SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 83,537

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

VERONICA ANN LAFORET and
HENRY A. LAFORET, her
husband,

Respondents.

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BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION, NATIONWIDE INSURANCE COMPANIES AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER'S POSITION

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae, The Florida Defense Lawyers Association (FDLA), Nationwide Insurance Companies (Nationwide) and National Association of Independent Insurers (NAII) accept and adopt Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

Florida Statutes § 627.727(10) violates the due process guarantees contained in the state and federal constitutions in several ways. First, the statute improperly inhibits the exercise of the insurer's fundamental right to a jury trial in a contract action for damages between itself and its insured. Under the Act, an uninsured motorist (UM) carrier is exposed to liability for damages caused by a third-party tortfeasor, exceeding the policy limits, when the insurer elects to investigate and test the legality and justice of the claim. Under the statutory scheme created by the Legislature, this penalty applies only to UM carriers and can only apply when that insurer elects to exercise its due process rights. This Court has recognized that the Legislature is not free to place an unreasonable burden upon the exercise of a constitutional right because that burden constitutes a violation of due process. Likewise, the United States Supreme Court has recognized that a statute with no other purpose than to chill the assertion of a constitutional right by penalizing those who exercise them is a law which is patently unconstitutional. A law which punishes a person for exercising a protected constitutional right is a due process violation of the most basic kind.

The United States Supreme Court has recognized that under certain circumstances, statutes which place a penalty upon the right of going to court may not result in a denial of due process. Due process guaranteed by the Fourteenth Amendment does not

prohibit a fixed award of damages, moderate in amount, in addition to the costs and fees of an attorney, where the payment of a policy has been wrongfully refused. Life and Casualty Co. of Tenn. v. McCray, 291 U.S. 566, 570, 54 S.Ct. 482, 484, 78 L.Ed. 987 (1934). Under such a scenario, the amount of the penalty must be reasonable in relation to the amount the insurer should have paid and also reasonable in relation to the costs associated with the delay. Statutes which have imposed double liability upon a defendant for having exercised its right to due process have been held to violate the due process clause guaranteed in the Constitution. See, e.g., Chicago, Milwaukee & St. Paul Railway Co. v. Polt, 232 U.S. 165, 34 S.Ct. 301, 58 L.Ed. 554 (1914). This Court has likewise recognized that penalizing a defendant merely for exercising its rights to fully investigate and test the legality and justice of the plaintiff's cause in an amount disproportionate to the plaintiff's claim eliminates the element of fair play or righteous judgment guaranteed the defendant by the Constitution. See, New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So. 50 (1935).

Florida Statutes § 627.727(10) violates the restrictions identified in McCray. The damages awarded are not fixed, and instead, are limited solely by the severity of the plaintiff's personal injuries which were caused by some third party. Likewise, the penalty provided by the statute is neither moderate nor bears any reasonable relationship to the amount the insurer should have paid or to the costs of its delay in payment. As applied in this case, State Farm was penalized in an amount more than ten times the

compensatory damages determined by a jury to be the result of its alleged bad faith. The imposition of such a penalty upon State Farm or any other insurer is oppressive and violates the most fundamental principles of due process.

Finally, Fla. Stat. § 627.727(10) is substantive, notwithstanding the Legislature's statement otherwise. As such, it may not be retroactively applied to causes of action which accrued prior to the date the legislation was enacted. Retroactive application of this statute results in a denial of due process. This Court should rule that the statute is unconstitutional, either on its face or as applied.

ARGUMENT

I.

FLORIDA STATUTES § 627.727(10) IS CONSTITUTIONALLY DEFECTIVE BECAUSE IT VIOLATES THE DUE PROCESS GUARANTEES CONTAINED IN THE FEDERAL AND FLORIDA CONSTITUTIONS.

Article I, § 9 of the Florida Constitution provides in pertinent part:

> No person shall deprived of life, liberty or property without due process of law . . .

This protection is also embodied within the Fifth and Fourteenth Amendments to the United States Constitution. Florida Statutes § 627.727(10), created by the 1992 amendment to the UM statute, violates insurers' due process rights guaranteed to them by the United States and Florida Constitutions in a variety of ways. First, it improperly inhibits the exercise of an insurer's fundamental right to a jury trial in a contract action for damages between itself and the insured. Under the provisions of the Act, an insurer who dares to ask for a jury trial to have the extent of its obligations to its insured determined by a factfinder risks being statutorily penalized by having to pay damages caused by some third party. Moreover, the statute is constitutionally defective and violative of due process guarantees because the amount of the penalty is virtually unlimited, bearing no reasonable relationship to the amount the insurer should have paid nor the costs associated with any delay in payment. Statutes which have imposed far less egregious penalties than Fla. Stat. § 627.727(10) for the exercise of the constitutional right to due process have been found by both

this Court and the United States Supreme Court to violate the due process guarantees found in the Florida and United States Constitutions. This Court should find that Fla. Stat. § 627.727(10) not only facially violates due process, but denies due process as applied in this case.

At the outset, it is important to identify the relationship between a UM insurer and its insured. In the UM context, the relationship between the insurer and insured is adversarial and is not a fiduciary relationship. See, Kujawa v. Manhattan National Life Ins. Co., 541 So.2d 1168, 1169 (Fla. 1989); Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), aff'd., 317 So.2d 725 (Fla. 1975). As explained by a commentator often quoted by this Court, the relationship between the insurer and the insured is akin to a debtor-creditor relationship. See, Couch on Insurance 2d (Rev.Ed.) § 23:11.

The right to a trial by jury has been recognized in Florida to be an organic right that under no circumstances should be denied. See, Tesher & Tesher, P.A. v. Rothfield, 392 So.2d 1000, 1001 (Fla. 4th DCA 1981). See also, Orr v. Avon Florida Citrus Corp., 130 Fla. 306, 177 So. 612 (1938). Article I, § 22 of the Florida Constitution secures the right of a jury trial for cases in which a jury trial was traditionally afforded at common law. See, Smith v. Barnett Bank of Murray Hill, 350 So.2d 358, 359 (Fla. 1st DCA 1977). An action for the recovery of money damages is among the class of cases in which the common law afforded a right to jury trial. Id. See also, Hobbs v. First Florida

National Bank, 480 So.2d 153 (Fla. 1st DCA 1985); Cheek v. McGowan Electric Supply, 404 So.2d 834 (Fla. 1st DCA 1981); Knowles v. Bank of Green Cove Springs, 393 So.2d 612 (Fla. 1st DCA 1981).

Where an unreasonable burden is placed upon the exercise of a constitutional right, that burden amounts to a violation of the organic right to due process of law. See, State, ex. rel. Hosack v. Yocum, 136 Fla. 246, 186 So. 448 (1939). If a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, that law is patently unconstitutional. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Moreover, to punish a person for exercising a protected constitutional right "is a due process violation of the most basic sort." United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982). A corporation is a "person" for purposes of due process guarantees. See, Friedus v. Friedus, 89 So.2d 604 (Fla. 1956).

Florida Statutes § 627.727(10) provides:

> The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of the law of this state. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor. [2]

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[2] The effort of the Legislature to penalize a UM insurer for "any damages caused by a violation of the law of this state" as embraced in the statute probably violates due process on its face and renders the statute void for vagueness. A statute which either forbids or requires

Section 627.727(10) Fla. Stat. and the court's additur in the present case impose upon the insurer the duty to pay damages caused by the tortfeasor which exceed the insurer's policy limits. The imposition of this liability constitutes a penalty upon insurers. See, McLeod v. Continental Ins. Co., 591 So.2d 621, 625 (Fla. 1992). Under the statutory scheme, only UM carriers are exposed to these types of damages. No other insurer under Fla. Stat. § 624.155 in a first-party context is ever exposed to the payment of damages caused by some third party. More importantly, the only way the UM insurer could ever be exposed to the payment of damages which are caused by the tortfeasor and exceed its limits is by exercising its constitutional right to have a jury determine the amount of damages it owes to its insured. If, in a case like the present one, where there is competing evidence concerning causation

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the doing of an act in terms so vague that anyone of common intelligence must necessarily guess at its meaning or differ as to its application violates due process of law. Falco v. State, 407 So.2d 203, 206 (Fla. 1981). Vague statutes fail to give adequate notice of what conduct is prohibited and also invite arbitrary and discriminatory enforcement. Southeastern Fisheries Assn. v. Dept. of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984). In Southeast Aluminum Supply Corp. v. Metropolitan Dade Co., 533 So.2d 777 (Fla. 3d DCA 1988), rev. den., 540 So.2d 241 (Fla. 1989), the Third District held that a catch-all ordinance which broadly prohibited a contractor from violating or disregarding "any county or Dade County municipal ordinance or state law pertaining to the contractor's business" was unconstitutionally void for vagueness. The court reasoned that the ordinance required contractors to read the Dade County ordinances and state statutes in their entirety and guess which ones would pertain to the contractor's business and then comply with them. There is no meaningful distinction between the unconstitutional ordinance there and the language contained in Fla. Stat. § 627.727(10) at issue here.

and damages, the insurer elects to exercise its constitutional right to have a jury determine the amount of its damages, and there is an adverse verdict, the insurer will be penalized for having exercised that constitutional right. Given that the statute applies only to UM carriers and that the insured's damages can only exceed the amount of the coverage when the insurer elects to exercise its right to a jury trial, this statute violates the insurer's due process guarantees and should be declared void by this Court.[3]

The statute itself likewise violates the due process guarantees of insurers because it penalizes them for exercising due process rights to a hearing. Almost 70 years ago, in Atlantic Coast Line R.R. Co. v. Wilson & Tumor Fertilizer Co., 104 So. 593, 89 Fla. 224 (1925), this Court recognized that the defendant has a right to fully investigate and test the legality and justice of a claim. Moreover, this Court stated that to impose heavy penalties for doing so would deny the defendant the rudiments of fair play which would violate the due process guarantees contained in both the federal and state constitutions. Id. at 594. Since that time, the United States Supreme Court has had the opportunity to address the issue of whether statutes which place a penalty upon the right of going to court to have a dispute settled denies due process. In

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[3] The result should be no different if the "penalty" is treated like punitive damages. Punitive damage awards may not be unlimited, and the process must satisfy the procedural safeguards of due process. See, Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1, (1991).

Life & Casualty Co. of Tenn. v. McCray, 291 U.S. 566, 570, 54 S.Ct. 482, 484, 78 L.Ed. 987 (1934), the Supreme Court explained that due process guaranteed by the Fourteenth Amendment ". . . does not prohibit a fixed award of damages, moderate in amount, in addition to the costs and the fees of the attorney, when the payment of a policy of life insurance has been wrongfully refused." That court emphasized that the amount of the penalty must be reasonable in relation to the amount the insurer should have paid, and also reasonable in relation to the costs associated with the delay. 54 S.Ct. at 485 - 486.

In McCray, the insurance carrier had issued a life insurance policy in the amount of $500 payable to McCray's wife. That policy was first issued in March, 1930, and it lapsed in June, 1931 for non-payment of premium. In August, 1931, it was reinstated with the company's consent. Nine months later, in May, 1932, the insured committed suicide. Under the terms of the policy, if the suicide occurred within a year of the date of issuance of the policy, the insurer's liability was limited to a return of premiums paid by the insured. However, if the suicide occurred after the expiration of the year, the liability of the insurer was the same as if the death occurred from other causes.

Mrs. McCray maintained that the suicide occurred after the expiration of the one year period, and as such, she was entitled to full benefits under the policy. The company, on the other hand, maintained that the year was to be calculated from the date of reinstatement, and as such, Mrs. McCray was entitled to a

return of premiums only. Ultimately, a judgment was entered against the insurer, which was affirmed on appeal in the Arkansas Supreme Court. Under the state law, 6% interest was added to the face amount of the policy, as well as an attorney's fee of $200.00. The statute also provided an award of 12% computed on the payments due under the contract.

The insurer contested the validity of the statute for a variety of reasons including the basis that it denied the insurer due process guaranteed by the Fourteenth Amendment. In finding that this statutory scheme presented did not violate due process, the court carefully distinguished two previous cases where it found the penalty in fact violated due process guaranteed by the Constitution. The first case the court distinguished was Chicago, Milwaukee & St. Paul Railway Co. v. Polt, 232 U.S. 165, 34 S.Ct. 301, 58 L.Ed. 554 (1914). At issue in Polt was a South Dakota statute which made the railroad company absolutely responsible for damages caused by its locomotive, and further, made it liable for double the amount of damages actually sustained unless it had paid the full amount within 60 days from notice. In Polt, the plaintiff received a verdict for $780.00 after the railroad had offered $500.00 to settle the case. A judgment for double the compensatory damages was sustained by the Supreme Court of South Dakota.

The United States Supreme Court found that while states have a large latitude in the policies they can pursue and enforce, that the rudiments of fair play required by the Fourteenth Amendment were wanting when a defendant was required to guess

rightly what a jury would find or pay double if the jury decided to add one cent to the amount that the defendant had offered to tender.

In St. Louis, Iron Mountain & Southern Railway Co. v. Wynne, 224 U.S. 354, 32 S.Ct. 493 56 L.Ed. 799 (1912), the Court found that under a similar statute, due process was violated where the statute likewise imposed double liability and the railroad in good faith properly resisted payment and then instead exercised its right to due process.

The present statute and its application to the present facts clearly violate the principles stated in McCray. First, the damages awarded are not fixed to any degree. Instead, the statutory penalty is limited solely by the severity of the plaintiff's personal injuries which were caused by some third-party tortfeasor. Under McCray, the state may not impose an unlimited penalty upon an insurer for exercising its due process rights to a hearing. This Court has already held that to penalize a defendant for merely exercising its right to fully investigate and test the legality and justness of the plaintiff's cause in an amount disproportionate to the plaintiff's claim is to eliminate the element of fair play or righteous judgment guaranteed the defendant by the Constitution. See, New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So. 50 (1935). The present statute, which imposes an unlimited penalty upon the insurer, absolutely deprives it of its right to fair play and due process and should be declared unconstitutional by this Court.

The statutory penalty and the imposition of additional damages in this case also demonstrates how the statute violates the second restriction of McCray, that the award be moderate in amount and bear some reasonable relationship to the amount that an insurer should have paid from the beginning of the case. In this case, the jury determined that Plaintiffs had sustained damages in the amount of $24,000.00 as a result of State Farm's alleged bad faith. In granting Plaintiffs' Motion for Additur, the trial court, applying the statute, imposed a penalty more than ten times that amount upon State Farm. It is impossible to understand how that amount could be deemed "moderate" in relation to the amount of benefits the insurer provided. In fact, it greatly exceeds those policy limits.

It is likewise quite clear that the amount of the award bears no reasonable relationship to the delay allegedly created by State Farm's failure to pay its policy limits earlier in the process. As noted above, statutes which have required defendants to pay twice their liability for exercising their right to test the legitimacy of a claim have been held to be oppressive and violative of due process. If paying double the damages created by a defendant's conduct is deemed to be oppressive for purposes of the constitutional guarantee of due process, it is inconceivable how an award ten times actual damages (not including attorney's fees and costs) could satisfy that strict constitutional standard.

It is clear that Fla. Stat. § 627.727(10) violates due process, both facially and as applied to the facts of this case. The amount of damages to which an insurer is exposed for exercising

its constitutional right to challenge the legitimacy and justness of a claim is neither fixed nor moderate in amount. Instead, the penalty imposed upon the insurer is dependent solely upon the injuries inflicted upon its insured by some third party. This Court has already recognized that an award of such damages is not based upon the insurer's conduct and bears no reasonable relationship to damages it has actually caused. See, McLeod v. Continental Ins. Co., 591 So.2d 621 (Fla. 1992). Under the clear and unambiguous requirements of the respective due process clauses contained in both the state and federal constitutions, this Court should determine that the statute in question is unconstitutional both facially and as applied.

II.

EVEN IF FLA. STAT. § 627.727(10) DID NOT OTHERWISE VIOLATE DUE PROCESS, IT MAY NOT CONSTITUTIONALLY BE RETROACTIVELY APPLIED TO A CAUSE OF ACTION WHICH ACCRUED PRIOR TO THE ENACTMENT OF THE LEGISLATION.

In its decision below, the Fourth District certified to this Court the following question as one of great public importance:

> Whether amended section 627.727(10), (Florida Statutes) (Supp. 1992) is a remedial statute and has retroactive application?

For a variety of reasons, this Court should answer that question in the negative and rule that the amendment is substantive and may not constitutionally be retroactively applied. The statute impairs the existing contract between the parties[4] and likewise violates due process.

Section 80 of Chapter 92-318, Laws of Florida (1992) which created subsection (10) to the UM statute also provided:

> The purpose of subsection (10) of s. 627.727 Florida Statutes, relating to damages, is to reaffirm existing legislative intent, and as such, is remedial rather than substantive. This section and s. 627.727(10) Florida Statutes, shall take effect upon this act becoming a law and, as it serves only to reaffirm the original legislative intent, s. 627.727, Florida Statutes, shall apply to all causes of action accruing after the effective date of 624.155, Florida Statutes.

The Legislature's statement notwithstanding, this statute is substantive and remedial in name only.

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[4] The argument of State Farm regarding impairment of contract is adopted and will not be duplicated.

To understand why the statutory amendment is substantive, one need only look to this Court's decision in McLeod v. Continental Ins. Co., 591 So.2d 621 (Fla. 1992). In McLeod, this Court explained that compensatory damages are the loss, injury or deterioration caused by negligence, design or accident of one person to another. Id. at 624, (citing, Hanna v. Martin, 49 So.2d 585, 587 (Fla. 1950)). The McLeod court further noted that the fundamental principle of the law of damages was that a person injured by a breach of contract or some other wrongful conduct shall have fair and just compensation commensurate with the loss sustained and consequence of the defendant's act. Applying those principles to the statutory "bad faith" cause of action, this Court noted that there were fundamental differences between a first and third-party action. In a third-party action, the term "damages" would include the amount of an excess judgment to which the insured was exposed to additional liability for the excess amount. In a first-party case, however, the insured was not injured by an excess judgment, and to allow such recovery would be in direct conflict with the fundamental principle that one is not liable for damages that he or she did not cause. In rejecting the insured's contention that the insurer should be liable for the excess award, this Court stated that in order to be liable under the statute, the insurer must not only have caused the excess judgment, but the excess judgment must have also injured the insured. The amount of the excess judgment represented damages caused by the tortfeasor, not the insurer, and thus, the excess award did not qualify as

damages resulting from a violation of the statute. This Court explained that there was nothing in the legislative history of the statute to suggest that the insurer was obligated to pay damages other than those caused by its own conduct. This Court then concluded that the damages recoverable in a first-party action pursuant to Fla. Stat. § 624.155 were only those amounts which were the natural, proximate, probable and direct consequence of the insurer's bad faith actions. Thus, McLeod made clear that insurers had a vested right not to be responsible for damages other than those actually caused by its alleged bad faith conduct.

In Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), this Court was asked whether Fla. Stat. § 768.56 applied to a cause of action that accrued prior to the statute's effective date. The analysis in Young focused upon whether that statute created a new obligation or duty and was, therefore, substantive in nature. In determining that the statute could not be retroactively applied, this Court explained that the plaintiff's right to enforce his cause of action for malpractice vested prior to the effective date of the statute. At the time the cause of action vested, there simply was no obligation nor entitlement to a fee to the prevailing party in such an action.

This Court used a similar analysis to determine whether a right was substantive or remedial in Florida Patients Compensation Fund v. Scherer, 558 So.2d 411 (Fla. 1990). In Scherer, this Court held that damages and penalties, including an award of attorney's fees for which a physician might be held liable

in a malpractice case, could not constitutionally be enlarged after the date of the alleged malpractice. In Scherer, a physician challenged an entry of an award of attorney's fees under Fla. Stat. § 768.56 where the alleged malpractice action accrued prior to the effective date of the statute. Again noting that the creation of a right to attorney's fees was substantive, this Court stated that damages and penalties, including an award of attorney's fees, for which a physician might be held liable, could not be constitutionally enlarged after the date of the alleged malpractice. "To do so violates state and federal prohibitions against ex post facto laws." Id. at 414.

Any doubt that the present statute involves a substantive right can be removed by reading the Fifth District's decision in St. John's Village I, Ltd. v. Dept. of State, 497 So.2d 990 (Fla. 5th DCA 1986). There, the Fifth District defined a remedial statute as "one which confers or changes a remedy; a remedy is the means employed in enforcing a right or in redressing an injury." Alternatively, a statute which imposes "a new obligation or duty" is substantive in nature, not procedural. Id. at 993.

The mere fact that the statute changes the measure of damages does not render it a "remedial" change. In L. Ross, Inc. v. R. W. Roberts Constr. Co., Inc., 466 So.2d 1096 (Fla. 5th DCA 1985), app'd., 481 So.2d 484 (Fla. 1986), this Court quoted with approval the following language from the Fifth District's decision:

> The argument [that the amendment is procedural, affecting only the measure of damages for vindication of an existing substantive right] fails to recognize that

> substantive rights do not exist in an absolute binary world, but are relative and are often a matter of degree and that damages always follow the right and that any change in a substantive right normally changes the amount of damages resulting from a breach of that substantive right. Therefore, it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely "remedial" and thus, procedural, and, therefore, is not a change of the substantive law giving the substantive right which is the basis for the damages.

Id. at 485.

Under the test utilized by the Fifth District and approved by this Court in L. Ross, Inc., a general rule of thumb was created. Generally, if a new statute gives a party a legal right to recover something from a party who did not previously have a legal obligation to pay it, the statute is a substantive one.

Quite clearly, insurers had no legal obligation to pay the excess damage award created by the negligence of a third-party tortfeasor under Fla. Stat. § 624.155 prior to the 1992 amendment to Fla. Stat. § 627.727. No matter how the Legislature chose to characterize this change, it created a right in insureds to attempt to obtain a recovery of that excess award by an insurer who never before had a legal obligation to pay that amount. Application of that statute retroactively would be a denial of due process. As this Court explained in Village of El Portal v. City of Miami Shores, 362 So.2d 275, 277 (Fla. 1978), retroactive statutes are constitutionally defective:

> . . . in those cases where vested rights are adversely affected or destroyed or when a new obligation or duty is imposed, or an additional disability is established, in

> connection with transactions or considerations previously had or expiated.

Citing, McCord v. Smith, 43 So.2d 204 (Fla. 1950). Here, the present statute unquestionably is substantive in nature, and its retroactive application to State Farm in this case and to all insurers for causes of action which occurred before the effective date of the statute, violates the insurers' constitutionally-guaranteed rights.

CONCLUSION

Florida Statutes § 627.727(10) violates the due process guarantees contained in the state and federal constitutions. First, it imposes an onerous penalty limited solely to UM carriers who elect to exercise their due process right to a hearing. Second, the penalty itself violates due process because the penalty is neither fixed nor moderate in amount. The statute does not require the penalty to bear any reasonable relationship to the amount of the benefits owed or to the costs associated with the insurers' delay in payment. Finally, the statute creates a new substantive right in an insured and corresponding obligation upon an insurer for payment of money an insurer was not previously obligated to pay. As such, the statute may not be retroactively applied. This Court should answer the certified question of the Fourth District in the negative and further determine that the statute violates due process of the insurers and is unconstitutional and unenforceable.

Respectfully submitted,

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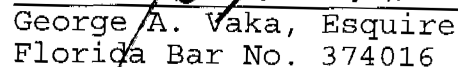
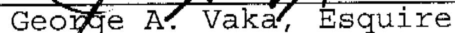
By: 

George A. Vaka, Esquire
Florida Bar No. 374016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to **Betsy E. Gallagher, Esquire,** Penthouse, City National Bank Building, 25 W. Flagler Street, Miami, Florida 33130-1712; **George H. Moss, Esquire,** 817 Beachland Blvd., Vero Beach, Florida 32964-3406; **Jane Kreusler-Walsh, Esquire,** Suite 503, Flagler Center, 501 S. Flagler Drive, West Palm Beach, Florida 33401; **Louis K. Rosenbloum, Esquire,** Attorney for Academy of Florida Trial Lawyers, Amicus Curiae, Post Office Box 12308, Pensacola, Florida 32581; and **James K. Clark, Esquire,** Suite 1003, Biscayne Building, 19 W. Flagler Street, Miami, Florida 33130, on June 15, 1994.



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