* which stands contrary now to statutory plain meaning.

II. THE FIFTH DISTRICT COURT AND THE TRIAL COURT ERRED IN HOLDING SECTION 627.727(9) APPLICABLE TO THIS CASE, IN THAT THE 1987 AMENDMENT WHICH ADDED SUBSECTION NINE TO SECTION 627.727 SIMPLY OFFERS INSURERS THE OPTION TO SELL A NON-STACKED UNINSURED MOTORIST COVERAGE POLICY

Respondent argued to the courts below that the only valid exclusion of a resident family member from uninsured motorist (UM) coverage is one performed according to section 627.727(9). Such a conclusion is clearly erroneous. The only effect of the 1987

enactment of section 627.727(9) is to allow insurers to offer non-stacked UM coverage at a reduced premium. This conclusion is exclusive in light of the legislative history surrounding section 627.727(9).

The Court must read section 627.727(9) entirely to appreciate its meaning and objective. The provision provides as follows:

> (9) 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:
>
> > (a) The coverage provided as to two or more motor vehicles shall not be added together to determine the limit of insurance coverage available to an injured person in any one accident, except as provided in paragraph (c).
> >
> > (b) If at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to him is the coverage as to that motor vehicle.
> >
> > c) If the injured person is occupying a motor vehicle which is not owned by him or by a family member residing with him, he is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle as to which he is a named insured or insured family member. Such coverage shall be excess over the coverage on the vehicle he is occupying.
> >
> > (d) 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.
> >
> > (e) If at the time of the accident the injured person is not occupying a motor vehicle, he is entitled to select any one limit of uninsured motorist coverage for any one vehicle afforded by a policy under which he is insured as a named insured or as an insured resident of the named insured's household.

> In connection with the offer authorized by this subsection, insurers shall inform the named insured, applicant, or lessee, on a form approved by the Department, of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations. . . . Any insurer who provides coverage which includes the limitations provided in this subsection shall file revised premium rates . . . [which] . . . shall reflect the anticipated reduction in loss costs attributable to such limitations but shall in any event reflect a reduction in the [UM] coverage premium of at least 20 percent for policies with such limitations. . . .

§ 627.727(9), Fla. Stat. (1987) (emphasis added).

The staff report of the Senate Commerce Committee dated April 27, 1987, outlines a proposed draft of the amendments to section 627.727. *See* Staff of Fla. S. Comm. on Com., SB 829 (1987) Staff Analysis 1-3 (April 27, 1987). The draft of the bill reviewed therein provided:

> 627.727--Motor Vehicle Insurance; Uninsured and Underinsured Vehicle Coverage; Insolvent Insurer Protection.
>
> (9)(a) Any policy providing uninsured motorist coverage may contain the following provisions:
>
> 1. That the coverages provided as to two or more motor vehicles will not be added together to determine the limit of coverage available to an injured person for any one accident;
>
> 2. If at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to him is the coverage available as to that motor vehicle. However, if he is occupying a motor vehicle which is not owned by him or by a family member residing with him, he is entitled to uninsured motorist coverage for any one vehicle for which he is a named insured or insured family member. Such coverage shall, however, be off-set by the amount of uninsured motorist coverage available to him under the policy covering the vehicle in which he was injured;
>
> 3. 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; and
>
> 4. If at the time of the accident the injured person is not occupying a motor vehicle, he may select

> one limit of uninsured motorist coverage for one vehicle afforded by a policy under which he is insured as a named insured or insured resident of the named insured's household
>
> (b) The insurer at the time of the named insured's selection, or rejection of uninsured motorist coverage, shall advise him in writing on a form of his right to purchase an endorsement deleting the policy provisions authorized in this section, at his written request and upon payment of an appropriate additional premium.
>
> . . .

Fla. SB 829 (1987) (draft dated April 8, 1987) (emphasis added). Recall however that the provision finally passing the legislature requires that the insured receive stacked UM coverage unless he affirmatively rejects it, as opposed to the dead bill's requirement that the insured automatically receive non-stacked UM coverage unless he affirmatively accepts stacked. *See,* § 627.727(9), Fla. Stat.

Thus, it is clear in amending section 627.727 that the legislature was only addressing the question of offering non-stacked uninsured motorist protection. The issue before the legislature was simply whether the policy should be non-stacked, with the insured having the option to purchase stacked coverage, or whether the policy should be stacked, with the insured having the option of purchasing non-stacked coverage. The draft bill provided that the coverage would be non-stacked with the insured having the option to buy stacked. Section 627.727(9) as enacted provides that UM coverage be stacked and that the insureds have an option to reject that and purchase non-stacked at a 20% reduced premium. Any other construction of this amendment is mere folly, unsupported by

legislative history.

A plain reading of section 627.727(9) also confirms legislative intent. The terms "this offer" and "the limitations" are singular references in the provision which indicate clearly that the legislature intended a complete package: subpart (a) through (e). It is only this complete package that is subject to the signed form requirement. The provision's use of a cross-reference in subpart (a) and its requirement that insurers reduce their premiums 20% for policies containing the limitations further support this contention.

"Example 1" as explained by Petitioner in its brief on the merits below properly illustrates the applicability of section 627.727(9). That example provided:

EXAMPLE 1

> Suppose John Doe selects in writing a GEICO non-stacking UM policy covering three cars and purchases UM coverage on cars 1 and 2 only but purchases liability coverage for all three cars. When involved in an accident while occupying car 3, he would not be entitled to UM coverage even though he carried liability coverage under the policy on car 3 because of the limitation authorized by s.627.727(9)(d). This would be inconsistent with Wright and Mullis because Doe would be a defined insured under liability provisions of the policy since car 3 would be an "owned auto." Such a limitation of UM benefits is authorized by subsection (9) only if the proper selection form required by the statute has been signed. The result would be the same if car 3 was not insured at all under the GEICO non-stacking policy. When involved in an accident in car 1, however, Doe would be entitled to UM coverage, but the UM coverage for cars 1 and 2 would not be stacked and per subsections (a) and (b) of the 1987 amendment, the limit of UM benefits would be the amount purchased for car 1.

This example is a straight forward and correct illustration of

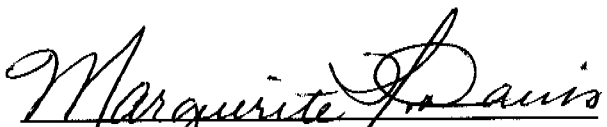
the effect section 627.727(9) would have under a GEICO policy utilizing section 627.727(9)'s package. The example demonstrates that if an insured bought liability coverage on a vehicle, then that is a covered vehicle, and the uninsured motorist coverage would be available unless the insured had elected non-stacked coverage as provided for in subsection (9). Conversely under the GEICO policy, if an insured does not buy liability coverage for the vehicle, then it is not a covered auto, and consequently there is no uninsured motorist coverage.

Therefore, the Court should quash the opinions of the Fifth District below and direct the trial court to rule in GEICO's favor.

CONCLUSION

This Court should quash the decision of the Fifth District Court of Appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was furnished by regular U.S. mail this 3rd day of September, 1993 to the following: Edward A. Perse, P.A., 410 Concord Building, Miami, Florida 33130, and David Falstad, Esquire, P.O. Box 1273, Orlando, Florida 32802-1273.

Marguerite H. Davis

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