IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1649

FLORIDA BAR NOS. 510815
988618

LILIANA CAHUASQUI,

Petitioner,

vs.

U. S. SECURITY INSURANCE COMPANY,

Respondent.

____/

BRIEF OF AMICI CURIAE,
FLORIDA DEFENSE LAWYERS ASSOCIATION,
FEDERATED NATIONAL INSURANCE COMPANY, AND
OCEAN HARBOR INSURANCE COMPANY

CONROY, SIMBERG, GANON,
KREVANS & ABEL, P.A.
Attorneys for Amici
Venture Corporate Center I
Second Floor
3440 Hollywood Boulevard
Hollywood, Florida 33021
(954) 961-1400 (Broward)
(305) 940-4821 (Dade)

BY:_________________________
HINDA KLEIN, ESQUIRE
MARA SHLACKMAN, ESQUIRE

TABLE OF CONTENTS

Page

Table of Citations iii

Preface 1

Statement of the Case and Facts 2

Points on Appeal 3

I. Offers of judgment under Section 768.79, Florida Statutes, should apply in all cases where insureds may recover against insurers under Section 627.428, Florida Statutes, and No-Fault Act cases do not warrant different treatment from other insurance cases. 5

II. If any special considerations do apply to Personal Injury Protection cases, those considerations favor application of Section 768.79, Florida Statutes, to achieve a proper balance between the interests of insureds and insurers, as No-Fault Act cases are especially plagued with problems of fraud. 10

III. Application of Section 768.79, Florida Statutes, does not frustrate the purposes underlying the No-Fault Act, as the Act was not intended to be an absolute guarantee of benefits. 12

Summary of the Argument 4

Argument 6

Conclusion 14

Certificate of Service 15

Certificate of Compliance with Font Requirement 17

TABLE OF CITATIONS

CASES **PAGE**

Carcaise v. Durden,
382 So.2d 1236 (Fla. 5th DCA 1980) 6

Holly v. Auld, 450 So.2d 217 (Fla. 1984) 7, 8

Livingston v. State Farm Auto. Ins. Co.,
774 So.2d 716 (Fla. 2d DCA 2000) 12

Oruga Corporation, Inc. v. AT & T Wireless of Florida, Inc.,
712 So.2d 1141 (Fla. 3d DCA 1998) 7, 8

STATUTES **PAGE**

Section 627.0127, Florida Statutes (former statute) 5

Section 627.428, Florida Statutes 3, 4, 5, 8, 9

Sections 627.730-627.7405, Florida Statutes 5

Section 627.736, Florida Statutes 4, 5, 12

Section 768.79, Florida Statutes 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

Chapter 59-205, Laws of Florida 5

Chapter 71-252, Laws of Florida 5-6

Chapter 86-160, Laws of Florida 6, 7

Chapter 90-119, Laws of Florida 7

CS/SB 1092 (2001) 9-10

OTHER

Second Interim Report of Fifteenth Statewide Grand Jury
(http://legal.firn.edu/swp/jury/fifteenth.html) 9-10

PREFACE

Petitioner, LILIANA CAHUASQUI, will be referred to CAHUASQUI in this brief. Respondent, U. S. SECURITY INSURANCE COMPANY, will be referred to as U. S. SECURITY.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, FLORIDA DEFENSE LAWYERS ASSOCIATION, FEDERATED NATIONAL INSURANCE COMPANY, AND OCEAN HARBOR INSURANCE COMPANY hereby adopts the Statement of the Case and Facts in Respondent's Answer Brief filed with this Court.

POINTS ON APPEAL

I. Offers of judgment under Section 768.79, Florida Statutes, should apply in all cases where insureds may recover against insurers under Section 627.428, Florida Statutes, and No-Fault Act cases do not warrant different treatment from other insurance cases.

II. If any special considerations do apply to Personal Injury Protection cases, those considerations favor application of Section 768.79, Florida Statutes, to achieve a proper balance between the interests of insureds and insurers, as No-Fault Act cases are especially plagued with problems of fraud.

III. Application of Section 768.79, Florida Statutes, does not frustrate the purposes underlying the No-Fault Act, as the Act was not intended to be an absolute guarantee of benefits.

SUMMARY OF ARGUMENT

The legislative histories of Florida Statutes 627.428, 768.79, and 627.736, the No-Fault Act, indicate that the Legislature had no intention of treating No-Fault Act cases any differently than other insurance cases for the purpose of attorney's fees. The Court cannot rewrite the clear language of the statute to preclude offers of judgment in no-fault cases without doing the same in all first-party insurance cases. There is no practical difference between no-fault and other types of first-party claims where the insureds need speedy resolution of their claims. If there is any difference at all between no-fault and other first-party claims, it is that no-fault litigation is rife with fraud, and the application of the offer of judgment statute can only serve to reduce the incidence of fraud by resolving groundless claims earlier for reasonable, rather than excessive, amounts.

While CAHUASQUI argues that the No-Fault scheme was designed to ensure swift payment of PIP claims, CAHASQUI overlooks the fact that no-fault claims have always been subject to various defenses, and insureds have never been guaranteed full payment. Medical providers take a calculated risk when they accept patients in reliance upon no-fault benefits, and will be hard-pressed to sue patients after a claim has been determined unreasonable. Thus, insureds will not be prejudiced if carriers are

permitted to serve offers of judgment in no-fault claims, and the purposes of the No-Fault Act will not be thwarted.

ARGUMENT

I. Offers of judgment under Section 768.79, Florida Statutes, should apply in all cases where insureds may recover against insurers under Section 627.428, Florida Statutes, and No-Fault Act cases do not warrant different treatment from other insurance cases.

Section 627.428(1), Florida Statutes, provides as follows:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Clearly, this statute, enacted in 1959, benefits all insureds who prevail against insurers, regardless of whether the insured is an individual or a corporation. Chapter 59-205, Laws of Florida, § 477. The broad language of this statute indicates that the Legislature believed that insureds in general are at a disadvantage in their dealings with insurers, and that this attorney's fee provision was necessary to level the playing field. When the Legislature subsequently enacted the Florida Motor Vehicle No-Fault Law (hereinafter referred to as "No-Fault Act"), Sections 627.730-627.7405, Florida Statutes, in 1971, Section 627.736(8), Florida Statutes, provided that Section 627.428 (formerly Section 627.0127) applied to cases under the No-Fault Act as well. Chapter

71-252, Laws of Florida, § 7. Thus, insureds under the No-Fault Act were regarded as similarly situated with all other insureds.

Not only are no-fault insureds legally similarly situated with all other insureds, they are also similarly situated in a practical sense. While a person who has been injured in an auto accident needs quick access to funds to better his situation, that need is no different from that of a person who needs to relocate or to rebuild a home after a hurricane, or business owners who may lose their livelihood after a fire damages their premises if insurance proceeds are not promptly paid. Given the urgency of the needs in all of these situations, there is no reason to treat no-fault insureds any differently from other first-party insureds.

When the Legislature later enacted Section 768.79, Florida Statutes, the offer of judgment statute, in 1986, it must be presumed that the Legislature did so with a knowledge of its own previously enacted statutes. Carcaise v. Durden, 382 So.2d 1236, 1238 (Fla. 5th DCA 1980); Chapter 86-160, Laws of Florida, § 58. Thus, the Legislature could have chosen to expressly exclude cases under the No-Fault Act from the ambit of Section 768.79, if it believed that application of Section 768.79 to cases under the No-Fault Act would undermine the purposes behind the Act, but the Legislature did not do so. Indeed, in 1990, the Legislature expanded the scope of

Section 768.79 from "any action to which this part applies" to "any civil action for damages filed in the courts of this state." Chapter 86-160, Laws of Florida, § 58; Chapter 90-119, Laws of Florida, § 48. Thus, the Legislature clearly intended Section 768.79 to have broad applicability, with no exceptions.

Section 768.79 is a statute "whose plain and unambiguous language states that it is applicable to any civil action for damages." Oruga Corporation, Inc. v. AT & T Wireless of Florida, Inc., 712 So.2d 1141, 1143 (Fla. 3d DCA 1998). The issue in Oruga was whether Section 768.79 was applicable to offers made to class representatives in class action suits. Id. at 1142. The appellant argued that class representatives have a fiduciary responsibility to the class, and that offers of judgment to the class representative create an inherent conflict of interest. Id. at 1143. Such an offer forces the representative to choose between the best interest of the class and the opportunity to be compensated for his individual losses and avoid personal exposure for class action attorney's fees and costs. Id.

While acknowledging that the appellant raised some "valid and legitimate concerns about applying the offer of judgment statute to class action representatives," the Third District concluded that it could not, "by judicial fiat, exempt class actions from section 768.79." Id. at 1143. Citing Holly v. Auld, 450 So.2d 217 (Fla. 1984),

the Third District noted that when a statute is unambiguous, it must be given its plain meaning, and there is no reason to resort to rules of statutory construction. Oruga, 712 So.2d at 1143. Moreover, Florida courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." Oruga, 712 So.2d at 1143-44 (quoting Holly, 450 So.2d at 219).

Likewise, in the instant case the Court cannot carve out an exception to Section 768.79, Florida Statutes, for cases under the No-Fault Act by judicial fiat, thereby abrogating legislative power, when there is nothing in the provisions of Section 768.79, Section 627.428, or the No-Fault Act to warrant the conclusion that no-fault cases were intended to be treated differently than all other insurance cases. CAHUASQUI does not even attempt to address the ramifications of excluding all cases where attorney's fees are available under Section 627.428, Florida Statutes, from the reach of Section 768.79. Such an exclusion would eviscerate Section 768.79, since actions between insured and insurers represent a substantial percentage of civil litigation. Moreover, CAHUASQUI probably recognizes that there is no basis in legislative history for a contention that Section 768.79 was not intended to apply in all cases where attorney's fees were available to insureds under Section 627.428.

Because there are no factors distinguishing no-fault cases from other insurance cases, CAHUASQUI'S attempt to preclude the application of Section 768.79 to no-fault cases fails.

II. If any special considerations do apply to No-Fault Act cases, those considerations favor application of Section 768.79, Florida Statutes, to achieve a proper balance between the interests of insureds and insurers, as No-Fault Act cases are especially plagued with problems of fraud.

CS/SB 1092, a bill passed by the Florida Legislature and awaiting signature by Governor Bush, makes significant changes to the No-Fault Act, and those changes are preceded by specific legislative findings in Section 1 of the bill. Section 1 states in pertinent part as follows:

> The Legislature finds that the Florida Motor Vehicle No-Fault Law is intended to deliver medically necessary and appropriate medical care quickly and without regard to fault, and without undue litigation or other associated costs. The Legislature further finds that this intent has been frustrated at significant cost and harm to consumers by, among other things, fraud, medically inappropriate over-utilization of treatments and diagnostic services, inflated charges, and other practices on the part of a small number of health care providers and unregulated health care clinics, entrepreneurs, and attorneys. Many of these practices are described in the second interim report of the Fifteenth Statewide Grand Jury entitled "Report on Insurance Fraud Related to Personal Injury Protection." The Legislature hereby adopts and incorporates in this section by reference as findings the entirety of this Grand Jury report. The Legislature further finds insurance fraud related to personal injury protection takes many forms, including, but not limited to, illegal solicitation of accident victims; brokering patients among doctors, lawyers, and diagnostic facilities; unnecessary medical treatment of accident victims billed to insurers by clinics; billing of insurers by clinics for

services not rendered; the intentional overuse or misuse of legitimate diagnostic tests; inflated charges for diagnostic tests or procedures arranged through brokers; and filing fraudulent no-fault law tort lawsuits.

The Grand Jury report referenced in the above legislative findings noted that "a number of greedy and unscrupulous legal and medical professionals have turned that $10,000 coverage into their personal slush fund." (Report at 2; Report is found on the Internet at **http://legal.firn.edu/swp/jury/fifteenth.html)**. Similarly, the Report's Conclusion states that "[f]ueled by the easy flow of insurance money, and enabled by greedy and disreputable lawyers, chiropractors and doctors, PIP fraud is taking a large bite out of every Floridian's insurance budget." (Report at 13).

Given these findings, insurers need the tool of Section 768.79 to combat fraudulent no-fault claims. While there is no legal distinction between no-fault claims and other first-party claims for purposes of attorney's fees, the Grand Jury report exclusively singles out no-fault claims as an area rife with fraud. If there is an outstanding offer of judgment under Section 768.79, Florida Statutes insureds will have a disincentive to prolong the litigation, and they will reach a reasonable settlement with the insurer, thereby reducing litigation costs.

III. Application of Section 768.79, Florida Statutes, does not frustrate the purposes underlying the No-Fault Act, as the Act was not intended to be an absolute guarantee of benefits.

A concern raised by CAHUASQUI is that the application of Section 768.79, Florida Statutes, to no-fault claims will deprive insureds of full and swift payment of claims, as intended under the No-Fault Act. However, there has never been a guarantee of payment under the No-Fault Act. The insurer has always had various defenses, including coverage and fraud defenses. Thus, CAHUASQUI'S concern reflects a misunderstanding of the No-Fault Act. As a practical matter, there is little chance of an insured being unable to "beat" an offer of judgment if the insured's bills are reasonable, and conversely, the insurer is unlikely to deny payment of a valid claim on the slim chance that the carrier will recover some of its fees on an offer of judgment.

Another concern of CAHUASQUI is that the application of Section 768.79 will foster an epidemic of suits by doctors to recover from patients the difference between the total amount of the bill and the portion paid by the insurer. History has shown this concern to be groundless. In the decade and a half since the enactment of Section 768.79, there has been exponential growth in suits under the No-Fault Act, but no such growth in suits by medical providers against insureds. Indeed, "[a]fter a lawful finder

of fact ruled that a provider's bill was 'unreasonable,' it would take considerable audacity for the provider to sue the patient for the unreasonable portion of the bill." Livingston v. State Farm Auto. Ins. Co., 774 So.2d 716 (Fla. 2d DCA 2000).[1] Doctors who take patients with the expectation of compensation under a no-fault policy take a calculated risk that some or all of the bills may not be paid if there is a determination that the bills are not reasonable, related, or necessary, or that the patient is not, in fact, insured. This is the same risk physicians take whenever they agree to accept insurance, whether it be health, auto or workers' compensation.

Not only does the application of Section 768.79 not undermine the policies of the No-Fault Act, but offers of judgment may actually effectuate the goal of speedy resolution of claims and delivery of benefits by shortening the litigation period. Since insureds have never been guaranteed full payment of their bills, in those cases where the insures have valid and viable defenses, the Office of Judgment Statute provides an invaluable tool for promoting settlement.

---

[1] Section 627.736(5)(d), Florida Statutes, requires submission of medical bills to the insurer under the No-Fault Act on a Health Care Finance Administration (HCFA) 1500 form, UB 92 forms, or any other standard form approved by the Department of Insurance. Both forms specifically referenced include certifications by the physician that the charges were medically necessary.

CONCLUSION

WHEREFORE, Amici Curiae, FLORIDA DEFENSE LAWYERS ASSOCIATION, FEDERATED NATIONAL INSURANCE COMPANY, AND OCEAN HARBOR INSURANCE COMPANY respectfully requests that this Court affirm the opinion of the Third District Court of Appeal in favor of Respondent, U. S. SECURITY INSURANCE COMPANY.

Respectfully submitted,

____
HINDA KLEIN, ESQUIRE
MARA SHLACKMAN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of May, 2001, to: MICHAEL NUZZO, ESQ., 2100 Coral Way, Suite 504, Miami, Florida 33145, Trial Counsel for Respondent; JUAN MONTES, ESQ., Lidsky & Vaccaro, 145 East 49th Street, Hialeah, Florida 33013, Counsel for Petitioner; BARBARA GREEN, ESQ., 1320 South Dixie Highway, Suite 450, Gables One Tower, Coral Gables, Florida 33146, Counsel for Academy of Florida Trial Lawyers; FRANCES F. GUASCH, ESQ., Luis E. Ordonez & Associates, One Southeast Third Avenue, Suntrust International Center, Suite 1800, Miami, Florida 33131, Counsel for Florida's Insurance Council and State Farm Mutual Automobile Insurance Company, DAVID B. PAKULA, ESQ., Fazio, Dawson, DiSalvo, 633 South Andrews Avenue, Fort Lauderdale, Florida 33301; TRACY RAFFLES GUNN, Esq., Fowler, White, Gillen, et

al., Post Office Box 1438, Tampa, Florida 336601.

CONROY, SIMBERG, GANON, KREVANS & ABEL, P.A.
Attorneys for Appellant
Venture Corporate Center I
Second Floor
3440 Hollywood Boulevard
Hollywood, Florida 33021
(954) 961-1400 (Broward)
(305) 940-4821 (Dade)

BY:__________________________
HINDA KLEIN , ESQUIRE
MARA SHLACKMAN, ESQUIRE

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief was typed in 14-point Times New Roman font.

CONROY, SIMBERG, GANON,
KREVANS & ABEL, P.A.
3440 Hollywood Blvd.
Second Floor
Hollywood, Fla. 33021
(954) 961-1400 (Dade)
(954) 940-4821 (Broward)

By:_________________________
HINDA KLEIN
Florida Bar No. 510815
MARA SHLACKMAN
Florida Bar No. 988618