IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: SC04-387
LOWER TRIBUNAL NO.: 2D02-4757

AMERISURE INSURANCE COMPANY	vs.	STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Petitioner(s)		Respondent(s)

PETITIONER'S INITIAL MERITS BRIEF

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PRELIMINARY STATEMENT

In this Initial Merits Brief, Petitioner Amerisure Insurance Company shall be referred to as "Amerisure." Respondent State Farm Mutual Insurance Company shall be referred to as "State Farm." Reference to the Record on Appeal shall be made by (R- p.#). Reference to the Appendix shall be made by (A- #).

STATEMENT OF THE CASE

Amerisure has petitioned this Court to exercise its discretionary jurisdiction, in furtherance of creating uniform state law relative to whether a commercial vehicle owner must be found at fault as a prerequisite for a commercial PIP carrier's or commercial vehicle owner's obligation to reimburse a private PIP insurer for benefits paid to its insured, pursuant to Florida Statute §627.7405.

The basis for this appeal stems from the Second District Court of Appeals' decision in *Amerisure Ins. Co. v. State Farm Mutual Automobile Ins. Co., 865 So.2d 590 (Fla. 2nd DCA 2004)*, wherein the Second District certified conflict with the Third District Court of Appeals' decision in *Florida Farm Bureau Mutual Insurance Company v. Tropicana Products, Inc., 456 So.2d 549 (Fla. 3d DCA 1984), rev. denied, 464 So.2d 554 (Fla. 1985)*, when it held that §627.7405 did not require a finding of fault on

behalf of the commercial vehicle owner prior to reimbursement. It further held that said statute satisfied the rational basis test and did not violate equal protection. (A-1).

The Third District previously held that to construe §627.7405 as providing for reimbursement without regard to fault "would be 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 a classification . . ." (A-1). In holding otherwise, the Second District sided with a Fifth District Court of Appeals' decision, *Dealers Insurance Co. v. Jon Hall Chevrolet Co., 547 So.2d 325 (Fla. 5th DCA 1989).* (A-1).

Amerisure contends a commercial vehicle owner must be found at fault as a prerequisite to private PIP insurer reimbursement, otherwise §627.7405 violates equal protection, procedural and substantive due process and infringes upon court access as guaranteed by the Florida Constitution.

STATEMENT OF FACTS

State Farm sued Amerisure in the County Court of the Sixth Judicial Circuit, Pinellas County, Florida, to recover Personal Injury Protection ("PIP") benefits State Farm paid to its insureds. (R-1). State Farm's insureds (Kelly Jo Edman and her five children) were involved in a motor vehicle accident while occupants of a commercial motor vehicle owned by Wright Construction and insured by Amerisure. (R-2). State Farm alleged it paid $11,684.72 in PIP benefits to its insureds as a result of the accident. (R-3). State Farm contended it was entitled to recover these PIP benefits from Amerisure pursuant to Florida Statute §627.7405:

Insurers' Right to Reimbursement

> Notwithstanding any other provisions of §§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 the 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.

§627.7405, Fla. Stat. (2002).

Amerisure and State Farm disagreed as to whether §627.7405 required the existence of fault by the commercial owner in order to trigger State

Farm's right of reimbursement. (R-45). In the absence of a fault requirement, Amerisure and State Farm disagreed as to the statute's constitutionality. (R-46). Cross-motions for summary judgment ensued. (R-45 and R-19).

In their respective summary judgment motions, State Farm and Amerisure stipulated to the following facts regarding the subject accident: (1) State Farm's insureds were occupants of a vehicle insured by Amerisure on the accident date of July 9, 1999; (2) Amerisure's policy was intended to insure the vehicle at issue as a commercial business vehicle and was in full force and effect on the date of accident; (3) the vehicle was owned by a business, commercial entity identified as Wright Construction, and was used primarily for business, professional or occupational purposes; (4) State Farm paid to or on behalf of its insureds a total of $11,684.72 as a result of injuries sustained in the subject accident; (5) the subject vehicle was a "commercial motor vehicle" as defined by Florida Statute §627.732; and, (6) Mrs. Edman was not at fault in the accident. (R-52).

As the Second District had yet to entertain the aforementioned issues, Amerisure's summary judgment motion relied on the Third District's decision in *Florida Farm Bureau, supra.* (R-46). In that case, the court held a private vehicle insurer paying PIP benefits did not have a statutory right of

reimbursement from the owner or insurer of the commercial vehicle causing the injury, absent a finding of fault. To hold otherwise would render §627.7405 unconstitutional as violating equal protection. (R-46).

State Farm's motion for summary judgment relied on the Fifth District's decision in *Dealers, supra,* which held that a commercial owner's fault was not a prerequisite for reimbursement and found §627.7405 to be constitutional. (R-20).

The respective motions were heard and the trial court ruled in favor of State Farm, relying on *Dealers Insurance*, supra. (R-51). Notwithstanding this, the trial court found conflict between the aforementioned decisions and certified this conflict as an issue of law of great public importance. (R-52).

Amerisure then filed an appeal with the Second District Court of Appeals, pursuant to Florida Rule of Appellate Procedure 9.030 (b)(4)(A), therein alleging §627.7405 violated equal protection, procedural and substantive due process and infringed upon Amerisure's fundamental right to court access, pursuant to the Florida Constitution. (A-3).

In its opinion, the Second District affirmed the trial court's decision, agreed with the Fifth District's rationale in *Dealers Insurance*, supra, and certified conflict between its decision and the Third District's decision in *Florida Farm Bureau*, supra. (A-1). Notably, the Second District failed to

address Amerisure's due process deprivation and court access infringement contentions, and accordingly, Amerisure filed a timely motion for rehearing (A-4). The Second District denied said motion on February 17, 2004. (A-2). Amerisure subsequently instituted this timely appeal, pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(vi).

SUMMARY OF ARGUMENT

In order to survive constitutional scrutiny, §627.7405 must be interpreted to require private vehicle PIP insurers to prove the commercial vehicle owner's fault as a prerequisite to reimbursement. Interpreting the statute to provide a pure right of reimbursement without regard to fault renders the statute unconstitutional, as it would violate equal protection, procedural and substantive due process and infringe upon the fundamental right of court access in Florida.

Classifying commercial vehicles separately from all others without regard to fault is wholly without a reasonable or practical basis and unjustly discriminates between those similarly situated. By recognizing fault as a prerequisite for reimbursement, the Third District appropriately places the risk of loss upon the entity collecting premiums and issuing the insuring agreement. Its interpretation is not only consistent with the statute's intent, but also avoids infringement of rights and enables the statute to withstand constitutional scrutiny.

Amerisure requests this Court find §627.7405 requires a private vehicle insurer to prove fault on behalf of the commercial vehicle owner, prior to any right of PIP reimbursement.

Alternatively, if this Court finds a right of reimbursement exists without regard to fault, Amerisure requests §627.7405 be held unconstitutional.

STANDARDS OF REVIEW

In equal protection and due process challenges under the constitution, the standard of review is whether the statute bears a reasonable relationship to a legitimate legislative objective and is not discriminatory, arbitrary or oppressive. *See Chicago Title Ins. Co. v. Butler, 770 So.2d 1210 (Fla. 2000).*

There is no relevant difference between the "compelling governmental interest/strict scrutiny" test for substantive due process and equal protection claims and the "no alternative method of correcting the problem/overpowering public necessity" test for claims under the state constitutional provision guaranteeing access to courts. *Mitchell v. Moore, 786 So.2d 521(Fla. 2001).*

The "strict scrutiny" standard of review requires proof that the legislation furthers a compelling State interest through the least intrusive means. *See Chiles v. State Employees Attorneys Guild, 734 So.2d 1030, 1033 (Fla. 1999).*

In a strict scrutiny analysis, legislative conclusions are not taken at face value and do not obviate the need for judicial scrutiny. *Chiles, supra, 734 So.2d at 1034.*

The standard of review when reviewing the entry of summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla. 2000).*

Whether challenged statutes are constitutional is a question of law which the appellate court reviews de novo. *See City of Miami v. McGrath, 824 So.2d 143 (Fla. 2002).*

ARGUMENT

I. FLORIDA STATUTE §627.7405 MUST BE INTERPRETED TO REQUIRE THE COMMERCIAL OWNER'S FAULT AS A PREREQUISITE TO REIMBURSEMENT OR ELSE IT IS UNCONSTITUTIONAL

In assessing a statute's constitutionality, courts are bound to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions, as well as with the legislative intent. *State v. Elder, 382 So.2d 687, 690 (Fla. 1980).*

The express language in §627.7405 provides a right of reimbursement against either the commercial vehicle owner's insurer or against the commercial vehicle owner itself. *§627.7405 Fla. Stat*. (2002) (emphasis added). It necessarily follows State Farm is required to prove fault as a prerequisite to reimbursement, because commercial owners (non-insurers) and commercial carriers (not parties to the private insuring agreement) would not otherwise be obligated to pay damages to State Farm's insureds.

Florida Farm Bureau, supra, involved a factually similar situation to the case at bar. A private vehicle insurer paid PIP benefits to its insured as a result of an accident involving its insured driving a commercial vehicle. It subsequently sought PIP reimbursement from the commercial carrier. *Florida Farm Bureau, supra, 456 So.2d at 549.* The action was brought pursuant to the 1982 version of §627.7405, entitled "Insurers' Right to Reimbursement." This title was changed in the 1982 version from the original (1981) title, "Subrogation." Otherwise, the 1981 statutory language

remained unchanged and both versions showed the legislative intent of reimbursement[1]

Section 627.7405, Florida Statutes (1981), which provides:	Section 627.7405, Florida Statutes (1982), provides:
627.7405 Subrogation.---	627.7405. Insurers' Right to Reimbursement
Notwithstanding any other provisions of ss.627.730-627.741, 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-	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 occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle while not an occupant

[1]Further support for this proposition can be found in the legislative history, which merely indicates §627.7405 was reenacted with a technical change. *See* Ch. 82-243, Laws of Fla. Nowhere in the legislative history does it state that the title change was meant to substantively alter the statute. *See Id.*

propelled vehicle.	of any self-propelled vehicle.
(Emphasis added).	(Emphasis added).

The private vehicle insurer in *Florida Farm Bureau* contended the legislature's intent not to require fault was evinced by the 1982 title change. *Florida Farm Bureau, 456 So.2d at 550.* However, the Third District rejected the private vehicle insurer's contention holding such a construction (i.e., "without fault") impermissibly created two classifications of owners and insurers, to wit: (1) those that insured commercial vehicles; and, (2) those that insured all other vehicles. *Florida Farm Bureau, 456 So.2d at 550.* The court implicitly recognized this distinction discriminated amongst similarly situated classes, and concluded such a distinction was without a rational basis and violative of equal protection. *Id.*

A. The Second District's interpretation of §627.7405 based on the Fifth District's decision in *Dealers Insurance* fails to justify the classification and its rationale does not achieve the perceived legislative purpose.

For a statutory classification to satisfy the equal protection clause, it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed. *Rollins v. State, 354 So.2d 61, 62 (Fla. 1978) (relying on Article I §2 of the Florida Constitution).*

Notably, both the Second and Fifth Districts failed to explain how they reached their conclusions from a comparative reading of the statutory language (1981 and 1982 versions set forth above). They similarly failed to justify the distinction amongst private insurers and commercial carriers, when both entities: (1) are involved in the business of assessing risks and losses; (2) have the ability to collect premiums commensurate with their assessments; (3) undertake the duty to indemnify their respective insureds pursuant to the terms and conditions set forth in the insuring agreement; (4) can decide what types and amounts of insurance to sell; and, (5) are free to reject risks, thus avoiding the potential for loss. The Second and Fifth District's rationale in this regard fail to recognize the well-settled principle under Florida law that all similarly situated persons are equal under the law and must be treated alike. *St. Mary's Hospital v. Philli, 769 So.2d 961, 971 (Fla. 2000).*

Moreover, the Second and Fifth District's rationales for distinguishing between private and commercial vehicles are incongruous with the perceived purpose. Concluding private vehicle owners will save money by shifting the burden of loss onto commercial owners and carriers ignores the reality (and irony) that costs associated with this unjustifiable imposition will negatively affect the individuals it seeks to protect. If commercial businesses are forced

to shoulder the burden of private PIP costs (a risk not previously bargained for), the private sector and consumers can expect these to be passed on in the form of increased costs for goods and services. The Second and Fifth District's distinctions not only fail to accomplish the perceived purpose, but also enable private PIP insurers to gain a windfall in the form of accumulated premiums without accountability for the risks under the applicable insuring agreement.

On the other hand, the Third District in *Florida Farm Bureau, supra*, recognized the private-commercial distinction as improperly discriminating between the two classes. *Id. at 550.* In refusing to recognize a pure right of reimbursement without regard to fault, it appropriately places the risk of loss upon the entity collecting premiums and issuing the insuring agreement -- the private PIP insurer. Moreover, its interpretation avoids infringement of substantive rights and enables §627.7405 to withstand constitutional scrutiny.

B. Requiring PIP reimbursement absent fault deprives commercial owners and carriers of property without due process under the law and forecloses the fundamental right of court access.

Enabling private PIP insurer reimbursement without regard to fault forces commercial vehicle owners and carriers to become gratuitous insurers of individuals who would otherwise not be entitled to compensation. This is

especially troubling when one considers that all commercial vehicle owners are not in the insurance business and do not collect premiums. Although commercial carriers (as with private PIP insurers) collect premiums, they only provide insurance to the extent of the terms and conditions in their insuring agreements.

Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue. *Department of Law Enforcement v. Real Property, 588 So.2d 957, 960 (1991).* Procedural due process under the Florida Constitution guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. *Id. at 960.* It contemplates that the defendant shall be afforded a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him. *Id.*

Traditional safeguards afforded to litigants include the right to: 1) discovery; 2) have the evidence weighed in accordance with well-established principles; and, 3) judicial review. *See A.G. Edwards & Sons, Inc. v. Petrucci, 525 So.2d 918 (Fla. 2d DCA 1988); Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So.2d 1240 (Fla. 2d DCA 1976, cert. den., 353 So.2d 675 (Fla. 1977).*

Moreover, the right of court access is specifically mentioned in Florida's Constitution. *See Art. I, §21, Fla. Const.* The right to go to court to resolve our disputes is one of our fundamental rights. *Psychiatric Associates v. Seigel, 610 So.2d 419, 424 (Fla. 1992); receded from on other grounds, 678 So.2d 1239 (Fla. 1996).* Moreover, since it is expressly mentioned in Florida's Constitution, it deserves more protection than those rights found only by implication. *Mitchell, supra, 786 So.2d at 527 (citing Lloyd v. Farkash, 476 So.2d 305, 307 (Fla. 1st DCA 1985)).*

The "compelling governmental interest/strict scrutiny" test is to be applied when assessing infringement of court access claims. *Id. at 527.* The "strict scrutiny" standard of review requires proof that the legislation furthers a compelling governmental interest through the least intrusive means. *See Chiles v. State Employees Attorneys Guild, 734 So.2d 1030, 1033 (Fla. 1999).* Furthermore, in a strict scrutiny analysis, legislative conclusions are not taken at face value and "do not [. . .] obviate the need for judicial scrutiny. *Chiles, supra, 734 So.2d at 1034.*

In the instant case, Amerisure was unable to dispute whether benefits sought by the private PIP insureds were necessary or reasonably related to the accident, because the private PIP insureds' claims were made directly to State Farm (which ultimately controlled benefits and payments to or on

behalf of its insureds). (R-52). Amerisure was equally 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. (R-52).

Furthermore, if a dispute regarding the provision or payment of benefits had arisen between State Farm and its insureds culminating in litigation, State Farm would have been controlling the litigation. This cumulative effect forces commercial owners and carriers to pay claims or judgments without the opportunity to investigate or defend against the private insureds' pending claims.

Additionally, commercial owners and carriers forfeit their rights in the reimbursement action by a statutory interpretation imposing strict liability without fault. The Second and Fifth District's decisions would enable private PIP insurers to successfully prosecute a lawsuit by merely proving the amount of benefits paid to or on behalf of their insureds. Indeed, §627.7405 expressly requires reimbursement " [. . .] to the extent of **any** personal injury protection benefits paid [. . .]." (emphasis added). Consequently, commercial owners and carriers would have no redress to undo the inequity of having to pay for the private insurer's losses (a risk not assumed; and, a risk the private insurer elected to incur in exchange for a premium).

II. AMERISURE'S DUE PROCESS DEPRIVATION AND FORECLOSURE OF COURT ACCESS CHALLENGES ARE INEXTRICABLY INTERTWINED WITH THE EQUAL PROTECTION CHALLENGE AND SHOULD BE ENTERTAINED BY THIS COURT DESPITE AMERISURE NOT RAISING THESE SAFEGUARDS AS AFFIRMATIVE DEFENSES AT THE TRIAL LEVEL

Although the Second District's opinion was silent as to the sufficiency or viability of Amerisure's due process deprivation and foreclosure of court access challenges, State Farm argued these had been waived since they were not raised as affirmative defenses at the trial court level. However, State Farm's position in this regard is based on a mischaracterization of the meaning and purpose of these constitutional safeguards.

An affirmative defense is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse, justification or right to engage in the conduct in question. *State v. Cohen, 568 So. 2d 49, 51-52 (Fla. 1990).* An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. *Id.* In effect, an affirmative defense says, "Yes I did it, but I had good reason." *Id.* Based on these definitions, due process deprivations and

foreclosure of court access do not qualify as affirmative defenses subject to waiver.

In the event this Court finds Amerisure could have raised these issues at the trial level, Amerisure contends this Court can still entertain these issues on appeal. It is well-settled that a determination of whether challenged statutes are constitutional is a question of law which appellate courts review de novo. *See City of Miami v. McGrath, 824 So.2d 143 (Fla. 2002)*. "De Novo means to try a matter anew, as though it had not been heard before and no decision has been rendered. *Sarah Lee v. St. Johns County Board of County Commisioners, 776 So.2d 1110 (5th DCA 2001).*

Moreover, and as can be seen from the legal analysis in the preceeding sections, the due process and court access challenges are inextricably intertwined with the equal protection issues. The Second and Fifth District's holdings requiring carte blanche reimbursement to a private PIP carrier in the absence of a fault determination on behalf of the commercial owner, forecloses the ability to challenge the reasonableness, necessity and relatedness of the PIP benefits paid by the private PIP insurer, as well as depriving commercial carriers and owners of property rights and due process under the law.

CONCLUSION

Amerisure requests this Court find §627.7405 requires a private vehicle insurer to prove fault on behalf of the commercial vehicle owner, prior to any PIP reimbursement rights. This holding appropriately places the risk/losses upon the entity collecting premiums and issuing the insuring agreement. This is consistent with the well-settled principle that all similarly situated persons are equal under the law and must be treated alike. It avoids due process deprivation and court access infringement, while preserving guaranteed property rights and enabling the statute to withstand constitutional scrutiny, consistent with judicial principles favoring statute constitutionality.

Amerisure requests this Court issue an opinion consistent with the Third District's opinion in *Florida Farm Bureau, supra*, thereby resolving the conflict certified by the Second District and establishing uniform law.

Additionally, this Court should address Amerisure's due process and court access challenges, which Amerisure contends are inextricably intertwined with the equal protection issues and necessary towards overall uniformity in the law.

Amerisure further requests this Court reverse the trial court's granting of State Farm's summary judgment motion and to vacate/quash the final

judgment entered in its favor. Amerisure further requests this case be remanded back to the trial court for proceedings consistent with this Court's opinion, and any other relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David B. Kampf, Esq., Ramey, Ramey & Kampf, P.O. Box 1064, Tampa, FL 33602; Betsy E. Gallagher, Esq., and Michael C. Clarke, Esq., Cole, Scott & Kissane, P.A., Bridgeport Center, Suite 750, 5201 West Kennedy Boulevard, Tampa, FL 33609, this _____ day of April, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief filed in this case was submitted in 14 font Times New Roman type, a font that is proportionately spaced.

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