

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 REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

REPLY TO RESPONDENT'S ADDITIONAL STATEMENT OF FACTS

Amerisure incorporates its prior Statement of Facts and replies to State Farm's fact additions, seriatim:

1. Amerisure previously noted it raised only one affirmative defense at the trial level, to wit: 627.7405 is unconstitutional as violating equal protection. Even assuming equal protection meets the legal definition of an affirmative defense, this does not preclude Amerisure from raising other defenses which are not affirmative defenses subject to waiver, such as challenges based on procedural and substantive due process deprivation, or infringement of court access. Amerisure refers this Court to its prior discussion on the topic (Initial Merits Brief, pp. 17-18).

2. Contrary to State Farm's assertion, Amerisure was not able to contest reasonableness, relatedness or necessity of benefits paid by State. The express language of 627.7405 prohibits such a challenge. Indeed, the trial court entered summary final judgment and awarded State Farm the full amount of benefits paid (R - 52).

3. The due process and court access infringement violations stem from Amerisure's inability to contest entitlement and expenses, or lack of involvement in the claims processing directly with the insured/insured's medical providers. Amerisure notes the lack of discovery regarding reasonableness, relatedness or necessity of benefits paid by State Farm is inconsequential since 627.7405 requires reimbursement "[. . .] to the extent of **any** personal injury protection benefits paid [. . .]" (emphasis added). Once the reimbursement lawsuit was filed at the trial level, these issues were foreclosed and no longer ripe for consideration.

4. Amerisure has previously conceded it did not raise due process or access to court arguments in its affirmative defenses at the trial level (Initial Merits Brief, pp. 17-18). Amerisure refers this Court to said analysis as the basis for this Court's ability to address these issues in the present appeal.

SUMMARY OF REPLY ARGUMENT

Amerisure incorporates its prior analysis and arguments submitted in its Initial Brief on the Merits, as all of the arguments raised by State Farm were previously addressed therein.

Additionally, Amerisure emphasizes the concept of Florida's PIP and no-fault system is not undermined by a proper determination requiring fault as a prerequisite

to commercial vehicle owner/commercial insurer and private PIP insurer reimbursement. Florida's no-fault system focuses on the insured-insurer contractual relationship, and is a means by which insureds may obtain certain medical and wage benefits directly from their own insurer, irrespective of whether the insured himself/herself is at fault for the automobile accident. In contrast, reimbursement amongst commercial vehicle owners/commercial insurers and private PIP insurers has no such basis, and must necessarily be founded upon a finding of fault to avoid infringement of valuable constitutional rights.

Furthermore, the high volume of PIP cases litigated on an annual basis involving insureds and private PIP insurers over such issues of necessity, relatedness and reasonableness of treatment/costs and the litigation expenses associated therewith, belies the illusory concept that private PIP insureds will benefit from a reduction in premiums by arbitrarily drawing a classification between commercial vehicle owners/commercial insurers and private PIP insurers. Increases in PIP premiums are a result of any number of factors unrelated to commercial vehicle/commercial insurer and private PIP insurer reimbursement.

Amerisure requests this Court find 627.7405 requires a private 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 as violating equal protection, procedural and substantive due process and infringing upon court access.

REPLY ARGUMENT

I. FLORIDA'S NO-FAULT SCHEME IS NOT UNDERMINED BY A FAULT REQUIREMENT AS A PREREQUISITE TO REIMBURSEMENT IN 627.7405

The purpose of Florida's no-fault statutory scheme is to provide swift and virtually automatic payment so that the *insured* may get on with his life without undue financial interruption. *Ivey v. Allstate Ins. Co.*, 774 So.2d 699 (Fla. 2000) (*emphasis added*). Indeed, Florida Statute 627.736 speaks to the obligations a PIP insurer has towards its insured under applicable the insuring agreement. Said statute also imposes additional obligations upon the PIP insurer with respect to its insured, as proscribed by Florida law.

Requiring a finding of fault on behalf of the commercial vehicle owner prior to private PIP insurer reimbursement would not affect the insured's entitlement to PIP benefits, or the insured's ability to obtain expedient medical care and related benefits. Additionally, a fault requirement would preserve the contractual relationship between an insurer and its insured (previously discussed in Amerisure's Initial Merits Brief, pp. 11-13).

As noted above, the no-fault statutory scheme is intended to benefit the

insured, and not private PIP insurers. If indeed a fault requirement is not a prerequisite to reimbursement, then the legislature would have logically provided for private PIP insurers to reimburse commercial owners/commercial carriers the premiums collected by the private PIP insurer under the applicable policy. However, 627.7405 does not contain such a provision, which is consistent with a fault requirement (whereby the insurer of the culpable party would logically bear all costs, including no right to premium reimbursement).

II. LITIGATION COSTS ASSOCIATED WITH THE PROSECUTION OF A REIMBURSEMENT ACTION DO NOT JUSTIFY ARBITRARY CLASSIFICATIONS, PROCEDURAL AND SUBSTANTIVE DUE PROCESS DEPRIVATION OR THE ABROGATION OF FUNDAMENTAL COURT ACCESS RIGHTS

State Farm contends a fault requirement would defeat the purpose of Florida's no-fault scheme and render 627.7405 meaningless, as it would force private PIP insurers to incur additional expenses in typically nominal value cases, without necessarily the potential for attorney fee recovery (State Farm's Response Brief on the Merits, p. 12). However, (and as discussed in Section I, supra) the purpose of Florida's no-fault scheme is to benefit the insureds and not private PIP insurers.

Furthermore, the high volume of PIP cases litigated on an annual basis involving insureds and private PIP insurers over such issues of necessity, relatedness and reasonableness of treatment/costs (and litigation expenses associated therewith), belies the illusory concept that PIP insureds will benefit from a reduction in premiums by arbitrarily drawing a classification between commercial vehicle owners/commercial insurers and private PIP insurers. Increases in PIP premiums are invariably the result of any number of factors unrelated to commercial vehicle owner/commercial insurer and private PIP reimbursement. Capricious classifications based on the commercial or private nature of vehicle ownership/insurance will not affect the costs (and commensurate premium increases) by a private PIP insurer as a result of litigating numerous private claims annually. These same classifications will not affect other factors private PIP insurers use to determine premium rates, including but not limited to, age, residence and vehicle type.

Amerisure refers this Court to its Initial Merits Brief for further analysis and discussion regarding the unconstitutional ramifications of this arbitrary classification (pp. 8-11), as well as the consequential violations of procedural/substantive due process and court access infringement (pp. 13-17).

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 Mutual Insurance Company v. Tropicana Products, Inc.*, 456 So.2d 549, 550 (Fla. 3d DCA 1984), rev. denied, 464 So.2d 554 (Fla. 1985), 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 July, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Reply Brief filed in this case was submitted in

14 font Times New Roman type, a font that is proportionately spaced.

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