IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA



RITA STROCHAK,

Appellant,

-vs-

CASE NO. 90,298

FEDERAL INSURANCE CO., etc., et al.,

Appellees.
_____/

**BRIEF OF APPELLANT ON THE MERITS**

Certified Question from the United States Circuit Court of Appeals, Eleventh Circuit

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## PREFACE

This case is before the Court on a Certified Question from the United States Court of Appeals, Eleventh Circuit. The parties will be referred to by their proper names or as they appeared in the trial court. The following designations will be used:

(R__, __, __) - Record Volume, Document Number, Page Number

(A) - Appellant's Appendix

## STATEMENT OF THE CASE

The Plaintiff, Rita Strochak, initially filed her Complaint in the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida; and the action was then removed by Federal Insurance Company (hereafter "Federal") to the United States District Court for the Southern District of Florida (Rl-1). The trial judge denied Plaintiff's Motion for Remand (R1-20), and dismissed Plaintiff's claim that the excess insurance policy provided her uninsured motorist coverage under its own terms (Rl-20). However, the trial court denied the Motion to Dismiss Plaintiff's claim that uninsured motorist coverage under the excess policy was mandated by the provisions of Fla. Stat. §627.727(2) (Rl-20).

Defendant Federal[1] filed a Motion for Summary Judgment on the issue of whether it was compelled to provide uninsured motorist coverage under Fla. Stat. §627.727(2) (R2-78). The Plaintiff filed a Cross-Motion for Summary Judgment on the same issue (R3-85).

The trial court held a hearing on the Motions for Summary Judgment and subsequently ruled in favor of Federal, but noted that the issue was a matter of first impression under Florida law, and suggested that certification to the Florida Supreme Court might be appropriate (R3-93; R5-108-35-36). In its order, the trial court assumed,

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[1]/Plaintiff had also named as a Defendant Keevily , Spero-Whitelaw, Inc., her insurance agent, alleging a cause of action in negligence for failing to inform her of the availability of, or to obtain, uninsured motorist coverage under the excess policy (Rl-24). That claim has been severed from the claim against Federal and, therefore, is not relevant to this Court's consideration.

without deciding, that Florida law applied (R3-93). Subsequently, the trial court entered a judgment and authorized an immediate appeal (R3-102-05).

On appeal, the Eleventh Circuit held that Florida law applied, and certified the following question to this Court (A5):

> 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.

However, the Eleventh Circuit's opinion noted that its phrasing of the question was not intended to limit this Court's inquiry, and it has submitted the entire record to this Court for review (AS).

## STATEMENT OF FACTS

Rita and Donald Strochak married in 1983, and at that time maintained residences in New Jersey and Delray Beach, Florida (R3-80-RS6-7, EF61).[2] At that time, Donald had an excess liability policy with Federal designated policy #7206-3 1-75, which provided $2,000,000 in excess liability limits (R2-78-Ex. A). That policy provided liability coverage for numerous automobiles; however, none of them were registered or garaged in Florida (R2-78-Ex. A).

In 1985, Donald completed an application with Federal for an excess liability policy with limits of $5,000,000, which resulted in the issuance of a policy which was designated policy #1051832901-01 (R2-78-Ex. B). As with the prior policy, none of the three automobiles listed were registered or principally garaged in Florida (R3-80-WK, Ex. H).

Contrary to the statement in the Eleventh Circuit's opinion, Federal's 1985 excess liability policy did not specifically provide coverage for the 1984 Lincoln subsequently owned by Rita Strochak. The 1985 application lists three vehicles, a 1985 Lincoln, a 1980 Lincoln, and a 1978 Porsche (R2-78-Ex. B, A6). No 1984 Lincoln was listed on that application and both Rita and her son testified that the 1984 Lincoln was a different vehicle from the 1985 Lincoln listed on the 1985 application (R3-80-EF 13, 21-22,

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[2]/The docket sheet contains a Notice of Filing of four depositions, which are indicated to be contained in an expandable folder, Docket Sheet p. 8, #80. Appellant will refer to them by the second number, the initials of the deponent, and the page number or exhibit.

R5-2 1-22). Further evidence of this is the application executed by Donald Strochak for primary automobile coverage with Federal for the 1984 Lincoln (R3-80-WK Ex. 26, A7). That application is dated December 30, 1986, eighteen months after the 1985 application, and states that it is not a renewal policy, but is a "new line" automobile policy (R3-80-WK Ex. 26).

Donald Strochak died in 1987. Two'years after his death, Rita received ownership of the Delray Beach residence, and it became her primary residence (R3-80-EF67). In 1988, Rita's son, Edmond Frankel, moved into the co-op in New Jersey and began living there, at which time he took over paying the co-op maintenance fees (R3-80-RS48-49, 62, 116, EF23). Rita remained in Florida and became a registered voter in Florida in 1988 (R3-80-RS17).

After her husband's death, Rita Strochak purchased from his dealership the 1984 Lincoln that she had previously been using in New Jersey (R3-80-EF13, 68). In March of 1989, the dealership shipped the vehicle to Rita in Florida, at which time she registered it in Florida in her name and obtained Florida license plates for it (R3-80-EF13, RS15, 109, 112-13, 115). Effective March 18, 1989, Rita obtained a primary automobile liability policy from Federal for the 1984 Lincoln, and her address for that policy was her residence in Delray Beach (R3-80-PH, Ex. D, see A8-9). Federal delivered the policy to Rita in Florida, and its coverage summary stated that the 1984 Lincoln was "garaged in - Delray Beach, FL" (R3-80-PH, Ex. D, A8). Rita obtained the

maximum liability coverage of $300,000, and the maximum uninsured motorist coverage ($300,000) available under the primary policy (R3-80-PH, Ex. D, A8-9).

Federal sent Rita a Florida automobile insurance identification card for the 1984 Lincoln and the primary automobile policy stated that all of its provisions were in accordance with the State of Florida (R3-80-PH, Ex. D). Through the date of the accident, that policy was renewed each year by Rita, mailed to her in Florida, contained solely provisions drafted in accordance with Florida law, and included a Florida Automobile Insurance Identification Card (R3-80-PH, Ex. D, A8- 19).

Effective June 17, 1989, Federal issued a "masterpiece" excess liability policy to the Strochaks (R3-80-PH, Ex. E). Even though he had died more than eighteen months previously, that policy still listed only Donald Strochak as the named insured, and Federal mailed it to him, in care of his truck dealership in New Jersey (R3-80-PH, Ex. E). In comparing the "masterpiece" excess liability policy to the prior excess policy issued to Donald Strochak, Federal's underwriting representative, Patricia Harris, described it as (R3-80-PH51), "A different policy providing broader coverage. " It had a new policy number (105 18329-01), different required limits for the underlying automobile coverage, and it provided different coverages (R3-80-PH5 1, 70, 75). The "masterpiece" policy included a liberalization clause, similar to that contained in the earlier excess liability policies, that if there was any conflict between the provisions of the policy and the laws of the state in which the insured resided, the policy would be amended to conform to those laws (R3-80-PH, Ex. E).

The Eleventh Circuit's opinion states (A3):

> The 1989 Masterpiece policy did not specifically identify any vehicle for coverage, but, by its terms, covered all vehicles unless specifically excluded, regardless of whether a separate premium was paid for the vehicles.

However, the 1984 Lincoln was specifically excluded from coverage under the 1989 Masterpiece policy. The initial documentation with the June 17, 1989, Masterpiece excess policy listed three vehicles: a 1984 Lincoln, a 1980 Lincoln and a 1978 Porsche; and a separate premium was calculated for each vehicle (R3-80-PH, Ex. E, A20). However, that coverage was deleted by Donald's estate, effective June 17, 1989 (the same day), and the premium was reduced by $286 accordingly (R3-80-PH, Ex. E, A21). The Coverage Update document (effective June 17, 1989), stated inter alia, that it "Deleted Liability for [the] 1984 Lincoln," and also under "New Coverage" for that vehicle stated "none" (R3-80-PH, Ex. E, A21). Plaintiff's insurance agent then issued a credit to Donald Strochak, c/o Turnpike Truck Center, for $286, and that document stated, "Return Premium Deleting Coverage for Automobile Liability Under This Policy," and listed the Masterpiece excess policy number (10518329-01) (R3-80-WK Ex. 26, A22).

Effective March 1, 1990, the "masterpiece" excess liability policy was amended to name Rita Strochak as the named insured for the first time, and to provide that her mailing address was White Cedar Drive in Delray Beach, Florida (R3-80-PH, Ex. E). Effective June 17, 1990, Rita added the Delray Beach residence and the 1984 Lincoln to

the excess liability policy (R3-80-PH, Ex. E, A23). Federal charged a separate premium for the excess coverage for the 1984 Lincoln (R3-80-PH, Ex. E, A24). The "Coverage Update" issued at that time stated that the "old coverage" for the 1984 Lincoln under the excess policy was "none" (R3-80-PH, Ex. E, A23). Federal's representative admitted that Rita was never offered uninsured motorist coverage under the Masterpiece excess policy, even after the 1984 Lincoln was added, because Federal believed New Jersey law applied and that it did not require such an offer (R3-80-PH117- 18).

The "masterpiece" policy effective June 17, 1990, was mailed to Rita Strochak in Delray Beach, Florida (R3-80-PH, Ex. E). The policy designated New Jersey with respect to the "excess liability coverage," but provided that the "policy terms" were in accordance with Florida law (R3-80-PH, Ex. E, A2539). Additionally, the signature page of the "masterpiece" policy contains the signatures of Federal's officers designated as "Florida Signatures" (R3-80-PH, Ex. E, A40). The subsequent excess renewal policies for the next two years charged separate premiums for the 1984 Lincoln, and contained Florida "policy terms" and "Florida Signatures" (R3-80-PH, Ex. E, A42-48).

No application for Rita's addition of the 1984 Lincoln to the excess policy was ever produced, Federal's representative, Patricia Harris, testified that prior to the utilization of the "masterpiece" policies, the addition of a new coverage would have required the completion of an application form (R3-80-PH, P.37). However, she said that under the "masterpiece" system, coverage changes were effectuated with "worksheets," and applications were never used (R3-80-PH, p.37).

The "Masterpiece" policy, issued June 17, 1992, which was in effect at the time of the accident in issue, contains Florida "policy terms" and "Florida Signatures" (R3-80-PH, Ex. E, A47-48). The policy contains the following statement on the "Coverage Summary Renewal" (R3-80-PH, Ex. E, A46):

> Whenever vehicles are shown we have included the type of uninsured or underinsured (UM/UIM) coverage you have selected, For vehicles where no UM/UIM appears there is no coverage. The amount of UM/UIM is determined by where the vehicle is garaged, which appears in the Mandated Coverages Section. [Emphasis supplied.]

However, that "Masterpiece" policy produced by Federal does not include any "Mandated Coverages Section" (R3-80-PH, Ex. E).

On November 14, 1992, Rita was in Florida for her uncle's funeral, and she was severely injured in an automobile accident involving an uninsured motorist (R3-80-RS47, 95, EF60). Thereafter, she sought uninsured motorist's benefits under the "masterpiece" excess liability policy, and Federal's denial of those benefits resulted in this litigation.

## SUMMARY OF ARGUMENT

The Certified Question should be answered in the affirmative, because an insurance company does not have the duty under Fla. Stat. §627.727(2) to offer excess uninsured motorist coverage unless the excess liability policy specifically provides coverage for a vehicle registered or garaged in Florida. The purpose of the statute is to protect Florida residents and those who register or garage vehicles in Florida. For that reason, and based on the literal terms of the statute, the insurer's duty cannot arise, nor can it be satisfied, until there is a sufficient nexus with Florida. Therefore, when a vehicle registered or garaged in Florida is specifically added to an excess policy for the first time, that is when the insurer's duty arises to inform the insured of the availability of excess uninsured motorist coverage pursuant to Fla. Stat. §627.727(2).

In this case, there was no nexus between the excess liability policy and Florida with respect to any motor vehicles until the 1984 Lincoln was specifically added to the excess liability policy in 1990. Since that was the first time a vehicle specifically identified in that policy was registered and principally garaged in Florida, that is when Federal had a duty to notify the insured of the availability of excess uninsured motorist coverage. It is undisputed that Federal did not inform the insured of the availability of that coverage and, therefore, that coverage is mandated by Fla. Stat. §627.727(2).

For the reasons stated above, the Certified Question should be answered in the affirmative.

## CERTIFIED QUESTION PRESENTED

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.

## ARGUMENT

The Certified Question should be answered in the affirmative, because Fla. Stat. §627.727(2) requires that an insured be informed of the availability of excess uninsured motorist coverage as part of the application for any excess policy delivered or issued for delivery in Florida, which provides coverage for liability arising from the "maintenance, operation, or use of a specifically insured motor vehicle." If the excess policy is not delivered or issued for delivery in this state, and the vehicle is neither garaged nor registered in Florida, there is an insufficient nexus with this state to apply Fla. Stat. §627.727(2). However, when the requisite nexus with this state first exists, the duty is created and must be complied with by the insurance company; otherwise, the intent of the statute is frustrated.

Prior to addressing the issue in detail, some historical background on excess uninsured motorist coverage might be helpful. Prior to 1984, the provisions of Fla. Stat. §627.727( 1) were consistently applied to excess liability policies in the same manner as

primary policies, see AETNA CASUALTY & SURETY CO. v. GREEN, 327 So.2d 65 (Fla. 1st DCA 1976), cert. den., 336 So.2d 1179 (Fla. 1976); AETNA CASUALTY & SURETY CO. v. FULTON, 362 So.2d 364 (Fla. 4th DCA 1978); COHEN v. AMERICAN HOME ASSURANCE CO., 367 So.2d 677 (Fla. 3d DCA 1979), cert. den., 378 So.2d 342 (Fla. 1979); FIRST STATE INSURANCE CO, v. STUBBS, 418 So.2d 1114 (Fla. 4th DCA 1982), pet. for rev. den., 426 So.2d 29 (Fla. 1983); SPIRA v. GUARANTY NATIONAL INSURANCE CO., 468 So.2d 540 (Fla. 4th DCA 1985). During that time period, the excess liability carriers had the same obligation as the primary automobile liability insurer with respect to uninsured motorist coverage. The excess carriers were required to include uninsured motorist coverage in a policy providing automobile liability coverage for a specifically identified vehicle, unless they obtained a written and knowing rejection of uninsured motorist coverage from the insured, see Fla. Stat. §627.727(1) (1983). Additionally, the insured had to be notified annually of the option to obtain uninsured motorist coverage, Ibid.

Effective October 1, 1984, subsection (2) of Fla. Stat. $627.727 was amended to change the duty owed by excess liability carriers, Ch. 84-41, Laws of Florida. Subsection (2) was amended to provide:

> 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 named 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 the bodily injury liability limits contained in such policy. [Emphasis supplied.]

This Court has addressed the language of Fla. Stat. §627.727(2) in only one decision. In TRAVELER'S INSURANCE CO. v. QUIRK, 583 So.2d 1026 (Fla. 1991), the plaintiff sought uninsured motorist coverage under his employer's insurance policies including, inter alia, an excess liability policy issued by Southern American Insurance Company. While determining that the plaintiff was entitled to uninsured motorist benefits under the primary liability policy. This Court rejected the plaintiff's argument that he was entitled to recover them under the excess policy, stating (583 So.2d at 1029):

> . . .[S]ubsection (2) requires an excess carrier to "make available as a part of the application for such policy, and at the written request of an insured, [UM benefits] up to the bodily injury liability limits contained in such policy." § 627.727(2), Fla. Stat. (Supp. 1984). Quirk concedes that West Coast never requested UM coverage from Southern American, but he maintains that the statute requires Southern American to offer UM coverage in the application even in the absence of a written request by the insured. We agree that the statute requires an issuer of an umbrella policy to notify an applicant of the availability of UM coverage. However, we agree with Southern American that it substantially complied with this statutory notice requirement when it asked that a written form for rejection of UM coverage be executed, thereby exceeding the requirements of the statute. [Emphasis supplied.]

In the case sub iudice, Federal did not do anything to comply with Fla. Stat. §627.727(2), even though it knew that the 1984 Lincoln, the only vehicle specifically identified in the excess masterpiece policy, was registered and garaged in Florida. Federal did not inform Rita Strochak of the availability of uninsured motorist coverage under the excess policy, nor did it request a rejection of such coverage. Thus, no substantial compliance argument can be made in this case.

Fla. Stat. §627.727(2) applies in this case to mandate coverage, because when the 1984 Lincoln was added to the Masterpiece excess policy (effective June 17, 1990) that policy, for the first time, provided "coverage for liabilities arising from the maintenance, operation, or use of a specifically insured motor vehicle" that was registered and garaged in Florida. As a result, that policy was "issued for delivery" in Florida, as that statutory phrase has been defined by the courts of this state, see AMARNICK v. AUTOMOBILE INSURANCE COMPANY OF HARTFORD, 643 So.2d 1130 (Fla. 3d DCA 1994); APERM OF FLORIDA v. TRANS-COASTAL MAINTENANCE CO., 505 So.2d 459 (Fla. 4th DCA 1987), rev. den., 515 So.2d 229 (Fla. 1987); EAST COAST INSURANCE CO. v. COOPER, 415 So.2d 1323 (Fla. 3d DCA 1982). The 1990 excess policy was also delivered in Florida, since it was mailed to Rita's Delray Beach residence, 1 COUCH ON INSURANCE 2d $10: 1, see MORRISON GRAIN CO., INC. v. UTICA MUTUAL INSURANCE CO., 632 F.2d 424, 441-42 (5th Cir. 1980) (applying Florida law); WILMINGTON TRUST CO. v. MANUFACTURERS LIFE INSURANCE, 749 F.2d 694, 699-700 (11th Cir. 1985) (applying Florida law).

Therefore, the elements necessary for the application of Fla. Stat. §627.727(2) did not exist until the June 17, 1990, excess policy on which the 1984 Lincoln was specifically identified. That was the first time that the masterpiece excess policy had a sufficient nexus with Florida to trigger application of that statute, As a result, since it is undisputed that Federal was aware of the location of the risk, i.e., that the 1984 Lincoln was registered and garaged in Florida, it had the duty to offer uninsured motorist coverage in an amount equal to the liability limits in conjunction with the issuance of the June 17, 1990, excess policy.

This conclusion is supported not only by the literal language of the statute, but also the extensive case law explaining the public policy upon which the statute is based. Once the Delray Beach residence and the 1984 Lincoln were added to the policy in June of 1990, Florida had a significant relationship to the insurance contract and, thus, had a substantial interest in protecting its citizens pursuant to the insurance statutes enacted by the legislature, see GILLEN v. UNITED SERVICES AUTOMOBILE ASSOCIATION, 300 So.2d 3 (Fla. 1974).

More specifically, this Court has repeatedly stated that the intention of the legislature in enacting Fla. Stat. $627.727 is to protect residents and people with vehicles registered or principally garaged in this state from damages caused by uninsured motorist, BROWN v. PROGRESSIVE MUTUAL INSURANCE CO., 249 So.2d 429, 430 (Fla. 1971); SALAS v. LIBERTY MUTUAL FIRE INSURANCE CO., 272 So.2d 1, 5 (Fla. 1972). In DECKER v. GREAT AMERICAN INSURANCE CO., 392 So.2d 965, 968

(Fla. 2d DCA 1980), rev. den., 399 So.2d 1143 (Fla. 1981), the court stated that Fla. Stat. $627.727 was designed to protect "persons who are insured under a policy covering a motor vehicle registered or principally garaged in Florida, and who are impaired or damaged in Florida by motorists who are uninsured or underinsured and cannot thereby make whole the impaired party, " quoted in AMARNICK v. AUTOMOBILE INSURANCE CO., supra, 643 So.2d at 1131. Precisely what occurred here, since Rita had a policy covering a vehicle registered and principally garaged in Florida, and she was severely injured by an uninsured motorist in this state. Therefore, the policy underlying the statute also supports the result dictated by the literal language of the statute, That is, Federal had an obligation to offer Rita uninsured motorist coverage in an amount equal to the excess liability limits when the excess policy specifically insured a vehicle registered and principally garaged in Florida.

It should be noted that the Eleventh Circuit has determined that Florida law applies here based on the fact that Federal was aware at that time that the 1984 Lincoln was garaged in Florida and, thus, knew the location of the risk.[3] That determination is consistent with Florida law, see GILLEN v. UNITED SERVICES AUTOMOBILE ASSOCIATION, supra; AMARNICK v. AUTOMOBILE INSURANCE COMPANY OF

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[3]/Plaintiff also maintains that Florida law applied because the excess policy was delivered to Rita in Florida, and it was executed in Florida, as demonstrated by the "Florida Signatures," see Fla. Stat. $627.416, and Florida "Policy Terms" which Federal included with the policy.

HARTFORD, supra; APERM OF FLORIDA v. TRANS-COASTAL MAINTENANCE CO., supra.

During this litigation, Federal has made three arguments to avoid application of Fla. Stat. §627.727(2), that the excess policy is a New Jersey policy and, thus, it had no obligation to comply with Florida law. Of course, that is inconsistent with the Eleventh Circuit's determination that Florida law applies in this case, which is amply supported by Florida precedent.

Federal's position is also inconsistent with Florida statutory law. Fla. Stat. §624.11(1) provides that "no person shall transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, without complying with the applicable provisions of this code, " Additionally, Federal's own documents reflect its awareness that the policy was governed by Florida law, since the excess policies issued in June of 1990 to Rita Strochak contained Florida "policy terms" and "Florida signatures, " as did the excess policy issued the next two years. Thus, Federal's contention that the excess policy is a New Jersey policy governed solely by New Jersey law is belied by its own documents.

Federal also argues that since Donald Strochak was offered uninsured motorist coverage in the 1985 application for an excess policy, it complied with its duty under Florida law. That conclusion is erroneous for numerous reasons. First, Fla. Stat. §627.727(2) requires that the excess insurer make such coverage available as part of the application for "such policy" which obviously implicates the prior language in the statute,

which addresses only policies which are delivered or issued for delivery in Florida and provide "coverage for liabilities arising from the maintenance, operation, or use of a specifically insured motor vehicle. " The 1985 excess policy was not such a policy, since it was not delivered or issued for delivery in Florida. In 1985, the Strochaks owned no motor vehicles that were registered or principally garaged in Florida, and no such vehicle was specifically identified in the application or policy. Thus, Fla. Stat. $627.727 did not apply to the 1985 excess policy.

Furthermore, the facts compel the conclusion that the 1985 policy was not the same policy as the Masterpiece excess policy that specifically provided excess liability coverage for the 1984 Lincoln, effective June 17, 1990. The 1985 policy was not executed in Florida, was issued in the name of a different named insured (i.e. Donald Strochak), and contained a different policy number (R3-80-PH-70, 75). Additionally, as Federal's representative testified, the "Masterpiece" policy was "a different policy providing broader coverage" (R3-80-PH-51), and it required different limits for the underlying automobile coverage (Ibid). Moreover, Donald Strochak had died prior to issuance of the 1989 "masterpiece" policy and, thus, any authority, as Rita Strochak's agent, to reject uninsured motorist coverage on her behalf had terminated, see 3 Am.Jur.2d Agency $57, p.559.

Federal's contention that its conduct in 1985 could be relevant to its compliance with Fla. Stat. §627.727(2) in 1990 is also flawed for an additional reason Under that rationale, if Federal had not offered uninsured motorist coverage in 1985, it would have

violated the Florida statute, even though at that time there was absolutely no nexus between the excess policy and Florida. There are significant constitutional and jurisdictional hurdles to overcome in order to hold that Fla. Stat. §627.727(2) could apply to an excess liability policy that did not insure any vehicles registered or garaged in Florida. More importantly, the legislature clearly did not intend that Fla. Stat. §627.727(2) would apply to such policies. Thus, an offer of uninsured motorists coverage which was made five years before the policy had any nexus with a Florida vehicle cannot satisfy the duty imposed by Fla. Stat. §627.727(2).

The trial court accepted Federal's argument that the offer of uninsured motorist coverage in 1985 was sufficient to satisfy Fla. Stat. §627.727(2) based on its conclusion that no new policy had issued since that time (R3-93-5). That is not factually accurate, nor consistent with Florida law. Federal's representative, Patricia Harris, testified that when the masterpiece policy issued in 1989, it was a different policy, with different coverages, terms, and a different policy number (R3-80-PH-5 1). Additionally, the named insured had changed from Donald to Rita Strochak, and the "policy terms" for the policies issued beginning in 1990 contained Florida "policy terms, " whereas the prior policy did not. Thus, factually, the policy in effect at the time of the accident was not the same policy as had been issued in 1985.

Furthermore, in MARCHESANO v. NATIONWIDE PROPERTY & CASUALTY INSURANCE CO., 506 So.2d 410, 413 (Fla. 1987), this Court stated:

> The general rule in Florida is that upon each renewal of an insurance policy an entirely new and independent contract of insurance is created. [Citations omitted.]

Thus, Florida courts have held that when there are statutory amendments passed relevant to an existing insurance policy, upon renewal that contract is required to conform to the newly amended law, see METROPOLITAN PROPERTY AND LIABILITY INSURANCE CO. v. GRAY, 446 So.2d 216 (Fla. 5th DCA 1984); LAND1 v. NATIONWIDE MUTUAL FIRE INSURANCE CO., 529 So.2d 1170 (Fla. 2d DCA 1988); ADAMS v. AETNA CASUALTY & SURETY CO., 574 So.2d 1142 (Fla. 1st DCA 1991). Based on the same reasoning, if a renewal of a policy contains additional coverages that implicate different statutes for the first time, those statutes must be deemed to apply to the new contract. Thus, the issuance of the masterpiece excess policy in 1990, which specifically identified the 1984 Lincoln, necessarily implicated Fla. Stat. §627.727(2), and Federal was required to comply with that statute at that time.

A separate and independent basis for reaching the same conclusion is that the endorsement adding the 1984 Lincoln involved a separate and additional risk, and resulted in the charging of a separate and additional premium. In FIREMAN'S FUND INSURANCE CO. v. POHLMAN, 485 So.2d 418, 420-21 (Fla. 1986), this Court stated:

> It is possible that an endorsement which either adds a premium or adds both a premium and a vehicle constitutes the issuance of a new policy incorporating a statutory amendment into its terms. A court must examine the risk covered by the additional premium. In this instance, the fact that the increased premium is covering the risk involved with insuring an additional vehicle leads to the conclusion that a separate

> and severable contract was entered into on the date of the endorsement. [Emphasis supplied.]

Here, the addition of excess coverage for the 1984 Lincoln, which prior to 1990 was not covered under the masterpiece excess policy, created an additional risk and resulted in an additional premium. Therefore, it was a separate and severable contract subject to Fla. Stat. §627.727(2). That is an additional reason why the trial court erred in concluding that no new policy issued and that the offer of uninsured motorist coverage with the 1985 application satisfied the requirement of Fla. Stat. §627.727(2).

Federal also argues that Fla. Stat. §627.727(2) does not apply because no application for insurance was generated after 1985. Federal's representative, Patricia Harris, testified that prior to the utilization of the "masterpiece" policies, Federal required an application any time a new coverage came into existence (R3-80-PH, p.37). Subsequent to the adoption of the "masterpiece" policies, coverages were changed through the use of a "worksheet" (Ibid). Thus, under Federal's practices prior to the "masterpiece" policies, the duty to offer excess uninsured motorist coverage would have been created at the time coverage for the 1984 Lincoln was added to the excess motor vehicle liability policy, i.e., June 17, 1990, since an application would have been used. Federal's argument is that since it no longer utilizes applications, it has no duty under Fla. Stat. §627.727(2) to notify the insured of the availability of uninsured motorist coverage. It is respectfully submitted that that position is neither logical, nor consistent with the legislative intent behind Fla. Stat. $627.727.

Florida courts have repeatedly noted the strong legislative policy behind Fla. Stat. 8627.727. In AMARNICK v. AUTOMOBILE INSURANCE COMPANY OF HARTFORD, supra, 643 So.2d at 113 1, the court stated:

> The purpose of section 627.727 is to protect "persons who are insured under a policy covering a motor vehicle registered or principally garaged in Florida and who are impaired or damaged in Florida by motorists who are uninsured or underinsured and cannot thereby make whole the impaired party. " DECKER v. GREAT AM. INS. CO., 392 So.2d 965, 968 (Fla. 2d DCA 1980), rev. denied, 399 So.2d 1143 (Fla. 1981) (citing BROWN v. PROGRESSIVE MUT. INS. CO., 249 So.2d 429 (Fla. 1971); STATE FARM MUT. AUTO. INS. CO. v. DIEM, 358 So.2d 39 (Fla. 3d DCA 1978)).

It has also been noted that the statute is not designed for the benefit of insurance companies and that it imposes a heavy burden upon insurance companies to offer, or obtain rejections of, uninsured motorist coverage, see NATIONWIDE PROPERTY & CASUALTY INSURANCE CO. v. MARCHESANO, 482 So.2d 422, 424-25 (Fla. 2d DCA 1985), approved, 506 So.2d 410 (Fla. 1987). Additionally, in construing the statute, courts must "avoid a construction which would defeat the intended operation of the statute," FIRST NATIONAL INSURANCE COMPANY OF AMERICA v. DEVINE, 211 So.2d 587, 589 (Fla. 2d CA 1968).

Federal's construction of the statute would defeat its intended operation, because it would permit an insurance company to avoid application of the statute by simply changing its internal procedures to eliminate the use of a document designated an application. That would permit the insurance companies to control the operation of the

statute. The contention that an entity regulated by a statute can defeat its purpose by altering the form, but not the substance of its conduct, has been repeatedly rejected by this Court, JERSEY PALM-GROSS, INC. v. PAPER, 658 So.2d 531 (Fla. 1995) (lender cannot insulate itself from liability under usury statute by inserting usury savings clause in contract); SHRINERS HOSPITAL FOR CRIPPLED CHILDREN v. ZRILLIC, 563 So.2d 64 (Fla. 1990) (testator's intent cannot control construction of statute intended to control legacies); JACK STILSON & CO. v. CALOOSA BAYVIEW CORPORATION, 278 So.2d 282 (Fla. 1973) (contractor not allowed to circumvent statutory time limitation for filing mechanic's lien claim by filing an untimely "amended" claim). Additionally, Federal's construction of Fla. Stat. §627.727(2) does not protect people who are insured under a policy covering a Florida motor vehicle, because the requisite offer of coverage could be made, as argued by Federal in this case, years before an insured had any vehicle registered or garaged in Florida.

While the legislature did not define the term "application" in Fla. Stat. §627.727(2), and did not specify when such applications must be utilized, a logical and practical analysis compels the conclusion that an application would be utilized when a new form of coverage is requested.[4] This is consistent with the manner in which the insurance business is operated (as reflected in Federal's prior practices), and the manner

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[4]/Contrary to the statement in the trial court's order (R3-80-5), the Plaintiff has never argued that a new application was required every year. Plaintiff's counsel specifically stated at the hearing on the Motions for Summary Judgment that that was not his client's position (R5-108-18).

in which the rights of the parties are regulated. As with most states, Florida law provides that a material misrepresentation in an application for insurance may prevent recovery under the policy. Fla. Stat. §627.409(1) provides:

> 627.409 Representations in applications; warranties.--
>
> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and is not a warranty. misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

See, CONTINENTAL ASSURANCE CO. v. CARROLL, 485 So.2d 406 (Fla. 1986); see also, Fla. Stat. §626.9541(K)(1) (misrepresentation in insurance application by agent or solicitor). As a practical matter, when new coverages are obtained, the application contains the information upon which the insurance company relies to determine the risks, terms, and premium(s). That is the logical time to expect an application to be generated. The language of Fla. Stat. §627.727(2) must be construed in accordance with other statutory provisions governing insurance and, therefore, that provision requires an offer

of uninsured motorist coverage, when a new coverage which triggers the application of the statute, is requested.

Applying a reasonable construction of Fla. Stat. §627.727(2), Federal had the duty to offer uninsured motorist coverage to Rita Strochak under the excess policy in June of 1990, when coverage for the 1984 Lincoln was added to the "masterpiece" excess policy. That was the first time the "masterpiece" excess policy provided motor vehicle coverage for a specifically identified Florida vehicle. Consistent with the literal terms of Fla. Stat. §627.727(2) and the legislative intent upon which it is based, Federal had the duty to offer Rita excess uninsured motorist coverage at that time. To hold otherwise would defeat the purpose of that statutory provision, and render it ineffective to protect Florida residents, especially those who move here from other states.

## CONCLUSION

For the reasons stated above, the Certified Question of the Eleventh Circuit should be answered in the affirmative.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to GEORGE A. VAKA, ESQ., P.O. Box 1438, Tampa, FL 33601; GERALYN M. PASSARO, ESQ., 600 S. Andrews Ave., Ft. Lauderdale, FL 33301, by mail, this 20th day of May, 1997.

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