IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,052

RONNIE WOODALL, et ux.,

Petitioners,

-vs.-

TRAVELERS INDEMNITY COMPANY,

Respondent.

ON QUESTION CERTIFIED FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

PETITIONERS' BRIEF ON MERITS

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PRELIMINARY STATEMENT

Reference to the Record on Appeal will be denoted as (R - followed by the appropriate page number). Reference to the Transcripts of hearings will be denoted by (R - trans. followed by the appropriate page number).

The Plaintiffs/Appellants, Ronnie and Judith Woodall, will be referred to as "the Woodalls"; Defendant/Appellee, The Travelers Indemnity Company, will be referred to as "Travelers".

STATEMENT OF THE CASE AND THE FACTS

This appeal comes before the Court on a matter certified to be of great public importance by the First District Court of Appeal.

On December 15, 1987, John D. Stewart, Jr. was operating a motor vehicle which struck the rear of Ronnie Woodall's vehicle causing it to go out of control and roll over a distance of 88 feet before coming to rest on its wheels. As a result of the accident, Ronnie Woodall was injured.

At the time of this accident, Mr. Stewart had an insurance policy with Superior Insurance Company which provided $10,000.00 coverage for bodily injury liability. An action was filed against the tortfeasor, Mr. Stewart. It was not until September 9, 1993, that the full policy limits of this coverage were tendered to the Woodalls by the tortfeasor's liability insurer. The Woodalls' counsel wrote a letter to Travelers requesting permission to Settle with Mr. Stewart for his policy limits and to pursue an underinsured motorist claim [R - 218]. Travelers made no objection to the settlement and the Woodalls accepted payment of the policy limits [R - 217].

The express language of the Travelers underinsured motorist insurance policy relied upon by the Woodalls in making their claim provides in pertinent part:

> We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds or policies.

The express language of the Travelers policy also provides:

> Legal action may not be brought against us

> under any coverage provided by this policy, unless the insured has fully complied with all the provisions of the policy.

After the tender and payment of the full policy limits by Mr. Stewart's liability insurer, the Woodalls turned to Travelers, seeking benefits provided by their underinsured motorist coverage. The Woodalls contend that on November 12, 1993, Travelers breached its contract of underinsured motorist insurance by denying coverage. Travelers' contends that the statute of limitations had run.

A Complaint [R - 1] was filed on December 14, 1993, followed by two Amended Complaints [R - 9 and R - 23]. On July 13, 1994, Travelers filed a Motion to Dismiss Second Amended Complaint, alleging that the statute of limitations had run [R - 47]. The Motion to Dismiss was denied by an Order with detailed findings of fact by Circuit Judge W. 0. Beauchamp, dated September 27, 1994 [R - 67]. Travelers subsequently filed a Motion for Summary Judgment on July 28, 1995, again contending that the statute of limitations had run [R - 183]. Circuit Judge Nath C. Doughtie, contrary to the earlier holding and fact findings of Circuit Judge W.O. Beauchamp, entered his Order Granting Motion for Summary Judgment dated August 10, 1995 [R - 233] . The Final Summary Judgment was rendered on August 15, 1995 [R - 239].

A Notice of Appeal was timely filed on September 9, 1995 [R - 245].

The appeal was reviewed by the First District Court of Appeal. Woodall v. Travelers Indemnity Company, 21 Fla. L. Weekly D2044 (Fla. 1st DCA September 11, 1996). The First District Court of Appeal rendered its Opinion affirming the decision of the trial

court on the authority of State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 362 (Fla. 1982). However, the First District certified the following question to be a matter of great public importance:

> Whether the holding in Kilbreath applies when a plaintiff's UM policy contains a no-action/exhaustion clause providing that payment will be made only after the limits of liability have been used up under all applicable bodily injury liability policies.

SUMMARY OF ARGUMENT

The opinion in Kilbreath failed to distinguish the difference between an **uninsured** motorist claim and an **underinsured** motorist claim. At the time of the Kilbreath decision, §627.727(6), Fla. Stat. (1982), was not yet the law of Florida. Section 627.727(6), Fla. Stat. (1982), became the law of Florida one month after this Court's decision in Kilbreath. By enactment of §627.727(6), the Legislature mandated when an **underinsured** motorist claim is **created.** An **uninsured** motorist claim is different than an **underinsured** motorist claim, and each requires different treatment under the law.

The cause of action in Woodall is for an **underinsured** motorist claim. By enactment of §627.727(6), Fla. Stat. (1982), the Legislature mandated that an **underinsured** motorist claim is **created** when the injured person agrees to settle a claim with the liability insurer for the limits of liability and such settlement would not fully satisfy the claim for personal injuries. The Legislature further mandated that liability insurance coverage must first be exhausted before any award could be entered against the **underinsured** motorist insurer.

The "no action/exhaustion clause" provides that no payment will be made by Travelers, and no legal action can be brought against Travelers, until after the limits of all liability policies had been used up. The "no action/exhaustion clause" contractually tolled the running of the statute of limitations, and the accrual of the Woodalls' **underinsured** motorist claim was not triggered until Travelers became obligated to make payments under the policy and failed to do so.

The "no action/exhaustion clause" is consistent with the statutory scheme for treatment of an **underinsured** motorist claim set forth in §627.727(6), Fla. Stat. (1987), the controlling statute in Woodall. The Woodalls did not bring an action against Travelers until they had satisfied all of the requirements of both the "no action/exhaustion clause" and §627.727(6).

A cause of action for an **underinsured** motorist claim is **created** under §627.727(6) when the injured person agrees to settle a claim with the liability insurer for the limits of liability and such settlement would not fully satisfy the claim for personal injuries. A cause of action cannot accrue before it is **created**. The effect of the trial court's determination was to extinguish the Woodalls' **underinsured** motorist claim before it existed. This was not the intent of this Court in Kilbreath.

Under §627.727(6), the date that an **underinsured** motorist claim is **created** is arguably the date on which the cause of action accrues. Traditional contract law, however, provides that a cause of action for breach of contract accrues on the date that the contract is breached. Under the reasoning of this Court in State Farm Mutual Automobile Insurance Company v. Lee, 21 Fla. L. weekly S335 (Fla. August 22, 1996), it is also arguable that the date on which an **underinsured** motorist insurer breaches its obligation to pay is the date on which a cause of action accrues. under either of these theories of accrual, the statute of limitations did not run on the Woodalls' **underinsured** motorist claim.

In light of the Legislature's mandate in §627.727(6), Fla. Stat. (1982), this Court should revisit Kilbreath to distinguish

between an uninsured motorist claim and an underinsured motorist claim. The certified question should be answered in the negative, and the Court should find that the Woodalls cause of action accrued either when it was created by statute, or in the alternative, when Travelers breached the contract.

ARGUMENT

ISSUE I: WHETHER THE HOLDING IN KILBREATH APPLIES WHEN A PLAINTIFF'S UM POLICY CONTAINS A NO-ACTION/EXHAUSTION CLAUSE PROVIDING THAT PAYMENT WILL BE MADE ONLY AFTER THE LIMITS OF LIABILITY HAVE BEEN USED UP UNDER ALL APPLICABLE BODILY INJURY LIABILITY POLICIES.

A. The Decision in Kilbreath:

In State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982), the determinative issue was "whether, in an action under an uninsured motorist insurance policy, the statute of limitations begins to run as of the date of the accident." Id. at 632. This Court held that it does.

The pertinent facts in Kilbreath were set forth by this Court as follows:

> Kilbreath had automobile insurance coverage under four separate policies issued to him by State Farm. On June 11, 1972, Kilbreath was injured in a motor vehicle accident. He requested arbitration of his claim on April 26, 1976, which was denied on May 19, 1976. On May 16, 1980, almost eight years after the accident, Kilbreath filed suit against State Farm seeking underinsured motorist coverage. The trial court dismissed the action with prejudice reciting in the order of dismissal that the claim was barred by the statute of limitations. The Fifth District Court of appeal reversed, stating that arbitration or its waiver or denial by the company is a condition precedent to an action on the policy and that the statute of limitations did not begin to run until all conditions precedent to recovery under the contract had occurred. It held that the statute of limitations did not begin to run until arbitration had occurred or had been waived or denied by the insurance company.

Id. **at 633.**

The Kilbreath Court determined that the cause of action for an **"uninsured/underinsured"** motorist claim arises on the date of the accident with an **"uninsured/underinsured"** motorist since the right of action stems from the plaintiff's right of action against the tortfeasor. This Court then determined that the statute of limitations begins to run on the date of the accident rather than on the date of compliance with the conditions precedent contained in the insuring agreement.

The insuring language upon which this Court relied was as follows:

> To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

Id. at **633.**

The policy also provided that no action shall lie against the insurer unless as a condition precedent thereto there shall be full compliance with all terms of the policy. This Court determined that an effort to agree amicably on the issue of entitlement and amount of damages, and failing that, arbitration, are both conditions precedent to an action against the insurer, but neither has any effect on when the cause of action arises. This Court held that

these were "remedies" provided by the insurance policy which the insured must exhaust before he can sue the insurer, but the statute of limitations is not tolled during the running of these times.

B. Legislative History on the Distinction Between an Uninsured and an Underinsured Motorist Claim:

A thorough understanding of the law of Florida on this issue requires a review of the Legislative history of statutory enactments, both before and after Kilbreath. The automobile accident in Kilbreath occurred on June 11, 1972. The controlling statute at the time of the Kilbreath accident was Section 627.727, Fla. Stat. (1972), which was silent as to when an uninsured motorist claim or an underinsured motorist claim is created.

Five years after the Kilbreath accident, the Florida legislature enacted §627.727(6), Fla. Stat. (1977), which provided that an uninsured motorist claim was created against an uninsured motorist insurer when an injured person settles a claim with a liability insurer and its insured and such settlement would not fully satisfy the claim for personal injuries. Section 627.727(6), Fla. Stat. (1977), was enacted as a part of Chapter 77-468, Section 30, Laws of Florida (1977):

> **If an injured person or in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim against the uninsured motorist insurer, then such settlement agreement shall be submitted in writing to the uninsured motorist insurer, which shall have a period of 30 days from receipt thereof in which to agree to arbitrate the uninsured motorist claim and**

> approve the settlement, waive its subrogation rights against the liability insurer and its insured and authorize the execution of a full release. If the uninsured motorist insurer does not agree within 30 days to arbitrate the uninsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person or in the case of death, the personal representative may file suit joining the liability insurer's insured and the uninsured motorist insurer to resolve their respective liabilities for any damages to be awarded; provided, however, that in such action, the liability insurer's coverage shall first be exhausted before any award may be entered against the uninsured motorist insurer, and any such award against the uninsured motorist insurer shall be excess and subject to the provisions of s. 627.727(1). Any award in such action against the liability insurer's insured shall be binding and conclusive as to the injured person and uninsured motorist insurer's liability for damages up to its excess coverage limits. The provisions of s. 627.428 shall not apply to any action brought pursuant to this section against its uninsured motorist insurer.
>
> (Note : Language in bold underline was added as Subsection (6) to s627.727 by the Legislature.)

The 1977 statute did not distinguish between an uninsured motorist claim and an underinsured motorist claim.

However, by the time the Woodall accident had occurred on December 15, 1987, the Legislature had further amended §627.727(6) to provide a specific statutory scheme for the treatment of an underinsured motorist claim. Section 627.727(6), Fla. Stat. (1982), was amended by Chapter 82-243, Section 544, Laws of Florida (1982), as follows:

> If an injured person or in the case of death, the personal representative agrees to settle

> a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an **underinsured** [uninsured] motorist claim against t **underinsured** [uninsured] motorist insurer, then such settlement agreement shall be submitted in writing to the **underinsured** [uninsured] motorist insurer, which shall have a period of 30 days from receipt thereof in which to agree to arbitrate the **underinsured** [uninsured] motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the **underinsured** [uninsured] motorist insurer does not agree within 30 days to arbitrate the **underinsured** [uninsured] motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person or, in the case of death, the personal representative may file suit joining the liability insurer's insured and the **underinsured** [uninsured] motorist insurer to resolve their respective liabilities for any damages to be awarded; however, in such action, the liability insurer's coverage shall first be exhausted before any award may be entered against the **underinsured** [uninsured] motorist insurer, and any such award against the **underinsured** [uninsured] motorist insurer shall be excess and subject to the provisions of s. 627.727(1). Any award in such action against the liability insurer's insured shall be binding and conclusive as to the injured person and **underinsured** [uninsured] motorist insurer's liability for damages up to its coverage limits. [The provisions of s. 627.428 shall not apply to any action brought pursuant this section against its uninsured motorist insurer.]
>
> (Note: Language in **bold underline** was added to the statute by the Legislature; Language in brackets [] was deleted from the statute by the Legislature.)

The only change made by the Legislature was to substitute the term

"underinsured" for the term "uninsured" throughout the statute. Under §627.727(6), Fla. Stat. (1982), which became law and took effect on October 1, 1982, the Legislature decreed that an underinsured motorist claim against anunderinsured motorist insurer is created when the injured person agrees to settle a claim with the liability insurer for the limits of liability and such settlement would not fully satisfy the claim for personal injuries. By the amended language in Chapter 82-243, Section 544, Laws of Florida (1982), the Legislature mandated a very specific treatment for an underinsured motorist claim.

The purpose of uninsured motorist coverage is to allow a person to obtain insurance to protect himself from being injured by an uninsured person. Underinsured motorist coverage only applies to situations where the insured's coverage exceeds the amount of liability coverage held by the tortfeasor. See Staff of Fla.S.Comm. on Corn., C/SB 829 (1987) Staff Analysis 1-2 (May 25, 1987) (on file at the Florida State Archives), cited by Hon. Overton, J., attached as Appendix B to dissenting opinion in Government Employees Insurance Company v. Douglas, 654 So.2d 118, 125 (Fla. 1995).

An uninsured motorist claim can only arise when the tortfeasor has no liability insurance coverage, i.e. when the tortfeasor is uninsured. This Court's decision in Kilbreath is the law of Florida with respect to uninsured motorist claims. However, the Legislature, by Chapter 82-243, Section 544, Laws of Florida (1982), amended §627.727(6) to substitute the term "underinsured" for "uninsured" throughout the statute, making it unmistakably clear the Legislature's statutory scheme for the treatment of underinsured

motorist claims. Chapter 82-243 became law and took effect on October 1, 1982, approximately one month after this Court entered its opinion in Kilbreath. Chapter 82-243, Section 813, Laws of Florida (1982).

The Legislature has decreed that an underinsured motorist claim against an underinsured motorist insurer, does not exist until it is determined that the claim for personal injuries or wrongful death would not be fully satisfied by the limits of the tortfeasor's liability insurance coverage. There is a compelling rationale for the Legislature's mandate. when the liability insurer tenders the full limits of liability and the injured person agrees to accept the full limits of liability, it establishes the status of the injured person as being "underinsured", or as more aptly put by the Legislature, an underinsured motorist claim is "created." Section §627.727(6) goes on to provides that the liability insurer's coverage must first be exhausted before any award may be entered against the underinsured motorist insurer. This statutory scheme, with respect to both the underinsured status of the injured person and the exhaustion of all liability coverage, is implemented by the "no action/exhaustion clause" in the Travelers insurance policy.

The Woodall accident occurred on December 15, 1987. Section 627.727(6), Fla. Stat. (1987), is the controlling statute for the Woodall cause of action. Section 627.727(6), Fla. Stat. (1987), provides:

> If an injured person or in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim

> **for personal injuries or wrongful death so as to create an underinsured motorist claim against the underinsured motorist insurer,** then such settlement agreement shall be submitted in writing to the underinsured motorist insurer, which shall have a period of 30 days from receipt thereof in which to agree to arbitrate the underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not agree within 30 days to arbitrate the underinsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person or, in the case of death, the personal representative may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve their respective liabilities for any damages to be awarded; however, **in such action, the liability insurer's coverage must first be exhausted before any award may be entered against the underinsured motorist insurer,** and any such award against the underinsured motorist insurer shall be excess and subject to the provisions of subsection (1). Any award in such action against the liability insurer's insured is binding and conclusive as to the injured person and underinsured motorist insurer's liability for damages up to its coverage limits. (Emphasis supplied.)

Section 627.727(6), Fla. Stat. (1987), is substantially the same as §627.727(6), Fla. Stat. (1987), and each expressly provides that **an underinsured motorist claim is created against the underinsured motorist insurer when the injured person agrees to settle a claim with the liability insurer for the limits of liability and such settlement would not fully satisfy the claim for personal injuries.**

C. Rilbreath Did Not Distinquish Between an Uninsured and an Underinsured Motorist Claim:

This Court did not make, and could not have made, a distinction in Kilbreath between an **uninsured** motorist claim and an **underinsured** motorist claim, because the Florida Legislature had not yet enacted the statutory language which distinguishes between an **uninsured** and an **underinsured** motorist claim. The time is ripe and right for this Court to revisit the decision in Kilbreath and honor the Legislature's mandate on the separate and distinct treatment to be applied to an **underinsured** motorist claim occurring after October 1, 1982. By enactment of §627.727(6), Fla. Stat. (1987), the Legislature decreed when an **underinsured** motorist claim is **created**, and this Court should give effect to the statutory language in determining when the statute of limitations accrues in an **underinsured** cause of action. The facts in Woodall are compelling, and provide this Court with an exemplary opportunity to clarify the law as it should be applied to the treatment of both an **uninsured** motorist claim and an **underinsured** motorist claim.

D. The Travelers Policy Is Consistent with Sec. 627.727(6), Fla. Stat. (1987):

The plain language of the Travelers insurance policy is consistent with the provisions of §627.727(6), Fla. Stat. (1987), for the treatment of an **underinsured** motorist claim. The "no action/exhaustion clause," provides that no payment will be made until after the limits of liability have been used up under all liability insurance policies, and that no action may be brought against Travelers unless the insured has fully complied with all the

provisions of the policy. The Travelers policy language reflects the statutory scheme mandated by the Legislature in §627.727(6) for the treatment of an **underinsured** motorist claim.

The Woodalls complied with the express language of the Travelers insurance contract. Travelers was not contractually obligated to make payment to the Woodalls until the limits of all liability policies had been used up. Complying with the express language of the "no action/exhaustion clause", the Woodalls sought recovery of the tortfeasor's liability coverage and filed suit against the tortfeasor. The Woodalls did not seek payment from Travelers until the limits under all of the tortfeasor's liability policies had been used up. The "no action/exhaustion clause" in the Travelers contract also provides that no action could be brought against Travelers until the limits under all liability policies had been used up. Complying with the express language of the "no action/exhaustion clause", the Woodalls did not bring an action against Travelers until all liability limits were paid by the tortfeasor's liability coverage. When the Woodalls made demand under their **underinsured** motorist claim which had just come into existence, Travelers denied coverage. After Travelers denied coverage, the Woodalls filed the action sub judice.

The Woodalls also complied with the requirements of §627.727(6), Fla. Stat. (1987). After the Woodalls filed suit against the tortfeasor, the tortfeasor's liability insurer ultimately tendered its full limits of liability coverage. The Woodalls' counsel wrote a letter to Travelers requesting permission to settle with Mr. Stewart for his full liability coverage limits.

Travelers made no objection to the settlement and the Woodalls accepted payment of the liability coverage limits. The Woodalls did not file suit or seek an award from Travelers until the full limits of the liability coverage were exhausted.

Travelers' position is that the Woodalls' cause of action for the **underinsured** motorist claim accrued on the date of the accident under the decision in Kilbreath. Travelers has not considered the effects of §627.727(6), Fla. Stat. (1987), and would have the Court believe that the Woodalls' **underinsured** motorist claim was barred by the statute of limitations prior to the time that the claim was **created.** under §627.727(6), the Woodalls' **underinsured** motorist claim did not exist until the Woodalls agreed to settle their claim with Mr. Stewart and his liability insurer for policy limits and the settlement did not fully satisfy the claim for personal injuries. Travelers' argument is that the Woodalls **underinsured** motorist claim was barred by the statute of limitations approximately ten months before it came into existence, a result clearly not intended by the Legislature or the Kilbreath Court.

E. The Conditions Precedent Rationale Expressed in Kilbreath Does Not Apply Sub Judice:

The First District Court of Appeal, sub judice, described the decision in Kilbreath as follows:

> In Kilbreath, the plaintiff's policy language provided that no action shall lie against the insurer unless, as a condition precedent thereto, there shall have been full compliance with the terms of the policy. The two pertinent conditions precedent therein were (1) an effort to agree amicably on the issue of entitlement and amount of damages, and failing that, (2) arbitration. The court

> held that, while both were conditions precedent to an action against the insurer, neither had any effect on when the cause of action arose. Id. at 634. Sub judice, the Travelers policy contains an additional proviso that payment will be made only after the limits of liability have been used up under all applicable bodily injury liability policies.

Woodall at 2044-2045.

Travelers argued and the trial court agreed, that the "no action/exhaustion clause" creates a condition precedent akin to those reviewed in Kilbreath. In Kilbreath, this Court held that compliance with the conditions precedent in the insurance contract had no affect on when the cause of action arose. Kilbreath at 633. The conditions precedent in Kilbreath were two **contractual remedies against the UM insurer** with which the plaintiff had to comply before he could bring an action against the UM insurer. The first condition precedent was amicable settlement with the UM insurer, and failing that, the second condition precedent was arbitration. Id. These conditions precedent, amicable settlement and arbitration, were matters which the plaintiff could pursue directly with the UM insurer. The plaintiff had the opportunity to exhaust these conditions precedent directly with the UM insurer within the time requirements imposed by the statute of limitations. More importantly, there was nothing in the UM contract which precluded the plaintiff from seeking his **contractual remedies** against the UM insurer.

In the case sub judice, however, the "no action/exhaustion clause" is **not a contractual remedy against Travelers,** but rather, the "no action/exhaustion clause" requires the woodalls to exhaust

a **non-contractual remedy against a third party,** to-wit, the tortfeasor's liability insurer, who was not a party to the Woodalls' UM contract. under the "no action/exhaustion clause", the Woodalls were required to exhaust all liability insurance coverage before they would be entitled either to seek payment from Travelers or to bring an action against Travelers, and, falling short of satisfying these **non-contractual remedies against a third party,** the Woodalls would be **precluded from seeking their contractual remedies against Travelers.** The Woodalls, in an effort to comply with the express requirements of the "no action/exhaustion clause", brought an action against the tortfeasor. The Woodalls possessed no unilateral right to force the tortfeasor's liability insurer to tender full liability limits within the five year time requirements of the statute of limitations. The Woodalls possessed no unilateral right to force the conclusion of litigation with the tortfeasor within the five year time requirements of the statute of limitations. When the tortfeasor's liability insurer ultimately tendered the full limits of liability coverage, the Woodalls sought their contractual remedies against Travelers. Until tender of the tortfeasor's full liability policy limits, under the "no action/exhaustion clause," the woodalls were **precluded from pursuing their remedies against Travelers. Travelers,** having waited out the five year period under the umbrella of its "no action/exhaustion clause," denied coverage on the theory that the statute of limitations had run.

The contract language, sub judice, is materially different from the contract language in Kilbreath. The Kilbreath contract language required the plaintiff to exhaust its remedies against the

UM insurer before bringing an action. The Travelers' "no action/exhaustion clause" required the Woodalls to exhaust its remedies the third party liability insurer who was not a party to the insurance contract. The "no action/exhaustion clause" is not a condition precedent akin to or governed by the decision in Kilbreath.

F. The "No Action/Exhaustion Clause" is Not Void As Against Public Policy:

Travelers argues that its "no action/exhaustion clause" has been void as against public policy since the decision in Liberty Mutual Insurance Co. v. Reyer, 362 So.2d 390 (Fla. 3d DCA 1978). The issue and decision in Reyer was:

> [W]hether, under Florida law for purposes of **uninsured-underinsured** motorist coverage, an insurer may enter into a bona fide contract (policy) provision which requires that the insured must pursue the **uninsured-underinsured** motorist to a judgment or settlement prior to proceeding against its own insurer. In our opinion, the proper answer is no. (Emphasis supplied.)
>
> ....
>
> [W]e believe that public policy, as indicated by the clear expression of legislative intent in Section 627.727, Florida Statutes (1975), prohibits an insurer from legally conditioning its obligation to afford **uninsured-underinsured** motorist coverage upon its insured's first pursuing the third party tortfeasor to a settlement or judgment. (Emphasis supplied.)

Id. at 391-392. The Reyer automobile accident occurred on September 11, 1976. The Court referred to the cause of action as one for **"uninsured-underinsured"** motorist coverage, which clearly shows that the Court made no distinction between an **uninsured** motorist coverage

and **underinsured** motorist coverage. This is readily explained in the Court's opinion by its notation that the Reyer cause of action was governed by 5627.727, Fla. Stat. (1975). This was two years prior to the first enactment of subsection (6) to §627.727, Fla. Stat. (1977), which changed the law upon which the Reyer Court relied. Section 627.727(6), Fla. Stat. (1977), specifically provided that an **uninsured** motorist claim does not arise against an **uninsured** motorist insurer until the injured person agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for personal injuries. Section 627.727(6), Fla. Stat. (1977), also provided that the liability insurer's coverage shall first be exhausted before any award may be entered against the **uninsured** motorist insurer. Five years after the decision in Reyer, the Legislature amended the language of §627.727(6), substituting the term **"underinsured"** for **"uninsured"** throughout subsection (6) to clarify that subsection (6) was to apply only to an **underinsured** motorist claim against an **underinsured** motorist insurer. BY enactment of §627.727(6), Fla. Stat. (1977) and the amendments codified in §627.727(6), Fla. Stat. (1982), the Legislature essentially contravened and obviated the decision in Reyer. The "no action/exhaustion clause" has not been void as against public policy since the enactment of §627.727(6).

G. The "No Action/Exhaustion Clause" Contractually Tolled the Running of the Statute of Limitations:

The First District Court of Appeal, sub judice, stated:

> Arguably, **by its very terms, this clause**

> **effectively provides that the statute of limitations on the Woodalls' claim for UM benefits was not triggered until Travelers became obligated to make payments under the policy and failed to do so, thereby creating a cause of action on the date the contract was breached.** Certainly, it can be argued that while the Woodalls were awaiting the offer of the tortfeasor's policy limits, they also had the option to file an action against Travelers. However, **by the very terms of the Travelers policy, the Woodalls' opportunity to recover UM benefits was obviated until the insurer tendered payment.** (Emphasis supplied.)

Woodall at 2045.

Even without the benefit of §627.727(6), Fla. Stat. (1987), the express language of the "no action/exhaustion clause" must be construed as contractually tolling the running of the statute of limitations for an **underinsured** motorist claim. The "no action/exhaustion clause" provides that no payment will be made by Travelers and that no action may be brought against Travelers until after the full limits of liability have been paid. The "no action/exhaustion clause" specifically addresses an **underinsured** motorist claim, since, by definition, the tortfeasor has no liability insurance coverage in an **uninsured** motorist claim. Travelers contends that an **underinsured** motorist cause of action accrued on the date of the accident, citing Kilbreath as authority. However, the explicit language of the Travelers contract of insurance precluded the Woodalls from bringing a legal action for an **underinsured** motorist claim against travelers at any time prior to payment of the full limits of the tortfeasor's liability insurance.

Travelers has placed itself in an untenable position of

duplicity with respect to the inconsistencies between its legal argument and the express provisions of its insurance contract. Travelers contends that the cause of action accrued on the date of the accident. The "no action/exhaustion clause", however, precluded the Woodalls from seeking recovery from Travelers for the cause of action that Travelers contends has accrued. Travelers then contends that the statute of limitations ran during the time that the "no action/exhaustion clause" precluded the Woodalls from bringing an action against Travelers. There is a simple explanation for the inconsistencies in Travelers' argument: Travelers has failed to distinguish the difference between an **uninsured** motorist claim and an **underinsured** motorist claim. Travelers argument attempts to mix apples and oranges, i.e. to treat an **uninsured** motorist claim in the same manner that it would treat an **underinsured** motorist claim. The "no action/exhaustion clause" expressly provides for the contractual treatment of an **underinsured** motorist claim, not an **uninsured** motorist claim. If the Woodalls claim was an **uninsured** motorist claim, then the "no action/exhaustion clause" would not apply and Travelers' argument that the cause of action accrued on the date of the accident under Kilbreath would be correct. Since the Woodalls' cause of action is for an **underinsured** motorist claim, the "no action/exhaustion clause" must be given its full force and effect. Simply stated, the "no action/exhaustion clause" contractually tolled the running of the statute of limitations.

When the language of an insurance policy is clear and unambiguous, it must be enforced as written:

> Under Florida law, a trial court must

> construe an insurance contract in its entirety, striving to give every provision meaning and effect. (Citation omitted.) To further this goal, the terms contained in an insurance contract must be given their plain, unambiguous and common meaning. (Citation omitted.) Thus, **where contractual language is clear and unambiguous,** there is no need for judicial construction and **the contract must be enforced as written.** (Emphasis supplied.)

Florida Power & Light Company v. Penn America Insurance company, **654** So.2d 276, **277-278** (Fla. 4th DCA 1995).

> Terms in insurance policies, like terms in a statute, should be accorded their plain and unambiguous meaning. (Citation omitted.) Where the plain meaning of terms contained in an exclusion is not ambiguous, there is no occasion for employing the rule of construction against the insurer, and the court simply applies the plain meaning provision.

Old Dominion Insurance Company v. Elysee, Inc., 601 So.2d 1243, 1245 (Fla. 1st DCA 1992).

The "no action/exhaustion clause", which is clear and unambiguous, must be **construed according to its plain meaning and enforced as written.** The language of the policy contractually tolled the statute of limitations until Travelers became obligated to make payment. Until that time, the contract precluded the Woodalls from seeking their **contractual remedies** against Travelers.

Travelers drafted the insurance contract. It was not drafted by the Woodalls. An insurance contract is essentially an adhesion contract in which the insureds have no opportunity to negotiate terms. The insurer drafts the insurance contract and the insureds must, without benefit of negotiation, accept the language as drafted by the insurer. Travelers should be estopped from using its '"no

action/exhaustion clause" language to preclude its insureds from filing an action against Travelers, and after five years has passed, claiming that the statute of limitations has run during the period that its "no action/exhaustion clause" language precluded its insureds from filing an action. This type of duplicity should be estopped and not permitted by this Court.

The Woodalls complied with the plain language of their contract with Travelers. The Woodalls were lulled into a false sense of security by the plain language of the contract drafted by Travelers. They were led to believe that they had no cause of action against Travelers until after a settlement was reached with the liability insurer.

In Newton v. Auto-Owners Insurance Company, 560 So.2d 1310 (Fla. 1st DCA 1990), review denied, 574 So.2d 139, 141 (Fla. 1990), the critical question was whether insurance carriers should be bound by the language of their contracts with their insureds, ox whether they should be afforded certain exemptions afforded by statute. Id. at 1312. In answering this question, the First District Court of Appeal held that the insurance carriers should be bound by the language of their contracts:

> Reasons for holding the insurers to the terms of their agreement include the **rule** that **the terms of a contract should be construed strictly against the party drafting the agreement, and that policy language should be construed liberally in favor of the insured, and strictly against the insurer so as to effect the dominant purpose of payment.** (Citations omitted.) **An additional reason for holding the insurer to the terms of its contract with its insured is that the policyholder pays an additional premium for such coverage, and the carrier pays only if**

> **the tortfeasor would have to pay.** (Emphasis supplied.)

Id. The decision in Newton was approved by this Court in Dauksis v. State Farm Mutual Automobile Insurance Company, 623 So.2d 455, 457 (Fla. 1993), wherein this Court stated:

> **It is well settled that insurance policies should be construed liberally in favor of the insured.** (Citation omitted.) **While insurance companies may not provide less uninsured motorist coverage than required by statute, there is nothing to prevent them from providing broader** coverage. (Emphasis supplied.)

Travelers is bound by the language of its policy as well as by §627.727(6), Fla. Stat. (1987). Section 627.727(6) includes two critical provisions applicable sub iudice: (1) an underinsured motorist claim is created when an **injured person** agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for personal injuries; and (2) the liability insurer's coverage must first be exhausted before any award may be entered against the underinsured motorist insurer. As stated in National Merchandise Co., Inc. v. United Service Automobile Association, 400 So.2d 526, 531 (Fla. 1st DCA 1981):

> **The law in existence at the time of the making of a contract forms a part of that contact, as if it were expressly referred to in its terms.** (Emphasis supplied.)

Under the "no action/exhaustion clause" the Woodalls did not have any ascertainable claim against Travelers until after the limits of liability had been used up under the bodily injury liability policy. The policy language is clear and unambiguous, and

should be strictly construed against Travelers, the drafter of the insurance contract. The policy language should be construed liberally in favor of the Woodalls so as to effect the dominant purpose of the insurance policy, that of providing payment. This Court should find that the "no action/exhaustion clause" contractually tolled the running of the statute of limitations.

ISSUE II: WHETHER, A CAUSE OF ACTION FOR AN UNDERINSURED MOTORIST CLAIM AGAINST AN UNDERINSURED MOTORIST INSURER ACCRUES:

(1) ON THE DATE WHEN AN UNDERINSURED MOTORIST CLAIM IS CREATED AGAINST THE UNDERINSURED MOTORIST INSURER UNDER THE EXPRESS LANGUAGE OF SECTION 627.727(6); OR

(2) ON THE DATE THAT THE UNDERINSURED MOTORIST CONTRACT IS BREACHED?

The Woodalls and Travelers are in agreement that §95.11(2)(b), Florida Statues, providing for a five-year statute of limitations for actions based on contract, is the applicable statute of limitations to be applied in this cause of action. Hartford Accident & Indemnity Company v. Mason, 210 So.2d 474 (Fla. 3d DCA 1968); Burnett v. Fireman's Fund Insurance Company, 408 So.2d 838 (Fla. 2d DCA 1982), Pet for rev. den. 419 So.2d 1197 (Fla. 1982); Bolin v. Massachusetts Bay Insurance Company, 518 So.2d 393, 395 (Fla. 2nd DCA 1988).

The specific issue for consideration sub judice is when a cause of action **accrues** for an **underinsured** motorist claim. Kilbreath held that an **"uninsured-underinsured"** motorist claim accrues on the date of the accident, but the controlling statute in Kilbreath was §627.727, Fla. Stat. (1972), which was silent as to the time of creation of either an **uninsured** or an **underinsured** motorist claim. Subsection (6) to 5627.727 was enacted as a part of Chapter 77-468, Section 30, Laws of Florida (1977), mandating the time of creation of an **uninsured** motorist claim, but did not distinguish between an **uninsured** and an **underinsured** motorist

claim. Five years later, however, the Legislature further amended §627.727(6) to provide a specific statutory scheme for the treatment of an **underinsured** motorist claim. Chapter 82-243, Section 544, Laws of Florida (1982).

under §627.727(6), Fla. Stat. (1982), an **underinsured** motorist claim against an **underinsured** motorist insurer is **created** when the injured person agrees to settle a claim with the liability insurer for the limits of liability and such settlement would not fully satisfy the claim for personal injuries. By the amended language in Chapter 82-243, Section 544, Laws of Florida (1982), the Legislature mandated a very specific treatment for an **underinsured** motorist claim and decreed the time that an **underinsured** motorist claim comes into existence.

Reason would dictate that there are two possible times that the Woodalls' **underinsured** motorist claim could **accrue** under Florida law. First, it is certainly arguable that the **underinsured** motorist claim **accrued** on the date it was **created** under §627.727(6), Fla. Stat. (1987). Second, it is arguable that the **underinsured** motorist claim **accrued** on the date that the **underinsured** motorist insurance contract was breached, which is more in accord with traditional contract law.

In Lumbermens Mutual Casualty Co. v, August, 530 So.2d 293, 295 (Fla. 1988), this Court stated:

> Although we recognize that an action to recover uninsured motorist benefits is not strictly an action dealing with contract, but also involves some aspects of a tort action, we agree with the conclusion of the Second District Court in Burnett v. Fireman's Fund Ins. Co., 408 So.2d 838 (Fla. 2d DCA 1982),

> review denied, 419 So.2d 1197 (Fla. 1982), that the rights and obligations of the parties under an insurance policy are governed by contract law since they arose out of an insurance contract. (Citation omitted.) That the insured stands in a tort relationship does not change the fact that an action by the insured against the insurer arises out of an insurance contract between the parties.

This Court's statement in Lumbermens Mutual would indicate that contract law should be the more favored view for a determination of the time that a cause of action **accrues** for an **underinsured** motorist claim.

Under the Supreme Court's reasoning in its recent decision in State Farm Mutual Automobile Insurance Company v. Lee, 21 Fla. L. Weekly S335 (Fla. August 22, 1996), it would appear that a cause of action for an **underinsured** motorist claim against an **underinsured** motorist insurer accrues on the date that the **underinsured** motorist insurer breaches its obligation to pay rather than on the date that the **underinsured** motorist claim is created.

In Lee, this Court held that a cause of action based on an insurer's failure to pay personal injury protection (PIP) benefits begins to run when the insurer breaches its obligation to pay. The decision was based in part upon §627.736(4)(c), Fla. Stat. (1995):

> In determining when the insurance contract at bar as breached, when an action could have been brought, and thus, when the statute of limitations began to run, the statutory provision is also relevant. Section 627.736(4)(c), Florida Statutes (1995), provides in part: "Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same." Pursuant to this

> statute, State Farm had no contractual obligation to pay PIP benefits until thirty days after receipt of respondents' PIP claim. However, once the thirty days elapsed and no benefits were paid on the claim, assuming they were properly due, State Farm had effectively breached their contract with respondents. At the time of the accident, and before any PIP payments were due, respondents could not have brought an action against State Farm for PIP benefits and thus the statute of limitations did not begin to run. It was only on the denial of the actual PIP claim that the limitations period began running.

Id. at S336.

under the case sub judice, by enactment of §627.727(6), Fla. Stat. (1987), the Legislature mandated that an **underinsured** motorist claim is created when the injured person agrees to settle a claim with the liability insurer and its insured for the limits of liability and such settlement would not fully satisfy the claim for personal injuries. In other words, this is the date upon which an **underinsured** motorist claim first comes into **existence**. Section 627.727(6) goes on to provide that the settlement agreement shall be submitted in writing to the **underinsured** motorist insurer . . .

> which shall have a **period of 30 days** from receipt thereof **in which to** agree to **arbitrate the underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not** agree **within 30 days to arbitrate the underinsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person** or, in the case of death, the personal representative **may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve**

their respective liabilities far any damages to be awarded . . . (Emphasis supplied.)

It is axiomatic that an **underinsured** motorist insurer has no obligation to pay an **underinsured** motorist claim prior to the time that it is determined that an **underinsured** motorist claim has arisen. **Underinsured** status arises when there is liability insurance coverage, and that liability coverage will not fully satisfy the claim for personal injuries, as statutorily decreed in §627.727(6). Once **underinsured** status arises by submission of the settlement agreement in writing to the **underinsured** motorist insurer, the **underinsured** motorist insurer has 30 days in which to agree to arbitrate the **underinsured** motorist claim and approve the settlement, waive its subrogation rights authorize the execution of a full release. If the **underinsured** motorist insurer does not agree within **30** days, then the injured person may file suit against the **underinsured** motorist insurer and the tortfeasor.

Under the facts sub judice, the Woodalls submitted the settlement agreement in writing to Travelers. After the tender and payment of the liability policy limits, the Woodalls turned to Travelers seeking the benefits provided by their **underinsured** motorist coverage. Travelers denied coverage, contending that the statute of limitations had run. The settlement obviated any need to file an action against the tortfeasor, and the Woodalls proceeded by filing this action against Travelers.

There is a parallel between Lee and Woodall. In both Lee and Woodall, there is a definitive statutory time under which an obligation to make payment can be said to arise. In Lee, the

statute specifically provides that a payment shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact and amount of a covered loss. In Woodall, the statute specifically provides that once the claim is **created** by written notice of the settlement to the insurer, the insurer has 30 days within which to agree to arbitrate the **underinsured** motorist claim, approve the settlement, waive its subrogation rights and authorize the execution of a full release, and failing that, the **underinsured** claimant may file suit against the insurer. While §627.727(6) does not address payment directly, it can be readily **inferred that payment is not due** prior to the time that an **underinsured** motorist claim is **created** or arises. More importantly, the "no action/exhaustion clause" provides that **no payment will be made by Travelers** until after the limits of liability have been used up under all liability policies. It is apparent that **Travelers had no obligation to pay,** pursuant to the statute or the policy, until after the **underinsured** motorist claim was **created.** under the statute, the obligation to make payment could not arise until 30 days after submission of the settlement agreement. under the policy, the obligation did not arise until after payment of the liability insurance coverage.

This Court stated in Lee at S336:

> Section 95.11(2)(b), Florida Statutes (1995), provides that a "legal or action on a contract obligation, or liability founded on a written instrument" should be commenced within five years. The intent of section 95.11(2)(b) is to limit the commencement of actions from the time of their accrual. Cf. walker v. Beech Aircraft Corp., 320 So.2d 418 (Fla. 3d DCA 1975) (applying same intent to

> statute of limitations for wrongful death actions), cert. dismissed, 338 So.2d 843 (Fla. 1976). However, **a cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought.** Loewer v. New York Life Ins. Co., 773 F. Supp. 1518, 1521 (M.D. Fla. 1991). **Generally, a cause of action on a contract accrues from the time of the breach of contract.** Fradley, 187 So.2d at 49. (Emphasis supplied.)

There is a sufficient parallel between Lee and Woodall to support this Court's determination that a cause of action for an **underinsured** motorist claim accrues on the date that the **underinsured** motorist contract is breached, rather than on the date that the **underinsured** motorist claim is **created.**

The Woodalls had **no ascertainable claim** until the requirements of both the policy and §627.727(6) had been satisfied. The specific act which created the cause of action was Travelers' breach of contract by denial of coverage. The Woodalls' claim against Travelers exists solely by reason of the coverage provided by the policy, without which there could be no conceivable basis for recovery against Travelers. **underinsured** motorist benefits are not an immediately ascertainable right. Mr. Woodalls' claim for these benefits became operative only after he had established his **underinsured status** under §627.727(6) which triggered a legal entitlement to recover damages against Travelers. The personal injuries suffered by Mr. Woodall were not only the basis for his cause of action, but also the **measuring stick to determine whether or not** Mr. **Woodall had a cause of action.** Until it could be ascertained that Mr. Woodall had a cause of action by establishment of his **underinsured status** under §627.727(6), it could not be

determined that a cause of action had accrued.

Whether this Court determines that the Woodalls' underinsured motorist cause of action accrued on the date it was created under §627.727(6), Fla. Stat. (1987), or in the alternative, on the date that Travelers breached the contract, the five-year statute of limitations has not run on the Woodalls' cause of action.

CONCLUSION

The certified question should be answered in the negative. The facts in Woodall are compelling, and provide this Court with an opportunity to clarify the law as it should be applied to the treatment of **both** an **uninsured** motorist claim and an **underinsured** motorist claim.

At the time of the Kilbreath decision, §627.727(6), Fla. Stat. (1982), was not yet the law of Florida. In light of the Legislature's mandate, this Court should revisit Kilbreath to distinguish between an **uninsured** motorist claim and an **underinsured** motorist claim, and find that the Woodalls' underinsured motorist claim could not have accrued before it was created by statute. The Court should further find that the "no action/exhaustion clause" contractually tolled the running of the statute of limitations and that the Woodalls' underinsured motorist claim could not have accrued before Travelers became obligated to make payment. The Court should further find that the Woodalls cause of action accrued either when it was created under the statute, or in the alternative, when Travelers breached the contract.

The decision of both the trial court and the First District Court of Appeal should be reversed, and the cause remanded to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY **CERTIFY** that a true and correct copy of the foregoing has been furnished by U. S. Mail to DEBORAH C. DRYLIE, ESQUIRE, Post Office Box 1526, Gainesville, Florida, 32602, attorney for Respondent; SUSAN J. SILVERMAN, ESQUIRE, 1800 Second Street, Suite 819, Sarasota, Florida 34236; RHONDA B. BOGGESS, ESQUIRE, Barnett Centex, Suite 3500, 50 North Laura Street, Jacksonville, Florida 32202; and ROBERT J. DENSON, ESQUIRE, Santa Fe Community College, Office of the President, 3000 N.W. 83rd Street, Gainesville, FL 32606-6200, this 22nd day of November, 1996.

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