IN THE SUPREME COURT
STATE OF FLORIDA

AUDREY SHAPS **CASE NO. SC01-558**

Appellant,

vs.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY, and PROVIDENT LIFE & CASUALTY INSURANCE COMPANY,

Appellees.

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APPELLANT'S INITIAL BRIEF ON THE MERITS

An Appeal from the United States Court of Appeals
for the Eleventh Judicial Circuit
on Certified Questions
Circuit Court Case Nos. 99-5500, 99-4028

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PREFACE

Because the entire Record on Appeal, including the parties' Briefs have been transmitted to this Court pursuant to the Certification by the Eleventh Circuit Court of Appeal, the parties will be referred to as they were in those Briefs and in the Eleventh Circuit Court of Appeal. The Appellant/Plaintiff, AUDREY SHAPS, will be referred to either as the "Plaintiff" or "or by her name, e.g., "Ms. Shaps". The Appellees/Defendants, PROVIDENT LIFE and ACCIDENT INSURANCE COMPANY and PROVIDENT LIFE and CASUALTY INSURANCE COMPANY will be referred to, collectively, either as "Defendants" or as "Provident". References to the record will be proceeded by the abbreviation "R.". Following that abbreviation, the volume number, document number and page number(s) to those documents, where necessary, will be referred to. For example, "R.I:2:3". The Trial Transcript is separated and provided in a Supplemental Record. It will be proceeded by the abbreviation "TR.". Also, the volume number, document number, where necessary, and page number(s) will be referred to as above. (TR.I:2:3). References made to any material in the Record Excerpts will be proceeded by "RE.". References to document and page number(s) will be made where necessary.

STATEMENT OF THE CASE AND OF THE FACTS

This case comes to the Court based upon Certification to this Court of the following questions by the Eleventh Circuit Court of Appeal.

> 1. Is the burden of proof rule recognized in Fruchter v Aetna Life Insurance Company, Inc., 266 So. 2d 61, 63 (Fla. 3rd DCA 1972) cert. disch. 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 Assn., 300 So. 2d 3 (Fla. 1974).

FACTUAL BACKGROUND

Provident issued an individual disability insurance policy to Ms. Shaps in June, 1987. At the time, Ms. Shaps was a New York resident and also was employed there. The policy contained the following pertinent provisions:

> "We will pay benefits for temporary disability or other covered loss resulting from injuries or sickness subject to the definitions, exclusions, and other provisions of this policy. Loss must begin while the policy is in force." (RE:B)

Pertinent definitions in the policy are as follows:

> "Injuries means (*sic*) accidental bodily injuries occurring

> while your policy is in force."
> "Sickness means sickness or disease which is first manifested while your policy is in force. It includes disability from transplant surgery."
>
> "Total disability before age 55 or before benefits have been paid for ten (10) years for a period of disability, whichever is later, 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." (RE.B:6).

In addition to the above provisions, the policy provided the following definition of "occupation":

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

Ms. Shaps was a housewife, who never worked away from the home until her first husband passed away in 1977. (TR.II:221:174-176). Ms. Shaps remarried and this marriage also ended with her husband unexpectedly passing away after nine (9) months of marriage. (TR.II:221:179). This prompted Ms. Shaps to become employed as a salesperson for Metropolitan Life Insurance Company. (TR.II:221:177). Ms. Shaps became employed with other business concerns, such as Prentice Hall and Research Institute of America, through the early 1980s.

Ms. Shaps' next occupation was that of a mortgage broker/loan consultant employed at Savings of America. Ms. Shaps described her duties as having client contacts, which included visits to their homes. By 1987, she was earning $115,000.00 annually. (TR.II:221:183-187). Ms. Shaps left her employment with Savings of America because despite her assurances to her clients, the savings bank was adding closing costs to her client's mortgages. Also, Ms. Shaps' sales territory was no longer protected. (TR.II:221:187-188).

Following her resignation from Savings of America, Ms. Shaps' anxiety disorder increased, as did her TMJ symptoms. These conditions negatively impacted upon her ability to do her job and produce sales. (TR.II:221:188-191). Unfortunately, Ms. Shaps also was experiencing difficulty with her son, who was having psychiatric problems of his own. Ms. Shaps' son was terrorizing her and her business associates, which further increased her anxiety disorder and added to the TMJ symptoms. (TR.II:221:194-196). Ms. Shaps continued to work in various occupations until July 7, 1989 when the conditions became totally disabling.

Ms. Shaps first submitted a claim for disability benefits to Provident in New York in July, 1989. The nature of the total disability on the claim form was "TMJ syndrome". (TR.II:228). On the proof of loss, Ms. Shaps stated "Pain in check to ear, headaches, pain radiates to neck and down right side". In addition, Ms. Shaps listed

Joseph Turk, the therapist in New York who was treating Ms. Shaps for generalized anxiety disorder, and Dr. Laurence Weinberg, who was treating the TMJ condition. (TR.II:227-228). On July 29, 1989, Provident accepted her as totally disabled and commenced payments of benefits under the disability insurance policy. (TR.II:197-198).

Provident commenced payments based upon the above without a reservation of rights and paid total disability benefits until September, 1990. These payments were made on the basis of Ms. Shaps' treating psychotherapist, Joseph Turk's statements that Ms. Shaps was totally disabled from performing work because of anxiety disorder and TMJ. (TR.II:221:197). Prior to Provident's cessation of the payment of benefits, Ms. Shaps moved to Florida to escape from her son who continually threatened her. At that time, due to the move, she discontinued her treatment with Joseph Turk, the psychotherapist in New York and commenced treatment with Ethel Green, a psychotherapist in Florida, who also attested to Ms. Shaps' continuing disability. (TR.II:221:198-200). Following the move, Ms. Shaps' relationship with her son improved.

PROVIDENT HAD NO PROOF THAT MS. SHAPS WAS NO LONGER DISABLED WITHIN THE MEANING OF THE DISABILITY POLICY WHEN IT CEASED PAYMENT

It is important to review the evidence concerning what Provident knew

concerning Ms. Shaps' disability status, and when it knew it. This is because it will be shown in the remainder of the Brief that Provident had the burden of proving that Ms. Shaps had regained the ability to perform her usual occupation of mortgage broker/loan officer, at the time it ceased payment of total disability benefits in September, 1990.

Mark Germaine was the claims representative in charge of Ms. Shaps' disability claim. He testified at the trial by deposition. (TR.II:221:65). In Mr. Germaine's testimony, he stated that Ms. Shaps' benefits were cut off due to statements made by Ethel Green, Ms. Shaps' psychotherapist in Florida. (TR.II:221:76). Mr. Germaine also stated that Ms. Green's responses and communication he had with Provident's Medical Department were the determining factors in determining that Ms. Shaps was no longer disabled within the meaning of the policy. (TR.II:221:79). This is so even though Mr. Germaine could point to no documents in the claim file which reflected a consultation with the Medical Department. (TR.II:221:80). There is no written opinion from the Medical Department that Ms. Shaps was no longer disabled as of September, 1990, the date Provident ceased payment. (TR.II:221:80).

While living in Florida and being paid total disability benefits there, Provident requested Ms. Shaps be examined by Dr. Ratner, Provident's "independent medical examiner". Dr. Ratner's diagnostic impression was that Ms. Shaps was suffering from

"TMJ and generalized anxiety disorder, rule out major affective disorder, headaches". (TR.II:220:101-103). (The report is admitted in evidence at TR.II:220:60). Provident never attempted to have the additional tests performed that were recommended by its own IME physician. Provident sent Ms. Green a questionnaire concerning whether Ms. Shaps suffered from bipolar disorder and major depression, conditions Ms. Shaps never claimed were disabling. Ms. Green opined that Ms. Shaps did not suffer from bipolar disorder and while Ms. Shaps was depressed, she opined that she was not suffering from "major depression". (TR.II:220:231). Admittedly, this did not have an impact upon Provident's decision to cease payments. (TR.II:220:91). Provident's adjuster, Mr. Germaine conceded that no testing was performed, even though Dr. Ratner, Provident's own private independent medical examiner, suggested that these tests be performed during the claim evaluation. (TR.II:220:223-238).

Indeed, the claims representative admitted that, in fact, Ethel Green stated that Ms. Shaps was totally disabled and that he could not tell whether Ms. Shaps' TMJ condition alone was not disabling. According to Mr. Germaine, Dr. Leagus, Provident's in-house physician in the Medical Department, never told him that Ms. Shaps did not suffer from TMJ and there was no medical evidence to conclude that she was not suffering from TMJ or generalized anxiety disorder -- the conditions upon which the disability payments were commenced. (TR.II:221:83,86,100,105). Mr.

Germaine could not produce a document nor medical record which allowed him to conclude that Ms. Shaps was not still suffering from TMJ and generalized anxiety disorder at the time he decided to cut off her benefits. (TR:II:221:119). On review of the independent medical examination report of Dr. Ratner, Dr. Leagus stated that he was uncertain that Ms. Shaps was totally psychologically disabled. (TR.II:221:125). Yet, Mr. Germaine determined that in conjunction with a Mr. Allen at Provident, Ms. Shaps could perform the substantial and material duties of her occupation as a mortgage broker, consistent with the requirements of the disability policy. (TR.II:221:138-139). Mr. Germaine noted that Ms. Shaps submitted a letter from the Social Security Administration confirming her disability status. Mr. Germaine stood upon his decision that Ms. Shaps was no longer disabled within the meaning of the policy and informed Ms. Shaps that the letter would not necessarily change his decision, but if there was additional information, he would consider it. (TR.II:221:140). Dr. Leagus wrote an internal memo to Mr. Germaine that Ms. Shaps should be advised of Dr. Ratner's recommendations that she be treated psychiatrically and with medication. Provident never advised Ms. Shaps of these recommendations. (TR.II:220:148-149). In fact, Dr. Leagus' statement went so far as to suggest "settling" the claim as he did not think Ms. Shaps' condition would change. (TR.II:221:128-131). Dr. Leagus stated "I think that unless she, the claimant, presents

us with an attending physician statement from a psychiatrist, we should consider settling the claim as we are otherwise not likely to anticipate a status change from the present set of circumstances which does not appear to correctly address her problem". (TR.II:221:130).

More insight into the paucity of information Provident had when it decided to cease payments to Ms. Shaps under the disability policy is found in testimony of Thomas Timpanaro, Director of Field Claims of Provident. He also acknowledged that Dr. Ratner recommended additional testing be done to determine whether Ms. Shaps was disabled at the time her claim was being examined. Mr Timpanaro concluded that while the testing recommendations were made, Dr. Ratner stated that he was not entirely certain that Ms. Shaps was totally disabled, but Dr. Ratner also did not say that she was totally disabled. Apparently this allowed for the conclusion that Ms. Shaps was not disabled. (TR.IV:223:37-49). Mr. Timpanaro further conceded that there was nothing in his file to indicate that Ms. Shaps could perform the substantial and material duties of her occupation as a loan consultant. (TR.IV:223:51-52).

The evidence revealed that Ms. Shaps' actual psychological and medical condition essentially remained unchanged from the time that Provident recognized that she was totally disabled under the policy between 1990 and 1994. When she first

treated Ms. Shaps, she was anxious, suffering from a number of stressors and suffering from TMJ (TR.I:220:228). Ms. Green stated that Ms. Shaps easily met the diagnosis of generalized anxiety disorder. (TR.I:220:222-224). This because Ms. Shaps was functioning at a minimal level, due to the generalized anxiety disorder and because of severe pain related to the TMJ, Ms. Shaps was totally disabled from her employment. (TR.I:220:225-227). This was reflected on the attending physician statements she provided to Provident from February, 1990 through September, 1990. (TR.I:220:228). Ms. Shaps was last seen by Ms. Green in 1992 when she moved from her residence in Margate, Florida to Boca Raton, Florida. (TR.I:220:239-243). According to Ms. Green, Ms. Shaps was functioning at a minimal level and she was even unable to operate a carpet sweeper. (TR.I:220:239-243). Ms. Green noted that Ms. Shaps' coping skills needed a great deal of improvement and the generalized anxiety disorder continued to disable Ms. Shaps. (TR.I:220:239-243).

Following her move to Boca Raton, Florida, Ms. Shaps came under the care of Dr. John Girard, a board certified internal medicine and geriatrics physician. (TR.III:222:156-157). The doctor's initial diagnosis was that Ms. Shaps suffered from TMJ, frequent headaches, and back pain (TR.III:222:159). Noting Ms. Shaps' psychological problems, he referred her to a psychotherapist. (TR.III:222:160). Ms. Shaps was seen by Dr. Girard twenty-two (22) times between June, 1992 and June,

1995. (TR.III:222:163). During that time span, it was Dr. Girard's opinion that Ms. Shaps could not work in her occupation as a mortgage loan consultant/loan officer. (TR.III:222:174). The doctor admitted on cross-examination, however, that he was not a "disability specialist". (TR.III:222:194). The above is the only medical evidence regarding Ms. Shaps' condition. Provident offered no medical evidence on the point.

FACTS AND CIRCUMSTANCES CONCERNING THE PRESENTATION OF THE CERTIFIED QUESTIONS BY THE ELEVENTH CIRCUIT COURT OF APPEAL TO THIS COURT.

As there is a dearth of evidence in Provident's possession that Ms. Shaps was not disabled within the meaning of the policy at the time they ceased paying her benefits, the issue of which party had the initial burden of proof in the case became important. Indeed, the Eleventh Circuit Court of Appeal recognized that it was outcome determinative and the "primary and most complex issue" in the case.

The parties recognized that the Federal District Court sitting in Florida, will behave as a Florida Court would behave, sitting in diversity, as it decided conflicts of law issues relative to the burden of proof issue at trial.

Thus, the District Court was called upon to decide whether Ms. Shaps, the Plaintiff, had the burden of proving that she was disabled for the two time periods in contest (September 10, 1990-October 23, 1994 and September 8, 1995-April 6, 1996),

or whether Provident had to prove that at the time it terminated Ms. Shaps' total disability benefits, it had sufficient evidence that Ms. Shaps was no longer disabled within the meaning of the policy.

The District Court below had to decide whether the law of New York, the state where the disability income insurance policy was completed, or the law of Florida, where Ms. Shaps resided, where the claim was re-evaluated, where payment was made, and where payment was denied, to determine the respective burdens of proof under the insurance agreement. The District Court astutely recognized the issue on the first day of trial. (TR.I:220:15).

By the second day of trial, the issue of the burden of proof and the choice of law question relative to it had not yet been decided. Ms. Shaps contended that New York applies according to Florida conflicts of law rules to the substantive issue of contract interpretation. However, Ms. Shaps contended that according to Florida choice of law rules, burdens of proof are procedural and not substantive and accordingly, the District Court must apply the law of the forum state, Florida., just as a State Trial Court would. (TR.II:221:6-7).

The District Court initially understood Florida's procedural burden of proof applicable to the case before it. It commented that once a disability insurer begins paying benefits, the burden is upon the insurer to prove that the insured is no longer

disabled within the meaning of the policy. (TR.II:221:7). Ms. Shaps pointed out to the District Court that New York also considers burdens of proof to be procedural law issues. Thus, according to Ms. Shaps burden of proof of the forum state, Florida, applies and it was Provident who had the burden of proving that at the time it discontinued benefits it had sufficient evidence to conclude that Ms. Shaps was no longer disabled pursuant to the definition contained in the disability policy. (TR.II:221:8-9).

Provident urged that the Florida Supreme Court in Aetna Life Insurance Company, Inc. v. Fruchter,[1] stated that the burden of proof issue is actually substantive and thus, New York law applies. Provident contended that Ms. Shaps therefore had the burden of proving continuing disability. (TR.II:221:11).

The District Court eventually ruled sitting as a Trial Court in Florida that the Fruchter case dictated the finding that the burden of proof is substantive and, according to the doctrine of *lex loci contractus*, the substantive law of the place of contract was made, New York, would apply. Therefore, Ms. Shaps had the burden of proving continued disability under the disability insurance contract. (TR.IV:223:13-14). The Jury decided that Ms. Shaps did not prove her continued disability between September 10, 1990 through October 23, 1994. The Jury also found that Ms. Shaps

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[1] 283 So. 2d 36 (Fla. 1976).

proved her status between September 8, 1995 through April 6, 1996, but found that Ms. Shaps did not comply with policy terms not relevant here.

By Opinion dated March 16, 2001, the Eleventh Circuit Court of Appeal set forth the outcome determinative certified questions referenced above to this Court for disposition.

This review ensues.

<u>SUMMARY OF ARGUMENT</u>

Since there is no conflict of laws between New York and Florida with respect to the issue of burden of proof involved in this case, the conflict of laws analysis need not occur. This is because no New York case has been found which has applied the rule that the insured has the continuing burden to prove his or her disability where the insurer accepts the insured's disabled status and commences payment. Since there is no need to engage in the conflict of law analysis, Florida's procedural burden of proof should apply.

Even under a conflict of laws analysis, Florida's procedural burden of proof as announced in <u>Fruchter</u> must apply to the facts of this case. Florida applies the rule of *lex fori* which requires the application of its own procedural rules to cases, even though the substantive law of the foreign jurisdiction may also apply in a given case. Florida courts have consistently ruled that issues concerning burden of proof are procedural. This is because rules which allocate the burden of proof do not prescribe the rights and duties of the parties. Accordingly, the first question posed by the Eleventh Circuit Court of Appeal must be answered in the negative.

Even if viewed as part of the substantive law of the State of Florida, the burden of proof set forth in <u>Fruchter</u> must apply to the facts and circumstances at bar. This is because New York's burden of proof rule is repugnant to Florida's public policy as

expressed by the courts of this state. This Court has expressed the state's public policy with respect to which party bears the burden of proving the insureds' condition after an insurer accepts an insured as disabled and commences payment. As announced by this Court, the public policy of this state is to protect insureds from unilateral and arbitrary decisions to suspend or cease payment of benefits by requiring the insurer, who seeks relief from such payment, to have sufficient proof of the change in the insured's disability status prior to the cessation of payments. Ms. Shaps, a Florida resident, must be protected by Florida's public policy in this regard and, therefore, the second question posed by the Eleventh Circuit Court of Appeal must be answered in the affirmative.

ARGUMENT

I. IS THE BURDEN OF PROOF RULE AS RECOGNIZED IN FRUCHTER v. AETNA LIFE INSURANCE COMPANY, INC., 266 So. 2d 61 (Fla. 3rd DCA 1972), cert. disch., 283 So. 2d 36 (Fla. 1973), PART OF THE SUBSTANTIVE LAW OF FLORIDA, SUCH THAT IT WOULD 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?

Burdens of proof are clearly procedural as viewed by Florida's Courts. To date, no Florida Court has held that the burden of proof is anything but a procedural requirement in Florida trials. The District Court erred by applying New York's procedural burden of proof at the trial of the breach of disability contract case. This is so for two (2) reasons: There is actually no "conflict of law" between New York and Florida since, apparently, New York has not addressed the precise issue at bar. And, even under a "conflicts of law" analysis, Florida's procedural burden of proof and not New York's, applies to the circumstances at bar.

Before one engages in a choice of law or conflicts of law analysis, it must first be determined whether there is, in fact, a conflict on the issue of burden of proof between the law of New York and the law of Florida. Apparently, the Eleventh Circuit Court of Appeal has decided that New York does not adhere to the procedural

rule that shifts the burden of proof to the insurer where, as here, the insurer accepts the insured's disability status and commences payment but thereafter, terminates payment without any evidence that the insured's condition has changed. The Eleventh Circuit Court of Appeal cites Klein v. Mutual Life of Vermont, 7 F. Supp. 2nd 223, 226 (E.D.N.Y. 1998), evidently for the purpose of presenting a citation to a New York authority which conflicts with Fruchter. However, it should be noted that Klein involved an outright initial denial of the insured's claims under the various disability policies in question. Research fails to reveal a New York case which decides the issue of which party has the burden of establishing disability or non-disability following commencement of payment by the insurer before a jury.[2]

In reality, there is no conflict because New York has not announced a burden of proof rule governing the circumstances at bar. In contrast, this Court requires that the disability insurer prove by the preponderance of evidence that the insured is no longer disabled within the meaning of the policy once disability is established by the insured, accepted by the insurer, and payment has commenced. New York Life

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[2] Paul Revere Insurance Company v. Bavaro, 957 F. Supp. 444 (S.D.N.Y. 1997) was cited by Provident and relied upon the District Court in making its decision. However that case involved the insurer's motion for summary judgment. The court stated the insured has the burden of proving disability after disability is accepted and payment commenced, but the burden of proof was not applied in a jury trial.

Insurance Company v. Lecks, 122 Fla. 127, 137, 165 So. 50, 54 (1936); Mutual Life Insurance Company of New York v. Ewing, 151 Fla. 661, 664 10 So. 2d 316, 317-318 (1942). Florida, like New York, places the initial burden upon the insured to establish disability in the first instance, Lecks, supra, Ewing, supra. There being an absence of conflict on the burden of proof issue, the District Court erred in applying New York's procedural burden of proof.[3]

Even under a conflicts of law analysis, Florida would apply its own procedural burden of proof under the circumstances of this case. In a conflicts of law analysis, the first step is to identify the type of legal issue involved. Aetna Casualty and Surety Company v. Huntington National Bank, 582 So. 2d 483, 484 (Fla. 4th DCA 1991) *approved*, 609 So. 2d 1315 (Fla. 1992).

The issue involved at bar is: Which party to the insurance disability contract has the initial burden of proof once the insurer accepts the insured as totally disabled and commences payment under the policy without a reservation of rights? Since the Federal Circuit Court and, indeed, the parties, have identified the issue as one of the burden of proof, the next step in the analysis is to determine how the forum, Florida, views the burden of proof. Florida views issues of burdens of proof as procedural.

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[3] New York also views burdens of proof as procedural issues and governed by the law of the forum state. Goldfields American Corp. v. Aetna Casualty & Assurity Co., 173 Misc. 901, 902 661 N.Y. 2d 948, 949 (1997).

Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 242 (Fla. 1977); Ziccardi v. Strother, 570 So. 2d 1319, 1321 (Fla. 2nd DCA 1990).

Having determined that Florida views burdens of proof as procedural, the next step in the analysis is to determine what rule a Florida court would apply to decide a conflict between its burden of proof and that of a foreign jurisdiction. Marion Power Shovel v. Hargis, 698 So. 2d 1246, 1247 (Fla. 3rd DCA 1997).

The rule in this state is that matters of procedure are governed by the law of the forum state, which in this case is Florida, despite the fact that a foreign state's laws may apply to determine the parties' rights and liabilities under the contract and interpretation of the contract terms of a contract entered into in a foreign state. Brown v. Case, 80 Fla. 703, 705 86 So. 684, 685 1920; Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18, 19-20 (Fla. 1972); Wingold v. Horowitz, 292 So. 2d 585, 586 (Fla. 1974); Goodman v. Olsen, 305 So. 2d 753, 754 (Fla. 1975);Fincher Motors v. Northwestern Bank & Trust Co., 166 So. 2d 717, 179 (Fla. 1964); Farris & Company v. William Schluderberg, T.J. Kurdle Co., 141 Fla. 462, 463 193 So. 429, 430 (1940) [Trial Court's failure to apply Florida's burden of proof to a dispute concerning a foreign contract held reversible error.]; Maryland Casualty Co. v. Williams, 377 F.2d 389 (5th Cir. 1969).

At bar it is clear that the Federal District Court should have applied the

procedural law of the forum state, Florida, governing the burden of proof. It reversibly erred in failing to do so.

The reasoning used by the District Court to determine that the issue of the burden of proof in the instant case is "substantive" and therefore, New York's rule applies is found in this Court's Opinion which discharged *certiorari* review of Fruchter v. Aetna Life Insurance Company, Inc., 266 So. 2d 61, 63 (Fla. 3rd DCA 1972); cert. disch. 283 So. 2d 36 (Fla. 1973). The Federal District Court relied upon this Court's statement and in the Opinion which discharged *certiorari* review as a proper characterization of whether the burden of proof is substantive or procedural in a conflict of law analysis:

> "We uphold the Third District's correct application and continued viability as a matter of substantive law of the holdings in Lecks and Ewing and the District Court's reversal and remand of the cause for a new trial."

Fruchter, 283 So. 2d, 237-238.

The statement by this Court in Fruchter should not have been followed by the District Court and does not control the issue of whether the burden of proof is substantive or procedural to ultimately determine the conflict of law question. This is so because the discharge of *certiorari* is not a decision on the merits, nor can it be utilized as precedent. Southern Bell Telephone & Telegraph Co. v. Bell, 116 So. 2d

617, 619 (Fla. 1959).

Moreover, not a single Florida decision has ruled that the burden of proof is substantive in any context. In every case where the burden of proof was categorized, Florida Courts have determined that it is procedural. See, e.g., Walker & LaBerge, Inc. v. Halligan, 344 So. 2d at 243 [Court distinguishes procedural burden of proof requirement from the substantive statutory right]; Stuart L. Stein, P.A. v. Miller Industries, Inc., 564 So. 2d 539, 540 (Fla. 4th DCA 1990) [amendment to statute increasing the burden of proof in a civil theft case to clear and convincing evidence was not a substantive change in statute.]; McCarthy v. Bay Area Signs, 639 So. 2d 1114, 1115-1116 (Fla. 1st DCA 1994) [burden of proof is procedural in workers' compensation case].

The reason for the consistency in the holdings which states that the burden of proof is procedural can be found in the distinction between substantive law and procedural law. Substantive law sets forth the duties and rights of the parties. Procedural law concerns the means and methods to apply and enforce those duties and rights. Alamo-Rent-a-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994).

In the instant case, interpretation of the rights and duties, including the obligations of the parties under the insuring agreement, are governed by New York law. This includes issues not before this Court, such as the obligation to file

continuous proofs of loss, the meaning of "disabled" pursuant to the policy under New York law, and the effect of New York case law on interpretation of the contract. By way of contrast, burdens of proof are the mechanisms through which those rights are enforced. Walker & LaBerge, Inc., supra. These rules or laws in no way create, define or otherwise prescribe duties and rights under the disability policy in question. No reasoning has been advanced by Provident nor recognized by the Eleventh Circuit Court of Appeal why this Court should depart from established law viewing burdens of proof as procedural.

In the instant case, the insurer accepted Ms. Shaps as disabled, commenced payment, and thereafter, terminated payments in Florida without evidence that her condition had changed. On these facts, the burden of proof in the instant case should not be held to be substantive, effectuating a change in the application of the burden of proof under Florida law. Accordingly, it is respectfully requested by Ms. Shaps that this Court answer the certified question in the negative, and that the *lex fori* of Florida should apply. New York's procedural burden of proof should not have been applied to this case. Florida's procedural burden of proof should have been applied by the Federal District Court sitting as a Florida trial court in diversity.

II. 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 ASSN., 300 So. 2d 3 (Fla. 1974).

Even if this Court concludes that the burden of proof in disability insurance contract disputes is substantive, this Court should nevertheless apply the law of the State of Florida, the forum, since New York's procedural burden of proof is repugnant to the public policy expressed by this Court and the Appellate Courts of the State following this Court's Decisions.

This Court has held that under conflicts of law principles, Florida courts will not apply the principle of comity and apply a foreign state's substantive laws regarding insurance contracts, where that state has little or no interest in the matter or controversy -- even though the contract was executed in that foreign state. Gillen v. United Services Automobile Assn., 300 So. 2d 3, 6-7 (Fla. 1974). The Gillens entered into two (2) insurance policies with the insurer. These contracts were entered into in the State of New Hampshire. The Gillens were involved in an accident in which Mr. Gillen was killed and his wife was seriously injured. The insurance company took the position under the policies that if the insured had other similar insurance available and applicable to the accident, the damages would be limited to the higher of the applicable limit. The Gillens argued that while that may be the law of the State of New Hampshire, Florida public policy prohibits such a construction of the contract

for uninsured motorist coverage and, as such, they were entitled to recovery on both of the uninsured motorists' policies.

The Trial Court found that the Gillens were entitled to the benefits of both policies since application of New Hampshire law is repugnant to Florida's public policy. The District Court of Appeal reversed. It held that since the insurance policy was issued and delivered in the State of New Hampshire, the "other insurance" clause was enforceable, consistent with New Hampshire's substantive insurance law, despite Florida's public policy. This Court reversed the District Court's decision and expressly held that the principles of comity would not apply since the State where the contract in dispute was entered into had little or no interest in the controversy. This Court will not apply a foreign state's law where to do so would bring harm to a Florida citizen, or to frustrate the public policy of the state.

Here, it is undisputed that Ms. Shaps was a resident of Florida at the time of Provident's decision to cease payments under the insuring agreement. As in Gillen, where the insurer was fully aware of the Gillens move to Florida, so too was Provident fully aware of Ms. Shaps' move to Florida and indeed, paid disability payments there, directed her to submit to an independent medical examination there, conducted an investigation of her disability claim with healthcare providers in Florida, and informed her in Florida that payments would no longer be made. It is also undisputed that while

in Florida Ms. Shaps continued to pay, and Provident continued to accept, premiums to keep the policy in effect. Other than New York being the place of the application and delivery of the policy, New York has no connection with the issues under consideration here. Further, as the insureds in Gillen, Ms. Shaps purchased a home here, and possessed all of the indicia of residency. Accordingly, she must be entitled to the protection of Florida's public policy regarding disability insurance policies to the extent the burden of proof requirement of New York is repugnant to that of Florida.

In order to discern the public policy of the state, one may look to the constitution, statutes, or the decisional rules set forth by the Courts. Northside Motors, Inc. v. General Motors Acceptance Corp., 255 So. 2d 560, 563 (Fla. 1st DCA 1971).

This Court has held that as in the instant case where the insurer accepts the insured as disabled, commences payment and, thereafter, seeks relief from its duty to make payments under the policy that:

> "The burden is 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."

Lecks, supra 165 So. at 54.

This Court again set forth Florida's public policy with respect to the burden of

proof as between the disability insurer and its insured under the circumstances at bar as follows:

> "Where, however, it is established, as in this case, that a permanent and total disability existed within the preview of the policy and the insurer seeks relief from continuation of payment of indemnities theretofore paid under and within preview 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 preview of the policy in this regard."

Ewing, supra 10 So. 2d at 318. Citations omitted.

This rule was again applied by the District Court in Fruchter v. Aetna Life Insurance Company, Inc., 266 So. 2d 61 (Fla. 3rd DCA 1972) following Lecks and Ewing that the trial court erred for its failure to instruct that the insurer had the burden of establishing by the greater weight of the evidence that the insured was, and is, able to engage in an occupation for remuneration or profit, and that the total disability as defined by the insurance policy had ceased. 266 So. 2d at 62.

The Federal District Court's application of the New York burden of proof clearly frustrates the intent of Florida's public policy, which is to protect insureds from the unilateral, potentially arbitrary, and financially devastating decision to cease payment of disability insurance benefits once it has accepted the insured's status as being totally disabled. The facts in this case in no way minimize the application of

Florida's public policy to Ms. Shaps. The facts in the case at bar virtually mirror those present in Gillen. Provident was fully aware that Ms. Shaps was located in Florida, paid her benefits there and, indeed, exercised its decision to cease payment in Florida as well. Ms. Shaps undertook contractual commitments in Florida and sought medical care here. Ms. Shaps made these decisions based upon her anticipated continued payment from Provident. As a Florida resident, the performance by Provident under the disability insuring agreement and thereafter, its breach of that performance has many more ties with Florida than with New York. In fact, the decisions concerning the further handling of Ms. Shaps' disability payments were not made in New York, but in Chattanooga, TN.

Should this Court determine that the burden of proof at bar is substantive, the New York burden of proof, while viewed by New York itself as procedural, should not apply to this case given Florida's public policy expressed by the decisions of this Court and of the District Courts of Appeal in this state. That protection should be especially afforded at bar, where the insurer had no evidence of the change in Ms. Shaps' total disability status when it decided her status had changed. The Eleventh Circuit Court of Appeal's decision to seek the decision of this Court on the issue is recognition of the fact that placing the initial burden upon Provident will result in an entirely different outcome on retrial. Accordingly, the second certified question posed

by the Eleventh Circuit Court of Appeal must be answered in the affirmative, and find that the Federal District Court violated the public policy of Florida by failing to place the burden of proof on the insurer.

CONCLUSION

Wherefore, due to the foregoing, it is respectfully requested that this Court find that Florida's burden of proof rule applies to disputes between the insurer and insured under the disability policy in question and that, in any event, Florida's public policy requires that the burden of proof announced by the Florida Supreme Court in Lecks and Ewing apply in this case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U. S. Mail to **Jeffrey M. Landau, Esq**., Attorney for Appellees, SHUTTS & BOWEN, 201 S. Biscayne Boulevard, 1500 Miami Center, Miami, Florida 33131 on April 19, 2001.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the Appellant's Initial Brief On The Merits is printed in 14-point, Times New Roman, proportionally-spaced typeface.

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