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
2nd District No.: 94 01241

APPELLANTS' REPLY BRIEF

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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. 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" are referring to §627.727(6) Fla. Stat. (Supp. 1992) as amended effective October 1, 1992.

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

SUMMARY OF ARGUMENT

Statutory amendments can only unconstitutionally infringe on rights which are vested on the effective date of the amendment. Rights which are not vested do not exist and therefore are availed no due process protection. In the case at hand, State Farm does not possess a vested right of subrogation until it makes a payment under the policy. Therefore, any argument on the part of State Farm that the 1992 statutory amendment to § 627.727(6) has unconstitutionally infringed on its right of subrogation is a fallacy. State Farm had no right of subrogation absent payment and no unconstitutional deprivation can occur when there is nothing to take away.

The 1992 amendment to § 627.727(6) Fla. Stat. merely provides insurance companies with an ability to make payment to secure a vested right of subrogation. This is a quid pro quo situation. State Farm did not have vested rights affected or taken away because those rights do not vest until payment. State Farm's assertion that under the statutory changes it must make payment to retain its subrogation rights, is an incorrect statement. State Farm has no right to subrogation until payment is made; therefore, State Farm is making payment to **secure** subrogation rights not to retain subrogation rights. Nothing has changed, State Farm has always had to make payment to secure subrogation rights. Application of § 627.727(6) Fla. Stat. as amended effective October 1, 1992, will not infringe on State Farm's due process rights.

Procedural changes that do not affect any vested rights are permitted retroactive application. The legislature sought to promote an overpowering public need and provided insurance companies with a commensurate benefit. Until State Farm makes payment under its UM coverage, no vested right of subrogation exists; therefore, the amendments to Section 6 are not affecting any vested right. The reasonable restrictions imposed by the legislature serve important public purposes and should withstand constitutional scrutiny.

ARGUMENT

I.

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.

Insurance companies are not entitled to subrogation whether express or equitable until **after** payment is made. Hough v. Hoffman, 555 So. 2d 942, 945 (Fla. 5th DCA 1990), approved, 564 So. 2d 1081, 1082 (Fla. 1990). Until State Farm makes payment, it cannot claim a vested right to subrogation or claim it has suffered an unconstitutional deprivation of a right it did not possess.

The Opinion of the Second District Court of Appeal stating State Farm has suffered a due process violation is flawed in that it pre-supposes that State Farm had a pre-existing right to subrogation absent payment to its insured. State Farm did not have

a pre-existing right to subrogation, therefore, any requirements imposed on State Farm to secure a right it did not possess cannot be an unconstitutional infringement. Allstate v. Metro Dade, 436 So. 2d 976 (Fla. 3d DCA 1983).

State Farm and Florida Farm Bureau's reliance upon Attorneys' Title Ins. Fund, Inc. v. Punta Gorda Isles, Inc. 547 So. 2d 1250 (Fla. 2d DCA 1989), is gravely misplaced as pointed out in the Initial Brief of the Appellants. First, Attorneys' Title is contrary to Allstate v. Metro Dade 436 So.2d 976 (Fla. 3d DCA 1983)(UM carrier had no right to subrogation until it paid the claim) and Quinones v. Florida Farm Bureau, 336 So. 2d 854 (Fla. 3d DCA 1979) cert. denied at 376 So. 2d 71 (1979)(UM carrier had no vested right to subrogation until it made payment), which specifically address the subrogation rights of UM carriers against the underinsured tortfeasor. In addition, Attorneys' Title involved a subrogation claim for title insurance. The relationship involved in title insurance versus that of uninsured motorist coverage is more closely aligned with an indemnification where liability for the entire loss is shifted. Title insurance companies provide a defense when its insured is sued and do not have to pay if a third party is found responsible. However, in underinsured motorist claims, the UM carrier stands in the shoes of the underinsured motorist and must pay if the third party is found responsible. The UM carrier can, at its discretion, file a separate subrogation claim against the uninsured motorist but not before payment is made. It is important to note that nothing in

the State Farm policy nor the statutes require an insured to attempt to collect damages from the uninsured motorist prior to claiming UM benefits. The purpose of purchasing UM coverage is to allow an insured to claim against its own insurance company for damages. It is then the option of the UM carrier to pursue subrogation.

Absent a vested right to subrogation, State Farm is not being deprived of any substantive rights by the 1992 amendment to §627.727(6) Fla. Stat. Village of El Portal v. City of Miami, 362 So. 2d 275 (Fla. 1978). State Farm's subrogation rights are merely an expectancy and not a right until payment is made on behalf of the underinsured motorist. Since State Farm does not possess subrogation rights until payment is made; there cannot be a constitutional deprivation of a right that has not vested and therefore does not exist. State Farm's position that they are being made to pay for a right that already existed, is flawed. State Farm is receiving a right to subrogation in exchange for their payment. This is a right that does not vest until payment is made. By making payment, State Farm is securing a right to subrogation and, therefore, receiving a right in exchange for the payment. State Farm is not being forced to pay for a right that already existed. There cannot be a deprivation of a right that does not exist; therefore, there cannot be an unconstitutional infringement on what does not exist.

In reality, a situation will never arise wherein State Farm suffers an infringement upon its right of access to courts. If

State Farm determines that it has legitimate defenses, State Farm does not have to make payment, it merely waives its subrogation rights. State Farm will not ultimately make any payment and no subrogation rights will come into play. If State Farm determines that the claim is worth in excess of the underinsured motorist policy limits and desires a jury determination of the value of the claim, then as discussed above, under the statutory amendment, State Farm has the option of purchasing subrogation rights should it determine that the underinsured motorist is collectable. The underinsured motorist's liability limits still exist to offset the judgment and State Farm was provided the opportunity to make the decision whether or not to make payment, based upon its own determination of exposure. It is not the place of the legislature or the courts to provide State Farm with protection from risk for its own business decisions.

Despite the fact that no infringement on State Farm's access to courts is being created by the statutory amendment, the legislature can impose reasonable restrictions on access to courts provided an overpowering public need exists or a commensurate benefit is provided. Encouraging settlements and minimizing litigation is an overpowering public need. Williams v. Gateway, 331 So. 2d 301 (Fla. 1976). The legislature intended to fulfill this need by requiring UM insurers to timely accept or reject settlement proposals from underinsured motorists. HOUSE OF REPRESENTATIVES COMMITTEE ON INSURANCE, Twelfth Legislative Session, 1992, Final Bill Analysis & Economic Impact Statement at

28. It is the task of the legislature to make public policy decisions and the courts are bound by these determinations. University of Miami v. Echarte, 619 So. 2d 189, 196 (Fla. 1993).

In addition, a commensurate benefit in the form of a quid pro quo similar to that established by the no-fault law exists for UM carriers. Although UM carriers lose the time value of money due to pre-payment to secure subrogation rights, just as often the insurers will be on the liability side and will enjoy the benefit of a delayed payment. Based upon the overpowering public need to reduce litigation and encourage settlements as well as the commensurate benefit outlined above, the reasonable restrictions imposed on State Farm do not represent an unconstitutional violation of its right to access to courts. State Farm's right of subrogation has not been abolished, the requirement that they make payment in order to secure subrogation rights remains the same.

II.

THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT RULING HOLDING THE LEGISLATIVE CHANGES TO § 627.727(6) 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.

Retroactive application of statutory amendments is permissible when the changes are procedural, meaning changes in the procedure for redressing a right, Village of El Portal v. City of Miami, 363 So. 2d 275 (Fla. 1978); or remedial, meaning a change in the method employed to enforce a right or redress an injury, City of Lakeland

v. Cantinella, 129 So. 2d 133 (Fla. 1961). In each of the forgoing examples, explicit statutory language is not required for retroactive application to apply. Walker & LaBerge, Inc. v. Halligan 344 So.2d 239 (Fla. 1977).

Prior to the 1992 statutory changes to § 627.727(6) Fla. Stat., insurers were allowed thirty days after a request by an insured to evaluate their subrogation rights and express their intention to pursue or waive subrogation against a tortfeasor. In 1992, the legislature amended § 627.727(6) Fla. Stat. in order to clarify the original intent of the statute to compel insurance companies to perform good faith investigations and evaluations of their subrogation rights in a timely manner. HOUSE OF REPRESENTATIVES COMMITTEE ON INSURANCE, Twelfth Legislative Session, 1992, Final Bill Analysis & Economic Impact Statement at 28.

The legislative intent is clearly identified by reviewing the Final Bill Analysis & Economic Impact Statement, id.:

> The amendments to subsection (6) provide additional procedures that a UM insurer must follow if their insured (the injured party) agrees to settle a claim with a liability insurer and its insured (the underinsured motorist). The basic intent is to force the UM insurer to either accept or reject a settlement within 30 days, and to pay their UM insured the amount of any rejected settlement amount and seek subrogation against the liability insurer and its insured.

This analysis and the case law on retroactive application clearly demonstrate that the amendments to Section 6 are appropriate for retroactive application. First, the legislature

identified these changes as procedural, further, the changes made merely changed the method employed by an insured to redress a right to claim benefits in underinsured motorist situations. The insured is not gaining any additional rights, the insurance company is merely required to take affirmative action in regards to its subrogation rights within a specified time period. Further, it appears from the legislative analysis identified above, that the amendment to § 637.727(6) Fla. Stat. (Supp. 1992), was designed to enforce the original intent of the statute, which was to force insurance companies to respond to its insured's requests to settle with tortfeasor's within the 30 day time-frame to encourage and expedite the resolution of claims. Providing insureds with redress for non-compliance does not create any new rights, it merely provides insureds with a means to redress a right they already possessed. Grammer v. Roman, 174 So. 2d 443 (Fla. 2d DCA 1965).

Since State Farm cannot possess a vested right in any mode of procedure; retroactive application of § 627.727 Fla. Stat. (1992) does not create an unconstitutional infringement.

CONCLUSION

The 1992 amendment to § 627.727(6) Fla. Stat. did not impose any new obligations on State Farm, as there never existed a vested right in subrogation absent payment by State Farm. In addition, the amendment has not unconstitutionally infringed on any vested rights of State Farm, as a vested right of subrogation did not exist absent payment. State Farm is statutorily required to make

payment to secure a right rather than retain a right that already existed; therefore, no unconstitutional deprivation has occurred. Further, State Farm is free to determine if procurement of subrogation rights is in its best interest; State Farm will only make payment when it determines the benefit gained is in its best interest. Reasonable limitations on access to courts are constitutional based on the legislature's promotion of an overpowering public need or provisions are made for a commensurate benefit.

State Farm also cannot claim a vested right in any mode of procedure; therefore, retroactive application does not create an unconstitutional infringement on State Farm.

Wherefore, this Honorable Court should reverse the decision of the Second District Court of Appeal and answer the certified question in the affirmative, upholding the constitutionality of § 627.727(6) Fla. Stat. (Supp. 1992).

Respectfully submitted,

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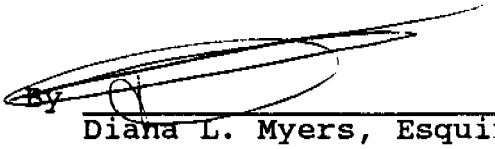

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CERTIFICATE OF SERVICE

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, George A. Vaka, Esquire, Post Office Box 1438, Tampa, FL 33601 and Roy D. Wasson, Esquire, Suite 402, Courthouse Tower, 44 W. Flagler Street, Miami, FL, 33130, this 10th day of August, 1995.

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