IN THE SUPREME COURT OF FLORIDA

JUAN YOUNG and ALINA YOUNG, his wife, Petitioners, v. PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY, Respondent.	:	CASE NUMBER: 93,544

ON CERTIFIED QUESTION
FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 12-point Courier non-proportionally spaced type font which does not exceed ten characters per inch.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: (Cont'd.) **PAGE**

STATUTES

STATEMENT OF THE CASE AND FACTS

On September 29, 1995, Petitioner Juan Young ("Young"), was injured when, while stopped at a red light, he was struck from behind by a Hillsborough County Sheriff's Office ("HCSO") patrol car driven by an HCSO deputy within the course and scope of his employment (R. 1-37; 134). Mr. Young and his wife (collectively, "the Youngs") brought suit against HCSO for damages sustained in this accident. HCSO, pursuant to the authority conferred by §768.28(15)(a), Fla. Stat. (1995), had self-insured its liability for the $100,000.00 per person and $200,000.00 per occurrence limited waiver of sovereign immunity provided for in §768.28(5), Fla. Stat. (1995) (R. 135).[1]

The Youngs also sued Progressive Southern Insurance Company ("Progressive"), their liability and uninsured/underinsured motorist ("UM") carrier, alleging that their damages from the accident exceeded the liability limits available from HCSO. Progressive admitted that it had issued a policy of automobile liability insurance to the Youngs containing UM coverage in the amount of $25,000.00, and that this policy was in effect on the date of the accident. Progressive, however, denied that the Youngs

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[1] **References to the record on appeal will be designated by the prefix "R.," followed by the page number of the reference. The volume number has been omitted because the record consists of one volume.**

were entitled to UM benefits under the policy because, *inter alia*, of the self-insured status of HCSO (R. 134-35).

The Definition of "uninsured motor vehicle" in the Additional Definition section of Part III of the Progressive policy, applicable only to UM coverage, provides in pertinent part:

> 4. "Uninsured motor vehicle" means a motor vehicle which is:
>
> a. Not insured by a bodily injury liability bond or policy at the time of the accident;
>
> b. Insured by a liability bond or policy at the time of the accident which provides bodily injury liability limits less than an insured person's damages;
>
> c. A hit-and-run vehicle whose operator or owner is unknown and which causes injury or damage to:
>
> (i) you or a relative;
>
> (ii) a vehicle which you or a relative are occupying or;
>
> (iii)your insured auto.
>
> You or your relative or someone on your behalf must have reported the accident within 24 hours to a police, peace or judicial officer, or the Commissioner of Motor Vehicles, if physically able to do so.
>
> d. Insured by a bodily injury liability bond or policy at the time of the accident but the insuring company denies coverage or is or becomes insolvent.
>
> Provided that, an uninsured motor vehicle does not include any vehicle:
>
> * * *
>
> **d. Owned by or operated by a self-insurer as contemplated by any financial responsibility law, motor carrier law, or similar law**

(R. 9-36; 93) (emphasis added).

Because HCSO was self-insured, Progressive took the position that subsection (d) of the proviso to the definition of "uninsured

motor vehicle" under the Progressive policy excluded the HCSO patrol car from that definition (R. 92-95). Progressive then argued that, since the HCSO patrol car was not an uninsured motor vehicle under its policy, it had no obligation to provide UM benefits to the Youngs, as UM coverage is "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles...." §627.727(1), Fla. Stat. (1995).

Progressive moved for summary judgment against the Youngs on this ground, predicating its motion solely upon the Fourth District decision in *Amica Mutual Insurance Company v. Amato*, 667 So.2d 802 (Fla. 4th DCA 1995), *rev. denied*, 676 So.2d 1368 (1996) ("*Amato*"). *Amato* had held that, under a policy providing that the term "uninsured motor vehicle" did not include any "vehicle or equipment... owned or operated by a self insurer...," UM benefits were not payable with respect to a collision between the insured and a truck owned and self-insured by the City of Fort Lauderdale (R. 92-108).

The trial court granted Progressive's motion by order dated March 17, 1997 (R. 134-35). That order specifically stated that the summary judgment was predicated on the decision in *Amato*. Final judgment was entered for Progressive on May 9, 1997 (R. 141-143), and on June 3, 1997, the Youngs timely appealed to the Second District Court of Appeal from this final judgment (R. 144).

On appeal, the Youngs took the position that *Amato* had been incorrectly decided and that self-insurer exclusions from UM coverage were contrary to Florida law and public policy. While the appeal was being briefed, a panel of the Second District, in *Comesanas v. Auto-Owners Ins. Co.*, 700 So.2d 118 (Fla. 2d DCA 1997), adopted without further analysis the decision in *Amato*. The Youngs continued to maintain that *Amato* had been wrongly decided, but since the Second District had now issued a decision on the issue, requested in their reply brief and at oral argument that the validity of this exclusion be certified to this Court. On June 24, 1998, a panel of the Second District, including two members of the panel which had decided *Comesanas*, certified to this Court as a question of great public importance the issue of whether a "self-insurer" exclusion from uninsured motorists coverage was permissible under Florida law and public policy. *Young v. Progressive Southeastern Ins. Co.*, 712 So.2d 460 (Fla. 2d DCA 1998). On July 21, 1998, the Youngs filed a notice to invoke this Court's discretionary jurisdiction.

ISSUES PRESENTED FOR REVIEW

I. **IS A POLICY PROVISION WHICH EXCLUDES A VEHICLE OWNED OR OPERATED BY A SELF-INSURER FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" FOR PURPOSES OF UNINSURED/UNDERINSURED MOTORIST COVERAGE PERMISSIBLE UNDER FLORIDA LAW AND PUBLIC POLICY?**

II. **IF SUCH PROVISIONS ARE PERMISSIBLE, DOES THE PROGRESSIVE EXCLUSION APPLY TO THE YOUNG'S CLAIM?**

SUMMARY OF ARGUMENT

This petition for discretionary review concerns whether the exclusion of a self-insured vehicle from the definition of "uninsured motor vehicle" for uninsured/underinsured motorist coverage ("UM") purposes is permissible under Florida law and public policy. The Second District Court of Appeal has certified the issue to this Court as a question of great public importance.

Such self-insurer exclusions, including the Progressive provision at issue here, are contrary to Florida law and public policy, which prohibit the "whittling away" of prescribed UM coverage by unauthorized exclusions and exceptions. The Second District upheld Progressive's self-insurer exclusion because of its holding in *Comesanas*, which in turn had relied exclusively on the Fourth District's *Amato* decision. *Amato*, however, was incorrectly decided; this decision was predicated upon the logically and factually faulty analysis that self-insurers retain a "theoretically infinite" risk of liability so that UM coverage can never attach when a self-insurer is involved. In fact, all motorists retain the same theoretically infinite risk of liability in excess of their policy limits. In addition, both the certificates of self-insurance issued by the Florida Department of Insurance, and the certificate of self-insurance created by HCSO here, expressly include limits on the self-insurance provided.

The *Amato* decision also failed to consider the import of several of this Court's decisions whose rationales would have dictated a different result. These include cases which hold that the test of whether a motor vehicle is "uninsured" for UM purposes is whether the injured party can in fact recover the insurance proceeds at issue; that the existence of collateral remedies, such as a claims bill in the Florida legislature, does not alter "uninsured" status; and that the sovereign immunity defense of a governmental entity is not available to a UM insurer.

Self-insurer exclusions are also contrary to Florida law and public policy because they lead to inappropriate and untoward results such as preventing motorists from financially protecting themselves from "self-insured" motorists who have obtained that status merely by demonstrating the existence of the minimal assets necessary to satisfy the financial responsibility law. In addition, it incongruously allows the availability of UM coverage for amounts above the statutory cap on a sovereign immunity waiver to be controlled by the method chosen to fund liability for amounts below the cap.

Finally, even if self-insurer exclusions were deemed permissible under Florida law, the Progressive policy provision on its face does not apply to the Youngs' claim. Unlike the broader language construed in *Amato*, the Progressive exclusion excludes only motor vehicles owned or operated by a self-insurer "as

contemplated by any financial responsibility law, motor carrier law, or similar law." HCSO was not insured under a financial responsibility law, is not a motor carrier, and the partial waiver of sovereign immunity statute is not even arguably a "similar law" under controlling contract construction principles.

ARGUMENT

I. THE PROGRESSIVE POLICY PROVISION WHICH EXCLUDES A VEHICLE OWNED OR OPERATED BY A SELF-INSURER FROM THE DEFINITION OF "UNINSURED MOTOR VEHICLE" IS INVALID AND UNENFORCEABLE AS CONTRARY TO FLORIDA LAW AND PUBLIC POLICY.

This petition for discretionary review involves a question of great public importance as certified by the Second District Court of Appeal. That question is whether a UM policy provision which excludes a self-insured vehicle from the definition of an "uninsured motor vehicle" for UM coverage purposes is permissible under Florida law and public policy.

The trial court decision underlying this appeal is a final summary judgment holding that the Youngs were not entitled to receive UM benefits under their personal automobile policy solely because Hillsborough County, which owned the HCSO patrol car which struck Mr. Young and caused his injuries, had happened to self-insure its liabilities arising under the limited waiver of sovereign immunity provided by §768.28(5), Fla Stat. (1995). Under this ruling, the Youngs were precluded from receiving the UM benefits they had bought and paid for even though their damages exceeded the amount which could be recovered from HCSO pursuant to the limited waiver of sovereign immunity. If this decision were to stand, the only way the Youngs can be compensated for damages above the waiver amount would be to persuade the Florida legislature to

pass a claims bill allowing them additional compensation purely as a matter of legislative grace.

The trial court reached this harsh result on the authority of *Amica Mutual Insurance Company v. Amato*, 667 So.2d 802 (Fla. 4th DCA 1995), *rev. denied*, 676 So.2d 1368 (1996) ("*Amato*").[2] The *Amato* decision, however, is contrary both to logic and to fundamental principles of UM law established by prior decisions of this Court. The Youngs request that this Court answer the certified question in the negative and hold that policy provisions which purport to exclude vehicles owned or operated by a self-insurer from the definition of an "uninsured motor vehicle," such as that in the Progressive policy, are invalid and unenforceable as contrary to the law and public policy of the State of Florida.

Amato bases its conclusion on two principal holdings. First, it holds that a policy provision excluding vehicles owned or operated by self-insurers from the definition of "uninsured motor vehicle" does not violate the principles of *Mullis v. State Farm Mutual Automobile Ins. Co.,* 252 So.2d 229 (Fla. 1971) ("*Mullis*"),

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[2] **The Second District panel which heard the Youngs' appeal was compelled to affirm because a panel of that court had previously followed** *Amato* in *Comesanas v. Auto-Owners Ins. Co.*, 700 So.2d 118 (Fla. 2d DCA 1997) ("*Comesanas*"). *Comesanas* offered no new or additional rationale for its decision, but simply stated that "we agree" with *Amato*. This brief therefore addresses the grounds for decision set forth in *Amato*, which were adopted by the Second District in *Comesanas* and in the decision below.

and similar cases which preclude insurers from reducing statutorily-prescribed UM coverage through the use of policy exclusions and exceptions. Second, *Amato* holds that "uninsured" or "underinsured" status does not exist with respect to a governmental self-insurer even if the claimant's damages exceed the statutory cap under the limited waiver of sovereign immunity provided in §768.28(5), Fla. Stat. (1993).

If either of these two holdings are incorrect, the Youngs are entitled to UM benefits from Progressive. The Youngs submit that both of these holdings are illogical and contrary to principles of UM coverage law firmly established by prior decisions of this Court.

As noted, the first principal holding of *Amato* is that a UM policy provision excluding the vehicles of a self-insurer from the definition of "uninsured motor vehicle" does not violate the settled principle of Florida UM law that "insurers may not reduce statutorily prescribed UM coverage through the use of policy exclusions and exceptions." *Amato*, 667 So.2d at 803 (citing *Mullis*). *Amato* acknowledged that this principle continues to accurately state Florida law,[3] but rejected its applicability to

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[3] **The** *Amato* court also purported to recognize that the "self-insurer exclusion" was not among the "authorized" policy provisions set out in §627.727(9), Fla. Stat. (1995), but failed to explain why it concluded this did not invalidate the exclusion. This statute represents an additional reason why the Progressive (continued...)

the self-insurer exclusion based on an illogical and artificial attempt to distinguish between "uninsured" and "self-insured" status.[4]

Amato articulated the distinction it purported to divine between being "self-insured" and being "uninsured" in the following terms:

> "Self-insured" is different from "uninsured." Uninsured is when the tort-feasor's liability insurer has provided limits of bodily injury liability for its insured which are less than the total damages sustained. A self-insured entity is statutorily permitted to retain the risk of liability -- a risk that is theoretically infinite. (*Id.*)

In other words, *Amato* found that "self-insured" status was different from "uninsured" status because only a self-insurer purportedly retained a "theoretically infinite" risk of liability. From this incorrect premise, *Amato* then reasoned that being injured by a vehicle owned or operated by a self-insurer was, for UM purposes, the legal equivalent of being injured by a vehicle insured by a policy with no limits or, more precisely, with infinite policy limits. Since the damages sustained by a UM

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[3](...continued)
policy provision is contrary to Florida law and public policy.

[4] **This "distinction" led the** *Amato* court to reason that the self-insurer exclusion was actually not an exclusion or exception to coverage at all, but simply a statement of the controlling law. Thus, the *Amato* opinion states: "[w]e are unable to agree that the policy provision at issue does any more than correctly state the law and inform the insured of its limitations." (*Id.*)

insured could never exceed the tortfeasor's "infinite" policy limits, UM coverage, which is designed to come into play only when the insured's damages exceed the tortfeasor's policy limits, would never attach when a self-insurer was involved.

Amato's analysis is facially faulty. The retention of a "theoretically infinite" risk of liability, which the *Amato* court identifies as the critical distinction between "self-insured" and "uninsured" status, is in fact applicable to everyone who owns or operates a motor vehicle, whether they are insured, self-insured, or uninsured. A motorist who buys a liability insurance policy continues to retain the theoretically infinite risk of liability above the limits of that policy. The actual distinction between insureds and self-insureds involves the point at which the risk of liability attaches, not in the upper limit of liability. In short, the theoretically infinite risk of liability posited by *Amato* as unique to self-insurers is in fact shared by all owners and operators of motor vehicles. It therefore cannot serve as a logical or legal basis for distinguishing "self-insureds" from "uninsureds" for purposes of UM coverage.

In addition to being illogical, the *Amato* decision's assumption that self-insurance has no upper limits for UM purposes is factually incorrect. Section 324.171, Fla. Stat. (1995), titled "Self-Insurer," establishes the procedures and requirements by which private parties may become self-insurers. Subsection (1) of

this statute provides that the way a person qualifies as a self-insurer is by obtaining a certificate of self-insurance from the Department of Insurance. Subsection (2) then goes on expressly to state that the certificate shall provide liability limits for the self-insurance:

> **The self-insurance certificate shall provide limits of liability insurance** in the amount specified under s.324.021(7) [the financial responsibility law for private automobiles] or s.627.7415 [commercial vehicles] and shall provide personal injury protection coverage under s.627.733(3)(b). (Emphasis added.)

Further, in this case HCSO itself considers its self-insurance program to have liability limits. Paragraph 5 of the "Certificate of Insurance" prepared by HCSO to delineate the parameters of its self-insurance program, titled "Limits of Liability," identifies these limits as follows:

> $100,000 per claim, $200,000 per occurrence limits of liability are those specified in 768.28(5), Florida Statutes. (R. 97.)

The "Self-Insurer" statute also expressly contemplates that insurance policies may provide coverage in excess of self-insured limits. For example, §324.171(1)(b) 2., Fla Stat. (1995), provides that one of the factors to be considered in determining the net worth a non-natural person must possess to qualify to be self-insured is the "excess insurance carried by the applicant." Thus, directly contrary to *Amato's* assumption, Florida statutes do not contemplate that a self-insured assumes "theoretically infinite"

liability it would not otherwise have had by the act of becoming self-insured; rather, a self-insurer thereby assumes risks up to defined limits -- limits which may be supplemented by excess insurance (or by UM insurance maintained by a party injured through the negligence of a self-insured).

Amato's second holding, that a self-insured municipality is not "uninsured" or "underinsured" even if a UM insured's damages exceed the cap applicable to the statutory waiver of sovereign immunity, consists of a single sentence which states in conclusory fashion that "[t]he sovereign immunity of the tortfeasor, with the limitations and procedural complications attendant to its limited waiver, does not create an 'uninsured' status, however." (*Id.*) No authority is cited for this holding; this lack of support is not surprising because the logic of this conclusion is also faulty.

There is no reason why the fact that there may be "limitations and procedural complications" attendant to the limited statutory waiver of sovereign immunity should lead to the conclusion that damages in excess of the statutory cap are not "uninsured." In fact, this Court has held directly to the contrary. In *Michigan Millers Mutual Ins. Co. v. Bourke*, 607 So.2d 418 (Fla. 1992) ("*Michigan Millers*"), this Court found that the less than absolute nature of the sovereign immunity defense was one of the reasons that this defense was **not** available to a UM insurer. In addition, this Court has also expressly held that the existence of a

collateral remedy, such as a claims bill, does not render a vehicle "insured." *Allstate Ins. Co. v. Boynton*, 486 So.2d 552, 555 (Fla. 1986) ("*Boynton*").

Amato's holdings also do not withstand legal analysis. The only authorities cited by *Amato* as support for its conclusion that self-insured motor vehicles are not "uninsured" for UM purposes were two dated district court decisions which *Amato* itself acknowledged were not on point.[5]

One of these decisions, *Centennial Ins. Co. v. Wallace*, 330 So.2d 815 (Fla. 3d DCA), *cert. denied*, 341 So.2d 1087 (Fla. 1976) ("*Wallace*"), concerned an employee of Florida Power & Light ("FP&L") electrocuted as a result of an accident involving a winch boom on a self-insured FP&L truck. While the policy at issue in *Wallace* contained a self-insurer exclusion, the validity of that exclusion was not litigated. Rather, Mrs. Wallace argued that FP&L's self-insurance was not available because her deceased husband was an employee of FP&L and could not maintain an action in tort against FP&L because of the worker's compensation statute. The litigated issue in the case was thus whether FP&L's worker's

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[5] **The** *Amato* court euphemistically described these cases as "decided in a context slightly different from the one at hand...." *Amato*, 667 So.2d at 803.

compensation immunity rendered the winch truck an uninsured motor vehicle.[6]

The other case cited by *Amato* was *Gabriel v. Travelers Indemnity Co.*, 515 So.2d 1322 (Fla. 3d DCA 1987) ("*Gabriel*"). In *Gabriel*, the litigated issue was whether the City of Miami was required to obtain a certificate of self-insurance from the Department of Insurance in order to be considered self-insured. The Third District held that it was not. The insured in *Gabriel* took the position that, because the city failed to obtain a certificate, it had no insurance, and the opinion does not even indicate if the UM policy at issue contained a provision regarding self-insurers. *Gabriel* also did not involve uncompensated damages since the opinion twice notes that the city had insurance through its trust fund and possessed the ability to make the insured whole. Clearly, *Wallace* and *Gabriel* do not justify the *Amato* holding.

Even more importantly, the *Amato* court failed to consider several decisions of this Court which would have compelled it to reach the opposite conclusion. *Boynton*, for example, concerned whether an insured could recover UM benefits when the tortfeasor was immune from liability because of a worker's compensation

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[6] *Wallace* held that it did not. This Court subsequently reached a contrary conclusion on this issue in *Boynton*, and expressly disapproved the holding of *Wallace* on this point. *Boynton*, 486 So.2d at 554 n. 4.

defense. Although ultimately concluding that the worker's compensation defense was available to the UM insurer because the UM policyholder could not prove he was "legally entitled to recover" from the owner or operator of the tortfeasor's vehicle, this Court explicitly considered and rejected the contention that a vehicle was not "uninsured" for UM purposes if there was a liability policy which would have provided coverage except for the fact that the insured did not have a viable cause of action against the tortfeasor. *Boynton* held that the test of whether a motor vehicle is uninsured is pragmatic, and turns on whether the insurance in question is in fact available to the injured plaintiff. Specifically, this Court stated:

> Allstate asserts that the vehicle in question was not "uninsured" because Xerox had a liability insurance policy that would have provided coverage if Boynton had had a cause of action against Xerox. **We reject this argument**. The fact that an owner or operator of a motor vehicle has a liability insurance policy does not always mean that the vehicle is insured in the context of section 627.727(1). **A vehicle is insured in this context only when the insurance in question is available to the insured plaintiff**.

Boynton, 486 So.2d at 555 (emphasis added).

Both the holding and the rationale of *Boynton* are clearly contrary to *Amato's* conclusion that a "self-insured" vehicle can never be "uninsured" because of the "theoretically infinite" limits of liability retained by the self-insurer, even though those "infinite" limits are not actually available to the injured party.

This Court's decision in *Boynton* is also significant in that it also discusses and cites with approval *American Fire & Cas. Co. v. Boyd*, 357 So.2d 768 (Fla. 1st DCA 1978) ("*Boyd*"), a decision which is closely comparable in several respects to the case at bar. *Boyd* concerned a UM insured involved in an accident with a tortfeasor traveling under military orders. The tortfeasor was insured by a GEICO policy which contained an express exclusion of liability coverage while the insured was traveling on orders of a branch of the military service. When the insured sought UM benefits from his insurer on account of this accident, the carrier declined to provide them on the ground that, notwithstanding the exclusionary clause in the tortfeasor's liability policy, his motor vehicle did not qualify under the statute as an uninsured motor vehicle because the tortfeasor's employer, the United States Government, was liable for his negligence under the Federal Tort Claims Act.

The *Boyd* court rejected this contention in the following language:

> The sole issue is whether the Hansen vehicle was "an uninsured vehicle" within the meaning of that term as used in F.S. 627.727. We hold that it was, and therefore affirm. Although Hansen had procured a policy of insurance, that policy afforded no coverage because of the exclusionary clause; and the mere fact that Hansen was in such a position as to cause to be invoked by his negligence the provisions of the Federal Tort Claims Act does not mean that he is thereby "insured" within the meaning of the statute.

Boyd, 357 So.2d at 769.[7]

Amato is also contrary to this Court's decision in *Michigan Millers*, which decided the question of whether a UM insurer was entitled to the benefit of the sovereign immunity defense when its insured had been injured through the negligence of a publicly-owned or operated motor vehicle, and held that UM carriers were not entitled to the benefit of this defense. This Court stated its holding as follows:

> In conclusion, section 768.28 authorizes the rendition of a judgment in excess of the amount the State can be required to pay due to sovereign immunity. Furthermore, the legislature has determined that, in addition to allowing discretionary recovery through a legislative claims bill, the limits of the sovereign immunity statute may be exceeded when insurance coverage is available. We find that the immunity defense available under section 768.28 is not absolute within the meaning of the term "legally entitled to recover" so as to allow such a defense to be raised substantively by an insurance carrier. Consequently, the sovereign immunity defense is not available to Michigan Millers.

607 So.2d at 422.

By considering a governmental entity to be "self-insured" for amounts exceeding the limited sovereign immunity waiver cap, even though the governmental entity has no obligation to pay such

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[7] **Similarly,** *Johns v. Liberty Mutual Fire Ins. Co.*, 337 So.2d 830 (Fla. 2d DCA 1976), *cert. denied*, 348 So.2d 949 (Fla. 1977), invalidated a policy provision which excluded government-owned vehicles from the definition of uninsured vehicles for UM purposes. The court held this provision was more restrictive than the Uninsured Motorists Act and therefore invalid under the authority of *Mullis* and similar decisions.

amounts, *Amato* in effect permits a UM insurer to enjoy the benefit of the sovereign immunity defense. Such a result is in direct contravention of *Michigan Millers*' holding that this defense is "not available" to a UM insurer.

In addition to their logical and legal infirmities, "self-insurer exclusions" such as Progressive's constitute impermissible exceptions to UM coverage because they lead to incongruous and legally inappropriate results. The Progressive policy purports to remove from the definition of "uninsured motor vehicle" not only government-owned vehicles but also any vehicle owned or operated by a "self-insurer under any financial responsibility law...." Under Florida law, a person may obtain a certificate of self-insurance from the Florida Department of Insurance to comply with the financial responsibility law simply by demonstrating a net unencumbered worth of $40,000.00. *See* §324.171(1)(a), Fla. Stat. (1995).

If Progressive's self-insurer exclusion were permissible, an individual who bought substantial UM coverage, but had the misfortune to be seriously injured by the negligence of a "self-insured" motorist with a $40,000.00 net worth, would be precluded from recovering under the UM coverage he had purchased to protect himself and his family, even though the tortfeasor's total assets were not nearly sufficient to satisfy that individual's damage claims. Such a construction of the UM statute would mean that a

Florida motorist could not protect himself or herself financially from injuries inflicted by the negligence of a "self-insured" motorist with limited assets.

Such a result is inconsistent with this Court's admonition in *Brown v. Progressive Mutual Ins. Co.*, 249 So.2d 429, 430 (Fla. 1971), that the UM statute was designed "for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others." Similarly, in *Ferrigno v. Progressive American Ins. Co.*, 426 So.2d 1218, 1219 (Fla. 4th DCA 1983), the court noted that the remedial UM statute must be broadly and liberally construed precisely because "[u]ninsured motorist coverage may be the only meaningful protection available to Floridians who daily are subjected to misguided missiles on the highways of this State." The description in *Ferrigno* aptly summarizes the Youngs' position. Since the HCSO is immune from liability in excess of the statutory cap, the only meaningful protection the Youngs have is that provided by their UM policy.

Amato and the decision below also lead to an incongruous result in that they cause the Youngs' entitlement or lack of entitlement to UM coverage to turn on the totally irrelevant issue of how HCSO chose to handle its responsibility for damages the Youngs would be entitled to recover even if they had purchased no UM insurance. Section 768.28(5), Fla. Stat. (1995), gives HCSO the option either to purchase insurance for or to self-insure its

responsibilities under the limited waiver of sovereign immunity. Had HCSO chosen to purchase a policy of insurance to cover its liability up to the statutory waiver cap, it would not be "self-insured," the Progressive "self-insurer exclusion" would not even arguably have come into play, and the Youngs would have been entitled to receive UM coverage. However, under the decision below, the Youngs have been precluded from obtaining UM benefits for damages exceeding the statutory cap merely because HCSO chose to self-insure its liabilities for amounts less than the cap. This makes no sense.

For all of these reasons, the "self-insurer exclusion" in the Progressive policy should be declared void as contrary to Florida law and public policy.

II. EVEN IF "SELF-INSURER EXCLUSIONS" ARE PERMISSIBLE, THE PROGRESSIVE POLICY PROVISION DOES NOT APPLY TO THE YOUNGS' CLAIM.

Although this matter is before the Court on the certified question of whether self-insurer exclusions from UM coverage are permissible and valid, this Court may review any issue arising in the case which has been properly preserved and presented. *Tillman v. State*, 471 So.2d 32 (Fla 1985).

Even if this Court were to conclude that "self-insurer exclusions" constitutes permissible restrictions on UM coverage and that *Amato* is therefore a correct statement of Florida law, it

should nonetheless consider that the summary judgment below was erroneous because the Progressive self-insurer exclusion is substantially narrower than the language construed in *Amato* and facially does not apply to the Youngs' claim. In *Amato*, the court construed language that excluded from the definition of "uninsured motor vehicle" any "vehicle or equipment... owned or operated by a self-insurer...." The Progressive policy, however, excludes a much narrower class of motor vehicle, namely those motor vehicles "owned by or operated by a self-insurer **as contemplated by any financial responsibility law, motor carrier law, or similar law**" (emphasis added).

This Court has expressly held that "[w]hile insurance companies may not provide less uninsured motorist coverage than required by statute, there is nothing to prevent them from providing broader coverage." *Dauksis v. State Farm*, 623 So.2d 455, 457 (Fla. 1993). Even if a full "self-insurer exclusion" were permissible under Florida law, the Youngs would still be entitled to the benefit of the exclusion contained in the Progressive policy, which excludes only a much narrower class of self-insured vehicles, namely those self-insured "as contemplated by any financial responsibility law, motor carrier law, or similar law." In order to apply this exclusion to the Youngs, Progressive must demonstrate that, as a matter of law, the HCSO patrol car was self-

insured under a "financial responsibility law, motor carrier law, or similar law." It cannot.

First, HCSO is plainly not a self-insurer as contemplated by the Florida financial responsibility law. Among other things, HCSO did not obtain a self-insurance certificate from the Department of Insurance, as required by §324.171(1), Fla. Stat. (1995). Second, HCSO is not a "motor carrier." Third, §768.28, Fla. Stat. (1995), the statute pursuant to whose authority HCSO became self-insured, cannot be a "similar law" as that term is used in the Progressive policy.

The required "similarity" between the waiver of sovereign immunity statute and a financial responsibility or motor carrier law cannot be merely that both permit self-insurance. Such a construction would treat the word "similar" in the Progressive policy as superfluous, contrary to the numerous decisions holding that insurance contracts must be interpreted if possible to give effect to each word or phrase contained in the policy. *E.g.*, *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938 (Fla. 1979).[8]

Further, the term "similar" as used in the Progressive policy is, at best, ambiguous and must therefore be construed against

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[8] **If the capacity to self-insure were the relevant criterion, the provision would simply read "owned by or operated by a self-insurer as contemplated by law."**

Progressive. *See*, *e.g.*, *Schutt v. Atlantic Casualty Companies*, 682 So.2d 684 (Fla. 5th DCA 1996). Accordingly, to be able to avail itself of this exclusion, Progressive would have to show that the waiver of sovereign immunity statute is "similar" to a financial responsibility law under any reasonable test of similarity.

Obviously, Progressive cannot do so, since such statutes are dissimilar in many respects. For example, these statutes are dissimilar in purpose. A financial responsibility law establishes minimum standards of financial responsibility for pre-existing liabilities; a limited waiver of sovereign immunity statute creates a liability where none previously existed. The statutes are also dissimilar in subject matter; unlike financial responsibility or motor carrier laws, the waiver of sovereign immunity statute is not exclusively, or even primarily, concerned with motor vehicles, but encompasses tort actions generally. For all of these reasons, the Progressive policy provision cannot apply to the Youngs' claim even if the exclusion were legally permissible.

CONCLUSION

For the reasons stated, the Youngs respectfully request this Court to answer the certified question in the negative and to hold that "self-insured exclusions," such as that in the Progressive policy, are invalid and unenforceable as contrary to Florida law and public policy. Alternatively, and at a minimum, the Youngs request a ruling that the narrower version of the exclusion contained in the Progressive policy does not apply to the Youngs because the HCSO vehicle was not self-insured under a "financial responsibility law, motor carrier law, or similar law."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 23rd day of September, 1998, a true and correct copy of the foregoing PETITIONERS' INITIAL BRIEF ON THE MERITS, was sent via U.S. Mail to:

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