SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

RITA STROCHAK, Petitioner, v. FEDERAL INSURANCE COMPANY, a foreign corporation, and KEEVILY, SPERO-WHITELAW, INC., Respondents.	)	CASE NO. 90,298

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

ANSWER BRIEF OF RESPONDENT, FEDERAL INSURANCE COMPANY

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WHETHER AN EXCESS CARRIER HAS A DUTY TO MAKE AVAILABLE THE UNINSURED MOTORISTS COVERAGE REQUIRED BY FLORIDA STATUTE §627.727(2) TO AN INSURED UNDER AN EXISTING POLICY ON VEHICLES WHICH HAD NEVER BEEN REGISTERED OR PRINCIPALLY GARAGED IN FLORIDA WHENEVER ANY VEHICLE, COVERED OR SUBSEQUENTLY ADDED, FIRST BECOMES REGISTERED OR PRINCIPALLY GARAGED IN FLORIDA?

STATEMENT OF THE CASE

Rita STROCHAK appeals an adverse summary judgment in this action for excess uninsured motorist ("UM") coverage. This action for declaratory judgment arises out of an automobile accident which occurred on November 14, 1992, in Broward County, Florida. (R.1-1-9). Ms. STROCHAK alleged that the negligence of a phantom vehicle caused an accident which resulted in serious injury to her. (R.1-1-9). At the time of the accident, Ms. STROCHAK was the named insured under FEDERAL INSURANCE COMPANY (hereinafter referred to as "FEDERAL") Masterpiece personal excess liability policy number 1051832901-01 (hereinafter referred to as "the excess policy"). The excess policy, as continually renewed through the date of the accident, provides bodily injury liability coverage with limits of $5,000,000.00. (R. 2-78-77).[1] It is undisputed that the policy by its terms does not provide excess UM coverage. (R. 2-78-53, 54, 77, 78). Nevertheless, Ms. STROCHAK claims that by virtue of Florida Statutes section 627.727(2), the policy is deemed by operation of law to provide excess UM benefits in the amount of $5,000,000.00. (R. 1-24).

FEDERAL filed a motion for summary judgment, seeking a determination as a matter of law that (1) New Jersey law controls this case; or (2) that FEDERAL complied with Florida law in renewing the policy without excess UM coverage. (R. 2-78; 2-79). Ms. STROCHAK also moved for summary judgment, seeking a

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[1/] The original 1985 policy is located at page 2-78-53 of the record on appeal. The 1992 renewal of the policy is located at page 2-78-77 of the record.

determination that Florida law applies in this case, and arguing that the policy provides $5,000,000.00 in excess UM coverage as a result of Florida Statutes section 627.727(2). (R. 3-91).

On December 23, 1994, the trial court entered its order denying STROCHAK's Motion for Summary Judgment, and granting FEDERAL's Motion for Summary Judgment. (R. 3-93). The trial court assumed, without deciding, that Florida law applied in this case, and held that FEDERAL complied with Florida Statutes section 627.727(2) in renewing the policy without excess UM coverage. (R. 3-93). The trial court therefore concluded that FEDERAL's policy should be applied according to its terms, without excess UM coverage. (R. 3-93).

Due to the pendency of Ms. STROCHAK's claim against the agent, FEDERAL filed a motion for entry of final summary judgment, and for certification of finality. (R. 3-102). The trial court granted this motion, and entered final judgment in favor of FEDERAL on May 11, 1995. (R. 3-105). On June 8, 1995, Ms. STROCHAK filed her notice of appeal to the Eleventh Circuit. (R. 3-106).

On appeal, the Eleventh Circuit certified the following question to this court:

> Whether an excess carrier has a duty to make available the uninsured motorists coverage required by Florida Statute §627.727(2) to an insured under an existing policy on vehicles which had never been registered or principally garaged in Florida whenever any vehicle, covered or subsequently added, first becomes registered or principally garaged in Florida?

(P.A.5).[2]

The Eleventh Circuit decided that Florida law would apply to this case, but expressly noted that this choice of law issue can also be decided by this court. (P.A.4.). The Eleventh Circuit expressly stated that its phrasing of the certified question was not intended to limit this court's inquiry, and ordered the entire record and briefing to be transmitted to this court. (P.A.5).

STATEMENT OF THE FACTS

There is no question that the policy by its terms does not provide excess UM coverage. (R. 2-51). The only basis for Ms. STROCHAK's claim for UM benefits is her assertion that Florida Statutes section 627.727(2)[3] mandates such coverage by operation of law. Ms. STROCHAK does not dispute that the initial issuance of the policy in 1985 without excess UM coverage was proper. The sole basis for her contention that the policy's failure to provide UM coverage is in violation of the statute is the assertion that such coverage should have been "made available" at the time of a subsequent renewal. Thus, this court must determine whether the trial court was correct in its finding that FEDERAL complied with Florida Statutes section 627.727(2) in renewing the policy without excess UM coverage.

[2/] References to the Appendix to Ms. STROCHAK's Initial Brief filed with this court will be referred to as "P.A." (for Plaintiff's Appendix) followed by the appropriate page number.

[3/] There is no question that this policy is an excess policy, which, assuming that Florida law applies, is subject only to subsection (2) of the UM statute and not the subsection (1) of that statute.

This court must also determine whether Florida or New Jersey law applies to control the parties' rights and obligations under this insurance policy. It is undisputed that if New Jersey law applies, the summary judgment in favor of FEDERAL was proper because New Jersey law does not mandate excess uninsured motorists coverage under any circumstances.

Because this case is rather fact-intensive, it is most logical to address first the facts relating to the history of the insurance policy and then the facts relating to the choice of law analysis.

FACTS RELATING TO POLICY HISTORY

The policy at issue in this case was initially issued to Rita STROCHAK's deceased husband, Donald STROCHAK, in 1985. Rita STROCHAK was married to Donald STROCHAK until October 24, 1987, when he died. (R. 3-80- Deposition of Rita STROCHAK, page 14 lines 14-20).[4] Donald STROCHAK was first insured for excess liability with FEDERAL in 1981. A true and accurate copy of the 1981 policy is located at R. 2-78-14. In 1985, Donald STROCHAK submitted to FEDERAL another application for excess coverage. (R. 3-80-Deposition of William Kaufman, May 6, 1994, page 5-6 and Exhibit H thereto). This second application was required because Mr. STROCHAK wanted to increase his excess liability limits from $2,000,000.00 to $5,000,000.00. (R. 3-80-Deposition of Kaufman,

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[4/] FEDERAL filed several depositions with the lower court in this case under the same Notice of Filing. This Notice of Filing, along with all the attached depositions, is located at docket number 80 of volume 2 of the Record on Appeal. For clarity herein, references to the depositions located at that docket number will be made by referring to the docket number, the deponent, and the deposition page and line.

page 22, lines 15-23; page 38, line 6 - page 40 line 15). The application was submitted to FEDERAL, and in response FEDERAL issued personal excess liability policy number 1051832901-01. (R. 3-80-Deposition of Kaufman, page 25, lines 16-20; page 107, line 22 - page 108 line 21).[5] This policy is referred to as "the policy" or "the STROCHAK policy." The policy is located at page 2-78-53 of the record.

Significantly, in conjunction with the issuance of the policy, Donald Strochak signed a rejection of excess UM coverage, in which he elected not to obtain any UM coverage under the policy. R.3-80-Deposition of Kaufman, Exhibit H). There is no dispute that this rejection was proper and valid.

For the 1989-1990 renewals, FEDERAL made some marketing changes, which included renaming several of its policies "Masterpiece."[6] (R. 3-80-Deposition of Harris, pages 48 - 51). The purpose of the Masterpiece program was to make the policies easier to read and to provide the same or broader coverage. (R. 3-80-Deposition of Harris, page 49, lines 20-25; page 71, lines 3-4). Any policies existing at the time that the Masterpiece program was

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[5/] RITA STROCHAK was an additional insured under the 1985 policy as Donald's spouse. (R. 3-80-Deposition of STROCHAK, page 14 lines 14-20) (R. 3-80-Deposition of Patricia Harris, page 107, lines 18-19). On March 1, 1990, the policy was changed to reflect Mrs. STROCHAK as the named insured.(R. 3-80-Deposition of Harris, page 108, lines 4-10); (R. 3-80-Deposition of Kaufman, page 36, lines 12-19).

[6/] Contrary to Ms. STROCHAK's assertion, FEDERAL did not stop using applications. Applications continued to be taken for any new policies. No application was required when an existing policy renewed under the Masterpiece name because it was not a new policy.

introduced were renewed into policies called "Masterpiece" upon the next renewal. (R. 3-80-Deposition of Harris, page 48, lines 20-23). Because the Masterpiece policy was simply a renewal of an existing policy, no new application was required or taken when existing policies were renamed "Masterpiece." (R. 3-80-Deposition of Harris, page 15, line 24 - page 16, line 2; page 39, lines 16-20; page 59, lines 20-25, page 51, lines 1-5; page 51, lines 16-18; page 52, lines 21-24; page 53, lines 22-25; page 168, lines 20-25). Ms. STROCHAK admitted that she never filled out an application for an excess policy after the 1985 application by Donald STROCHAK. (R. 3-80-Deposition of STROCHAK, page 100, lines 17-24).

When a policy was renewed under the Masterpiece name, the named insured received a letter explaining the new name of the policies. (R. 3-80-Deposition of Harris, page 16, lines 1-2; page 105, lines 12-19; page 159, line 18 - page 160, line 15). Significantly, this letter also explained the availability of optional excess UM coverage. (R. 3-80-Deposition of Harris, page 105, lines 12-19). Rita STROCHAK received this Notice of Uninsured Motorists Options with her June 17, 1989 renewal. (R. 3-80-Deposition of Harris, page 70, lines 20-25; page 106, lines 2-3). Furthermore, Ms. STROCHAK also admitted that she was aware at least since the time that she purchased the car rental businesses in 1992 of the purpose and nature of UM coverage. (R. 3-80-Deposition of STROCHAK, page 128).

FACTS RELATING TO CHOICE OF LAW[7]

In addition to the above facts relating to the history of the insurance policy at issue in this case, it is necessary to correct and clarify certain facts relating to Ms. STROCHAK's New Jersey contacts. The policy when first issued insured two residences: one in New Jersey and a Del Ray Beach vacation home in Florida. It also insured three vehicles, all of which were registered and garaged in New Jersey. (R. 3-80-Deposition of Kaufman, page 22, line 24 - page 23, line 8).

Where the named insured has two addresses, Federal allows the insured to designate which address is the "primary" residence. (R. 3-80-Deposition of Harris, page 118, line 24 - page 119, line 3; page 188, line 24 - page 119, line 3). The primary residence is the address listed first on the coverage summary. (R. 3-80-Deposition of Harris, page 118 line 20 - page 119, line 3). The New Jersey residence is listed first on each renewal of the policy. (P.A. 20; 42).

Both at the time of the issuance of the initial 1981 excess policy and at the time of the 1985 application for the personal excess policy, Donald STROCHAK informed FEDERAL that the STROCHAKs resided in New Jersey. (R. 3-80-Deposition of Kaufman, page 16, lines 3-8; page 22, line 24 - page 23, line 8; see Exhibit H to Harris deposition (1985 application)). Ms. STROCHAK never changed

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[7] Although the proper test for choice of law in this case is the lex loci test, these record facts relating to dominant contacts are provided in the event that the court finds a dominant contacts analysis relevant.

this designation of primary residence. In fact, in each coverage summary provided to Ms. STROCHAK with each renewal, the New Jersey residence has at all times been listed first as the primary residence. (R. 3-80-Deposition of STROCHAK, page 18, lines 20-25; R.3-80- Deposition of Kaufman, page 82, line 10, lines 14-18). The policy was at all times a New Jersey policy under FEDERAL's rules and guidelines. (R. 3-80-Deposition of Harris, page 67, lines 9-10, lines 16-18; page 82, lines 21-22; page 151, lines 4-12); (R. 3-80-Deposition of Kaufman, page 112 line 16 - page 113 line 3).

The primary residence controls premium rating for excess policies. (R. 3-80-Deposition of Harris, page 119, lines 15-17; page 153, lines 11-13) (R. 3-80-Deposition of Kaufman, page 113, lines 18-21). The premium for the STROCHAK excess policy was therefore rated off of New Jersey rating guidelines. (R. 3-80-Deposition of Harris, page 119, lines 15-17; page 153, lines 11-13) (R. 3-80-Deposition of Kaufman, page 113, lines 18-21).

Furthermore, all aspects of the insurance contract, with the sole exception of a part of the policy called "Policy Terms," are controlled by the state of primary residence. (R. 3-80-Deposition of Harris, page 83, lines 14-18) (R. 3-80-Deposition of Kaufman, page 113, lines 18-21). The "Policy Terms" section of the excess policy, in contrast, is controlled by the named insured's mailing address. (R. 3-80-Deposition of Harris, page 122, lines 6-10).

In this case, three sections of the policy are identified: the "Introduction," the "Policy Terms," and the "Excess Liability Coverage." The policy specifically states that the "Excess

Liability Coverage" section is controlled by New Jersey. (P.A. 26; 43). The terms and conditions of the policy relating to vehicle coverage, including UM coverage, are located in the "Excess Liability Coverage" section and not the "Policy Terms" section. (P.A. 29); (R. 3-80-Deposition of Harris, page 117, lines 11-19; page 122, lines 6-10; see Exhibit "A"). Thus, the UM coverage is a New Jersey provision. (P.A. 26; 29; 43).

No part of the excess policy is based on vehicle location. This is because automobile coverage for the policy is worldwide, and is not affected by garage location. (R. 3-80-Deposition of Harris, page 85, line 24 - page 86, line 5; page 90, lines 3-10). FEDERAL therefore does not require or rely on garage location in issuing or rating excess policies. (R. 3-80-Deposition of Harris, page 98, lines 1-6; page 110, line 7 - page 111, line 2).

Significantly, the producer of this policy, William Kaufman of KEEVILY, SPERO-WHITELAW, is not even authorized or licensed to solicit or offer Florida UM coverage. (R. 3-80-Deposition of Kaufman, page 42, lines 18-19).

At the time of the 1985 application, three vehicles were covered by the policy. All three vehicles listed on the policy were registered and garaged in New Jersey. (R. 3-80-Deposition of Kaufman, page 22, line 24 - page 23, line 8). One of these was a 1984 Lincoln Continental. Ms. STROCHAK's own deposition, as well as the other record evidence in the case, establishes that this is the very same 1984 Continental which was listed on the policy at the time of the 1992 renewal. (R. 3-80-Deposition of STROCHAK,

page 14, line 3 - page 16 line 22; page 20, line 18 - page 21, line 3; page 107, line 10 - page 109, line 7; page 112, line 20 - page 113, line 2); (R. 3-80, Deposition of Frankel, page 13, lines 16-23; page 21, line 7 - page 24, line 13). Although Ms. STROCHAK disputes this fact, the Eleventh Circuit agreed with Federal's statement that the vehicle involved in the accident was one of the vehicles listed at the time of the 1992 renewal. (P.A. 2).

At the time of the application for this policy in 1985, the 1984 Continental was owned by Donald STROCHAK's business, Turnpike Ford. (R. 3-80, Deposition of Frankel, page 13, lines 16-23). Sometime after Donald STROCHAK died, Turnpike Ford sold the vehicle to Ms. STROCHAK as part of a settlement of his estate. (R. 3-80, Deposition of Frankel, page 13, lines 16-23). Therefore, while the 1984 Lincoln did have a titleholder change after Donald's death, the record establishes that it is the same vehicle which was listed on the policy at the time of the accident. This is a significant fact which is misstated by Ms. STROCHAK through her Brief. She relies heavily in her argument on the mistaken assertion that the 1984 Lincoln was a new vehicle added to the policy in 1990.[8]

At the time of the 1985 application for the excess policy, all vehicles insured under the policy, including the 1984 Continental, were registered and garaged in New Jersey. (R. 3-80- Deposition of Kaufman, page 22, line 24 - page 23, line 8.) Ms. STROCHAK testified that she took the Continental to Florida in October 1988

[8/] Ms. STROCHAK apparently confuses the excess policy at issue in this case with the primary policy.

so that she could use it while she stayed at her Del Ray Beach vacation home in Florida for the winter. (R. 3-80 Deposition of STROCHAK page 16, line 2 - page 2, line 22). Although there is some discrepancy concerning when it occurred,[9] the record is clear that Ms. STROCHAK took the car back to New Jersey prior to the accident. (R. 3-80 Deposition of STROCHAK page 16, line 2 - page 2, line 22). It is further undisputed that by the time this accident occurred, the Continental was again principally garaged in New Jersey and had been for some time. (R. 3-80-Deposition of STROCHAK, page 16, lines 11-22; page 45, line 16-18); see also Exhibit H to Harris deposition, R. 3-80 (1985 application); (R. 3-80-Deposition of Frankel, page 28, line 22, page 29, line 1).

On August 29, 1991, Ms. STROCHAK registered the Continental in Florida. (R. 2-78-88). Significantly, however, Ms. STROCHAK allowed the Florida registration to lapse on September 8, 1992, before the accident, and never re-registered the Continental in Florida. (R. 2-78-88). Thus, at the time of the accident, the vehicle was garaged in New Jersey and was not registered in Florida.

Ms. STROCHAK never asked her insurance producer, KEEVILY SPERO-WHITELAW, or FEDERAL to change her primary address to

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[9/] Ms. STROCHAK testified that she took the Continental back to New Jersey in 1988 when she started the New Jersey businesses with her son. (R. 3-80 Deposition of STROCHAK page 16, line 2 - page 2, line 22). Ms. FRANKEL testified that his mother took the car back and forth between Florida and New Jersey, but testified that it was continuously located in New Jersey at least from August 1992 until the time of the accident. (R. 3-80-Deposition of Frankel, page 27, line 16 - page 29, line 1).

Florida. (R. 3-80-Deposition of STROCHAK, page 18, lines 20-25; page 30, lines 16-20) (R. 3-80-Deposition of Kaufman, page 82, line 10, lines 14-18; page 113 line 22 - page 114, line 9) (R. 3-80-Deposition of Harris, page 121, line 24 - page 122, line 1). She changed only her mailing address to Florida. Even her mailing address was changed back to New Jersey before the accident occurred. (R. 3-80-Deposition of STROCHAK, page 74, line 17 - page 75, line 2) (R. 3-80-Deposition of Frankel, page 7, line 21 - page 8, line 19; page 10, lines 8-14). At all times Ms. STROCHAK maintained clothes, furniture, and personal possessions at her residence in New Jersey, and returned regularly to New Jersey, spending only winters in Florida. (R. 3-80-Deposition of STROCHAK, page 42, line 18 - page 43, line 11) (R. 3-80-Deposition of Frankel, page 46, line 16 - page 47, line 15).

In fact, Ms. STROCHAK'S son, Ed Frankel, testified that she resided in New Jersey from at least April 1992 through the time of the accident. (R. 3-80-Deposition of Frankel, page 48, lines 5-8). KEEVILY, SPERO-WHITELAW records show that they contacted her in New Jersey in May and July of 1992. (R. 3-80-Deposition of Kaufman, page 110, lines 3-9; page 110, line 17 - page 111, line 14).

Ms. STROCHAK has never had a Florida Driver's license. (R. 3-80-Deposition of STROCHAK, page 13, lines 4-6). Although she temporarily changed her mailing address to Florida, Ms. STROCHAK never received any insurance information at her Del Ray Beach vacation home, and kept all insurance records in New Jersey at all times from Donald's death through the date of her accident. In her

own words, this was because she spent a majority of her time in New Jersey. (R. 3-80-Deposition of STROCHAK, page 25, lines 20-25; page 35, lines 20-24). She paid insurance premiums through New Jersey bank accounts. (R. 3-80-Deposition of STROCHAK, page 98, lines 7-11) (R. 3-80-Deposition of Frankel, page 16, line 17 - page 17, line 1). She received a salary from and was president of a New Jersey corporation, GWB. (R. 3-80-Deposition of STROCHAK, page 51, lines 14-19). The STROCHAKs never claimed a homestead exemption for their Del Ray Beach vacation home. (R. 3-80-Deposition of STROCHAK, page 42, lines 2-4).

In 1992, Ms. STROCHAK purchased two car rental businesses in New Jersey. (R. 3-80-Deposition of STROCHAK, page 28, lines 22-25; page 29, line 23 - page 30, line 7; page 44, lines 4-6, lines 22-24). Ms. STROCHAK testified that she planned for she and her son, Ed Frankel, to manage the businesses, and planned to remain in New Jersey for that purpose. (R. 3-80-Deposition of STROCHAK, page 28, lines 22-25; page 29, line 23 - page 30, line 7; page 44, lines 4-6, lines 22-24). At that time, Ms. STROCHAK asked Mr. Frankel to ensure that all relevant entities, including FEDERAL, were made aware that her mailing address had changed back to New Jersey. (R. 3-80-Deposition of STROCHAK, page 74, line 17 - page 75, line 2) (R. 3-80-Deposition of Frankel, page 7, line 21 - page 8, line 19; page 10, lines 8-14). The mailing address for the excess policy was changed back to New Jersey effective June 17, 1992. (R.3-80-Deposition of Harris, page 146, lines 8-10; Exhibit 1 to STROCHAK deposition). Thus, at the time of the accident, Ms. STROCHAK's

primary address on the policy was New Jersey, and she had instructed FEDERAL that her mailing address was New Jersey.

Ms. STROCHAK admitted that at the time of the accident she had been spending a majority of her time in New Jersey, and was in Florida only for a few days and only to attend an uncle's funeral. (R. 3-80-Deposition of STROCHAK, page 47, lines 1-5) (R. 3-80-Deposition of Frankel, page 60, lines 10-22). In fact, during that visit to Florida, Ms. STROCHAK stayed with her daughter, and not in her vacation home in Del Ray Beach. (R. 3-80-Deposition of STROCHAK, page 102, lines 1-2).

SUMMARY OF THE ARGUMENT

The trial court below properly entered summary judgment in favor of FEDERAL, and the certified question should be answered in the negative. Even if Florida law applies, FEDERAL complied with all requirements of Florida law in renewing the policy without excess UM coverage. This policy is an excess policy which is not subject to subsection (1) of the UM statute, and is instead required only to comply with the limited requirements imposed in subsection (2). It is clear that an excess carrier's only obligation is to "make available" excess UM coverage, and that this obligation need only be fulfilled at the time of policy application, unless the named insured thereafter requests excess UM coverage in writing.

There is no question that Donald STROCHAK executed a valid written rejection of excess UM coverage under this policy at the time of application, in 1985. There is likewise no question that FEDERAL sent Ms. STROCHAK a notice of her UM options at the time of her June 1989 renewal. Finally, there is no question that neither Mr. nor Ms. STROCHAK ever requested that excess UM coverage be added to the policy, in writing or otherwise. However, after sustaining injuries at the hands of a phantom vehicle, Ms. STROCHAK has now decided that her policy should provide excess UM coverage.

In light of the undisputed 1985 written rejection of excess UM coverage, and the undisputed 1989 notice of UM options, Ms. STROCHAK's only recourse in this case is to argue that this rejection and notice are somehow no longer valid. Her only grounds

for such an argument is to assert that a new policy was subsequently created which required a new "application," thereby giving rise to an obligation on the part of FEDERAL to again "make available" excess UM coverage.

The event which Ms. STROCHAK contends was sufficient to terminate the policy, create a new policy, terminate the prior rejection, and require a new compliance with subsection (2) was the 1990 registration of her Lincoln Continental in Florida. However, the addition of a Florida vehicle is simply not one of the events expressly listed in subsection (2) of the statute as being sufficient to renew an excess carrier's UM obligations. To hold otherwise would require this court to improperly rewrite the statute. The statute is clear. Most respectfully, this court simply does not have the authority to rewrite the statute to add new conditions and requirements not imposed by the legislature.

In order to answer the Eleventh Circuit's certified question, this court need only review the text of that question and the text of Florida Statutes section 627.727(2). It is clear from the plain language of the statute that no duty is imposed on excess carriers under an "existing policy" unless the insured requests the coverage. It is equally clear that the duties imposed upon excess carriers under subsection (2) do not depend in any fashion on the registration or garage location of a motor vehicle.

Furthermore, the record is clear in this case that at the time of the accident, the vehicle was garaged in New Jersey and was not

registered in Florida. Thus, factually, this case does not even present the alleged grounds for invoking Florida public policy.

Alternatively, the summary judgment in favor of FEDERAL must be affirmed because this action is controlled by New Jersey law. Florida follows the lex loci test for choice of law in automobile insurance cases, and this policy was issued and delivered in the state of New Jersey. It is undisputed that New Jersey law has no compelled excess UM coverage.

Either because New Jersey law applies or because FEDERAL properly renewed the policy without excess UM coverage even under Florida law, the trial court properly entered summary judgment in favor of FEDERAL finding as a matter of law that Rita STROCHAK is not afforded excess UM benefits under the policy in question.

ARGUMENT

I. EVEN IF FLORIDA LAW APPLIES IN THIS CASE, AN EXCESS CARRIER DOES NOT HAVE A DUTY TO MAKE AVAILABLE THE UNINSURED MOTORISTS COVERAGE REQUIRED BY FLORIDA STATUTES §627.727(2) TO AN INSURED UNDER AN EXISTING EXCESS POLICY WHENEVER ANY VEHICLE, COVERED OR SUBSEQUENTLY ADDED, FIRST BECOMES REGISTERED OR PRINCIPALLY GARAGED IN FLORIDA.

The certified question should be answered in the negative. The plain language of Florida Statutes section 627.727(2) makes clear that the only time that an excess carrier has a duty to make available excess UM coverage under an existing policy is when the named insured makes a written request for such coverage. It is undisputed that no such request was made in this case. To impose a duty upon an excess carrier to also make available UM coverage when a vehicle becomes registered or garaged in the State of Florida would improperly require this court to re-write the statute.

It is undisputed that this policy by its terms does not provide excess UM coverage. It is also clear that the initial issuance of the policy in 1985 was properly completed without excess UM coverage; Ms. STROCHAK does not dispute the validity of Donald STROCHAK's 1985 rejection. Therefore, even assuming that Florida law applies,[10] Ms. STROCHAK can successfully argue that the policy provides excess UM coverage only if FEDERAL violated Florida Statutes section 627.727 in later renewing the policy without such

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[10] FEDERAL's first grounds for summary judgment in this case was the fact that this action is controlled by New Jersey and not Florida law. Ms. STROCHAK admits that she is entitled to no uninsured motorists coverage under this policy if New Jersey law applies. The choice of law question is FEDERAL's argument II on appeal.

coverage. Subsections (1) and (2) of the 1991 version of the UM statute provided in pertinent part:[11]

> (1) No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto 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, sickness, or disease, including death, resulting therefrom.
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> (2) The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the rating plan of the company as may be selected by the name insured. The limits set forth in this subsection, and the provisions of subsection (1) which require uninsured motorist coverage to be provided in every motor vehicle policy delivered or issued for delivery in this state, do not apply to any policy which does not provide primary liability insurance that includes coverage for liabilities arising from the maintenance, operation, or use of a specifically insured motor vehicle. However, an insurer issuing such a policy shall make available as a part of the application for such policy, and at the written request of an insured, limits up to

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[11]/ Because the last renewal before the accident was in June 1992, the 1991 version of the statute controls the parties' rights and obligations. See Adams v. Aetna Cas. & Surety Co., 574 So. 2d 1142 (Fla. 1st DCA), review dismissed, 581 So. 2d 1207 (Fla. 1991). See also Fireman's Fund Ins. Co. v. Pohlman, 485 So. 2d 418 (Fla. 1986). The legislature has since limited statutorily provided excess UM coverage to one million dollars, regardless of the policy's particular liability limits. See Fla. Stat. §627.727(2)(1995).

> the bodily injury liability limits contained in such policy. [emphasis added]

It is clear that subsection (1) of the UM statute applies to primary automobile liability policies, and subsection (2) of the statute applies to excess policies.[12] Because the STROCHAK policy is an excess all-liability policy, and not simply a primary automobile liability policy, it is undisputed that subsection (2) of the statute, and not subsection (1), controls this case. Thus, even if Florida law applies, Federal was only obligated to comply with subsection (2) of the statute and was not subject to the broader requirements set forth in subsection (1).

Nevertheless, while Ms. STROCHAK cannot refute that FEDERAL is under no circumstances subject to subsection (1) of the UM statute, she seems to have overlooked this crucial distinction in the case law, because her Initial Brief cites cases construing subsection (1). In fact, Ms. STROCHAK makes the somewhat astounding argument that primary and excess coverage cases are interchangeable and that case law construing subsection (1) of the UM statute is applicable to this case.

[12/] Primary automobile liability policies are governed by the requirements set forth in subsection (1) and the first sentence of subsection (2). Excess policies are controlled by the remaining language in subsection (2). Thus, technically, subsection (1) applies only to primary policies and subsection (2) applies partially to both primary policies and excess or umbrella policies. For the sake of brevity and clarity herein, the primary auto policy requirements are referred to as "subsection (1)," and the excess coverage requirements are referred to as "subsection (2)," even though the first sentence of subsection (2) is a continuation of the primary policy requirements and does not apply to excess policies.

However, the subsections are obviously not interchangeable. While subsection (1) of the statute expresses a broad public policy in favor of primary UM coverage in a variety of situations, subsection (2) provides only very limited duties with respect to excess UM coverage. Compare Fla. Stat. 627.727(1) with Fla. Stat. §627.727(2). The fact that more limited requirements are imposed upon excess carriers is logical given that statutorily imposed UM coverage is intended to provide the reciprocal of the liability coverage mandated under the Financial Responsibility Act. See Mullis v. State Farm Mut. Auto. Ins. Co., 252 So. 2d 229 (Fla. 1971). The Financial Responsibility Act, like the broad provisions of subsection (1), affects only the first layer of primary coverage. Florida's public policy in favor of UM coverage is obviously reduced, and the legislature's imposition of less strict requirements is reasonable, in the context of excess policies which have no corollary in the Financial Responsibility Act. An insured purchasing excess or umbrella coverage has already been issued a policy or policies complying with the Financial Responsibility Act and the corollary primary UM requirements. If UM coverage is to be implied by operation of law into the STROCHAK policy, such mandate must come from subsection (2).

No such mandate exists. In order to answer the Eleventh Circuit's certified question, this court need only compare the text of that question with the text of Florida Statutes section 627.727(2). Under the plain language of the statute, no duty is imposed on excess carriers under an "existing policy" unless the

insured requests the coverage. It is equally clear that the duties imposed upon excess carriers under subsection (2) do not depend in any fashion on the registration or garage location of a motor vehicle.

The excess insurer's sole obligation is to "make available" excess UM coverage. This obligation arises only at two times during the life of a policy: (1) at the time of application; and (2) when requested in writing by the named insured. Fla. Stat. §627.727(2). See also Travelers Insurance Company v. Quirk, 583 So. 2d 1026, 1029 (Fla. 1991) (wherein this court stated that "the statute requires an issuer of an umbrella policy to notify an applicant of the availability of uninsured motorists coverage") (emphasis supplied).

In this case, there is no question that neither Donald nor Rita STROCHAK ever requested excess UM coverage for this policy, in writing or otherwise. There is also no question that at the time of the 1985 application, not only did FEDERAL make excess UM coverage available, but Donald STROCHAK signed an express rejection of excess UM coverage. Ms. STROCHAK does not, and could not, argue that the 1985 rejection is defective in any way. See Acquesta v. Industrial Fire and Cas. Co., 467 So. 2d 284 (Fla. 1985) (holding that a spouse's rejection of uninsured motorists benefits is binding on and imputed to the other spouse).

Furthermore, there is no question that FEDERAL notified Ms. STROCHAK of the option of purchasing excess UM coverage at the time of her June 17, 1989 renewal. While there is no case defining what

a carrier must do to "make available" excess UM coverage, it is clear that a notice of UM options is sufficient and that obtaining a signed rejection of UM coverage is more than the statute requires. See Travelers Ins. Co. v. Quirk, 583 So. 2d 1026 (Fla. 1991). Finally, Ms. STROCHAK herself admitted that she was aware of the nature and purpose of UM coverage.

Thus, Ms. STROCHAK's only recourse in this case is to argue that the 1992 renewal was actually a different insurance policy than the 1985 policy, and that FEDERAL therefore should have obtained a new policy application even after the 1989 renewal notice and after Donald STROCHAK's 1985 signed rejection of excess UM coverage. Ms. STROCHAK concludes that such a new policy terminates the effect of the prior notice and rejection and triggers a new obligation on the part of FEDERAL to yet again make excess UM coverage "available."

However, it is clear that a policy application is only required upon the initial issuance of a policy, the creation of a wholly new insurance policy where none previously existed. See Nat'l American Ins. Co. v. Baxley, 578 So. 2d 441 (Fla. 1st DCA 1991) (defining an "existing" policy as terminating only when there is a period of time when the insured is wholly not covered; no other policy change terminates an "existing" policy). Based upon Ms. STROCHAK's own testimony, she cannot establish that a new policy was created or that a new application was required after 1985. Ms. STROCHAK admitted that she never filled out an excess policy application after Donald STROCHAK's 1985 rejection. (R. 3-

80-Deposition of STROCHAK, p. 100, lines 17-24). Ms. STROCHAK herself characterizes the policy as a "renewal," and not a new policy or application.[13] See also Fla. Stat. §627.728(1)(b) (defining a "renewal"). There is no question that there is no duty to make excess UM coverage available at the time of renewal. Thus, this should be a very simple case.

Nevertheless, Ms. STROCHAK urges that this court should find that the duty imposed upon an excess carrier to "make available" UM coverage should be triggered not only at the time of application and upon the insured's request, but additionally when a vehicle becomes garaged or registered in the state of Florida.[14] She argues

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13/ The only part of the UM statute requiring notice at the time of renewal is subsection 627.727(1), which applies to primary policies only. Subsection (1) requires a written or otherwise knowing rejection of UM benefits upon application, and thereafter only requires notice of the availability of UM benefits for renewals. This provision demonstrates that the legislature has recognized that the insurer's duty under the UM statute at the time of application is a different issue than the insurer's duty at the time of renewal. It also demonstrates that with respect to excess policies, the legislature has imposed no duty upon insurers to give additional notice upon renewal. The notice required under section 627.727(2) expressly applies only to the application, and section 627.727(2) expressly states that the provisions of 627.727(1) do not apply to policies that do not provide primary coverage.

14/ Ms. STROCHAK previously argued three facts which she alleged constituted a new policy or required a new application: (1) the change in named insured from her deceased husband to herself; (2) the change in the marketing name and number of the policy form; and (3) an alleged addition of vehicle. Ms. STROCHAK has apparently recognized that each of these events has been considered and rejected by Florida courts as triggering an insurance carrier's obligation under the UM statute, because she now contends primarily that the coverage of a Florida-garaged vehicle was an event so monumentous as to extinguish all prior UM decisions and to create an entirely "new policy," thereby requiring FEDERAL to again "make available" excess UM coverage. Although Mrs. STROCHAK has either abandoned or reduced her reliance on these other factors, they will be addressed later in this section.

that a Florida garaged vehicle was first listed on the excess policy in 1990, that event dictates that the 1990 renewal was a new "policy," requiring a new application, and triggering a new duty on the part of FEDERAL to again "make available" excess UM coverage.

Ms. STROCHAK's argument requires this court to hold that in addition to the two events expressed in subsection (2) as requiring that excess UM coverage be made available, there is also a judicially-created third triggering event: the addition of a Florida garaged vehicle. Most respectfully, this court simply does not have the authority to add new conditions to the statute. See Devin v. City of Hollywood, 351 So. 2d 1022 (Fla. 1976); Chaffee v. Miami Transfer Co., 288 So. 2d 209 (Fla. 1974); Atlantic C. Line R.R. v. Boyd, 102 So. 2d 709 (Fla. 1958).

Apparently in recognition of the fact that this court must adhere to the legislature's choice of statutory requirements, Ms. STROCHAK contends that section 627.727(2) by its terms applies only to excess policies "which insure specifically identified motor vehicles which are registered and garaged in Florida." Ms. STROCHAK appears to conclude that this policy was not subject to Florida Statutes section 627.727(2) until 1990, when the Continental was garaged in Florida. While most insurance companies would appreciate such a narrow construction of their obligations, this is an improper interpretation of the scope of subsection (2). The quoted language from subsection (2) defines the primary policies not subject to subsection (2), not the excess policies within its scope:

> The limits set forth in this subsection, and the provisions of subsection (1) which require uninsured motorist coverage to be provided in every motor vehicle policy delivered or issued for delivery in this state, do not apply to any policy which does not provide primary liability insurance that includes coverage for liabilities arising from the maintenance, operation, or use of a specifically insured motor vehicle. [emphasis added]

There is no reference in subsection (2) to policies insuring specifically identified vehicles garaged or registered in this state, other than a definition of the subsection (1) policies not subject to subsection (2). The words "motor vehicle registered or principally garaged in this state" appear only in subsection (1) and do not appear anywhere in subsection (2). The second sentence of subsection (2) specifically states that the provisions of subsection (1) do not apply to excess policies. It could not be clearer that the reference to specifically identified vehicles registered or garaged in the state applies only to subsection (1).[15] The legislature's use of that term in subsection (1) and its omission of that term in subsection (2) must be presumed to intend that the two subsections have a different scope. Castillo-Plaza v. Green, 655 So. 2d 197 (Fla. 3d DCA 1995); St. George Island Ltd. v. Rudd, 547 So. 2d 958 (Fla. 1st DCA 1989), approved, 561 So. 2d 253 (Fla. 1990); Department of Prof. Reg. v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984). Ms. STROCHAK's interpretation of the statute improperly attempts to use an exception to define the scope of

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[15]/ These words track those in Chapter 724 Florida Statutes which defines the inapplicability of the Financial Responsibility statute and presumably policies subject to Florida Statute section 627.727(1).

inclusion, and is in contravention of the clear language, syntax, and grammar of the statute.

Ms. STROCHAK's argument is allegedly based on public policy but overlooks the fact that the public policy of the state with respect to UM coverage is defined by the statute. Salas v. Liberty Mut. Fire. Ins. Co., 272 So. 2d 1 (Fla. 1972). She does not, and could not, cite to any part of the statute which dictates that an excess carrier must make available UM coverage under an existing policy when a vehicle becomes garaged in Florida.

Without identifying any part of the statute to support her argument, Ms. STROCHAK contends that a Florida-garaged vehicle being added to the policy invoked the public policy of this state because it was allegedly the first time that the policy insured a Florida risk. To accept Ms. STROCHAK's argument, this court must find that the policy was subject to Florida law in 1990 but was not subject to Florida law in 1985, because if the policy was subject to Florida law in 1985, the 1985 rejection would necessarily still have been valid at the time of the accident. Ms. STROCHAK argues that the 1985 rejection was premature because, she asserts, the policy was not required to comply with section 627.727 until 1990 when the Continental was registered in Florida.

Ms. STROCHAK's argument ignores the fact that the scope of section 627.727 is defined not only by its terms but also by the general scope provisions of the insurance code. Section 627.727 applies only to policies issued and delivered in the state of Florida. See Fla. Stat. §627.401(2). It applies to contracts of

casualty insurance "covering subjects resident, located or to be performed in this state." Fla. Stat. §627.4135. If this policy was not, as Ms. Strochak argues, issued and delivered in Florida in 1985, then neither was the 1992 renewal.[16] Likewise, if the policy insured a "subject resident, located or to be performed" in the state of Florida in 1990, it also did so at the time of the 1985 application when the STROCHAKs listed a Florida home as their secondary residence. Garage location of one vehicle is not the defining event under an excess policy because such policies are all-risk policies covering many different types of liability, not just automobile liability. The STROCHAKs had potential homeowner's liability in Florida at all times since their 1985 application. If the policy was not subject to Florida law in 1985, it was never subject to Florida law. See R. 2-78-77 (1992 renewal). FEDERAL was either required to comply with subsection (2) in 1985, which it undisputedly did, or was never required to do so. Under either option, the summary judgment in favor of FEDERAL should be affirmed.

Furthermore, significantly, the "facts" upon which Ms. STROCHAK bases her argument are simply not at issue in this case: at the time of the accident, the vehicle was neither garaged nor registered in Florida. It is undisputed that the Continental was principally garaged in New Jersey at the time of the accident. (R.

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[16]/ Under the same analysis, Ms. STROCHAK's argument leads inescapably to the conclusion that New Jersey law controls this case, which would also compel an affirmance of the summary judgment below. See Point II on appeal.

3-80-Deposition of STROCHAK, page 16, lines 11-22); see Exhibit H to Harris deposition (1985 application); (R. 3-80-Deposition of Frankel, page 28, line 22, page 29, line 1). Furthermore, Ms. STROCHAK neglects in her argument to inform the court that she allowed her Florida registration to lapse prior to the accident. In light of these facts, Ms. STROCHAK's public policy argument that the policy provides excess UM coverage on the basis that the Continental was registered and principally garaged in Florida at the time of the accident is somewhat incredible.

In addition to the registration or garaging of a vehicle in Florida, Ms. STROCHAK has throughout this case attempted to couch several other events as new "applications" or "new policies." First, Ms. STROCHAK notes that the policy was initially issued to Donald STROCHAK as the named insured, and that Mr. STROCHAK subsequently died at which time Rita STROCHAK was substituted as the named insured. Ms. STROCHAK does not, and cannot, cite any authority whatsoever for the proposition that a change in named insureds between husband and wife is such a sufficient policy alteration as to create a "new policy" or to require a new application.

In fact, Florida case law is directly contrary to that assertion. In Kerr v. State Farm Mutual Automobile Insurance Company, 434 So. 2d 970 (Fla. 5th DCA), review denied, 441 So. 2d 632 (Fla. 1983), the court specifically held, even under the old

"materiality" test for subsection (1) cases,[17] that the substitution of a wife as sole named insured after husband's death was not a material policy change requiring a new rejection. Similarly, in Atlanta Casualty Company v. Evans, 668 So. 2d 287 (Fla. 1st DCA

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[17] Appellant's confusion with respect to FEDERAL's obligations in this case may stem from her failure to distinguish subsection (1) cases dealing with primary automobile coverage from the present case, which deals solely with excess coverage. Unlike subsection (2), which has since its inception required only that the insurer "make available" excess UM coverage at the time of application and thereafter at the written request of the insured, there has been significant judicial discussion and legislative amendment regarding when a primary carrier is required to obtain a new rejection or selection of primary UM coverage. Prior to October 1, 1980, primary carriers were required to obtain a new selection or rejection of UM coverage unless a policy was simply a "renewal." Courts developed the "materiality test" to analyze whether a subsequent policy "renewed" a prior policy. If a change in a policy was "material," the subsequent policy could not be considered a renewal and a new rejection would be required under the pre-1980 version of the statute. However, these cases were statutorily overruled in 1980 when the legislature specifically rejected the materiality test and provided that a new rejection is not required under subsection (1) for policies which "renew, extend, change, supersede, or replace an existing policy." Accordingly, after October 1, 1980, the mere fact that a change in the policy was "material" so as to preclude the subsequent policy from qualifying as "renewal" was simply not enough to require the insurance carrier to obtain a new rejection, as long as the subsequent policy "extended, changed, superseded, or replaced an existing policy issued by the same insurer." See Cote v. American Fire & Cas. Co., 433 So. 2d 590 (Fla. 2d DCA), review denied, 440 So. 2d 351 (Fla. 1983); Coney v. Gen. Ins. Co., 445 So. 2d 671 (Fla. 3d DCA 1984). In 1984, the "same insurer" requirement was deleted and was replaced with the requirement that a new rejection or selection be obtained if there is a change in bodily injury liability limits. See GEICO v. Stafstrom, 668 So. 2d 631 (Fla. 5th DCA 1996) (on rehearing en banc), review denied, 677 So. 2d 841 (Fla. 1996).

These numerous case decisions addressing subsection (1) are not applicable in this case, except to the extent that they illustrate events which are not sufficiently significant policy changes even to require a new rejection or selection under subsection (1). An event which does not trigger a new obligation under subsection (1) is clearly not sufficient to trigger a new obligation under the more limited subsection (2).

1996), the First District Court of Appeal recently reaffirmed that a change in named insured from one spouse to another does not require a new uninsured motorists rejection even under subsection (1). Pursuant to these authorities, which unequivocally reject Ms. STROCHAK's argument even under the stricter subsection (1) requirements, the change in named insured from Donald to Rita STROCHAK is simply irrelevant to this case.

Ms. STROCHAK next claims that the fact that FEDERAL changed the marketing name of its excess policies to "Masterpiece" and gave the STROCHAKs a new policy number constitutes the caliber of change which results in a "new policy" and requires a "new application" for purposes of subsection (2). A change in the policy marketing name and policy number does not amount to an "application" for a new policy and does not terminate the effect of Mr. STROCHAK's rejection. See Liberty Mut. Ins. Co. v. Ledford, 22 Fla.L.Weekly D982 (Fla. 2d DCA, April 18, 1997).

Even for primary policies, even a change in carriers does not trigger a new obligation on the part of the insurer, as long as the policy does not lapse. See Laws of Florida, Ch. 84-41; Orion Ins. Co. v. Cox, 681 So. 2d 760 (Fla. 4th DCA 1996). One carrier would have a different name for its policy product and would certainly assign the insured a different policy number. Since these facts along with a change in insurers is clearly not sufficient to trigger new obligations even under the stricter standards applicable to primary carriers, there is absolutely no support under Florida law for Ms. STROCHAK's argument that a change in

policy numbers in a renewal excess policy with the same carrier requires a new rejection.

Ms. STROCHAK next argues that a "new coverage" (excess motor vehicle coverage) was created in June 1990, when she claims that the 1984 Lincoln was added to the excess policy. This argument is both legally unsound and factually baseless. Florida law is clear that the addition of a vehicle is not sufficient to require a new rejection or selection even under subsection (1). GEICO v. Stafstrom, 668 So. 2d 631 (Fla. 5th DCA 1996)(on rehearing en banc), review denied, 677 So. 2d 841 (Fla. 1996). Given this recent reaffirmance that an additional vehicle does not create a "new policy" under subsection (1), it is virtually impossible to justify the argument that the same event could trigger a new obligation under the more restricted subsection (2).

Furthermore, Ms. STROCHAK's argument is based on a misstatement of the record in this case. At the time of the 1985 application, three vehicles were covered by the policy. The record, including Ms. STROCHAK's own deposition, establishes that one of these vehicles was the very same 1984 Lincoln Continental which Ms. STROCHAK now asserts was added to the policy in 1990. (R. 3-80-Deposition of STROCHAK, page 14, line 3 - page 16 line 22; page 20, line 18 - page 21, line 3; page 107, line 10 - page 109, line 7; page 112, line 20 - page 113, line 2); (R. 3-80, Deposition of Frankel, page 13, lines 16-23; page 21, line 7 - page 24, line 13). Thus, this was simply not a new vehicle. The Eleventh Circuit recognized this fact, although Ms. STROCHAK contends

otherwise. (P.A.2). Thus, in addition to the fact that the addition of a vehicle does not create a new policy or require a new application under established Florida law, this contention is based solely on a misstatement of the record facts and need not even be considered by this court.

Actually, although the Eleventh Circuit's certified question refers to a vehicle being registered or garaged in Florida, Ms. STROCHAK apparently argues only that the garage location is the relevant inquiry. The Continental was garaged in Florida in 1990, although it was garaged in New Jersey at the time of the accident and at the time of the last renewal prior to the accident. However, the car was not registered in Florida until 1991 (and the car was not registered in Florida at the time of the accident nor at the time of the last renewal prior to the accident). Ms. STROCHAK in her Initial Brief argues only that Federal had a duty to make available excess UM coverage in 1990, and she makes no argument regarding any 1991 events. Thus, it appears that Ms. STROCHAK contends either that the addition of a vehicle to a policy or the garaging of a vehicle in Florida is the statutory triggering event, and she makes no argument relating to the registration of the vehicle in Florida. The argument that the addition of a vehicle creates new UM obligations has already been considered and rejected even under subsection (1). The argument that garage location triggers re-application of the statute is contrary to the plain meaning of the statute as well as lacking in common sense, due to the temporary and transitory nature of garage location,

especially among Florida's many winter-only residents such as Ms. STROCHAK. In short, each of the events alleged by Ms. STROCHAK to constitute a new policy simply do not qualify as such. Only a new application or a request by the insured can trigger FEDERAL's obligations to make available excess UM coverage. Neither of these events occurred in this case.

Although Ms. STROCHAK may characterize the result as unfair, it is important to recognize that Florida's UM statute does provide a mechanism by which the insured is guaranteed the availability of excess UM coverage. If the insured properly requests excess UM coverage, the insurer must write the coverage. However, until this accident occurred, Ms. STROCHAK apparently did not believe that excess UM coverage was a good investment because she declined to request such coverage notwithstanding her knowledge of what the coverage provided. In hindsight, she can only assert that there was another "application," and that the absence of UM coverage from the policy was therefore FEDERAL's mistake, and not her own. There is nothing that occurred after 1985 which would qualify as a new "policy" or require a new application. While Ms. STROCHAK's injuries may be sympathetic, her legal position is not. The trial court properly entered summary judgment in favor of FEDERAL, and the Eleventh Circuit's certified question should be answered in the negative.

II. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF FEDERAL BECAUSE NEW JERSEY LAW APPLIES.

The trial court assumed, without deciding, that Florida law controlled this action. The choice of law issue is properly before

this court. Thus, this court can affirm the summary judgment either on the grounds that New Jersey law applies or on the grounds that FEDERAL complied with Florida law in renewing the policy without excess UM coverage. See Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1952); Carraway v. Armor Co., 156 So. 2d 494 (Fla. 1963).

New Jersey law does not impose any duty upon an excess insurer with respect to UM coverage. See N.J.S.A. § 17:28 -1.1(a);(b);(e). It is therefore undisputed that Ms. STROCHAK is not entitled to excess UM benefits under the excess policy if New Jersey law rather than Florida law applies.

A. New Jersey law applies because the lex loci doctrine controls in Florida and the policy was issued and delivered in New Jersey.

Florida choice of law principles will determine which state's law controls this case. Fahs v. Martin, 224 F.2d 387, 396-97 (5th Cir. 1955) (applying Florida law) (a federal court sitting in diversity must apply the choice of law principles of the state in which the court sits). This court has made clear that the doctrine of lex loci contractus controls the choice of law issue in determining automobile coverage under insurance policies. Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988). As this court emphasized in Sturiano, the lex loci test provides both the insured and the insurer with the certainty they each need to understand and assess their rights and obligations before an accident occurs:

> Parties have a right to know what the agreement they have executed provides. To allow one party to modify the contract simply by moving to another state would substantially

> restrict the power to enter into valid, binding, and stable contracts. There can be no doubt that the parties to insurance contracts bargained for and paid for the provisions in the agreement, including those provisions that apply the statutory law of that state.

523 So. 2d at 1129-30 (emphasis supplied). See also Andrews v. Continental Ins. Co., 444 So. 2d 479, 483 (Fla. 5th DCA) (emphasizing in the UM context that the insured pays for and expects the law of the state in which the policy was issued to apply to his contract of insurance), review denied, 451 So. 2d 847 (Fla. 1984).

Particularly with the transitory nature of our society, and the inherently mobile nature of motor vehicles, basing the law of the contract on the place where the contract was issued provides unquestionable certainty. The fortuity of other factors, including where the named insured moves, carries a level of uncertainty and instability which this court was expressly unwilling to accept. Sturiano, 523 So. 2d at 1129-30. The court concluded that New York law would apply to a policy issued in New York, and that this result would not be changed by the fact that the insured spent winters in Florida or that the accident occurred in Florida. 523 So. 2d at 1130. See also LoCicero v. American Liberty Ins. Co., 489 So. 2d 81 (Fla. 2d DCA) (holding that a policy issued in Florida would be governed by Florida law, regardless of the happenstance that the accident occurred in Georgia), review denied, 500 So. 2d 543 (Fla. 1986); Fla. Stat. §627.401(2) (section 627.727

applies only to policies issued and delivered in the state of Florida).

The same analysis applies in this case. Applying the bright-line lex loci test mandated by the Sturiano court, there is no question that New Jersey law controls this policy. See generally Lumbermens Mutual Cas. Co. v. August, 530 So. 2d 293, 295-96 (Fla. 1993) (expressly applying Sturiano and the lex loci rule to an uninsured motorists question, and finding that Massachusetts law controlled a policy issued in Massachusetts regardless of the fact that the accident occurred in Florida); Bennett v. Granite State Ins. Co., 526 So. 2d 187 (Fla. 3d DCA 1988) (also illustrating that Sturiano applies in the uninsured motorists context). It is undisputed that the policy was issued and delivered in New Jersey in 1985. Sturiano makes clear that Ms. STROCHAK's winters at her Florida beach home do not alter this result.

Furthermore, even where the insured moves to another state, with the insurer's full knowledge, the first state's law continues to control the parties rights and duties under the policy unless a new policy is issued in the new state. See State Farm Mut. Auto. Ins. Co. v. Davella, 450 So. 2d 1202 (Fla. 3d DCA 1984) (dealing specifically with uninsured motorists law, and holding that section 627.727 was not applicable to a policy issued in Colorado even after the insured moved to Florida and fully informed the insurer of that fact). No event has occurred in Ms. STROCHAK's case since 1985 which could possibly constitute a new policy for purposes of the UM statute. A change in mailing address simply does not alert

an insurer to a change in the insured's residence. New Jersey Manuf. Ins. Co. v. Woodward, 456 So. 2d 552, 553 (Fla. 3d DCA 1984). The change in named insured from Donald to Rita STROCHAK has been expressly held not to constitute a new policy for purposes of the UM statute. Kerr v. State Farm Mut. Auto. Ins. Co., 434 So. 2d 970 (Fla. 5th DCA), review denied, 441 So. 2d 632 (Fla. 1983). In fact, the only type of event held sufficient under the present statutory scheme[18] to warrant finding a new policy is a complete lapse in coverage. National American Ins. Co. v. Baxley, 578 So. 2d 441 (Fla. 1st DCA 1991). There was no lapse in coverage in this case. Kaufman, p. 117, ll. 1-12; Harris, p. 135, ll. 3-9; p. 169, ll. 1-6; see Composite Exhibit "F." This policy was issued in 1985 to Donald STROCHAK, and it is undisputed that this issuance and delivery took place in New Jersey. The New Jersey issuance continues to dictate the law governing the policy.

The choice of law analysis is intertwined with and reaffirms the fact that FEDERAL was simply not required to make available excess UM coverage to Ms. STROCHAK at any time after 1985. None of the events cited by Ms. STROCHAK as invoking Florida law are sufficient to require application of Florida public policy nor to amount to a new policy "application" sufficient to require that

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[18/] Prior to the 1980 amendment to the uninsured motorists statute, the test for a "new policy" was more broad. See Fla. Stat. §627.727(1) (1981); Cote v. American Fire and Cas. Co., 433 So. 2d 590 (Fla. 2d DCA), review denied, 440 So. 2d 351 (Fla. 1983); Coney v. General Ins. Co., 445 So. 2d 671 (Fla. 3d DCA 1984). See generally GEICO v. Stafstrom, 668 So. 2d 631 (Fla. 5th DCA 1996) (on rehearing en banc), review denied, 677 So. 2d 841 (Fla. 1996).

excess UM coverage again be "made available" or offered to the insured. The key to both the choice of law analysis and Florida's UM requirements is the initial issuance of the policy in New Jersey in 1985.

The Eleventh Circuit based its choice of law analysis on the case of Amarnick v. Automobile Insurance Company of Hartford, 643 So. 2d 1130 (Fla. 3d DCA 1984), and essentially held that Florida law applies because Ms. STROCHAK made a claim under Florida Statutes section 627.727. (P.A.3). With all respect to the Eleventh Circuit, this analysis is circular. The statute does not apply unless the case is controlled by Florida law. The Eleventh Circuit's analysis would conclude that all UM claims are subject to Florida law if the insured elects to assert a claim under section 627.727. Such a result is obviously inappropriate.

Furthermore, Amarnick is inapplicable to this case. While the facts of Amarnick are difficult to discern because the court does not state the dates on which certain events occurred, the court in Amarnick held that AIC was required to comply with Florida Statutes section 627.727(1) for a primary policy which covered three vehicles, all of which were principally garaged in Florida at the time of the accident. It appears from the opinion that the policy was originally issued and delivered in New York, and that the insured subsequently notified his insurer that his primary residence and the garage location of two vehicles would be changed to Florida. The New York policy was canceled and the coverage was transferred into a Florida policy.

Amarnick is wholly inapplicable to this case for several reasons. First, the Amarnick court specifically stated that the New York policy had been canceled. The holding that a carrier cannot rely on the state of issuance of a canceled policy has no bearing on this case, where the policy was continually renewed. It is completely unclear from the opinion whether Amarnick involved the creation and issuance of a wholly new policy. If it did, the application of section 627.727 at that time was certainly proper.

Furthermore, it is undisputed that Ms. STROCHAK had allowed the Florida registration for the 1984 Continental to lapse before this accident and that the vehicle was garaged in New Jersey at the time of the accident. Amarnick relied on the fact that the vehicle in that case was at all times garaged in Florida, which is not true in this case. Thus, this policy did not insure a Florida automobile risk even if it were a primary auto policy. Additionally, the insured in Amarnick notified the carrier that his permanent residence had changed to Florida, which Ms. STROCHAK admits that she never did.

Moreover, this is an excess policy and case law construing subsection (1) of the UM statute does not apply to excess policies. The Amarnick decision is based on the public policy of the state with respect to primary UM coverage, which does not apply in this case. Whether Amarnick holds that the risk insured in a primary automobile policy is located where the vehicle is principally

garaged[19] is completely irrelevant to this case, which concerns an excess policy which provides global or worldwide coverage. The risk insured in an excess policy cannot be defined by state borders.

Amarnick relied on Florida case law which holds simply that Florida law applies if there is only a Florida risk insured. In this case, the principal home insured under the excess policy was at all times the STROCHAKs' New Jersey residence. The policy also covered Ms. STROCHAK's personal liability for any events, not only automobile liability, anywhere in the world. This policy does not solely or even principally insure only a Florida risk, and Amarnick does not apply.

If Florida law were held applicable in this case, the excess policy would have to be construed as a Florida policy for purposes of excess automobile coverage for the temporary periods when the vehicle was garaged in Florida, a New Jersey policy for purposes of excess automobile coverage when the vehicle was again garaged in New Jersey, a New Jersey policy for purposes of excess homeowner's coverage based on Ms. STROCHAK's continuous New Jersey residence, and, for purposes of excess personal liability coverage, a policy of any state in which she happens to be when she injures another person. The absurdity of this result is apparent and has been rejected by this court. Sturiano v. Brooks, 523 So. 2d 1126 (Fla.

[19/] To construe Amarnick in this manner creates a conflict with Sturiano. As a lower court appellate court decision, Amarnick must be construed so as not to conflict with Sturiano. Thus, Ms. STROCHAK's interpretation cannot be correct.

1988). This court expressly recognized that the law controlling automobile coverage does not change simply because the insured changes his state of residence. Ms. STROCHAK's interpretation of Amarnick has been expressly rejected by this court.

Under the lex loci test adopted by this court in Sturiano, this policy was issued and delivered in New Jersey. Thus, New Jersey law controls and the trial court properly entered summary judgment in favor of FEDERAL.

B. New Jersey law applies even under the significant relationships/public policy test, because the dominant contacts are with New Jersey and the public policy of the state of Florida has not been invoked in this case.

Despite the clear dictates of this court in the Sturiano case, Ms. STROCHAK argued below that the public policy of the state of Florida compels application of Florida law. However, this argument was expressly rejected by this court in Sturiano. The Sturiano court addressed and dismissed in turn each argument based on overriding public policy, and explained that the very basis of the lex loci test and the only guarantee of its desirable certainty is that there simply can be no overriding consideration. Therefore, the lex loci test mandated by this court in Sturiano simply does not permit the consideration of any factor other than where the policy was issued.

Furthermore, even if other factors were relevant, New Jersey law would apply. Prior to Sturiano, Florida applied either the significant relationship test or the overriding public policy test

for choice of law.[20] Under either test, New Jersey law would control this case.

This policy was issued and delivered in New Jersey to a New Jersey resident, insuring only vehicles registered and garaged in New Jersey. Mr. STROCHAK informed FEDERAL in 1985 that his primary residence was New Jersey, and Ms. STROCHAK never changed that designation. In fact, she told FEDERAL only that her mailing address had changed to Florida, and she even changed that back to New Jersey before the accident. See New Jersey Manuf. Ins. Co. v. Woodward, 456 So. 2d 552, 553 (Fla. 3d DCA 1984) (expressly holding that a change in mailing address simply does not alert an insurer to a change in the insured's residence). She at all times maintained clothes, furniture, and personal possessions at her residence in New Jersey, and returned regularly to New Jersey, spending only winters at her beach home in Florida. (R. 3-80-Deposition of STROCHAK, page 42, line 18 - page 43, line 11) (R. 3-80-Deposition of Frankel, page 46, line 16 - page 47, line 15). She never obtained a Florida Driver's license. (R. 3-80-Deposition

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[20/] See, e.g., Gillen v. United Services Automobile Ass'n, 300 So. 2d 3 (Fla. 1974); Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980); Amica Mutual Ins. Co. v. Gifford, 434 So. 2d 1015 (Fla. 5th DCA 1983); Safeco Ins. Co. v. Ware, 424 So. 2d 907 (Fla. 4th DCA 1982); Decker v. Great American Ins. Co., 392 So. 2d 965 (Fla. 2d DCA), review denied, 399 So. 2d 1143 (Fla. 1981); Petrik v. New Hampshire Ins. Co., 379 So. 2d 1287 (Fla. 1st DCA 1979), cert. denied, 400 So. 2d 8 (Fla. 1981). Any pre-Sturiano cases have been overruled by the adoption of the lex loci test in Sturiano to the extent that they apply these outdated analyses. However, pre-Sturiano law is of necessity discussed in this subsection to illustrate that even under these more liberal and since rejected tests, this case would be controlled by New Jersey law.

of STROCHAK, page 13, lines 4-6). Ms. STROCHAK allowed her Florida registration to lapse before the accident.

Ms. STROCHAK never received any insurance information at her Del Ray Beach vacation home. (R. 3-80-Deposition of STROCHAK, page 25, lines 20-25; page 35, lines 20-24). She paid the premiums through New Jersey bank accounts. (R. 3-80-Deposition of STROCHAK, page 98, lines 7-11) (R. 3-80-Deposition of Frankel, page 16, line 17 - page 17, line 1). She received a salary from and was president of a New Jersey corporation, GWB. (R. 3-80-Deposition of STROCHAK, page 51, lines 14-19). The STROCHAKs never claimed a homestead exemption for the Florida house. (R. 3-80-Deposition of STROCHAK, page 42, lines 2-4).

In addition to all these factors which point to New Jersey law under the significant relationships test, there is no overriding public policy of the state of Florida in this case. Statutes relating to vehicle coverage have been expressly held not to reach the level of importance sufficient under a significant contacts analysis to overcome the place where the policy was issued. Florida's public policy with respect to insurance coverage is defined in the Florida Statutes, and section 627.727 controls Florida's UM coverage. Andrews v. Continental Ins. Co., 444 So. 2d 479, 482 (Fla. 5th DCA 1984); Aetna Casualty and Surety Company v. Diamond, 472 So. 2d 1312, 1314 (Fla. 3d DCA 1985). Section 627.727 applies by its terms only to policies issued and delivered in the state of Florida. Because the Florida motor vehicle statutes by their terms apply only to policies issued and delivered in Florida,

Florida public policy is simply not invoked unless the policy was issued in Florida. Andrews, 444 So. 2d at 482. See also Fla. Stat.627.727.

In Aetna Casualty and Surety Company v. Diamond, 472 So. 2d 1312 (Fla. 3d DCA 1985), the court expressly found even under the pre-Sturiano test that the public policy of the state of Florida as expressed in the UM statute was not significant enough to overcome the fact that the policy was issued in Maryland. Diamond, 472 So. 2d at 1314. See also Allstate Ins. Co. v. Clenending, 289 So. 2d 704 (Fla. 1974); Continental Ins. Co. v. Howe, 488 So. 2d 917 (Fla. 3d DCA), review denied, 494 So. 2d 1151 (Fla. 1986); New Jersey Manuf. Ins. Co. v. Woodward, 456 So. 2d 552 (Fla. 3d DCA 1984); Allstate Ins. Co. v. Langston, 358 So. 2d 1387 (Fla. 3d DCA 1978) (all holding that Florida law and particularly Florida Statutes section 627.727 did not apply to a policy which was not issued and delivered in Florida). These authorities make clear that even if this court had not adopted the lex loci test in Sturiano, New Jersey law would control this case.

Furthermore, these authorities were all construing subsection (1) of the UM statute, which is broader in application than subsection (2) which is at issue in this case. By its terms, subsection (2) imposes much more narrow obligations upon an excess carrier than subsection (1) imposes upon a primary auto carrier. This limited scope of public policy regarding excess UM coverage as compared with primary UM coverage is logical given the fact that excess coverage is intended to cover all of an insured's many

liabilities. It also recognizes that the public policy of Florida concerning the intent that UM coverage provide the reciprocal of the coverage required by the Financial Responsibility statute has already been satisfied under the rigorous requirements imposed on primary policies.

As the Andrews and Diamond courts explained, the public policy of the state with respect to UM coverage is defined by the UM statute, and Florida public policy is not invoked unless and until the statute is invoked. In the present case, Donald STROCHAK signed a valid written rejection of excess UM benefits at the time of application. Neither Donald nor Rita STROCHAK ever affirmatively requested in writing excess uninsured motorists coverage. Therefore, neither of the two events which could invoke the public policy of the state of Florida with respect to excess UM benefits has occurred in this case, and even under the prior significant relationships test, New Jersey law applies.

In summary, New Jersey law controls this action because the lex loci rule controls and the policy was issued in New Jersey, Furthermore, even under the broader significant relationships test, the most significant contacts are in New Jersey and there is no overriding public policy of the State of Florida. It is undisputed that the possibility of Ms. STROCHAK being entitled to excess UM arises only if Florida law applies. The trial court properly entered summary judgment in favor of FEDERAL.

CONCLUSION

This court should answer the certified question in the negative. Subsection (2) sets forth two triggering events for its application, and this court simply does not have the authority to add a third. Even if Florida law applies, FEDERAL did not violate section 627.727(2) in renewing the policy without excess UM coverage.

The summary judgment below should also be affirmed on the alternative basis that New Jersey law controls this action. It is undisputed that Ms. STROCHAK's claim is meritless if New Jersey law applies.

This court should answer the question certified by the Eleventh Circuit in the negative, and direct that the summary judgment entered in favor of FEDERAL be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U. S. Mail to **David E. French**, **Esquire**, Fountain Square, Suite 125, 2600 N. Military Trail, Boca Raton, Florida 33431; **Geralyn M. Passaro**, **Esquire**, 600 Jefferson Bank Building, 600 S. Andrews Avenue, Ft. Lauderdale, Florida 33301; and **Philip M. Burlington**, **Esquire**, 1615 Forum Place, Suite 3A, Barristers Building, West Palm Beach, Florida 33401, on May 2, 2001.

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