In the Supreme Court of Florida

CASE NO. SC04-2313

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.
MARGARET ROACH and THOMAS ROACH,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

A. Overview

This case comes before this Court from a decision of the Florida Second District Court of Appeal which applied Florida public policy in lieu of the lex loci contractus rule to alter the underinsured motorist coverage provisions of an Indiana automobile insurance policy covering an automobile principally garaged in Indiana. (The decision is attached as an Appendix to this brief).[1] The Second District believed that the significant aspect of the case was that the Indiana owners of the automobile regularly spend some of the winter months in Florida, characterizing its decision thusly: "Our decision addresses our state's public policy as it relates to "snow birds" - those who spend substantially less time in Florida than year-round residents but who reside in our state with a significant degree of permanence." (App 2). Because its decision was based on public policy grounds, the Second District certified the question to this Court. (App 12).

B. Statement of the facts

1. The accident and the Respondents Roaches' recovery of liability limits

The material facts as to the accident and the insurance coverages involved have never been in dispute, and thus need not be recited in any particular light.

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[1] The Appendix is referred to by page number, and appears as (App __). The references to the record on appeal appear as (R __). Unless otherwise stated, all emphasis herein has been added by undersigned counsel.

The accident occurred on January 26, 2001 in Lake Wales, Florida. (R 8). Two cars were involved in the accident - one driven by Matthew Elmore and one driven by Ivan Hodges. (R 8). Respondents Margaret and Thomas Roach were passengers in Ivan Hodges' vehicle, as was Hodges' wife Betty. (R 8, 539-540). The Roaches were injured in the accident. (R 8).[2] The Roaches sued Elmore and Hodges, and were paid the $100,00 per person/$300,000 per occurrence liability limits on each of those defendants' respective automobile insurance policies. (R 843).

2. The claim for underinsured motorist benefits under Hodges' Indiana-issued State Farm auto policy

The Roaches also sued Petitioner State Farm, Ivan Hodges' insurer, seeking to recover underinsured motor vehicle benefits under Hodges' State Farm policy. (R 12-14). The State Farm policy had underinsured motor vehicle coverage also in limits of $100,000 per person/$300,000 per occurrence. (R 12-14, 572).

Mr. Hodges' State Farm policy defined "***under***insured motor vehicle" as a vehicle covered by liability insurance with limits of ***less*** than the underinsured motor vehicle limits provided by the State Farm policy. (R 583). Specifically, the policy provides:

> **UNDERINSURED MOTOR VEHICLE - COVERAGE W**
> ***You*** have this coverage if "W" appears in the "Coverages" space on the declarations page [which it did in Mr. Hodges' policy - R 572].

[2] Mrs. Hodges died in the accident. (App 3, n 1).

> We will pay damages for ***bodily injury*** an ***insured*** is legally entitled to collect from the owner or driver of an ***underinsured motor vehicle***. The ***bodily injury*** must be caused by accident arising out of the operation, maintenance or use of an ***underinsured motor vehicle***.
> **THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENT OF JUDGMENTS OR SETTLEMENT.**
> ***Underinsured Motor Vehicle*** - means a land motor vehicle:
> 1. the ownership, maintenance or use of which is insured ... for bodily injury liability at the time of the accident; and
> 2. whose limits of liability for bodily injury liability:
>   a. are less than the limits ***you*** carry for underinsured motor vehicle coverage under this policy; or
>   b. have been reduced by payments to ***persons*** other than the ***insured*** to less than the limits ***you*** carry for underinsured motor vehicle coverage under this policy.

(R 583). As is evident from the text of the policy itself set out above, it is the covering and definitional provisions of the underinsured motorist section of the policy that set out what underinsured coverage is available to insureds under the policy, ***not*** "an exclusionary provision in the policy", as the Second District's decision has incorrectly characterized it. (App 1, 3, 9, 10).

We provide the details as to the Hodges' permanent Indiana residence and their mobile home in Florida below, but for present purposes we note that it is undisputed that the Hodges' State Farm automobile policies were issued for delivery and delivered in Indiana. (E.g., App 2; R 761). The Indiana underinsured motorist coverage statute contains the same definition as that in Hodges' auto policy:

> 27-7-5-4 **"Uninsured motor vehicle" and "underinsured motor vehicle" defined;** insurer's insolvency protection
> * * *

> Sec. 4. (b)) For the purpose of this chapter, the term **underinsured motor vehicle**, subject to the terms and conditions of such coverage, includes **an insured motor vehicle where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured <u>are less than the limits for the insured's underinsured motorist coverage</u> at the time of the accident**, but does not include an uninsured motor vehicle as defined in subsection (a).

§27-7-5-4, Indiana Code.

Indiana has also put statutory limits on the uninsured and underinsured coverage that insurers may issue in Indiana, which *do not permit* payment of underinsured motorist coverage to an insured who has recovered liability insurance in an amount equal to the underinsured motor vehicle coverage limits

> **27-7-5-5 Limitations on coverage**
> * * *
> (c) **The maximum amount payable for bodily injury under** uninsured or **underinsured motorist coverage** is the **lesser** of:
> (1) **the difference between:**
> **(A) the amount paid in damages to the insured by or for any person or organization who may be liable for the insured's bodily injury; and**
> **(B) the per person limit of uninsured or underinsured motorist coverage provided in the insured's policy**; or
> (2) the difference between:
> (A) the total amount of damages incurred by the insured; and
> (B) the amount paid by or for any person or organization liable for the insured's bodily injury.

§ 27-7-5-5, Indiana Code.

As the policy terms reflect, the underinsured motor vehicle coverage provisions in the Hodges' State Farm policy conform with the above Indiana statutory provisions. (R 583). Under the policy definition (and the Indiana Code §27-7-5-4 definition), there was

no underinsured motor vehicle involved in this accident. Mr. Elmore's policy had $100,000/$300,000 liability limits, which were the same as - not ***less*** than - the $100,000/$300,000 underinsured motor vehicle limits of Hodges' State Farm policy. (App 2-3). The State Farm policy only provides underinsured motor vehicle coverage for injuries caused by an underinsured motor vehicle. (R 583).

In short, under the terms of Hodges' State Farm policy, purchased in Indiana, there was no underinsured motor vehicle coverage available for the Roaches' bodily injury claims. (R 583). State Farm accordingly moved for summary judgment as to the Roaches' claim under the State Farm policy. (R 393-399).

3. The Respondents Roaches' contention that the Florida uninsured/ underinsured motorist statute should be applied to override the actual terms of the State Farm policy

The Respondent Roaches also filed a motion for summary judgment in which they took the position that "State Farm affirmatively owed a duty to Margaret and Thomas Roach (who were passengers in Ivan Hodges' car) to provide the uninsured motorist coverage benefits consistent with Florida law and Florida public policy. Florida law governs the interpretation of the contract under Florida law and is applicable in this cause of action, and the portions of the policy which are inconsistent with Florida law and Florida public policy should be stricken." (R 275-276). The Roaches raised this argument because Florida's UM statute, §627.727, Fla. Stat., contains different provisions than

those in the Indiana statute.

The provisions of Florida's UM statute are set out below. Notably, they *only* apply to policies issued for delivery *in Florida* on motor vehicles registered or principally garaged *in Florida*:

> **627.727. Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection**
>
> (1) **No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein** or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. [Provisions re rejection of uninsured/underinsured motorist coverage omitted]. **The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured** under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under any automobile medical expense coverage; **under any motor vehicle liability insurance coverage**; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident; **and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. The amount of coverage available under this section shall not be reduced by a setoff against any coverage, including liability insurance.**

Section 627.727(1), Fla. Stat. The Roaches argued that under Florida's UM statute, they would be entitled to collect the $100,000/$300,000 underinsured motor vehicle coverage limits on Hodges' State Farm policy over and above the $100,000/$300,000 liability limits they had collected on Hodges' policy and the $100,000/$300,000 liability limits they had collected on Elmore's policy. (R 275-276).

In contending that Florida law and Florida public policy should be applied to strike

or alter portions of the State Farm policy that had been issued to Mr. Hodges in Indiana, the Roaches relied on the fact that Hodges spent time in Florida during the winters, as discussed next. (R 741-752).

4. The Hodges' Indiana residence and Florida mobile home properties, and their automobiles and automobile insurance policies

Ivan Hodges was born in Indiana in 1927, and has lived in Indiana his whole life except when he went into the service in 1945. (R 512-513). Hodges lives in Anderson Indiana, and has insured his home at 707 Alexandria Pike in Anderson through his State Farm agent Jim Swain since the 1970's. (R 288). In 1993, he purchased property in Lake Wales, Florida, and he and his wife had a mobile home on the property. (R 513, 521). The Florida property was put just in his wife's name in hopes of being able to claim a homestead tax exemption. (R 515).

The second year the Hodges came to Florida, in 1994, Mr. Hodges got a Florida driver's license in furtherance of the effort to get the Florida homestead exemption. (R 515). Mrs. Hodges also got a Florida driver's license to aid the attempt to get the exemption. (R 517-519). But Hodges already had an Indiana homestead exemption for the Indiana home where he lived with his wife (R 515-516), and the attempt to get the Florida homestead exemption was not successful:

> Q. What happened when you applied for that Homestead exemption ? Was it granted ?

A. They told my wife, says, no, you're married to him, he's got homestead in Indiana, we can't give it to you down here.

(R 516). Mr. Hodges gave up his Florida driver's license the next year because he found out that he would not be allowed to vote in Indiana with a Florida license. (R 478, 516-517). Mr. Hodges wanted to vote in Indiana, so he gave up the Florida driver's license and got his Indiana license back. (R 478, 517). Mr. Hodges' voter registration card is from Indiana. (R 517). Mrs. Hodges kept her Florida driver's license, but continued to vote in Indiana. (R 518-519). As Mr. Hodges put it "it might have not been just exactly legal, but she voted up there." (R 518).

From the time they purchased the Florida property in 1993, it was the Hodges' custom to stay in Indiana through Thanksgiving - "we would have the kids all come home for Thanksgiving" (R 513) - and then they would drive down from Indiana to Florida. (R 513-514). Mr. Hodges testified that they would then stay down in Florida "until usually about the last of April so it would get a chance to warm up back home[.]" (R 514). With Thanksgiving falling in the last week or last two weeks of November, depending on the year, and thereafter the drive from Indiana to Florida, the stays in Florida were, according to this testimony from Mr. Hodges, basically for five months or five and a half months. (R 513-514). Mr. Hodges sometimes used a rough estimate of six months in his deposition testimony. (E.g., R 478).

At the time of the accident in January of 2001, the Hodges had two automobiles - a 1996 Cadillac and a 1990 Oldsmobile. (R 316, 317, 524-525, 570). Both of the cars were titled in Ivan Hodges' name, and were registered in Indiana with Indiana license tags. (R 570, 627, 632, 633). The State Farm automobile insurance policies in effect on the two automobiles at the time of the January 2001 accident were issued by State Farm agent Jim Swain of Anderson, Indiana whose agency had been handling the coverage on the two autos since 1998. (R 569-570). The policies were issued from Swain's office in Anderson Indiana, and were delivered to Ivan D. Hodges at his address at 707 Alexandria Pike, Anderson, Indiana 46012-2601. (R 570).

Both policies list Ivan Hodges as the Named Insured at his Indiana address. (R 572, 596, 632, 633). Ivan Hodges and Betty Hodges were listed on the policies as authorized drivers. (R 560, 632, 633). All renewals and notices pertaining to the policies were delivered to Mr. Hodges at the 707 Alexandria Pike address. (R 570).

The 1990 Oldsmobile was the automobile that was involved in the January 2001 accident in which the Roaches were injured. (E.g., R 486). The Hodges had driven the Oldsmobile down to Florida after Thanksgiving in 2000, and had left the Cadillac in Indiana. (R 486, 513, 525). The year before, the Oldsmobile had been left in Indiana for the winter when the Hodges drove down to Florida. (R 524). At the time of the January 2001 accident, the Oldsmobile had been in Florida for about 2 months, and in Indiana for

the 19 months preceding that time. (R 524-525).

Based upon testimony of Mr. Hodges identifying documentation for the record (622-703), the parties stipulated that the Hodges filed Indiana Full Year Resident Tax Returns with the State of Indiana for the years 1998 through 2001, listing 707 Alexandria Pike, Anderson Indiana 46012 as their address; that the Hodges filed U.S. Individual Income Tax Returns for the years 1998 through 2001, identifying 707 Alexandria Pike, Anderson, Indiana as their home address; and that Hodges filed Madison County, Indiana tax returns also listing the 707 Alexandria Pike address, and designating "resident" rather than "non-resident" status. (R 760-762, 771-808).

5. The Roaches' residence

While the Second District properly held that the residence of the Roaches (who were only insureds under the policy by their happenstance status as passengers) was not material to the choice of law issue, we note for the sake of accuracy that the Second District was incorrect in stating that the Roaches were "year-round Florida residents." (App 2). Summary judgment was entered by the trial court on the parties' cross-motions before the Roaches' depositions were taken, but, in 2002 answers to interrogatories, both Mr. and Mrs. Roach responded to a request that they provide "all addresses where you have lived for the past ten years" by identifying an address in Maryland for the years

1977-1997, and an address in James Creek, Pennsylvania for "1997 - present." (R 191, 206). The Roaches later filed affidavits stating that they had purchased a residence in Lake Wales, Florida in 1992, and that "on the date of this accident" they "resided at 35 Breeze Hill, Lake Wales, Florida." (R 706, 708). The affidavits were notarized in Pennsylvania. (R 707, 709). The Roaches no longer have that Florida property. (R 539).

6. The fact issue about notice

The Second District noted that there is a fact question on the subject of what notice the State Farm agent had as to the Hodges' trips to Florida or as to their ownership of property in Florida. (Appendix, page 7). We do not detail the facts about notice here because we do not believe it is material to the legal issue presented, or, if it does become material as a result of this Court's disposition, it will have to be resolved by a jury and does not require further discussion in this brief.

What is *undisputed* is that the Hodges never became permanent residents of Florida; never told their Indiana State Farm agent that they had become permanent residents of Florida; and never sold or abandoned their residence at 707 Alexandria Pike in Anderson, Indiana. (R 512-513, 570-571). It is also undisputed that the 1990 Oldsmobile involved in the accident was in Indiana for 19 of the 21 months preceding the accident. (R 524-525).

C. Statement of the case - the proceedings to date

With the parties' cross-motions for summary judgment and the record evidence before it, the trial court determined that summary judgment should be granted to State Farm. (R 842-844). The trial court thereupon entered final judgment in favor of State Farm (R 847), and the Roaches noticed their appeal to the Second District (R 852-855).

On appeal, the Second District reversed the summary judgment in favor of State Farm. (App 1-12). The Second District's holding was:

> [W]e hold that when there is a significant degree of permanency in the insured's sojourn in Florida, then the insured may invoke Florida's public policy to invalidate an exclusionary clause in an insurance contract prohibiting the "stacking" of underinsured motorist benefits, provided that the insurance company is on reasonable notice that the risk of the policy is centered in Florida at the time of the accident.

(App 9-10). The Second District then certified the following question to this Court:

> **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 ?**

(App 12).

This Court entered an order postponing a decision on jurisdiction, and setting a schedule for briefing on the merits. (See Order of this Court, dated December 13, 2004). This initial merits brief of Petitioner State Farm is submitted accordingly.

SUMMARY OF ARGUMENT

This case arises from the Respondents' efforts to call upon Florida law and Florida public policy to afford them underinsured motor vehicle benefits under an Indiana automobile insurance policy that was issued to an Indiana resident on an automobile registered and principally garaged in Indiana, when under Indiana law the vehicle in question was not an underinsured motor vehicle. The Second District held that because the Indiana resident had a secondary residence in Florida, Florida public policy required the Indiana insurance policy to be re-written so as to provide the underinsured motor vehicle benefits that would be available under a Florida-issued auto policy. The Second District then went further, and indicated that its decision would extend the UM benefits available under Florida's UM statute to "snowbirds" in general, loosely translated in the decision as out-of-state insureds whose 'sojourns in Florida have a significant degree of permanency'.

Petitioner State Farm seeks reversal of the Second District's decision. In *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988), this Court held that in cases involving automobile policies, the rule of lex loci contractus applies in determining the parties' rights and obligations under the policy. The Second District has created a public policy exception that is not authorized by *Sturiano*, and conflicts with the Sturiano Court's reasoning that an ***inflexible*** rule is necessary to ensure stability for the contracting parties to automobile

insurance contracts.

The Second District also deviated entirely from all prior case law by applying Florida public policy to alter automobile insurance contract provisions solely on the basis of an out-of-state insured's ownership of a secondary residence in Florida. Florida law has heretofore applied Florida public policy to alter auto insurance contract provisions only when the policy was issued to a permanent Florida resident or to cover an automobile registered and principally garaged in Florida.

Finally, Petitioner respectfully submits that the Second District exceeded its judicial functions by going beyond this case to make its ruling applicable to some broader, ill-defined 'group' of out-of-state insureds, decreeing in advance that Florida public policy will make additional UM coverage available to them all, whomever they may be - and without any premium charge. Insurers and insurance agents are subject to regulation in every state, and may only issue policies with the coverage permitted under the laws of the state of issuance and at the rates set by the insurance regulators of that state. Thus, neither insurers nor insurance agents are in a position to issue policies in other states that have coverage designed to comply with Florida's UM statute and Florida's public policy as to UM coverage if, as is the case with Indiana, the other state's law does not permit such coverage.

The secondary residence circumstances which the Second District Court set out to

address are not the subject of 'inequitable insurance practices' by insurers and insurance agents - they are just issuing the policies they are required to issue under the laws of the state of issuance. If insureds with secondary residences in Florida wish to acquire the coverage available under Florida's UM statute for the duration of their 'sojourns' in Florida, they are perfectly capable of doing so. Insureds are in a better position than any third party, such as an agent or insurer, to know their own comings and goings and ***how much they want to pay for UM coverage.***

Thus, if there is any 'problem' to be solved here as to out-of-state insureds with secondary residences in Florida, Petitioner submits that it is one easily addressed by the insureds themselves. The Second District's approach of judicially creating coverage that requires payment of UM benefits that do not exist under the terms of out-of-state policies, for which no premiums were received, is without basis or precedent in Florida law, and does not, in fact, comport with or serve any Florida public policy.

The Second District's decision should be reversed, and the case remanded for reinstatement of the final summary judgment entered by the trial court in favor of Petitioner State Farm.

ARGUMENT

THE SECOND DISTRICT INAPPROPRIATELY ALTERED THE PROVISIONS OF AN OUT-OF-STATE AUTOMOBILE INSURANCE CONTRACT ON THE BASIS OF FLORIDA PUBLIC POLICY

A. The governing lex loci contractus rule

As the Second District recognized, the beginning point for analysis of the issues presented in this case must be the fact that, without dispute, the subject automobile policy was issued for delivery and delivered in another state, Indiana. The case thus falls squarely within this Court's decision in *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988) holding that in cases involving automobile policies, the rule of lex loci contractus applies in determining the parties' rights and obligations under the policy. "That rule specifies that the law of the jurisdiction where the contract was executed should control." 523 So. 2d at 1129.

The Second District noted this Court's *Sturiano* rule, but decided that there is a public policy exception that should be applied here because of the Hodges spending time during the winter at their property in Florida. As set forth below, Petitioner respectfully submits that the Second District's decision does not comport with *Sturiano*, and further that there was no Florida public policy in any event that would be violated by giving effect to Mr. Hodges' policy as written and issued in Indiana.

In deciding *Sturiano*, this Court considered - but rejected - adoption of the "significant relationships" test outlined in the Restatement (Second) of Conflict of Laws § 181 as the choice of law rule for contracts based. This Court concluded that the inflexible lex loci contractus rule continues to be preferable for the stability it provides

the contracting parties to an automobile insurance contract. In so doing, the Court specifically rejected the *Sturiano* petitioner's argument that, because of the migratory nature of the population and its automobiles in this day and age, automobile policies should be open to interpretation under the laws of a variety of states, based on a case-by-case analysis of the various "significant relationships" factors listed in the Restatement's test:

> Sturiano argues that in this modern, migratory society, choice of law rules must be flexible to allow courts to apply the laws which best accommodate the parties and the host jurisdiction. She contends that the archaic and inflexible rule of lex loci contractus does not address modern issues or problems in the area of conflict of laws. ***While it is true that lex loci contractus is an inflexible rule, we believe that this inflexibility is necessary to ensure stability in contract arrangements***. ***When parties come to terms in an agreement, they do so with the implied acknowledgment that the laws of that jurisdiction will control absent some provision to the contrary. This benefits both parties, not merely an insurance company.*** The view espoused in the Restatement fails, in our opinion, to adequately provide security to the parties to a contract.

523 So. 2d at 1129-1130. The Court went on to point out that the migratory nature of modern day living calls for ***safeguarding*** the stability of automobile insurance contracts - ***not*** for subjecting them to flexible choice-of-law rules under which the parties' rights and obligations are left open for future, and shifting, interpretations, depending on what state the automobile might happen to be in at the time of an accident, and how courts might decide which of conflicting state statutes or conflicting state views of public policy

should control what policy provisions will - and will not - be given effect:

> Although lex loci contractus is old, it is not yet outdated. The very reason Sturiano gives as support for discarding lex loci contractus, namely that we live in a migratory, transitory society, provides support for upholding that doctrine. ***Parties have a right to know what the agreement they have executed provides. To allow one party to modify the contract simply by moving to another state would substantially restrict the power to enter into valid, binding, and stable contracts. There can be no doubt that the parties to insurance contracts bargained and paid for the provisions in the agreement, including those provisions that apply the statutory law of that state.***
>
> We recognize that this Court has discarded the analogous doctrine of lex loci delicti with respect to tort actions and limitations of actions. However, we believe that the reasoning controlling those decisions does not apply in the instant case. ***With tort law, there is no agreement, no foreseen set of rules and statutes which the parties had recognized would control the litigation. In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction's laws are incorporated by implication into the agreement.*** The parties to this contract did not bargain for Florida or any other state's laws to control. We must presume that the parties did bargain for, or at least expected, New York law to apply.

523 So. 2d at 1129-1130. The *Sturiano* decision was confined by the Court to automobile insurance, and this Court thereafter explicitly confirmed that uninsured motor vehicle coverage in automobile policies is subject to the *Sturiano* lex loci contractus rule. *Lumbermens Mutual Casualty Co. v. August*, 530 So. 2d 293, 295 (Fla. 1988).

It is therefore clear that under the *Sturiano* lex loci contractus rule, the law of Indiana applied here to govern the rights and obligations of the insurer and insureds under

this policy issued and delivered in Indiana, just as the trial court ruled. The Second District's (erroneous, we submit) rationale for applying Florida law notwithstanding the *Sturiano* lex loci contractus rule is discussed below, but we first address certain inaccuracies in the Second District's terminology so that the case will be decided on the actual provisions of the insurance policy and statutes.

B. The accurate characterization of the policy terms and statutory provisions

First, the Second District's decision refers throughout to an "exclusionary provision" in the subject State Farm policy. As set forth above in the statement of the facts, however, the subject portion of the policy is *not* an "exclusionary provision". Rather it is the policy's underinsured motor vehicle *coverage* provision, including its definition of "underinsured motor vehicle."

The point is made here for the sake of accuracy, as there is no particular substantive significance to the distinction for purposes of our legal arguments. We merely note that the term "exclusionary provision" in the context of insurance analysis can bear negative connotations, as exclusions are perceived as attempts to avoid or restrict coverage. Thus, for example, Florida law requires exclusions, unlike covering provisions, to be construed narrowly and strictly. *See, e.g., Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984)(insurance coverage must be construed broadly and its

exclusions narrowly); *Purrelli v. State Farm Fire and Casualty Co.*, 698 So. 2d 618, 620 (Fla. 2d DCA 1997)("exclusionary clauses in insurance policies are construed more strictly than coverage clauses"). Insofar as negative connotations can, over time, become subliminal, we point out that the Second District was in error in referring to the underinsured motor vehicle section of the subject State Farm policy as "an exclusionary provision."

The second inaccuracy is in referring to "stacking" and "anti-stacking" in connection with the underinsured motor vehicle provision at issue. The Second District's decision says that the State Farm policy's underinsured motor vehicle "exclusionary provision" prevents the Roaches from "stacking" the underinsured motor vehicle benefits on top of the liability limits they already recovered from Elmore's policy and Hodges' State Farm policy, and that "anti-stacking" provisions are "repugnant to the public policy of Florida." (App 4).

Under both Florida and Indiana law, what "stacking" and "anti-stacking" actually refers to is the ability to ***stack UM coverages*** where the insured has paid premiums for more than one auto policy, or has insured more than one vehicle under a single auto policy. In the Indiana case cited by the Second District, for example, *Ansert v. Indiana Farmers Mut. Ins. Co.*, 659 N.E.2d 614, 621 (Ind. App. 1995), "[t]he insurance policy covered three vehicles with a $500,000 limit for underinsured motorist coverage on each

vehicle", and the insured sought to recover all three UM limits. A clause in the policy prohibiting that "stacking" of the coverages on the insured's own autos was enforceable under Indiana law. It was that "stacking" concept, i.e., of the ***insured's own*** coverages for multiple vehicles or from multiple policies, that was involved in the *Ansert* case cited by the Second District in its decision here.

Florida's concept of "stacking", and "anti-stacking" is the same, as explained, for example, in an early Florida Supreme Court case on the subject:

> At that time [i.e., the time that the insured sought to recover uninsured motorist coverage under all of his own policies], section 627.4132, Florida Statutes (1977), provided that every uninsured motorist policy shall only cover the insured to the extent of the coverage the insured has on the vehicle involved in the accident. **This law is commonly referred to as anti-stacking.**
> * * * Section 627.4132 was amended, effective October 1, 1980, to remove this restriction and allow an insured to collect uninsured motorist coverage on all of the vehicles covered under all of his insurance policies. **This is commonly referred to as stacking**.

Fireman's Fund Ins. Co. v. Pohlman, 485 So. 2d 418, 419 (Fla. 1986).

The provision at issue in the State Farm policy here is not an "anti-stacking" clause. In pertinent portion, the subject provision simply defines "underinsured motor vehicle" as one with liability insurance limits that are less than the policy's own UM limits. Therefore, if a motor vehicle's liability limits are equal to or greater than the UM limits of the State Farm policy, it is not an underinsured motor vehicle. Injuries caused in an accident with such a vehicle do not arise from an underinsured motor vehicle, and do not

trigger the underinsured motor vehicle benefits.

The Second District's references to "stacking" and "anti-stacking" are just misuses of those terms. And, ironically, anti-stacking clauses are not at all "repugnant to the public policy of Florida." Florida has changed its statutes such that anti-stacking clauses are now expressly *required* by Florida statute as to all motor vehicle coverages except UM, *see* §627.4132, Fla. Stat., entitled "Stacking of coverages prohibited", and expressly *permitted* by Florida statute as to UM coverage. §627.727, Fla. Stat.

Furthermore, even when "anti-stacking" clauses were deemed to be against Florida public policy, Florida courts confined application of that public policy to ***Florida*** policies; Florida law was held ***not*** to apply to invalidate "anti-stacking" clauses found in policies issued in other states. *See, e.g.*, *Eagle Star Ins. Co. v. Parker*, 365 So. 2d 780, 781 (Fla. 4th DCA 1978)(Florida law could not be invoked to permit stacking of UM coverage where policy was issued in New York); *Allstate Insurance Co. v. Langston*, 358 So. 2d 1387, 1390 (Fla. 3d DCA 1978)(Florida law regarding stacking of UM coverage would not apply to policy issued in Maryland to mother of University of Miami student injured in an accident in Florida because policy was issued in Maryland).

C. The Second District's inappropriate use of Florida public policy to strike provisions from an Indiana insurance contract

The problem that the Second District actually has with the State Farm policy (the

problem is not "anti-stacking") is that it is governed by Indiana law, which ***required*** the underinsured motor vehicle coverage to be provided just as it is set out in the State Farm policy. The Indiana underinsured motor vehicle statute defines "underinsured motor vehicle" the same way it is defined in the policy. *See* § 27-7-5-4. Furthermore, §27-7-5-5 of the statute, entitled "Limitations on coverage", ***does not permit*** UM coverage to be paid if the insured has already recovered liability coverage in an amount equal to or greater than the UM coverage limits. The Florida UM statute, on the other hand, was amended in 1989 to provide that UM coverage may be collected over and above any liability coverage recoveries the insured may have made.

Because of these differences in the two states' approaches to UM coverage, the Second District effectively re-wrote the State Farm policy in the name of Florida public policy. The Second District then went even further by indicating that its decision was intended to address a broader 'problem' it perceived as to *all* insureds who might fall within whatever the parameters may be for the slang concept of "snowbirds."

These actions by the Second District raise three main questions. First, whether, given the *Sturiano* rule, public policy *may* be used to displace or override the law of the state where an automobile policy was issued for delivery and delivered. Second, whether there *is* any paramount rule of Florida public policy that is affected here so as to override comity. Third, whether the Second District exceeded its judicial function by issuing an

unwarrantedly overbroad decision that reaches far beyond the facts of this single case to an ephemera of other insureds referred to by the Court as "snowbirds", and judicially bestowing on them, whoever they may be, UM coverage that is *outside* insurance contract terms and *without* premium charge. We address these three questions below.

1. **Whether Florida public policy may be used to override the state law that applies under *Sturiano***

The first issue is whether Florida public policy may be used to override the automobile insurance law of another state, given this Court's *Sturiano* decision. The question has not heretofore been answered by this Court. In *Shaps v. Provident Life & Acc. Ins. Co.*, 826 So. 2d 250 (Fla. 2002), this Court posed, but did not reach, a question about whether Florida public policy could be used to displace the lex loci contractus rule (because answering a threshold question mooted the necessity of reaching the public policy question).

The Court, of course, will answer the question when and how it sees fit, but the entire rationale of *Sturiano* is that an ***inflexible*** rule is needed so that the parties will know that what they agree upon in their insurance contract is what will happen between them when either is called upon to perform. Thus, ***without exception***, the *Sturiano* decision certainly seems to say, the law of the place where an insurance contract is issued for delivery and delivered ***will*** govern. Allowing Florida courts to defeat the contract

expectations of the parties to the contract every time they feel that Florida's public policy would be offended by applying the law of a different state is wholly at odds with the stability *Sturiano* held must be protected.

In fact, in *Sturiano* itself, lex loci contractus was applied despite reaching a result at odds with a new Florida public policy the Court adopted in that same decision. There were actually *two* public importance questions answered in *Sturiano*. The first question involved interspousal immunity in Florida, and whether it must be preserved sacrosanct forevermore and in all respects, or whether it should be set aside in some instances, for example, to allow recovery of available liability insurance if to do so would not disrupt family harmony.

Despite having determined to hold, for policy reasons, that in Florida interspousal immunity may now be deemed waived to the extent of liability insurance in circumstances like those involved in *Sturiano*, this Court then refused to allow the plaintiff wife to sue for the insurance because of the Court's second ruling adhering to the lex loci contractus rule. Under the law of New York where the *Sturiano* auto policy was issued, an action by Mrs. Sturiano against her husband's estate was barred unless the insurance policy specifically included coverage for claims between spouses, which the policy in *Sturiano* did not. 523 So. 2d at 1127, 1130.

Petitioner submits that the *Sturiano* rule as set out, and as applied in *Sturiano* itself,

appears to be that the lex loci contractus rule is to be applied without exception to all substantive issues in automobile insurance cases. This Court re-emphasized stability as the paramount interest in *Lumbermens Mut. Cas. Co. v. August*, 530 So. 2d 293 (Fla. 1988), even though application of another state's law meant that the insured would recover *no UM benefits at all*.

In *August*, this Court applied the *Sturiano* lex loci contractus rule to determine that a claim for UM benefits arising from an accident in Florida was barred altogether under Massachusetts statute of limitations because the policy under which the benefits were sought was issued in Massachusetts to a Massachusetts resident. The Court held that statutes of limitations are substantive, and thus applicable in applying the lex loci contractus rule in a conflict-of-laws case:

> Under this analysis [i.e., the analysis determining that statutes of limitation are substantive], the doctrine of lex loci contractus would be applied in actions arising out of an automobile insurance contract to determine the applicable statute of limitations, just as with other substantive issues. ***To allow the period within which an action to recover uninsured motorists benefits must be commenced to be determined by the fortuity of the location of an accident would substantially restrict the power to enter into stable contracts in our migratory, transitory society.*** As this Court recognized in *Sturiano*, ***the lex loci contractus rule ensures stability in automobile insurance contract arrangements***.

530 So. 2d at 295-296. *See also, e.g., In re Estate of Nicole Santos*, 648 So. 2d 277, 280 (Fla. 4th DCA 1995), in which the Court said:

> ***The Sturiano Court recognized that the lex loci contractus rule is inflexible, but stated that the inflexibility was necessary to ensure stability in contracts. Under Sturiano, the knowledge that their contract will be governed by the laws of the place the contract is made, is imputed to the contracting parties, unless the contract provides to the contrary. The court reasoned that parties have a right to know what their agreement provides***[.]

648 So. 2d at 280.

The Second District's decision in the instant case appears to be the first post-*Sturiano* decision to use a Florida public policy analysis to override lex loci contractus. The decision has already acquired a life of its own, however, as another Florida District Court opinion has now cited the Second District's decision as standing for the proposition that: "An exception to the general rule of lex loci contractus occurs when a Florida court recognizes a 'paramount interest' in protecting Florida residents from a provision of the insurance contract that is repugnant to the public policy of Florida." *Barnier v. Rainey*, 2004 WL 2921789, 1 (Fla. 1st DCA 2004), citing *Roach*, 29 Fla. L. Weekly at D1547. The *Barnier* Court's phrasing of the test it believes to have been set by *Roach* is alarmingly vague: "For the public policy exception to be invoked properly, it must be shown that Florida has a significant connection to the insurance coverage, and the insurance company has had reasonable notice that the policy risk is centered in Florida." 2004 WL 2921789, *1. The phrase 'significant connection' is certainly open to a variety of interpretations, and 'centered in Florida' raises timing questions - centered

in Florida when, and for how long?

In *Sturiano*, this Court decreed that stability is the paramount interest to be protected in the case of automobile insurance policies, and that the ***inflexible*** - in the Court's word - lex loci contractus rule would therefore provide the choice-of-law rule in automobile insurance cases. If lex loci contractus does apply ***without exception*** in automobile insurance cases - as it must to ensure the *Sturiano*-decreed stability - then the Second District impermissibly created a 'public policy' exception, which alone warrants reversal. As set forth below, however, Petitioner also submits that the Second District's public policy analysis was flawed.

2. The public policy of Florida as to UM coverage is not implicated here

The Second District's decision indicated that it was relying on the public policy of Florida to override an Indiana automobile policy's UM provisions. In fact, we respectfully submit, there is no Florida public policy that requires any such result or that is offended by applying the terms of the Indiana policy just as they would be applied in Indiana.

Florida law is clear that: "The public policy of a state or nation must be determined by its Constitution, laws, and judicial decisions." *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28(Fla. 1956), *quoting Atlantic Coast Line R. Co. v. Beazley*, 45 So. 761, 786 (Fla. 1907). And, it has repeatedly been held that the public policy of Florida in connection

with UM coverage is found in the UM statute, where it was expressed by the Florida legislature. *See, e.g., Alamo Rent-A-Car, Inc. v. Hayward*, 858 So. 2d 1238, 1240 (Fla. 5th DCA 2003); *Andrews v. Continental Ins. Co.*, 444 So. 2d 479 (Fla. 5th DCA 1984)*; Aetna Casualty & Surety Co. v. Enright*, 258 So. 2d 472 (Fla. 3d DCA 1972). The UM statute that is the source of Florida's public policy as to UM coverage expressly confines its reach to policies delivered or issued for delivery in Florida insuring vehicles registered and principally garaged in Florida.

The Florida courts have heretofore been entirely consistent in holding that Florida's public policy as to UM coverage extends only as far as the UM statute says it does. Thus, for Florida law to apply, the case must involve a policy delivered or issued for delivery in Florida on an automobile registered or principally garaged in Florida. A review of the case law shows that the Florida UM statute and the public policy of Florida embodied therein as to what UM coverage insurers must provide will ***only*** be applied to automobile policies providing coverage for (1) permanent Florida residents, or (2) automobiles that are registered or principally garaged in Florida. As stated in an early decision recently quoted with approval by this Court:

> We find that the trial court's interpretation of section 627.727 is not consistent with the primary public policy concerns which the uninsured motorist statute seeks to address. ***The purpose of the statute is not to protect the insurance carrier or the uninsured motorist, but is to extend protection to persons who are insured under a policy covering a motor vehicle registered or***

> ***principally garaged in Florida*** and who are impaired or damaged in Florida by motorists who are uninsured or underinsured and cannot thereby make whole the impaired party.

Decker v. Great American Ins. Co., 392 So. 2d 965, 968 (Fla. 2d DCA 1980), *rev. denied*, 399 So. 2d 1143 (Fla. 1981), quoted with approval in *Strochak v. Federal Insurance Co.*, 717 So. 2d 453456 n. 5 (Fla. 1998).

Thus, Florida's former public policy (expressed in an earlier version of the UM statute, since amended in 1987[3]) of disallowing enforcement of "other insurance" clauses that deprive an insured of otherwise available UM coverage was held to apply ***only*** to insurance policies issued in Florida; Florida public policy could ***not*** be applied to invalidate such clauses in policies issued in New York to a New York resident where they were valid under New York law. *Aetna Cas. & Sur. Co. v. Enright*, 258 So. 2d 472 (Fla. 3d DCA 1972). In *Enright*, the Court said:

> This appeal presents a question of the application of the public policy of the State of Florida. The trial court held that the public policy of the State of Florida as expressed by Florida statute voided the 'other insurance' or 'excess coverage' clause contained in an uninsured motorist provision of an automobile insurance policy issued in New York to a New York resident when the enforcement of the uninsured motorist provision was to be in Florida. We hold

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[3] *See, e.g., Nationwide General Ins. Co. v. United Services Auto. Ass'n*, 715 So. 2d 1119 (Fla. 1st DCA 1998), discussing the 1987 amendment to §627.727, adding subsection (9), which allows 'other insurance' and 'excess insurance' clauses as listed. As the *Nationwide* Court pointed out, the change in the statute represented a change also in public policy. Cases predating the amendment thus became inapposite insofar as they disapproved 'other insurance' clauses on public policy grounds.

> that the trial court incorrectly applied the public policy of the State of Florida and we reverse.

258 So.2d at 472. The trial court in *Enright* had invalidated an 'other insurance' clause in a New York policy issued to a New York resident who was in an accident in Florida by relying on cases involving ***Florida***-issued insurance policies in which the courts explained why 'other insurance' and 'excess insurance' clauses that diminish or withhold UM benefits were against Florida public policy, i.e., *Sellers v. United States Fidelity and Guaranty Co.*, 185 So. 2d 689 (Fla. 1966) and *Travelers Indemnity Co. v. Powell*, 206 So. 2d 244 (Fla. 4th DCA 1968). The Court of Appeals reversed because Florida public policy as to UM coverage, as expressed in the Florida UM statute and case law, only applies to Florida policies issued to Florida residents:

> The trial judge concluded that these expressions of public policy [in *Sellers* and *Travelers*] applied in the instant case where the insurance policy in question was issued in New York to a New York resident. ***We think that by so holding he has improperly extended statutory expressions of public policy regulating insurance policies issued in Florida to the point where he has overruled the general law of contracts. The expressions of the legislature in the statute clearly apply only to contracts issued in the State of Florida.*** In both *Sellers* and *Travelers* the policy against limiting uninsured motorist coverage was applied ***to policies issued to Florida residents.***
>
> ***The question then is whether or not the operation by a nonresident of an automobile on Florida highways coupled with a subsequent attempt to enforce a foreign insurance contract in the courts of Florida constitutes a sufficient basis to activate the state policy regarding Florida contracts. We hold that it does not*** and that the trial court mistakenly applied the public policy expressed in the *Sellers* and *Travelers Indemnity* cases.

258 So. 2d at 474. This reasoning in *Enright* was cited with approval by this Court in *H. S. Equities, Inc. v. Hartford Acc. & Indemnity, Co.,* 334 So. 2d 573, 576 (Fla. 1976).

The court in *Aetna Cas. & Sur. Co. v. Diamond*, 472 So. 2d 1312 (Fla. 3d DCA 1985) also ruled that Florida public policy had no bearing on non-Florida automobile insurance policies issued to non-Florida citizens:

> ***Pursuant to the greater weight of authority in Florida, it is appropriate to apply foreign law to an insurance contract made in a foreign state and issued to foreign residents.***[cites omitted]. The court may depart from this doctrine of comity only in cases involving the application of some paramount rule of Florida public policy. [cites omitted]. The underlying reason for Florida's public policy prohibiting "other insurance" clauses ***is to protect Florida citizens from inequitable insurance arrangements*** by ensuring that ***every policy issued in Florida*** will operate to provide uninsured motorist protection. [cites omitted]. ***We see no reason to void a provision in an insurance policy issued in Maryland to Maryland citizens on the basis of a judicially created public policy aimed at protecting Florida citizens entering into insurance contracts governed by Florida law.***

472 So. 2d at 1314-1315.

Similarly, in *New Jersey Mfrs. Ins. Co. v. Woodward*, 456 So. 2d 552 (Fla. 3d DCA 1984), the court rejected an attempt to apply Florida's notions of what UM coverage must be provided as expressed in Florida's UM statute because "the subject insurance policy was not delivered or issued for delivery in Florida with respect to any motor vehicle registered or principally garaged in Florida." 456 So. 2d at 553.

> Without dispute, the subject policy was issued and delivered while the insureds [Robert and Sara Woodward] were permanent residents of New Jersey; the

> policy also, without dispute, related solely to motor vehicles which the insureds principally garaged in New Jersey. The insurance policy herein was therefore not subject to the Florida statutory requirement that the uninsured motorist coverage limits contained therein must equal to the liability coverage limits of the policy, § 627.727(2)(a), Fla. Stat. (1983), because this requirement is applicable only to motor vehicle liability insurance policies "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state...." §627.727(1), Fla. Stat.

456 So. 2d at 553.

In *State Farm Mut. Auto. Ins. Co. v. Davella*, 450 So. 2d 1202 (Fla. 3d DCA 1984), an insured moved from Colorado to Florida and notified her State Farm agent of her Florida address. She then received a letter from State Farm telling her to contact a local State Farm agent and enclosing a Florida policy, which had higher UM limits to comply with Florida law. The insured still had three months left on her Colorado-issued policy, and she returned the Florida policy to State Farm saying that there was some question as to whether she was going to remain in Florida. She therefore asked that her Colorado policy be reinstated. While the Colorado policy was still in effect, the insured was in an accident with an uninsured motorist in Florida. The insured sued State Farm saying that under the Florida UM statute she was entitled to UM coverage in limits equal to her liability coverage limits of $100,000/$300,000, rather than the $15,000 in limits available under her Colorado policy. The court held to the contrary because the insured had kept her Colorado policy:

> On the date of loss, the original Colorado policy was still in effect. ***The Florida insurance code uninsured motorist statute specifically applies only to policies delivered or issued for delivery in Florida, therefore these statutes have no applicability in the instant case***. §§ 627.401 and 627.727, Fla. Stat.

450 So. 2d at 1204. *See also, e.g., Allstate Insurance Co. v. Pierce,* 468 So. 2d 536 (Fla. 3d DCA 1985)(North Carolina law rather than Florida law applied to determining the amount of UM insurance coverage available under policies issued in North Carolina on automobiles principally garaged in North Carolina, notwithstanding the fact that Florida was the situs of the accident).

The automobile insurance cases in which the Florida courts *have* applied Florida law and Florida public policy - including the case of *Gillen v. United Services Automobile Association*, 300 So. 2d 3 (Fla. 1974) on which the Second District relied herein - ***invariably*** involved either (a) automobiles registered or principally garaged in Florida; and/or (b) insureds who were permanent Florida residents or in the process of becoming permanent Florida residents. *See Strochak v. Federal Ins. Co.,* 717 So. 2d 453 (Fla. 1998); *Gillen, supra*; *Amarnick v. Automobile Ins. Co. of Hartford, Connecticut,* 643 So. 2d 1130 (Fla. 3d DCA 1994)*; Safeco Insurance Co. of America v. Ware*, 424 So. 2d 907 (Fla. 4th DCA 1982).

We discuss these cases next, but initially note that only this Court's decision in *Strochak* post-dates *Sturiano.* The other three cases involve automobiles registered or

principally garaged in Florida, permanent residents of Florida, or, in *Gillen*, insureds who had moved to Florida, notified their insurer of that fact, and were in the process of becoming permanent residents. But, insofar as any of the three pre-*Sturiano* cases suggest that the choice as to what law would govern was determined by weighing which jurisdiction had the most significant relationships or contacts with the automobile policy in question, we respectfully submit that they may have to be disapproved or receded from in light of the fact that *Sturiano* rejected a 'significant relationships' test in favor of lex loci contractus.

In *Strochak*, this Court disallowed an insurer's attempt to have New Jersey law apply to determine the amount of UM coverage available under policies issued in Florida on an automobile registered and principally garaged in Florida, reciting the following as the significant facts in the case:

> Shortly after Donald Strochak's death, in October of 1987, Rita Strochak purchased the vehicle from [their] business and had it shipped to Florida. ***In March of 1989, she registered the Lincoln in Florida. At this time, Rita Strochak obtained a primary automobile liability policy from FIC for the Lincoln, listing Delray Beach, Florida as her address. This primary policy was issued and delivered in Florida.***
>
> For the 1989 renewal of the excess policy, FIC mailed a Masterpiece policy addressed to Donald Strochak to the New Jersey residence along with a letter explaining the newly created Masterpiece program .... The Masterpiece policy sent to Donald Strochak in 1989, number 1051832-01, replaced all excess policies held by Donald Strochak .... ***On June 17, 1990, the Lincoln, which was now registered and principally garaged in Florida, was added to the***

> ***Masterpiece policy …. Effective June 17, 1992, the Masterpiece was renewed, listing the 1984 Lincoln as garaged in Florida***. This policy was in effect at the time of the November 1992 accident.

Strochak, supra, 717 So. 2d at 454. Rejecting the arguments of the insurer, FIC, that New Jersey law should apply to its excess policy because the original of the excess policy was delivered in New Jersey in 1985, this Court stated:

> In the instant case, FIC knew of Rita Strochak's move and connection to Florida: the Lincoln was registered in Florida, principally garaged in Florida, and added to the Masterpiece policy in June 1990; the 1990 Masterpiece policy contained Florida policy terms and Florida signatures and was mailed to Strochak's Florida residence. Further, when compared to the 1985 policy, the 1990 policy was issued in the name of a different insured, contained a different policy number and provided different coverage.
>
> We therefore conclude that the 1990 Masterpiece policy that provided excess liability coverage for the 1984 Lincoln was not the same policy that was issued and delivered in New Jersey in 1985. ***The 1990 policy was issued and delivered in Florida, renewed in June 1992, and was in effect at the time of the accident. Under these circumstances, we must presume that the parties to this contract bargained for, or at least expected, Florida law to apply.*** *See Sturiano*, 523 So. 2d at 1130.

Strochak, supra, 717 So. 2d at 455. The key facts for this Court in *Strochak* were clearly that the actual excess policy in effect at the time of the accident was issued and delivered in Florida to provide coverage for an automobile registered and principally garaged in Florida.

The *Gillen* case involved United States Services Association (USAA) as the insurer, which, as the Court noted, has as its "specialty ... active duty and retired military officers,

a rather mobile group." 300 So. 2d at 6. The insureds, the Gillens, moved from New Hampshire to Florida, notified USAA of the move, and thereafter were issued another automobile policy:

> The Gillens notified [USAA] of their move to Florida and were subsequently issued a policy (No. 31). This can be seen as an acknowledgment of domiciliary change and would indicate to [USAA] that coverage under both policies would be shifted to Florida.

Gillen, *supra*, 300 So. 2d at 6. In determining whether New Hampshire or Florida law should apply to an accident that occurred in Florida, in which Mr. Gillen was killed and Mrs. Gillen was seriously injured after the move, the Court determined that the Gillens should effectively be treated as citizens of Florida due to their move to Florida and their actions in establishing themselves as permanent residents:

> ***Concerning protection of one's citizenry***, it should be noted that the ***Gillens had purchased automobile tags, drivers' licenses***, mortgaged their home in Florida and entered their children in local schools. ***They were in the process of establishing themselves as permanent residents of this State, and as such are proper subject of this Court's protection from injustice or injury.***

300 So. 2d at 6. In considering the arguments based upon what the Court referred to as the 'locus of the contract', the Court noted that although the policy was delivered while the insureds were still in New Hampshire, the following facts indicated to the Court that Florida had a 'significant relationship' to the policy: "(1) the covered vehicles were garaged in Florida at the time of the accident, with appropriate notice having been given

to United; (2) the Gillens had taken affirmative steps to establish residence in Florida; (3) the risk of the policy was centered in Florida and only minimal contact with New Hampshire existed in terms of actual risk." 300 So. 2d at 6-7.

Given the facts recited, the Court decided that the then-current Florida law as to 'other insurance' would apply so as to permit recovery by the insureds on both of two potentially available UM policies. Despite the somewhat loose reference to Florida's 'significant relationship' to the policy, the fact is that the insureds had become Florida residents and the automobile insured by the USAA policy was registered and principally garaged in Florida, thus meeting the Florida UM statute's criteria. As this Court later summed up the significant facts in *Gillen*:

> [In *Gillen*] the insureds under an automobile liability policy issued in New Hampshire had notified their out-of-state insurer at the time of their move to Florida, ***had been issued a second policy after the move***, ***and were Florida residents*** at the time of the loss which occasioned the litigation. This Court said that the issuance of a new policy 'can be seen as an acknowledgment of domiciliary change and would indicate to [USAA] that coverage . . . would be ***shifted*** to Florida.'

H. S. Equities, Inc. v. Hartford Acc. & Indem. Co., 334 So. 2d 573, 576-577 (Fla. 1976). The *Gillen* Court itself indicated that the rationale for applying Florida public policy was the fact that the insureds had effectively become permanent Florida residents, and thus 'Florida's own' to protect: "Public policy requires this Court to assert Florida's paramount interest ***in protecting its own*** from inequitable insurance arrangements." 300

So. 2d at 7.

In *Amarnick*, an insurer attempted to argue for application of New York law based on the initial delivery of a policy to the insured in New York. The court held that Florida law would apply because of facts showing that the insured transferred the car to Florida, notified his agent of the transfer, and that the insurer subsequently issued a new declarations page reflecting that the car was principally garaged in Florida. The critical facts for the *Amarnick* court's holding were summed up in its conclusion: "Because the AIC policy covered a vehicle principally garaged in Florida and was issued for delivery in Florida, it must comply with Florida law and provide uninsured motorist coverage." 643 So. 2d at 1131-1132.

The final case, *Ware*, applied Florida law at least in part because at the time of the accident the automobile in question had been principally garaged in Florida for six months. The court's brief opinion indicates that there was also a 'significant relationship' component to the court's analysis which, as in *Gillen*, may or may not survive *Sturiano* muster. *See* 424 So. 2d at 908.

From the foregoing review of the case law, it is clear that Florida public policy as to UM coverage is reserved for application to Florida-issued policies, insureds who are permanent Florida residents, and automobiles registered or principally garaged in Florida. The undisputed evidence in this case showed that the policy in question was issued in

Indiana to provide coverage for an automobile principally garaged in Indiana and owned by an Indiana resident.

Specifically, at the time of the accident in January of 2001, Mr. Hodges was an Indiana resident with an Indiana driver's license and Indiana voter's registration card. Mr. Hodges obtained his automobile (and homeowner's) policies from an Indiana insurance agent, who issued the policies in Indiana and delivered them to Hodges at his address in Anderson, Indiana - the same address the agent had had for Hodges for almost 30 years. Hodges had a homestead exemption on his Indiana residence, and, in fact, knew that the failed attempt to get a homestead exemption in Florida by titling the mobile home property in his wife's name only was occasioned by the fact that he and his wife lived together at the Indiana residence which already had a homestead exemption.

Further, the Hodges reported Indiana as their home in federal income tax filings, and also filed permanent Indiana resident tax returns. Both of the Hodges' vehicles, including the 1990 Oldsmobile involved in the accident, were registered and principally garaged in Indiana. The 1990 Oldsmobile was only in Florida for two of the 21 months preceding the accident. The Hodges spent approximately five months to five and a half months of the year in Florida. Undisputedly, the Hodges never became permanent residents of Florida, and never told their Indiana insurance agent that they had become - or were becoming - permanent Florida residents. Florida itself recognizes that one cannot have

more than one permanent residence in any event:

> "Permanent residence" means that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning. ***A person may have only one permanent residence at a time***; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred.

§196.012, Fla. Stat. In fact, the Hodges' attempt to get two ***homestead*** exemptions - one in Florida in addition to the one they had in Indiana - failed for that very reason. *See Reinish v. Clark*, 765 So. 2d 197 (Fla. 1st DCA 2000), *rev. denied,* 790 So. 2d 1107 (Fla. 2001), *cert. denied*, 534 U.S. 993 (2001), in which the court held that a married couple who were residents of Chicago, but who spent 4 to 5 months a year in a residence they purchased in Palm Beach, Florida, were not entitled to claim a homestead exemption for the Palm Beach residence: "[S]econdary residences do not trigger the same public policy concerns and are not entitled to the same protection as permanent Florida residences." 765 So. 2d at 208.

The fact that the Indiana resident Hodges' had a secondary residence in Florida was the entire basis for the Second District's decision to apply Florida public policy to rewrite the Hodges' automobile policy so as to give underinsured motor vehicle benefits to the Roaches. Petitioner respectfully submits that there is no Florida precedent at all to support the Second District's ruling.

Under the lex loci contractus rule set by *Sturiano,* Indiana law applies to the subject Indiana-issued automobile policy. As a matter of comity, the Florida courts should give effect to Indiana's laws with respect to underinsured motor vehicle coverage under these circumstances where there are no Florida citizens involved and there is no paramount Florida rule of public policy that must be enforced. "The rule of judicial comity has reference to the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state, not as a matter of obligation, but out of deference and respect." *Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 130 So. 7, 8 (Fla. 1030). "[T]he rules of comity 'may not be departed from unless in certain cases for the purpose of the necessary protection of Florida citizens or of enforcing some paramount rule of public policy.'" *Berger v. Hollander*, 391 So. 2d 716, 719 (Fla. 2d DCA 1980), *quoting Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539 (1926).

Florida has never treated its UM statutory provisions as being of such ***paramount importance*** that they must override any contrary out-of-state law as to accidents occurring in Florida. On the contrary, so long as a policy was not issued in Florida to a Florida resident or to cover an automobile principally garaged in Florida, Florida courts have readily enforced the terms of out-of-state policies - whether the result was reduced coverage or no coverage at all because of the differing provisions of other states' UM

statutes.

Thus, for example, Massachusetts law was applied in *August* to hold that the plaintiff's UM claim was time-barred, thereby *altogether precluding the recovery of UM benefits that would have been available under Florida law*. In *Davella*, the plaintiff was limited to recovering only the $15,000 UM limits afforded by her policy under Colorado law, when Florida law would have given her a recovery of $100,000.

In *Aetna v Diamond*, an "other insurance" clause that was valid under the laws of Maryland where the policy was issued was given effect although the result was that the plaintiff recovered no UM benefits under the policy, while she would have been able to obtain up to $60,000 under Florida law. A final example is *Sturiano* itself, in which the plaintiff was disallowed from recovering *any* UM benefits under her New York-issued policy because of provisions of New York law, although the Court had just ruled that she would have been able to seek recovery if Florida law applied.

There is, in short, no *paramount rule* of public policy in Florida that is inherently offended by the notion that not all automobile accidents in Florida will result in the same UM benefits being available. Indeed, UM coverage is *optional* under Florida's own statute; any insured may reject purchasing any UM coverage at all. §627.727, Fla. Stat. Absent a Florida citizen or paramount rule of public policy to protect, there was no basis for the Second District's disregard of *Sturiano* and of established principles of comity.

Petitioner accordingly respectfully submits that the Second District's decision should be reversed.

3. The Second District's decision is also unwarrantedly overbroad

At the Respondents Roaches' urging, the Second District decided that "significant degree of permanency in the insured's sojourn in Florida" would be the test for determining what out-of-state insureds' out-of-state automobile policies may be rewritten in the name of Florida public policy. As set out above, Petitioner believes that Florida's conflict of laws and comity rules do not allow for rewriting of *any* such policies. Moreover, the Second District's test is overbroad, and it imposes unworkable underwriting obligations on insurers and insurance agents.

The Second District's decision went way beyond the scope of the case actually before the Court. The Court's decision created a 'problem' with what it referred to as 'snowbirds', and then decreed a judicial solution to the 'problem' that ignores both the practicalities of insuring decisions and the heavy regulation to which the insurance industry is subject. We respectfully submit that both the creation of the problem and the decreed solution were inappropriate.

As to creation of a 'snowbirds' problem, the Second District improperly took on more than was before it. "It is a long-standing rule of appellate jurisprudence that the appellate court should not undertake to resolve issues which, though of interest to the

bench and bar, are not dispositive of the particular case before the court." *Marion County Hosp. Dist. v. Akins*, 435 So. 2d 272, 273 (Fla. 1st DCA 1983). And while 'snowbirds' may be a familiar term to Floridians, it does not convert into a legal term with manageable parameters - as to either time or place or composition. The Second District's loose translation is 'those who have a significant degree of permanency in their sojourns in Florida.' But, does that cover people visiting from the North for two months? four months? who rent? own? stay in a hotel? drive down in a mobile home and stay in a trailer park? migrant workers? seasonal waiters? Any of these may have a 'significant degree of permanency' in their sojourns in Florida, but each may have unique insurance issues or living circumstances subject to different considerations. The 'solution' of judicially rewriting policies for this amorphous 'group' to provide them more coverage than they paid premiums for is also flawed. The Indiana insurance agent here, for example, could only issue Indiana automobile policies (e.g., R 441), and those policies had to comply with the Indiana automobile insurance statutes. Had Mr. Hodges wanted to buy automobile insurance with the type of UM coverage that complies with *Florida's* automobile insurance statutes, his Indiana agent could not have sold it to him. (E.g., R 416-417, 422, 441). Rather, the Indiana agent could only refer Mr. Hodges to a Florida agent. (E.g., R 409, 441). The Florida agent could then have advised Mr. Hodges as to the premium he would have to pay to obtain such coverage in a Florida policy, and Mr.

Hodges would have had to decide if he wanted to pay the premium necessary to obtain the coverage. As indicated, insureds are permitted to reject UM coverage altogether under Florida's UM statute. §627.727, Fla. Stat.

Given the realities of the process for obtaining insurance, the Second District's decision has placed an impossible burden on insurance agents and insurers in all other states who issue automobile policies to insureds who reside in their states, but who may have secondary residences in Florida - or, for that matter, Arizona, California, Maine, Colorado or other states frequently selected for secondary residences. Such insurers and agents may *only* issue the policies permitted in the state in which they are licensed to sell insurance to residents of that state, and they are regulated as to the premium rates they may charge for such policies. The premiums charged will *only* reflect the coverage afforded by the policy's terms - *not* the coverage that other states have required as a matter of public policy to be made available to their own residents.

Insureds are perfectly capable of deciding for themselves whether they want to pay the premiums to buy more or different coverage in another state during an extended stay there. The insureds know better than any third parties whether they have secondary residences, and whether and when they will be making use of such residences. Changes in insurance due to extended change of locale should accordingly be left to the insureds themselves. If insureds wish to procure additional insurance that is available in the state

of their secondary residence, but not in their home state, they have only to go to an agent licensed in that state - and then ***pay the required premium***.

The Second District's approach was to create coverage, with the stroke of a judicial pen, for a vast, ill-defined 'group' of out-of-state insureds in the name of Florida public policy. The effect, however, is to afford such out-of-state insureds coverage that was never expected ***or paid for***. Moreover, the coverage was not withheld by the insurers issuing the out-of-state policies because the insurers were too cheap or too conniving, but because the insurers could *only* issue such insurance as was permitted in the state of issuance. Similarly, the coverage was not withheld by the out-of-state insurance agents because they were too lazy or too un-diligent to bother keeping track of which of their insureds have secondary residences and where, but because they can *only* issue policies in the state in which they are licensed, and then *only* the policies that conform to that state's law.

The Second District's decision is thus not only unsupported by the *Gillen* decision on which it relied, but directly at odds with the basis for the *Gillen* ruling, which was: "Public policy requires this Court to assert Florida's paramount interest ***in protecting its own*** from ***inequitable insurance arrangements***." 300 So. 2d at 7. With insureds whose primary residences are out-of-state, none of '***Florida's own***' are involved, and neither are any ***inequitable insurance arrangements***. What *is* involved is an out-of-

state resident who *could* have purchased Florida insurance had he so desired when he came for an extended stay at his secondary residence in Florida, but did not.

JURISDICTION

This Court's order of December 13, 2004 reserved ruling on jurisdiction. Petitioner respectfully submits that the Court has jurisdiction based on the Second District's certification of a question of great public importance, Art. V, § 3(b)(4), Fla. Const., and also has jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const., because the Second District's decision expressly and directly conflicts with this Court's decision in *Sturiano v. Brooks*, 523 So.2d 1126 (Fla.1988), and with the district court decisions referenced above holding that Florida public policy does not apply to policies issued elsewhere to out-of-state residents, *e.g.*, *New Jersey Manufacturers Insurance Co. v. Woodward*, 456 So. 2d 552 (Fla. 3d DCA 1984) and *Aetna Casualty & Surety Co. v. Enright*, 258 So. 2d 472 (Fla. 3d DCA 1972). Petitioner respectfully urges the Court to exercise jurisdiction in order to eliminate the unwarranted anomaly in Florida law created by the Second District's decision herein.

CONCLUSION

Based on the foregoing facts and authorities, Petitioner State Farm Mutual Automobile Insurance Company respectfully submits that the decision of the Second District Court of Appeal issued herein should be reversed and the case remanded for

reinstatement of the trial court's final summary judgment in favor of Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on the Merits was sent by U.S. mail this 17th day of January, 2005 to: Weldon Earl Brennan, Esquire, Wagner, Vaughan & McLaughlin, 601 Bayshore Boulevard, Suite 910, Tampa, Florida 33606; and Joel D. Eaton, Esquire, Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on the Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.
