IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC 01-558

AUDREY SHAPS
Plaintiff/Appellant

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY
and
PROVIDENT LIFE AND CASUALTY INSURANCE COMPANY
Defendants/Appellees

On Review of Certified Questions from
the United States Court of Appeals for the Eleventh Circuit

Case Nos. 98-5500, 99-4028

ANSWER BRIEF OF DEFENDANT/APPELLEE PROVIDENT LIFE AND CASUALTY INSURANCE COMPANY

SHUTTS & BOWEN LLP
John E. Meagher
Jeffrey M. Landau
Attorneys for Provident
201 South Biscayne Boulevard
1500 Miami Center
Miami, Florida 33131
(305) 358-6300

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

STATUTES

COUNTERSTATEMENT OF THE CASE

Introduction

This case is before this Court on certified questions from the United States Court of Appeals for the Eleventh Circuit on an appeal of a jury verdict in favor of an insurance company after a five day trial in which the jury found that the insured was not entitled to benefits under a disability insurance policy issued by the insurer. Faced with a complex choice of law analysis involving the application of New York and Florida law, the trial court correctly placed the burden on the insured to show that she was covered under the terms of the policy. The questions certified by the Court of Appeals now ask this Court to re-enter what it has previously termed the "twilight zone" of substance and procedure.[1/]

Provident Casualty disagrees with the Statement of the Case and the Facts submitted by appellant Audrey Shaps, which Provident Casualty submits is both incomplete and misleading, as it misstates facts and ignores major issues in the case, such as the statute of limitations and the interplay between that issue (governed by New York law) and the burden of proof to be applied. Accordingly, Provident

---

[1/] Adams v. Wright, 403 So. 2d 391, 393 (Fla. 1981) (quoting In re Florida Rules of Civil Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring opinion)).

Casualty submits its Counterstatement of the Case and the Facts.[2/]

The Proceedings in the Trial Court

Plaintiff/Appellant Audrey Shaps ("Shaps") initiated this action in Circuit Court, Palm Beach County, Florida, on September 18, 1995, alleging breach of a contract of insurance. The insurance policy attached to the Complaint clearly set forth that the policy was issued by Provident Life and Casualty Insurance Company ("Provident Casualty"). Nonetheless, Shaps sued Provident Life and Accident Insurance Company ("Provident Accident"), which had no contract with Shaps, as the defendant in the action. Provident Accident timely removed the action to the United States District Court for the Southern District of Florida, R1-1-1, and answered and asserted affirmative defenses. R1-2-1.

In late January, 1997, Shaps began multiple attempts to amend the Complaint. R1-36-1. The eventual result was her Fourth Amended Complaint, R3-96-1, in five counts, alleging separate counts for breach of contract and specific performance against Provident Accident and Provident Casualty, and a count for intentional

---

[2/] Because this Court has the entire record of all proceedings below, for consistency herein all record citations shall be in the same format as required by the United States Court of Appeals for the Eleventh Circuit, as used in the briefs submitted to that Court. Record citations shall be in the format "R1-2-3," signifying, in this example, record volume 1, docket number 2, page 3. Transcript citations shall be in the format 1SR-1-100, signifying, in this example, the first (and only) supplemental record, transcript volume 1, page 100.

infliction of emotional distress against both Provident Accident and Provident Casualty. Shaps' attempts to plead causes of action for bad faith and fraud, and to seek punitive damages, were denied by the trial court or stricken. R3-86-1.

Provident Accident and Provident Casualty both answered the Fourth Amended Complaint, denying liability and asserting as affirmative defenses, as pertinent to this appeal, that Shaps' causes of action were barred by the applicable statutes of limitations and limitations period set forth in the policy, by a failure to comply with all conditions precedent, including the filing of timely notice of claim and proof of loss, laches, waiver, and estoppel. R4-101-1, R4-121-1.[3/]

Both Provident Accident and Provident Casualty moved for summary judgment on all counts of the Fourth Amended Complaint. R4-116-1, R4-120-1. The trial court

---

[3/] In her amended complaints, Shaps also attempted to assert a claim for benefits after April, 1996. However, based on claim forms submitted by Shaps through her counsel for disability benefits in 1996 and 1998, after the litigation already was in progress, Provident Casualty had issued benefit checks and waiver of premium checks totaling $54,448.06. Nevertheless, Shaps and her counsel refused to cash those checks, apparently intending to create a "non-payment" issue to present to a jury, despite the fact that Provident had issued benefit checks for the claims. Accordingly, Provident sought leave to deposit in the Court Registry funds representing those checks issued to Shaps for claims she submitted, but which she refused to accept. Rather than accept the benefits, Shaps opposed the motion. R5-161-1. The Court granted Provident's motion, R5-166-1, and the funds were deposited into the Court Registry. R5-172-1. An additional $9,900.00 was subsequently deposited into the Court Registry with authorization from the Court, R5-184-1, R5-185-1, representing benefits for May through September, 1995, that also had been rejected by Shaps' counsel. After trial, Shaps withdrew all benefits from the Court Registry. R5-187-1, R6-203-1.

granted the motion in part, dismissing the count for intentional infliction of emotional distress, and further ruling that Shaps had no claim for attorneys' fees pursuant to Florida's statutes. R4-154-1.

The case proceeded to trial on August 3, 1998 through August 7, 1998, on the breach of contract and specific performance counts against Provident Accident and Provident Casualty. At the close of all of the evidence the trial court directed verdicts in favor of Provident Accident on both counts remaining against it -- for breach of contract and specific performance,[4/] and in favor of Provident Casualty on the count for specific performance. 1SR-4-144-145.

All that remained for the jury was the breach of contract claim against Provident Casualty. After receiving instruction from the trial court, R6-190-1,[5/] the jury was

---

[4/] On appeal to the United States Court of Appeals, Shaps did not raise any appealable issue with respect to the directed verdicts in favor of Provident Accident, which did not issue the policy. Accordingly, those verdicts should be affirmed by the Eleventh Circuit, irrespective of the outcome in this Court.

[5/] The pertinent parts of the jury instructions read as follows:

> In this case, each party asserting a claim or a defense has the responsibility to prove every essential part of his contention by a preponderance of the evidence. This is sometimes called the burden of proof or the burden of persuasion.
>
> ***
>
> Two periods of disability are at issue in this case. For each, you must

(continued...)

presented with a special verdict form, R6-198-1, that read in pertinent part:

> 1. Was PLAINTIFF AUDREY SHAPS continuously totally disabled within the terms of her Provident Life and Casualty Insurance Company disability policy during the time frames of:
>
> A. September 10, 1990 through October 23, 1994?
>
> YES _____ NO ____X_____ [6/]

R6-198-1,2.

Final Judgment was entered in favor of Provident Accident and Provident Casualty, R6-202-1, and Shaps appealed.

[5/](...continued)
decide whether Shaps was continuously totally disabled within the terms of the policy; that is, whether Shaps was continuously unable to perform the substantial and material duties of her occupation during the periods of her claimed disability. In addition, Shaps also must show that at the time of her disability she was under the care and attendance of a physician, including licensed clinical social workers.

1SR-5-124-127.

[6/] Because the question was answered "No," the jury did not reach the second possible question for that time frame:

> 2. Did PLAINTIFF AUDREY SHAPS fail to comply with the conditions precedent to her disability policy so as to bar her claim for benefits during the time frames of:
>
> A. September 10, 1990 through October 23, 1994?
> YES _____ NO _____

The United States Court of Appeals found "no merit" in Shaps' appellate arguments, save one, that pertaining to the burden of proof instruction, and certified two questions to this Court:

1. Is the burden of proof rule recognized in Aetna Life Insurance Co. v. Fruchter, 266 So. 2d 61 (Fla. 3d Dist. Ct. App. 1972), cert. discharged, 283 So. 2d 36 (Fla. 1973), part of the substantive law of Florida such that it would not be applied in a case where under Florida's doctrine of *lex loci contractus* the substantive law of another state (New York) governs the parties' contract dispute?

2. Would requiring the insured to prove disability in this context violate the public policy of Florida, such that the burden of proof must be placed on the insurer? See Gillen v. United Services Automobile Ass'n, 300 So. 2d 3 (1974).

CounterStatement of Facts

Rather than set forth the facts that solely are pertinent to this appeal, which for the most part raises questions of law, Shaps, as she did in her brief to the Eleventh Circuit, has elected to set forth in her brief irrelevant facts designed to elicit sympathy for Shaps. Similarly, Shaps also attempts to place the focus on Provident's actions, rather than the real issue before the jury: whether Shaps was totally disabled within the terms of her policy for the periods at issue at trial, and whether she had properly complied with the policy so as to even be able to bring an action against Provident Casualty. Accordingly, Provident states the pertinent facts of the case.

1. The Policy and History of the Claims.

Following application by Shaps, a former insurance agent, in April, 1987, Provident Casualty issued an individual disability insurance policy (the "policy") to Shaps in June, 1987. The policy was applied for, issued, and delivered in New York, where Shaps resided and worked.

The policy defines "Total Disability" as follows:

> Total disability . . . means that due to Injuries or Sickness:
>
> 1. you are not able to perform the substantial and material duties of your occupation; and
>
> 2. you are under the care and attendance of a Physician.

The policy defines "Sickness" as follows:

> Sickness means sickness or disease which is first manifested while your policy is in force.

The policy defines "Occupation" as follows:

> your occupation means the occupation (or occupations, if more than one) in which you are regularly engaged at the time you become disabled.

The policy defines "Physician" as follows:

> Physician means any legally qualified physician. . . .

Policy, at 4.

The policy further provides:

> PROOFS OF LOSS
> If the policy provides for periodic payment for a continuing

> loss, you must give us written proof of loss within 90 days after the end of each period for which we are liable. For any other written loss, written proof must be given within 90 days after such loss. . . .
>
> * * *
>
> TIME OF PAYMENT OF CLAIMS
> After receiving written proof of loss, we will pay monthly all benefits then due you for disability. Benefits for any other loss covered by this policy will be paid as soon as we receive proper written proof.
>
> * * *
>
> LEGAL ACTIONS
> No legal action may be brought to recover on this policy within 60 days after written proof of loss has been given as required by this policy. No such action may be brought after three years from the time written proof of loss is required to be given.

Policy, at 14-15.

Shaps first submitted a claim for disability benefits to Provident Casualty's New York office on or about July 29, 1989, asserting that the nature of her sickness or injury was "TMJ Syndrome," and that she had last worked in early July, 1989. 1SR-2-196-197, 227, 228. At that time, Shaps lived in New York. Shaps subsequently submitted additional claim forms to Provident Casualty's New York office, and Provident Casualty paid benefits to her. Shaps moved to Florida in 1990. 1SR-2-198. As she testified at trial, the weather was warmer and the lifestyle was easier in Florida than in New York. 1SR-4-116-117.

Provident Casualty's last payment on the claim was by draft dated on or about September 7, 1990. By letter dated October 3, 1990, Provident Casualty advised Ms. Shaps:

> Dear Mrs. Shaps:
>
> I am writing in connection with your claim for total disability.
>
> We have concluded our review of all the current medical information provided by your therapist Ethel Greene, LCSW.
>
> After careful review, we have determined that there is no evidence of continuous total disability as defined by your policy. Therefore, our draft dated September 7, 1990 was a full and final payment and no further benefit is payable.
>
> If you think we have been misinformed or if you have additional medical facts to submit, please write to us and we will be happy to review the matter further.
>
> Sincerely,

1SR-1-161; 1SR-2-240.

Shaps contacted Provident Casualty in New York by telephone shortly after receiving the letter and inquired as to whether her benefits could be reinstated. Once again, she was told that the information already provided to Provident Casualty had been reviewed, but that if she had additional information she should provide it. Shaps indicated that she would send Provident Casualty a copy of a Social Security report,

but never did so. 1SR-2-140-141, 240-241.[7/]

Shaps had no further contact with Provident Casualty regarding a claim for disability benefits until 1994. 1SR-2-241 After having waived policy premiums during the time her claim was paid, Provident Casualty resumed premium billing after the claim denial. Although Shaps subsequently paid quarterly premiums on her policy to keep the policy in force, she never submitted another claim form to Provident Casualty between October, 1990 and December, 1994. 1SR-2-276-277; 1SR-4-120.

On or about December 15, 1994, Provident Casualty received from Shaps notice of a new claim for disability benefits, dated December 1, 1994. Ms. Shaps stated that the nature of her disabling sickness or injury was "Breast Cancer" and "TMJ Syndrome." Shaps' claim form stated that her disabling sickness began on October 24, 1994, and that she was disabled as of that date. 1SR-2-291-292.

After receiving Shaps' new claim form in December, 1994 that indicated that her disabling sickness began in October, 1994, Provident Casualty again paid benefits pursuant to the policy. In May, 1995, Provident received a claim form from Dr. Gerald Spunberg, Shaps' treating physician, that indicated that Shaps was no longer totally disabled as of May 5, 1995. 1SR-3-143. Provident Casualty paid Shaps benefits

---

[7/] Given the direct testimony by both Germaine and Shaps to the contrary, Shaps' assertion in her brief that she submitted a letter to Provident from the Social Security Administration simply is inexplicable and inexcusable.

through May 7, 1995, provided additional claim forms, and advised Shaps in two letters that if it appeared that she continued to be disabled or unable to return to work, Shaps should "write or call this office" and have her doctor fully complete the claim form. 1SR-2-295.

On September 26, 1995, after receiving additional information, 1SR-3-38-39, and having a field representative meet with Shaps and her attorney, 1SR-3-46, Provident Casualty sent another benefit check to Shaps, through her attorney, in the amount of $9,900.00, representing benefits for May through September, 1995. 1SR-2-218; 1SR-3-48-49. Additional claim forms to be completed by Shaps' physicians also were provided to Shaps through her counsel. Unknown to Provident, at the time the letter, check, and claim forms were sent, Shaps already had filed this lawsuit.

Shaps moved to California in early 1996. 1SR-2-219.

2. <u>The Four Year Gap between 1990 and 1994</u>.

This is the critical period in this case, although, from reading Shaps's brief, one would not know why, as she totally ignores a major issue in the case -- Shaps' ability to even maintain an action against Provident in 1995 for a breach that allegedly occurred in 1990. As set forth above, the policy contained a "Legal Actions" clause that provided that no action on the policy could be brought after three years from the time proof of loss was required, in effect, a three year statute of limitations. Because

the policy was applied for and delivered in New York, it was governed by New York law. See Fioretti v. Massachusetts General Life Insurance Co., 53 F.3d 1228, 1235 (11th Cir. 1995), cert. denied, 516 U.S. 1046, 116 S.Ct. 708 (1996). Under New York law, insurance policy provisions shortening the statute of limitations are fully enforceable, and indeed, in the case of this policy, are mandated by New York law. N.Y. Insurance Law § 3216(d)(1)(K) (McKinney 1996). Shaps, however, did not initiate her action alleging a breach of contract in 1990 until 1995, five years later. Until late 1997, actions such as Shaps' for the period between 1990 and 1994 would be dismissed in New York courts as barred by the three year limitation set forth in the policy. See e.g. Rodriguez v. Nationwide Insurance Co., 97 A.D.2d 817, 468 N.Y.S.2d 693 (N.Y. App. Div. 1983) (action on disability income policy barred by contractual statute of limitations). In late 1997, however, while this action was pending, New York's Court of Appeals reversed a lower court ruling that had affirmed such a dismissal and held that the limitations period commences upon the termination of the disability, and not upon the termination of the benefits by the insurer (the alleged "breach"). Panepinto v. New York Life Insurance Company, 90 N.Y.2d 717, 688 N.E.2d 241, 665 N.Y.S.2d 385 (N.Y. 1997).[8/] Thus, under New York law, Shaps'

[8/] Panepinto is contrary to Florida law on this issue. Under Florida law, assuming a three year statute of limitations and an alleged "breach" in October, 1990, Shaps' claim would have been barred by the statute of limitations in October, 1993.
(continued...)

action for an alleged breach of contract occurring in 1990 would be time barred unless she could prove she was continuously totally disabled from October, 1990 through October 24, 1994, the date of her new "second" disability. Anything less than a continuous total disability for that period would bar the claim for the breach in 1990. Accordingly, at trial, Shaps' condition, actions, and statements had to be examined throughout the entire four year gap, and not just at the time of the alleged "breach," October, 1990. In that regard, the evidence at trial was overwhelming that Shaps was not continuously totally disabled within the terms of her policy for the entire period.

Shaps' brief attempts to paint a misleading picture of the evidence at trial as to Shaps' condition during the four year gap. However, as the Eleventh Circuit stated, "Provident Casualty presented evidence that Shaps was not continuously disabled during the 1990-94 period." Slip. Op. at 7. Indeed, the record is replete with evidence that Shaps was not totally disabled from any condition during this gap.

Particularly telling was Shaps' March 20, 1991 application to Federal Kemper Life Insurance Company for the $100,000.00 life insurance policy. The application lists her occupation as a mortgage loan officer who was "between jobs." 1SR-2-245. Although Shaps, a former insurance agent, disclosed on that application that she had received disability payments in the past for TMJ as a result of stress, she also stated

---

[8/](...continued)
See Dinerstein v. Paul Revere Life Insurance Co., 173 F.3d 826 (11th Cir. 1999).

that she was "doing fine,"and with respect to TMJ, had "No problems. Haven't seen doctor for 2 years," hardly the picture of one who supposedly was totally disabled. She further stated that all her tests on her examinations were "normal." 1SR-2-254. Shaps further affirmed to Kemper that she then had no "mental or physical impairment or disease." 1SR-3-35. Shaps' Kemper application file, which contained her signature no less than five times on application materials affirming these statements, also indicated that Shaps stated that she was now (in 1991) ready to return to work and would be looking for employment. 1SR-2-264.

Although at trial Shaps attempted to dispute many of the statements in her tax returns and the insurance materials from Kemper, it is also clear that she signed the applications, 1SR-2-248, and that the information on those forms could have only come from Shaps, as the broker she used to purchase the insurance would have had no other information about Shaps. 1SR-2-261. Thus, given that she had in the past been licensed to and had sold life insurance, and had relied upon others to complete applications correctly and accurately when she was a mortgage loan broker, 1SR-2-177-178, 184, 236, 237, 244, it was reasonable for the jury to disregard her statements to the contrary at trial.[9/] The Court of Appeals found no error in the admission of this

---

[9/] Shaps also applied to Metropolitan Life Insurance Company at or about the same time as the Kemper policy but chose not to purchase that policy because of a yearly increase in premiums. 1SR-2-247.

evidence.

Moreover, from October, 1990, when Provident Casualty made its last payment on her 1989 claim, through December, 1994, when she made her second claim for disability benefits, Shaps managed her affairs and purchased a home in Boca Raton, Florida, arranged a mortgage for the home in Boca Raton, moved from Margate, Florida to Boca Raton, Florida, sold an apartment that she owned in New York, 1SR-2-209, paid premiums for her disability policy to Provident Casualty, 1SR-2-276-277, filed U.S. Income Tax returns each year in which she stated her occupation as "disabled" in 1990 (when she was on claim), "unemployed" in 1991, "loan officer" in 1992, and “retired” in 1993 and 1994. 1SR-2-281-283. Shaps also managed her investments with sufficient acumen to enable her to pay off her mortgage in Boca Raton, 1SR-2-284-285, engaged in estate planning by applying for a life insurance policy, 1SR-2-244, and establishing a revocable trust naming herself as trustee, paying premiums on that policy, and arranged for the transfer of ownership of that policy to her sons.

As to Shaps’ medical condition during the four year gap from 1990 to late 1994, Shaps provided testimony at trial from two health care providers who saw her at various periods during that gap, Ethel Green, a social worker, and Dr. John Girard, an internist who first saw Shaps in June, 1992, and who was her primary care physician.

Green saw Shaps for therapy sessions from 1990, when Shaps moved to Florida from New York, until January 8, 1992. 1SR-1-242. Green testified that Shaps exhibited the symptoms of a general anxiety disorder, 1SR-1-243, which she described as "common in the layman's world," and "common in [her] world" also. 1SR-1-251. Such as condition is not necessarily disabling, as Green testified that many patients with general anxiety disorder continue to work in their occupations. In reviewing her records that were available, Green stated that Shaps did not suffer from bipolar disorder. She also ruled out a major depressive disorder. Green also testified that Shaps' anxiety disorder did not affect Shaps' intellectual functioning.

Green is not a medical doctor, and is neither a psychiatrist nor a psychologist. She cannot prescribe medications, but if she thought medication was necessary, she would refer her patient to a professional that could prescribe medication. Green never referred Shaps to another professional for medications. She also never referred Shaps to another professional for a full battery of psychological tests, but would have done so if she thought it would be of assistance to Shaps. 1SR-1-258.

Green also did not treat Shaps for the TMJ or shoulder pain that Shaps supposedly reported. Thus, Green testified at trial that she could not testify as a medical expert about either the TMJ or the shoulder pain, or say whether Shaps was disabled as a result of those conditions.

Green last saw Shaps on January 8, 1992. Her progress notes leading up to Shaps' final session do not reflect any discussion of Shaps seeing or needing to see anyone else for treatment after Shaps completed treatment with Green. Green did not refer Shaps to anyone else for continued treatment. Green's last treatment note, referring to Shaps, concludes, "She thanks me. Will call in future if needed. And we end." 1SR-1-248. Shaps never contacted Green again.

The other treatment provider during the four year gap who testified at trial was Dr. John Girard, her internist. Shaps first saw him on June 1, 1992, six months after her treatment with Green concluded, thus interposing a significant gap in care and treatment. As a primary care physician, Dr. Girard was a "gatekeeper," that is, if Shaps needed referral to a specialist, he would be the one to do so. Dr. Girard was the attending physician who first certified Shaps as disabled for her second claim for cancer, made in December, 1994, for disability beginning two months earlier, on October 24, 1994. At trial, Shaps attempted, through Dr. Girard's testimony, to portray herself as disabled between June, 1992 and October, 1994. Dr. Girard testified that he had no medical knowledge and no opinion as to whether Shaps was disabled in 1990, 1991, or even in 1992 before he saw her for the first time. He also conceded that he never advised Provident Casualty that Shaps may have been disabled prior to October 24, 1994. 1SR-3-194. Although Dr. Girard opined for the first time at trial, on

prompting from Shaps' counsel, that Shaps was disabled from June 1992 through June 1995, 1SR-3-175, he conceded that he was "not a disability specialist," that he didn't "know about her particular job," and, in fact, had "no idea" what Shaps' job was. 1SR-3-194-95. He also admitted that there was nothing in his chart or medical records for Shaps that indicated that she was totally disabled from 1992 to 1994. 1SR-3-194.

As a "gatekeeper," Dr. Girard testified that if he felt uncomfortable treating a psychiatric problem he would refer the patient to a psychiatrist. He never did so with Shaps. Nor was Dr. Girard a specialist in TMJ. 1SR-3-185-186. Prior to 1995, he never referred Shaps to a specialist for TMJ. Indeed, Dr. Girard testified that he did not treat Shaps for TMJ, her supposed disabling condition during that four year gap. By 1995, however, Provident Casualty already was paying Shaps disability benefits for her claim beginning in October, 1994. Although Dr. Girard believed he may have referred Shaps to a psychotherapist in 1992, 1SR-3-160, that is contradicted by the other evidence and testimony at trial that Shaps did not see a psychotherapist after she stopped seeing Ethel Green on January 8, 1992. 1SR-3-191-192. Moreover, when Shaps completed and signed her initial intake form for Dr. Girard on June 1, 1992, she indicated that she was not depressed. Def. Ex. 132A. Taken together, there was more than sufficient evidence, from Shaps' own statements, that she was not continuously totally disabled under the terms of the policy from October 1990 until October, 1994.

3. Provident's Handling of the 1990 Claim.

Rather than contend with the lack of evidence at trial that Shaps was continuously totally disabled within the terms of her policy from October 1990 to October 1994, Shaps spends much of her brief attempting to criticize Provident's claims handling in 1990 and the evidence Provident had when Shaps' benefits were discontinued in 1990. None of it, however, is relevant to the question asked the jury – was "Shaps continuously totally disabled within the terms of her Provident Life and Casualty Insurance Company disability policy during . . . September 10, 1990 through October 23, 1994?" Nevertheless, without giving credence to the relevancy of these "facts," Provident Casualty is constrained to respond, at least in part, and in particular with respect to certain misleading misrepresentations contained within Shaps' brief about what Dr. Charles Leagus, a Provident medical consultant who reviewed the file, did with respect to the file and his recommendations, and concerning testimony by Mark Germaine, the Provident Casualty claims examiner involved in the file in 1990, about which documents were in the "claim file" by which he could determine that Shaps was not disabled.

As to Dr. Leagus, although Shaps' brief makes it appear as if Dr. Leagus testified at trial, and "interprets" a memo Dr. Leagus prepared in 1990, there was no testimony from Dr. Leagus either by deposition or at trial because he died in 1994,

before this action was initiated. As the trial judge recognized with respect to testimony about Dr. Leagus' notes, "the problem is, it is [a] fairly cryptic discussion of other people's notes." 1SR-2-111.

The more pernicious of the misrepresentations is the assertion that Germaine testified that no documents in the claim file supported termination of benefits. The reason for this is simple – when asked such questions at his deposition (of which portions were read at trial), Germaine did not have the entire claim file in front of him, notwithstanding Shaps' counsel's reference to the file before Germaine as the "claim file." See 1SR-2-41, 75, 79, 80, 81, 121,122; 1SR-5-67. To be clear, when Germaine responded at deposition about a lack of information in the "claim file," he had only a portion of the claim file in front of him (Deposition Exhibit 4). Additional documents from the complete claim file were contained in another exhibit (Deposition Exhibit 7), which was not before Germaine as that testimony was given. Although this discrepancy was explained to the jury, faced with these same "factual" assertions by Shaps in her brief to the Court of Appeals, Provident noted in response that "given the somewhat confusing nature of the trial transcript with respect to these exhibits and Germaine's testimony, Provident prefers to believe that lead appellate counsel for Shaps (who was not present at trial), was simply confused by the record and not deliberately misstating facts." At this point in time, however, repeating the canard

about "no documents in the claim file" to this Court can only be read as an intentional misrepresentation by Shaps of the facts of the case.

The bottom line on Provident Casualty's handling of Shaps' claim in 1990, irrelevant as it may be to the issue presented to the jury, and to the issue before this Court, is that Provident reviewed her treatment, had an independent medical examination conducted by a psychiatrist,[10/] had her claim and the results of the examination reviewed by an in-house medical consultant, Dr. Leagus,[11/] reviewed comments from her treatment provider, and determined that she was not totally disabled within the terms of the policy.

SUMMARY OF THE ARGUMENT

[10/] Shaps also is critical of the fact that the report of Dr. Ratner, the independent medical examiner, was not sent to Shaps. This, of course, is entirely irrelevant to the issue at trial, whether or not Shaps was disabled under the terms of the policy. In any event, as Germaine testified, the report was sent to Shaps' treatment provider, Ethel Green, 1SR-2-146, twice, in fact, because "as Ms. Shaps' primary care treater, we thought it was important for her to review Doctor Ratner's report." Id. Shaps also complains in her brief that she was not submitted to additional testing in 1990, although Germaine testified that the company could not require such testing to be done. 1SR-2-97. See also 1SR-4-50.

[11/] Dr. Leagus died in 1994, four years after the termination of Shaps' benefits in 1990, and before this litigation was initiated. As Germaine testified, Dr. Leagus was important in the claim determination. 1SR-2-145. His death, as well as problems inherent in Germaine having to testify in 1997 about matters that occurred in 1990, 1SR-2-144-145, underscores the prejudice suffered by Provident Casualty in having to litigate this matter eight years after the denial in 1990. See Panepinto, 665 N.Y.S.2d at 388.

The trial court's determination that Shaps had the burden of proof to show total disability within the terms of the policy was correct. An analysis of the line of cases upon which the Fruchter decision rests reveals that each case is predicated upon this Court's interpretation, based upon substantive Florida law, of the specific policy language of the policies before it at the time, each of which, by contract, included a presumption of continued disability. Thus, if the same analysis was applied to the language of the policy at issue here, Fruchter, Ewing, Lecks, and McKeithan would be inapplicable because Shaps did not make a claim under the "presumptive total disability" language of her policy. Moreover, even if applicable to the policy in this case, this Court was merely applying substantive Florida law in the aforementioned cases to a specific factual scenario (the termination of a previously accepted claim) under specific contract language, not promulgating procedure or practice, or general rules of trial administration, such that the substantive law set forth in those cases would not be applicable in a case governed by New York law. Thus, the first certified question should be answered in the affirmative.

The second certified question should be answered in the negative. Given that the policy at issue was applied for, issued, paid for and delivered in New York by an insurer not doing business in Florida, the policy is governed by New York law, and the insured made her claim in New York and received benefits there, this is not a case that

requires this Court to depart from its stricture of extreme caution in overturning transactions on public policy grounds. There simply are no overwhelming concerns or "paramount rules" of law at issue here that would warrant a public policy exception for Shaps, now a California resident, because she happened to file suit in Florida.

ARGUMENT

I. THE BURDEN OF PROOF RULE RECOGNIZED IN AETNA LIFE INSURANCE CO. V. FRUCHTER, 266 SO. 2D 61 (FLA. 3D DIST. CT. APP. 1972), CERT. DISCHARGED, 283 SO. 2D 36 (FLA. 1973), IS PART OF THE SUBSTANTIVE LAW OF FLORIDA SUCH THAT IT WOULD NOT BE APPLIED IN A CASE WHERE, UNDER FLORIDA'S DOCTRINE OF *LEX LOCI CONTRACTUS*, THE SUBSTANTIVE LAW OF ANOTHER STATE (NEW YORK) GOVERNS THE PARTIES' CONTRACT DISPUTE.

The first certified question posed by the Court of Appeals should be answered in the affirmative by this Court, as the Fruchter "burden of proof" is, as stated by the trial court, "a substantive rule. It is not a general rule of trial administration. It is a substantive policy decision applicable to a certain type of proceeding or case. And that is the reason why it seems to me that you have got – we have to look at this as a substantive law issue rather than procedural." 1SR4-13-14. In order to understand why the Fruchter "rule" is substantive one must go back and review the development of the doctrine itself. In so doing, Provident will show not only that the doctrine is substantive, but that it is not applicable to the policy at issue in this case under any conditions.

Shaps' brief basically begs the question posed by the Court of Appeals. Rather than analyze the issue, Shaps merely states that because burdens of proof generally are procedural, Fruchter must be applied here, assuming that Fruchter establishes a procedural burden of proof. What her brief fails to do, however, is examine whether

the unique burden shift recognized in Fruchter is, in fact, substantive or procedural. Indeed, to read Shaps' brief, one might reasonably assume that Fruchter is applicable in every disability insurance case in Florida because her brief is silent as to the normal burden of proof in insurance matters in Florida, that is, that the burden is on the insured to prove entitlement to benefits. That, of course, is the general burden of proof in all cases – that the party seeking relief must prove its entitlement to same.

Shaps' policy was applied for and delivered in New York and, therefore, New York law governed the policy. See Fioretti, supra. Under New York law, the burden of proving total disability within the terms of a disability insurance policy falls upon the insured. Klein v. National Life of Vermont, 7 F. Supp.2d 223, 226 (E.D.N.Y. 1998). The burden of proof in Florida is the same, Equitable Life Assurance Society of the United States v. Wiggins, 155 So. 327 (Fla. 1934), except that when an insurer has acknowledged a presumptive disability, made payments, and subsequently discontinues the benefits. Under those specific circumstances, the burden is on the insurer to show that the insured is no longer eligible for benefits. Aetna Life Insurance Co. v. Fruchter, 283 So. 2d 36 (Fla. 1973) (citing New York Life Insurance Co. v. Lecks, 165 So. 50 (Fla. 1935); Mutual Life Insurance Co. of New York v. Ewing, 10 So. 2d 316 (Fla. 1942)). As noted by the Court of Appeals, New York law does not contain any rule or law comparable to Fruchter shifting the burden to the insurer. Slip.

Op. at 13 n.3.[12/]

A. Fruchter, Ewing, and Lecks Do Not Apply to the Policy Language at Issue in this Case.

To understand the Fruchter decision one must first review the underpinnings of that decision. A review of same reveals not only that Fruchter is an extension of substantive law, not procedure, but that in the circumstances of this case and the policy at issue, Fruchter would not even apply in this case. As noted by the Court of Appeals, this is an issue that Provident raised in that Court. Slip. Op. at 11 n.2. Although the Court of Appeals could not resolve that issue, this Court may.[13/] As the Court of Appeals noted, this Court is not restricted in its consideration of the issues involved and has latitude to restate the issue or issues in its examination of the case. Slip. Op., at 11.

[12/] Despite this finding by the Court of Appeals, and citations to other cases by Provident in its brief to that court, Shaps continues to appear to question that, under New York law, the burden of proof remains on the insured to show total disability, even if the insurer had made payments on the policy. See Shaps' Brief, at 17 ("New York has not announced a burden of proof rule governing the circumstances at bar."). The assertion is disingenuous at best, and contrary to the finding of the Court of Appeals. Significantly, in the three years since trial Shaps has been unable to cite a single New York case that even suggests a Fruchter - like shift. This is not surprising, given that undersigned counsel is unaware of any cases other than Fruchter, in any jurisdiction, that suggest such a shift in a policy such as Shaps'.

[13/] The Court of Appeals focused solely on the issue of "permanent" disability, rather than contractual language that provides a "presumption" of continuing disability. As explained herein, that is a critical difference.

The starting point for the analysis is Equitable Life Assurance Society of the United States v. McKeithan, 160 So. 883 (Fla. 1935). In McKeithan, the insured sought payment of monthly payments for alleged total and presumable permanent disability benefits payable under life insurance policies. The policies sued upon contained the following language, as pertinent here:

> *Total and Permanent Disability*. Upon receipt of due proof as hereinafter provided that the Insured, while this policy was in force and no premium hereunder in default became totally disabled as hereinafter defined due to bodily injury or disease before the anniversary of the Register date of this policy upon which the Insured's age at nearest birthday is 60 years and that such Total Disability has existed continuously for at least four months, the Society will, subject to the conditions set forth below, presume such Total Disability to be permanent and . . . . [p]ay to the insured for the fourth and each subsequent completed month of such Total Disability during its continuance the monthly disability income stated on the first page hereof. . . . The first payment hereunder shall be made upon receipt of such due proof and an additional payment upon the completion of each additional month of such total disability during its continuance.

Id. at 883-84 (emphasis added). Although the insufficiency of the evidence at trial was the issue on appeal, and not the burden of proof, this Court stated that "[u]nder the language of the policies, the presumption of permanence attaches to a proven total disability after it has existed continuously for at least four months. The insured is contractually entitled to the benefit of such presumption in aid of recovery until the

insurer succeeds in overthrowing such presumption in the manner provided for under the heading 'Recovery from Disability'. . . ."[14/] Id. at 884 (emphasis added). Thus, this Court's statements in McKeithan were based upon a contractual presumption in favor of the insured for continued disability benefits.

The next case to address the issue was New York Life Insurance Co. v. Lecks, 165 So. 50 (Fla. 1935). As did McKeithan, Lecks involved disability benefits under life insurance policies and waiver of premiums if the insured was disabled. Once again, the sufficiency of the evidence, and not the burden of proof was the issue on appeal. As in McKeithan, the language of the policies expressly provided for a presumption of permanent disability if the insured became "wholly and presumably permanently disabled." As this Court stated, "[t]he policy also provides that disability shall be presumed to be permanent whenever the insured will presumably be so totally disabled for life, or after the insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof." Id. at 52

[14/] The "Recovery from Total Disability" section of the policy stated that:

> The Society shall have the right at any time during the first two years after receipt of such proof, and thereafter once a year, to require proof of the continuance of such Total Disability. If satisfactory proof is not furnished, or if it appears at any time that such total disability has terminated, no further premiums will be waived and no further Disability Income payments will be made on account of such Total Disability. Id. at 884.

(emphasis added). As in McKeithan, the policies contained a "Recovery from Disability" clause. This Court then repeated the above quoted language from McKeithan that "[u]nder the language of the policies, the presumption of permanence attaches to a proven total disability after it has existed continuously for at least four months. The insured is contractually entitled to the benefit of such presumption in aid of recovery until the insurer succeeds in overthrowing such presumption in the manner provided for under the heading 'Recovery from Disability'. . . ." 165 So., at 52 (quoting McKeithan, supra) (emphasis added)). Once again, patently relying on the express language of the policies that contained a presumption in favor of the insured, this Court then stated that "the burden was upon the company to establish the insured's recovery to the degree of ability enabling him to engage in an occupation for profit or remuneration." Id. at 54.

Mutual Life Insurance Co. of New York v. Ewing, 10 So. 2d 316 (Fla. 1942), is the next significant case cited on this issue. Ewing, as Lecks and McKeithan before it, also involved disability benefits payable under life insurance policies and the possible waiver of premiums on same. This Court noted that "under a policy such as these," the burden of proof is on an insured who makes his initial claim to "show that he comes within the purview of the terms of the policy; that he is totally and permanently disabled." This Court noted that this rule was so well settled that it did

not even require citation of authorities. Id. at 317-18. The Court then stated that:

> Where, however, it is established, as in this case, that a permanent and total disability existed within the purview of the policy and the insurer seeks relief from continuation of payment of indemnities theretofore paid under and within the purview of the policy the burden is on the insurer to establish by the preponderance of the evidence that the condition of the insured is such that he no longer comes within the purview of the policy in this regard. See New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So. 50; DeVore v. Mutual Life Ins. Co. of New York, 103 Mont. 599, 64 P.2d 1071.

Id. at 318 (emphasis added). This Court's opinion in Ewing does not set forth the specific language of the life insurance policies as to "permanent and total disability." However, the only two cases the Court cited as authority for a shift in the burden were Lecks, supra, and DeVore v. Mutual Life Insurance Co. of New York, 103 Mont. 599, 64 P.2d 1071 (Mont. 1937). The life insurance policy at issue in DeVore, as did the policies referenced above in Lecks and McKeithan, contained explicit policy language that created a presumption of permanent disability. See 64 P.2d at 1074 (The policy provided that "total disability shall . . . be presumed to be permanent" if it exists continuously for ninety days. (emphasis added)).

Moreover, a review of the insurer's brief to this Court in Ewing makes clear that the life insurance policy at issue in Ewing was of the exact same type as those discussed in Lecks, McKeithan, and DeVore. As stated by Mutual Life Insurance

Company in its brief in Ewing, the policy definition of total disability "stipulated" that disability was permanent if it "existed continuously for 90 days." Brief of Mutual Life Ins. Co., at 2 (Mutual Life Ins. Co. v. Ewing, filed July 13, 1942 (available in Florida State Archives)). Patently, each of these cases -- Ewing, Lecks, and McKeithan -- involved disability payments on life insurance policies in which, by contract, as interpreted by this Court, the insurer shifted the burden to itself to show that the insured was no longer eligible for benefits by including contract language in the policies that stipulated or "presumed" a disability to be permanent after a certain period of time.

But that is not the case here, where Shaps' disability claim was not under a contractual provision of presumptive permanent disability. Rather, she was being paid under provisions of the policy that provided for monthly benefit checks to be paid after monthly submission of proof of loss.[15/]

[15/] The policy provides, in pertinent part:

> We will pay the Monthly Benefit for Total Disability as follows:
>
> * * *
>
> 3. Benefits are payable while a period of Total Disability continues. But, in no event are benefits payable beyond the Maximum Benefit Period shown on Page 3 during a Period of Disability.

Policy, at 5. See also, Policy, at 15 ("Time of Payment of Claims: After receiving (continued...)

To be clear, Shaps' policy does contain a provision for presumptive total disability.[16] Equally as clearly, Shaps' disability claim did not fall under those presumptive total disability provisions, which, for example, ease the burden on the insured by removing the requirement of continuous care and attendance of a physician, and increase the maximum benefits payable to an insured. Thus, the holding of Ewing,

---

[15](...continued)
written proof of loss, we will pay monthly all benefits then due you for disability.")

[16] PRESUMPTIVE TOTAL DISABILITY - LOSS OF SPEECH, HEARING, SIGHT OR THE USE OF TWO LIMBS.

You will be presumed totally disabled if Injuries or Sickness results in:

1. the entire and irrevocable loss of speech or hearing;
2. the entire and irrevocable loss of sight of both eyes; or
3. the entire and irrevocable loss of the use of both hands, both feet, or one hand and one foot.

You must present satisfactory proof of your loss. Your ability to engage in any occupation will not matter. Further medical care and attendance will not be required. Benefits will be paid according to the Total Disability provisions of this policy. But, benefits will start on the date of loss of earlier than the day benefits start as shown on Page 3. If loss occurs prior to age 65, the Monthly Benefit for Total Disability will be paid as long as you live regardless of the Maximum Benefit Period shown on Page 3.

Policy, at 5.

and the statements in Lecks and McKeithan interpreting the life insurance policies at issue in those cases, which by the express policy language therein shift the burden of proof to the insurer on the discontinuance of contractually presumptively permanent total disability benefits to show that the insured no longer qualifies for benefits, should not and does not apply in this case to the discontinuance of Shaps' **nonpresumptive** disability benefits, for there is no dispute that Shaps' claim was not made under the "Presumptive Total Disability" provisions of her disability policy.[17/]

This distinction between presumptively permanent disabilities and the "total disability" claimed by Shaps is most assuredly a distinction with a substantial difference, rather than a "distinction without a difference," as it is well recognized in the law. See e.g., 10 Couch on Insurance 3d § 147:169; 70A N.Y. Jur.2d Insurance § 2013 (1998). Thus, for example, in Yoffa v. Metropolitan Life Insurance Co., 304 Mass. 110, 23 N.E.2d 108 (Mass. 1939), in an action seeking disability benefits under a life insurance policy, the Massachusetts Supreme Court explained the distinction

---

[17/] The nonpermanent, nonpresumptive nature of Shaps' disability claim is seen in the policy requirement of Shaps needing to file monthly claim forms to receive benefits, as the Court of Appeals recognized. Slip. Op., at 20-21.

Moreover, although the Court of Appeals noted Provident's assertions that Fruchter "is not actually implicated here," Slip. Op., at 11 n.2, it then focused solely on the issue of "permanent" disability without recognizing or discussing the critical issue of contractual policy language clearly setting forth a "presumption" of continued disability, as in Ewing, Lecks, and McKeithan.

between a policy that contained provisions similar to those in Ewing, Lecks, and McKeithan that "if total disability exists for a period of ninety consecutive days, the 'disability shall be presumed to be permanent,'" and a policy such as Shaps' that did not contain such contractual presumptions. 23 N.E.2d, at 109.

Accordingly, because Shaps' disability did not fall within the "presumptive total disability" provisions of her policy, whether this case was governed by New York law or Florida law, and whether or not the trial court made the proper choice-of-law determination with respect to the burden of proof, the burden was properly squarely on Shaps' shoulders to prove total disability within the terms of the policy. This is true whether New York or Florida's burden of proof was applicable at trial, as in both instances the burden would be the same. See e.g., Klein v. National Life of Vermont, 7 F. Supp.2d 223, 226 (E.D.N.Y. 1998) (applying New York law; burden of proof on insured); Equitable Life Assurance Society of the United States v. Wiggins, 155 So. 327 (Fla. 1934) (burden of proof on insured under Florida law).[18/]

To be clear, Provident is not suggesting here that either Fruchter, Ewing, Lecks,

---

[18/] Concededly, a review of the record in this case can be confusing as to whether the trial court applied New York's burden of proof or Florida's general burden of proof, which are the same, as the trial court made references to applying the New York rule. Some of this confusion also is reflected in the Court of Appeals' opinion. However, as the Court of Appeals realized, Provident's argument was "[w]ith Fruchter rendered inapplicable . . . we must fall back on the 'normal' Florida rule placing the burden on the insured." Slip. Op., at 12.

or McKeithan was improperly decided. Rather, it is simply asserted that in this case, where the policy language contains both nonpresumptive and presumptive disability definitions, a claim such as Shaps' that was not subject to the presumptive disability definition of her policy should not be subject to the burden shift imposed by the Court in Ewing, Lecks and McKeithan in interpreting those policies because of the contractual "presumption of permanence" that arose "under the language of th[ose] policies." McKeithan, 160 So., at 884.[19/] By so holding, the Court would not need to address the other issues certified by the Court of Appeals.[20/]

B. Fruchter is Substantive, Not Procedural.

As should clear from the above discussion, the entire line of cases upon which the Fruchter decision presumably rests are pure substantive discussions of contract interpretation. In each case, this Court was not engaged in procedural rule making. Rather, it was simply interpreting, according to Florida law, the express terms of the

---

[19/] Consistent with this reasoning, if Shaps' claim had been under the Presumptive Total Disability provision of her policy, which it plainly was not, application of Fruchter, Ewing, Lecks, and McKeithan would have been appropriate. See Equitable Life Assurance Society of the United States v. Neill, 243 F.2d 193 (5th Cir. 1957) (citing McKeithan and Lecks in a disability case involving policy language defining "presumably permanent" disability if total disability existed continuously for three months).

[20/] Indeed, even the Florida Jurisprudence treatise recognizes that the burden shift at issue here is tied to a contractual presumption, "under the language of the policy," of permanence. 31A Fla.Jur.2d Insurance § 3591 (citing McKeithan, supra).

specific contracts before it.

Which brings us to Fruchter v. Aetna Life Insurance Co., 266 So. 2d 61 (Fla. 3d DCA), writ discharged, 283 So. 2d 36 (Fla. 1972). In Fruchter, the Third District Court of Appeals reversed a jury verdict because of an improper jury instruction. The reversal was predicated upon this Court's decisions in Ewing and Lecks that shifted the burden to the insurer to show that the insured was no longer entitled to benefits under the policy when benefits had been paid. The case came before this Court on an asserted conflict with Rigot v. Bucci, 245 So. 2d 51 (Fla. 1971). Rigot was a fraud action not involving disability insurance. As this Court noted, in Rigot, the issue was quantum of proof, there being no question of upon whom the burden of proof fell, while Fruchter involved the question of upon whom the burden of proof fell. Finding no conflict between the decisions to support jurisdiction, the Court discharged the writ of certiorari as improvidently granted. Without analyzing the Third District's opinion, this Court noted that based on the policy language, Lecks and Ewing applied.

Provident Casualty agrees that burdens of proof generally are controlled by the law of the forum and that both New York and Florida generally consider burdens of proof to be procedural in nature.[21/] And, clearly, the rule in both New York and Florida

---

[21/] Shaps plainly misrepresents the case of Farris & Co. v. William Schluderberg, T.J. Kurdle Co., 193 So. 429 (Fla. 1940), by stating that "a trial court's failure to apply Florida's burden of proof to a dispute concerning a foreign contract (continued...)

is that the burden is on an the insured to show coverage under a disability policy. But that begs the question, as Shaps did in her brief, as to whether the burden shift for presumptive disability as set forth in Ewing, Lecks, and McKeithan is substantive or procedural.[22/] Certainly, as the Court of Appeals stated, New York has no such burden shift applicable to a policy such as Shaps'.

As this Court has previously stated, "the question of whether a rule or statute relates to substantive law or to practice and procedure is one which constantly arises. 'The entire area of substance and procedure may be described as a 'twilight zone' and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.'" Adams v. Wright, 403 So. 2d 391, 393 (Fla. 1981) (quoting In re Florida Rules of Civil Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring opinion)). Further quoting Justice Adkins, this Court stated:

> Practice and procedure encompass the course, form, manner,

[21/](...continued)
held reversible error." Shaps Brief, at 19. Farris does not so hold. Farris merely restated the general proposition on procedure (not burden of proof) being governed by the law of the forum without any analysis or even an indication that there may have been a choice-of-law issue with respect to the burden of proof to be applied in the case.

[22/] Moreover, this is not a case involving a distinction on the burden of proof or persuasion between, for example, a preponderance of the evidence or clear and convincing evidence.

> means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

Id. (emphasis added). This Court has also defined substantive law "as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." Caple v. Tuttle's Design Build, Inc., 753 So. 2d 49, 54 (Fla. 2000) (quoting Haven Federal Savings & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991)); State v. Garcia, 229 So. 2d 236 (Fla. 1969).

Justice Adkins' comments about procedure governing "the progress of the case from the time of its initiation" are precisely on point. Here, even if applicable, the burden shift is not present from the action's "initiation," but rather arises after the proof of a certain fact -- the "acceptance" or acknowledgment by the insurer of a claim for presumptive total disability. Absent that "fact," which may or may not be present in any particular case (for instance, suit may be brought on a claim that was denied

from the outset), there is no burden shift. Even assuming, arguendo, that "nonpresumptive" total disability claims such as Shaps' are covered by the burden shift, it nonetheless remains true that the burden shift is still dependent on the facts of a particular case. Indeed, the "acceptance" of a claim may be a hotly contested issue at trial that needs to be resolved by the jury. For example, consider the situation where a disability insurer pays a claim initially during its investigation under a full reservation of rights. The insured may argue that payment constitutes "acceptance" of a claim while the insurer denies that is so. The "burden shift" would be dependent on the fact-finder determining whether the condition precedent to the burden shift (i.e., "acceptance") occurred. This may well happen at the end of a case. Thus, a contingent burden shift such as that at issue here can hardly be called a rule of procedure governing the case from its inception.

Thus the trial court determined that the burden of proof shift followed in the Fruchter, Ewing, and Lecks line of cases is "a substantive rule," and "certainly not a general procedural rule. Florida doesn't follow that rule across the board in terms of its burden of proof. As they point out, it is a special rule for that kind of case that departs from their usual rule and supersedes their standard jury instructions." 1SR-4-11-12. The trial court continued:

> But that seems to me is a substantive rule. It is not a general rule of trial administration. It is a substantive policy

> decision applicable to a certain type of proceeding or case. And that is the reason why it seems to me that you have got – we have to look at this as a substantive law issue rather than procedural.

1SR-4-14.

In determining that it would place the burden of proof rule on Shaps to prove her claim the trial court relied in part on this Court's statement that "[T]his Court's standard jury instructions . . . are not intended to change the substantive law applicable to this case." 283 So. 2d at 37; 1SR-4-6. This Court then went on to state: "[w]e uphold the Third District's application and continued viability as a matter of substantive law of the holdings in Lecks and Ewing . . . ." 283 So. 2d at 37-38 (emphasis added). This Court also noted that any instructions to be given must be "consistent, however, with applicable substantive law." 283 So. 2d at 38. Certainly, there was more than ample grounds for the trial court to correctly conclude that the burden of proof had to be placed on the insured to prove her claim, whether one characterizes that burden as New York's general procedural rule or Florida's general burden of proof, as they are the same.

As is apparent from the discussion in Section I.A., supra, this Court was not engaged in rule-making, trial administration or other matters generally deemed procedural when it interpreted the specific contract language and facts (i.e., the existence of a presumptive disability) at issue in McKeithan, Ewing and Lecks. Rather,

it was interpreting and defining, pursuant to Florida law, the rights of individuals under the specific language of the policies at issue in those cases. Thus, it seems plain that the Court merely was engaged in setting forth Florida law as to the rights of individuals insured under life insurance policies that provided a contractual presumption of continued disability. Thus, this Court's opinion in Fruchter, to the extent it mentions Lecks and Ewing, is merely an extension of that same application of Florida's substantive law to the policy language[23/] in Fruchter.[24/]

Shaps argues that this Court's ruling in Fruchter should not be followed in any event because that decision was merely a discharge of a writ of certiorari that carries no precedential value. Provident agrees that "[a] simple denial of certiorari without opinion is not an affirmance and does not establish the law of the case." Don Mott Agency, Inc. v. Harrison, 362 So. 2d 56, 58 (Fla. 2d DCA 1978) (emphasis added). Cf, Mystan Marine, Inc. v. Harrington, 339 So. 2d 200 (Fla. 1976). But that does not mean, as the trial court and the Court of Appeals implicitly recognized, that the

---

[23/] Neither this Court's nor the Third District's opinion in Fruchter quoted the language of the policy at issue.

[24/] Both the majority and the dissent in Fruchter discussed the use of the Florida Standard Jury Instructions promulgated by this Court, specifically, instructions 3.7 and 3.9 regarding burden of proof and greater weight of the evidence. Of course, in federal court, such instructions are not used and the Eleventh Circuit's pattern jury instruction (6.2) on burden of proof and preponderance of the evidence was given. 1SR-5-124-125.

statements of this Court in discharging certiorari do not carry persuasive weight. Nor does it mean that this Court did not mean what it said in stating that the Lecks and Ewing line of cases reflect substantive Florida law.[25/] In any event, this Court now has the opportunity to affirm that it meant that the Lecks and Ewing line of cases are indeed part of Florida's substantive law.

C. Fruchter is Not Outcome Determinative.

There is a more fundamental reason why the burden of proof was correctly placed on Shaps on trial -- shifting the burden would create an absurd and inequitable result under the New York system. Shaps, concedes, as she must, that New York law governs the parties' rights under the policy. Prior to trial, Shaps avoided entry of

---

[25/] Shaps' position here and in the Court of Appeals is inconsistent with her position in the trial court, as this Court's opinion in Fruchter was the authority that she cited as support for her argument that the burden of proof should be on Provident. See Shaps Motion in Limine (Shaps Appendix, Tab C, at 7), proposed jury instructions (Shaps Appendix, Tab E, at 22). Moreover, as the Court of Appeals noted, the Third District Court of Appeals has twice cited this Court's Fruchter opinion as authority, rather than its own decision in the case, see Principal Mutual Life Insurance Co. v. Martin, 585 So. 2d 474 (Fla. 3d DCA 1991); Mizrahi v. Provident Life & Accident Insurance Co., 748 So. 2d 1059 (Fla. 3d DCA 1999), in spite of the fact that it is well aware of the general rule on a denial of certiorari. See Keay v. City of Coral Gables, 236 So. 2d 133 (Fla. 3d DCA 1970) (denial of certiorari cannot be construed as passing on issues in litigation; rather it decides only that order sought to be reviewed could not be disturbed). In Principal and Mizrahi the burden of proof issues were different than in this case, or nonexistent. Thus, the Third District Court of Appeals' citation to Fruchter in those cases can be viewed as examples of the Third District's self-perpetuation of its original decision in Fruchter. Certainly, the Third District has no authority to extend one of this Court's decisions. Such an innovation can only come from this Court. Hannah v. State, 402 So. 2d 555 (Fla. 4th DCA 1981).

summary judgment against her because of the Panepinto decision which held that the policy's three year limitations period would not commence until the termination of the disability and that proofs of loss would not have to be provided to the insurer until that time. 665 N.Y.S.2d at 388. In New York the burden always is on the insured to prove disability, so that a delay in bringing an action (although the New York Court of Appeals recognized the danger of stale claims and lawsuits, see id.) can be reconciled under New York law because if an insured brings such a claim he or she would still have to prove at trial that they were continuously disabled under the terms of the policy. Indeed, as Shaps' counsel stated at trial, under Panepinto, "[a]ll you have to do is prove that you have been continuously disabled during that period of time." 1SR-4-156. That, however, was not a burden Shaps was willing to accept at this trial. By attempting to place the burden of proof on Provident Casualty after not submitting claim forms for four years, and indeed never submitting proof of loss for that four year period, Shaps intended to turn the contract on its head and both have her cake and eat it by attempting to have Provident prove the negative – that is, that Shaps was not disabled for a period for which she had never submitted a claim form.[26/] That simply cannot be reconciled under New York law, which governs the parties' rights under the

---

[26/] Requiring Provident Casualty to carry the burden of proof would also rewrite or ignore the legal action clause of the policy, which states that no action can be brought until 60 days after proof of loss is provided to the insurer. Shaps never provided proof of loss for the four year gap between 1990 and 1994.

contract.

Moreover, even if Fruchter was applicable here and the burden had been placed on Provident at trial to show that Shaps was not disabled at time her benefits were discontinued in 1990 – the alleged "breach" – Shaps, as her counsel conceded at trial, would still have the burden to prove that she was continuously totally disabled during that four year period in order to meet the three year limitations period set forth in the policy. But the jury already answered that question required by New York law "No." Thus the ultimate outcome of the matter would be the same.[27/]

Accordingly, the trial court's ruling that this Court's opinion in Fruchter reflects a substantive interpretation of Florida law such that the burden of proof was correctly placed on Shaps at trial should be recognized by this Court by answering the first certified question in the affirmative.

[27/] Shaps argues in her brief that burden of proof was outcome determinative in the case, almost implying that judgment could be entered in her favor. That, of course, is not the case, as a reversal would only lead to a new trial at which Shaps would still have to prove she was totally disabled for the continuously four year period from September, 1990 through October, 1994. Although inexplicably the bulk of the charge conference on the afternoon of the fourth day of trial was not transcribed, see 1SR-4-183, with no further transcript of the charge conference, the ultimate result reflected in the jury instructions and verdict form, see supra at 4-5 & n. 5, was single question reflecting what would be, if this case were retried, a series of multiple questions with shifting burdens of proof for each question, but ultimately with the same question asked of the jury at trial in 1998 – whether Shaps was continuously totally disabled within the terms of the policy from September 1990 through October 1994, which it would still be her burden to carry.

II. REQUIRING THE INSURED TO PROVE DISABILITY IN THIS CONTEXT WOULD NOT VIOLATE THE PUBLIC POLICY OF FLORIDA.

When both the law and the facts are contrary to one's position, "public policy" is often the last resort for one seeking a result-oriented decision, and thus "public policy" considerations may be used only in extraordinary circumstances. This is not such a case, and the second certified question should be answered in the negative.

As this Court has stated:

> Public policy is variable. The very reverse of that which is the policy of the public at one time may become public policy at another; hence no fixed rules can be given by which to determine what is public policy. A contract is not void, as against public policy, unless it is injurious to the interest of the public or contravenes some established interest of society. It is the province of a court to expound the law only, and not to speculate upon what is the best in its opinion for the advantage of the community. Hence the public policy of a state or nation should be determined by its Constitution, laws, and judicial decisions, and not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. Judicial tribunals should hold themselves bound to the observance of rules of extreme caution when called upon to declare a transaction void on the ground of public policy, and prejudice to the public interest must clearly appear before a court would be warranted in pronouncing the transaction void on this account.

Hall v. O'Neil Turpentine Co., 56 Fla. 324, 47 So. 609, 611-13 (Fla. 1908) (citing Atlantic Coast Line R. Co. v. Beasley, 54 Fla. 311, 45 So. 761 (Fla. 1907)) (emphasis

added); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 347 (Fla. 1940) (same). Moreover, as this Court said in Beasley, "Public policy has been aptly described as 'an unruly horse, and, when once you get astride, you never know where it will carry you." 45 So. at 785. See also Herron v. Passailaigue, 92 Fla. 818, 110 So. 539, 542 (Fla. 1926).

Shaps raised for the first time in the Court of Appeals Florida "public policy" concerns to urge application of imposition of the Fruchter "shift" upon Provident, relying on Gillen v. United Services Automobile Ass'n, 300 So. 2d 3 (Fla. 1974). Ironically, Shaps, a California resident, seeks a Florida "public policy" exception with respect to burden of proof for a policy purchased and paid for in New York, governed by New York law, for which she made a claim in New York that was handled by the insurer in New York where she was paid disability benefits, when she has not been a resident of Florida for more than five years, having moved to California a few months after filing this action.[28/]

In Gillen, burden of proof was not at issue . Moreover, although not specifically

---

[28/] Indeed, even more ironically, considering that Shaps asserts in her brief that New York has no interest in this case, Shaps avoided entry of summary judgment against her because of the New York Court of Appeals decision in late 1997 in Panepinto, supra, which held that the three year limitations period set forth in the policy would not commence until the termination of the disability and that proofs of loss would not have to be provided to the insurer until that time. 665 N.Y.S.2d at 388. In New York, of course, the burden always is on the insured to prove disability.

adopting a significant relationship test for choice-of-law in contracts, the Gillen court appeared to use that test in its choice-of-law determination. Both the Court and the concurring opinion cited approvingly to Judge Mager's dissent in the Fourth District Court of Appeals that had urged application of the significant relationship to the contract test. 300 So. 2d, at 5, 8. Although this Court did not "now deem it necessary to adopt or reject" the test, the Court then went on to state that "suffice it to say, Florida has a significant relationship to the contract at issue." for among other reasons, "[t]he only relationship with New Hampshire was established during the making of the contract." Id. at 6. In the light of the this Court's later decision in Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988), which specifically adopted a *lex loci contractus* test for choice-of-law in contracts, the continued viability of Gillen in this regard is subject to question.

In any event, the facts of Gillen, which included an automobile accident in Florida and which weighed in favor of applying Florida law, rather than the foreign state's (New Hampshire) law, are not present in this case. In contrast to Gillen, in which, as this Court stated, "[t]he only relationship with New Hampshire was established during the making of the contract," id. at 7, in the instant case, Shaps applied for and was issued her policy in New York in 1987, applied for and received an increase in potential benefits through a amendment to her policy applied for and

delivered in 1988 while she was in New York, and then made a claim to Provident's New York office in 1989 for a disability she first suffered while working in New York. Shaps only moved to Florida after she was being paid disability benefits,[29/] and her claim continued to be handled by Provident Casualty's New York office.[30/] Because Shaps was receiving disability benefits when she moved to Florida, her policy was on waiver of premium; that is, no premiums were paid by Shaps from Florida to Provident before the alleged breach of contract in 1990.

In Gillen, moreover, multiple insurance policies were at issue. Although initially issued in New Hampshire, after the insureds moved to Florida the insurer issued yet another policy on the insured's vehicles that were located in Florida, thus centering the risk in Florida, that was delivered to them in Florida, and upon which they paid premiums from Florida. That clearly is not the case here, as Shaps lived in New York, her policy was issued and amended in New York where the "risk" was centered, she paid premiums in New York,[31/] made a claim in New York, and received disability

---

[29/] As she testified at trial, the weather was warmer and the lifestyle was easier in Florida than in New York. 1SR-4-116-117.

[30/] Provident Casualty is licensed as an insurer in New York. It is not licensed in Florida and does not issue insurance policies in the State of Florida. R4-116-3-4 (and attached affidavit).

[31/] Shaps assertion in her brief that she paid premiums in Florida is notably without citation, because she is attempting to mislead the Court as to when she paid such premiums, implying that she paid premiums from Florida before the alleged (continued...)

benefits in New York. Here, in this case, no policy was issued or renewed in Florida.

Another critical difference between Gillen and this case is that in Gillen is there was a conflict between statutes enacted by the Florida legislature and New Hampshire's legislature. Certainly, the state constitution and legislative enactments are the clearest and highest indication of a state's public policy. Equally as certainly, the issue now before this Court does not involve a legislative expression of public policy. For Shaps to argue, as she does, for a public policy exception because of this Court's prior interpretations, pursuant to Florida law, of specific contract language not present in the policy at issue here, would virtually do away with the conflict-of-laws doctrine because in every case "public policy" concerns could then be used to ignore foreign law.[32/]

The danger in this was implicitly recognized by Justice Dekle in his concurring opinion in Gillen, which also acknowledged the application of the significant relationship test, noting both the move to Florida by the insureds, and the issuance of a policy in Florida before the claim by the insureds, Justice Dekle stated:

[31/](...continued)
breach. That simply is not true. Although she may have paid premiums after benefits were terminated (the alleged breach), Provident had no choice in the matter as the policy is noncancellable (other than for failure to pay premiums).

[32/] Certainly, there is no indication in Fruchter, Ewing, Lecks, or McKeithan that "public policy" concerns were driving the opinions in those cases.

> otherwise . . . Florida's public policy against 'other insurance' clauses would not extend to policies issued and delivered in another state, for the statute on which Florida's public policy in this regard is founded (§ 627.0851) is hinged upon the predicate expressed in the statute itself as to insurance 'delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state.' Our Florida statute cannot be engrafted upon New Hampshire legislation which that sovereign has seen fit to provide for its citizens.
>
> Where the delivery of the insurance policy is in another state upon a vehicle there, our statute would not be invoked. To hold insurers all over the United States to a blanket Florida public policy applying to foreign vehicles when non-residents happen to be traveling in Florida would completely erase the rule of comity. Apparently the majority view does not intend so to hold.

300 So. 2d, at 7-8 (emphasis added). By the same reasoning, public policy should not be invoked in this case.

In Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (Fla. 1926), this Court discussed conflicts of laws and the application of comity:

> There may be five instances wherein it is generally considered that the municipal law of the state where the question is raised (lex fori) forbids the enforcement of a foreign law: (1) Where the enforcement of the foreign law would contravene some established and important policy of the state of the forum; (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such enforcement would contravene the canons of morality established by civilized society; (4) where the forum law is penal in its nature; and (5) where the question relates to real property.

Id. at 542 (citations omitted). The Court also stated that "[t]he general rule governing the comity of nations is that in a proper case the laws and judicial proceedings of one state will be enforced in another state, provided they do not involve anything immoral, contrary to general policy, or violative of the conscience of the state called upon to give them effect." Id. at 544 (citations omitted).

Under the facts of this case, and particularly given Shaps' selective use of New York law favorable to her, it is respectfully submitted, there is no "paramount" rule of law at issue here that would warrant this Court, in the exercise of using "extreme caution," to bring "public policy" concerns to bear here. Accordingly, the second certified question, if reached by this Court, should be answered in the negative.

CONCLUSION

For the foregoing reasons, appellee Provident Life and Casualty Insurance Company respectfully requests that the Court reframe the questions and issues certified by the United States Court of Appeals for the Eleventh Circuit and hold that the burden shift set forth in Fruchter is not applicable to the policy at issue here. In the alternative, the Court should answer the first certified question in the affirmative and the second certified question in the negative.

Respectfully submitted,

SHUTTS & BOWEN LLP
Attorneys for Appellees

201 South Biscayne Boulevard
1500 Miami Center
Miami, Florida 33131
(305) 358-6300
Telecopier (305) 381-9982

By:_____
John E. Meagher
Florida Bar No. 511099
Jeffrey M. Landau
Florida Bar No. 863777

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were mailed on this _____ day of May, 2001 to: Edward D. Schuster, Esq., Massey, Coican & Schuster, L.L.C., 2455 East Sunrise Blvd., Suite 1100, Ft. Lauderdale, Florida 33304 and Howard Grossman, Esq., Grossman & Goldman, 1098 N.W. Boca Raton Boulevard, Boca Raton, Florida 33432.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

In accordance with Rule 9.210, Florida Rules of Appellate Procedure, we certify that this brief has been printed in a 14 point Times New Roman font.

SHUTTS & BOWEN LLP
Attorneys for Provident
201 South Biscayne Boulevard
1500 Miami Center
Miami, Florida 33131
(305) 358-6300

By:_____
John E. Meagher
Florida Bar No. 511099
Jeffrey M. Landau
Florida Bar No. 863777