IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 82,933

BARBARA A. SAVONA,

Plaintiff-Appellant/Petitioner,

versus

PRUDENTIAL INSURANCE CO.,

Defendant-Appellee/Respondent./

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT, CASE # 93-2281
BASED ON APPEAL FROM MAGISTRATE'S ORDER U.S. DISTRICT COURT
MIDDLE DISTRICT FLORIDA, CASE # 91-462-CIV-ORL-19

INITIAL BRIEF OF PLAINTIFF, SAVONA

CHARLES E. DAVIS, ESQUIRE
Charles E. Davis, P. A.
P.O. Box 568569
Orlando, Fl 32856
(407) 293-1510
Florida Bar # 254959
Attorney for Savona

TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS

STATEMENT OF THE ISSUES

Whether, under Florida Statute section 627.6675 (1987), a conversion insurance policy must provide benefits equal to those provided under the original group insurance policy, and correspondingly whether the Magistrate at the Federal District Court was bound to follow and award Plaintiff $1,000,000 in lifetime health coverage according to the uncontroverted case law as set forth in two Florida appellate districts as well as statutory history.

STATEMENT OF THE CASE

Course of Proceedings

This suit was initiated by the filing of Plaintiff's Petition for Declaratory Relief in state court on June 14, 1991 (R1-2). The Defendant filed a Notice of Removal of the Civil Action from the Circuit Court of the Ninth Judicial Circuit, in for Orange County, Florida, to the United States District Court, in and for the Middle District of Florida (R1-1). The Notice of Removal and notification of new case number was entered on August 2, 1991 (R1-7).

On July 16, 1991, the Defendant filed an Answer to Count I of the Complaint, and a Motion to Dismiss and/or Strike Count II of the Petition.(R1-3;R1-4) In opposition to Defendant's motions, the Plaintiff filed a Response to said motion (R1-9).

On August 27, 1991, the Plaintiff filed an Amended Petition for Declaratory Relief and Amended Complaint for Breach of Contract (R1-13). Defendant filed a Motion to Dismiss, and/or Strike Amended Petition for Declaratory Relief and Complaint for Breach of Contract.(R1-16)

On December 10, 1991, the case was assigned to trial by Magistrate. Plaintiff filed her consent to that procedure on January 8, 1992. (R1-19)

On February 20, 1992 an order was entered granting the Motion to Strike the Amended Petition (R1-20). The Plaintiff filed an Amended Petition for Relief on March 12, 1992 (R1-21). Defendant again filed a Motion to Dismiss and/or Strike Count II of Amended Complaint (R2-22), and shortly thereafter Plaintiff filed a Response to that

Motion. On May 14, 1992, an Order granting Motion to Dismiss and Motion to Strike Count II of Amended petition for declaratory relief was granted. Count II was dismissed for failure to state a cause of action. (R2-30).

On May 14, 1992, a status conference was held wherein the Plaintiff and Defendant agreed to a stipulation of facts. (R2-31)

On June 23, 1992, Defendant filed its Memorandum for final ruling (R2-35). Plaintiff filed her Memorandum on June 24, 1992 (R2-36). Notice of Supplemental Authority was filed by the Defendant on October 19, 1992 (R2-41). The Plaintiff filed a Notice of Supplemental Authority on October 19, 1992.(R2-42)

On February 12, 1993 the Court filed its Memorandum of Opinion. (R2-43) The Memorandum Opinion declined to follow the Florida District Court of Appeal decisions of Blue Cross/Blue Shield v. Shufelt, 487 So.2d 1085 (Fla. 5th DCA 1986) and Northbrook Life Insurance v. Clark, 582 So.2d 1199 (Fla. 2nd DCA 1991). The Court further found that the provision of a $250,000 lifetime major medical benefit was all that was required under the plain language of subsections (8) and (11) of section 627.6675 (1990). (R2-43) Judgment was entered on February 12, 1993 for the Defendant and against the Plaintiff (R2-44).

The Plaintiff filed her Notice of Appeal from the Final Judgment on March 15, 1993 (R2-45). The case was then briefed at the Court of Appeals for the Eleventh Circuit, and they chose to certify this question to the Florida Supreme Court.

STATEMENT OF FACTS

This was an action for declaratory relief brought pursuant to Florida Statute §86.011, and an action for breach of contract in failing to comply with Florida Statute §627.6675. That on or about January 29, 1986, the Plaintiff, BARBARA A. SAVONA, was employed by the Hotel Royal Plaza and was entitled to group health benefits under a policy issued PRUDENTIAL INSURANCE COMPANY. Further on that date, the Plaintiff, BARBARA A. SAVONA, was involved in a catastrophic motor vehicle accident which rendered her totally disabled, and as such she was eventually terminated from the group policy pursuant to the terms of that policy.

That BARBARA A. SAVONA, after termination of the group policy, was entitled to a conversion to an individual policy; and the Defendant/Appellee eventually issued an individual conversion policy (on approximately November 26, 1987) after accepting BARBARA A. SAVONA's application. However, the Defendant, PRUDENTIAL, did not furnish timely copies of the policy, its terms, conditions, or premium rates prior to issuing said policy.(R1-2-exhibits)

In fact, Defendant, PRUDENTIAL, eventually refused to offer any other policy maximum limits besides $100,000.00 or $250,000.00, despite the fact that the Plaintiff, BARBARA A. SAVONA, was previously covered with a $1,000,000.00 lifetime policy and had requested those limits in the individual conversion.

Plaintiff advised that said refusal was in violation of Florida Statute §627.6675, and the established law in Florida as found in the Blue Cross/Blue Shield v. Shufelt, 487 So.26 1085, (Fla. 5th DCA 1986). Litigation then followed.

SUMMARY OF ARGUMENT

Plaintiff contends that the Magistrate should have followed the Florida case law set forth in Northbrook Life Insurance v. Clark, 582 So.2d 1199 (Fla. 2nd DCA 1991) and Blue Cross/Blue Shield v. Shufelt, 487 So.2d 1085 (Fla. 5th DCA 1986). Those cases clearly set forth that the intent of Florida Statute section 627.6675 (1987) requires that an individual receive the right to a conversion policy with benefits equal to those provided under the original group plan. In other words, Plaintiff, Barbara Savona should have been given the right to a conversion policy with the same $1,000,000 lifetime benefits as her group policy, not $250,000 as now ruled appropriate by the Magistrate.

Plaintiff further contends that the District Magistrate should not have attempted to make an educated prediction on behalf of the Florida Supreme Court when the federal law seems to prohibit same. Flintkote v. Dravo, 678 F.2d 942, 945 (11th Cir. 1982).

Lastly, the fact that the Florida legislature in amending section 627.6675 specifically chose to pass (in March 1992), and then delete (in July 1992 before the effective date of the March revision) the provisions of subsection (20) which attempted to make retroactive or retrospective changes to overrule cases like Clark and Shufelt is persuasive against the Magistrate's prediction. Further, the legislature decided that $500,000 was more appropriate than the $250,000 offered to Plaintiff.

Thus, Plaintiff, Barbara Savona, submits that Prudential should be required to issue a $1,000,000 lifetime individual conversion policy.

ARGUMENT

This case is before the court only on a certified question of Florida law, and is not in anyway connected with ERISA, as might be contended by PRUDENTIAL. The decision of the Magistrate and the submission of the certified question to the Florida Supreme Court for its interpretation puts the issue of the applicability of ERISA versus Florida law to rest.

Florida Statute section 627.6675 (1987) as interpreted in Northbrook and Shufelt specifically mandates a **minimum** coverage to be afforded upon conversion, but also requires the insurance company to provide benefits equal to those provided under the group policy. Thus, Plaintiff should have been provided $1,000,000 in benefits because there is no equivocation or dispute between the Fifth and Second District Courts of Appeal in Florida as to this applicability or interpretation of this statute.

While it is true that this Court has not yet spoken on the case law generated interpreting this statute, the Federal Magistrate was incorrect in attempting to predict. There is no conflict in the Florida intermediate courts as to the proper construction of this statute, and the law to which the Magistrate was obliged to follow is found in Flintkote Co. v. Dravo at 945, wherein the court ruled that "only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." Likewise, the law of the Eleventh Circuit as found in Silverberg v. Paine Webber, 710 F.2d 678, 690 (11th Cir. 1983) seems to say that where there was no indication that the Florida Supreme Court would choose not to enforce a particular statutory

requirement which was more stringent and offered greater protection to the citizens of the state, the federal court is bound to follow the state decisions. Studstill v. Borg Warner Leasing, 800 F.2d 1005, 1007 (11th Cir. 1986) and Provau v. State Farm Mutual Insurance Co., 777 F.Supp. 817, 820 (1985), hold likewise and add that these intermediate state court decisions must be followed even if the federal courts don't like the reasoning or the outcome.

Further, the Magistrate's analysis of the amendments to section 627.6675 are extremely important for this Court. As stated, the legislature amended the law in March 1992, in the Laws of Florida, Chapter 92-33, section 138, to become effective October 1, 1992. Of particular relevance are the new subsections (10) and (20) as amended, while the renumbered subsection (15) is the same as old (17), and thus of no new significance. New subsection (10) purported to reduce the maximum benefit to $250,000, and new subsection (20) read as follows:

> Nothing in this section or in the incorporation of it into insurance policies shall be construed to require insurers to provide benefits equal to those provided in the group policy from which the individual converted. Further, the legislature finds and declares that this subsection is a clarification and specification of the legislative intent of this section prior to the enactment; and that in light of confusion relating to the rights and obligations of insurers and insureds resulting from judicial and administrative interpretations of this section, the state has great interest in giving retrospective intent to this clarification. The Legislature therefore intends that this section be give such retrospective effect as is necessary to clarify that it does not, and did not before this enactment, require the issuance of conversion policies providing benefits equal to those provided in the group policy from which the individual converted.

Once again this amendment was meant to become effective on October 1, 1992, but before

that date, on July 7, 1992, the legislature again amended this statute in Laws of Florida, Chapter 92-318, section 116. Therefore, the March amendments never became law, at least as they apply to this case.

Of great significance to this case, and the legislative intent if any other than already interpreted in both Northbrook and Shufelt, is the **deletion** of the following language from new subsection (20):

> Further, the legislature finds and declares that this subsection is a clarification and specification of the legislative intent of this section prior to the enactment; and that in light of confusion relating to the rights and obligations of insurers and insureds resulting from judicial and administrative interpretations of this section, the state has great interest in giving retrospective intent to this clarification. The Legislature therefore intends that this section be given such retrospective effect as is necessary to clarify that it does not, and did not before this enactment, require the issuance of conversion policies providing benefits equal to those provided in the group policy from which the individual converted.

Thus, the legislature clearly chose **not** to override the previous case law, and gave the new amendment prospective effect only, at least as to this issue. Furthermore, the legislature enacted a different subsection (10) requiring a maximum of the lesser of the group policy or $500,000. It would appear that they recognized or compromised finding that a $250,000 policy like the one in this case is insufficient to accomplish the necessary public purposes of insuring adequate health care coverage for persons most needing same.

This type of statutory construction as used by the Shufelt and Northbrook courts is supported by the Florida case law as referenced in Jett v. State, 605 So.2d 926 (Fla. 5th DCA 1992), and the cases cited therein acknowledging the concept that when the literal context of a statute conflicts with the clearly discernible legislative intent, the context yields

to the legislative purpose to prevent defeat of that purpose/intent. See also Griffis v. State, 356 So.2d 297, 299 (Fla. 1978). These types of statutes are enacted in the public interest and should be liberally construed in favor of that purpose and in favor of the public, i.e. the Plaintiff, Barbara Savona.

CONCLUSION

The Magistrate while choosing not to follow the decisions of the intermediate appellate courts in Florida has substituted its rationale and reasoning for that of the state courts. Furthermore, the Court's attempt at discovering legislative intent seems to be flawed by disregarding the above referenced deletions.

Therefore, Plaintiff submits that the certified question should be answered consistently with the case law and statutory history/changes so as to provide her with conversion benefits in the amount of $1,000,000 which was the same provided to her under the group plan.

Respectfully submitted,

CHARLES E. DAVIS
Florida Bar #254959
P.O. Box 568569
Orlando, FL 32856
(407)293-1510
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Melissa Arony, Attorney At Law, Eubanks, Hilyard, Rumbley, Meier & Lengauer, P.A., Post Office Box 4973, Orlando, FL 32802-4973, this 28th day of March, 1994.

CHARLES E. DAVIS