CASE NO. SC 05-214

IN THE SUPREME COURT OF FLORIDA

MARK ANDREW TOBIN, *Plaintiff/Petitioner*,
v.
MICHIGAN MUTUAL INSURANCE COMPANY, *Defendant/Respondent.*

CRAIG MACKAY, individually and as Personal Representative of the ESTATES OF ANA GUTIERREZ MACKAY and JONATHAN PATRICK MACKAY,
Plaintiff/Petitioner,
v.
MICHIGAN MUTUAL INSURANCE COMPANY, *Defendant/Respondent.*

HELEN J. HUNTER, *Plaintiff/Petitioner*,
v.
MICHIGAN MUTUAL INSURANCE COMPANY, *Defendant/Respondent.*

On Certification from the United States Court of Appeals
for the Eleventh Circuit

Consolidated Case No.: 03-12737-JJ

BRIEF OF RESPONDENT MICHIGAN MUTUAL INSURANCE COMPANY

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STATEMENT OF THE CASE

Plaintiffs Helen J. Hunter ("Hunter"), Mark Andrew Tobin ("Tobin"), and Craig Mackay ("Mackay"), individually and as the personal representative of Ana Gutierrez Mackay and Jonathan Patrick Mackay, (collectively "Plaintiffs") were retail lessees of Ford vehicles who were involved in accidents with uninsured motorists.[1] (R4 – 108 – 2). Plaintiffs subsequently sought uninsured/underinsured motorist coverage insurance coverage ("UM coverage") under a policy issued by Michigan Mutual Insurance Company ("Michigan Mutual") to Ford Motor Company ("Ford"). (*Id.*) The policy in question, however, was not intended to cover retail lessees; rather, its purpose was to provide coverage to Ford and certain of Ford's management employees who leased Ford vehicles pursuant to Ford's internal vehicle evaluation program.

This simple and fundamental fact was not lost on the United States District Court for the Southern District of Florida. After conducting a bench trial, the court rejected Plaintiffs' claim for benefits and concluded that Michigan Mutual had established by clear and convincing evidence that neither it nor Ford intended to provide any coverage to retail lessees of Ford vehicles under the policy in question.

[1] Hunter was the first case filed and thus all of the early motions were filed in that case. Later all three actions were consolidated. For ease of reference, all Record cites are to the Record for Hunter. References to the record will be designated as "R. Vol. No. – Doc. No. – Page No."

The District Court therefore reformed the policy to reflect the parties' mutual intent. (R4 – 108).

On appeal to the United States Court of Appeals for the Eleventh Circuit, Plaintiffs did not challenge any of the factual findings made by the District Court, including its finding as to the scope of coverage intended by the parties. Instead, Plaintiffs contended that, despite the plain language of the policy and the clear intent of Michigan Mutual and Ford, they were entitled to UM coverage under Ford's policy because: (1) they were covered under the policy as Class II insureds; and (2) the operation of the Florida Uninsured Motorist Statute, section 627.727, mandated that Michigan Mutual provide UM coverage to Ford in connection with the policy. Plaintiffs' appeal therefore centered on purely legal questions of Florida law concerning the proper construction and application of the Florida Uninsured Motorist Statute. *See Tobin v. Michigan Mutual Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005). The United States Court of Appeals for the Eleventh Circuit certified the question of whether Plaintiffs were entitled to UM coverage under the Michigan Mutual insurance policy to this Court.[2]

STATEMENT OF FACTS

This case arises out of three separate automobile accidents involving

[2] Further relevant factual and procedural history of this case was set forth by the Eleventh Circuit in its decision certifying questions to this Court. *See generally Tobin v. Michigan Mutual Ins. Co.*, 398 F.3d 1267 (11th Cir. 2005).

vehicles leased from Ford or its subsidiaries under typical consumer retail lease programs. Tobin, while driving a Jaguar that he leased from Jaguar Motor Credit Corporation ("Jaguar Credit"), allegedly was involved in an accident with an uninsured motorist on March 24, 1996.[3] (R4 – 108 – 2). Hunter allegedly was involved in an accident with an uninsured motorist on February 18, 1997 while driving a 1997 Ford Explorer that she leased from Ford Motor Credit Corporation ("Ford Credit"). (*Id.*) Ana Gutierrez Mackay and Jonathan Mackay – whose estate Mackay represents – allegedly were fatally injured in an accident with an uninsured motorist on October 4, 1997 while traveling in a vehicle leased from Ford Credit.[4] (*Id.*)

Plaintiffs thereafter filed suit against Michigan Mutual seeking UM coverage under a policy issued by Michigan Mutual to Ford. (*Id.*) That policy was intended by Michigan Mutual and Ford to provide coverage to Ford and certain of its management employees who leased vehicles from Ford under a special company lease program. (R4 – 105 – 2-16). Plaintiffs argued, however, that under their reading of the policy's definition of "named insured," the policy also provided coverage to retail lessees of Ford vehicles and the occupants of those vehicles.

[3] Jaguar Credit is a wholly-owned subsidiary of Ford Credit.

[4] Because the trial only addressed the issue of reformation of the policy, there is no evidence on the record as to whether the plaintiffs' accidents in fact involved un- or under-insured motorists or as to whether plaintiffs' own insurance would have covered their claims.

(R1 – 1). Although all three cases were filed separately, they were all ultimately consolidated before the United States District Court for the Southern District of Florida. (R4 – 108 – 2).

Ford did not – and does not – provide insurance for its retail lessees. (R4 – 102 – 53-56). To the contrary, Ford's standard lease agreements applicable to the Plaintiffs' vehicles specifically required the retail lessee to obtain his or her own insurance. (R4 – 105 – 54-57). The Ford Credit lease agreement for the Hunter and Mackay vehicles stated that "**LESSOR IS NOT PROVIDING VEHICLE INSURANCE OR LIABILITY INSURANCE**" and required that the lessee "must insure the vehicle during this lease," including obtaining liability insurance covering the lessee. (R4 – 105 – 55 (emphasis in original)). Similarly, the Jaguar Credit lease agreement for Tobin's vehicle stated that "[t]he Lessee must insure the vehicle for the term of the lease." (R4 – 105 – 58). In addition, both agreements required the lessees not only to obtain liability insurance for themselves, but also to obtain coverage for Ford to protect it against any liability that it might incur as the vehicle lessor/owner. (R4 – 105 – 55, 58).

The insurance policy under which Plaintiffs sought coverage in this case, Policy No. CCP 0052141[5] (the "Policy"), did not provide coverage for retail

[5] The Policy was issued to Ford for three-year periods, but typically was renewed at the end of the second year. The versions of the Policy period relevant to this case were issued on December 15, 1994 and December 15, 1996. The district

lessees. (R4 – 105 – 2-16). Rather, it provided insurance coverage for Ford and certain of its management employees and retired employees who leased Ford-owned vehicles for their personal use as part of Ford's internal vehicle evaluation program. The vehicle evaluation program is a special Ford program, distinct from the ordinary consumer retail lease program, and is available only to certain current and former Ford management employees who are required to provide periodic evaluations of their leased vehicles. (R4 – 102 – 41-46). The lease agreement for participants in that program specifically states that Ford was also providing the lessees with insurance for the vehicles. (R4 – 105 – 39). Accordingly, under its plain terms, the Policy provides both primary liability and UM coverage for Ford and the Ford employees who lease vehicles under – and participate in – the vehicle evaluation program, with respect to those vehicles.

Retail leased vehicles, however, are not part of Ford's internal vehicle evaluation program; and unlike the leased evaluation vehicles, retail leased vehicles are not included in Ford's vehicle administration system. (R4 – 102 – 44-45). Thus, there is no provision in the section of the Policy providing UM coverage that addresses or otherwise references retail lessees or occupants of retail leased vehicles. (R4 – 105 – 10-11). Rather, the Policy makes clear that UM coverage is only provided for an "insureds" – which does not include retail lessees – with

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court's decision was based on language and negotiating history that was the same for both versions of the Policy. (R4 – 108 – 2-3).

respect to a "covered auto" – which does not include retail leased vehicles. (*Id.*)

Despite the fact that Plaintiffs were not lessees under Ford's internal vehicle evaluation program and despite the plain language of their own lease agreements, Plaintiffs sought UM coverage under the Policy. Relying on an interpretation of the Policy that had been previously adopted by the Third District Court of Appeal in *Perez v. Michigan Mutual Insurance Company*, 723 So. 2d 849 (Fla. 3d DCA 1999), Plaintiffs asserted that they came within the definition of "Named Insured" in Item 1 of the Personal Auto Supplement to the Policy, which provided coverage for "anyone to whom a vehicle was assigned, leased or loaned." (R1 – 1).

Michigan Mutual filed a motion for summary judgment on September 9, 1999, in which it argued that Plaintiffs' proposed interpretation of the Policy ignored Item 2 of the Policy, which defines the "covered autos" which would be "assigned, leased or loaned" to the "named insureds" and which does not included retail leased vehicles. (R1 – 13). Since retail leased vehicles are not included within the definition of "covered autos," Plaintiffs' vehicles were not "covered autos" under the Policy, and Plaintiffs, as lessees of those vehicles were not "named insureds." (*Id.*) Michigan Mutual further noted the absurdity that would result under Plaintiffs' proposed interpretation of the Policy – *i.e.*, that every person leased, assigned, or loaned a vehicle in the United States would be covered by the Policy. (*Id.*)

Michigan Mutual, however, recognizing that the *Perez* court had previously interpreted the Policy as covering retail lessees by its express terms, therefore asserted a second argument. It contended that, even if the court felt bound to adopt the *Perez* court's interpretation, the Policy should be reformed to reflect the actual intent of the only two parties to the Policy, Michigan Mutual and Ford, not to provide coverage to retail lessees. (R1 – 13).

Plaintiff Hunter responded and cross-moved for summary judgment on the coverage issue and for class certification on December 10, 1999. (R1 – 27, 29, 30). On September 24, 2002, the District Court ruled on the summary judgment motions.[6] Although the District Court agreed that the *Perez* court had improperly interpreted the Policy, it determined that as a federal court, it was bound by the state court's interpretation. (R3 – 68). However, in order to resolve Michigan Mutual's request that the Policy be reformed, the district court held a bench trial to determine Michigan Mutual's and Ford's intent with respect to the scope of coverage of the Policy. (R4 – 102). At that trial, Michigan Mutual presented live testimony from Martin Taft, Michigan Mutual's Assistant Vice-President, and Daniel Sobczynski, Ford's Director of Corporate Insurance, the two people responsible for negotiating the Policy, as well as affidavit evidence, that demonstrated that neither party to the Policy ever intended for the Policy to

[6] The District Court also denied Hunter's motion for class certification at that time. (R3 – 70).

provide UM coverage – or indeed, any coverage whatsoever – to retail lessees. (R4 – 102 – 54-55, 100, 110).

On May 7, 2003, the District Court entered its findings of fact and conclusions of law, concluding that Michigan Mutual had demonstrated by clear and convincing evidence that the plain language of the Policy – as interpreted in *Perez* and reluctantly followed by the District Court – did not reflect the mutual intent of Ford and Michigan Mutual. (R4 – 108 – 6-7). Accordingly, the court reformed the contract to exclude UM coverage for retail lessees. The court also rejected the Plaintiffs' contention that the Florida Uninsured Motorist Statute nonetheless required Michigan Mutual to provide retail lessees with UM coverage – and thereby barred reformation of the Policy – on the basis that the Policy, once reformed to match the intent of the parties, did not implicate or otherwise trigger the Florida Uninsured Motorist Statute as to Plaintiffs. (R4 – 108 – 9-10).

On appeal to the Eleventh Circuit, Plaintiffs abandoned their primary theory of the case – that the express terms of the Policy require Michigan Mutual to provide retail lessees with coverage as named insureds – and did not challenge the District Court's factual finding that Ford and Michigan Mutual intended to exclude such retail lessees from coverage. Instead, as their initial brief in this Court makes plain, their appeal focused solely on their secondary, wholly legal argument – that the Florida Uninsured Motorist Statute, section 627.727, Florida Statutes,

precluded the District Court from reforming the Policy so as to exclude retail lessees from UM coverage, regardless of the District Court's factual findings.

Plaintiffs' argument was based on Endorsement PP FO RD 01 to the Policy, which provides contingent loss and excess auto liability coverage to Ford in those cases where Ford, as the lessor/owner of a retail leased vehicle, may be liable for injuries caused by its retail leased vehicles.[7] (R4 – 105 – 3). But, as Michigan Mutual argued, that liability is contingent on the primary insurance the lessee is required to obtain under the lease being insufficient to cover any such liability. Further, the endorsement expressly limits its coverage to the "Named Insured" – a category which plainly does not include retail lessees. In fact, the endorsement explicitly states that "[n]o coverage is provided to lessees, agents, or permissive users." (*Id.*)

The Eleventh Circuit heard oral argument on November 18, 2004. On February 3, 2005, the Eleventh Circuit certified the following question to this Court:

> Does the Defendant, Michigan Mutual, have any liability to the Plaintiffs under the Policy in question, and, if so, what is the extent of that liability?

In addition, the Eleventh Circuit also listed five sub-questions that it

[7] Plaintiffs concede that Endorsement PP FO RD 01 is the only provision in the Policy that is at issue in this proceeding, *i.e.*, Plaintiffs no longer claim an entitlement to coverage under any other section of the Policy. (*See* Initial Brief and Appendix of Appellants ("Pls. Br.") at 21 n.4).

suggested this Court might deem "relevant" in answering the certified question. However, because Plaintiffs have abandoned their original argument that they are "named insureds" under the Policy and have chosen not to challenge the District Court's factual findings, sub-questions (A), (B), and (C) no longer have any relevance to this proceeding. Sub-questions (D) and (E), which deal with whether the portion of the Policy relevant to this proceeding constitutes primary or non-primary coverage and whether the Michigan Mutual and Ford complied with the requirements of section 627.727 are addressed below.

SUMMARY OF THE ARGUMENT

Although superficially complicated, this is, in many respects, a very simple case. Michigan Mutual issued Ford a policy designed to provide coverage for certain vehicles in a Ford vehicle evaluation program, open to only certain Ford management employees and retirees. That policy was not intended to provide coverage for retail lessees of Ford vehicles and, in fact, the only portion of that policy that dealt with retail leased vehicles explicitly excluded "lessees" and "permissive users" from the policy's coverage. Moreover, any individual who leased a Ford vehicle was told categorically that Ford was not providing him or her with insurance and was required – both under the lease contract and under Florida law – to acquire their own motor vehicle liability policy. Accordingly, as the District Court correctly recognized, Plaintiffs are simply not covered by the Policy, and therefore whether Michigan Mutual and Ford complied with the Florida Uninsured Motorist Statute is irrelevant as to them.

Plaintiffs, however, attempt to circumvent this outcome by arguing that, because they are lawful occupants of the leased vehicles, they are entitled to coverage under the Policy as Class II insureds despite the Policy's plain terms. But Plaintiffs' argument contorts the concept of Class II insureds beyond recognition. A Class II insured is traditionally an individual who is permitted by another person to occupy that person's motor vehicle. Although the Class II insured pays no

insurance premiums, he or she has a derivative claim under the Class I insured's policy because he or she is occupying the Class I insured's motor vehicle. In other words, the concept of Class II insurance is about extending a Class I insured's coverage to include those people (*e.g.*, passengers, employees) that the Class I insured allows to use his or her vehicle.

This concept, however, is not consistent with the long-term lessor-lessee relationship. While the lessor is technically permitting the long-term lessee to occupy the leased vehicle, in truth the leased vehicle is essentially the lessee's vehicle. In short, when lessees are driving their leased vehicles, they are not being permitted to use others' vehicles – ***they are driving their own cars.*** Accordingly, permitting Plaintiffs to invoke Class II insured status to avoid the Policy's plain terms will serve none of the purposes behind Class II coverage. Instead, it will provide retail lessees with a windfall, allowing them to use their essentially permanent Class II status vis-à-vis the lessor to obtain Class I coverage without paying for it. Plaintiffs' end-run around the Policy's express terms – and their own lease agreements' express terms – therefore should not be countenanced.

But even if Plaintiffs are entitled to Class II insured status, they still have no valid claim to UM benefits against Michigan Mutual. As Plaintiffs concede, the portion of the Policy relevant to retail leased vehicles, and thus to this proceeding, is Endorsement PP FO RD 01, which provides only contingent loss and excess

auto liability coverage. As the Policy itself makes clear, this coverage is non-primary coverage – it does not attach upon the insured incurring liability, but rather comes into play only when the lessees' own primary liability policy fails or is exhausted. It is well established that exclusions of UM coverage from non-primary liability policies are governed by the requirements of section 627.727(2) and that those requirements are satisfied as long as the insured is aware of the availability of UM coverage. Because the Policy on its face demonstrates that Ford was aware that it could obtain UM coverage under the Policy if it so wished, the Florida Uninsured Motorist Statute poses no bar to Michigan Mutual's and Ford's decision not to provide UM coverage under endorsement under Endorsement PP FO RD 01.

Accordingly, the District Court was wholly correct in concluding that there was nothing in the Florida Uninsured Motorist Statute that entitled Plaintiffs to UM coverage under the Policy. The certified question should therefore be answered in the negative with this Court indicating that Michigan Mutual has no liability to Plaintiffs for UM benefits.

ARGUMENT

I. BECAUSE PLAINTIFFS ARE NOT COVERED UNDER THE POLICY, THE FLORIDA UNINSURED MOTORIST STATUTE HAS NO BEARING ON THIS CASE.

As an initial matter, section 627.727, Florida statutes, is inapplicable to this case because Plaintiffs cannot claim coverage of any sort under the Policy. The purpose of UM coverage "is to place the insured motorist in the same position with regard to liability insurance when he is injured by an uninsured motorist as the insured motorist would have been in if the uninsured motorist had obtained liability insurance." *Pena v. Allstate Ins. Co.*, 463 So. 2d 1256, 1258 (Fla. 3d DCA 1985). In other words, it is to protect insured people against the bad choices of others – to prevent an injured party from being subject to extraordinary expenses because another party failed to properly insure his or her vehicle. *See Bulone v. United Servs. Auto. Ass'n*, 660 So. 2d 399, 404 (Fla. 2d DCA 1995) ("The goal of this coverage was to assure that families had protection to satisfy judgments or claims when the negligent operator of a car did not comply with financial responsibility laws."). To achieve this end, the Florida Uninsured Motorist Statute requires that Floridians be given the opportunity to acquire UM coverage at the same time they purchase liability insurance. Indeed, because Florida law favors the use of UM coverage, the law makes the provision of such coverage the default and – depending on the type of policy – imposes various requirements before a

policyholder can opt-out of obtaining UM coverage.

But the requirements of the Florida Uninsured Motorist Statute only become relevant if a party is first able to claim to be covered by a liability policy. *See Government Employees Ins. Co. v. Douglas*, 654 So. 2d 118, 120 (Fla. 1995) (noting that "UM coverage is unavailable if liability coverage is inapplicable to a particular individual") (quotation omitted). Simply put, section 627.727 creates a presumption that a party who obtains liability coverage also will obtain UM coverage. That means that the existence of a liability policy is a precondition to the operation of section 627.727 – unless a party can assert coverage under the liability portion of a policy, he or she lacks a basis for claiming UM coverage under the policy.

Under Florida law, an individual seeking coverage under a particular motor vehicle insurance policy may assert his or her claim either as a Class I insured or as a Class II insured. The distinction between these two classes of insureds is well established in Florida law. Class I insureds are individuals who are the named insureds (or their immediate family members) under a liability policy, *i.e.*, they are the individuals for whom the liability policy for the vehicle in question has been obtained. *See Bulone*, 660 So. 2d at 400 n.1 ("Class I includes the named insured and [the] resident family members. Class I uninsured motorist coverage protects the family of the person who purchased and paid for the policy."). In contrast,

Class II insureds are third-party beneficiaries of liability policies – their claim of coverage under a liability policy derives from the fact that they have been permitted to occupy a covered vehicle by a Class I insured. *Travelers Ins. Co. v. Warren*, 678 So. 2d 324, 326 n.2 (Fla. 1996) ("[C]lass II insureds are lawful occupants of the insured vehicle who are not named insureds or resident relatives of named insureds. Class II insureds do not pay for UM coverage under the named insureds' policy. Rather, class II insureds are essentially third party beneficiaries to the named insureds' policy.").

Thus, for Plaintiffs to assert a claim to UM coverage under the Policy, they must be entitled to coverage under the Policy as either a Class I or Class II insured. Plaintiffs, however, cannot qualify for either status. Accordingly, Plaintiffs have no grounds for seeking UM coverage under the Florida Uninsured Motorist Statute.[8] *See Auto Owners Ins. Co. v. Potter*, 774 So. 2d 859, 860 (Fla. 4th DCA

[8] In attempting to refute this point, Plaintiffs devote a significant portion of their brief to asserting that (a) Endorsement PP FO RD 01 is a motor vehicle policy and (b) that all motor vehicle policies must comply with section 627.727. (*See* Pls. Br. at 27-32). But this argument misses the point. No one disputes the fact the Policy is a motor vehicle policy, but that fact is not relevant to the matter at issue in this proceeding. Rather, the relevant issue is whether Plaintiffs fall within the scope of the Policy. Motor vehicle policies need to comply with section 627.727, but only with respect to individuals who are covered under the Policy. If an individual is expressly excluded from liability coverage by a particular motor vehicle policy, then, as the District Court recognized, whether the policy was obtained in compliance with section 627.727 is indeed irrelevant with respect to that individual – he can't claim insurance benefits either way. In short, Plaintiffs attack a straw man in asserting that the District Court found section 627.727 inapplicable

2000) (finding that because "the liability provision excluded coverage, the concomitant exclusion from uninsured motorist's coverage" was warranted).

A. Plaintiffs Cannot Assert A Claim For Coverage Under The Policy As Class I Insureds.

Plaintiffs do not – and, given the unchallenged findings of the District Court, cannot – claim to be Class I insureds under the Policy. As previously noted, the only portion of the Policy that applies to retail leased vehicles is Endorsement PP FO RD 01, which provides excess and contingent liability coverage to Ford in those circumstances where Ford might be liable for injuries caused by Ford retail leased vehicles. (R4 – 105 – 3). That endorsement, however, specifically states that "[n]o coverage is provided to ***lessees***, ***agents, or permissive users***." (*Id.* (emphasis added)). Thus, Ford – in negotiating this Policy with Michigan Mutual – explicitly identified Plaintiffs and other lessees and permissive users as parties who were not receiving coverage under the Policy. This exclusion is hardly surprising given that Ford made clear to the lessees in their lease agreements that it was not providing them with insurance. Accordingly, as Plaintiffs themselves readily concede, to the extent they can assert a claim for coverage under the Policy, they can only do so as Class II insureds.

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generally to the Policy. The District Court concluded no such thing. Instead, the District Court recognized that section 627.727 was inapplicable to Plaintiffs because they were expressly excluded as insureds under the Policy.

B. Plaintiffs Cannot Assert A Claim For Coverage Under The Policy As Class II Insureds.

Plaintiffs' efforts to claim Class II insured status, however, are ultimately no more availing. Plaintiffs assert that they qualify as Class II insureds under the Policy because they are "occupants" of their retail leased vehicles. But such an argument radically distorts the concept of Class II insureds. Class II insureds are individuals who gain the benefit of another's insurance policy, without paying for that coverage, because they have been permitted to "occupy" a motor vehicle by the vehicle's owner. Lessees, however, are not mere "occupants" of their leased vehicles – they are, for all intents and purposes, the ***owners*** of their leased vehicles. Indeed, the Florida financial responsibility recognizes them as such. § 324.021(9), Fla. Stat.; *Aetna Cas. & Sur. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992). Accordingly, allowing Plaintiffs to exploit the fact that a lessee of a vehicle is (by virtue of the nature of lease agreements) necessarily an individual permitted to occupy the vehicle by the lessor/owner so as to obtain free coverage for what is essentially their own vehicle runs contrary to basic principles of Florida insurance law and should not be permitted.

Simply put, the effect of accepting Plaintiffs' argument would be to render Endorsement PP FO RD 01's exclusion of lessees and permissive users – indeed, any attempt by a lessor to exclude lessees and permissive users from a liability policy – meaningless. Because the whole point of a lease agreement is to grant the

lessee the right to occupy and use the leased vehicle, lessors would be unable to purchase liability coverage for the vehicles they lease without also providing coverage to lessees. Any lessee excluded by the lessor would merely relabel himself or herself as an "occupant" of the leased vehicle and assert access to the supposedly denied coverage as a Class II insured. Thus, pursuant to Plaintiffs' argument, every long-term lessee would necessarily qualify as a Class II insured and would be entitled to coverage under the lessor's liability policy, regardless of what the terms of the lease agreement or the liability policy actually provided. Accordingly, lessors would have no choice but to obtain insurance for their lessees in Florida, providing either a windfall to those lessees or, more likely, raising the cost of retail leases in Florida.[9]

Indeed, Plaintiffs' proposed interpretation of the Florida Uninsured Motorist Statute is contrary to the fundamental purpose of that statute. As noted previously,

[9] Moreover, Plaintiffs' proposed construction of the Policy would substantially distort the automotive insurance process. Class II insureds are not supposed to be regular claimants under the Policy from which they derive their Class II status; rather, the very nature of the category makes it clear that Class II insureds should be individuals whose connection to the insured vehicle and the relevant policy is tangential at best. Long-term lessees, however, are full-time possessors of leased vehicles – in fact, for all intents and purposes, leased vehicles are ***their*** vehicles. Indeed, this reality is categorically acknowledged in other parts of Florida insurance law. For example, the financial responsibility statute defines lessees who lease their vehicles for more than one year as the sole owner of the leased vehicles – the lessor is expressly exempt from ownership status under such circumstances. § 324.021(9), Fla. Stat.; *Aetna Cas. & Sur. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992).

the point of the statute is to protect motorists from others' irresponsibility. By mandating that UM insurance be made available to motorists and by setting heightened standards for disclaiming such coverage, section 627.727 helps ensure that injured motorists are protected even when their injuries are caused by a driver who has irresponsibly and/or illegally failed to properly insure his or her vehicle. In short, the statute makes sure that innocent motorists do not bear the costs of others' poor decision-making. *See Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229, 238 (Fla. 1971) ("[The Uninsured Motorist Statute] was enacted to provide relief to innocent persons who are injured through the negligence of the uninsured motorist . . .").

What the statute is not supposed to do, however, is protect people from their own bad choices. Yet, under Plaintiffs' proposed interpretation, that is precisely what will occur. Under both their lease agreements and Florida law, Plaintiffs were required to obtain liability coverage for their retail leased vehicles. Moreover, pursuant to section 627.727, Plaintiffs must have been offered the chance to acquire as much UM coverage as they needed in the course of purchasing their primary liability insurance. Accordingly, Plaintiffs are ultimately before this Court because they either chose not to purchase UM coverage or chose not to purchase enough coverage.

In other words, having failed to acquire sufficient UM coverage under their

own policy to meet their needs, Plaintiffs are looking to this Court to bail them out of their own poor decision-making. But that is not what the Florida Uninsured Motorist Statute does, and Plaintiffs should not be permitted to contort its provisions to avoid the consequences of their own choice and obtain a windfall from Michigan Mutual. Plaintiffs were deliberately excluded from coverage under the Policy – and nothing in the Florida Uninsured Motorist Statute requires that they be given UM coverage under that Policy.[10]

II. EVEN IF PLAINTIFFS ARE DEEMED TO BE CLASS II INSUREDS ENTITLED TO TAKE ADVANTAGE OF THE FLORIDA UNINSURED MOTORIST STATUTE, MICHIGAN MUTUAL AND FORD FULFILLED THE STATUTORY REQUIREMENTS FOR REJECTING UNINSURED MOTORIST COVERAGE FOR RETAIL LEASED VEHICLES.

Even assuming that Plaintiffs are able to claim the benefit of section 627.727, they cannot claim an entitlement to UM coverage because Michigan

[10] In arguing to the contrary, Plaintiffs claim that Florida law does not permit UM coverage to be extended to Class I insureds without also extending the same coverage to Class II insureds. (Pls. Br. at 35-38). But that begs the question. Fundamentally, the issue in this proceeding is whether lessees can claim Class II insured status by virtue of being "lawful occupants" of the lessors' vehicles, even when they have been explicitly excluded from the insurance policy upon which they are asserting Class II coverage. If such lessees are Class II insureds, then they are entitled to the coverage inherent in that category. But whether they are capable of asserting such a status must first be determined and, as Michigan Mutual has noted, permitting them to do so would be deleterious both to the automotive leasing industry and to Florida's uninsured motorist insurance regime. Moreover, as shown below in Section II, Ford is not seeking to discriminate between Class I and Class II insureds with respect to UM coverage since Ford, as the Class I insured, did not obtain UM coverage for itself with respect to the retail lease vehicles.

Mutual and Ford properly excluded that coverage for retail leased vehicles from the Policy. As noted above, the only portion of the Policy that applies to retail leased vehicles is Endorsement PP FO RD 1, which provides Ford with contingent loss and excess auto liability coverage for such vehicles. Coverage that is contingent and excess is, by definition, not primary – it attaches only when an underlying primary coverage fails. Accordingly, in determining whether Ford and Michigan Mutual complied with the requirements of the Uninsured Motorist Statute for excluding UM coverage, it is the provision of the statute that applies to non-primary coverage – section 627.727(2) – that controls.

This point is significant, for this Court has held on multiple occasions that the requirements for excluding UM coverage are less stringent for non-primary policies than they are for primary policies. *See Travelers Ins. Co. v. Quirk*, 583 So. 2d 1026, 1029 (Fla. 1991). As Justice Wells recognized in his concurring opinion in *Strochak v. Federal Insurance Company*, 717 So. 2d 453, 457 (Fla. 1998), "The [Uninsured Motorist] statute was [in 1984] supplemented by amendment for the obvious purpose of distinguishing between primary motor vehicle liability policies and excess liability policies in respect to the requirement that policies providing bodily injury liability insurance were also required to provide uninsured motorist coverage unless affirmatively rejected." Unlike primary policies, in which UM coverage can only be disclaimed by knowing rejection, an insurer complies with

the statutory requirements of section 627.727 when issuing a non-primary liability policy merely by making sure that the insured is aware of the availability of UM coverage. *See Tres v. Royal Surplus Lines Ins. Co.*, 705 So. 2d 643, 645 (Fla. 3d DCA 1998); *see also Strochak*, 717 So. 2d at 457 (Wells, J., concurring) ("The sum of the 1984 addition to subdivision (2) of the statute was to eliminate the affirmative rejection requirement as applying to excess policies and to substitute the requirement that uninsured motorist coverage be made available to a purchaser of an excess liability policy.").

Thus, all that matters in the context of non-primary policies is whether the insured is aware that it can obtain UM coverage if it wishes. If that condition is satisfied, then the statutory requirements of the Uninsured Motorist Statute have been met. *See Tres*, 705 So. 2d at 645 ("As Con-Struct already had the knowledge that Royal's section 627.727(2) notice would have given it, any such notice by Royal to Con-Struct would have been surplusage. The ultimate intention of the statute – making known to Con-Struct the availability of non-primary UM coverage so it could make a choice – was satisfied."); *Ellman v. Occidental Fire & Cas. Co.*, 763 So. 2d 1133, 1133 (Fla. 4th DCA 1999); *see also Strochak*, 717 So. 2d at 457 (Wells, J., concurring) (interpreting "the requirement of availability as part of the policy application as requiring the insurer to make the purchaser aware of the availability of uninsured motorist coverage").

In this case, it is abundantly clear that Ford was aware that it could obtain UM coverage for retail leased vehicles. In fact, under the terms of the Policy, Ford specifically obtained UM coverage (as well as primary liability coverage) with respect to the vehicles leased by its management employees under Ford's vehicle evaluation program. (R4 – 105– 4-11). Thus, it is plain from the face of the Policy that Ford knew that it could obtain UM coverage for the vehicles covered by the Policy, and chose to obtain such coverage for some vehicles and not others.[11] Accordingly, because Ford clearly knew that it had the option of purchasing UM coverage for the vehicles covered by Endorsement PP FO RD 01 if it so wished, the requirements of the Uninsured Motorist Statute were satisfied. *See Tres*, 705 So. 2d at 645 ("Assuming that no UM availability notice was given by Royal to Con-Struct, nonetheless the record reflects that Con-Struct was aware of Royal's duty to offer UM coverage but that Con-Struct deliberately rejected any non-primary UM coverage because of its cost."). And therefore it was entirely

[11] Ford's awareness of the availability of UM coverage is further illustrated by the testimony of Daniel Sobczynski, the individual who negotiated the Policy on Ford's behalf. Mr. Sobczynski testified at trial that not only was he aware of the availability of UM coverage, but also that he was aware of the requirements of various states' uninsured motorist statutes generally. (*See* R4 – 102 – 56, 72-73, 80-81). Indeed, as Mr. Sobczynski's testimony makes clear, Ford was wholly aware of the various types of insurance arrangements into which it could enter and it deliberately chose the arrangement that it believed best served its needs. Moreover, it makes sense that Ford would not want UM coverage for itself for the retail leased vehicles since UM coverage protects the driver of a vehicle and Ford, as the lessor, does not drive the leased vehicles.

permissible for Michigan Mutual and Ford to exclude UM coverage for the retail leased vehicles covered by the contingent loss and excess liability coverage portion of the Policy.[12]

Plaintiffs, however, assert that Michigan Mutual and Ford were required to meet the higher standards of section 627.727(1) of the Uninsured Motorist Statute. Plaintiffs contend that section 627.727(2) only applies to "umbrella," or "true excess" policies, and that therefore that provision has no applicability to a contingent loss and excess liability portion of the Policy. But Plaintiffs' argument ignores the plain language of section 627.727(2), which clearly states that "the provisions of subsection (1) . . . do not apply to any policy ***which does not provide***

[12] Indeed, Michigan Mutual arguably properly excluded UM coverage even if section 627.727(1) controlled. Although the absence of a written rejection form deprives Michigan Mutual of the presumption that it waived UM coverage, it can still satisfy its statutory obligations by demonstrating that Ford "orally waived the statutory requirement of a written rejection by knowingly selecting a lesser limit or by knowingly rejecting UM coverage." *Liberty Mut. Ins. Co. v. Ledford*, 691 So. 2d 1164, 1166 n.3 (Fla. 2d DCA 1997) (quoting *Chmieloski v. National Union Fire Ins. Co.*, 563 So. 2d 164, 166 (Fla. 2d DCA 1990)). Furthermore, Michigan Mutual can carry this burden by providing evidence of its routine business practice regarding negotiations, *i.e.*, how the parties generally discussed the scope of coverage under Ford's insurance policies, specifically how they addressed UM coverage. If it is clear that, in light of the negotiations regarding the Policy and the parties' general practice, Ford deliberately rejected UM coverage with respect to retail lessees, then Michigan Mutual has satisfied the requirements of section 627.727(1) as well as section 627.727(2). And, given Mr. Sobcyznski's testimony about Ford's typical negotiations with Michigan Mutual, that is clearly what occurred in this case. However, since this issue was not addressed by the District Court, if this Court determines that section 627.727(1) applies to the coverage provided in Endorsement PP FO RD 01, then the matter should be sent back to the District Court for further factual findings.

primary liability insurance." (emphasis added). Thus, the distinction between subsection (1) and subsection (2) is not a distinction between umbrella and non-umbrella policies, but it is rather a distinction between primary and non-primary policies. *See Tres*, 705 So. 2d at 645 ("First we note that section 627.727(2), Florida Statutes (1993), which deals with non-primary policies as here involved, differs substantially from section 627.727(1), which deals with primary policies[.]").

"Primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability." *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 178 Cal. Rptr. 908, 910 (Cal. Ct. App. 1981); *Whitehead v. Fleet Towing Co.*, 442 N.E.2d 1362, 1366 (Ill. Ct. App. 1982). In other words, a primary liability policy provides the first layer of coverage to the insured in the event of the insured's liability. Although a primary liability policy may be affected by the existence of another primary liability policy (by virtue of, *inter alia*, an "other insurance" clause, *see infra*), fundamentally the only event necessary to trigger its application is the insured incurring liability.

Given this criteria, it is clear that the contingent loss and excess auto liability coverage at issue here does not provide primary liability coverage. Pursuant to the unambiguous language of Endorsement PP FO RD 01, "contingent loss" coverage

only attaches when "the lessee's underlying ***primary insurance*** limit is inadequate." (R4 – 105 - 3) (emphasis added). And excess liability coverage is by definition "coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted." *King v. Guaranty Nat'l Ins. Co.*, 440 So. 2d 607, 608 (Fla. 3d DCA 1983) (emphasis removed) (citation omitted). In short, Ford's contingent loss and excess auto liability coverage only becomes applicable once a retail lessee's primary policy fails, either because the policy limit was reached or because the lessee did not fulfill his or her statutory and contractual duties to obtain a primary policy in the first instance. Accordingly, the Policy is a non-primary policy to which section 627.727(1) does not apply.

None of the cases cited by Plaintiffs are to the contrary. In support of their contention that section 627.727(2) only applies to umbrella policies, Plaintiffs cite a series of cases – *Travelers Insurance Co. v. Quirk*, 583 So. 2d 1026 (Fla. 1991); *Ferreiro v. Philadelphia Indemnity Insurance Co.*, 816 So. 2d 140 (Fla. 3d DCA 2002); *Tres v. Royal Surplus Lines Insurance Co.*, 705 So. 2d 643 (Fla. 3d DCA 1998); *Weesner v. United Services Automobile Ass'n*, 711 So. 2d 1192 (Fla. 5th DCA 1998); *Continental Insurance Co. v. Howe*, 488 So. 2d 917 (Fla. 3d DCA

1986)[13] – in which section 627.727(2) was applied to an umbrella or excess policy. But just because the provision applies to umbrella policies does not mean that it only applies to umbrella policies.[14] And indeed none of the decisions cited by Plaintiffs contain such a categorical limitation on the scope of section 627.727(2). In fact, several of them clearly indicate that umbrella policies are merely one of multiple types of non-primary policies. *See, e.g., Weesner*, 711 So. 2d at 1193 (noting that "[w]e find subsection (1) of [the Uninsured Motorist Statute] inapplicable to non-primary policies ***such as*** the umbrella policy involved in this appeal") (emphasis added).

Plaintiffs also contend that the Policy is actually a primary policy because it can potentially offer "first dollar" coverage. (Pls. Br. at 39 – 41). But this is true of all excess policies since they necessarily provide "first dollar" coverage in situations in which covered liability is incurred after the limits of the underlying policy have been exhausted. Plaintiffs also attempt to support their position by pointing out that primary policies can provide excess coverage in certain circumstances through the operation of an "other insurance" clause. But this

[13] It should be noted that *Continental Insurance Co. v. Howe* was decided under Rhode Island's, not Florida's, uninsured motorist statute. Accordingly, that case has no bearing on the proper application of section 627.727(2).

[14] Plaintiffs assert that Endorsement PP FO RD 01 must provide primary coverage because the endorsement does not define the specific dollar amount of the underlying primary coverage. (Pls. Br. at 40). But of course the reason the amount is not specified is because the underlying insurance is purchased by the lessees and the lessees could choose to purchase different amounts of coverage.

observation is irrelevant to this case because Endorsement PP FO RD 01 expressly describes the coverage for the retail leased vehicles as excess – not as primary coverage subject to an "other insurance" clause.

In short, the fact that the Policy may sometimes provide "first dollar" coverage for the retail leased vehicles (*e.g.*, if a retail lessee fails to fulfill his or her statutory and contractual obligations to obtain primary liability insurance) has no bearing on its status as a non-primary policy. Instead, what is determinative is whether coverage under the Policy attaches immediately for the insured's liabilities. And indeed the cases cited by Plaintiffs themselves make this point plainly. *See, e.g., Fireman's Fund Ins. Co. v. CNA Ins. Co.*, 862 A.2d 251, 266 (Vt. 2004) ("A primary policy with an 'other insurance' clause is a device used by the insurer to limit liability where other primary insurance exists. . . . This does not mean, however, that like the 'true' excess policy, liability attaches only if the primary policy is exhausted. Rather, where a primary policy is secondarily liable because of an 'other insurance' clause, liability attaches at the moment of loss."); *Bosco v. Bauermeister*, 571 N.W.2d 509, 516 (Mich. 1997) ("As soon as the insured experiences the bodily injury or property damage described in the policy language, the carrier's liability for those losses under the policy attaches. On the other hand, under an umbrella policy, liability will never automatically attach upon the occurrence of an insured event."). Therefore, because Michigan Mutual's

liability under the Policy does not automatically attach upon the occurrence of an insured event, *i.e.*, an accident involving a Ford retailed leased vehicle, the Policy is a non-primary policy and therefore is governed by section 627.727(2).

CONCLUSION

Ultimately, this is a straightforward case. Plaintiffs are neither Class I nor Class II insureds under the Policy, and therefore they have no claim to any benefits under its provisions, UM or otherwise. Moreover, even if they were deemed to be Class II insureds under the Policy, they would not be able to obtain UM benefits because Michigan Mutual and Ford expressly excluded UM coverage in accordance with section 627.727(2) from the only portion of the Policy that addresses retail leased vehicles. Accordingly, for the reasons set forth above, this Court should answer the certified question in the negative and further indicate that Michigan Mutual is not liable for UM benefits to Plaintiffs.

To the extent this Court wishes to address the five sub-questions listed by the Eleventh Circuit, it should answer sub-questions (A)-(C) in the negative, because Plaintiffs do not challenge the District Court's finding that they are not named insureds under the Policy; it should answer sub-question (D) in the negative, because Michigan Mutual did not issue primary coverage to Ford that is applicable to retail leased vehicles, *see infra* Section II; and it should answer sub-question (E) in the negative, because while Michigan Mutual issued Ford

contingent loss and excess auto coverage in connection with retail leased vehicles, the parties properly excluded UM coverage from that portion of the Policy, *see infra* Section II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this ____ day of May, 2005 to: **Christopher J. Lynch, Esquire**, Hunter, Williams & Lynch, P.A., 66 West Flagler Street, 8th Floor, Concord Building, Miami, Florida 33130; and **Robert Josefsberg, Esquire**, Podhurst, Orseck, et. al., Co-Counsel for Appellants, 25 West Flagler Street, Suite 800, Miami, Florida 33130.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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