ON APPEAL TO THE SUPREME COURT OF THE STATE OF FLORIDA
APPEAL NUMBER 85-300

DIANE S. HASSEN and
THOMAS S. HASSEN,

Petitioners/Appellants,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a foreign
corporation,

Respondent/Appellee.
_______________________________/

Appealed from the Second
District Court of Appeal
Case No. 94 01241

FILED
SID J. WHITE
MAY 25 1995
CLERK, SUPREME COURT
By Chief Deputy Clerk

APPELLANTS' INITIAL BRIEF

Diana L. Myers, Esquire
Mark H. Perenich, Esquire
PERENICH, CARROLL, PERENICH,
AVRIL & CAULFIELD, P.A.
1875 North Belcher Road
Suite 201
Clearwater, Florida 34625
(813) 796-8282
Florida Bar No.: 972665
Attorneys for Appellants

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities .... ii-iv

Preliminary Statement v

Statement of the Case and Facts 1-3

Summary of Argument 4-5

Argument 6

THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT RULING HOLDING THE LEGISLATIVE CHANGES TO § 627.727(6)(a) FLA. STAT. (SUPP. 1992), TO BE PURELY REMEDIAL/PROCEDURAL THEREBY PROVIDING RETROACTIVE APPLICATION WHICH COUPLED WITH APPELLANTS' COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS, ENTITLED APPELLANTS TO PURSUE UNINSURED MOTORIST BENEFITS............... 6

THE DISTRICT COURT EXCEEDED ITS JURISDICTION IN RULING ON THE CONSTITUTIONALITY OF RETROSPECTIVE APPLICATION OF LEGISLATIVE CHANGES TO § 627.727(6) FLA. STAT. (SUPP. 1992) AND ERRED IN HOLDING THE AMENDMENT TO BE UNCONSTITUTIONAL........................ 15

Conclusion 28

Certificate of Service 29

TABLE OF AUTHORITIES

CASES **PAGES**

Allstate v. Boynton, 486 So. 2d 552 (Fla. 1986) 18

Allstate v. Metro Dade, 436 So. 2d 976 (Fla. 3d DCA 1983) 12,16

Argiro v. Progressive American, 510 So. 2d 635 (Fla. 3d DCA 1987) 10

Attorney Title v. Punta Gorda, 547 So. 2d 1250 (Fla. 2d DCA 1989) 12

Ballen v. Plaza Del Prado, 319 So. 2d 90 (Fla. 3d DCA 1975) 15

Blue Cross and Blue Shield v. Ryder Truck, 498 So. 2d 423 (Fla. 1986) 7,24

Brown v. Progressive, 249 So. 2d 429 (Fla. 1971) 18,22

Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976) 10,18

City of Lakeland v. Cantinella, 129 So. 2d 133 (Fla. 1961) 13

City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986) 14

Dewberry v. Auto Owner's, 363 So. 2d 1077 (Fla. 1978) .. 16

Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993) 25

Gleason v. Dade County, 174 So. 2d 466 (Fla. 3d DCA 1965) 15

Grammer v. Roman, 174 So. 2d 443 (Fla. 2d DCA 1965) 13

Henry v. Lemac Builders, 245 So. 2d 115 (Fla. 3d DCA 1971) 15

Jones v. Travelers Indemnity Co., 368 So. 2d 1289 (Fla. 1989).. 16

Lasky v. State Farm, 296 So. 2d 9 (Fla. 1974) 22

Michigan Millers v. Bourke, 581 So. 2d 1365 (Fla. 2d DCA 1991) 16

Pearlstein, M.D. v. Malunney 500 So. 2d 585 (Fla. 2d DCA 1986) 26

Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992) 25

Purdy v. Gulf Breeze, 403 So. 2d 1329 (Fla. 1981) 24

Quinones v. Florida Farm Bureau, 366 So. 2d 854 (Fla. 3d DCA 1979) 12

Scenic Hills Utility v. City of Pensacola, 156 So. 2d 874 (Fla. 1st DCA 1963) 15

St. John's Village I, Ltd. v. Department of State, Div. of Corporations, 497 So. 2d 990 (Fla. 5th DCA 1986).. 13

State Farm v. Diem, 358 So. 2d 39 (Fla. 3d DCA 1978) ... 18

University of Miami v. Echarte, 619 So. 2d 189 (Fla. 1993) 25

Village of El Portal v. City of Miami, 362 So. 2d 275 (Fla. 1978) 12,13,14

Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977) 11,12

Williams v. Gateway, 331 So. 2d 301 (Fla. 1976) 9,22

OTHER AUTHORITY

§ 627.727 Fla. Stat. (Supp. 1992) 1-27

§ 768.76 Fla. Stat. (1993) 11,18

PRELIMINARY STATEMENT

In this brief, the Plaintiffs, DIANE S. HASSEN and THOMAS S. HASSEN, her spouse, shall be collectively referred to as Appellants or Hassens and the Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY shall be referred to as Appellee or State Farm.

References to the record on appeal will be abbreviated "R" followed by the applicable page number. References to documents in the Appendix shall be abbreviated "A" followed by the applicable page number.

Unless otherwise noted, § 627.727 Fla. Stat. (Supp. 1992), which is referred to throughout the brief is referring to this Statute as amended effective October 1, 1992 and contained in Chapter 92-318, Laws of Florida and Florida Statutes Supplement 1992. All references to "Section 6(a)" are referring to § 627.727(6)(a) Fla. Stat. (Supp. 1992) and references to "Section 6(b)" are referring to § 627.727(6)(b) Fla. Stat. (Supp. 1992) as amended effective October 1, 1992, unless otherwise noted.

The terms "uninsured motorist coverage" and "underinsured motorist coverage" are used interchangeably and will be abbreviated throughout with the term "UM".

STATEMENT OF CASE AND FACTS

This is an appeal from a decision of the Second District Court of Appeal reversing a summary judgment order entered in favor of Appellants/Hassens by the Sixth Judicial Circuit Court. The issues presented to the trial court and the appellate court were the retroactive application of a 1992 amendment to § 627.727(6) Fla. Stat. (Supp. 1992) and the Hassens' compliance with the statutory mandated procedures set forth in Section 6(a) prior to waiver of State Farm's subrogation rights.(R 230-231)(A 1-2) The Second District Court reversed on the issue of retroactive application and went beyond the trial court issues to certify the following question:

> Is Section 627.727(6), Florida Statutes (Supp 1992), Constitutional? If so, is it a substantive statute, as opposed to a remedial statute, such that its terms cannot be applied constitutionally to a pending claim brought under the uninsured motorist provisions of an automobile insurance policy issued prior to it's effective date?

This claim involves a policy of automobile insurance issued by State Farm Insurance Company to the Hassens. The policy included uninsured/underinsured motorist coverage in the amount of $100,000/$300,000.(R 20-21) The policy renewed on March 26, 1990 with a policy expiration date of September 26, 1990. (R 20-21)

Appellant, Diane Hassen, was injured in an automobile accident on June 15, 1990, as a result of the negligence of an

underinsured motorist.(R 1-5) Mrs. Hassen's primary injury was to her head and right eye.(R 101) Mrs. Hassen is legally blind in her right eye as a result of the accident.(R 101) The underinsured motorist was insured with UniSun Insurance Company with liability limits of $100,000.00.(R 30) Unisun evaluated the claim and damages and determined the value of the claim exceeded their policy limits.(R 30) Appellants reached a settlement with Unisun for its policy limits contingent upon receiving the authorization of the uninsured motorist carrier, State Farm, to accept the settlement and release the underinsured tortfeasor.(R 30) By certified letter dated October 9, 1992, (R-28), Appellants' counsel provided written notice of the proposed settlement with the underinsured motorist and requested authorization in compliance with § 627.727(6) Fla. Stat. (Supp. 1992). State Farm failed to respond within the thirty day time frame as required by § 627.727(6)(a) Fla. Stat. (Supp. 1992) allowing the Hassens to proceed to execute a full release in favor of the underinsured motorist.

State Farm denied Appellants' claim for uninsured motorist benefits and Appellants filed an action for declaratory judgment, requesting a declaration of their compliance with all conditions precedent to a claim for UM coverage.(R 1-5) The Appellants filed a motion for summary judgment and amended motion for summary judgment which was granted as to Count I,

Action for Declaratory Judgment.(R 221-223, 230-231, 239)(A 1-2) The Circuit Court by granting summary judgment in favor of the Hassens essentially confirmed the Hassens compliance with all conditions precedent to settlement with the underinsured motorist as required by § 627.727(6) Fla. Stat. (Supp. 1992) entitling them to pursue their underinsured motorist benefits without prejudice. (R-230-231)(A 1-3)

This matter was appealed to the Second District Court of Appeal where it was reversed and remanded. In addition, the Second District Court of Appeal certified the above noted question. (A 4-36)

SUMMARY OF ARGUMENT

Appellants fulfilled their procedural duties under the statute and State Farm failed to respond within thirty days as required by the statute to preserve its subrogation rights. Therefore, the Hassens were free to settle and release the tortfeasor and pursue underinsured motorist benefits under their State Farm insurance policy. The 1992 amendments to § 627.727(6)(a) Fla. Stat., requiring insurance companies to respond within 30 days or waive their rights is purely remedial/procedural. The trial court's determination that the Hassens properly complied with the statute and State Farm failed to respond timely justifies the summary judgment entered on the issue. Argument as to the constitutionality and retroactive application of Section (6)(b) should have been unnecessary, but since it has been Certified by the District Court, it is addressed herein.

The legislature can pass laws which restrict access to courts if an overwhelming public need exists or a commensurate benefit is provided. The need to expedite claims and minimize litigation is an overwhelming public need. In addition, the insurance companies have been provided with a *quid pro quo* similar to that seen in the no-fault limitations on subrogation where the benefits and burden will be equally distributed to all carriers.

Until State Farm makes payment under its UM coverage, no

vested subrogation right exists; therefore, amendment to the statute is not affecting any vested right. The reasonable limitations imposed by the legislature serve important public purposes and should withstand any constitutional scrutiny.

ARGUMENT

THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT RULING HOLDING THE LEGISLATIVE CHANGES TO § 627.727(6)(a) FLA. STAT. (SUPP. 1992), TO BE PURELY REMEDIAL/PROCEDURAL THEREBY PROVIDING RETROACTIVE APPLICATION WHICH COUPLED WITH APPELLANTS' COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS, ENTITLED APPELLANTS TO PURSUE UNINSURED MOTORIST BENEFITS.

Appellants complied with the notice requirements of § 627.727 Fla. Stat. (Supp. 1992) prior to settling with the underinsured tortfeasor for his policy limits. Since State Farm did not respond within the statutory 30 days, Appellants were within their statutory rights to settle with the tortfeasor and claim entitlement to underinsured motorist coverage. State Farm clearly waived its right of subrogation by failing to respond within 30 days. This declaratory action arose after State Farm claimed prejudice resulting from the settlement with the tortfeasor.

The lack of timely response displayed by State Farm is often typical of the non-response by insurance companies in Florida to requests made pursuant to § 627.727(6) Fla. Stat. Prior to the statutory change, a non-response often times resulted in unnecessarily filing suit against the tortfeasor and the UM carrier. It was this failure to timely act on the part of the insurance companies and the unnecessary protracted litigation that prompted the Florida Legislature to act in its capacity as the creator of public policy to pass legislation to

expedite the resolution of claims involving underinsured tortfeasors and reduce the amount of overall litigation. Blue Cross and Blue Shield v. Ryder Truck, 498 So. 2d 423 (Fla. 1986)(if there is a problem with increased suits, the appropriate forum for the remedy is the legislature). The Legislative response to this public need was Chapter 92-318, Laws of Florida which amended § 627.727 Fla. Stat., effective October 1, 1992.

Before October 1, 1992, § 627.727(6) Fla. Stat. required compliance with the following procedures prior to settling with a tortfeasor and pursuing uninsured motorist benefits:

1. Upon receiving a settlement offer from the tortfeasor's insurer, the insured must notify the UM carrier and request in writing permission to approve the settle with the liability insurer. By approving the settlement, the UM carrier would thereby waive its subrogation rights against the tortfeasor.

2. If the UM carrier did not respond to the request within thirty days or denied permission to settle, the insured's only remedy was to file suit against the tortfeasor and the uninsured motorist carrier.

Because the statute contained no enforcement provisions, it was often in the UM carriers' best interest to simply not respond within the statutory thirty day period or to arbitrarily withhold permission to settle. Ultimately, such

action could coerce financially destitute claimants into dropping any claim for UM benefits and effectively settling their case for less than full value. Although there is no recorded legislative history, the 1992 amendment effectively created a remedy to reduce unnecessary litigation involving the tortfeasor and the liability insurer, and to prevent unnecessary delay caused by the 30 day approval period.

Although the injured person must still request UM permission to settle with the liability insurer, the 1992 amendment to Section (6) created a remedy in those cases where the UM carrier fails to respond within the 30 day period. Now, under Section 6(a) the insured may consummate a settle with the liability insurer and assume that the UM carrier desires to waive its subrogation claim. On the other hand, under Section (6)(b), where the UM carrier determines that the tortfeasor is not judgment proof, it must act to preserve its subrogation right by responding to the claimant's request and tendering to the insured an amount equal to the proposed settlement. The 1992 amendment to Section (6) merely creates a procedural enforcement mechanism that requires the UM carrier to make a decision concerning the tortfeasor's solvency. Certainly, both before and after the 1992 amendment, the UM carrier could always approve the settlement and waive subrogation rights.

The 1992 amendment confers the insured no additional rights, but only operates to create a procedure which

encourages settlements and avoids unnecessary litigation, particularly in those cases where it has already been determined that the tortfeasor's exposure is likely to exceed his or her policy limits. In addition, the procedure for retaining subrogation rights was changed. Reducing litigation and encouraging settlements is an important legislative concern especially in cases involving injury claims arising from automobile accidents. Williams v. Gateway, 331 So. 2d 301 (Fla. 1976).

The 1992 amendment represents a reasonable limitation and does not effectively operate to deprive UM carriers access to the courts. It should be emphasized that Section (6)(a) merely clarifies the procedure for requesting approval from the UM carrier prior to settlement with the underinsured tortfeasor while Section (6)(b) creates a procedure to preserve subrogation rights after a request has been made under Section (6)(a). The trial court determination that the Appellants complied with all notice requirements and State Farm failed to respond within the thirty day time-frame, makes any constitutional review of Section 6(b) wholly unnecessary for the resolution of this appeal. State Farm never tendered to the appellants money equal to the proposed settlement reached with the liability insurer. State Farm will not lose money in the event the jury returns a verdict less than the tortfeasors liability limits. The trial court found that the 30 day time

limitation set forth in Section (6)(a) is purely procedural/remedial and applied the statute retroactively. There is no factual basis in the instant case which would require this Court to pass on the constitutionality of Section (6)(b).

The legislature may constitutionally impose reasonable limitation periods within which to assert rights. Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976)(fixing of time limits within which to make claims is a reasonable and acceptable restriction on due process). The requirement that insurance companies respond within thirty days is a reasonable limitations period which does not interfere with the due process rights of the insurance companies. The statutory changes contained in Section (6)(a) are clearly procedural/remedial as they merely require the UM carrier to decide whether it is feasible to retain subrogation right against the tortfeasor and to affirmatively communicate its position to the injured party with the statutory 30 day period. Before the 1992 amendment, if an injured party settled it's claim with the liability insurer, the UM carrier could refuse to honor any UM claim if it could be shown that such a settlement prejudiced it's rights. Argiro v. Progressive American, 510 So. 2d 635 (Fla. 3d DCA 1987). Effectively, the 1992 amendment prevents the UM carrier from later claiming prejudice if it failed to take affirmative act within the 30

day period. The subject statutory provision is identical to the statutory provisions contained in § 768.76 Fla. Stat. (1993) requiring health insurance carriers to assert whether they intend to pursue their subrogation rights within thirty (30) days after notice by the insured.

There are two general rules that apply to retroactive application of statutes, first they, cannot be applied retroactively in the absence of a clear legislative intent, and second, they cannot be applied retroactively if they impair vested rights. These principals are rules of general application and do not apply when the statute is solely remedial or procedural. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977).

The historical notes to Chapter 92-318 Laws of Florida, specifically provide retroactive application to Section 10 which was added at the time of the amendment to Section (6). However, the absence a statutory provision providing for retroactive application cannot be used to show the Legislature's intent not to retroactively apply the amendments to Section (6)(a). Section 10 did not exist prior to October 1992. For this reason, the legislature needed to specifically state that Section 10 was to be applied retroactively. Since Section (6)(a) already existed and the changes were merely procedural/remedial in nature, no separate statement as to their retroactivity was or is necessary.

Even without a legislative mandate, procedural rights granted by statute are applied retroactively because no vested rights exist in any mode of procedure. Walker & LaBerge at 243. Further, State Farm does not possess a vested right to subrogation until payment is made. Allstate v. Metro Dade, 436 So. 2d 976 (Fla. 3d DCA 1983) (UM carrier could not file suit for subrogation until it paid the claim) and Quinones v. Florida Farm Bureau, 366 So. 2d 854 (Fla. 3d DCA 1979) cert. denied at 376 So. 2d 71 (1979)(Insured brought suit for UM coverage and UM carrier filed third party complaint for subrogation, court dismissed third party action as the UM carrier had no vested right to subrogation until it made payment). Although the court in Attorney Title v. Punta Gorda, 547 So. 2d 1250 (Fla. 2d DCA 1989), looked with disfavor on the holding in Quinones, it should be noted that Attorney Title involves title insurance not uninsured motorist insurance and the relationships between the insured and the insurer are very different.

Without a vested right to subrogate, State Farm cannot protest that a substantive right is being taken away by the amendment to Section (6)(a). Village of El Portal v. City of Miami, 362 So. 2d 275 (Fla. 1978)(a change in the Uniform Contribution Amount Tortfeasor's Act was to be applied retroactively to cases that were not yet to judgment because the substantive rights of the joint tortfeasor's did not vest

until judgment was entered). State Farm has not paid out any money, therefore, no deprivation exists and no due process violation has occurred.

Remedial statutes are exceptions to the rule that statutes cannot be applied retroactively. Village of El Portal v. City of Miami, 362 So. 2d 275 (Fla. 1978). Remedial statutes have been defined as statutes relating to remedies or modes of procedure that do not confer any new rights but merely change a remedy. City of Lakeland v. Cantinella, 129 So. 2d 133 (Fla. 1961); St. John's Village I, Ltd. v. Department of State, Division of Corporations, 497 So. 2d 990 (Fla. 5th DCA 1986). A remedy is merely the means employed in enforcing a right or in redressing an injury. Grammer v. Roman, 174 So. 2d 443 (Fla. 2d DCA 1965). The statutory amendment to Section 6(a) did not create any new obligations with respect to State Farm's tort liability, rather it merely changed the procedure employed to enforce an existing right. Appellants had the right to make a claim for their damages in excess of the tortfeasor's liability limits. The statute changed the procedure to require the insured to notify the insurer by certified mail and wait thirty days for a response prior to proceeding with a settlement and release of the underinsured motorist. Prior to the rewording of Section 6(a), an insurer was given thirty (30) days within which to investigate their subrogation claim and make a decision to waive or retain the subrogation rights. The

wording of Section 6(a) was altered to change the procedure if the insurer did not respond within the statutory thirty days. The change merely provides the insured with an option to settle and release the tortfeasor without prejudice in those instances where the UM carrier fails to respond or is dilatory in conducting their investigation.

Since the changes to this section were strictly remedial/procedural, they do not fall within the constitutional prohibition against retroactive legislation. These changes only affected the remedies available in a cause of action which already existed. Therefore, these changes were applicable upon passage and apply to all cases pending at the time of passage. Village of El Portal at 278 and City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986).

Appellants fulfilled their procedural duties under the statute and State Farm failed to reply within the thirty day time limit as required by the statute. Therefore, when Appellants proceeded to settle with and release the underinsured motorist as permitted by § 627.727(6)(a) Fla. Stat., the Hassens did not breach the uninsured motorist coverage contract by waiving State Farm's subrogation rights. The Hassens complied with the provisions of § 627.727(6)(a) and were able to proceed without prejudice with their claim for uninsured motorist benefits under the State Farm insurance contract.

THE DISTRICT COURT EXCEEDED ITS JURISDICTION IN RULING ON THE CONSTITUTIONALITY OF RETROSPECTIVE APPLICATION OF LEGISLATIVE CHANGES TO § 627.727(6) FLA. STAT. (SUPP. 1992) AND ERRED IN HOLDING THE AMENDMENT TO BE UNCONSTITUTIONAL.

Enforceability and compliance with the thirty day response period was the only issue addressed by the trial court. Since the issue of prospective constitutionality was not an issue before the Circuit Court nor was it presented to or ruled on by the Circuit Court, the District Court of Appeal could not consider the matter for the first time on appeal. Gleason v. Dade County, 174 So. 2d 466 (Fla. 3d DCA 1965) and Scenic Hills Utility v. City of Pensacola, 156 So. 2d 874 (Fla. 1st DCA 1963). It must appear from the record that the issue was raised and argued in the trial court before it can be considered by the appellate court. Ballen v. Plaza Del Prado, 319 So. 2d 90 (Fla. 3d DCA 1975) and Henry v. Lemac Builders, 245 So. 2d 115 (Fla. 3d DCA 1971). However, should this matter be considered by this Honorable Court, appropriate argument has been included.

The purpose of uninsured motorist coverage is clearly illustrated by the definition found in State Farm's policy as well as Florida Statute § 627.727, as follows:

> "An underinsured motor vehicle means; a land motor vehicle, the ownership, maintenance or use of which is insured, self-insured or bonded for bodily injury liability at the time of the accident, but the limits of liability of the insurance, self-insurance or bond are less than the damages for bodily injury sustained by the insured."

This wording clearly demonstrates the intent that underinsured motorist coverage is first party gap coverage to fill the gap between the tortfeasor's coverage and the insured's total damages. Michigan Millers v. Bourke, 581 So. 2d 1365 (Fla. 2d DCA 1991), citing to Dewberry v. Auto-Owner's, 363 So. 2d 1077 (Fla. 1978) and Jones v. Travelers Indemnity Co., 368 So. 2d 1289 (Fla. 1989). Underinsured motorist coverage was sold to the Hassens in order that they may protect themselves from injuries caused by individuals that carry insufficient liability coverage, which is common place in Florida since automobile liability insurance is not mandatory. The policy definition does not make an exception for tortfeasors that are underinsured but collectible, rather it specifically states that "we will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle" and an "uninsured motor vehicle" is defined as a vehicle whose liability limits are less than the insured's damages.

The Insurer is required to pay benefits when the damages to which an insured is entitled exceed the underinsured motorist's liability limits. If uninsured motorist benefits are paid, the carrier has a contractual right of subrogation against the tortfeasor. Allstate v. Metro Dade, 436 So. 2d 976 (Fla. 3d DCA 1983). The burden of collection from the tortfeasor for damages in excess of liability limits, however,

should be the responsibility of the UM carrier since subrogation is for the benefit of the carrier.

Prior to the statutory change, insureds could be penalized because they were struck by a tortfeasor that is collectible but underinsured even though this is clearly not within the policy definition of an uninsured motorist. By denying permission to settle with the tortfeasor for the policy limits, UM carriers could force their insureds to litigate the subrogation claim for them and at the same time the UM carriers were acting as co-counsel defending the claim. The insurers were clearly in a win/win situation, they were basically representing that the insured should not receive an award for damages and if an award was given, then it should be paid by the co-defendant. It is unfathomable that the legislature ever intended for an uninsured motorist carrier to have the power to require its own insured to pursue the carrier's subrogation claim.

Under the pre-1992 law, insurers could penalize their insureds for making a legitimate claim over and above the tortfeasor's limits. This is exactly what State Farm is doing to the Hassens by refusing permission and requiring them to file suit against the tortfeasor whose insurance company has already agreed to tender its policy limits.

Uninsured motorist coverage as defined in the statute is "for the protection of persons insured thereunder." This sets

forth the intent of the legislature that the primary purpose of uninsured motorist coverage is to protect the injured party. Allstate v. Boynton, 486 So. 2d 552 (Fla. 1986). The Hassens' rights to be promptly compensated for injuries and financial losses should be primary to the subrogation rights of the carriers. Uninsured motorist coverage was not designed to protect the insurer or the underinsured motorist. Brown v. Progressive, 249 So. 2d 429 (Fla. 1971) and State Farm v. Diem, 358 So. 2d 39 (Fla. 3d DCA 1978).

The legislature by requiring the carrier to respond to requests for waiver within thirty days, set up a system to expedite the process for the insured and reduce litigation. Carriers are now required to perform more than perfunctory evaluations of claims and to disclose whether subrogation will be pursued prior to requiring their insured to initiate protracted litigation involving multiple defendants. Again, this is the same as the time deadline in § 768.76 Fla. Stat. (1993) for health insurers asserting their subrogation rights as was previously discussed herein. Reasonable time frames for asserting a claim do not interfere with a party's due process rights. Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976) 381 So. 2d 231 (Fla. 1980). Insureds cannot be expected to have their claims endlessly delayed because there is no recourse for a carrier that refuses or fails to respond. In the Hassens' case, State Farm had almost two and 1/2 years

within which to evaluate the value of this claim, review the medical records and explore its potential for subrogation. Despite this, State Farm failed to respond within the statutory thirty days.

State Farm talks out of both sides of their mouth; first stating that they want to retain their subrogation rights because they have exposure and secondly, stating that the claim is not worth more than the tortfeasor's liability limits. This is clearly a misnomer. If the case is not worth more than the tortfeasor's limits, then no exposure exists for State Farm and they should waive. State Farm does not need to retain its subrogation rights if they do not feel the case is worth more than the tortfeasor's limits.

State Farm is in the business of evaluating and adjusting claims. State Farm is the expert in this area, much more so than an injured insured who is most likely involved in the process for the first time. Therefore, the scenario set forth by the Appellate Court where State Farm makes payment of the $100,000 tortfeasor offer and then obtains a judgment less than $100,000 and is unable to subrogate is unlikely to occur.

Because of their experience and expertise in the area of claims evaluation, it is unlikely State Farm will be paying out sums which they will not be able to recover. Should State Farm evaluate the claim in excess of the tortfeasor's policy limits and should the tortfeasor be collectible, then State Farm by

its own evaluation has determined that the case will bring a judgment in excess of its policy limits and State Farm will not be left short. In addition, liability carriers do not needlessly pay out policy limits on cases that do not warrant payment. The value of the claim is being evaluated by two separate insurance companies to avoid this threat of an overpayment by State Farm. Should a liability carrier offer more than State Farm's evaluation of the claim, their response is simple: waive subrogation rights as the insured will not receive a judgment in excess of the tortfeasor's limits and no exposure will ever exist for State Farm. The fact of the matter is that if State Farm evaluates the claim at less than the tortfeasor's limits, State Farm is not waiving anything because they have no exposure.

The risk of an unexpected jury verdict is the same risk State Farm takes everyday when they settle a case. If they were to take the settled claim to jury verdict rather than settle, the jury could find a zero verdict or award less in which case State Farm overpaid the claim and has no recourse to recoup the overpayment. When State Farm makes a payment to an insured to retain subrogation rights, it is not doing do without aforethought, it recognizes a risk and is paying the money as a means to protect themselves from the risk of a potential excess verdict which they desire to subrogate. This is no different that if State Farm were to settle a claim for

more than they feel it is worth to avoid the cost of litigation and the risk of a runaway verdict. It is merely claim control and minimizing risk. This same business judgment must be utilized by State Farm under the amended statute in deciding whether it is in its best interest to retain its subrogation rights. It is not the statutory mandated procedures which will cause hardship to the carriers, it is their own negligent judgment in evaluating claims.

If State Farm evaluated the Hassens' claim as worth less than the tortfeasor's limits, then they had no exposure and they should have instructed the Hassens to settle with the tortfeasor because there would be nothing to subrogate. Instead, State Farm used their right to subrogation as a defense tactic to make the Hassens choose between accepting the $100,000 and waiving their UM rights or initiating litigation against the tortfeasor <u>and</u> State Farm and waiting a year or more to recover money which was already on the table. As an example, should the value of the Hassens' claim be $110,000, State Farm could force the Hassens to incur litigation costs, increased time, increased attorneys' fees and loss of interest to recover the full value of their claim. In the end, the Hassens would be in a worse position than having just waived their UM rights and not making a claim with State Farm. Who is in a better position to shoulder the "potential" loss of $10,000, the injured insured who paid the premiums or the

insurance company who accepted the premiums and the risk?

The constitutionality of the legislative changes to Section (6) is measured by whether the statute bears a reasonable relation to a permissible legislative objective. In Lasky v. State Farm, 296 So. 2d 9 (Fla. 1974), this Court held that the passage of No-Fault law and cutting off of rights to sue were reasonably related to the legislative objective to reduce litigation, encourage settlements and prevent insureds with pressing needs to pay medical bills to accept an unduly small settlement of a claim. Although not presented in the Lasky case, the Court speculated as to instances where No-Fault might cause some inequality; however, this Court stated that "some inequality in result is not enough to vitiate on due process grounds a legislative classification grounded in reason."

Although State Farm can propose some rare circumstances that will probably never occur, these obscure chances should not obstruct well thought out legislation intended to provide relief to insurers and insureds as well as the congested court system. These are issues better addressed if and when they occur and not as an unrelated speculation frustrating the case at hand. Lasky at 17.

It is presumed that the Florida Legislature, keeping in touch with the needs of the public, realized that UM carriers could abuse the process by coercing insureds into settling for

less than the value of their claims or unnecessarily causing insureds to litigate against two defendants by unreasonably withholding permission to settle. Insureds who were in desperate need of funds for medical care and wage loss benefits were placed in a dilemma by the insurance company. Their dilemma was: accept the tortfeasor's limits and waive the right to uninsured motorist benefits or forego financial remuneration until after suit is filed, discovery completed and the trial and appeal processes are complete. Insureds such as the Hassens who are without the funds to survive the losses already sustained due to the accident, are unable to financially survive the litigation process while the tortfeasor's insurer collects interest on the offered policy limits. Although the carrier has an equitable right of subrogation, these examples clearly demonstrate that the rights of the insured should be superior to that of the UM carrier. Brown v. Progressive, 249 So. 2d 429 (Fla. 1971).

The Florida Legislature can limit the right of access to courts provided there exists an overpowering public need or a commensurate benefit. The change in procedure for UM carriers to retain their subrogation rights is quite similar to the change the legislature made when the right of carriers to subrogate against the tortfeasor for PIP benefits paid was removed. The legislature intended to encourage settlement and minimize litigation. Williams v. Gateway, 331 So. 2d 301 (Fla.

1976). When no-fault was instituted, carriers were required to pay for their insureds medical bills and lost wages regardless of fault. In addition, carriers were denied the ability to subrogate against the at fault party for reimbursement. The Courts determined this was constitutional because a *quid pro quo* existed for the carriers; they would sometimes pay when their insureds were not at fault, however, they would just as often not pay when their insureds were at fault. The carriers access to courts was restricted because they could not sue for subrogation; however, in turn they could not be sued. This was both equitable and beneficial to carriers because each insurer received both benefits and detriments. Blue Cross and Blue Shield v. Ryder Truck, 498 So. 2d 423 (Fla. 1986).

This same *quid pro quo* exists in the statutory changes to the UM statute. The carriers are required to pay out settlement offers to retain subrogation rights, thereby costing them the time value of money; however, just as often they will be the tortfeasor's carrier retaining liability limits for this same period of time, gaining the time value of money and avoiding additional litigation costs. Although a restriction on their access to courts exists, a commensurate benefit has been provided. These benefits will eventually be shared by all carriers and reduce the need for litigation. Purdy v. Gulf Breeze, 403 So. 2d 1329 (Fla. 1981).

What the Legislature has effectively created is a

commensurate benefit for the carriers, which invalidates any arguments by State Farm that they have been denied access to courts. The exceptions to a denial of access to courts has been explained by this Court in Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992), wherein two exceptions were noted; a commensurate benefit must be provided or there must be a strong public necessity. Although only one is necessary, each of these exceptions can be found in the legislation at hand. The commensurate benefit was discussed above and the over-powering public necessity is to put a stop to the abuses of the UM approval statute thereby reducing litigation. The need to reduce litigation is an overpowering public need. Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

The Legislature has the final word on declarations on public policy and the courts are bound to give great weight to legislative determinations of facts. University of Miami v. Echarte, 619 So. 2d 189, 196 (Fla. 1993). These legislative determinations of public purpose and facts are presumed correct and entitled to deference unless clearly erroneous. University of Miami, at 196. The Legislative intent to reduce litigation and encourage expeditious resolution of claims is an overpowering public necessity and such purpose of the amendments to § 627.727 Fla. Stat. should be given great weight by this Court.

Even if constitutional impairments may exist, it is within

the authority of the legislature to determine that the impairments are outweighed by an overpowering public need. In the case at hand, the legislature determined that some rare cost to the insurance companies is an acceptable cost to reduce litigation. This is the exact premise that was utilized when additional time and costs were placed on plaintiffs in medical malpractice claims. Pearlstein, M.D. v. Malunney 500 So. 2d 585 (Fla. 2d DCA 1986)(mandatory presuit requirements that temporarily delay formal litigation does not deny prospective plaintiffs due process or equal protection). Reasonable infringement on constitutional rights is acceptable provided the legislature determines that it is outweighed by the benefits to be gained by the public as a whole.

§ 627.727(6) Fla. Stat. as applied prospectively to cases arising after its effective date of October 1, 1992, provides a *quid pro quo* situation for insurers and a remedy to an overpowering public need to encourage settlements and reduce litigation and should accordingly withstand any constitutional scrutiny.

CONCLUSION

Appellants complied with all conditions precedent to settlement with the tortfeasor as required by § 627.727(6) Fla. Stat. (Supp. 1992) and did not breach their underinsured motorist coverage contract when they accepted the tortfeasor's limits after State Farm failed to respond. The decision of the Second District Court of Appeal should be quashed and the case remanded to the Circuit Court for the Hassens to pursue their claim for underinsured motorist benefits without prejudice.

An overpowering public need existed for reform of the procedures for approval of the UM carrier as a condition precedent to claiming UM benefits. In amending the statute to meet this need, the Legislature met an overpowering public need and created a commensurate benefit to the UM carriers so as not to interfere with their access to courts or right to due process. Wherefore, this Honorable Court should uphold the constitutionality of § 627.727(6) Fla. Stat. (Supp. 1992).

Respectfully submitted,

PERENICH, CARROLL, PERENICH,
AVRIL & CAULFIELD, P.A.

By:

Diana L. Myers, Esquire
1875 Belcher Road, North
Suite 201
Clearwater, Florida 34625
(813) 796-8282
Florida Bar No.: 972665
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent by regular U.S. Mail to H. Shelton Philips, Esquire, Post Office Box 14333, St. Petersburg, FL 33733-4333, Roy D. Wasson, Esquire, Suite 402, 44 West Flagler Street, Miami, FL, 33130, and George Vaka, Esquire, Post Office Box 1438, Tampa, FL 33601, this 22nd day of May, 1995.

PERENICH, CARROLL, PERENICH,
AVRIL & CAULFIELD, P.A.

By:

Diana L. Myers, Esquire
1875 Belcher Road, North
Clearwater, Florida 34625
(813) 796-8282
Florida Bar No.: 972665
Attorneys for Plaintiffs

APPELLANTS' APPENDIX

INDEX TO APPENDIX

Page

Order Granting Plaintiffs' Motion for Summary Judgment entered February 18, 1994 1

Final Judgment entered March 17, 1994 3

Opinion of the Second District Court of Appeal Opinion filed February 1, 1995 4-36

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA
CASE NO. 93-001198-CI-20

DIANE S. HASSEN, and
THOMAS S. HASSEN, her spouse,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.
_______________________________/

FINAL JUDGMENT

THIS CAUSE came on for consideration upon Plaintiffs' Motion for Summary Judgment as to Count I of Plaintiffs' Action for Declaratory Judgment and the Court having duly considered the pleadings, the insurance contract and in particular having thoroughly reviewed Florida Statute §627.727(6) and having duly considered the arguments of the respective parties and being otherwise duly advised in the premises, it is therefore hereby;

ORDERED AND ADJUDGED that as to Count I, Action for Declaratory Judgment, that final judgment is entered in favor of the Plaintiffs, DIANE S. HASSEN and THOMAS S. HASSEN, it being determined that they are entitled to underinsured motorist coverage under the insurance contract issued to them by the Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

The Court reserves jurisdiction to determine and award attorneys' fees and costs.

____
John S. Andrews, Circuit Judge
____
Judicial Assistant

cc: Guy N. Perenich, Esquire
H. Shelton Phillips, Esquire

Original Signed

MAR 17 199[illegible]

JOHN S. ANDREWS
Circuit Judge

Diane

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA
CASE NO. 93 1198 20

DIANE S. HASSEN, and
THOMAS S. HASSEN, her spouse,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a foreign
corporation,

Defendant.
______________________________/

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This cause came on to be heard on Plaintiff's Motion for Summary Judgment as to Count I, Action for Declaratory Judgment. The Court, having heard argument of counsel, and being otherwise fully advised, finds:

1. Florida Statute, section 627.727(6), effective October 1, 1992, is a remedial/procedural statute and applies, therefore, to claims for uninsured motorist benefits and policies of insurance issued before its effective date.

2. Plaintiffs complied with all requirements of F.S. 627.727(6), by way of giving Defendant ample notice and opportunity to tender the sum offered by the tortfeasor in order to retain subrogation right.

3. Defendant, STATE FARM, failed to timely waive subrogation or tender the amount of the written offer. Therefore, as provided by F.S.§627.727(6)(a), Plaintiffs' were free to settle and release the tortfeasors without prejudice to their claim for underinsured motorist benefits from Defendant, STATE FARM.

It is therefore,

ORDERED that Plaintiff's Motion for Summary Judgment as to Count I, Action for Declaratory Judgment, is hereby granted and Plaintiffs are entitled to pursue their claim for uninsured motorist benefits from Defendant, STATE FARM.

The Court reserves jurisdiction for determination of attorneys fees and costs, if applicable.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, this _____ day of _______________, 1994.

____
John S. Andrews, Circuit Court Judge

cc: Diana L. Myers, Esquire
Shelton Phillips, Esquire

Original Signed

FEB 18 1994

JOHN S. ANDREWS
Circuit Judge

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation,

Appellant,

v.

DIANE S. HASSEN and THOMAS S. HASSEN,

Appellees.

Case No. 94-01241

Opinion filed February 1, 1995.

Appeal from the Circuit Court for Pinellas County; John S. Andrews, Judge.

H. Shelton Philips of Kaleel & Kaleel, P.A., St. Petersburg, for Appellant.

Diana L. Myers of Perenich, Carroll, Perenich, Avril & Caulfield, P.A., Clearwater, for Appellees.

LAZZARA, Judge.

State Farm Mutual Automobile Insurance Company (State Farm) appeals a partial final summary judgment entered in a declaratory judgment action brought by Diane and Thomas Hassen (the Hassens) in which the trial court determined that the Hassens were entitled to uninsured motorist coverage under an

automobile insurance policy issued by State Farm. We have jurisdiction. Insurance Co. of North America v. Querns, 562 So. 2d 365 (Fla. 2d DCA 1990); Fla. R. App. P. 9.110(k). Because we agree with State Farm's contention that the trial court constitutionally erred by applying the provisions of section 627.727(6), Florida Statutes (Supp. 1992), to the Hassens' claim, we reverse and remand for further proceedings. We also certify a two-part question of great public importance regarding whether the statute is constitutional and, if so, whether it can be applied constitutionally to a pending claim brought under an insurance policy executed prior to the statute's effective date.

I. FACTUAL BACKGROUND

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 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 Hassens' 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 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

---

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

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.

II. PROCEDURAL BACKGROUND

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 Hassens "were free to settle and release the tortfeasors without prejudice to their claim for underinsured motorist benefits from Defendant, STATE FARM."

---

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

III. STATUTORY/CONTRACTUAL BACKGROUND AND ANALYSIS

On the effective date of the policy at issue, section 627.727(6), Florida Statutes (1989), governed the respective rights and obligations of the parties in the event the Hassens presented State Farm with a proposed settlement agreement from an uninsured motorist's liability insurance carrier. Under this version of the statute, State Farm had thirty days from receipt of the agreement to approve the settlement, waive its subrogation rights, authorize a full release, and agree to arbitrate the uninsured motorist claim. If it did not abide by these conditions, the only consequence it faced was a lawsuit brought by the Hassens against it and the uninsured motorist "to resolve their respective liabilities for any damages to be awarded" the Hassens. Additionally, the statute provided that "[a]ny award in such action against the liability insurer's insured [would be] binding and conclusive as to the [Hassens] and [State Farm's] liability for damages up to its coverage limits." The statute also required that "in such action, the liability insurer's coverage must first be exhausted before any award [could] be entered against [State Farm], and any such award against [State Farm] [would] be excess and subject to the provisions of subsection (1)."[3] The statute, however, placed no advance

---

[3] Subsection (1) provided in pertinent part that:

> The [uninsured motor vehicle] coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured . . . under any motor vehicle liability insurance coverage . . . and such coverage shall cover the *difference*, if

payment obligation on State Farm's right to preserve its subrogation rights against the uninsured motorist if it refused to approve the settlement offer.

Significantly, the parties recognized the 1989 statute's requirements and limitations by incorporating its terms in the uninsured motorist provisions of their policy. They specifically agreed that if State Farm, within thirty days of receiving a tortfeasor's settlement agreement from the Hassens, did not approve the settlement, waive its right of recovery against the tortfeasor, authorize a full release, and agree to arbitrate the uninsured motorist claim, then the Hassens could file a lawsuit against State Farm and the tortfeasor. The purpose of the lawsuit would be to decide "a. if the [Hassens are] legally entitled to collect damages; and b. if so, how much?" The policy also provided that the tortfeasor's liability limits for bodily injury "shall be exhausted before any award may be entered against [State Farm]. The award against [State Farm] shall be binding and conclusive on [State Farm] and the [Hassens] up to [State Farm's] coverage limit."

Furthermore, as clearly contemplated by the parties under their contract, State Farm's obligation to pay uninsured

---

> any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. (Emphasis added.)

Thus, as we noted in Michigan Millers Mutual Insurance Company v. Bourke, 581 So. 2d 1365, 1366 (Fla. 2d DCA 1991, approved, 607 So. 2d 418 (Fla. 1992), the purpose of such coverage "is meant to compensate the plaintiff for a deficiency in the tortfeasor's personal liability insurance coverage."

motorist benefits was to be reduced by "the total of the bodily injury limits of liability of all other vehicle liability policies . . . that apply to any person or organization legally liable for such bodily injury." They agreed, therefore, that State Farm's uninsured motorist coverage would be "excess over, but shall not duplicate any amount paid to or for the [Hassens] by or for any person or organization who is or may be held legally liable for the bodily injury to the [Hassens]."

Because the parties obviously incorporated the provisions of the 1989 statute into the insurance contract, we presume that they entered into the contract with reference to this *specific* statute so that its provisions became an *integral* part of the contract. Grant v. State Farm Fire & Casualty Co., 638 So. 2d 936 (Fla. 1994).

Under one clause of the uninsured motorist provisions of the policy, the Hassens and State Farm also clearly and unambiguously agreed that:

> The insured shall not enter into any settlement with any person or organization legally liable for the insured's bodily injury without our written consent if the settlement agreement precludes our right of recovery against such person or organization.

They then agreed, consistent with this clause, that there would be no uninsured motorist coverage "for any insured who, without [State Farm's] written consent, settles with any person or organization who may be liable for the bodily injury." The obvious intent of these provisions were twofold.

First, they were designed to preserve State Farm's

well-established right under Florida law, consistent with public policy, to be subrogated to any right of action which the Hassens may have had against third persons who caused them bodily injury. Schwab v. Town of Davie, 492 So. 2d 708 (Fla. 4th DCA 1986). This right is based on the premise that an insurance contract is a business undertaking not founded on principles of philanthropy or charity. State v. De Witt C. Jones Co., 108 Fla. 613, 147 So. 230 (1933). Thus, "[a]fter an insurance company has paid a loss on behalf of the insured, it is entitled to subrogation either by express contract rights, or by equitable subrogation by operation of law." Hough v. Huffman, 555 So. 2d 942, 945 (Fla. 5th DCA), approved, 564 So. 2d 1081, 1082 (Fla. 1990). Second, these provisions were intended to prevent the Hassens from unilaterally extinguishing this right without State Farm's consent because, under the law, "if one who sustains loss as a result of negligence or wrongdoing of another releases the tortfeasor, an insured subrogated to the right of the injured party is barred by that release." High v. General American Life Ins. Co., 619 So. 2d 459, 461 (Fla. 4th DCA), review denied, 629 So. 2d 133 (Fla. 1993). Significantly, the provisions of the contract, just like the 1989 statute, imposed no prepayment obligation on State Farm in order to preserve its right of recovery against a tortfeasor.

In 1992, however, the legislature clearly manifested its intent to substantially revise the subrogation rights of an uninsured motorist carrier under section 627.727(6) by imposing a new prepayment obligation on such a carrier if it chooses to

preserve those rights.[4] Under paragraph (a) of the revised statute, the carrier still has thirty days to consider authorization of a settlement or retention of subrogation rights. However, if it fails to respond as required by paragraph (b), then "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." Paragraph (b) then provides that:

> 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 rights against the underinsured motorist and the liability insurer for the amounts paid to the injured party. (Emphasis added.)[5]

Thus, unlike the 1989 statute, the revised statute imposes an advance payment obligation on an uninsured motorist

---

[4] The title to chapter 92-318, at 3081, 3084, reads in part as follows: "[a]n act relating to insurance; . . . amending s. 627.727, F.S.; . . . revising provisions with respect to subrogation rights of underinsured motorist insurers . . . ." See Parker v. State, 406 So. 2d 1089 (Fla. 1981) (title of enacting legislation is one indicator of legislative intent).

[5] We reject the Hassens' argument that we should consider paragraph (a) separately from paragraph (b) in deciding this case. It is obvious that they relate to the same subject matter and are inextricably intertwined. Accordingly, we are obligated to construe them together. See Major v. State, 180 So. 2d 335 (Fla. 1965) (statutes relating to the same subject matter and arising out of the same act must be read in pari materia).

carrier in order to preserve its legally recognized right to subrogation. Additionally, even though the carrier is then entitled to recoup this payment by means of a subrogation claim, the practical effect of this new obligation is to require the carrier to make an immediate award to its insured prior to the determination of any liability for damages and the exhaustion of the uninsured motorist's liability insurance coverage.

It is obvious from this analysis that the legislative purpose for the 1992 revision of section 627.727(6) was to address the situation in which an injured party was denied immediate access to needed compensation from a tortfeasor's liability carrier because the injured party's uninsured motorist carrier refused to approve a settlement offer and waive its subrogation rights. Thus, the legislature, through this revision, shifted the financial burden from the injured party to the uninsured motorist carrier by mandating that the carrier immediately pay over to its insured the full amount of the tortfeasor's liability carrier's settlement offer, irrespective of any determination of liability, as a condition of preserving subrogation rights.[6]

---

[6] The 1992 revision of section 627.727(6), which alters the contours of an uninsured motorist carrier's subrogation rights, is the latest example of the "fragile" relationship existing between the legislature and the uninsured motorist statute. See Quirk v. Anthony, 563 So. 2d 710, 713 (Fla. 2d DCA 1990), approved, 583 So. 2d 1026 (Fla. 1991). As our subsequent analysis will show, however, the legislature's well-intentioned change in the law has the effect of roiling the waters instead of calming the seas of uninsured motorist litigation. See Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 559 (Fla. 1986).

IV. CONSTITUTIONAL ANALYSIS: IMPAIRMENT OF CONTRACT

Against this background, we begin our resolution of this case by noting that the jurisprudence of this state has long recognized that in the absence of an explicit legislative expression, a substantive law is to be applied prospectively. Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985). "This rule mandates that statutes that interfere with vested rights will not be given retroactive effect." 472 So. 2d 1154. Although retroactive application of a statute is not necessarily invalid, it becomes so "in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated." McCord v. Smith, 43 So. 2d 704, 709 (Fla. 1949).

It has also been the long established law of this state that a statute contravenes the constitutional prohibition against impairment of contracts when it has "the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts." Manning v. Travelers Ins. Co., 250 So. 2d 872, 874 (Fla. 1971). The polestar of any analysis of whether a statute constitutionally impairs an existing contract is the fundamental principle that essentially no degree of impairment will be tolerated, no matter how laudable the underlying public policy considerations of the statute may be. Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979). See also Sarasota County v. Andrews, 573 So. 2d 113, 115 (Fla. 2d DCA 1991 (Pomponio "specifies that the

bedrock of its analysis is the principle that virtually *no* degree of impairment will be allowed.") (emphasis in original). Thus, in order to prevent the impairment of an insurance contract, Florida law generally requires that "the statute in effect at the time the insurance contract is executed governs any issues arising under that contract." Lumbermans Mut. Casualty Co. v. Ceballos, 440 So. 2d 612, 613 (Fla. 3d DCA 1983). See also Metropolitan Property & Liab. Ins. Co. v. Gray, 446 So. 2d 216, 218 (Fla. 5th DCA 1984), approved, 478 So. 2d 25 (Fla. 1985) ("[S]tatutory changes occurring between renewals cannot be incorporated into [an insurance] policy without unconstitutionally impairing the obligations of the parties to the insurance contract.").

Measured against these time-honored principles, we conclude that the application of section 627.727(6), Florida Statutes (Supp. 1992), to a pending claim brought under the uninsured motorist provisions of an automobile insurance policy executed prior to its effective date would unconstitutionally impair the obligation of that contract in violation of article I, section 10, of the Florida Constitution, which prohibits the enactment of any "law impairing the obligation of contracts." See Yamaha Parts Distrib., Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975). Our conclusion is based on the following analysis.

We initially observe that the legislature clearly expressed its intent regarding the effective date of the act amending section 627.727(6) by providing "[e]xcept as otherwise provided herein, this act shall take effect October 1, 1992."

Ch. 92-318, § 17 [sic], at 3178, Laws of Fla. Moreover, our review of this enabling legislation reveals nothing in its language manifesting any intention by the legislature that the specific amendments to subsection (6) were to be applied retroactively. Larson v. Independent Life & Accident Ins. Co., 29 So. 2d 448 (Fla. 1947).

Conversely, however, the legislature clearly manifested its intent that the amendment to section 627.727 creating subsection (10) was remedial and was to be given retroactive effect. Ch. 92-318, § 80, at 3151, Laws of Fla.; State Farm Mut. Auto. Ins. Co. v. LaForet, 632 So. 2d 608 (Fla. 4th DCA 1993). Thus, had the legislature intended that amended subsection (6) was to be classified as remedial and was to be applied retroactively, it would have said so, as it did with regard to subsection (10).[7] Accordingly, we presume that the legislature did not intend subsection (6), as amended, to apply to pre-existing insurance contracts. See Fleeman v. Case, 342 So. 2d 815 (Fla. 1976).

Even in the face of this well-founded presumption, however, the Hassens strongly urge us to conclude that the 1992 statute is remedial in nature and thus can be constitutionally

---

[7] In creating subsection (10), we perceive the legislative purpose to have been the overruling of the supreme court's holding in McLeod v. Continental Insurance Company, 591 So. 2d 621, 626 (Fla. 1992), that rejected "the contention that first-party bad faith damages should be fixed at the amount of the excess judgment" in an action for bad faith brought against an uninsured motorist carrier under section 624.155, Florida Statutes (1985). We do not determine, however, the legislature's authority to effectuate such a retroactive change in the law.

applied to a pending claim. See, e.g., City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986). They contend that the statute does nothing more than change the "road map" by which an uninsured motorist carrier enforces its right of subrogation. We reject this contention because, in our view, the statute substantively changes the "rules of the road" regarding the law governing uninsured motorist coverage. See generally Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994) ("[S]ubtantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights.").

First, application of the 1992 statute imposes a new obligation on State Farm, not found in the 1989 version or in its contract, requiring it to pay the amount of UniSun's settlement offer to the Hassens before it is entitled to preserve its long-recognized legal right to subrogation. Second, the application of the statute's mandate of such an advance payment to preserve this established right abrogates State Farm's vested right under the 1989 statute and its contract to have its liability for damages conclusively resolved in a lawsuit prior to having to pay any award to the Hassens. Third, the imposition of this new obligation compels State Farm to make an immediate award to the Hassens prior to the exhaustion of UniSun's insurance coverage, which was also not required under the 1989 version of the statute or its contract. Moreover, the effect of requiring such an immediate payment is to substantially alter the purpose of uninsured motorist coverage under the 1989 statute and the

contract, which was to compensate the Hassens for a shortfall in damages occurring *after* the exhaustion of UniSun's liability insurance coverage.

Additionally, the statute's requirement of an immediate payment effectively deprives State Farm of the right to question its legal liability for noneconomic damages under its contract in the event the tortfeasors had personal injury protection insurance coverage under section 627.737(2), Florida Statutes (1989), at the time of Mrs. Hassen's accident. In that regard, section 627.727(7), Florida Statutes (1989), provided that:

> The legal liability of an uninsured motorist coverage insurer does not include damages in tort for pain, suffering, mental anguish, and inconvenience unless the injury or disease is described in one or more of paragraphs (a) through (d) of s. 627.737 (2).[8]

Section 627.737(2), which describes the "injury" or "disease" requirements that must first be met, provided as follows:

> In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.730-627.7405, or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:
>
> (a) Significant and permanent loss of an important bodily function.

---

[8] The legislature left this subsection intact when it amended the statute in 1992. Ch. 92-318, § 79, at 3150, Laws of Fla.

> (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
> (c) Significant and permanent scarring or disfigurement.
> (d) Death.[9]

Thus, "[i]n view of section 627.727(7), it is clear that the statute does not require an insurance carrier to provide uninsured motorist coverage for pain, suffering, mental anguish, and inconvenience unless the threshold requirements of section 627.737(2) have been met." Dauksis v. State Farm Mut. Auto. Ins. Co. 623 So. 2d 455, 456 (Fla. 1993).

In Dauksis, the supreme court interpreted the interplay of these statutes in the context of construing a provision of an uninsured motorist policy, identical to the one in this case, in which the uninsured motorist carrier agreed to "pay damages for bodily injury [its] insured [was] legally entitled to recover from the owner or driver of an uninsured motor vehicle." 623 So. 2d 457. The specific issue facing the court was whether the insured, based on this policy language, could recover noneconomic damages against the uninsured motorist carrier without first satisfying the threshold requirements of section 627.737(2) in a factual setting involving an uninsured motorist who did not have personal injury protection coverage.

The court began its analysis by noting that the underlying legislative theory of section 627.737 "is that if every automobile has PIP coverage, injured motorists will be

---

[9] This subsection continues to retain this language to the present day. § 627.737(2), Fla. Stat. (1993).

reimbursed by their own carriers for most of their economic damages regardless of fault, and negligence actions against third parties will be limited to the more serious cases." 623 So. 2d 456. The court also observed that section 627.737 furthers this objective by rewarding individuals who have secured personal injury protection coverage as required by Florida's no-fault law "by exempting them from liability for noneconomic damages except in cases involving permanency or death." Id. The court finally noted that under the specific policy language construed, the insured was entitled to recover the same damages from the uninsured insurer that could legally be recovered in a direct action against the uninsured motorist.

Against this statutory and contractual backdrop, the court held that the question of whether the insured could recover noneconomic damages against the uninsured motorist carrier depended on whether the uninsured tortfeasor had complied with the security provisions of Florida's no-fault law. If the tortfeasor had personal injury protection coverage then the uninsured motorist carrier, standing in the shoes of the tortfeasor, was entitled to raise as a defense to such damages its insured's failure to meet the threshold conditions of section 627.737(2). If the tortfeasor had no such security then the insured was relieved of this obligation in recovering noneconomic damages. The court then determined in Dauksis that because the insured could legally recover noneconomic damages directly from the tortfeasor based on the tortfeasor's failure to carry PIP coverage, the uninsured motorist carrier, under its policy

language, was required to pay the same damages. Accord Pollard v. Williams, 623 So. 2d 588 (Fla. 2d DCA 1993); State Farm Mut. Auto. Ins. Co. v. Gomez, 605 So. 2d 968 (Fla. 3d DCA 1992), approved, 623 So. 2d 455 (Fla. 1993).

In this case, however, if the statute's mandatory advance payment condition is enforced against State Farm, and the tortfeasors had personal injury protection coverage at the time of the accident, then State Farm is effectively deprived of its contractual and statutory right to "stand in the shoes of the tortfeasors" and question its legal liability for any noneconomic damages which Mrs. Hassen may be claiming as a result of an alleged permanent injury. Hence, by an anomalous twist of legislative fiat, the mandatory payment requirement imposed on State Farm by the 1992 statute effectively relieves Mrs. Hassen of having to satisfy the mandatory threshold requirements of section 627.737(2) before she is entitled to collect noneconomic damages from State Farm.

Finally, as the following analysis will show, the 1992 statute substantively alters the concept of uninsured motorist coverage when a carrier providing such coverage seeks to preserve subrogation rights. The effect of this substantive change, if applied to claims brought under insurance contracts predating the statute, such as State Farm's, would be to diminish the value of those contracts.

Under the 1989 version of the statute, uninsured motorist coverage was required "for the protection of persons insured thereunder who are legally entitled to recover damages

from owners or operators of uninsured motor vehicles because of bodily injury." § 627.727(1).[10] Based on this legislative policy statement, such coverage was viewed by the supreme court as "a limited form of third party coverage inuring to the limited benefit of the tortfeasor to provide a source of financial security if the policyholder is entitled under the law to recover from the tortfeasor." Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 557 (Fla. 1986). The court did not construe this coverage as "first party coverage even though the policyholder pays for it." Id. Thus, unlike first party coverage, where fault is not an element of recovery and an insurance company must pay a claim even if its insured is totally at fault, the court interpreted uninsured motorist coverage as requiring payment by the carrier "only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor." Id. Consistent with this interpretation, the court construed the phrase "legally entitled to recover" found in the uninsured motorist statute, as well as the policy at issue in the case, to mean "that the insured must have a claim against the tortfeasor which could be reduced to judgment in a court of law." 486 So. 2d 555. Accord Jones v. Integral Ins. Co., 631 So. 2d 1132 (Fla. 3d DCA 1994).[11]

---

[10] The legislature also left this subsection undisturbed when it amended the statute in 1992. Ch 92-318, § 79, at 3147-3148, Laws of Fla.

[11] In the Hassens' uninsured motorist policy, State Farm similarly agreed to "pay damages for bodily injury an insured is *legally entitled to collect* from the owner or driver of an uninsured motor vehicle." (Emphasis added.)

In recognition of this concept, the Boynton court observed that the uninsured motorist carrier "effectively stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge." 486 So. 2d 557. Furthermore, after payment of an uninsured motorist claim, "[t]he insurer is subrogated to any sum that it pays the policyholder under the UM coverage and may bring suit against the uninsured motorist to recover all sums it has paid its insured under the UM policy." 486 So. 2d 558. As noted by the court, however, this right of recovery "would be frustrated if the insurer were forced to pay claims when it would be barred by a substantive defense from winning a judgment against a tortfeasor." Id.

Under the 1992 version of the statute, however, uninsured motorist coverage effectively becomes first party coverage if the carrier opts to preserve its right of subrogation by refusing permission to its insured to settle the third party claim. That is, the statute eliminates the need for any legal determination of liability on the part of the tortfeasor by mandating an immediate advance payment to the insured in the amount of the tortfeasor's offer if the carrier chooses to preserve its right of recovery. Thus, the statute abrogates the element of fault as a condition of payment from an uninsured motorist carrier to its insured in a situation involving retention of subrogation rights by no longer requiring the insured to first establish an entitlement to uninsured motorist

benefits based on a claim against a tortfeasor "which could be reduced to judgment in a court of law."

Furthermore, even though the statute later entitles the uninsured motorist carrier to recover its payment through subrogation, how does the carrier *fully* recover its money if, after a determination of fault, the tortfeasor is either absolved of all liability or the amount of damages ultimately awarded to the insured is less than the amount initially paid by the carrier? Two examples, based on the record in this case, poignantly manifest our concern in that regard.

Assume that "upon final resolution of the [Hassens'] underinsured motorist claim," the tortfeasors are absolved of all liability. In that event, State Farm's subrogation rights would be totally worthless in terms of being able to recover the $100,000 advance payment to the Hassens it was statutorily mandated to make in the first place in order to preserve those rights. See Jones v. Bradley, 366 So. 2d 1266 (Fla. 4th DCA 1979) (where subrogor's action was barred by res judicata, subrogee's action was similarly barred).

Or, assume that "upon final resolution" of the claim the Hassens damages are fixed at $150,000, but, after a finding of 50% comparative negligence, the damages ultimately awarded are $75,000. In that event, State Farm's right of recovery would be limited to $75,000, thus impeding its ability to recover the $25,000 difference between the amount it was required to pay under the statute ($100,000) and the damages "legally" awarded the Hassens ($75,000). See Atlantic Coast Line R.R. Co. v.

Campbell, 104 Fla. 274, 278, 139 So. 886, 888 (1932) ("[I]n any form of remedy the insurer can take nothing by subrogation in any case but the rights of the insured."). See also Holyoke v. Mut. Ins. Co. v. Concrete Equip., Inc., 394 So. 2d 193 (Fla. 3d DCA), review denied, 402 So. 2d 609 (Fla. 1981) (a party's right of subrogation is limited by any impediment in the injured party's claim).

Thus, ironically, under any scenario in which the legal award to the Hassens is less than the $100,000 State Farm was required to pay to preserve its subrogation rights, such a right of recovery would always be inadequate to fully compensate State Farm. Hence, State Farm's subrogation right would be totally or partially frustrated by the bar of a substantive defense in a later action for subrogation. Such a scenario is further exacerbated when, as appears from the record in this case, one of the tortfeasors, Mr. Buttmi, may have sufficient assets to reimburse State Farm for the full amount of its payment under a subrogation claim.[12]

State Farm's only other alternative would be to sue the Hassens. But under what theory of recovery could it proceed? The only theory that comes to mind is an action for unjust enrichment. Such a cause of action, however, would appear to be unfounded because the money was not paid inadvertently or by

---

[12] Because the record is not fully developed, we do not determine whether State Farm was prejudiced by the Hassens' release of the tortfeasors. We leave that determination to the trial court on remand. See Watherwax v. Allstate Ins. Co., 538 So. 2d 108 (Fla. 2d DCA 1989).

mistake but pursuant to a lawfully enacted statute which is presumptively constitutional. See, e.g., Sharp v. Bowling, 511 So. 2d 363 (Fla. 5th DCA 1987). Moreover, even if State Farm could secure a judgment, such a judgment could prove to be a hollow remedy if the Hassens have expended the money because of their immediate financial needs and were otherwise insolvent.

We think it reasonable to conclude that when State Farm executed its contract with the Hassens, it did not bargain for an insurance policy that could later be amended by legislative fiat requiring it to immediately afford $100,000 worth of fault-free coverage to the Hassens under the uninsured motorist provisions of the policy if it elected to retain its already established legal entitlement to subrogation. We think it is also a reasonable conclusion that State Farm did not enter into this contract with the expectation that if it decided to preserve this right, a later statutory consequence would be the deprivation of the time-value of this money pending the outcome of litigation to resolve the issue of fault. See Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, 782-783 (Overton, J., specially concurring opinion).

Instead, it is a reasonable assumption that State Farm set its premium schedule with every expectation that the uninsured motorist statute in effect at the time of the contract, which was clearly incorporated in the contract and expressly required a determination of liability prior to any obligation to pay, would govern the rights and obligations of the parties in the event the Hassens made an uninsured motorist claim. In that

regard, our supreme court has made it clear that "[t]he citizens of this State cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation, for it is generally accepted that a statute speaks from the time it goes into effect." Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978) (footnote omitted). Or, as our United States Supreme Court so pointedly stated:

> The severity of an impairment of contractual obligation can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 2723, 57 L.Ed. 2d 727 (1978).

State Farm was thus entitled to rely on the substantive rights of the 1989 statute, which rights vested prior to the passage of the 1992 statute, in determining its loss exposure under its contract with the Hassens. Hence, to apply the new statute to State Farm's contract with the Hassens would unconstitutionally diminish the value of that contract. See State Farm Mut. Auto. Ins. Co. v. Gant, 478 So. 2d 25 (Fla. 1985). Moreover, we emphasize again, the fact that the underlying purpose of the new statute may have been just and equitable does not authorize its application to a pre-existing contract when to do so would contravene the contract impairment

clause of the Florida Constitution. See Department of Trans. v. Edward M. Chadbourne, Inc., 382 So. 2d 293 (Fla. 1980).

Thus, the changes wrought by the 1992 statute substantially impair State Farm's rights and obligations under its insurance contract with the Hassens by imposing a new obligation in order to preserve an already established legal and contractual right and by depriving it of other vested statutory rights specifically incorporated in the contract. It is well-established, however, that when parties have contractually agreed to recognize statutory rights, "[a] subsequent enactment should not disturb the substantive rights and duties created by this contractual relationship." Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 243 (Fla. 1977). Accord State Farm Mut. Auto. Ins. Co. v. Gant, 478 So. 2d 25; Allstate Ins. Co. v. Garrett, 550 So. 2d 22 (Fla. 2d DCA 1989), review denied, 563 So. 2d 631 (Fla. 1990).

Accordingly, because the 1992 statute substantially alters the landscape of uninsured motorist law, we conclude that it is a substantive law that cannot be applied to a pending uninsured motorist claim based on an insurance contract predating the statute without diminishing the value of that contract. We, therefore, reject the Hassens' argument that it is remedial in nature.

V. CONSTITUTIONAL ANALYSIS: DUE PROCESS/ACCESS TO THE COURTS

Even if we were to construe the 1992 statute as only changing the procedure by which an uninsured motorist carrier enforces its remedy of subrogation and thus can be applied to a pending claim which is based on an event predating the statute, see Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978), we would still conclude that such an application fails to pass constitutional scrutiny in two significant respects. First, the statute violates an uninsured motorist carrier's right to due process of law in terms of property deprivation as guaranteed by the Fourteenth Amendment to the United States Constitution and by article I, section 9, of the Florida Constitution. Second, the statute violates an uninsured motorist carrier's right of access to the courts as protected by article I, section 21, of the Florida Constitution, which provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[13]

---

[13] It could be argued that our determination that the 1992 statute cannot be retroactively applied to the Hassens' claim moots any further consideration of State Farm's additional argument that a prospective application of the statute cannot stand constitutional scrutiny. The law is clear, however, that mootness does not destroy an appellate court's jurisdiction when the question raised is of substantial public interest and is likely to recur, especially when due process rights are at stake. Times Publishing Co. v. Burke, 375 So. 2d 297 (Fla. 2d DCA 1979). Thus, because the continued application of the statute is a matter of great public importance in the highly regulated field of uninsured motorist insurance and is obviously occurring on a statewide basis, any perceived mootness would still not divest us of the jurisdictional authority to provide future guidance as to the basic constitutionality of the statute. See Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

A. DUE PROCESS ANALYSIS

Our primary focus involving a due process violation centers on the statute's requirement that an uninsured motorist carrier *must* first make an award to its insured in the amount of the liability carrier's offer if it chooses to preserve what has always been regarded by law as a clearly established right of subrogation. As written, the statute deprives an uninsured motorist carrier of the due process right which guarantees it a *prior* determination on the merits in an appropriate forum before its liability for such an award is fixed by law. In that regard, the United States Supreme Court has clearly described the "root requirement" of the due process clause as being "that an individual be given an opportunity for a hearing *before* he 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) (emphasis in original) (footnote omitted). See also Peoples Bank of Indian River County v. State Dep't of Banking & Fin., 395 So. 2d 521 (Fla. 1981) (at a minimum, due process involves reasonable notice and a fair opportunity to be heard before rights are decided); Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166, 169 (Fla. 1974) ("Due process requires that no one shall be personally bound until he has had his 'day in court.'").

The 1992 statute, as applied in this case, provided State Farm no "fair opportunity" to be heard before it was called upon to divest itself of a significant property interest if it chose to preserve its long-recognized right of subrogation. Instead, the statute placed State Farm in the untenable position

of being bound by law to the outcome of private settlement negotiations between the Hassens and UniSun that essentially determined its immediate liability for an award of damages, including noneconomic damages, even though it was not a party to the negotiations and had no available means to assert any legal defenses to the Hassens' claim. Cf. Freidus v. Freidus, 89 So. 2d 604 (Fla. 1956) (holding that a corporation is entitled to due process of law insofar as property rights are concerned so that a money judgment may not be entered against it where it was not a party to a cause and was not served with process, even though the principal stockholder was a party to the cause).

The fact that the statute entitled State Farm to recover its payment through a subrogation action at some *unspecified time* after final resolution of the Hassens' uninsured motorist claim, does not, in our view, lessen this due process violation, for "it is now well settled that a temporary, nonfinal deprivation is nonetheless a 'deprivation' in terms of the Fourteenth Amendment." Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 1996, 32 L.Ed. 2d 556 (1972). Moreover, as we have previously noted in our analysis, depending on the outcome of the claim's final resolution, State Farm's right of recovery may either be legally worthless or inadequate to fully compensate it for the money the statute mandated it pay to the Hassens. Additionally, as also noted, even if State Farm did recover the full amount of its payment, it would still be deprived of the time-value of its money pending resolution of the claim. Thus, even though the statute later provides a remedy for a "post-

deprivation" vindication of State Farm's subrogation rights, such a remedy, for due process purposes, is "too little, too late."

Accordingly, we conclude that section 627.727(6), Florida Statutes (Supp. 1992), as applied in this case, unconstitutionally impaired State Farm's due process rights in two significant respects. First, it placed State Farm at the whim and caprice of the final outcome of private settlement negotiations without providing an independent forum to assert its right to be heard before it was required to divest itself of a significant property interest if it chose to preserve its subrogation rights. See Fuentes v. Shevin, 92 S. Ct. 1983, 2001 (state power, without some form of supervision, cannot confer on private parties the right to unilaterally invoke that power to serve their own private interests). Second, and just as egregious, the statute did not provide State Farm with an immediate, meaningful post-deprivation proceeding in which to vindicate its right of recovery. See Unique Caterers, Inc. v. Rudy's Farm Co., 338 So. 2d 1067, 1071 (Fla. 1976).

B. ACCESS TO THE COURTS ANALYSIS

We also determine that the 1992 statute impermissibly restricts an uninsured motorist carrier's right of access to the courts to resolve any disputed issue of liability before it is required to make an award of damages. Although the legislature may restrict access to the courts, it must first provide a reasonable alternative remedy or commensurate benefit *or* it must make a showing of overpowering public necessity justifying the restriction with a finding that there is no alternative method of

meeting such public necessity. Kluger v. White, 281 So. 2d 1 (Fla. 1973). The statute fails to meet either prong of this test.

As previously noted, before State Farm could legally question its obligation to make an award of damages to the Hassens' based on their uninsured motorist claim, it first had to make an advance payment of $100,000 to secure this right in the event it sought to preserve its right of subrogation. However, "[t]he constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims or *defenses* in court." Psychiatric Assoc. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992) (emphasis added). See also G.R.B. Inv., Inc. v. Hinterkopf, 343 So. 2d 899, 901 (Fla. 3d DCA 1977) ("[R]equiring payment of a sum of money into the registry of the court unrelated to filing fees as a condition for defending a lawsuit has long been declared constitutionally impermissible."). And, again, in the event of a subsequent legal determination that the Hassens were entitled to less than what State Farm was required to pay initially, the statute provided State Farm with no reasonable alternative remedy to fully recover its initial payment. Moreover, the only "commensurate benefit" which the statute conferred on State Farm as a result of having to make the advance payment, the preservation of its right of subrogation, is illusory because State Farm already had that right by law and by contract.

Furthermore, the legislature has not demonstrated an overpowering public necessity for imposing such a financial

restriction with a concomitant showing that no alternative method of addressing such public necessity exists. See Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987). Unlike other statutes in which the legislature has taken great care to delineate why an overpowering public necessity requires it to act by imposing restrictions on access to the courts,[14] the legislature has made no such findings either in the statute itself or the enabling act detailing why there exists an overwhelming public need to financially restrict an uninsured motorist carrier's right to legally question its liability for damages in a claim for uninsured motorist benefits. Such a declaration, although not binding, would have been very persuasive in determining the need for such a restriction. See State v. Cotney, 104 So. 2d 346 (Fla. 1958).

Furthermore, similar to Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, we have not been made aware of any documented evidence establishing that uninsured motorist carriers in this state are engaging in wholesale bad faith refusals to approve settlements of third party claims, thereby depriving their insureds of immediate access to needed compensation. Moreover, to the extent that some carriers may be engaging in such tactics, the legislature has provided a remedy by enacting section 627.727(10), Florida Statutes (Supp. 1992),

---

[14] Section 766.301, Florida Statutes (1993), for example, sets forth extensive findings justifying the public need for the establishment of an exclusive administrative remedial process for the compensation of birth-related neurological injuries on a no-fault basis in a limited class of cases. See Turner v. Hubrich, 19 Fla. L. Weekly D2339 (Fla. 5th DCA Oct. 21, 1994).

which provides that in an action for bad faith under section 624.155 an uninsured motorist carrier's liability for damages includes "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 a law of this state."

Accordingly, we conclude that the application of section 627.727(6), Florida Statutes (Supp. 1992), to this case unconstitutionally infringed on State's Farm's right of access to the courts for a determination of its liability for damages under the Hassens' uninsured motorist claim by imposing a financial precondition for such access that constituted a substantial burden on its right to be heard. See Psychiatrist Assoc., Inc. v. Siegel, 610 So. 2d 419.

VI. CERTIFIED QUESTION

Because we determine, however, that the constitutional issues posed in this case are ones of great public importance, we certify the following two-part question to the Florida Supreme Court:

> IS SECTION 627.727(6), FLORIDA STATUTES (SUPP. 1992), CONSTITUTIONAL? IF SO, IS IT A SUBSTANTIVE STATUTE, AS OPPOSED TO A REMEDIAL STATUTE, SUCH THAT ITS TERMS CANNOT BE APPLIED CONSTITUTIONALLY TO A PENDING CLAIM BROUGHT UNDER THE UNINSURED MOTORIST PROVISIONS OF AN AUTOMOBILE INSURANCE POLICY ISSUED PRIOR TO ITS EFFECTIVE DATE?

VII. CONCLUSION

We, therefore, reverse the trial court's partial final summary judgment finding uninsured motorist coverage in favor of

the Hassens and remand for further proceedings. On remand, we specifically direct the trial court to apply the provisions of section 627.727(6), Florida Statutes (1989), to this case in determining the issue of coverage. In the event State Farm raises the issue of prejudice because of the Hassens' unauthorized release of the tortfeasors, we further direct the trial court to resolve that issue in accordance with the principles stated in Rafferty v. Progressive American Insurance Company, 558 So. 2d 432 (Fla. 2d DCA 1990).

Reversed and remanded with directions; question certified.

THREADGILL, A.C.J., and PATTERSON, J., Concur.