IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-240

JOHN RANDO and GAIL RANDO,

Appellants,

v.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Appellee.

On Certification of Question by the United States
Court of Appeals for the Eleventh Circuit
Case No.: 08-13247-BB

ANSWER BRIEF OF APPELLEE, GOVERNMENT EMPLOYEES INSURANCE COMPANY

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STATEMENT OF THE CASE AND FACTS

Appellee, Government Employees Insurance Company ("GEICO"), files this brief in support of the trial court's final judgment entering summary judgment in favor of GEICO on a question of uninsured motorist insurance coverage.[1]

John and Gail Rando ("Plaintiffs" or the "Randos"), long time residents of Delaware, moved to Florida in October 2004. (Doc. 20; Doc. 67 at 1.) As Delaware residents, Plaintiffs had insured all of their vehicles with GEICO for many years under a single Delaware insurance policy. (Doc. 67 at 2.) Upon moving to Florida, Plaintiffs contacted GEICO to request a change in coverage. (Doc. 67 at 2.)

Plaintiffs advised GEICO that two of their vehicles would be moving to Florida with them. (Doc. 67 at 2.) Plaintiffs further advised GEICO that their daughter, a student, remained living in Delaware and was the driver of a 1996 Honda that was registered and principally garaged in the state of Delaware. (Doc. 67 at 2.)

Pursuant to Plaintiffs' request, GEICO issued a Delaware-rated policy to Plaintiffs titled Delaware Family Automobile Insurance Policy

[1] The term uninsured motorist insurance is used in this brief to refer to both uninsured and underinsured coverage. It is underinsured motorist coverage that is involved in the instant case.

(hereinafter the "Delaware Policy"), to cover the Delaware vehicle driven by the daughter. (Doc. 67 at 2.) GEICO issued a Florida policy to cover the Florida vehicles. The Delaware Policy was re-rated according to its new location, Newark, Delaware, where the daughter moved after Plaintiffs sold their Delaware home. (Doc. 67 at 2; Doc. 60 at 77.) The 1996 Honda automobile remained registered and principally garaged in Delaware throughout all times pertinent to this action. (Doc. 67 at 3.)

The IMPORTANT MESSAGES section of the Delaware Policy Declarations pages states:

> "YOUR DAUGHTER, LAURA, IS NOW BEING RATED AS THE PRINCIPAL OPERATOR OF YOUR 1996 HONDA ACCORD EX.
>
> HERE ARE THE POLICY DOCUMENTS FOR YOUR 1996 HONDA ACCORD EX. PLEASE NOTE THAT WE ISSUED A SEPARATE POLICY WITH A DIFFERENT POLICY NUMBER BECAUSE YOUR VEHICLES ARE GARAGED AT DIFFERENT LOCATIONS.
>
> WE HAVE RE-RATED YOUR POLICY ACCORDING TO
>
> YOUR NEW LOCATION, NEWARK DELAWARE 19702-
>
> 0000. . . .

(Doc. 2 at Exhibit A - Delaware Family Automobile Insurance Policy; Doc. 27 at Exhibit 1 thereto at page 2.)

Further, the Declarations page to the Delaware Policy states that the vehicle will be regularly garaged in the town and state shown in Item 1, except as noted in the vehicle segment. (Doc. 2 Exhibit A - Delaware Family Automobile Insurance Policy at Declarations pages.) The vehicle segment provides:

VEHICLE	RATED LOCATION	CLASS
1 96 HONDA	NEWARK DE 19702	1 M 21SFP L

(Doc. 2 Exhibit A - Delaware Family Automobile Insurance Policy at Declarations pages; Doc. 27 at Exhibit 1 thereto at page 2.)

The Declarations page to the Delaware Policy reflects coverage for uninsured motorist bodily injury each person/each occurrence limits of $300,000/$300,000. (Doc. 2 Exhibit A - Delaware Family Automobile Insurance Policy at Declarations pages; Doc. 27 at Exhibit 1 thereto at page 3.) The face of the Delaware Policy form is titled "Delaware Family Automobile Insurance Policy." (Doc. 2 Exhibit A - Delaware Family Automobile Insurance Policy.)

In regard to the recovery of uninsured motorist coverage, the Delaware Policy states:

> LIMIT OF LIABILITY
>
> Regardless of the number of insured autos or trailers to which this policy applies:

> 1. The limit of liability for Uninsured Motorists coverage stated in the declarations as applicable to "each person" is the limit of our liability for all damages, including those for care or loss of services, due to bodily injury sustained by one person as the result of one accident.
> . . . .
> 4. When coverage is afforded to two or more autos under this policy, the limits of liability shall apply separately to each auto as stated in the declarations. But these limits may not be combined so as to increase the stated coverage for the auto involved in the accident.
>
> If separate policies with us are in effect for you or any person in your household, they may not be combined to increase the limit of our liability for a loss.

(Doc. 2 Exhibit A - Delaware Family Automobile Insurance Policy at page 14 of 19; Doc. 67 at 2-3.)

After the Delaware Policy was issued, Plaintiffs requested that the mailing address on the Delaware Policy be changed to Dunnellon, Florida. (Doc. 67 at 4.)[2] This triggered GEICO to verify the location of the 1996 Honda vehicle before processing Plaintiffs' request to change the mailing address on the Delaware Policy to Dunnellon, Florida. (Doc. 27 at 2-3; Doc.

[2] As noted in the federal district court decision, this request was necessitated by the fact that the policy was originally delivered to Plaintiffs' Delaware address. (Doc. 67 at 3.) Although there was conflicting evidence as to whether or not GEICO mailed a copy of the Delaware Policy to the Plaintiffs in Florida, this issue was eliminated from the court's consideration upon stipulation that the Delaware Policy was executed in Florida and that Florida law applies for purposes of contract interpretation. (*Id*. at 3 n.1.)

67 at 4.) Plaintiffs confirmed on November 29, 2004, that the 1996 Honda motor vehicle remained in Delaware and they only wanted the mailing address for the Delaware Policy changed to Dunnellon, Florida. (Doc. 27 at 2-3; Doc. 67 at 4).

Mr. Rando was involved in an automobile accident on August 4, 2005, in Marion County, Florida. (Docs. 2, 20; Doc. 67 at 4.) Plaintiffs entered into a $10,000.00 settlement with the tortfeasor. (Doc. 67 at 4.) In addition, GEICO paid uninsured/underinsured motorist benefits under the Florida policy providing coverage for two automobiles located in Florida, policy number 0245-19-55-08, in the amount of $600,000.00. (Doc. 67 at 4.)

In regard to the Delaware Policy, Plaintiffs filed a two count Complaint seeking uninsured/underinsured motorist benefits and a declaration of insurance coverage. (Doc. 2; Doc. 67 at 4-5.) The action was removed to federal court. (Doc. 67 at 4.) Upon cross motions for summary judgment, the district court entered judgment in favor of GEICO declaring that the limit of liability provision in the Delaware Policy, which precludes coverage, is valid and enforceable and does not violate Florida public policy. (Doc. 67 at 10.) The district court held that Florida's public policy on the

stacking of uninsured motorist coverage is codified in its uninsured motorist statute, section 627.727. (Doc. 67 at 7.) Further, the district court stated:

> As made clear by this statute, the Florida legislature has expressed a very strong public policy in favor of providing uninsured/underinsured motorist coverage to all persons residing within the state of Florida. The statute is equally clear that two conditions precedent must exist in order for this public policy to be of any relevance: (1) the policy must be delivered or issued for delivery in Florida; and (2) the policy must insure a motor vehicle that is registered or principally garaged in Florida. In this case, the first condition is met - the Parties agree that the Delaware Policy was delivered and/or issued for delivery in Florida. The second condition, however, cannot be met, for it is undisputed that the car insured under the Delaware Policy was continuously registered and garaged in Delaware and driven by a Delaware resident - it

> never crossed Florida's borders. As such, Florida's public policy, as set forth in Fla. Stat. § 627.727, does not apply in this case.

(Doc. 67 at 7-8.) Final judgment was entered in favor of GEICO. (Doc. 68.)

Plaintiffs appealed to the Eleventh Circuit Court of Appeals. *Rando v. Gov't Employees Ins. Co.*, 556 F.3d 1173 (11th Cir. 2009). Following briefing and oral argument, the Eleventh Circuit issued a certification opinion requesting that this Court resolve a perceived question of unsettled law. *Id*.

SUMMARY OF THE ARGUMENT

There are a few straightforward legal propositions that control the outcome in this case.

First, section 627.727, Florida Statutes, does not apply to the Delaware Policy issued to the Plaintiffs to cover a vehicle registered and principally garaged in Delaware and driven by their daughter, a Delaware resident.

Second, principles of freedom of contact necessarily afford a citizen the right to knowingly and intentionally purchase an out-of-state automobile insurance policy to cover a motor vehicle he or she maintains outside of the

state of Florida and require that the insured be subject to the terms of that contract.

Third, Florida does not have a public policy prohibition against an out-of-state insurance policy containing an anti-stacking, or limits of liability, provision where that policy is issued to cover a vehicle registered and principally garaged in another state, and never driven in the state of Florida.

In an attempt to avoid these controlling principles of law, Plaintiffs assert that Florida public policy, either as expressed in section 627.727 or by judge-created rule, prohibits anti-stacking provisions in an uninsured motorist insurance policy issued to a Florida citizen, and thus, an anti-stacking provision contained in an out-of-state automobile insurance policy issued to a Florida resident is void as against public policy, even if the subject vehicle is registered and principally garaged out-of-state and never driven in the state of Florida.

The Plaintiffs are mistaken in their interpretation of Florida public policy and fail to cite to any case that applies the judge-created public policy that they claim exists. Stated otherwise, there is no Florida case voiding an anti-stacking provision contained in a foreign insurance policy written to cover a vehicle registered and principally garaged in another state, and never

driven in the state of Florida. The controlling law requires that the summary judgment entered in favor of GEICO enforcing the Delaware Policy as written be affirmed.

CERTIFIED QUESTION

WHETHER, UNDER FLORIDA LAW, AN AUTOMOBILE INSURANCE POLICY – WHICH WAS EXECUTED, ISSUED AND DELIVERED IN FLORIDA TO THE NAMED INSUREDS RESIDING IN FLORIDA FOR A CAR THAT IS REGISTERED AND GARAGED IN DELAWARE – MAY VALIDLY PROVIDE THAT UNINSURED MOTORIST COVERAGE UNDER THAT POLICY MAY NOT BE COMBINED WITH UNINSURED MOTORIST COVERAGE PROVIDED BY A SEPARATE AUTOMOBILE POLICY ALSO ISSUED BY THE INSURER TO THE NAMED INSUREDS IN FLORIDA

GEICO urges that the Certified Question should be answered in the affirmative. Where an insured purchases multiple automobile insurance policies, one of which is a Delaware Family Automobile Insurance Policy, such policy, which does not provide coverage to a vehicle registered or

principally garaged in Florida, may validly contain a limits of liability provision prohibiting the combining of uninsured motorist coverage under that policy with uninsured motorist coverage provided by a separate Florida policy. The issues in this case involve questions of law that are reviewed de novo. *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995).

ARGUMENT

I. THE DELAWARE POLICY ANTI-STACKING PROVISION IS NOT VOID UNDER FLORIDA LAW BECAUSE SECTION 627.727, FLA. STAT., IS NOT APPLICABLE WHERE, AS HERE, THE COVERED VEHICLE WAS NEITHER REGISTERED NOR GARAGED IN FLORIDA (Plaintiffs' Issue IV restated)[3]

A. Section 627.727, Florida Statutes, does not apply to the Delaware Policy issued to the Plaintiffs for a vehicle registered and principally garaged in Delaware and driven by their daughter, a Delaware resident.

By its plain terms, section 627.727 does not apply to the Delaware Policy issued by GEICO to Plaintiffs. The statute only applies to automobile insurance "delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state." § 627.727, Fla. Stat. (2005). At all relevant times, the 1996 Honda was registered in and garaged in Delaware.

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[3] The arguments advanced by Plaintiffs in Issues I - III of their Initial Brief are necessarily subsumed in the discussion of Issue IV and are, therefore, addressed together. Within Plaintiffs' Issue I titled "Introduction," they note that Issues III and IV go hand in hand and that Issue II is background discussion concerning the development of Florida law on stacking. Appellants' Initial Br. at 9.

The Florida statute cannot be engrafted upon a Delaware Policy where the prerequisites to application of the statute are not present.

In the federal court proceedings and before this Court, Plaintiffs acknowledge that "the plain language of Fla. Stat. § 627.727(1) . . . excused GEICO from having to provide uninsured motorist coverage to Plaintiffs in the first place." (Appellants' Initial Brief at 21; Appellants' 11th Cir. Br. at 18.) Plaintiffs also state that: "Because the vehicle insured by the Delaware Policy was neither garaged nor registered in Florida, the federal court concluded (correctly) that the latter condition in the uninsured motorist statute was not satisfied . . . ." (Appellants' Initial Brief at 22; Appellants' 11th Cir. Br. at 18.)

While this Court has, under limited circumstances, applied the terms of section 627.727 to uninsured motorist policies not delivered or issued for delivery in this state, *see infra* Argument C, it has never created an exception to the statutory requirement that the insured vehicle be registered or principally garaged in Florida.

In *New Jersey Mfrs. Ins. Co. v. Woodward,* 456 So. 2d 552, 553 (Fla. 3d DCA 1984), the appellate court denied the insureds' request that the requirements of section 627.727 be engrafted upon an uninsured motorist policy issued in New Jersey. The court clearly relied upon the fact that the

policy "related solely to motor vehicles which the insureds principally garaged in New Jersey." *Id.* at 553. The court found that, although the insureds sent their insurer a post office change-of-address form indicating that they had changed their mailing address to Florida, there was no indication on the form that the insureds had changed their permanent residence or that the covered motor vehicles would now be principally garaged in Florida. *Id.* Thus,

> the insurer herein was therefore not on reasonable notice that the risk of the policy was centered in Florida rather than New Jersey, and, accordingly, Florida law cannot govern as to the extent of uninsured motorist coverage limits contained in the said policy.

Id.; *cited with approval in State Farm Mutual Automobile Ins. Co. v. Roach*, 945 So. 2d 1160 (Fla. 2006) ("courts consider whether the insured notified the insurer of a permanent change of residence and whether the insured risk is or will be primarily located in Florida"); *see also Allstate Ins. Co. v. Pierce*, 468 So. 2d 536 (Fla. 3d DCA 1985) ("the insurance policies in question were issued in North Carolina on automobiles registered and

principally garaged in that state, so that the risk of the policies was centered in North Carolina").

While the Plaintiffs in the instant case did put GEICO on notice of their move to Florida, they nevertheless insisted upon maintaining a Delaware Policy to cover the 1996 Honda. This triggered GEICO to verify the location of the 1996 Honda vehicle. Plaintiffs confirmed that the 1996 Honda remained in Delaware and that they only wanted the mailing address for the Delaware Policy changed to Dunnellon, Florida. Based upon Plaintiffs' representations, GEICO would have no reason to believe that the policy risk had relocated to Florida. In fact, at no time have the Plaintiffs asserted that the 1996 Honda was ever located in Florida.

Florida law does not require that an insurer provide the statutorily mandated uninsured motorist coverage for a vehicle not registered or principally garaged in Florida. Moreover, GEICO maintains that the requirements of section 627.727 cannot be imposed on the Delaware Policy where the Plaintiffs expressly repudiated GEICO's inquiry and concerns that the Delaware Policy should be converted to a Florida policy and insisted that the 1996 Honda should remain covered under a Delaware-rated policy because it remained registered and principally garaged in Delaware. Under these circumstances, there does not exist any basis in Florida law to alter the

terms of the Delaware Policy, a policy that was specifically requested by Plaintiffs and which covered a vehicle registered and principally garaged in Delaware. The district court properly rejected Plaintiffs' suggestion that Florida law would expand the scope of the Delaware uninsured motorist coverage beyond its plain terms.

B. Principles of freedom of contract necessarily afford a citizen the right to knowingly and intentionally purchase an out-of-state automobile insurance policy to cover a motor vehicle he or she maintains outside of the state of Florida and require that the insured be subject to the terms of that contract.

Under the general law of contracts, Florida courts will enforce an insurance contract as written to the extent it does not offend Florida public policy. *H.S. Equities, Inc. v. Hartford Ace & Indemnity, Co.*, 334 So. 2d 573, 576 (Fla. 1976); *Aetna Cas. & Sur. Co. v. Diamond*, 472 So. 2d 1312 (Fla. 3d DCA 1985). The Delaware Policy should be enforced as written because it was knowingly and intentionally selected by Plaintiffs and it does not conflict with any applicable Florida public policy.

Uninsured motorist coverage in Florida is a creature of statute. Accordingly, section 627.727, Fla. Stat., contains the state's ultimate expression of public policy on the subject. *See Salas v. Liberty Mut. Fire*

Ins. Co., 272 So. 2d 1, 3 (Fla. 1972) (uninsured motorist statute is expression of Florida's public policy); *see also* § 627.4132, Fla. Stat. (2005) (whether uninsured motorist coverage may be added to or stacked upon other coverage is governed by section 627.727). Florida's public policy concerning uninsured motorist coverage cannot be broader than the statute on which it is based.

As set forth above, by its plain language, the public policy expressed in the statute indicates the legislature's intent that the terms of the statute apply to uninsured motorist policies "delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state." § 627.727 (1), Fla. Stat. (2005). Since the statute does not apply to a Delaware Policy covering a vehicle not registered or principally garaged in this state, the public policy expressed therein does not apply. *See Woodward*, 456 So. 2d at 553 (refusing to apply Florida's statutory requirements to a New Jersery-rated uninsured motorist policy where the policy provided coverage for a motor vehicle registered or principally garaged in New Jersey). Absent any applicable public policy which would restrict the terms of the Delaware Policy, it will be enforced as written.

At least one Florida court has previously upheld the freedom of a Florida resident to specifically contract for the purchase of an out-of-state automobile insurance policy and to be bound by the terms of its uninsured motorist coverage. In a case whose facts are strikingly similar to those present in this case, *State Farm Mut. Auto. Ins. Co. v. Davella*, 450 So. 2d 1202 (Fla. 3d DCA 1984), the appellate court denied the insured's request that an uninsured motorist policy issued on a Colorado form be required, contrary to its terms, to provide the scope of coverage imposed by section 627.727, Fla. Stat.

In *Davella*, the insured moved from Colorado to Florida. Upon receiving notice of her move, the insurance company issued a Florida policy to the insured. *Id*. at 1203. The insured "*returned the Florida policy informing State Farm there was some question as to whether or not she would remain in Florida so she wanted the Colorado policy reinstated*." *Id*. (emphasis in original).

The Colorado policy was renewed two times and additional premiums paid for two six month periods prior to the insured being involved in an accident. *Id*. After the accident, the insured contended that she was entitled to the scope of coverage required under section 627.727, Fla. Stat. *Id*. The appellate court rejected the insured's arguments noting that the insured

advised the insurance company on several occasions that she wanted to keep her Colorado policy and she specifically rejected a Florida insurance policy. *Id*. at 1204.

Just as the insured in *Davella* insisted on maintaining her automobile liability coverage under the Colorado-rated policy and refused a Florida policy, the Plaintiffs in the instant case insisted on purchasing a Delaware-rated policy for the 1996 Honda. Moreover, Plaintiffs requested that GEICO maintain their Delaware Policy when questioned about their move to Florida and the location of the 1996 Honda. In striking contrast, Plaintiffs now seek to have this Court declare that the state of Florida will not permit them to abide by the Delaware contract. It would be inequitable to impose Florida's statutory terms upon the Delaware Policy where the Plaintiffs specifically requested the Delaware-rated policy and rejected GEICO's inquiry regarding changing the policy to a Florida policy.

Moreover, under Florida law, execution of an out-of-state automobile insurance policy carries the presumption that the parties bargained for the out-of-state law to apply to the interpretation of the policy. *See Woodward*, 456 So. 2d at 552 (New Jersey uninsured motorist policy carried by Florida residents interpreted under the laws of New Jersey where the policy provided coverage for a motor vehicle registered or principally garaged in

New Jersey*); Davella*, 450 So. 2d at 1204 (out-of-state uninsured motorist policy interpreted under law of foreign jurisdiction where insured specifically requested that the out-of-state policy remain in effect while living in Florida); *see also Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988) (New York residents residing in Florida during the winter months who purchased New York automobile insurance policy presumed to have bargained for, or at least expected, New York law to apply to interpretation of the policy). Thus, the selection of Delaware law through the selection of the Delaware-rated policy written on a Delaware policy form and delivered with an IMPORTANT MESSAGES section identifying Delaware law, governs the contractual choice of law question in this case.

The district court properly interpreted the policy as written consistent with Delaware law and based upon the parties' selection of Delaware law in the insurance policy. *See Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000) (a choice-of-law provision in a contract is enforceable "unless the law of the chosen forum contravenes strong public policy"); *see also Ware Else, Inc. v. Ofstein*, 856 So. 2d 1079 (Fla. 5th DCA 2003) (a contract may as a general rule stipulate to the law that will govern the interpretation and enforcement of the contract).

Indeed, an insurer asked to issue a Delaware-rated policy on a vehicle registered, operated and garaged in Delaware, may only issue policies with the coverage permitted under the laws of the state of Delaware and at the rates set by the insurance regulators of that state. Delaware's uninsured motorist statute provides, in part, that:

> (c) The affording of insurance under this section to more than 1 person or to more than 1 vehicle shall not operate to increase the limits of the insurer's liability. When 2 or more vehicles owned or leased by persons residing in the same household are insured by the same insurer or affiliated insurers, the limits of liability shall apply separately to each vehicle as stated in the declaration sheet, but shall not exceed the highest limit of liability applicable to any 1 vehicle.

18 Del. C. § 3902 c. Notably, Plaintiffs do not dispute that the limits of liability provision is valid and enforceable under Delaware law.

In *Johnson v. Colonial Ins. Co. of California*, No. 95C-05-189JOH, 1997 WL 126994 (Del. Super. Ct. 1997), the court construed the above statutory language as "intended to prevent stacking in the narrow

circumstance of policies for vehicles owned or leased by members of the same household that are insured by the same or affiliated insurers." 1997 WL 126994 at 3; *see also Lewis v. American Independent Ins. Co.*, No. 03C-11-001PLA, 2004 WL 1426964 at 8 (Del. Super. Ct. 2004) (reaffirming the prior holding in *Johnson*). Thus, in *Johnson*, the court held a limit of liability provision like the one involved in this case valid under Delaware law. 1997 WL 126994 at 2; *see also Jones v. Horace Mann Ins. Co.*, 723 A.2d 390, 393 (Del. Super. Ct.1998), *aff'd*, 720 A.2d 559 (Del. 1998).

The Plaintiffs' situation, a daughter away at school driving a vehicle registered and principally garaged in that foreign location, is just one example of many in which a Florida resident would bargain for the purchase of an out-of-state policy. Plaintiffs do not cite to any case law that precludes a Florida citizen from exercising the freedom to enter into such contracts or from being bound by the terms of the agreement. Accordingly, the trial court properly entered final judgment declaring the terms of the Delaware Policy enforceable.

C. Florida does not have a public policy prohibition against an out-of-state insurance policy containing an anti-stacking, or limits of liability, provision where that policy is issued to cover a vehicle

registered and principally garaged in another state, and never driven in the state of Florida.

Plaintiffs argue that this Court's decision in *Gillen v. United Services Automobile Assoc.*, 300 So. 2d 3 (Fla. 1974), expresses a public policy that anti-stacking provisions are not permitted in uninsured motorist policies purchased by Florida citizens unless the policy complies with the requirements of section 627.727, Fla. Stat. Contrary to Plaintiffs' assertions, neither *Gillen*, nor *Sellers v. United States Fidelity & Guaranty Co.*, 185 So. 2d 689 (Fla. 1966), upon which it is based, created a judicial pro-stacking policy separate from and broader than the public policy indicated by the legislature's statutory language.

i. The *Sellers* case.

Both parties agree that the *Sellers* case contains this Court's first judicial expression of Florida's public policy concerning uninsured motorist insurance. However, contrary to Plaintiffs' reference to a judicially created pro-stacking public policy, the *Sellers* case clearly indicates that this Court's articulation of Florida's public policy regarding the scope of uninsured motorist coverage was based upon the statutory language. *Sellers*, 185 So.

2d at 692 ("Our views herein are predicated upon our construction of s 627.0851 [the pre-1987 version of the uninsured motorist statute]".).[4]

Thus, there is no indication that this Court sought to declare public policy separate and apart from that expressed by the legislature in the uninsured motorist statute. To the contrary, this Court expressly stated that it was relying upon the statute as its source for the expression of Florida's public policy in this area. Although judicially announced, the pro-stacking policy was not judicially created.

While not usually the subject of debate, both this Court and the legislature have further acknowledged the uninsured motorist statute as the source of Florida's public policy regarding the scope of uninsured motorist coverage. *See Salas v. Liberty Mut. Fire Ins. Co.*, 272 So. 2d at 3 (uninsured motorist statute is expression of Florida's public policy); *see also* § 627.4132, Fla. Stat. (2005) (whether uninsured motorist coverage may be added to or stacked upon other coverage is governed by section 627.727).

The *Sellers* case held that, because the statute did not expressly provide that multiple uninsured motorist policies could not be stacked, insurance carriers lacked the authority to insert anti-stacking provisions in

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[4]During the trial court proceedings, Plaintiffs correctly acknowledged that section 627.727 expresses Florida's public policy concerning uninsured motorist law. (Doc. 28 at 7.)

their policies. 185 So. 2d at 690 ("There appears no latitude in the statute for an insurer limiting its liability through 'other insurance'; 'excess-escape' or 'pro rata' clauses, as attempted in Condition 5.").[5] Thus, the statute was read to encompass a pro-stacking public policy.

ii. The *Gillen* case.

This Court extended the public policy analysis a step further in the *Gillen* case. In *Gillen*, this Court held that the requirements of section 627.727 could be imposed on an out-of-state insurance policy based upon the paramount public policy exception to the rule of *lex loci contractus* where the insurer was on notice that the primary risk of the policy was centered in Florida and not in the state where the policy was initially issued and delivered. *Gillen*, 300 So. 2d at 6-7 (where only contact with New Hampshire to automobile policy was fact that it was originally delivered there to insureds before they changed their permanent residence to Florida and where it was undisputed that insureds had notified insurance company of

[5]In reaching its decision, this Court looked to the holding in *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965), in which an 'other insurance' clause was first challenged as being in conflict with a state uninsured motorist statute. The court there held that the 'other insurance' clause was rendered void and of no effect by the language of the Virginia uninsured motorist statute requiring the insurer to "pay the insured all sums to which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . ." *Sellers*, 185 So. 2d at 691.

their move such that it was on notice, public policy required court to assert paramount interest in protecting its citizens from what it considered inequitable insurance arrangement). Thus, the Court recognized a de facto delivery or issuance for delivery of the policy in this state where it was undisputed that the insureds had notified the insurance company of their move and it was on notice that the location of the risk has changed. *Gillen* in no way creates a rule that waives the requirement in section 627.727 that the "specifically insured or identified motor vehicle [be] registered or principally garaged in this state." § 627.727 (1), Fla. Stat.

In *Gillen*, the insureds initially took out two uninsured motorist policies with United to cover two separate vehicles and received delivery of the policies while residents of New Hampshire. 300 So. 2d at 4. Prior to expiration of the one year term on the policies, the Gillens moved to Florida. *Id*. at 5. "[A]fter notifying United of the move, [the Gillens] sold the Volkswagen bus and purchased a Volkswagen Squareback." *Id*. United issued a new policy to the Gillens in Florida on the Volkswagen Squareback. *Id*.

Following an accident involving an uninsured motorist, United refused to pay under the New Hampshire policy which contained an 'other insurance' clause. *Id*. The Gillens asserted "that such a policy would be

against the public policy of the State of Florida, as enunciated by this Court in *Sellers, supra*, and urge[d] the Court to allow recovery on both policies." *Id*.

The Court recognized that the language of section 627.727 (1) refers to an insurance policy "delivered or issued for delivery in this state." *Id*. at 6. However, the Court carved out an exception to the 'delivered or issued' language in situations where the insurance company was notified of the insured's move to Florida and issued a new policy in Florida. *Id*. ("This can be seen as an acknowledgment of domiciliary change and would indicate to United that coverage under both policies would be shifted to Florida."). Thus, the key to the holding in *Gillen* was the notice factor.

Moreover, the Court noted that "the Gillens had purchased automobile tags" in Florida and "[t]he covered vehicles were garaged in Florida at the time of the accident with appropriate notice having been given to United." *Id*. at 6-7. Thus, this Court was not called upon to create an exception to the statutory requirement that the insured vehicle be "registered or principally garaged in this state." § 627.727 (1), Fla. Stat.

In light of the foregoing background, the instant case is much closer to *Woodward* and *Davella* than *Gillen*. While *Gillen* was decided based upon United's notice of its insureds' move and the relocation of the vehicles,

GEICO was expressly told by the Plaintiffs that it should not interpret their move to Florida as notice that a Florida policy should be issued for the 1996 Honda. In fact, Plaintiffs rejected GEICO's inquiry and insisted on keeping the Delaware Policy.

Finally, this Court has never applied section 627.727 to a foreign insurance policy where the insured vehicle was not "registered or principally garaged in this state." Under the circumstances, there is no basis for Plaintiffs to state that there is a judicially created public policy that imposes the requirements of section 627.727 on Plaintiffs' Delaware Policy or in some other way voids the limits of liability provision.

iii. A change in the statute; a change in public policy.

In 1987, the legislature amended the uninsured motorist statute to expressly permit the inclusion of anti-stacking provisions in Florida uninsured motorist policies. § 627.727 (9), Fla. Stat. (1987).[6] At least one court has recognized that this amendment to the statute changed Florida's public policy in regard to anti-stacking provisions. *See Nationwide General Ins. Co. v. United Services Auto. Ass'n*, 715 So. 2d 1119, 1120, 1121 (Fla. 1st DCA 1998). The amendment granted insureds and insurers the right to include non-stacking provisions in uninsured motorist policies. § 627.727

[6] The 2005 version of subsection (9) is identical to the 1987 enactment.

(9), Fla. Stat. Thus, the legislature declared that there is no longer a blanket public policy prohibition against anti-stacking provisions.

The pre-1987 case law cited by Plaintiffs is, therefore, inapplicable insofar as it invalidates anit-stacking clauses on public policy grounds. *See Fireman's Fund Ins. Co. v. Pohlman*, 485 So. 2d 418 (Fla. 1986); *Gillen v. United Services Automobile Assoc.*, 300 So. 2d 3 (Fla. 1974); *Tucker v. GEICO*, 288 So. 2d 238 (Fla. 1973); *Sellers v. United States Fidelity & Guaranty Co.*, 185 So. 2d 689 (Fla. 1966); *Auto-Owners Ins. Co. v. Prough*, 463 So. 2d 1184 (Fla. 2d DCA 1985); *Hines v. Wausau Underwriters Ins. Co.*, 408 So. 2d 772 (Fla. 2d DCA 1982); *Sellers v. GEICO*, 214 So. 2d 879 (Fla. 1st DCA 1968); *see also Auto-Owners Ins. Co. v. Petrik*, 915 So. 2d 640, 643 (Fla. 2d DCA 2005) (a stacking case involving liability coverage, not uninsured motorist insurance), cited by Plaintiffs.

In essence, these pre-1987 cases found that there was no statutory authority for permitting an anti-stacking clause. Without an express basis for allowing anti-stacking clauses, they were considered against public policy. In the context of the then-existing uninsured motorist statute, which mandated the purchase of uninsured motorist coverage for every vehicle (even though only one uninsured motorist policy was necessary to provide such coverage to an insured and his family members) for a standard and

uniform premium rate on a per car basis, the maximum amount of uninsured motorist benefits recoverable was determined by the total of all coverages for which a premium was paid. *Tucker*, 288 So. 2d at 242.

As the court in *Nationwide* observed: "All of the cases cited by USAA involve statutory provisions which predate the 1987 amendment adding subsection (9) to section 627.727. Accordingly, they are inapposite." 715 So. 2d at 1121 (enforcing "other insurance" clause contained in non-stacking uninsured motorist coverage). The same analysis applies here.

Plaintiffs have failed to cite any post-1987 case law applying the asserted pro-stacking doctrine. There are no decisions from this Court post-1987 applying the pro-stacking doctrine. The only case that GEICO has uncovered applying the pro-stacking doctrine post-1987 involves the consideration of an uninsured motorist policy that did not contain an express anti-stacking provision.[7]

In *United Services Automobile Assoc. v. Roth*, 744 So. 2d 1227 (Fla. 4th DCA 1999), *rev. denied*, 763 So. 2d 1044 (Fla. 2000), the court was asked to determine whether an insured could stack umbrella coverage

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[7] In order for a pro-stacking doctrine to survive the 1987 amendments, it must necessarily be restricted in application to situations where the uninsured motorist policy under consideration does not place any limitations on stacking.

carried on five vehicles. The court held that payment of a premium is a threshold requirement for application of the pro-stacking doctrine. 744 So. 2d at 1228. Because the insured did not pay additional premiums for excess coverage on additional vehicles, the pro-stacking doctrine did not apply to impose stacking. *Id*.

Finally, to the extent the pro-stacking doctrine originally was intended to protect insureds from the inequitable insurance practice of collecting premiums on a compulsory element of insurance and not providing coverage, this underlying rationale no longer exists. The uninsured motorist statute's authorization of anti-stacking provisions shifts to the market place the negotiation of an appropriate premium for the coverage delivered.

As a further illustration of the demise of the pro-stacking doctrine, we need only examine Florida cases upholding anti-stacking provisions in uninsured motorist policies. In *Teachers Ins. Co. v. Bollman*, 617 So. 2d 817 (Fla. 2d DCA 1993), the insureds, injured in an accident involving an uninsured motorist, sought to recover stacked coverage under four separate policies purchased from Teachers Insurance. The insureds purchased non-stacked coverage containing language to the effect that:

> If two or more vehicle liability policies issued by us to you apply to the same accident, the total

> limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

617 So. 2d at 818. This language is very close to the language utilized in the Delaware Policy at issue in this case. In light of this clear language, the court held that the parties entered into a contract compatible with section 627.727 and enforced the policy provision limiting uninsured motorist benefits to recovery under a single policy. 617 So. 2d at 819.

Since 1987, the uninsured motorist statute explicitly provides for anti-stacking clauses in uninsured motorist policies. Therefore, as a general rule, the limit of liability provision in the Delaware Policy cannot be said to offend Florida public policy.

iv. If Florida's uninsured motorist statute does not apply, there is no applicable public policy to void the limits of liability provision.

As noted previously, Florida's public policy concerning uninsured motorist coverage cannot be broader than the statute on which the public policy is founded. There is no judicially created pro-stacking policy that is broader than the uninsured motorist statute. To the extent that Florida's public policy concerning uninsured motorist coverage is codified in Florida

Statute section 627.727, the statute must be triggered in order for the public policy to be invoked.

Section 627.727 is not triggered where the predicate expressed in the statute as to insurance "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state" is not satisfied. The statute simply does not extend to policies issued with respect to a vehicle registered and principally garaged out-of-state. There is no basis in Florida law to hold that a Florida citizen cannot be bound by a limits of liability provision contained in a foreign uninsured motorist policy issued to insure a vehicle registered and principally garaged in another state. Moreover, because Florida's uninsured motorist statute does not apply to the Delaware Policy, the validity of the policy is not effected by any of the technical requirements that control the utilization of anti-stacking clauses in Florida policies.

To impose the result Plaintiffs request would involve rewriting the Delaware Policy to remove a provision that does not offend Florida law or Florida public policy. Florida public policy allows, but does not require stacking of uninsured motorist coverage. Florida law permits anti-stacking clauses in uninsured motorist policies. Florida law further allows its citizens the freedom to purchase Delaware automobile insurance.

There is absolutely no error in the district court's decision to enforce the Delaware Policy as written.

CONCLUSION

Based upon the foregoing facts and legal authorities, Appellee, Government Employees Insurance Company, respectfully requests that this Court answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this _____ day of May, 2009 to all counsel on the service list below.

ANGELA C. FLOWERS

CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for Appellee, GEICO, certifies that the size and style of type used in this Brief are 14 point type, Times New Roman.

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