CASE NO: SC 05-214

IN THE SUPREME COURT OF FLORIDA

MARK ANDREW TOBIN, *Appellant* vs.
MICHIGAN MUTUAL INSURANCE COMPANY, *Appellee*,

CRAIG MACKAY, individually and as Personal Representative of the ESTATES OF ANA GUTIERREZ MACKAY and JONANTHAN PATRICK MACKAY, *Appellant* vs. MICHIGAN MUTUAL INSURANCE COMPANY, *Appellee*,

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HELEN J. HUNTER, *Appellant* vs. MICHIGAN MUTUAL INSURANCE COMPANY, *Appellee*

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

Consolidated Case No: 03-12737-JJ

INITIAL BRIEF AND APPENDIX OF APPELLANTS

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INTRODUCTION

This appeal centers on Appellants' attempts to obtain uninsured/underinsured motorist, or UM/UIM coverage, under liability policies issued by MICHIGAN MUTUAL, covering vehicles leased by Ford Motor Credit Corporation, ("FMCC"), and its subsidiary, Jaguar Motor Credit Corporation, ("JMCC"). The Eleventh Circuit's certification to this Court, presents the following issues for consideration:

(1) Whether MICHIGAN MUTUAL, in issuing a motor vehicle liability policy insuring the aforementioned vehicles, was obligated to comply with the Florida Uninsured Motorist Statute - §627.727 Fla. Stat;

(2) Whether HELEN HUNTER, ("HUNTER"), MARK TOBIN, ("TOBIN"), and ANA GUTIRREZ MACKAY and JONATHAN PATRICK MACKAY, (referred to individually by name or collectively as "MACKAY"), as occupants of such leased vehicles, are entitled to UM/UIM coverage under the MICHIGAN MUTUAL policies for any injuries sustained as a result of the negligence of an uninsured/underinsured motorist; and accordingly,

(3) Whether the district court erred in reforming the MICHIGAN MUTUAL policies to exclude UM/UIM coverage for occupants of the aforementioned vehicles.

STATEMENT OF THE CASE

A. Nature Of The Case[1]

The present consolidated actions arise out of three separate automobile accidents. Specifically, on March 24, 1996, TOBIN was driving a vehicle leased from JMCC when he was involved in a collision with an uninsured motorist in Miami - Dade County, Florida. On February 18, 1997, HUNTER was driving a 1997 Ford Explorer leased from FMCC, when she was involved in a collision with an uninsured motorist in Palm Beach County, Florida. Finally, on October 4, 1997, ANA GUTIERREZ MACKAY and JONATHAN PATRICK MACKAY, were fatally injured in a vehicle leased from FMCC, when it collided with an uninsured motorist in Miami-Dade County, Florida. (RE - 1).

TOBIN, HUNTER and MACKAY seek UM/UIM motorist coverage under motor vehicle liability policies issued to FMCC and JMCC covering their fleet of leased vehicles registered or principally garaged in Florida.[2] The Appellants claim

[1]Since the three appeals were consolidated by the Eleventh Circuit, there are three Records. Accordingly, references to the Records in the respective cases - Tobin, Hunter or Mackay, will be by the symbol "R" followed by the first letter of the respective party, i.e., R(T), R(H), or R(M). When the referenced material is included in the Record Excerpts, which were filed in the Eleventh Circuit, the designation "RE" is used. Finally, references to the Appendix to this brief will be by the symbol App. ___, and all emphasis is supplied by counsel unless otherwise indicated.

[2]Hunter and Mackay seek coverage under the same fleet policy, while Tobin seeks coverage under an earlier version of the policy. For purposes of this appeal the two policies are identical and relevant portions of the policy our attached hereto as

that as a result of MICHIGAN MUTUAL'S failure to comply with requirements of the Florida Uninsured Motorist Statute, §627.727, the MICHIGAN MUTUAL policies must be deemed to provide UM/UIM coverage for their benefit as occupants of FMCC and JMCC leased vehicles.

B. Course Of Proceedings

Three separate actions seeking declarations of entitlement to UM/UIM coverage were filed by the Appellants. On May 27, 1999, TOBIN filed an action in the United States District Court for the Southern District of Florida; on April 20, 1999, HUNTER filed an action in the United States District Court for the Southern District of Florida; and on October 3, 2002, MACKAY also filed such an action. (RE-1). The MACKAY action was originally filed in Miami - Dade County Circuit Court but on November 27, 2002, the action was removed to the United States District Court for the Southern District of Florida. (R (M) 1-1).

On September 9, 1999, MICHIGAN MUTUAL moved for summary judgment in the HUNTER action, contending that UM/UIM coverage was not available. (R (H) 1 - 13). On December 10, 1999, HUNTER followed with a cross-motion for summary judgment on coverage. (R (H) 1 -27, 29).

App. 1. While App. 1 appears to indicate that there is a single Personal Auto Policy Supplement, including an endorsment, App. 1, pg. 4, covering retail lease vehicels, the gravamen of MICHIGAN MUTUAL's argument is that the latter endorsement is, in effect, a separate policy, not governed by the remaining provisions of the Personal Auto Policy Supplement.

On January 4, 2000, the TOBIN action was transferred to the calendar of the Honorable Adalberto Jordan who was presiding over the HUNTER action, and on July 26, 2000, the court stayed proceedings in the TOBIN action pending a resolution of the summary judgment motions filed in the HUNTER action. (R (T) 1 - 20, 25).

On September 24, 2002, the district court granted HUNTER's motion for summary judgment finding that the MICHIGAN MUTUAL policy, by its express terms, provided UM/UIM coverage for the benefit of HUNTER. At the same time, the court also denied, in part, MICHIGAN MUTUAL's claim that the policy should be reformed to exclude such coverage, indicating that the issue of whether such a reformation should take place presented factual questions. (R (H) 3 - 68).

On December 3, 2002, the MACKAY action was also transferred to Judge Jordan's division, and on January 16, 2003, the court entered a scheduling order consolidating the TOBIN, HUNTER, and MACKAY actions for trial of the reformation issue. (R (M) 1 -10; R (H) 3 – 83; R (T) 1 - 37). In the same Scheduling Order, the court indicated that while the MACKAY action was only recently filed, it was indistinguishable from TOBIN and HUNTER "as far as legal issues are concerned." Thus, the court indicated that its prior order in HUNTER should apply to both TOBIN and MACKAY. (R (M) 1- 10 - 2; R (H) 3 - 83 - 2; R (T) 1 - 37 - 2).

On April 22, 2003, the parties presented evidence and arguments at a bench trial on the issue of reformation. On May 7, 2003, the district court issued its Findings of Facts and Conclusions of Law ruling in favor of MICHIGAN MUTUAL, reforming the MICHIGAN MUTUAL policies to exclude UM/UIM coverage, and rejecting the Plaintiffs' arguments, that as a result of MICHIGAN MUTUAL's violation of §627.727 Fla. Stat., the policies must be deemed to provide UM/UIM coverage. (App. 2; RE - 55).

TOBIN, HUNTER, and MACKAY then appealed the district court's judgment of no coverage to the Eleventh Circuit Court of Appeals. The Eleventh Circuit entertained oral argument in the consolidated cases on November 18, 2004, and on February 3, 2005, the Eleventh Circuit issued its opinion certifying this cause to this Court. (App. 3).

C. Statement Of Facts

As indicated above, TOBIN, HUNTER, and MACKAY have sued MICHIGAN MUTUAL, claiming entitlement to UM/UIM coverage, under two policies issued to FMCC and JMCC. On September 24, 2002, the district court granted summary judgment in favor of HUNTER on the issue of coverage, concluding that it was bound to follow the Florida Third District Court of Appeal decision in *Perez v. Michigan Mutual Ins. Co.*, 723 So.2d 849 (Fla. 3rd DCA

1999).[3] The court additionally concluded, however, that there was an issue of fact as to whether reformation of the policy was proper because it did not conform to the intent of the contracting parties, Ford and MICHIGAN MUTUAL. (R (H) 1 - 27).

Following the entry of summary judgment in favor of HUNTER, both MICHIGAN MUTUAL and HUNTER filed motions for reconsideration. In its motion, MICHIGAN MUTUAL contended that the lower court was not bound to follow the Third District's decision in *Perez* since there were indications that were this Court to address the question at issue in *Perez*, it would have ruled differently. (R (H) 3-71).

In her motion for reconsideration, HUNTER contended that she was entitled to summary judgment on the issue of reformation since Florida law, which the Parties agreed was applicable, (App. 3, pg. 15), requires an insured to prove that the insured waived UM/UIM coverage following an affirmative offer of said coverage. HUNTER further asserted that even if the endorsement covering the retail lease vehicles was considered to be a separate policy, since no such offer

[3]In the *Perez* action, the Third District concluded that a MICHIGAN MUTUAL policy, identical to those in question here, provided UM/UIM coverage, by its express terms, for the benefit of FMCC and JMCC lessees, as named insureds. Both TOBIN and HUNTER were lessees while the MACKAYS were simply occupants of such a leased vehicle. Because it was faced with the *Perez* decision, MICHIGAN MUTUAL sought reformation in the present action.

occurred prior to the issuance of that policy by MICHIGAN MUTUAL, any attempted reformation of the policy based on mutual mistake, so as to exclude such coverage, would violate Florida law. (R (H) 3 - 74).

HUNTER's contention that MICHIGAN MUTUAL had violated Florida law in issuing its policies, was based on admissions from Daniel Sobczynski, the Ford representative who negotiated the purchase of the MICHIGAN MUTUAL policy. In his deposition, Sobczynski testified that prior to the issuance of the MICHIGAN MUTUAL policy there was no rejection of UM/UIM coverage for the Florida retail lease vehicles. (R (H) 1 - 30 - 11, 12).

On November 21, 2002, the district court entered an order denying both MICHIGAN MUTUAL's and HUNTER's motions for reconsideration. In rejecting HUNTER's motion, the court indicated that if at trial, Ford and MICHIGAN MUTUAL could prove that they did not intend to provide coverage to retail lessees then HUNTER would not be a named insured under the MICHIGAN MUTUAL policy, and Florida law requiring UM/UIM coverage would not apply. (R (H) 3 - 80).

Following the court's denial of the motions for reconsideration, the TOBIN, HUNTER and MACKAY actions were consolidated for a bench trial on the reformation issue. In its order consolidating the cases for trial, the court once again rejected HUNTER's position that since it was undisputed that MICHIGAN

MUTUAL had not adhered to §627.727 Fla. Stat., **there was no triable issue presented on the question of reformation**. On this point, the court's order stated simply:

> First, I once again reject plaintiff's argument that the reformation defense must fail if the plaintiffs can demonstrate that Michigan Mutual failed to offer UM/UIM coverage without an informed rejection. That issue was resolved in the order on motion for summary judgment [D.E. 68] and again in the order on reconsideration [D.E. 80].

(R (H) 3 - 83 - 2).

On April 22, 2003, the district court conducted a bench trial on the issue of reformation. During trial, the court permitted Plaintiffs' counsel to question Martin Taft, MICHIGAN MUTUAL's representative, as to whether MICHIGAN MUTUAL offered UM/UIM coverage to Ford for its retail lease vehicles, also known as "Red Carpet" vehicles, registered or principally garaged in Florida:

> Mr. Hunter (Plaintiffs' counsel):Did your company [Michigan Mutual] offer uninsured motorist coverage to Ford?
>
> Ms. Thompson (Defense counsel): Objection, your Honor, irrelevant. You have ruled on this issue.
>
> The Court: I'am sorry: Ms. Thompson: Your Honor.

The Court: Hold on. It is not -

Ms. Thompson: I'am sorry. Thank you very much. It is amazing

Your Honor had ruled on the issue of whether or not the offer or failure to offer UM insurance was at issue in this case. You said it is not. So, consequently, we object based on relevancy.

The Court: No, if I remember correctly, that ruling is on whether or not Ford offered that to lessees. Right? Is that what I ruled on?

Ms. Thompson: Well, actually, Ford is not the party. It would be whether Michigan Mutual offered it to lessees.

The Court: Alright. To lessees. But that was not the question that was asked. Ms. Thompson? Ok.

The Court: The question was did your company offer uninsured motorist coverage to Ford?

Mr. Hunter (Plaintiffs' counsel): Yes, sir.

Ms. Thompson. Ok. Thank you, counsel. Thank you judge.

The Court: I think that is a relevant question. You can answer.

Mr. Taft. . . Those that would be covered under contingent liability - you

> understand that retail lessees, that liability (sic) is afforded on behalf of liability that Ford may have as a result of negligence of retail lessees, correct?
>
> Answer: That is correct.
>
> Question: That is the contingent liability?
>
> Answer: That is correct.
>
> Question: Alright. In connection with that coverage, you made no offer of uninsured motorist in connection with that?
>
> Answer: That is correct

(R (H) 3 - 102 - 104 - 06).

Following this inquiry, the court then questioned the witness:

> The Court: Mr. Taft, who has the obligation to offer uninsured motorist coverage?
>
> The witness: It varies by state, your Honor. For example, in the State of Ohio, there is no requirement to offer it.
>
> The Court: OK. Florida?
>
> The witness: I believe in Florida there has to be an offer.
>
> The Court: My whom?

> The witness: On the part of the insurance company. . .
>
> Question: Mr. Hunter (Plaintiffs' counsel): Well, following up on that, any liability policy issued on an automobile in many states requires a contemporaneous offer of uninsured motorist coverage, correct?
>
> Answer: In many states, yes. . .
>
> Question: In connection with this policy, it was never offered to Ford?
>
> Answer: Uninsured motorist was offered to Ford.
>
> Question: I thought we had already establish that early on with respect to the Red Carpet leasing program it was not?
>
> Answer: That is correct.

(R (H) 3 - 102 - 118 - 20).

Following the bench trial, the court requested that the Parties submit proposed findings of fact and conclusions of law. In their submission, Plaintiffs contended, based on the undisputed documentary evidence and oral testimony, that irrespective of whether or not the contracting parties had agreed not to provide coverage to retail lessees as named insureds, since there was a clear failure on the part of MICHIGAN MUTUAL to offer UM/UIM coverage equal to the liability limits of the MICHIGAN MUTUAL policy covering retail lease vehicles, any

attempts to reform the policies to exclude such UM/UIM coverage, or any conclusion that no such UM/UIM coverage was afforded, would constitute a violation of Florida law. (R (H) 3 - 106).

On May 7, 2003, the district court issued its Findings of Facts and Conclusions of Law. (App. 2). The court held that MICHIGAN MUTUAL satisfied its burden on the reformation issue by introducing clear and convincing evidence that it and Ford did not intend to provide coverage for the benefit of the Plaintiffs as named insureds. In rejecting the Plaintiffs' contention that MICHIGAN MUTUAL's admitted failure to comply with Florida law mandates a finding of UM/UIM coverage, the court indicated:

> Fifth, the Plaintiffs point out that there are no documents in evidence discussing the offer or rejection of uninsured motorist coverage for retail lessees. Because many states, including Florida, require uninsured motorist coverage to be explicitly rejected, the plaintiffs argued that Ford intended to provide such coverage to retail lessees. The fact that there are no rejection documents, however, is insignificant. The parties never intended to provide coverage to retail lessees at all. Accordingly, there was no need for them to obtain rejections of uninsured motorist coverage for the retail lessees. In other words, the absence of rejections is consistent with the intent of Ford and Michigan Mutual. Additionally, although the plaintiff

presented evidence that uninsured motorist coverage is required in several states, there is no indication that the lessor is always legally obligated to provide or offer such coverage.
(Footnote omitted).

Sixth, the plaintiffs, in their supplemental proposed findings of facts and conclusions of law, argue that the policy could not be reformed because Michigan Mutual did not obtain a signed rejection of uninsured motorist coverage from them. As discussed in previous orders, this argument does not carry the day. In relevant part, Fla. Stat. §627.727(1) provides that: "[n]o motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued. . . . unless uninsured motor vehicle coverage is provided therein." . . Once the policy is reformed, however, there is no "motor vehicle liability insurance" policy which provides bodily injury liability coverage" to retail lessees. The statute, therefore, is not triggered. As explained by the Florida Supreme Court, §627.727(1) requires that uninsured motorist coverage be offered in two instances: (1) when a motor vehicle liability insurance policy is issued; and; (2) when a motor vehicle is leased for a period of one year or longer and the lessor of the vehicle, by the terms of the lease contract provides liability coverage on the leased vehicle. *Diversified Services, Inc. v. Avila*, 606

> So.2d 364, 365 (Fla. 1992). Neither of these situations is applicable here. Once the contract has been reformed, no motor vehicle liability policy was issued with respect to lessees, and the terms of the lease agreement between Ford (or Jaguar) and the plaintiffs do not provide liability coverage. Accordingly, 627.727 is inapplicable here, and the lack of rejection by the plaintiffs of coverage is factually and legally insignificant.

(App. 2, pgs 9-10); (R. E. - 55 - 9 - 10).

The ultimate effect of the district court's ruling was that the definition of named insured under the Personal Auto Policy Supplement – "Any person to whom an automobile has been. . . leased" (App. 1, pg. 1), did not include retail lessees. In so finding, the court concluded that the language "leased" within the definition, referred to only those vehicles leased to Ford employees (App. 2, pgs 4-5). It was these vehicles, the court held, which were described by the designation "L" under the covered auto provisions of the policy. (App. 1, pg. 2). Accordingly, the court reasoned that only those "leased" vehicles were entitled to the UM/UIM coverage otherwise provided under the policy. (See Appendix 1, pg. 1, indicating UM/UIM limits of 100,000/300,000 and App. 1, pg. 9, the UM/UIM endorsement).[4]

[4] As a result of the district court's ruling, and as Michigan Mutual argued, Endorsement PP FORD – 01, providing coverage to Red Carpet vehicles, (App. 1,

Following entry of judgments in favor of MICHIGAN MUTUAL and against TOBIN, HUNTER, and MACKAY, the three judgments were appealed. (R. E. - 56). On July 2, 2003, the district court consolidated the appeals under the TOBIN case, number - 03-12737-JJ.

In its February 3, 2005 opinion, 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?

The court then indicated that in answering the aforementioned question this Court may deem the following issues relevant:

> (A) Whether Plaintiffs, Hunter, Tobin and Mackay, who leased vehicles from Ford under a retail lease program, are insured for and are entitled to UM/UIM coverage under the Auto Supplement to Defendant Michigan Mutual's policy for any injuries sustained as drivers or occupants as a result of the negligence of an uninsured/underinsured motorist?
>
> (B) If Plaintiffs are insured for and are entitled to any such UM/UIM coverage under the Auto Supplement, is that coverage primary coverage, excess coverage or both;

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pg. 4), is a stand alone endorsement unaffected by the remaining provisions - such as the UM/UIM provision - of the Personal Auto Policy Supplement.

> (C) If Plaintiffs are insured for or entitled to any such UM/UIM coverage under the Auto Supplement, whether the Auto Supplement of Defendant, Michigan Mutual's policy may be reformed to reflect the contracting parties' (Ford and Michigan Mutual) undisputed intentions not to purchase or provide such UM/UIM coverage in the Auto Supplement?
>
> (D) Whether the Defendant, Michigan Mutual in issuing primary coverage under the Auto Supplement of the policy is subject to and obligated to comply with the requirements in Fla. Stat. §627.727, and if so, whether as to primary coverage that statute applies only to Ford or the Plaintiff or both? Further, if applicable, did Defendant Michigan Mutual comply with Fla. Stat. §627.727, and, if not, what is the result of failure to comply with such statutory requirements?
>
> (E) Whether Defendant, Michigan Mutual in issuing the excess coverage under the Auto Supplement of the policy was subject to and obligated to comply with the requirements in Fla. Stat. § 627.727, and if so, whether as to excess coverage that statute applies only to Ford or to the Plaintiffs or to both? Further, if applicable did Michigan Mutual comply with Fla. Stat. §627.727, and, if not, what is the result of failure to comply with such statutory requirements.

In concluding its opinion the Eleventh Circuit then indicated:

> In certifying these questions, we do not restrict the Florida Supreme Court's consideration of the issues presented. ‘‘“This latitude extends to the Supreme Court's restatement of the issue or issues in the manner in which the answers are given’’’ *Simmons v. Sonyika*, 2004 WL 301574, *6 (11th Cir. Dec. 30, 2004) (quoting *Washburn v. Rabun*, 755 F.2d 414, 406 (11th Cir. 1985).

These proceedings follow.

SUMMARY OF THE ARGUMENT

While the factual context in which this case has arisen may be "novel," the resolution of the question posed by the Eleventh Circuit is controlled by well-established principles of Florida law.

First, in issuing liability policies covering Ford's Red Carpet leased vehicles registered or principally garaged in Florida, MICHIGAN MUTUAL was obligated to adhere to the dictates of the Florida Uninsured Motorist Statute, §627.727 Fla. Stat., by offering UM/UIM coverage equal to the liability limits of the MICHIGAN MUTUAL policies.

Second, as a result of the admitted failure to comply with the statute, there could not have been an informed rejection of UM/UIM coverage, and MICHIGAN MUTUAL is obligated to provide such coverage to the extent required by law - the liability limits of the subject policies.

And third, since Florida law mandates that UM/UIM coverage applicable to a particular vehicle must insure the vehicle's occupants, and since the Appellants, as such occupants, have standing to assert MICHIGAN MUTUAL's statutory non-compliance, the Appellants are entitled to UM/UIM coverage.

Accordingly, irrespective of whether the district court's reformation of the MICHIGAN MUTUAL policies to exclude retail lessees as named insureds under the Personal Auto Policy Supplement may have been appropriate, the district

court's conclusion that this, by necessity results in the exclusion of UM/UIM coverage from the policy insuring Red Carpet vehicles, must fail as violative of Florida law. The certified question should therefore be answered in the affirmative with the Court indicating that MICHIGAN MUTUAL is liable for UM/UIM benefits to the extent of the liability limits of the subject policies.

ARGUMENT

IN LIGHT OF MICHIGAN MUTUAL'S UNDISPUTED FAILURE TO OFFER UM/UIM COVERAGE EQUAL TO THE LIABILITY LIMITS OF ITS POLICIES INSURING FMCC'S AND JCC'S LEASED VEHICLES REGISTERED OR PRINCIPALLY GARAGED IN FLORIDA, THE COURT'S REFORMATION OF THE POLICY TO EXCLUDE SUCH COVERAGE VIOLATES FLORIDA LAW

The issue of whether a district court can properly reform MICHIGAN MUTUAL's policies to exclude lessees of FMCC and JMCC's retail leased vehicles as named insureds and the issue of whether the district court could reform the policy to exclude UM/UIM coverage to occupants of such vehicles present entirely different issues.[5] While the district court could reform the policy, based on its factual conclusion that the Parties never intended that the retail lessees be named insureds, the district court's additional conclusion that this, by necessity, implies that MICHIGAN MUTUAL need not provide any UM/UIM coverage to occupants of the leased vehicles is erroneous.

The district court's conclusion that the Florida Uninsured Motorist Statute, §627.727, was inapplicable, is patently wrong and violates well-established Florida law. Specifically, the court's reasoning that there was no need to obtain a rejection

[5] The Eleventh Circuit's characterization of issue (C) contained on page 17 of its opinion, is technically inaccurate to the extent the court indicates that the contracting parties had an undisputed intention "[n]ot to purchase or provide such UM/UIM coverage in the auto supplement." As previously indicated, the undisputed testimony is that with respect to the retail lease vehicles UM/UIM coverage was never even discussed. Also, contrary to the courts implication, UM/UIM coverage was otherwise provided under the Personal Auto Policy Supplement. (App. 1, pg. 1, 9).

of such coverage for the retail lessees; that the lessor was not obligated to provide or offer such coverage; and that §627.727 was inapplicable because there was no liability insurance policy providing liability coverage to retail lessees as named insureds, violates basic principles which have guided the Florida courts in interpreting the statute. The principles, and the reasons why the lower court's ruling violates those respective principles, are as follows.

1. The district court's ruling that §627.727 Fla. Stat. does not apply because no motor vehicle liability insurance policy was issued is erroneous.

While the district court, in its Findings of Fact and Conclusions of Law, (R. E. 55), properly cites *Diversified Services, Inc. v. Avila*, 626 So.2d 364, 365 (Fla. 1992), for the proposition that §627.727(1) requires that UM/UIM coverage be offered in two instances: (1) when a motor vehicle liability insurance policy is issued; and (2) when a motor vehicle is leased for a period of one year or longer and the lessor of the vehicle, by the terms of the lease contract, provides liability coverage on the leased vehicle, the district court, in concluding that §627.727 did not apply, otherwise incorrectly applied *Diversified Services* to the facts of this case.

The reason is simple. The liability policy, issued by MICHIGAN MUTUAL and covering "Red Carpet Lease" vehicles, is, without question, a motor vehicle liability insurance policy. And, as the Florida Third District Court of Appeal

indicated in *Ferreiro v. Philadelphia Indemnity Ins. Co.*, 816 So.2d 140, 141 (Fla. 3rd DCA 2002) rev. den. 835 So.2d 269 (Fla. 2002), a long uninterrupted chain of Florida cases:

> [S]ay that the failure of **any motor vehicle insurer**. . . to abide by pertinent statutory requirements concerning offers or provisions of UM protection, results in its being held to that coverage. *Strochak v. Federal Ins. Co.*, 717 So.2d 543 (Fla. 1998); *Travelers Ins. Co. v. Quirk*, 583 So.2d 1026 (Fla. 1991); *Weesner v. United Services Auto Ass'n*, 711 So.2d 1192 (Fla. 5th DCA 1998) rev. den. 727 So.2d 914 (Fla. 1999); *Glenn Falls Ins. Co. v. Russell*, 527 So.2d 228 (Fla. 4th DCA 1998); *Cohen v. American Home Assurance Co.*, 367 So.2d 677 (Fla. 3rd DCA 1979) cert. den. 378 So.2d 342 (Fla. 1979).

As *Ferreiro* indicates, every such motor vehicle policy must comply with §627.727. Thus, the label put on the policy - "contingent," "umbrella," "fleet," or otherwise - is not controlling. Rather, the simple question is whether the policy provides liability coverage for the use of a motor vehicle. *See also*, *Dell v. Progressive Specialty Ins. Co.*, 744 So.2d 1165 (Fla. 1st DCA 1999) (§627.727(1) requires an insurance company to offer uninsured motorist coverage with every policy that provides bodily injury liability coverage); *Sapienza v. Security Ins. Co. Of Hartford*, 543 So.2d 845 (Fla. 4th DCA 1989) (garagekeepers policy which

covers liability for motor vehicle accidents must comply with §627.727); *Padron v. H.W.G. Leasing, Inc.*, 436 So.2d 982 (Fla. 3rd DCA 1983) (policy covering vehicles subject to long-term lease must comply with §627.727); *Liberty Mutual Ins. Co. v. Dwyer*, 421 So.2d 587 (Fla. 3rd DCA 1982) rev. den. 431 So.2d 989 (Fla. 1983) (same); *Chicago Ins. Co. v. Dominguez*, 420 So.2d 882 (Fla. 2nd DCA 1982) (professional comprehensive catastrophe policy, which included liability coverage for motor vehicle accidents, is subject to §627.727); *Aetna Casualty & Surety Co. v. Fulton*, 362 So.2d 364 (Fla. 4th DCA 1978) (umbrella policy which provided personal injury liability coverage for liability incurred in other ways, but also provided automobile liability insurance, is subject to §627.727).

Since, as emphasized, it is the substance of the policy - whether it is a motor vehicle liability policy - and not the title, which controls whether or not the requirements of §627.727 are applicable, there are numerous cases in which Florida appellate courts have applied the requirements of the statute to commercial fleet policies, such as the policies in question, naming corporations as insureds. *E.g. Coleman v. Florida Insurance Guarantee Association*, 517 So.2d 686 (Fla. 1988); *Kimbrell v. Great American Ins. Co.*, 420 So.2d 1086 (Fla. 1982); *Chmieloski v. National Union Fire Ins. Co.*, 563 So.2d 164 (Fla. 2nd DCA 1990); *Sapienza supra; Rhodes v. Aetna Ins. Co.*, 437 So.2d 155 (Fla. 2nd DCA 1983); *Lane v. Waste Management Inc.,* 432 So.2d 78 (Fla. 4th DCA 1983).

In sum, there is nothing in the Florida Uninsured Motorist Statute, or in the case law interpreting the statute, which supports a finding that the policies in question, which provide liability insurance covering Florida retail leased vehicles, are not subject to the requirements of the statute. The district court's conclusion to the contrary violates this basic principle.

2. Michigan Mutual's admitted failure to offer UM/UIM coverage equal to the liability limits of the Michigan Mutual policy, mandates UM/UIM coverage in the amount of the liability limits.

It is an equally well established principle of Florida law, that in the absence of a signed rejection, the burden is on the insurer to prove a waiver by the insured of the statutory right to an offer and an informed rejection/selection of UM/UIM coverage. The courts emphasize that the requirements that the rejection of UM/UIM coverage specified in the statute, be in writing, is no mere "technicality" but a substantial statutory requirement designed to protect all insureds under the policy. This provision reflects "[A] legislative intent to place a heavy burden upon insureds to obtain a knowing rejection of statutorily provided for uninsured motorist limits and reflects a public policy in Florida in favor of uninsured motorist coverage for Florida residents unless knowingly rejected by the insured." *Nationwide Property & Casualty Company v. Marchesano*, 482 So.2d 422, 425 (Fla. 2nd DCA 1985) approved, 506 So.2d 410 (Fla. 1987); *Adams v. Aetna Casualty & Surety Company*, 574 So.2d 1142 (Fla. 1st DCA 1991) rev. den. 581

So.2d 1307 (Fla. 1991); *Auger v. State Farm Mutual Automobile Ins. Co.*, 516 So.2d 1024 (Fla. 2nd DCA 1987).

Florida law also dictates that an effective rejection/selection of UM/UIM coverage **requires that the carrier offer** the applicable Florida UM/UIM limits to a representative of the insured, and that the insured make a oral/knowing rejection/selection of the statutory coverage before delivery of the policy. *Chmieloski v. National Union Fire Ins. Co., of Pittsburgh*, 563 So.2d 164, 166 (Fla. 2nd DCA 1990).

In light of MICHIGAN MUTUAL's and Ford's concession, that UM/UIM coverage for Florida retail lease vehicles was never offered prior to the issuance of the policies, the required knowing rejection/selection of the statutory coverage could not have taken place. Thus, MICHIGAN MUTUAL must be held to provide UM/UIM coverage equal to the liability policy limits. *Ferreiro v. Philadelphia Indemnity Ins. Co.*, *supra*, and cases cited therein.

As *Chmieloski* further emphasizes, Florida law requires proof of an offer **and** oral rejection prior to the delivery of the policy, "not proof of what the named insured hypothetically would have decided if the coverage had been offered." *Id*. at 166. Accordingly, any post event contention that MICHIGAN MUTUAL and Ford never intended to provide UM/UIM coverage for retail lease vehicles is rendered

irrelevant in the face of undisputed evidence that the offer of UM/UIM coverage was never made and hence that there was no informed rejection/selection.

3. The Plaintiffs, as Occupants of FMCC and JMCC vehicles covered by the Michigan Mutual liability policy, have standing to assert Michigan Mutual's failure to comply with §627.727 Fla. Stat. and are entitled to UM/UIM benefits mandated by the statute

The Appellants, as occupants of Red Carpet vehicles covered under the MICHIGAN MUTUAL policies, have standing, as "Class II" insureds, [6] to raise challenges to MICHIGAN MUTUAL's alleged failure to comply with §627.727. *See, Travelers Ins. Co. v. Quirk*, 583 So.2d at 1028, citing *Mullis v. State Farm Mutual Automobile Ins. Co.*, 252 So.2d at 238 (uninsured motorist coverage statutorily intended to provide coverage for lawful occupants of the insured automobile); *see also, Liberty Mutual Ins. Co. v. Ledford*, 691 So.2d 1164 (Fla. 2nd DCA 1997) (child who was lawful occupant of parents employer's vehicle at time of accident, is a Class II insured, and her parents, on her behalf, have standing to raise the issue of the absence of UM/UIM coverage rejection).

As such, since the Plaintiffs can assert MICHIGAN MUTUAL's failure to comply with §627.727, and since the policy must be held to provide UM/UIM

[6] "Class II" insureds are lawful occupants of the insured vehicle while a "Class I" insured would be the named insured and members of his family, who reside in his household. *See, Travelers Ins. Co. v. Warren*, 678 So.2d 324 (Fla. 1996); *Mullis v. State Farm Mutual Automobile Ins. Co.*, 252 So.2d 229, 232; *Quirk v. Anthony*, 563 So.2d 710, 712 n. 2 (Fla. 2nd DCA 1990) *approved, Travelers Ins. Co. v. Quirk*, 583 So.2d 1026 (Fla. 1991)

coverage to the extent mandated by a statute, the resulting determinative issue is whether the coverage mandated by the statute applies to occupants of vehicles covered under the liability portion of the policy. And on this issue, Florida law is equally well established, that UM/UIM coverage is mandated for occupants of vehicles covered by a liability policy.

When enacting the Florida Uninsured Motorist Statute, the Florida legislature was very clear - the statute was enacted for the benefit of Florida's injured citizens. *Salas v. Liberty Mutual Fire Ins. Co.*, 272 So.2d 1, 5 (Fla. 1971). In *Brown v. Progressive Mutual Ins. Co.*, 249 So.2d 429, 430 (Fla. 1971), this Court emphasized that protecting injured Florida citizens was the very purpose of the statute. It was enacted "[t]o protect citizens who are injured by [uninsured motorists] who cannot make whole the injured party. The statute is designed for the protection of injured persons, not for the benefit of insurance companies." Accordingly, insurance policies must be interpreted in the context of this broad mandate:

> Thus, the intention of the legislature, as mirrored by the decisions of this Court, is plain, to provide for the broad protection of the citizens of this State against uninsured motorists. As a creature of statute rather than a matter for contemplation of the parties in creating insurance policies, the uninsured motorist protection is not susceptible to the attempts of the

> insurer to limit or negate that protection.

Salas, 272 So.2d at 5.

As we have emphasized, §627.727(1) requires UM/UIM coverage unless, following the requisite offer, an insured named in the policy makes a written rejection of the coverage. Since it is undisputed that Ford did not make a written rejection of UM/UIM coverage, the issue before the Court is whether an exclusion for occupants of the FMCC and JMCC vehicles, now required to be covered for UM/UIM coverage as a result of the failure to comply with the statute, is valid.

Once again, Florida law is crystal clear on this point. This Court has recognized that there are five limitations that insurance companies may place on UM/UIM coverage and exclusions. Exclusions to UM/UIM coverage are enforceable as long as the limitations are unambiguous and "consistent with the purposes of the UM statute." *Flores v. Allstate Ins. Co.*, 819 So.2d 740, 745 (Fla. 2002). The statutorily authorized exclusions are contained in §627.727(9)(a) - (e), Fla. Stat. These five limitations are:

> (a) That the coverage of two or more vehicles will "not be added together to determine the limits of insurance coverage available to an injured person for any one accident;"
>
> (b) that if the injured person is occupying a vehicle at the time of the

> accident "the uninsured motorist coverage available to her or him is the coverage available as to that motor vehicle;"
>
> (c) that if the injured person is occupying a vehicle at the time of the accident that he or she does not own, the injured person is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle for which he or she is a named insured;
>
> (d) that if the uninsured motorist coverage was not purchased for the vehicle in which the insured was riding at the time of the accident, the uninsured motorist coverage in the policy does not apply; and
>
> (e) that if the insured is injured in an accident while not in a motor vehicle, he or she may select the limits of uninsured motorist coverage for a vehicle afforded such coverage by his or her policy.

As indicated in *Young v. Progressive S.E. Ins. Co.*, 753 So.2d 80, 83 (Fla. 2000), the statutory UM/UIM protection is not to be "whittled away by exclusions and exceptions" and as such, it has been held that the legislature clearly intended to limit the types of valid exclusions to the exclusions listed above.

In other words, Florida law does not authorize an insurer, required to provide UM/UIM coverage with respect to a particular vehicle, to exclude such coverage for occupants of that vehicle. And there is no Florida case which has held

that Class II insureds may be validly excluded from the UM/UIM coverage otherwise provided for a particular vehicle.

To the contrary, Florida courts have expressly stated otherwise. *E.g.*,, *Valiant Ins. Co. v. Webster*, 567 So.2d 408, 410 (Fla. 1990) (even if the liability provisions of the policy do not apply to a given accident, the uninsured motorist provisions of a policy would also not apply except with respect to occupants of the insured automobile); *Varro v. Federated Mutual Ins. Co.*, 854 So.2d 726 (Fla. 2nd DCA 2003) (policy issued to corporation violated UM statute by attempting to exclude from coverage Class II insureds).

This Court has repeatedly emphasized that the UM/UIM coverage mandated by the Florida Uninsured Motorist Statute is statutorily intended to provide the reciprocal or mutual equivalent of automobile liability coverage mandated by Chapter 324, Florida Statutes, the Financial Responsibility Law. As indicated in *Mullis*:

> When uninsured motorist coverage was obtained by Shelby Mullis pursuant to §627.0851 [predecessor to §627.727] for himself as the named insured, for his spouse and for his or his spouse's relatives who are residents of his household, they were given the same protection in case of bodily injury as of the uninsured motorist had purchased automobile liability insurance in compliance with the financial responsibility law. This, of course,

> would not be the case as to other persons potentially covered who are not in the class of the named insured and relative residents in the Mullis household. **These latter are protected only if they receive bodily injury due to the negligence of an uninsured motorist while they occupy the insured automobile of the named insured with his permission or consent**.

Id at 233.

Plainly, as *Mullis* decrees, UM/UIM coverage is mandated for individuals lawfully occupying a covered vehicle. *See, Government Employees Ins. Co. v. Douglas,* 654 So.2d 118, 119 (Fla. 1995), (citing *Mullis v. State Farm Mutual Automobile Ins. Co., and Valiant Ins. Co. v. Webster); Worldwide Underwriters Ins. Co. v. Welker*, 640 So.2d 46, 49 (Fla. 1994) (same); *See also, Travelers Insurance Company v. Warren*, 678 So.2d 324 (Fla. 1996) (Class II insureds are essentially third party beneficiaries of the named insured's policy).

In sum, the UM/UIM coverage applicable to the vehicles occupied by TOBIN, HUNTER, ANA and JONATHAN MACKAY, and resulting from MICHIGAN MUTUAL's admitted failure to comply with §627.727 Fla. Stat., cannot be restricted to the named insureds, FMCC and JMCC. It is for this reason – that the law requires it – that standard policies include UM/UIM coverage for

occupants of the covered vehicle. (See App 1, pg. 9, ¶ B). The Appellants are thus entitled to the benefits of the coverage.

4. The Michigan Mutual policy is not a true excess or umbrella policy and thus §627.727(1) Fla. Stat. and not §627.727(2) Fla. Stat., controls

In its primary argument before the Eleventh Circuit, MICHIGAN MUTUAL contended that to the extent §627.727 is applicable, Ford and MICHIGAN MUTUAL satisfied the statutory requirements for rejecting UM coverage since the policy is governed by the "less stringent" requirements of §627.727(2) Fla. Stat.

At one point, the law in Florida was such that, in the absence of an informed rejection by the insured, a carrier issuing an **umbrella** policy was required to afford UM/UIM coverage equal to the liability limits. *Chicago Insurance Company v. Dominguez*, 420 So.2d 882 (Fla. 2nd DCA 1992); *Cohen v. American Home Assurance Company*, 367 So.2d 677 (Fla. 3rd DCA 1979). In 1984, the Legislature amended the uninsured motorist statute to provide that carriers issuing umbrella policies were not obligated to provide UM coverage under the provisions of §627.727(1).

Rather, pursuant to §627.727(2), such a carrier merely needs to make such coverage available as part of the application for the umbrella policy, and at the written request of the insured. *Travelers Ins. Co. v. Quirk*, at 1029; *Ferreiro v. Philadelphia Indemnity*; *Tres v. Royal Surplus Line Insurance Company*, 705 So.2d 643 (Fla. 3rd DCA 1998); *Weesner v. United Services Automobile Assn.*, 711

So.2d 1192, 1193 (Fla. 5th DCA 1998); *Continental Ins. Co. v. Howe,* 488 So.2d 917, 920 (Fla. 3rd DCA 1986); *see also, Annotation: "Excess or Umbrella Insurance Policy As Providing Coverage For Accidents With Uninsured or Underinsured Motorist,"* 2 ALR 5th 922 (citing several Florida cases and indicating in footnote 1, that the cases deal with true excess or umbrella policies).

Umbrella policies, or as otherwise known, true excess policies, which are subject to §627.727(2), are designed to provide coverage only when the amount of an insured loss reaches a predetermined level. *Travelers Indemnity Co. v. Overseas Ace Hardware, Inc.*, 550 So.2d 12, 13 (Fla. 3rd DCA 1989); *Chicago Ins. Co. v. Dominguez, supra*. Thus, an umbrella policy, subject to §627.727(2), is to be distinguished from other types of primary coverage, like MICHIGAN MUTUAL's policy, which, under a given set of circumstances, may be excess to other primary coverage, because of the operation of an "other insurance" or "excess" clause. *Allstate Ins. Co. v. Executive Car & Truck Leasing, Inc.*, 494 So.2d 487, 489 (Fla. 1986) citing *Appelman, Insurance Law & Practice Section 4909.85 (1981)*. *See also, Firemans Fund Insurance Co. v. CNA Insurance Co.*, 862 A. 2d 251, 265-266 (Vt. 2004) (primary insurance which is rendered excess by operation of a policy provision or the availability of other primary coverage, is considered, nonetheless, to be primary or "coincidental excess insurance," and not a true excess or umbrella policy); *Bosco v. Bauermiester*, 571 N.W. 509, 512, 518 (Mich. 1997) (same);

Penton v. Hotho, 601 So.2d 762, 765-766 (La. 1992) (same); *Liberty Mutual Ins. Co. v. Harbour Ins. Co.*, 603 A.2d 300, 301-303 (R.I. 1992) (same).

Simply put, the MICHIGAN MUTUAL Personal Auto Policy provides first dollar coverage to the named insured Ford, and unlike an umbrella policy, the coverage does not come into effect only when the amount of an insured loss reaches a predetermined level. The applicable provision of the policy indicates:

> This policy, however, shall provide contingent loss and excess auto liability coverage for autos included in the following programs:
>
> (a) Red Carpet Lease; (b) Primus Automotive Financial Services, Inc; and (c) CommerciaLease,
>
> but only as respects the liability of the Named Insured. No coverage is provided to lessees, agents, or permissive users.
>
> As used in this endorsement, contingent loss is defined as liability of the Named Insured that results in the payment of a claim when,
>
> i. The lessee's underlying primary insurance limit is inadequate, or
>
> ii. The lessee's insurer denies coverage.

(App. 1, pg. 4).

Virtually every automobile insurance policy which is written contains "other insurance" or "excess clauses," like the MICHIGAN MUTUAL policy, and which provide that the coverage may be excess to other available coverage. However, as the authorities outlined above indicate, such a provision does not transform such a policy into a true excess or umbrella policy so as to be outside the scope of §627.727(1), because these policies do not expressly state that the coverage is applicable only above a minimum level of loss.

If the opposite were true, and the provision of the uninsured motorist statute which applied - §627.727(1) or (2), depended upon whether other liability coverage was available for a particular loss, the statute would be rendered impossibly vague since a carrier could never determine whether it had to satisfy the provisions of §627.727(1) until a loss occurred and the carrier was in a position to determine whether there was other valid and collectable insurance available for such a loss. Accordingly, any assertion by MICHIGAN MUTUAL that the policy in question is governed by §627.727(2) should be rejected.[7]

[7] If nonetheless, the Court concludes that the standards set forth in §627.727(2) apply, it would also be difficult to imagine how that statutory provision could have been satisfied if UM/UIM coverage for Red Carpet vehicles was never even discussed.

4. The Michigan Mutual policies cannot be reformed to exclude the UM/UIM coverage mandated by statute

Because MICHIGAN MUTUAL failed to comply with §627.727, its attempt to reform the policies to exclude the UM/UIM coverage otherwise provided must fail. As recognized in *Kartzmark v. Kartmark*, 709 So.2d 583, 586 (Fla. 4th DCA 1998), before a court of equity can reform an instrument, the reformation must create an enforceable obligation. In other words, if the parties had no power to make such a contract in the first place, a court cannot make it for them. *See also, Hedges v. Dixon County*, 150 U.S. 182, 192 14 S.Ct. 71, 74, 37 L.Ed 1044 (1893) (where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract); *Board of Pub. Instruction v. Union Sch. Furnishing Co.*, 100 Fla. 326, 129 So.2d 824 (1930) (reformation of notes which the board could not under the constitution validity execute would be refused, nor can the legislature make them valid and binding); *Clearwater Key Associates - South Beach, Inc. v. Thacker*, 431 So.2d 641, 646 (Fla. 2nd DCA 1983) (a court of equity is without power to reform an instrument because of a draftsman's mistake where the instrument, as reformed, would conflict in any material way with provisions of a controlling statute).

Simply put, as Florida law outlined above unanimously indicates, a carrier such as MICHIGAN MUTUAL is obligated, by law, to provide UM/UIM coverage with respect to Florida vehicles in the absence of an offer and an informed

rejection/selection of said coverage. Thus, in the face of MICHIGAN MUTUAL's admitted non-compliance with the Florida statutory requirement, the subject policies cannot be reformed to exclude UM/UIM coverage, and the Plaintiffs, as occupants of the vehicles covered by that policy, are entitled to the benefits of the coverage.

CONCLUSION

For the reasons set forth above, the Court should answer the certified question in the affirmative and the Court should further indicate that MICHIGAN MUTUAL is liable for UM/UIM benefits to the extent of the liability limits of the policies insuring the Red Carpet vehicles.

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CERTIFICATE OF MAILING

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial brief of appellant was prepared in -point Times New Roman font, and was electronically filed on March 10, 2005

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