IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,300

DIANE S. HASSEN, et al,

Appellants/Petitioners,

-vs.-

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Appellee/Respondent.

ON APPEAL AND PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

This case is before the Court for review of the decision of the Second District Court of Appeal holding that § 627.727(6), Fla. Stat. (1992) unconstitutionally infringed upon the Appellee/ Respondent, State Farm Mutual Automobile Insurance Company's, right to due process of law and to access to the courts insofar as that statute required State Farm to either approve of its insured's (Appellant/Petitioner Diane Hassen) settlement with a tortfeasor and thereby waive subrogation against the tortfeasor or to pay the amount of the proposed settlement with that tortfeasor to preserve its ability to pursue subrogation thereafter. See State Farm Mut. Auto Ins. Co. v. Hassen, 650 So. 2d 128 (Fla. 2d DCA 1995). The following recitation of the factual background and procedural history of the case is taken verbatim from the Second District's decision, although typed using regular margins and double-spacing to reduce the eyestrain which accompanies reading long block-indented quotations:

"On June 15, 1990, Mrs. Hassen sustained injuries in an automobile accident as a result of the alleged negligence of another driver, Chad Carlton. At the time of the accident, State Farm insured both her and her husband under an automobile insurance policy with an effective renewal date of March 26, 1990. The policy provided "stacked" uninsured motorist benefits of $200,000.

The owner of the automobile driven by Mr. Carlton, William Buttmi, was insured through UniSun Insurance Company (UniSun) with

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a policy providing liability limits of $100,000. UniSun offered to settle the third party claim for the full amount of its policy limits. The Hassens accepted the offer subject to the approval of State Farm. They then sent State Farm a certified letter formally notifying it of UniSun's offer and requesting authorization to accept the offer. The letter further stated that "[s]hould [State Farm] choose to preserve its subrogation rights by refusing permission to settle, kindly forward a check in the amount of $100,000.00."

Correspondence followed in which State Farm, although making settlement overtures, questioned whether the value of the Hassen's third party claim was worth UniSun's policy limits. State Farm also stated that it had reason to believe that Mr. Buttmi may have sufficient assets to contribute to a settlement or to satisfy its subrogation claim because of his ownership in two construction companies and his recent inheritance from a deceased family member.[1] State Farm further advised that it had been in contact with Mr. Buttmi to determine if he would contribute to the settlement and that it would not make a decision on authorization to settle the third party claim until he responded. The record does not reflect whether Mr. Buttmi ever responded to State Farm's inquiry.

State Farm did, however, offer to settle the Hassens' uninsured motorist claim for $50,000 but without waiving its subrogation rights. Thus, its ultimate response was to deny

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[1]Documents in the record appear to support this statement.

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permission to settle, to refuse to waive its subrogation rights, and to decline to pay the sum previously offered by the third party liability carrier, UniSun.

The Hassens, over State Farm's objection, then proceeded to finalize UniSun's settlement offer by accepting the full amount of the policy limits and by executing a full release in favor of the tortfeasors. Their motivation for doing so was based on an immediate financial need for the settlement money. The Hassens later demanded coverage from State Farm under the uninsured motorist provisions of their policy. State Farm denied coverage because of the unauthorized settlement, resulting in the Hassens' seeking a declaration of their rights under their policy and Florida law as to the existence of uninsured motorist coverage.

In determining coverage by way of summary judgment, the trial court ruled that section 627.727(6), Florida Statutes (Supp. 1992), which had an effective date of October 1, 1992,[2] was a "remedial/procedural statute and applie[d], therefore, to claims for uninsured motorist benefits and policies of insurance issued before its effective date." The trial court then found that (1) the Hassens complied with the statute by giving State Farm "ample notice and opportunity to tender the sum offered by the tortfeasors in order to retain subrogation rights" and (2) that State Farm "failed to timely waive subrogation or tender the amount of the written offer." It thus concluded that under the statute the

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[2]This section was amended by a comprehensive act which undertook a wholesale revision of various insurance statutes. Ch. 92-318, Laws of Fla.

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Hassens "were free to settle and release the tortfeasors without prejudice to their claim for underinsured motorist benefits from Defendant, STATE FARM." Hassen, supra, 650 So. 2d at 130-131 (footnotes in original).

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SUMMARY OF THE ARGUMENT

The Academy does not herein address the only issue which was properly argued before and decided by the Second District Court of Appeal: to wit, whether the subject statute correctly was held by the trial court to retroactively apply to the Hassens' uninsured motorist claim under a policy which was issued and an accident which occurred prior to the effective date of the subject statute. Instead, the Academy has appeared in this proceeding to address the other portions of the Second District's decision which were neither properly considered nor correctly decided by that Court: to wit, whether the subject statute was unconstitutional under due process and access to courts analysis even if prospectively applied.

To begin with, neither of those constitutional arguments against prospective application of the subject statute was raised before the trial court. Therefore, the Second District should not have addressed the merits of those arguments by State Farm in its decision. This case presents none of the exceptions to the basic principle of appellate law that issues not raised before the trial court should not be raised for the first time on appeal, so this Court should reverse or quash[3] on the ground that the Second District erroneously considered the prospective constitutionality of Section 627.727(6), Fla. Stat. without having to reach the

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[3]It would appear that this case was appealable as the Second District held the subject statute to be invalid, but the Appellant/Petitioner also sought discretionary review in the event that an appeal does not lie.

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merits of those constitutional arguments.

Also improperly considered by the Second District was the issue whether the burden upon State Farm's defense of its insured's uninsured motorist claim against it--as opposed to State Farm's prosecution of its subrogation claim against the tortfeasor-- was impermissibly burdened by the subject statute, resulting in a violation of State Farm's right of access to courts. The only issue concerning access to courts briefed before the Second District was whether the perceived impairment of State Farm's subrogation claim against the tortfeasor--and not State Farm's defense of the UM claim--was impermissibly restricted by the subject statute.

Thus, there are two procedural reasons why the access to courts component of the Second District's decision should be reversed as well as one valid procedural reason why the due process component of that decision should likewise be reversed. However, even if this Court should see fit to address the merits of the Second District's decision, the subject statute should be held to be constitutional when applied prospectively.

On the merits, the subject statute should withstand due process analysis because the statute in no way deprived State Farm of nor impermissibly limited any vested property right worthy of due process protection. An insurer's expectation of subrogation against a tortfeasor does not vest into a cognizable property right until payment of subrogation is made. Prior to payment, subrogation is a mere expectancy of the UM carrier, not a right.

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Payment by State Farm of the proposed settlement amount with the tortfeasor in no way deprives State Farm of its right to assert a subrogation claim. To the contrary, insofar as the statute calls for such payment, it brings that subrogation expectation to ripeness as a cognizable right and permits assertion thereof. To the extent that the statute permits or can be said to require a choice of waiver of subrogation by approval of the tortfeasor's proposed settlement, the statute does not take any right protected under due process analysis, because such right cannot vest until the payment which never needs to be made. Therefore, there are no circumstances under which due process can be said to be violated by prospective application of the subject statute.

Likewise, prospective application of the subject statute does not unconstitutionally deny UM carriers to their right of access to the courts. Where a UM carrier has meritorious defenses to its insured's claim against it (whether defenses to coverage under the policy, defenses to the liability of the uninsured motorist, or damage defenses), those defenses are not at all burdened or limited by the statutory provision enabling a UM carrier to approve its insured's settlement with a tortfeasor, because no payment need be made, nor will any future barrier be erected by the statute to the litigation of those defenses.

Using the other procedure under the statute, where payment by a UM carrier is made of the amount of a tortfeasor's proposed settlement (as part of the UM carrier's tactical decision to preserve its subrogation claim against the tortfeasor), that

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payment in no way amounts to an unreasonable burden or limitation to the assertion of the carrier's UM defenses. The choice is solely that of the UM carrier, not that of the insured. It is a rational mechanism for obtaining a legitimate legislative goal, and cannot be held to be an unconstitutional denial of access to the courts. Therefore, the decision of the Second District should be reversed.

ARGUMENT

I.

THE SECOND DISTRICT ERRONEOUSLY HELD THAT THE SUBJECT STATUTE UNCONSTITUTIONALLY DEPRIVED STATE FARM OF DUE PROCESS OF LAW

The first part of the certified question--regarding whether § 627.727(6), Fla. Stat. (1992) is constitutional when prospectively applied--should be answered in the affirmative and the decision below should be reversed because the Second District Court of Appeal erroneously held that the prospective application of the subject statute unconstitutionally violated State Farm's right of due process of law. To begin with, as stated by State Farm in its Initial Brief filed in the Second District, the prospective constitutionality of the subject statute never was addressed by the trial court; so the issue regarding the statute's constitutionality under due process analysis was unripe for determination.

As noted on page 4 of State Farm's Initial Brief in the Second District, "retroactive application was the only issue before the

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trial court." It is a basic principle of appellate law that issues not raised before the trial court should not be raised for the first time on appeal. So this Court should hold that the Second District erroneously considered the prospective constitutionality of § 627.727(6), Fla. Stat. without reaching the merits of the constitutional arguments. See e.g., Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970) (where issue of alleged unconstitutionality of statute was not raised in trial court and there was no fundamental error, District Court of Appeal improperly considered constitutional issue on appeal). However, even if the merits of those arguments are addressed by this Court, the statute should be found to be constitutional and the first part of the certified question should be answered in the affirmative.

On the merits, the subject statute should withstand due process analysis because the requirement of a waiver of prospective subrogation rights or an advance payment to preserve those rights did not constitute a taking or other impairment of a vested property interest held by State Farm. The property rights protected under due process analysis are limited to those which are vested and definite and do not extend to mere expectancies of property rights which may vest in the future. E.g., Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973). A prospective right of subrogation anticipated by an uninsured motorist insurance carrier is not a vested property right and is, therefore, not subject to due process protection under the Florida or Federal Constitutions.

As noted by the Third District in a case discussing the nature

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of a right to subrogation, "The right to subrogation does not arise until the subrogee first pays the claim." Allstate Ins. Co. v. Metropolitan Dade County, 436 So. 2d 976, 980 (Fla. 3d DCA 1983). It is undisputed that State Farm has made no payment of any portion of the uninsured motorists benefits in the present case, nor will another insurer having made no payment be entitled to relief under due process analysis. The "right" of such insurers to subrogation is nothing more than a mere expectancy which has not yet vested. Therefore, under due process analysis, that "right" is not "property" which is subject to constitutional protection.

Insofar as the subject statute permits a UM carrier to choose to approve its insured's settlement with a tortfeasor or to immediately pay some portion of its UM policy benefits, the statute merely prescribes a method by which the UM carrier can bring to ripeness its inchoate expectation of a subrogation right or to decide that it will not seek to pursue such a right in the future. While a UM insurer may well prefer to delay that decision until such time as it chooses, the statutory requirement of such a decision cannot be violative of due process as it affects no vested property right of the insured.

Should State Farm or another UM carrier refuse to approve its insured's settlement with the tortfeasor's liability insurer--thereby ripening its subrogation entitlement from a mere expectancy to a property right which is vested--no property has been taken by the legislature or impaired by the statute because such payment is necessary to create the right to subrogation in the first place.

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If, on the other hand, State Farm were to approve its insured's settlement with the tortfeasor and thereby abandon its expectancy of recovering in subrogation, that abandonment is not one of "property" because there was not vested right to subrogation in the absence of a payment.

Under no circumstance does the subject statute impair a vested right of subrogation, because once payment has been made and that right to subrogation first vests, the UM carrier is fully entitled to pursue that property right to satisfaction against the tortfeasor. Therefore, insofar as the first portion of the certified question concerns the due process analysis employed by the Second District, the question should be answered in the affirmative and the decision of the Second District reversed.

II.

THE SECOND DISTRICT ERRONEOUSLY HELD THAT THE SUBJECT STATUTE UNCONSTITUTIONALLY LIMITED STATE FARM'S RIGHT OF ACCESS TO COURTS

As with the foregoing due process issue, this Court should respond affirmatively to the certified question concerning the constitutionality of the subject statute and reverse the Second District's decision holding the statute as violative of State Farm's right of access to the courts, because that issue was not raised before the trial court. "[R]etroactive application was the only issue before the trial court." Appellant's Initial Brief, Second DCA Case No. 94-1241 at 4. Issues not raised before the trial court for adjudication should not form the basis for

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appellate decisions, especially when the issue is one which would operate to invalidate an entire statutory scheme applicable to cases statewide.

Even before the Second District, the access to courts argument which was made was not the one which formed the basis of the Second District's decision invalidating § 627.727(6). The Appellant State Farm in its brief before the Second District did not argue that the subject statute impermissibly burden its defense of its insured's UM claim against it by requiring prepayment of the settling tortfeasor's liability limits or approval of the settlement with the tortfeasor. Instead, State Farm argued only that "the legislatively imposed limitation upon the insurance carrier's right to subrogation . . . [constituted] an unconstitutional limitation on the right of access to the courts." Appellant's Initial Brief, Second DCA Case No. 94-1241, at 13 (emphasis added).

In its decision, the District Court held that "the application of Section 627.727(6), Florida Statutes (Supp. 1992), to this case unconstitutionally infringed on State's [sic] Farm's right of access to the courts for a determination of its liability for damages under the Hassen's uninsured motorist claim by imposing a financial precondition for such access that constituted a substantial burden on its right to be heard." State Farm Mut. Auto Ins. Co. v. Hassen, 650 So. 2d 128, 141 (Fla. 2d DCA 1995) (emphasis added). The alleged unconstitutional denial of State Farm's access to courts resulting from any limitation on its right to defend the Hassen's UM claim not having been raised by the

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parties, the Second District should not have adjudicated that issue and this Court should reverse the decision on that ground.

On the merits, an analysis of the access to courts issue is simplified by separation of UM cases into two categories: those in which the UM carrier has meritorious defenses (whether coverage defenses, defenses to the liability of the uninsured motorist, damage defenses, or a combination of the three); and those cases in which there is no meritorious defense to the UM case. In those cases in which the UM carrier has a meritorious defense to the claim against it by its insured, the statute requiring it to approve a settlement between its insured and the tortfeasor in no way limits its right of access to the courts to adjudicate those defenses. There is nothing in the statute which requires an advance payment by the UM carrier; an insurer in the position of State Farm simply can approve the settlement, proceed to trial on the claim against it, successfully defend, and be in the same position it would have been in prior to the enactment of the subject statute.

It cannot be argued that the "waiver" of the UM carrier subrogation "right" in any way impaired its right of access to the courts, because if the UM carrier has a successful defense to its insured's claim, there is no payment to be made which will result in any need for subrogation to be pursued. Therefore, to the extent that there is any possibility of a meritorious defense to the Hassens' claims against it, a statute permitting the option of approval of the settlement with the tortfeasor to litigate those

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defenses cannot in any way adversely affect State Farm's invocation of those defenses and realization of the fruits thereof. Payment of the amount of the tortfeasor's proposed settlement is not an impermissible burden, because it is not required by the statute. The choice is that of the UM carrier.

Legislation which places restrictions on--but which does not abolish--a preexisting claim or legal defense will not be held to be unconstitutional, so long as the restriction is not unreasonable. In upholding a statute which required prepayment of uncontested taxes in order to contest another tax assessment on the property, this Court held that "[t]his requirement does not unreasonably restrict a taxpayer's access to court." Bystrom v. Diaz, 514 So. 2d 1072, 1075 (Fla. 1987). The Court explained the parameters of the exception to the access to courts doctrine as follows:

> Further, "[a]lthough courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law." Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976), receded from on other grounds, Aldana v. Holub, 381 So. 2d 231 (Fla. 1980). Examples of reasonable restrictions include "the fixing of a time within in which suit must be brought, payment of reasonable cost deposits, [and] pursuit of certain administrative relief such as zoning matters or workman's compensation claims . . . ." Id

Bystrom, Supra,at 1075.

In the case at bar, the restriction of access to the courts only is any arguable burden on those UM carriers with defenses which will prove to be factually or legally insufficient on their

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merits, and that burden need only be the earlier payment of a portion of its insurer's damages than would have been the case prior to the enactment of this statute. In anticipation of the argument that the amounts representing the tortfeasor's proposed settlement might not later be recoverable in a perfected subrogation claim, the Amicus Curiae submits that the practical uncollectability of those sums does not support an argument that the statutory mechanism constitutes an unconstitutional denial of access to the courts, because the UM carrier's right to obtain a judgment in subrogation still remains.

A statute which limits the collectability of a judgment--but which does not abolish a plaintiff's right to obtain a judgment--is not unconstitutional as a denial of access to the courts. Folmar v. Young, 591 So. 2d 220 (Fla. 4th DCA 1991) (statute partially abolishing dangerous instrumentality doctrine in long-term lease cases not violative of access to courts because the "statute does not limit or cap a plaintiff's right to recover damages from the lessee . . . although it is true that it eliminates a possible deep-pocket").

Only in those cases in which a UM carrier's defenses are meritless would the approval of settlement with the tortfeasor and waiver of a possible subrogation right constitute even an arguable limitation upon a UM carrier's right of access to the courts. In those cases, where the tortfeasor's settlement is approved, subrogation rights are waived, and the UM carrier's defenses are found to be insufficient, the right to pursue subrogation for

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payments made under the UM policy would be limited. However, in those cases of a meritless defense, the burden imposed by the subject statute is not an unreasonable one which can be found to unconstitutionally impair the insurer's right of access to the courts.

It cannot be overlooked (nor overemphasized) that the class of litigants to which the "burden" of approving a settlement with a tortfeasor or choosing to pay the amount of that settlement is that of sophisticated insurance companies in the business of making a living from evaluating potential liability on claims against it and potential for recovery of subrogation claims, and who recover losses under increases in their rate base when years of sophisticated experience in evaluating claims proves insufficient to guarantee a profit as opposed to an individual or casual participant in an enterprise.

This Court has indicated that access to courts analysis should include reference to the circumstances of the parties asserting such a limitation, noting in a case on the point as follows: "There is no suggestion that the filing fees or other costs incident to such judicial review are unreasonable as related to the general class of persons who may seek such review." Smith v. Department of Health and Rehabilitative Services, 573 So. 2d 320, 323 (Fla. 1991). State Farm and its similarly-situated breathering in the uninsured motorist insurance business are not often going to guess wrong, either about the likelihood of prevailing on their defenses to their insured's claims, or on their ability to obtain

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subrogation from a tortfeasor.

Therefore, the option of approving a settlement or advancing the monetary equivalent thereof should not be addressed in a vacuum, but must be addressed in the context of the realization of the debt of experience and sophistication from which such decisions will be made. If all else fails, insurers are going to recover any money they lose from increasing rates anyway. Therefore, the "burden" should be held to be reasonable and the decision of the Second District reversed.

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CONCLUSION

WHEREFORE, the Second District Court of Appeal having impermissibly addressed issues not raised by the parties before the trial court concerning the prospective application of the subject statute, the prospective application thereof not being impermissible under due process analysis because no vested property right is involved, the parties not having argued in the Second District that any limitation upon a UM carrier's ability to defend an uninsured motorist claim brought against it (as opposed to an impediment on its assertion of a subrogation claim against a tortfeasor), the statute being no burden whatsoever to the assertion of meritorious defenses to UM claims because approval of an insured's settlement with a tortfeasor requires no serious effort and imposes no serious burden, and the subject statute providing a reasonable limitation upon those UM carriers which would assert unmeritorious defenses to uninsured motorist claims, the decision under review should be reversed and the certified question should be answered in the affirmative, insofar as it pertains to the prospective application of the subject statute.

Respectfully submitted,

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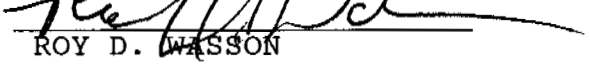
BY: 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies hereof were served by mail, upon Diana L. Myers, Esq., 1875 N. Belcher Road, Suite 201, Clearwater, Florida 34625; and H. Shelton Philips, Esq., KALEEL & KALEEL, P.A., Post Office Box 14333, St. Petersburg, Florida 33733-4333, on this, the 24th day of May, 1995.

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