IN THE SUPREME COURT
OF THE STATE OF FLORIDA

APPEAL CASE NO.: SC04-387
L.T. CASE NO.: 2D02-4757

AMERISURE INSURANCE COMPANY,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Amerisure Insurance Company, requests this Court to invoke its discretionary jurisdiction to review the underlying decision of the Second District Court of Appeal which certified conflict with the decision of the Third District Court of Appeal in *Florida Farm Bureau Mutual Ins. Co. v. Tropicana Products, Inc.*, 456 So.2d 549 (Fla. 3d DCA 1984).

In the underlying case, *Amerisure Ins. Co. v. State Farm Mutual Auto. Ins. Co.*, 865 So.2d 590 (Fla. 2d DCA 2004), the Second District held that section 627.7405, Florida Statutes (2001) does not violate the Equal Protection Clauses of the United States and Florida Constitutions. Art. I, § 2, Fla. Const. Section 627.7405 allows an insurer which provides personal injury protection benefits ("PIP") on a private passenger vehicle a right to reimbursement against the owner of a commercial motor vehicle under certain situations. The Second District concluded that no equal protection violation arises from the legislative classification of private vehicles and

commercial vehicles in the PIP statute because the legislative classification bears a rational relationship to the state's overall objective of reducing automobile insurance rates.

In contrast, in *Florida Farm Bureau Mutual Ins. Co. v. Tropicana Products, Inc*, the Third District reached a contrary result in holding section 627.7405 unconstitutional "as it would create two classifications of owners and insurers of vehicles, *i.e.*, owners and insurers of commercial vehicles and owners and insurers of all other vehicles, without a rational basis for such classification...." *Id.*

Although not addressed in the underlying Second District decision, petitioner Amerisure also requests this Court to determine whether section 627.7405 violates the Due Process[1] and Access to Court[2] Clauses under the Florida Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent adopts petitioner's Statement of the Case and Facts and adds:

1) Petitioner raised only one affirmative defense below; section 627.7405 is unconstitutional on equal protection grounds, makes classifications without a rational basis and seeks to impose liability without a finding of fault. (R. I: 6).

2) Petitioner never argued below that the benefits respondent paid were not

[1]Art. I. § 9, Fla. Const.

[2]Art. I, § 21, Fla. Const.

related to the accident or injuries claimed to have resulted from the accident.

3) Petitioner never pursued any discovery or investigation into the reasonableness or necessity of the benefits paid by respondent, State Farm.

4) Petitioner never asserted in the trial court that section 627.7405 denies due process or access to courts.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal certified the issue of whether section 627.7405, Florida Statutes (1999) violates the Equal Protections Clauses of the United States and Florida Constitutions based on a conflict of law between the underlying decision in this case and the decision of the Third District Court of Appeal in *Florida Farm Bureau Mutual Ins. Co. v. Tropicana Products, Inc.*, 456 So.2d 549 (Fla.3d DCA 1984). The Fifth District Court of Appeal has also addressed the issue and agreed with the Second District that section 627.7405 does not violate the Equal Protection Clauses. *Dealers Ins. Co. v. Jon Hall Chevrolet Co.*, 547 So.2d 325 (Fla. 5th DCA 1989).

Section 627.7405 gives an insurer which provides personal injury protection benefits ("PIP") on a private passenger vehicle a right to reimbursement against the owner or insurer of a commercial motor vehicle under certain situations. Amerisure

asserts that the Equal Protection Clauses of the State and Federal Constitutions are violated unless the statute is construed to require fault on the part of the commercial vehicle as a condition to reimbursement by the insurer of the private passenger vehicle. Petitioner, Amerisure, further asserts that if fault is not considered in the application of the statute there is an arbitrary distinction between insurers of owners of private vehicles and insurers of commercial vehicles.

In addressing the issue, the rational basis test applies because a fundamental right is not at stake and no suspect classification is involved. The rational basis test is met if the "classification bears a rational relationship to a legitimate governmental objective… ." *Amerisure, supra* at 592(citing *Fla. High Sch. Activities Ass'n v. Thomas*, 434 So.2d 306 (Fla. 1983)). The purpose of the no-fault statutes is to reduce insurance rates. The rational basis test is met because, as the court noted, "the effect of the statute is to redistribute some of the risk of loss from insurers providing coverage for private vehicles to insurers providing coverage for commercial vehicles which ... could be expected to reduce premium rates, at least for owners of private vehicles." *Amerisure, supra.* Where there is the classification of private and commercial vehicles, there is no equal protection violation.

Petitioner further asserts section 627.7405, Florida Statutes violates the Due Process and Access to Courts provisions of the Florida Constitution. The Second District did not address this issue below and these issues were not raised in the

certified conflict. In fact, no district court of appeal has addressed these additional issues. This Court, of course, may choose to review or not review any issue arising in a case "that has been properly preserved and presented." *Tillman v. State,* 471 So.2d 32, 34 (Fla. 1985). Here, these two additional constitutional arguments were not presented to the trial court and arguably not preserved.

In any event, petitioner asserts that due process rights were violated and access to courts was blocked because it is unable to "dispute whether benefits sought by the private PIP insureds were necessary or reasonably related to the accident" and also is unable "to contest other significant threshold issues set forth in the Florida Motor Vehicle No-Fault Law, as it was not involved in the claim processing." Initial Brief of Petitioner, page 15. However, petitioner specifically chose not to raise these specific defenses below, and therefore this Court has no standing to address this issue. "Courts have no license to retain jurisdiction over cases in which one or both of the parties plainly have no continuing interest." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 170 120 S.Ct. 693, 699 (2000). Since the plaintiff did not raise specific defenses below (for example, State Farm's payment of an unnecessary or unreasonable claim for medical expenses), there is no live controversy on this issue.

Finally, for the same reasons addressed in point I, petitioner's rights to Due process and Access to Courts were not violated–the legislature's changes were

"reasonable attempts to correct some of the practical problems which the no-fault law had posed…" *See, e.g., Chapman v. Dillon*, 415 So. 2d 12, 16 (Fla. 1982). Furthermore, the statute bears a reasonable relationship to permissible legislative objectives–reducing the cost of insurance. *Id.* at 18. Thus, petitioners' Due Process and Access to Courts constitutional rights were not violated.

STANDARD OF REVIEW

The standard of review in cases involving equal protection and due process challenges under the constitutions is whether the statute bears a reasonable relationship to a legitimate legislative objective--safeguarding the public health, safety, or general welfare--and is not discriminatory, arbitrary, or oppressive. *See Chicago Title Ins. Co. v. Butler,* 770 So.2d 1210, 1214-15 (Fla. 2000). When, as here, there is no suspect class or fundamental right involved, the rational basis test rather than the strict scrutiny test should be employed in evaluating the statute against an equal protection challenge. *See Chicago Title Ins. Co. v. Butler, supra*; *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So.2d 365 (Fla. 1981).

In addition, the standard of review for a summary judgment is *de novo* review. *See, e.g., The Florida Bar v. Cosnov,* 797 So.2d 1255, 1258 (Fla. 2001); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130-31 (Fla. 2000).

ARGUMENT

I.

SECTION 627.7405, FLORIDA STATUTES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES OR FLORIDA CONSTITUTIONS WHERE THE CLASSIFICATIONS BEAR A RATIONAL RELATIONSHIP TO THE LEGITIMATE GOVERNMENTAL OBJECTIVE OF REDUCING INSURANCE RATES.

Section 627.7405, Florida Statutes (1999) does not violate the Equal Protection Clauses of the United States or Florida Constitutions. Under section 627. 7405, a private passenger vehicle insurer providing PIP benefits has a right of reimbursement from the owner or insurer of the commercial motor vehicle under certain circumstances. The statute provides:

> **Insurers' right of reimbursement.–**Notwithstanding any other provisions of ss. 627.730-627.7405, any insurer providing personal injury protection benefits on a private passenger motor vehicle shall have, to the extent of any personal injury protection benefits paid to any person as a benefit arising out of such private passenger motor vehicle insurance, a right of reimbursement against the owner or the insurer of the owner of

> a commercial motor vehicle, if the benefits paid result from such person having been an occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle while not an occupant of any self-propelled vehicle.

Here, petitioner complains that by affording insurers of personal vehicles a right of reimbursement from the insurers of commercial vehicles without a finding of fault on the part of the commercial owner, the statute improperly creates two classifications without any rational basis for the distinction. Under Florida law, the requirements of the Equal Protection Clauses are met when statutory classifications are "reasonable and non-arbitrary, and all persons in the same class ...[are] treated alike." *Lasky v. State Farm Ins. Co.*, 296 So.2d 9, 18 (Fla. 1974). *See also Silver Blue Lake Apartments v. Silver Blue Lake Home Owners Ass'n.*, 225 So.2d 557 (Fla. 3d DCA 1969). As the Supreme Court of Florida stated in *Lasky:* "When the difference between those included in a class and those excluded from it bears a substantial relationship to the legislative purpose, the classification does not deny equal protection." *Id.* (citing *Daniels v. O'Connor*, 243 So.2d 144 (Fla. 1971)).

In 1971, the Florida legislature adopted the no-fault law in response to the growing crisis in the insurance industry. The express purpose of the statute is the provide benefits "**without regard to fault**." §627.731, Fla. Stat. (1999)(emphasis added). One of the main purposes behind the statute was "to replace the traditional tort system that was used for recovery in automobile accidents." Mark K. Delegal and

Allison P. Pittman, *Florida No-Fault Insurance Reform: A Step in the Right Direction* 29 FLA. ST. U. L. REV. 1031, 1032 (Spring, 2002). 1971 Fla. Laws ch. 71-252, §§1-12. The no-fault law was enacted to reduce insurance premiums and court congestion, speed up recovery of compensation and allow parties to go back to life as it was without "financial interruption." *Ivey v. Allstate Ins. Co.,* 774 So.2d 679, 683-84 (Fla. 2000)(citing *Gov't Employees Ins. Co. v. Gonzalez,* 512 So.2d 269, 271 (Fla. 3d DCA 1987)); *Lasky v. State Farm, supra* at 16.

Including the *Amerisure* decision, three Florida district courts of appeal have addressed the issue before this Court. *Amerisure, supra; Dealers Ins. Co. Inc. v. Jon Hall Chevrolet Co., Inc.,* 547 So.2d 325 (Fla. 5th DCA 1989); *Florida Farm Bureau Mutual Ins. Co. v. Tropicana Products, Inc.*, 456 So.2d 549 (Fla. 3d DCA 1984), *review denied,* 465 So.2d 554 (Fla. 1985). While the Third District held the provision on review violated the Equal Protection Clause, the Fifth and Second District Courts of Appeal have found section 627. 7405 does not violate this clause.

The first decision, *Florida Farm Bureau v. Tropicana,* was decided by the Third District Court of Appeal twenty years ago. The decision is a summary opinion which agreed with the trial court that section 627.7405 created two classifications of owners without a rational basis for the classification. The decision does not contain any further rationale for this result.

The second decision, *Dealers Ins. Co. Inc. v. Jon Hall Chevrolet Co., Inc.*, decided by the Fifth District five years later, held that 627.7405 did not violate the Equal Protection Clause. In reaching this decision, the court acknowledged the existing distinction between the insurers of private passenger vehicles and insurers of commercial vehicles, but expressly found the classification to be reasonable and non-arbitrary. In reaching this result, the Fifth District noted the wide discretion the legislature has in "making distinctions in insurance law" and recognized that a "legislative classification will not be annulled by the court on equal protection grounds unless it wholly without a reasonable or practical basis and unjustly discriminates between persons similarly regulated." *Id.* at 326-27(relying on *Reserve Ins. Co. v. Gulf Florida Terminal Co.*, 386 So.2d 550 (Fla. 1980); *State ex rel. Pennington v. Quigg,* 94 Fla. 1056, 114 So. 859 (1927)). The Fifth District fruther supported this position by pointing out that many distinctions made by legislature

> have been upheld as having a rational basis. *See, e.g., Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325 (Fla. 1981)(distinction between plaintiffs injured in automobile accidents and those injured in other accidents not violative of equal protection); *State Department of Insurance v. Insurance Services Offices,* 434 So.2d 908 (Fla. 1st DCA 1983), *review denied*, 444 So.2d 416 (Fla. 1984)(legislature intended to permit discrimination in insurance based on sex, marital status, and scholastic achievement so long as not unfair or based solely on these factors).

Id. at 327.

Importantly, the Fifth District's *Dealer's Ins. Co.* decision pointed out that historically, distinctions have often been made between private passenger vehicles and commercial vehicles in Florida's no-fault insurance law. In support of this point the court noted that commercial vehicles were originally excluded from the ambit of the statute.[3] In fact, in *Lasky v. State Farm Mutual Auto. Ins. Co., supra,* this Court held that the Equal Protection Clause was not violated as a result of the exclusion of commercial vehicles from the act.

The Fifth District, in *Dealers Ins. Co.*, found a rational basis for the classification in section 627.7405 stating,

> for the legislature to have determined the need for the instant distinction between commercial and personal vehicles in the economics of who can best afford to bear the burden of injuries and damage sustained when a commercial vehicle is used by individuals having private passenger insurance. Were the employee's PIP carrier required to bear such costs, the financial risk of insuring that individual would increase and, accordingly, so would the employee's PIP premium rates. If, however, the employee's PIP carrier is able to recoup its outlay from the commercial vehicle owner or its insured, the PIP carrier will be less susceptible to liability and can reduce its rates for individual coverage. Under the statutory scheme as it existed at the time of the subject incident, a commercial vehicle owner was required to obtain PIP insurance on all of its vehicles. §627.733. Fla. Stat. (1985). Payment of these premiums is a known cost of doing business, and we think the

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[3]The Fifth District's decision also noted that the uninsured motorist statute recognizes commercial/personal use distinctions including the "prohibition of aggregating or "stacking" uninsured motorist coverage for each insured vehicle owned by a business while allowing such stacking where the vehicles were privately owned." *Id.* at 327.

> legislature could rationally determine that the burden properly rests with the commercial vehicle owners.

Id. at 327.

Petitioner's argument that section 627.7405 should only be enforced if the driver/owner of the commercial vehicle is found at fault in an accident is at odds with the purpose of no-fault statutes-- providing PIP benefits without regard to fault. In fact, in 1982 the legislature changed the title of the statute from "subrogation" to "reimbursement."[4] As pointed out by the Fifth District, "the change in title is suggestive of the legislature's intent that the issue of fault is irrelevant to this area." *Dealers Ins. Co.* at 327-28.

Furthermore, if commercial vehicle insurers were only required to reimburse PIP benefits after a finding of fault on the part of the commercial vehicle owner/driver, private passenger vehicle insurers would be forced to litigate the issue of fault in every reimbursement case, incurring additional expense and needlessly tying up valuable court resources and time. Since the amount of PIP benefits is typically $10,000 or less, and attorneys' fees are usually not recoverable in an action by one insurer against another, it would not be economically feasible for an insurer to pursue a

[4] In subrogation claims, an insurer steps "in the shoes" of its insured and therefore assumes any liability issues–fault issues are still alive. *See, e.g., Underwriters At Lloyds v. City of Lauderdale Lakes,* 382 So.2d 702, 704 (Fla. 1980).

reimbursement claim at all. This result would defeat the purpose of the act and renders section 627.7405 meaningless.

The addition of section 627.7405 actually brings Florida's no-fault law closer to leveling the liability playing field between the insurers of commercial policies and those writing coverage for personal vehicles. In the absence of 627.7405, the insurer of a personally owned vehicle would pay a far greater proportionate amount of PIP claims under the coverage provisions of section 627.736(4)(d) than the insurer of an owner of a commercial vehicle; anyone occupying a commercial vehicle (other than the owner of that vehicle) or struck by a commercial vehicle would look to their own personal policy (or resident relative's policy) to provide PIP benefits rather than to the insurer of the commercial vehicle. No matter how the responsibility for no-fault benefits are allocated between the insurers of personal vehicles and the insurers of commercial vehicles there is no way to create systematic equality between the two.

The fact that there may be some inequality in the treatment of the two classes does not render a statute unconstitutional on equal protection grounds. *Amerisure* at 592-93. As the Second District stated in *Amerisure*, "the rational relationship test does not focus on whether the method chosen by the legislature is the wisest or more effective means of accomplishing its objective." *Id.* (citing *Fla. High Sch. Activities Ass'n v. Thomas, supra* at 309). *See Lasky v. State Farm, supra* at 20(wherein the Court opined that "perfection in classification is not required and rough and

unscientific accommodations are permissible so long as they are not unreasonable or arbitrary."[cite omitted]). Furthermore, in *Dandridge v. Williams,*[5] the United States Supreme Court stated that as long as a statutory distinction has some reasonable basis, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *See also Whitaker v. DeVilla,* 147 N.J. 341, 358, 687 A.2d 738, 747 (1997).

Petitioner did not meet its burden of showing section 627.7405 is unconstitutional. *See Chicago Title Ins. Co v. Butler, supra* at 1214-15. The statute does not violate the Equal Protection Clauses of the United States and Florida Constitutions.

[5] 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L.Ed 2d 491, 501 (1970).

II.

SECTION 627.7405, FLORIDA STATUTES DOES NOT VIOLATE THE DUE PROCESS AND ACCESS TO COURTS CLAUSES IN THE FLORIDA CONSTITUTION; PETITIONER LACKS STANDING TO RAISE THESE ISSUES BECAUSE THERE IS NO LIVE CONTROVERSY AND THE STATUTE MEETS THE RATIONAL RELATIONSHIP TEST.

Although not addressed in Second District's *Amerisure* decision, petitioner requests this Court to determine that section 626.7405 violates the Due Process and Access to Courts provisions of the Florida Constitution. The issue was also not certified by the Second District as part of the conflict. Of course, this Court has the discretion to review additional issues as long as they have been "properly preserved and properly presented." *See Tillman v. State,* 471 So.2d 32, 34 (Fla. 1985). *See also Trushin v. State,* 425 So.2d 1126 (Fla. 1983). Here, this additional argument was not raised in petitioner's affirmative defenses and was not presented in any way to the trial court and therefore at least arguably was not preserved.

Petitioner asserts that its Due Process rights and Access to Courts rights guaranteed by the Florida Constitution were violated because it was unable to "dispute whether benefits sought by the private PIP insureds were necessary or reasonably related to the accident" and also unable "to contest other significant threshold [6] issues set forth in the Florida Motor Vehicle No-Fault Law, as it was not involved in the claim processing." Initial Brief on the Merits of Petitioner, page 15. Petitioner did not even attempt to raise these issues below and therefore does not have standing to raise the unconstitutionality of the statute on these grounds. "Courts have no license to retain jurisdiction over cases in which one or both of the parties plainly have no continuing interest." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170 120 S.Ct. 693, 699 (2000). Since the plaintiff did not raise specific defenses below (for example, State Farm's payment of an unnecessary or unreasonable claim for medical expenses), there is no live controversy on this issue.

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[6]The tort threshold issues, although described in the no-fault statutes, have nothing to do with PIP claims. Under section 627.737(2), Florida Statutes a plaintiff may not recover for pain and suffering damages, among other damages, in a personal injury lawsuit arising out of the use of a motor vehicle, if she does not meet one of several listed verbal thresholds, including having sustained a "permanent injury within a reasonable degree of medical probability... ." Failure to meet a tort threshold is an issue related to personal injury claims arising out of motor vehicle accidents; the issue is not related to claims for PIP benefits. *Cf. Hoffman v. Ouellette*, 798 So.2d 42 (Fla. 2001)(wherein the defendant raised the plaintiff's failure to meet a no fault threshold in a claim for personal injuries arising out of an automobile accident) ; *State Farm Mutual Automobile Ins. Co. v. Clark*, 544 So.2d 1141 (Fla. 4th DCA) 1989)(same).

Petitioner's request for review on the Due Process and Access to Courts provisions is therefore tantamount to asking this Court for an advisory opinion.

Finally, for the same reasons addressed in point I, petitioner's rights to Due process and Access to Court were not violated–the legislature's changes were "reasonable attempts to correct some of the practical problems which the no-fault law had posed..." *See, e.g., Chapman v. Dillon*, 415 So. 2d 12, 16 (Fla. 1982). Furthermore, the statute bears a reasonable relationship to permissible legislative objectives–reducing the cost of insurance. *Id.* at 18. Thus, petitioners' Due Process and Access to Courts constitutional rights were not violated.

CONCLUSION

This Court is respectfully requested to affirm the decision of the Second District Court of Appeal finding section 627.7405, Florida Statutes (1999) constitutional.

Respectfully submitted,

Betsy E. Gallagher
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail on May 26, 2004 to: K. Mitch Espat, Esquire, Smith Clark Delesie Bierley Mueller & Kadyk, Post Office Box 2939, Tampa, FL 33601.

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I HEREBY CERTIFY that the font used in this brief is 14 point font, New Times Roman.

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