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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 85,~~285~~ 300

DIANE S. HASSEN, and
THOMAS S. HASSEN,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a foreign
corporation,

Respondent.

BRIEF OF AMICUS CURIAE, FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY, IN SUPPORT OF RESPONDENT'S POSITION

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PRELIMINARY STATEMENT

Florida Farm Bureau Casualty Insurance Company,[2] (Farm Bureau) is a domestic insurance company licensed to conduct the business of insurance in the State of Florida. In accordance with its license, Farm Bureau has issued thousands of automobile liability insurance policies which contain uninsured motorists (UM) coverage in accordance with § 627.727, Fla. Stat., and as such, is keenly interested in the issues presented by this appeal.

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[2] In the agreed motion to appear as amicus, Farm Bureau was identified as Florida Farm Bureau Mutual Insurance Company. That insurance company has been succeeded by Florida Farm Bureau Casualty Insurance Company, and any reference to Farm Bureau should be referenced to the successor in interest.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Farm Bureau Casualty Insurance Company, accepts and adopts the Statement of the Case and Facts as presented in Respondent, State Farm Mutual Automobile Insurance Company's, brief.

SUMMARY OF THE ARGUMENT

The issues involved in this case are straightforward. Prior to 1992, the insurer and the Plaintiff entered into a contract which provided certain rights and obligations amongst the parties. All appropriate Florida Statutes, including § 627.727(6) Fla. Stat. (1989) became part of that contract.

In 1992, the Florida Legislature amended § 627.727(6), and those amendments created drastic changes in the UM scheme. It placed new restrictions upon the exercise of the UM carrier's subrogation rights, and likewise, imposed additional obligations upon the insurance carrier should it choose to retain those rights and not waive them. In essence, it gave the insurance carrier the choice to either make payment of the private settlement negotiated between the plaintiff and the liability insurer for the tort-feasor or to waive its subrogation rights, either voluntarily or have them deemed abandoned by its failure to pay the money. The Second District appropriately ruled the 1992 amendment to § 627.727(6) Fla. Stat. was substantive and not procedural and could not be retroactively applied to an existing policy of insurance issued by State Farm.

The Second District also correctly determined that the new statute deprived UM carriers of due process rights guaranteed to them by the state and federal constitutions. Without the benefit of any prior determination, the statute deprived the insurers of either their money or of their subrogation claim, either of which are substantial property rights which are afforded

constitutional protection. The statute likewise infringes upon the insurer's rights to jury trial in actions on the contract for money damages and in their action against the tort-feasor for money damages. Finally, the statute impermissibly erects financial barriers as a prerequisite to even the assertion of these claims in violation of the guarantee to access to courts provided in the Florida Constitution. This Court should adopt the well-reasoned and thoughtful analysis of the Second District and approve the decision reached below.

ARGUMENT

I.

THE SECOND DISTRICT CORRECTLY CONCLUDED THAT § 627.727(6) FLA. STAT. (1992) WAS SUBSTANTIVE AND NOT PROCEDURAL AND, THEREFORE, COULD NOT BE RETROACTIVELY APPLIED TO A CONTRACT OF INSURANCE WHICH EXISTED BEFORE ITS EFFECTIVE DATE.

In 1992, the Legislature drastically amended § 627.727(6) Fla. Stat. Under the new statute, long-recognized subrogation rights of UM insurers were deemed waived if the insurer did not agree to voluntarily waive them or pay the insured the amount of the private settlement he or she had reached with the tort-feasor's liability insurer. Simply stated, under the new statute, the UM insurer is required to give up its money or give up its legal rights when the insured merely notifies the UM carrier of the proposed private settlement. This Court should adopt the thoughtful and well-reasoned decision of the Second District below which correctly recognized that these substantive changes may not be applied retroactively and that the amendment as a whole, violates other protected constitutional rights of insurers.

Prior to the October 1, 1992, amendment, § 627.727(6) Fla. Stat. (1989) provided as follows:

> (6) If an injured person, or in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim against the underinsured motorist insurer, then such settlement agreement shall be submitted in writing to the underinsured motorist insurer, which shall have a period of

> 30 days from receipt thereof in which to agree to arbitrate the underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not agree within 30 days to arbitrate the underinsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured and authorize the execution of a full release, the injured person or, in the case of death, the personal representative may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve their respective liabilities for any damages to be awarded; however, in such action, the liability insurer's coverage must first be exhausted before any award may be entered against the underinsured motorist insurer, and any such award against the underinsured motorist insurer shall be excess and subject to the provisions of subsection (1). Any award in such action against the liability insurer's insured is binding and conclusive as to the injured person and underinsured motorist insurer's liability for damages up to its coverage limits. If an insurer has an arbitration clause in its policy and elects arbitration, the arbitration decision is binding, and the insurer has no recourse to civil action.

The 1989 statute and the provisions of State Farm's policy recognized the well-established right of insurers under Florida law to be subrogated to any right of action which their insureds may have against third persons who cause them injury. See, Schwab v. Town of Davie, 492 So. 2d 708 (Fla. 4th DCA 1986). The right is premised upon the recognition that insurance contracts are business undertakings which are not founded on principles of philanthropy or charity. See, State v. DeWitt C. Jones Co., 108 Fla. 613, 147 So. 230 (1933). As such, once an insurance carrier

has paid a loss on behalf of its insured, a right of subrogation arises, either equitably by operation of law, or through the express terms of the contract. See, Hough v. Huffman, 555 So. 2d 942, 945 (Fla. 5th DCA), approved, 564 So. 2d 1081, 1082 (Fla. 1990).

The 1989 statute and the contract likewise recognized that these rights are to be protected by the insured for the insurer and prohibit the insured from unilaterally extinguishing the subrogation right without the insurer's consent. This protection is important to an insurance carrier because if the insured releases the tort-feasor, the insurer who is subrogated to the rights of the insured is barred from enforcing its subrogation rights by virtue of the release. See, High v. General American Life Ins. Co., 619 So. 2d 459, 461 (Fla. 4th DCA), rev. den., 629 So. 2d 133 (Fla. 1993).

In 1992, the Florida Legislature enacted Ch. 92-318, Laws of Florida. As part of that chapter, the Legislature drastically revised the subrogation rights of UM carriers under § 627.727(6) Fla. Stat. The 1992 statute provides in pertinent part:

> 627.727(6)(a) If an injured person or, in the case of death, the personal representative agrees to settle a claim with the liability insurer and its insured, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of 30 days after receipt thereof to consider authorization of the settlement or retention of subrogation

rights. If an underinsured motorist insurer authorizes settlement or fails to respond as required by paragraph (b) to the settlement request within the 30-day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.

(b) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing permission to settle, the underinsured motorist insurer must, within 30 days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the underinsured motorist and the liability insurer for the amounts paid to the injured party.

The Legislature stated that except as otherwise provided, the act shall take effect October 1, 1992. Ch. 92-318, § 17(sic) at 3178, Laws of Florida. Nowhere in the remainder of the chapter has the Legislature expressed its intention for the amendments to § 627.727(6) Fla. Stat. to be applied retroactively.[3] Therefore, one must assume that had the Legislature intended that the amendments to subsection (6) be either classified as remedial, or to have been retroactively applied, the Legislature would have said so as it had done with subsection (10). Since the Legislature did not make that clear expression of intent, this Court should presume that the

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[3] In the same chapter, the Legislature did manifest its intent that a different amendment to Fla. Stat. § 627.727 should be given retroactive application and was remedial. The 1992 Legislature created Fla. Stat. § 627.727(10) expressly stating that it was to be given retroactive effect. Chapter 92-318, § 80 at 3151, Laws of Florida.

Legislature did not intend that subsection (6), as amended, be applied to pre-existing insurance contracts. See, Fleeman v. Case, 342 So. 2d 815 (Fla. 1976).

Art. I, § 10 of the Florida Constitution provides:

> Prohibited laws - no bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

The Constitution clearly prohibits the Legislature from taking action which diminishes the value of a contract. See, Maison Grande Condo. Assn., Inc. v. Dorten, Inc., 580 So. 2d 859 (Fla. 3d DCA 1991) aff'd. in part, reversed in part on other grounds, 600 So. 2d 463 (Fla. 1992); In re: Advisory Opinion to the Governor, 509 So. 2d 292, 314 (Fla. 1987) (a statute which retroactively turns otherwise profitable contracts into losing propositions is clearly a prohibited enactment); Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774 (Fla. 1979); Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978); State v. Leavins, 599 So. 2d 1326 (Fla. 1st DCA 1992); Allstate Ins. Co. v. Garrett, 550 So. 2d 22, 24-25 (Fla. 2d DCA 1989), rev. den., 563 So. 2d 631 (Fla. 1990). As such, Florida courts have held that the law in effect at the time an insurance contract was executed governs the issues arising under that contract. See, State Farm Mut. Ins. Co. v. Gant, 478 So. 2d 25, 26 (Fla. 1985); Lumbermen's Mut. Cas. Co. v. Cebellos, 440 So. 2d 612, 613 (Fla. 3d DCA 1983).

There cannot be any doubt that retroactive application of § 627.727(6) Fla. Stat. (1992) impairs State Farm's existing rights

under the contract. Florida Statutes § 627.727(6) (1989) became part of State Farm's contract as a matter of law. The provisions in State Farm's policy provided that if it made a payment on behalf of its insured, State Farm was subrogated to the right of that person to recover damages from the tort-feasor. Under the statute as applied at the trial level, State Farm's rights to subrogation were waived because it refused to agree to the settlement when, under the terms of the 1989 statute, the results of that refusal should have been a lawsuit against the tort-feasor and joinder of State Farm in that case. Moreover, State Farm would not have been required to "pay" to its insured the settlement proceeds with the tort-feasor to preserve that right.

The Petitioner argues that the Second District erred because it determined that the statutory amendment was substantive and not procedural. Amicus, the Academy of Florida Trial Lawyers,[4] does not take issue with nor present any argument concerning that ruling of the Second District. The Second District here correctly concluded that the 1992 amendment to § 627.727(6) Fla. Stat. is substantive and not procedural.

A procedural law prescribes a method of enforcing rights or obtaining redress for their invasion. Haven Federal Savings & Loan Assn. v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). Generally, there is no vested right in any method of procedure. Heverle v. E. R. O. Liquidating Co., 186 So. 2d 280 (Fla. 1st DCA 1966). A substantive law, on the other hand, is one which creates, defines

[4] Hereinafter referred to as the Academy.

and regulates a right. Haven Federal Savings & Loan Assn. v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). Substantive law includes those principles which establish the rights of individuals with respect to their persons and their property. Id.

This Court recently stated in State Farm Mut. Ins. Co. v. Laforet, __ So. 2d. __, 20 Fla. L. Weekly 173, 176 (Fla. April 20, 1995):

> The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively.

Arrow Air, Inc. v. Walsh, 645 So. 2d 422 (Fla. 1994); Alamo Rent-A-Car, Inc. v. Mancussi, 632 So. 2d 1352 (Fla. 1994); City of Lakeland v. Catinella, 129 So. 2d 133 (Fla. 1961). Even where the Legislature expressly states that a statute is to have retroactive application, this Court has refused to apply a statute retrospectively if the statute impairs vested rights, creates new obligations, or imposes new penalties. Alamo; State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983); Seaboard System R.R. v. Clemente, 467 So. 2d 348 (Fla. 3d DCA 1985).

The Second District appropriately concluded that the 1992 amendment to § 627.727(6) Fla. Stat. drastically altered the rights and obligations between UM insurers and their insureds pertaining to settlement with tort-feasors and the UM carrier's subrogation rights. Prior to the effective date of the 1992 amendment, insurers had no obligation to make any type of prepayment of settlement proceeds. Under the 1992 amendment, if the carrier

fails to make such payment, its subrogation rights are statutorily deemed waived and are forfeited. Alternatively, should the carrier wish to preserve its subrogation rights, the statute requires payment of the settlement offer by the UM insurer to the insured before there is any determination of liability, the extent of damages or the exhaustion of the underinsured motorist's liability insurance coverage.

In Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985), this Court was asked whether § 768.56 Fla. Stat. applied to a cause of action that accrued prior to the statute's effective date. The analysis in Young focused upon whether the 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 or 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 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 to an award of attorney's fees under § 768.56

Fla. Stat. 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 easily 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. 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. See L. Ross, Inc. v. R. W. Roberts Constr. Co., Inc., 466 So. 2d 1096 (Fla. 5th DCA 1985), approved, 481 So. 2d 484 (Fla. 1986).

In the present situation, the statute clearly imposes a new obligation upon a UM carrier to pay, in addition to its UM benefits, monies offered by a tort-feasor's liability insurer to settle a case. The insurer's refusal to make such a payment or its refusal to voluntarily waive its subrogation rights results in the

forfeiture of its rights of recovery against the tort-feasor whose conduct gives rise to the claim for UM benefits in the first instance. These changes are far from remedial or procedural in nature and impose far greater obligations upon insurance carriers than the previous law required. As such, the Second District correctly concluded that the statute could not be retroactively applied to the pre-existing contract of insurance, and this Court should approve that decision.

II.

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION OF WHETHER § 627.727(6) FLA. STAT. (SUPP. 1992) IS CONSTITUTIONAL IN THE NEGATIVE AND DETERMINE THAT IT VIOLATES DUE PROCESS AND AN INSURER'S ACCESS TO COURTS.

At the outset, it is important to address both the Petitioner's and the Academy's contention that the Second District had no authority to go beyond the Art. I, § 10 Florida Constitution analysis. They have essentially maintained that State Farm did not raise those issues in the trial court, and as such, they should not have been considered by the District Court of Appeal.[5] This Court has held that while prudence may dictate that issues such as the constitutionality of a statute's application to a certain set of facts should normally be considered at the trial level to assure that the issues are not deemed waived, that once the court acquires jurisdiction, it may, in its discretion, consider any issue

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[5] Although the Petitioner argues that the District Court should not have considered the issues, nowhere in its Initial Brief does it state that it in any fashion objected to the Second District's consideration of those issues.

affecting the case. Cantor v. Davis, 489 So. 2d 18, 20 (Fla. 1986). This Court has also recognized that fundamental error based on the constitutionality of a statute may even be raised for the first time on appeal in this Court. Palm Beach Co. v. Green, 179 So. 2d 356, 362-363 (Fla. 1965). Generally, the rule that questions not presented to nor ruled upon by the trial court are not reviewable on appeal is subject to an exception that the appellate court may consider and rule upon a constitutional or fundamental error when first raised or revealed in the record on appeal. American Home Assurance Co. v. Keller Ind., Inc., 347 So. 2d 767, 772 (Fla. 3d DCA 1977). See also, Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970). Florida courts have also recognized that matters which substantially affect the public interest, even if not raised in the trial court, may be considered for the first time on appeal. Northwest Florida Home Health Agency v. Merrill, 469 So. 2d 893 (Fla. 1st DCA), rev. den., 479 So. 2d 1118 (Fla. 1985). Here, the Second District clearly determined that the matters substantially affected the public interest and would be recurring issues in need of resolution. As such, the constitutional issues were properly addressed by the Second District and should be analyzed by this Court.

In answering the certified question on the merits, this Court should determine that § 627.727(6) Fla. Stat. (Supp. 1992) is not constitutional because it violates due process guaranteed to insurers by both the state and federal constitution, and likewise,

denies access to court guaranteed by Art. I, § 21 of the Florida Constitution.

As applied by the trial court, § 627.727(6) Fla. Stat. (1992) denies State Farm its substantive due process rights. State Farm was deprived of its long-recognized subrogation rights because it refused to be deprived of its $100,000.00. As applied, the statute mandated State Farm pay that amount to preserve its subrogation rights.[6] Florida law has long recognized that a cause of action is a property interest. See Puzzo v. Ray, 386 So. 2d 49 (Fla. 4th DCA), rev. den., 392 So. 2d 1378 (Fla. 1980). A right to assert a subrogated interest may appropriately be pursued as a contingent claim even prior to payment. Attorney's Title Ins. Fund, Inc. v. Punta Gorda Isles, Inc., 547 So. 2d 1250 (Fla. 2d DCA 1989). Here, the statute fails to pass the appropriate test because it deprives a UM carrier either of its money or its long-recognized property right in a subrogation action. The remedy that is afforded subsequent to the deprivation is illusory at best, particularly when one considers that the insured may not be able to prove that he or she has sustained a permanent injury within a reasonable degree of medical probability as required pursuant to § 627.737 Fla. Stat., or alternatively, cannot prove damages which equal or exceed the settlement offer. Even when the insured can

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[6] The Academy suggests that this payment was part of the UM benefits provided by State Farm's contract. It must be noted that the $100,000.00 referred to is in addition to, and not part of, those benefits provided in the contract.

satisfy those burdens, the UM carrier is still deprived of the time value of its money or interest which is never recouped.

The statute is also unconstitutional because it deprives the UM carrier of its due process rights to a prior determination, on the merits, in an appropriate legal forum, before its liability for an award is fixed by law. The cornerstone guarantee of the due process clause is that an individual be given the opportunity for a hearing before he or she is deprived of any significant property interest. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). See also, Peoples Bank of Indian River Co. v. State Dept. of Banking & Finance, 395 So. 2d 521 (Fla. 1981); Scholastic Systems, Inc. v. LeLoup, 307 So. 2d 166 (Fla. 1974). See also, Fuentes v. Shevin, 407 U.S. 67, 82, 92 S.Ct. 1383, 1994, 32 L.Ed.2d 556 (1972). Procedural due process rights are derived from property interests to which the individual has a legitimate claim. Metropolitan Dade Co. v. Sokolowski, 439 So.2d 932, 934 (Fla. 3d DCA 1983), pet. rev. den., 450 So. 2d 488 (Fla. 1984). Corporations are likewise entitled to due process of law insofar as property rights are concerned. Confer, Freidus v. Freidus, 89 So. 2d 604 (Fla. 1956).

It is now well established that even a temporary, non-final deprivation of property constitutes a "deprivation" in terms of the Fourteenth Amendment's guarantee of due process. Fuentes v. Shevin, 407 U.S. 67, 82, 92 S.Ct. 1383, 1994, 32 L.Ed.2d 556 (1972). Florida Statutes § 627.727(6) (1992) deprived State Farm of procedural due process in a variety of ways. First, State Farm

was given no opportunity to be heard in an independent forum to assert it rights prior to the time that it was required to divest itself of either its money or its subrogation rights. Instead, State Farm's obligations in this regard were left to the private settlement negotiations between the Plaintiff and the tort-feasor's liability insurance carrier. Second, the statute does not provide an immediate, and as important, meaningful post-deprivation proceeding by which to vindicate its rights. As such, a UM carrier's due process rights are statutorily deprived under the enactment. See, Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d 1067, 1071 (Fla. 1976).

The due process violation created by the statute is exacerbated because it also improperly infringes upon an insurer's right to trial by jury. In essence, the statute penalizes a UM carrier for exercising its right to a jury trial to have liability of the tort-feasor, damages sustained by the insured, and the damages it is required to pay under its contract determined. The right to a trial by jury is an organic right that should not be denied under any circumstances. Tesher & Tesher, P.A., v. Rothfield, 392 So. 2d 1000, 1001 (Fla. 4th DCA 1981). Art. I, § 22 of the Florida Constitution secures the right of jury trial for cases in which a jury trial was traditionally afforded at common law. Smith v. Barnett Bank of Murray Hill, 350 So. 2d 358, 359 (Fla. 1st DCA 1977). Actions for the recovery of money damages are among the classes of cases in which the common law afforded a right to jury trial. Id. Legislation whose only purpose is to chill the

assertion of constitutional rights by penalizing those who choose to exercise them is patently unconstitutional. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600 (1969).

Almost 70 years ago, in Atlantic Coastline R.R. Co. v. Wilson & Toomer Fertilizer Co., 89 Fla. 224, 104 So. 593 (1925), this Court recognized that a defendant has a right to fully investigate and test the legality and justice of a claim and to impose heavy penalties for doing so would deny the defendant the rudiments of fair play which would violate due process guarantees contained in both the United States and Florida Constitutions. Id. at 594. Florida courts have since held that laws which chill a party's right to jury trial violate the party's constitutional rights under Art. 1, § 22 of the Florida Constitution. See, Slater v. State, 316 So. 2d 539, 543 (Fla. 1975); Weathington v. State, 262 So. 2d 724, 725 (Fla. 3d DCA 1972), cert. den. 267 So. 2d 3301 (Fla. 1972). Florida Statutes § 627.727(6)(b) which requires the UM insurer to pay its insured the amount of a settlement offer made by the tort-feasor, as a condition precedent to the preservation of its subrogation rights, penalizes UM carriers for the assertion of their right to have a jury determine liability and damages before it is required to make a payment. The amended statute requires the UM carrier to "pay" a heavy penalty solely for exercising its right to have the jury determine the liability and damages issues. It "pays" the settlement as a condition to maintaining its subrogation rights or it "pays" by waiver of its subrogation rights and right

to have the jury first determine liability and damages, in order to keep its money. The infringement occurs because the insurer is entitled to a jury trial on its contract obligations and when it retains its cause of action against the tort-feasor for money damages. It must give up one or the other to get the trial it has an absolute right to demand.

Both the Petitioner and the Academy strenuously maintain that the legislative requirement that an insurer prepay the settlement offer as a prerequisite to its legal ability to assert a claim against the tort-feasor is reasonable because the insurers are professionals in the business, and as such, the Legislature's serious intrusion upon the insurer's constitutional rights is actually a reasonable one. One has to wonder whether the welcome mats, both at this Court and at the Capitol, have been made threadbare given the frequency with which Academy lawyers and lobbyists have appeared at both governmental branches offering this justification for deprivation of an insurer's constitutional rights. Certainly, the Legislature is free, upon making proper findings, to allocate certain financial burdens among insurance companies and their insurers. In enacting such legislation, however, it is constitutionally prohibited from violating the rights guaranteed to every citizen of this state as expressed in the Constitution. Florida Statutes § 627.727(6) (Supp. 1992) and its requirement that the UM carrier prepay amounts agreed to by plaintiff's counsel and a tort-feasor's liability insurer or

forever lose its right to assert its legal claim for money damages against the tort-feasor tramples those constitutional rights.

Even if the legislative goal was to shift the financial burden of settlements to the UM carrier, as is suggested by the Petitioner and the Academy, the Legislature far exceeded permissible means by which to accomplish that task. In UM cases, the UM carrier is essentially placed in the position as the insurer of the tort-feasor who is either uninsured or underinsured. As noted by this Court in Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 557 (Fla. 1986):

> The UM coverage, in purpose and effect, provides a limited form of insurance coverage up to the applicable policy limits for the uninsured motorist. The carrier effectively stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge. In other words, UM coverage is a limited form of third-party coverage inuring to the limited benefit of the tort-feasor to provide a source of financial responsibility if the policyholder is entitled under the law to recover from the tort-feasor. It is not first-party coverage even though the policyholder pays for it. In first-party coverage, such as medical, collision or theft insurance, fault is not an element. The insurance carrier pays even though the policyholder is totally at fault. With UM coverage,, the carrier pays only if the tort-feasor would have to pay, if the claim were made directly against the tort-feasor.

Id. at 557.

In discussing the concept of UM coverage, the Boynton court further explained that UM coverage is historically derived from unsatisfied judgment insurance. Id. at 556. See also, Couch on Insurance 2d, (Rev. Ed.) § 45624, p. 32. UM coverage developed

as a less cumbersome method for an insured to receive payment from the party with the ultimate financial responsibility. Id. at 557. See also, A. Widiss, a Guide to Uninsured Motorist Coverage, § 1.9 (1969). When viewed in that historical context, one can easily understand that UM coverage is meant simply to compensate the injured party for deficiencies in the tort-feasor's liability insurance coverage and is intended to allow the insured the same recovery which would have been available had the tort-feasor had sufficient insurance coverage. See, Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978), on remand, 383 So. 2d 1109 (Fla. 1st DCA 1980).

The 1992 amended statute does far more than simply place the UM carrier in the shoes of the tort-feasor. The tort-feasor, after all, would not be liable simply because of the unfortunate happenstance that he or she was involved in an accident. Instead, the Plaintiff would be required to prove that the tort-feasor was at fault for the accident, and, assuming the tort-feasor had the minimum required financial security, would also be required to prove that he or she sustained damages sufficient to surpass the no-fault threshold identified in § 627.737 Fla. Stat. Finally, the Plaintiff would have to prove the actual amount of damages sustained. Under the new statute, the UM carrier must make payment to the insured, or forever abandon its rights of recovery against the ultimately-responsible party without their ever having been any determination of fault, permanency or amounts of damage. The Legislature did not identify any compelling public necessity which

provided the foundation for this drastic intrusion upon the rights of UM carriers, nor for the complete abrogation of well-established burdens upon claimants to prove their case before a defendant must pay. It is doubtful one could identify such a justification, and it certainly was not identified here.

The Second District also appropriately concluded that the financial barriers erected by the Legislature denied UM carriers their constitutional right to access to courts. In addition to the well-reasoned analysis of the Second District, the statute denies access to court in the event the UM carrier has a legitimate question whether coverage may be provided. Once again, to preserve its rights to a coverage determination, the UM insurer must first pay its money or waive subrogation. In the event that the UM carrier pays the settlement money and is later successful in the coverage action, it certainly is not inconceivable that some party would defend a claim for repayment on the basis that no UM coverage was owed and, therefore, no entitlement to repayment can be demonstrated. The Petitioner and the Academy have not identified any reasonable alternative remedy to the insurers provided by the new statute to recover, and this is but one more reason why the statute is unconstitutional. This Court should adopt the decision of the Second District and declare § 627.727(6) Fla. Stat. (1992) to be unconstitutional.

CONCLUSION

The Second District appropriately determined that the 1992 amendment to § 627.727(6) Fla. Stat. was substantive and not procedural. The statute drastically changes the rights and obligations of UM carriers from what they had previously been under the predecessor statute. Insurers were entitled to rely upon the rights which had previously vested in them under the predecessor law and their contracts.

The amended statute also deprives UM carrier's due process because they are deprived of their property interest without a prior hearing in an appropriate legal form. The new statute also impedes access to courts because it places improper financial barriers upon UM insurers to assert their rights in court. This Court should approve the decision below.

Respectfully submitted,

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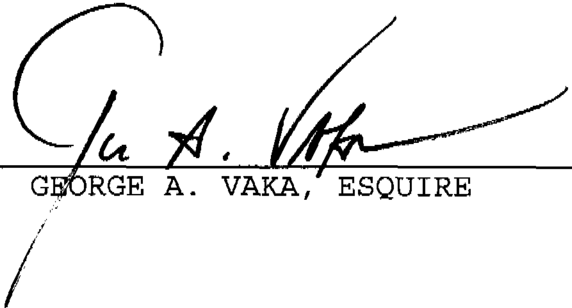
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **H. Shelton Philips, Esquire,** Post Office Box 14333, St. Petersburg, Florida 33733-4333; **Diana L. Myers, Esquire,** 1875 N. Belcher Road, Suite 201, Clearwater, Florida 34625; and **Roy D. Wasson, Esquire,** Suite 402, Courthouse Tower, 44 W. Flagler Street, Miami, Florida 33130, on July 21, 1995.



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