IN THE SUPREME COURT OF FLORIDA

No. SC04-2313
L.T. No. 2D03-201

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

MARGARET ROACH and THOMAS ROACH,

Respondents.

INITIAL BRIEF OF AMICUS CURIAE ALLSTATE INSURANCE COMPANY, SUPPORTING PETITIONER STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Filed by Consent of All Parties

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PRELIMINARY STATEMENT

This appeal arises out of an uninsured motorist insurance claim. The Petitioner, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, was the defendant below. It will be referred to as "STATE FARM" in this Brief. Respondents, MARGARET ROACH and THOMAS ROACH, were the plaintiffs and will be referred to collectively as "ROACH." Amicus Curiae ALLSTATE INSURANCE COMPANY will be referred to as "ALLSTATE."

References to the record on appeal will be designated by the symbol "R." followed by the appropriate page numbers. References to the documents contained in the appendix accompanying STATE FARM's Initial Brief will be designated by the symbol "App." followed by the appropriate page numbers. Legal citations contained in this Brief are intended to conform to Florida Rule of Appellate Procedure 9.800 and THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Rev., et. al. 17th Ed. 2000). All emphasis has been supplied by counsel unless otherwise noted.

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND INTEREST IN THE CASE

Pursuant to Florida Rule of Appellate Procedure 9.400(b), ALLSTATE provides the following statements of its identity and interest in the case.

Allstate Corporation is the United States' largest publicly-held personal-lines insurer, currently writing policies in 49 states including the State of Florida. As part of that business, ALLSTATE issues policies providing automobile insurance coverage to its insureds.

ALLSTATE is interested in this case because the Court's decision will have a substantial impact upon claims filed by ALLSTATE's insureds, the validity of insurance contracts, and upon the cost of automobile insurance nationwide and in the State of Florida.

SUMMARY OF ARGUMENT

Prior to the Second District's decision in this case, Florida adhered to the doctrine of lex loci contractus as an inflexible rule governing automobile insurance policies. However, the lower tribunal held that, despite that rule, Florida courts may transform out-of-state policies into Florida policies if they have been issued to "snowbirds" who visit this state with a "significant degree of permanency." This Court should reject that reasoning because it would disrupt the stability of contracts and cause injustice to both insureds and insurers.

Travelling snowbirds are free to decide what insurance they wish to purchase. They can research the coverages available in each state they frequent, compare the respective premiums, and thereafter make informed decisions. Under lex loci contractus, the insureds can rest assured that, no matter where they travel, they will always receive the full benefit of their chosen bargain.

However, under the Second District's approach, all of that certainty disappears. No one can say for sure whether any given insured visits Florida with such a "significant degree of permanency" that his or her out-of-state policy may be re-written. Likewise, no one can anticipate which policy provisions any given Florida court would deem to be contrary to Florida's public policy. In short, individuals purchasing insurance in other states will have no idea what coverage their agreements provide in Florida. Moreover, the adoption of the Second

Distric's approach would inevitably serve to foster litigation. It would make every coverage question involving an out-of-state policy fact-specific, and thus would require that every case proceed to judicial resolution.

Likewise, insurers who write policies in northern states would be equally adversely affected by the Second District's approach. First, they are required by the law of their home state to include certain terms and conditions in their policies. By re-writing those contracts to encompass terms that the parties could not legally have included in the original agreement, Florida courts would effectively be punishing insurers for complying with the law.

Second, insurers must base their premiums on the relative risks of the coverages provided. Presently, those risks are based upon the home state's particular insurance regulations. However, if insurers are compelled to face the possibility that a Florida court could extend coverage for snowbirds beyond the scope of those regulations, they would have to seek appropriate amendments to the rate schedules. Even if such modified schedules could be computed — a daunting task — the effect would be to increase the cost of insurance for all citizens of those states, even those that never travel to Florida at all. Likewise, insurers who choose not to write policies in Florida at all could nonetheless be compelled to provide Florida coverage. The results are obviously inequitable, and the Court should adhere to an inflexible application of lex loci contractus.

ARGUMENT

In Sturiano v. Brooks, 523 So. 2d 1126, 1129 (Fla. 1988), this Court adopted lex loci contractus as an "inflexible rule" governing automobile insurance policies — the law of the state where the contract was executed controls its interpretation. The Court reasoned that the rule's stability provides security to both insureds and insurers, stating: "Parties have a right to know what the agreement they have executed provides." Id. at 1129–30.

In the proceedings below, the Second District's opinion acknowledges Sturiano, yet opines that public-policy considerations may overcome that mandate. Roach v. State Farm Mut. Auto. Ins. Co., ___ So. 2d ___, 29 Fla. L. Weekly D2518 (Fla. 2d DCA Nov. 10, 2004). The district court reasoned that insureds who reside primarily in another state, and who have contracted for insurance coverage in that state, may nonetheless have their out-of-state policies transformed into Florida policies if they visit this state with a "significant degree of permanency." Id. However, the court certified the following as a question of great public importance:

> WHEN FLORIDA IS THE FORUM FOR AN ACTION TO OBTAIN UNDERINSURED MOTORIST BENEFITS UNDER AN INSURANCE CONTRACT THAT IS OTHERWISE GOVERNED BY THE LAW OF ANOTHER STATE, MAY AN INSURED INVOKE FLORIDA'S PUBLIC POLICY TO INVALIDATE AN EXCLUSIONARY CLAUSE PROHIBITING THE "STACKING" OF UNDERINSURED MOTORIST

> BENEFITS WHEN THERE IS A SIGNIFICANT DEGREE OF PERMANENCY IN THE INSURED'S SOJOURN IN FLORIDA AND THE INSURER IS ON REASONABLE NOTICE THAT THE RISK OF THE POLICY IS CENTERED IN FLORIDA AT THE TIME OF THE ACCIDENT THAT OCCURRED IN FLORIDA?

Id.

As a preliminary matter, the certified question addresses a narrow fact pattern — stacking of uninsured motorist benefits. However, the rule established by the Court's decision in this case will necessarily be much broader in scope because it will be applied to other coverage provisions, policy definitions, and exclusions.

The underlying legal issue is whether Florida courts may judicially re-write insurance policies issued in other states through a public-policy exception to lex loci contractus. Accordingly, the Court may wish to consider rephrasing the question to more accurately reflect the issue involved. E.g. State v. Smith, 641 So. 2d 849, 850 (Fla. 1994)(rephrasing a certified question "to reflect the issue presented"). ALLSTATE suggests the following:

> WHEN FLORIDA IS THE FORUM FOR AN ACTION ON AN AUTOMOBILE INSURANCE CONTRACT THAT WAS ISSUED IN ANOTHER STATE, AND THUS IS GOVERNED BY THAT STATE'S LAW PURSUANT TO LEX LOCI CONTRACTUS, MAY THE INSURED INVOKE FLORIDA'S PUBLIC POLICY TO RE-WRITE THE TERMS OF THAT AGREEMENT?

In any event, this Court should decline the invitation to create a public-policy exception to lex loci contractus and answer the certified question in the negative. Anything less than strict adherence to lex loci contractus would disrupt the stability of contracts and cause injustice to those who have relied on Sturiano.

I. THE INSTABILITY THAT WOULD RESULT FROM A PUBLIC-POLICY EXCEPTION TO LEX LOCI CONTRACTUS RENDERS THE SECOND DISTRICT'S APPROACH UNWORKABLE.

This Court has often heralded the importance of stability in contracts. E.g. Lumbermens Mut. Cas. Co. v. August, 530 So. 2d 293, 296 (Fla. 1988)(rejecting a position that "would substantially restrict the power to enter into stable contracts"); Sturiano, 523 So. 2d at 1129("inflexibility is necessary to ensure stability in contract arrangements. . . . This benefits both parties"). If this Court were to answer the certified question in the affirmative, it would destroy the valuable stability that lex loci contractus currently provides. Specifically, if courts are permitted to examine an insurance policy governed by the law of another state, and judicially re-write its terms to incorporate Florida law, neither insureds nor insurers will be able to gauge their respective benefits and duties under their contracts.

A. If automobile insurance polices may be re-written based upon case-specific criteria, neither insureds nor insurers will be able to anticipate the benefits available under their contracts.

The Second District's decision is founded on the premise that a public-policy exception is necessary to protect the interests of a specific class of insureds — "snowbirds" who reside in another state, yet spend a portion of the year in Florida. However, the exact opposite is true. Anything less than strict adherence to lex loci contractus harms snowbirds by rendering them unable to make informed decisions about their own insurance coverage.

Specifically, under lex loci contractus, snowbirds are free to decide what coverages they wish to purchase. For example, in this case snowbird Ivan Hodges elected to register and insure his automobiles in his home state, Indiana. (R.569–70, 627, 632–33). In order to make that decision, Mr. Hodges would only be required to call one insurance agent in Indiana and one in Florida. He could ask what coverages were available in each state, what the respective premiums were, and thereafter make an informed decision. Under lex loci contractus, Mr. Hodges could rest assured that, no matter where he was during his routine travels, he would receive the full benefit of his chosen bargain.

However, with the Second District's public-policy exception in place, all of that certainty disappears. No one could say for sure what coverage Mr. Hodges would receive on an Indiana policy while wintering in Florida. He could never

anticipate whether, under his given set of facts, the policy which he purchased would be governed by Indiana's insurance regulations or Florida's.

Mr. Hodges' example is only the tip of the iceberg. The Second District's exception to lex loci contractus creates further uncertainty when different states' policy decisions and different insureds' living arrangements are taken into account. First, Mr. Hodges' question revolved solely around Indiana's uninsured-motorist coverage stacking restriction. However, many other states have made different decisions about insurance coverage available to their citizens. For instance, the New York State legislature has chosen to place explicit caps on the amount of uninsured-motorist benefits that insureds may purchase. N.Y. Ins. Law §3420(f). The Michigan legislature has elected to forego regulation of uninsured motorist coverage altogether. Mich P.A. No. 345, § 2 (Oct. 1, 1973)(repealing section 500.3010, which provided for uninsured-motorist coverage, its rejection, and notice). In short, each state has made its own policy decisions regarding uninsured-motorist coverage, and each has enacted its own, unique legislation to govern the issue. If lex loci contractus is abandoned, citizens of those states would be left to speculate: If I am visiting Florida, would a Florida court deem the legislative decisions made by my home state to be contrary to Florida's public policy?

Compounding that uncertainty is the question of whether any given insured's particular lifestyle would trigger the public-policy exception. What qualifies as a "significant degree of permanency in the insured's sojourn in Florida" under the Second District's test? Is the exception limited to snowbirds, or do migrant workers, seasonal waiters, and visiting students also qualify? Does the insured have to own property in Florida, or possibly rights in a timeshare with others, or is it sufficient if the insured drives down and stays in a recreational vehicle? Is there a particular duration that governs? What if the insured spends several months in Florida annually, but that time is broken up into many smaller trips to visit family? The countless possible factual scenarios lead to only a single firm conclusion: Without strict adherence to lex loci contractus, individuals purchasing insurance in other states will have no idea what coverage their agreements provide in Florida.

Moreover, the adoption of a public-policy exception would inevitably serve to foster needless litigation. When an out-of-state policyholder is involved in an accident in Florida, claims inquiries will automatically be subject to the same uncertainty. Does the insured's visit to Florida have a degree of permanency sufficient to trigger transformation of the policy? Would a Florida court deem any of the home state's insurance regulations contrary to Florida's public policy?

The Second District's test has made every case fact-specific, and thus will require that every case proceed to judicial resolution. Notwithstanding the obvious

potential that different courts and juries may reach disparate results in similar cases, the mere fact that litigation would be required to resolve each case is chilling. Under lex loci contractus, there is no need for litigation. All parties know what to expect. Having bargained under the assumption that the home state's laws control, both parties understand that the policy provides precisely the coverage that the insured selected and paid for.

In addition, the Court should consider the parallel to the factual situation presented in this case — Florida residents who summer elsewhere. Lex loci contractus does not only serve to provide stability for residents of other states, but it also protects the expectations of traveling Florida citizens. For example, if a Florida resident obtains a Florida automobile policy, and then is involved in an accident during an extended stay at a summer house in another state, lex loci contractus will ensure that the citizen obtains the full benefit of that bargain. If the insured files an uninsured motorist claim with his or her Florida insurer, Florida law will apply. However, under the Second District's test, that conclusion may not be true. A Florida court could determine that the insured was in the foreign state with a "significant degree of permanence" such that the other jurisdiction's law applies. The result could obliterate the coverage selected by the insured.

Finally, the Court should note that other states which presumably attract their own snowbird populations — including, for example, neighboring Atlantic-

coast states Georgia and South Carolina — adhere to a strict construction of lex loci contractus. See Hostetler v. Answerthink, Inc., 599 S.E. 2d 271, 275 (Ga. App. 2004)("Georgia continues to follow the traditional choice of law rule, lex loci contractus, i.e., the law of the place where the contract was executed applies."); Lister v. NationsBank, 494 S.E. 2d 449, 455 (S.C. App. 1997)("It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the lex loci contractu governs."). If Florida adopts a public-policy exception to lex loci contractus, it is foreseeable that northern citizens who would ordinarily favor this state may choose to travel elsewhere. Insurance agents from those states could not say for certain what coverages their clients would receive in Florida, but could assure them that they will receive precisely the benefits listed in their policies if they winter in other states like Georgia or South Carolina. Simply stated, snowbirds who desire piece of mind and stability in their insurance arrangements could elect to winter elsewhere.

While the argument has thus far focused on the insureds' viewpoint, they make up only one half of the contractual arrangement. The other half — insurers who write policies in northern states — would be equally adversely affected by a public-policy exception to lex loci contractus.

First, judicially re-writing an insurance-policy effectively punishes the out-of-state insurer for complying with the law of the state where the policy was delivered. In this case, the policy was written by a STATE FARM agent in Indiana. He was only licensed to issue policies in that state. (R.441). Accordingly, the STATE FARM policy had to comply with Indiana insurance coverage law, including all of the statutorily-required restrictions on uninsured-motorist benefits. See Ind. Code §§27-7-5-4, 27-7-5-5. Likewise, the premiums charged for those statutorily-regulated coverages were governed by the rate schedule approved by the Indiana Department of Insurance. See Ind. Code §27-1-22-4.

In short, the STATE FARM agent was required by law to include the disputed terms in Mr. Hodges' policy. By re-writing that contract to encompass terms that the parties could not legally have included in the original agreement, the Second District's decision effectively punishes STATE FARM for complying with the law. The policy could only have been issued containing the terms Indiana requires, yet STATE FARM is now obligated to perform under a completely different set of terms.

Even worse than that problem is the potential solution. In order to ensure that their insureds are adequately protected, insurers must base their premiums on the relative risks of the coverages provided. Presently, residents of each state pay uninsured-motorist coverage premiums based upon their state's particular insurance

regulations. However, if insurers are compelled to face the possibility that a Florida court could extend coverage for snowbirds beyond the scope of those regulations, they would have to seek appropriate amendments to the rate schedules. That eventuality raises two issues.

First is the daunting task of properly assessing the increased risk. Insurers who write policies in any given state would have to somehow determine how many insureds in that jurisdiction travel to Florida as snowbirds or, for that matter, migrant farm workers, seasonal waiters, or students. They then would have to arrive at some conclusion as to how many of those Florida visitors have a "substantial degree of permanency" under the Second District's test. As explained above, that determination alone is virtually impossible to make — it is a fact question that can never be answered with any degree of certainty. However, the inquiry does not end there. The insurers would also have to contrast their home state's insurance regulations with Florida's, and form a legal conclusion about which portions a Florida court may consider contrary to its public policy. The task is simply unworkable.

Second, even if revised rate schedules could be computed, the effect would be to increase the cost of insurance for all citizens of those states. Individuals in Indiana, New York, or any other state who wish to purchase uninsured-motorist coverage would pay higher premiums to compensate for the fact that some of their

fellow citizens' policies may be re-written by a Florida court. That would be true for any given insured even if he or she is not a snowbird, or for that matter never travels to Florida at all.

The effect is obviously inequitable. Under the current lex loci contractus test, snowbirds may make their own informed decisions about which insurance to purchase. If they wish to obtain Florida coverage, they can purchase a Florida policy during their visit and pay the appropriate Florida premium. However, under the Second District's test, the increased premiums for transients who choose to travel to Florida will be spread amongst all other citizens of their home states. That concept is disheartening. Each individual insured knows his or her own travels, risks, and financial resources. Accordingly, each individual insured should be permitted to make his or her own insurance decisions — policies should not be re-written into entirely new agreements through the stroke of a judicial pen.

A similar inequitable consequence exists for out-of-state insurers who choose not to write policies in Florida at all. Despite having made that election, those insurers could have their policies judicially re-written such that they are compelled to provide Florida insurance coverage. For all of these reasons, the Court should decline the invitation to stray from lex loci contractus.

B. The Court should observe *stare decisis* and adhere to its Sturiano precedent.

The Second District's decision is founded upon the premise that an exception to lex loci contractus may occur "when Florida bears a significant connection to the insurance coverage." Roach, 29 Fla. L. Weekly at D2518. The court carefully attempted to distinguish its exception from the "significant relationship" test explicitly rejected by this Court in Sturiano. Id. at n.3. However, the effect of the Second District's "significant connection" analysis is precisely the same as the application of the previously-rejected "significant relationship" test — there is an utter lack of certainty inuring to the benefit of the contracting parties. Accordingly, this Court should observe *stare decisis*, adhere to the Sturiano precedent, and reject the public-policy exception.

Before receding from a prior decision, the Court has traditionally examined whether the rule of law previously announced "can be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law." North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612, 637 (Fla. 2003). In this case, that inquiry militates against reversing Sturiano's strict adherence to lex loci contractus for two reasons. First, parties to insurance contracts have relied on Sturiano while entering into their agreements. Furthermore, Florida's bench and bar have been able to unequivocally determine choice-of-law questions in insurance cases. E.g. Shaps v. Provident Life

& Acc. Ins. Co., 826 So. 2d 250, 254 n.3 (Fla. 2002); Strochak v. Federal Ins. Co., 707 So. 2d 727, 729 (Fla. 1998); Lumbermens Mut. Cas. Co. v. August, 530 So. 2d 293, 294 (Fla. 1988); In re Estate of Nicole Santos, 648 So. 2d 277, 280 (Fla. 4th DCA 1995); Bloch v. Berkshire Ins. Co., 585 So. 2d 1137, 1137 (Fla. 3d DCA 1991); Herndon v. Government Employees Ins. Co., 530 So. 2d 516, 518 (Fla. 5th DCA 1988); Bennett v. Granite State Ins. Co., 526 So. 2d 187, 188 (Fla. 3d DCA 1988); Allstate Ins. Co. v. Clohessy, 199 F. 3d 1293, 1294 (11th Cir. 2000); Strochak v. Federal Ins. Co., 109 F. 3d 717, 719 (11th Cir. 1997); Fioretti v. Massachusetts General Life Ins. Co., 53 F. 3d 1228, 1236 (11th Cir. 1995); Shapiro v. Associated Intern. Ins. Co., 899 F. 2d 1116, 1119 (11th Cir. 1990); Wausau Underwriters Ins. Co. v. Baillie, 281 F.Supp. 2d 1307, 1313 (M.D. Fla. 2002); Northland Cas. Co. v. HBE Corp., 145 F.Supp. 2d 1310, 1312 (M.D. Fla. 2001); Wackenhut Services, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 15 F.Supp. 2d 1314, 1320 (S.D. Fla. 1998).

Even more compelling, adoption of a public-policy exception to lex loci contractus would destroy the stability in the law that Sturiano provides. As explained more fully above, parties to insurance contracts would no longer be able to anticipate the coverage that their agreements provide in Florida. Each case would present a fact-specific jury question impossible of predetermination.

Therefore, this Court should adhere to *stare decisis* and answer the certified question in the negative.

CONCLUSION

For all of the foregoing reasons, the Court should answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies have been furnished by U.S. Mail this 21st day of January, 2005, to **THE SUPREME COURT OF FLORIDA**, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-192; and a copy each to **ELIZABETH, K. RUSSO, ESQUIRE,** Counsel for Petitioner, 6101 Southwest 76th Street, Miami, Florida 33143, **STEPHEN J. JACOBS, ESQUIRE** and **THOMAS F. NEAL, ESQUIRE,** Counsel for Petitioner, P. O. Box 87, Orlando, FL 32802-0087; **WELDON EARL BRENNAN, ESQUIRE**, 601 Bayshore Boulevard, Suite 910, Tampa, FL 33606; **JOEL D. EATON, ESQUIRE**, 25 West Flagler Street, Suite 800, Miami, FL 33130.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210, the undersigned counsel certifies that this Brief is printed in Times New Roman 14-point font.

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