IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-240

JOHN RANDO, GAIL RANDO,

Appellants,

v. Lower Tribunal No.: 08-13247-BB

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Appellee.

ON CERTIFICATION OF QUESTION BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANTS' INITIAL BRIEF

BABIARZ LAW FIRM, P.A.

Timothy S. Babiarz
Florida Bar No. 0050407
13940 N. US Hwy. 441, Suite 205
The Villages, FL 32159
(352) 205-7599
(352) 205-7590 (facsimile)
tim@babiarzlawfirm.com

Attorneys for Appellants

MILLS CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 0176631
865 May Street
Jacksonville, FL 32204
(904) 350-0075
(904) 350-0086 (facsimile)
bgowdy@appellate-firm.com

Attorneys for Appellants

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STATEMENT OF THE CASE AND FACTS[1]

This is an insurance coverage dispute over uninsured motorist benefits. The U.S. Court of Appeals for the Eleventh Circuit has certified the following question to this Court:

> 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.

Appellants John and Gail Rando are the named insureds and the plaintiffs in the federal district court ("Randos" or "Plaintiffs"). Appellee Government Employees Insurance Company is the insurer and defendant ("GEICO" or "Insurer"). Plaintiffs contend that the certified question should be answered in the negative because the Anti-Stacking Provision in the Insurer's Policy is void and unenforceable under Florida law. *Infra* Argument.

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[1] Most of the citations to the record are to the opinion of the Eleventh Circuit ("Op."), which is located at tab 1 of the appendix and is reported at *Rando v. Gov't Employees Ins. Co.*, 556 F.3d 1173, 21 Fla. L. Weekly Fed. C1441, 2009 U.S. App. LEXIS 2059 (11th Cir. Feb. 2, 2009). The federal district court's opinion is at tab 2 of the appendix. Other record citations are to document number of the district court's record (for example, "Doc. 67" is the district court's opinion) or to the parties' briefs filed with Eleventh Circuit (*e.g.*, "Appellants' 11th Br.").

The federal district court decided this case on cross-motions for summary judgment, as the material facts were undisputed. (Doc. 67; App. 2.) Hence, the facts and procedural history are quoted herein from the Eleventh Circuit's opinion:

> In October 2004, [Plaintiffs] moved from Delaware to Florida. Before the move, [Plaintiffs] and their daughter . . . had a single automobile insurance policy issued by GEICO. The policy covered three cars and listed [Plaintiffs] as the named insureds. When [Plaintiffs] moved to Florida, [their daughter] remained in Delaware, where she has continued to reside.
>
> On October 12, 2004, [Plaintiff] John Rando contacted [the Insurer] and requested that the policy be changed to reflect the fact that two of the cars would now be kept (i.e., garaged) and driven in Florida. The third car, a 1996 Honda driven primarily by [the daughter], still would be garaged and driven in Delaware. On October 15, 2004, [the Insurer] changed the policy to a Florida-rated policy covering two cars, and changed the garage location and mailing address to the [Plaintiffs'] new address in Florida. We refer to this policy as the "Florida Policy."
>
> At the same time, [the Insurer] created a new Delaware-rated policy, to which we refer as the "Delaware Policy," for the 1996 Honda driven by [the daughter] in Delaware. As with the Florida Policy, the Delaware Policy identified [Plaintiffs] as named insureds. The Delaware Policy listed [the daughter] as the principal operator of the 1996 Honda, and reflected that the car would remain garaged in Delaware. The Delaware Policy was executed and delivered in Florida.
>
> The Delaware Policy provided uninsured/underinsured motorist coverage for bodily injury to [Plaintiffs] for up to $300,000 for each person/each occurrence. The Delaware Policy also contained a section entitled "Limit of Liability" that provided, among other things, that the limits of separate policies may not be combined, stating:
>
> > When [uninsured/underinsured motorist] 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*.

(Emphasis added.)[2] This provision is known as an "anti-stacking" provision because it prevents coverages for different vehicles or from separate policies from being "stacked"--i.e., added—together [the "Anti-Stacking Provision"].

On August 4, 2005, in Marion County, Florida, [Plaintiff] John Rando was seriously injured in a automobile crash caused by an underinsured driver. John Rando's injuries include severe permanent brain damage that prevents him from ever working in the future. [Plaintiffs] reached a $10,000 settlement with the underinsured driver, and [the Insurer] paid [Plaintiffs] $600,000 in underinsured motorist benefits pursuant to the Florida Policy ($300,000 for each of the two vehicles insured under the policy).

[Plaintiffs] demanded that [the Insurer] also pay them as the named insureds under the underinsured motorist provisions of the Delaware Policy. [The Insurer] refused, citing the Delaware Policy's [A]nti-[S]tacking [P]rovision. [Plaintiffs] sued [the Insurer] in Florida state court, seeking a declaration of coverage and damages for breach of [the Insurer's] duties under the Delaware Policy.[3]

[The Insurer] removed the action to federal district court and, after discovery, the parties filed cross-motions for summary judgment. The district court granted [the Insurer's] summary judgment motion and denied [Plaintiffs'] motion.

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[2] The emphasis and alterations indicated by brackets to the quoted insurance clause were provided by the Eleventh Circuit.

[3] The parties agreed as to the amount of damages, should coverage exist. Thus, the only issue is coverage. *Rando*, 2009 U.S. App. LEXIS 2059, at *4 n.3.

> The district court acknowledged that Florida law applies to interpret the Delaware Policy because it was executed in Florida and the *lex loci contractus* doctrine applies. The district court also concluded that Florida law permits insureds, like [Plaintiffs], to recover uninsured or underinsured motorist benefits under two or more separate policies for the same accident and injuries. However, the district court concluded that such coverage stacking was not permitted here because: (1) the Delaware Policy's [A]nti-[S]tacking [P]rovision prohibited it; and (2) the Delaware Policy's [A]nti-[S]tacking [P]rovision was valid and enforceable under Florida law. [Plaintiffs] appealed [to the Eleventh Circuit], raising a single issue: whether the anti-stacking provision in the Delaware Policy is enforceable under Florida law.

(Op. 2-5; *Rando v. Gov't Employees Ins. Co.*, 556 F.3d 1173, 21 Fla. L. Weekly Fed. C1441, 2009 U.S. App. LEXIS 2059 (11th Cir. Feb. 2, 2009); App. 1.)

In addition to above-quoted facts, the Eleventh Circuit noted two stipulations pertinent to this appeal. First, "the parties agree[d] [that] the Delaware Policy was executed in Florida and Florida law applies."[4] (Op. 6 n.5; *Rando*, 2009 U.S. App. LEXIS 2059, at *6 n.5; App. 1, at 6 n.5). Second, the Eleventh Circuit noted that, under section 627.727(9), Florida Statutes (2005), an anti-stacking provision is valid only if the insurer satisfies certain informed consent requirements, and "[t]he parties agree[d] that [the Insurer] did not send notice to [Plaintiffs] or satisfy the requirements of [section] 627.727(9)." (Op. 14; *Rando*, 2009 U.S. App. LEXIS 2059, at *17; App. 1, at 14.)

[4] The federal district court also concluded that the parties had stipulated that Florida law applied to the Delaware Policy. (Doc. 67, at 6; App. 2, at 6.)

SUMMARY OF THE ARGUMENT

This Court repeatedly has declared anti-stacking provisions in uninsured motorist policies to be void for public policy and unenforceable. In other words, this Court permits insureds to combine, or "stack," insurance coverages even if the plain language of their insurance policy says they cannot "stack" coverages.

This pro-stacking policy is a judicial creation. But it has been the subject of nearly a half-century of a "dialogue" with the Legislature. This dialogue has consisted of numerous legislative amendments that have reformed, modified, and, for a brief period, completely abolished the Judiciary's pro-stacking policy. In enacting these amendments, the Legislature is presumed to know of judicial decisions, including this Court's decisions invalidating anti-stacking provisions. And, this Court further presumes that the Legislature adopts those prior judicial decisions – including those invalidating anti-stacking provisions – unless the Legislature expresses a contrary intention in the new legislation.

The end result of this long-running "dialogue" between the Judiciary and the Legislature is that insurers today may enforce anti-stacking provisions ***only if*** they obtain informed consent from the insured in accordance with the uninsured motorist statute. In this case, it is undisputed that the Insurer did not obtain this statutorily required informed consent. Therefore, Florida law prohibits the Insurer from enforcing its Anti-Stacking Provision.

The federal district court, however, concluded that Florida's pro-stacking public policy applies only if the conditions in the uninsured motorist statute are satisfied, including the condition that a motor vehicle be garaged or registered in Florida. The plain language of the statute does not say this. Indeed, this Court in *Gillen* held just the opposite. *Gillen* applied Florida's pro-stacking policy even though it expressly acknowledged that one of the conditions in the statute was not satisfied. Given the nature of the uninsured motorist coverage, it would be illogical to tie Florida's pro-stacking policy to where a motor vehicle is located. Uninsured motorist insurance is not designed to protect any particular vehicle. Instead, it is a personal benefit designed to protect the named insured from an injury caused by an uninsured motorist wherever that injury may occur, including when a named insured is nowhere near her vehicle – for example, when she is walking, riding a bicycle, or taking a public bus.

Gillen should control the decision in this case. It is a thirty-five year-old precedent. None of the numerous legislative amendments still in effect today have undermined this Court's decision in *Gillen*. Therefore, the Legislature is presumed to have adopted *Gillen*. But the federal district court and the Insurer erroneously relied on the Third District's *Woodward* decision, a non-stacking case that is legally and factually distinguishable from the instant case.

ARGUMENT

ISSUE and 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.

Standard of Review

The Eleventh Circuit concluded that its review of the federal district court's summary judgment order was *de novo*. *Rando,* 2009 U.S. App. LEXIS 2059, at *5 n.4. This Court's review also should be *de novo*, as the certified question is a pure question of law concerning the enforceability of a contract provision. *See, e.g., Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 396 (Fla. 2005) (holding validity of an agreement is a pure question of law subject to *de novo* review).

Arguments on the Merits

I. Introduction

The "[s]tacking of coverages occurs when coverage from vehicles not involved in the accident is sought to be added to the coverage for the vehicle involved in the accident." *Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 35 (Fla. 2000) (emphasis omitted). Provisions in insurance contracts that purport to prohibit stacking are commonly called, among other things, "other insurance,"

"excess escape" or "prorate" provisions. *See State Farm Mut. Auto. Ins. Co. v. Sinacola*, 385 So. 2d 115, 118 (Fla. 5th DCA 1980). This brief refers to all of these provisions that prohibit stacking as simply "anti-stacking provisions."

This Court has declared anti-stacking provisions in uninsured motorist ("UM") policies to be void for public policy and thus unenforceable. *E.g. Fireman's Fund Ins. Co. v. Pohlman*, 485 So. 2d 418, 419-21 (Fla. 1986); *Gillen v. United Servs. Auto-Mobile Assoc.*, 300 So. 2d 3, 6-7 (Fla. 1974); *Tucker v. GEICO*, 288 So. 2d 238, 240-42 (Fla. 1973); *Sellers v. United States Fid. & Guar. Co.*, 185 So. 2d 689, 692 (Fla. 1966); *see also Sinacola* (noting that "Florida is clearly among those states which has generally condemned and refused to enforce such [anti-stacking] clauses in a UMI context"). This public policy is premised on the "common sense notion that an insured should be entitled to get what is paid for." *United Servs. Auto. Ass'n v. Roth*, 744 So. 2d 1227, 1229 (Fla. 4th DCA 1999) (citing *Tucker*, 288 So. 2d at 242).

The Insurer, however, asserts that the "pro-stacking" cases cited immediately above do not apply and do not render its Anti-Stacking Provision unenforceable. The Insurer gives primarily two reasons to support its position. First, the Insurer notes that the cases cited above pre-date a 1987 amendment to section 627.727(9), Florida Statues, which allowed anti-stacking provisions if certain conditions were satisfied; therefore, although section 627.727(9)'s

conditions have not been satisfied in this case,[5] the Insurer argues that section 627.727(9) supersedes the cases cited above and their "pro-stacking" policy. (Appellee's 11th Cir. Br. 12-19). Second, the Insurer notes that, under its plain language, section 627.727(1), Florida Statutes, does not apply; therefore, even though Florida law applies to the Policy,[6] it argues that the Florida cases cited above and their pro-stacking policy do not apply to the Policy's Anti-Stacking Provision. The Insurer's two arguments are without merit. *Infra* Arguments III and IV. Before addressing these arguments, however, it is necessary to first explain the development of Florida law on stacking in the context of UM coverage. *Infra* Argument II.

II. Current Florida law on the stacking of UM coverages is the result of a long-running dialogue between the Legislature and the Judiciary.

Current Florida law on the enforceability of anti-stacking provisions in the UM context is the result of nearly a half-century of development. This development has been a "dialogue" of sorts between the Legislature and the Judiciary. As the ensuing discussion demonstrates, the Judiciary from time-to-time has declared the law on the enforceability of anti-stacking provisions. And, the Legislature has responded. It has responded with legislative enactments that have

[5] (Op. 14; App. 1, at 14); *Rando*, 2009 U.S. App. LEXIS 2059, at *17.

[6] (Op. 6 n.5; Doc. 67, at 6; Doc. 74, at 3-4; App. 1, at 6 n.5); *Rando*, 2009 U.S. App. LEXIS 2059, at *6 n.5.

reformed, modified, and sometimes abolished the Judiciary's declarations. Each and every time the Legislature has responded with legislation, it is presumed to have adopted the Judiciary's prior constructions on UM law unless a contrary intention is expressed in the new legislation. *E.g.*, *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1042 (Fla. 2008).

The tale of the dialogue between the Legislature and the Judiciary begins with this Court's decision in *Sellers v. United States Fidelity & Guaranty Co.*, 185 So. 2d 689 (Fla. 1966). In *Sellers*, this Court held that the original UM statute invalidated an anti-stacking provision in a UM policy. *Id.* at 690. To support its holding, this Court reasoned: "There appears no latitude in the [UM] statute for an insurer limiting its liability through [anti-stacking] clauses . . . . If the statute is to be meaningful and controlling in respect to the nature and extent of the coverage . . ., all inconsistent clauses in the policy . . . must be ***judicially*** rejected." *Id.* at 690 (emphasis added). Though this Court did not point to any express provision in the UM statute prohibiting stacking, it stated that its "views" were "predicated upon [its] construction" of the UM statute. *Sellers*, 185 So. 2d at 692.

When *Sellers* was decided the UM statute in effect was section 627.0851, Florida Statutes, which the Legislature had enacted five years before *Sellers* was decided. Ch. 61-175, §§ 1, 2 at 291-92, Laws of Fla. Although *Sellers* expressly relied on the original UM statute to invalidate an anti-stacking provision, the

original UM statute "did not contain any provision addressing the stacking of UM coverage for different vehicles or policies." *Rando*, 2009 U.S. App. LEXIS 2059, at *7; *see also* Ch. 61-175, §§ 1, 2 at 291-92, Laws of Fla. Instead, that statute provided that, if an insurer "delivered or issued for delivery" an automobile liability policy in Florida for a vehicle "registered or principally garaged" in Florida, then the insurer was required to provide uninsured motorist coverage.[7] Ch. 61-175, § 1, at 292, Laws of Fla. The UM statute was later re-codified at section 627.727. *Rando*, 2009 U.S. App. LEXIS 2059, at *7. The original language from section 627.0851 requiring insurers to provide uninsured motorist coverage has not materially changed and is largely the same as the language currently found in subsection (1) of the current UM statute, section 627.727. *Compare* note 7 *with* § 627.727(1), Fla. Stat. (2005).[8]

[7] Specifically, section 627.0851, Florida Statutes (1961) provided in pertinent part:

> No automobile liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, arising therefrom . . . .

[8] The 2005 version of section 627.727(1) – which is materially the same as the current version – applies because that version was in effect when the Plaintiffs' accident occurred and their cause of action accrued. *See, e.g., Estate of Doyle ex rel. Doyle v. Mariner Healthcare of Nashville, Inc.*, 889 So. 2d 829, 830 (Fla. 2d DCA 2004).

The next significant stage in the "dialogue" was this Court's decision in *Gillen*, 300 So. 2d at 3. There, this Court clarified that Florida's pro-stacking judicial policy did not depend on satisfying the conditions contained in subsection (1) of the current UM statute (§ 627.727, Fla. Stat.). *See id.* at 6; *infra* Argument IV. The importance of *Gillen* is discussed more fully below in Part IV.

Two years after *Gillen*, the Legislature sent a clear message and expressly repudiated this Court's pro-stacking policy. In particular, the Legislature in 1976 enacted an anti-stacking statute that prohibited the stacking of all types of insurance coverages. Ch. 76-266, § 10, at 725-26, Laws of Fla.; § 627.4132, Fla. Stat. (Supp. 1976). This period of judicial and legislative disagreement, however, was short lived. In 1980, the Legislature amended section 627.4132 to state that the general prohibition on stacking did not apply to UM policies. Ch. 80-364, § 1, at 1495, Laws of Fla.; § 627.4132, Fla. Stat. (Supp. 1980).

The 1980 amendment to section 627.4132 was thoroughly analyzed by the Second District Court of Appeal in *Auto-Owners Ins. Co. v. Prough*, 463 So. 2d 1184, 1185-87 (Fla. 2d DCA 1985). The insurer in *Prough* argued that, although the 1980 amendment repealed the stacking prohibition, it did not deprive the contracting parties of the right to decide whether UM coverages could or could not be stacked. *Id.* at 1185-86. The Second District disagreed. *Id.* Instead, it agreed with the argument that, under the 1980 amendment, Florida "revert[ed] back to the

pre-1976, ***judicially-declared*** public policy favoring stacking of uninsured motorist coverage." *Id.* at 1185-86 (emphasis added).

The Second District explained its reasoning as follows:

> It is apparent that the Florida Legislature intended for the [1980] amendment to once again put into effect the prior public policy regarding stacking of uninsured motorist benefits.
>
> This bill simply eliminates the prohibition against stacking and would thus revive prior case law which permitted and determined the extent of the stacking of uninsured motorist insurance policies.
>
> Staff of House Comm. on Insurance, 1980 Fla. Legislature, Reg.Sess., Report on Stacking of Uninsured Motor Vehicles, at 2 (April 28, 1980). *See also* Senate Staff Analysis and Economic Impact Statement, 1980 Fla.Leg., Reg.Sess., Report on Stacking of Uninsured Motor Vehicle Insurance, at 1 (May 30, 1980).

Id. at 1186. Therefore, the Second District held, the insurer's anti-stacking provision in an uninsured motorist policy was void for public policy and unenforceable. *Id.*

One year after *Prough*, this Court apparently agreed with the Second District's reading of the 1980 amendment. *See Fireman's Fund Ins. Co. v. Pohlman*, 485 So. 2d 418, 419-21 (Fla. 1986). This Court declined to enforce an anti-stacking provision for an insurance endorsement entered after the effective date of the 1980 amendment. *Id.* However, this Court did enforce the same anti-stacking provision for an insurance policy entered into between 1976 and 1980. *Id.*

Shortly after these decisions confirming the revival of the Judiciary's pro-stacking policy, the Legislature enacted another amendment to the UM statute in 1987. *See* Ch. 87-213, § 1, at 1342-43, Laws of Fla.; § 627.727(9), Fla. Stat. (1987). This 1987 amendment modified, but did not completely abolish, the judicial policy that anti-stacking provisions are unenforceable. *Infra* Argument III. With this amendment (which is still part of the UM statute today), the Legislature directed the Judiciary to enforce an anti-stacking provision ***only if*** the insurer complies with certain informed consent requirements. *See id.*; § 627.427(9), Fla. Stat. (2005); *GEICO v. Douglas*, 654 So. 2d 118, 120 (Fla. 1995); *see also* Ch. 87-213, § 1, at 1342-43, Laws of Fla. In particular, the amendment as presently worded provides:

> In connection with the offer authorized by this subsection [(9)], insurers ***shall inform*** the named insured, applicant, or lessee, ***on a form approved by the office***, of the limitations imposed under this subsection and ***that such coverage is an alternative to coverage without such limitations***. If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations.

§ 627.727(9), Fla. Stat. (2005) (emphasis added); *see also* Ch. 87-213, § 1, at 1342-43, Laws of Fla.; *infra* note 9. The 1987 amendment also states that the language in an insurance policy – including any anti-stacking provision – must be

"approved" by the Office of Insurance Regulation of the Financial Services Commission.[9] § 627.727(9), Fla. Stat. (2005); § 624.05(3), Fla. Stat. (2005).

In this case, it is undisputed that the Insurer failed to comply with any of the informed consent requirements of the 1987 amendment, as codified at section 627.727(9). (Op. 14; App. 1, at 14); *Rando*, 2009 U.S. App. LEXIS 2059, at *17. Nevertheless, the Insurer argued to the Eleventh Circuit that it could enforce its Anti-Stacking Clause in light of section 627.727(9). (Appellee's 11th Cir. Br. 12-19.) This Insurer is mistaken, as argued immediately below.

III. The 1987 amendment demonstrates that the Legislature adopted the Judiciary's pro-stacking policy for cases where, as here, the insurer fails to give informed consent to the insured.

The 1987 amendment proves that the Legislature adopted the Judiciary's pro-stacking policy for cases, likes this one, where the insurer has failed to give the insured the informed consent required by section 627.727(9). *See, e.g., Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1042 (Fla. 2008) (discussed *infra*). Admittedly, as the Insurer has argued, the 1987 amendment did grant insurers the right to enforce anti-stacking provisions. § 627.727(9), Fla. Stat. (2005); Ch. 87-213, § 1, at 1342-43, Laws of Fla.; (Appellee's 11th Cir. Br. 19.) However, insurers may exercise this right ***only if*** they comply with section 627.727(9)'s informed consent

[9] At the time of the 1987 amendment, approvals had to be sought from the "department" rather than the "office." Ch. 87-213, § 1, at 1342-43, Laws of Fla.

requirements. Indeed, this is the holding of a case from this Court in which the Insurer itself was a party. *GEICO v. Douglas*, 654 So. 2d 118, 120 (Fla. 1995).

In *GEICO*, this Court held that the insurer's failure to comply with the section 627.727(9)'s informed consent requirements precluded the insurer from enforcing limitations otherwise allowed by the statute:

> [T]o limit coverage validly, the insurer must satisfy the statutorily-mandated requirement of notice to the insured and obtain a knowing acceptance of the limited coverage. . . . It is our opinion that these requirements were the *quid pro quo* given by the legislature to insurers for the right to limit uninsured motorist coverage by this exclusion. . . . [T]he insurer, GEICO, was found not to have complied with the statute. The [lower court], therefore, quite correctly held that the insured was covered under the uninsured motorist provisions of the GEICO policy. We approve that decision.

Id. at 120-21. Because it is undisputed that the Insurer failed (as it did in *GEICO*) to comply with the informed consent requirements of section 627.727(9),[10] the Insurer should be precluded from enforcing its Anti-Stacking Provision, just as it was precluded from enforcing its exclusion in *GEICO*. *See id.*

Accordingly, the 1987 Amendment is not the "demise" of the Judiciary's pro-stacking policy, as suggested by the Insurer (Appellee's Answer Br. 18). To the contrary, with the 1987 amendment, the Legislature adopted the Judiciary's pre-1987 decisions proscribing anti-stacking provisions for cases where, as here, the insurer fails to comply with informed consent requirements of section

[10] (Op. 14; App. 1, at 14); *Rando*, 2009 U.S. App. LEXIS 2059, at *17.

627.727(9). This is so because the Legislature is presumed to be acquainted with judicial decisions on the subject matter of statutes it enacts. *E.g.*, *Ford v. Wainwright*, 451 So. 2d 471, 475 (Fla. 1984). Where, as here, the Legislature amends a statute, this Court presumes that the Legislature knows the Judiciary's prior constructions of the law. *E.g.*, *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1042 (Fla. 2008). And, this Court also presumes that, in amending the statute, the Legislature adopts the Judiciary's prior constructions of the law unless a contrary intention is expressed in the new legislation. *Id.*

In this case, the Legislature's 1987 amendment to section 627.727 shows an intention to modify, not completely abolish, this Court's pre-1987 decisions holding that anti-stacking provisions are unenforceable. To reiterate, the 1987 amendment permits the enforcement of anti-stacking provisions ***only if*** the insurer complies with the informed consent requirements of section 627.727(9). *See* § 627.427(9), Fla. Stat. (2005); *GEICO*, 654 So. 2d at 120. The 1987 amendment does ***not*** permit the enforcement of anti-stacking provisions where, as here, the insurer fails to comply with the informed consent requirements of section 627.727(9). *See GEICO*, 654 So. 2d at 120. Thus, for the circumstances in this case (i.e., no informed consent per section 627.727(9)), this Court must presume that Legislature adopted this Court's pre-1987 "pro-stacking" decisions that

prohibit the enforcement of anti-stacking provisions. *See Essex*, 985 So. 2d at 1042.

This result is also mandated by another canon of statutory construction: *inclusio unius est exlusio alterius* (the inclusion of one thing means the exclusion of another thing). *E.g., Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1338 (Fla. 1983). The Insurer construes the 1987 amendment as allowing ***all*** anti-stacking provisions to be enforceable, irrespective of whether or not the insurer complies with the UM statute's informed consent requirements. But, if the Legislature had wanted ***all*** anti-stacking provisions to be enforceable, it would have expressly repealed and repudiated the Judiciary's pro-stacking policy. Indeed, this is what the Legislature did with the 1976 amendment that remained in effect until 1980. *See supra* Argument II; § 672.4132, Fla. Stat. (1976 Supp.); Ch. 76-266, § 10, at 725-26, Laws of Fla.; *Auto-Owners Ins. Co. v. Prough*, 463 So. 2d 1184, 1186 (Fla. 2d DCA 1985). But that is not what the Legislature did with the 1987 amendment.

The Insurer's construction of the UM statute – allowing enforcement of anti-stacking provisions where no informed consent is obtained – contradicts legislative intent of the UM statute. *See, e.g., Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 334 (Fla. 2007) (stating that "legislative intent is the polestar that guides a court's inquiry"). The Insurer effectively wants to delete from the UM

statute the informed consent requirements enacted by the 1987 amendment and codified at section 627.727(9). This construction violates the legislative directive that, for an anti-stacking provision, the Insurer must obtain, by a specific process, the informed consent of the insured. *See* § 627.727(9), Fla. Stat. (2005); *GEICO*, 654 So. 2d at 120. Indeed, if the Insurer's Anti-Stacking Provision were to be valid despite its non-compliance with the informed consent requirements, then section 627.727(9) "would be rendered meaningless." *GEICO v. Douglas*, 627 So. 2d 102, 103 (Fla. 4th DCA 1993) (Pariente, J), *approved GEICO*, 654 So. 2d at 120.

Two final points bear mentioning with regard to the 1987 amendment. First, the sole case cited by the Insurer to the Eleventh Circuit to support its construction of the 1987 amendment was *Nationwide General Insurance Co. v. United Services Automobile Ass'n*, 715 So. 2d 1119 (Fla. 1st DCA 1998). (Appellee's 11th Cir. Br. 13, 17.) But this case does not mention, much less address, the informed consent requirements of section 627.727(9), apparently because those requirements were not at issue there. *See Nationwide*, 715 So. 2d at 1119-22.

Second, the Insurer contended to the Eleventh Circuit that there are no post-1987 cases declaring anti-stacking provisions invalid in the context of UM insurance. (Appellee's 11th Cir. Br. 17.) Plaintiffs agree that there are few, if any, post-1987 cases invalidating anti-stacking provisions in the context of UM

insurance. This is not surprising. One would expect that most insurers comply with this State's informed consent requirements. The fact that insurers rarely fail to follow the 1987 amendment's informed consent requirements is not a basis to delete these requirements from the 1987 amendment, as the Insurer suggests.

In any event, since 1987, Florida courts have invalidated anti-stacking or similar provisions in cases with similar circumstances. For example, in *GEICO*, this Court discussed "stacking," and it invalidated a "policy exclusion" that precluded a named insured on a UM policy from claiming coverage for an accident involving a vehicle that was owned and occupied by the insured but that was not insured by the insurer. *See GEICO*, 654 So. 2d at 120, *approving* 627 So. 2d at 103 (referring to a "policy exclusion"). This "policy exclusion" in *GEICO* certainly sounds like an anti-stacking provision. Furthermore, Florida courts have invalidated anti-stacking provisions in policies that, like UM policies, are exempted from the reach of the anti-stacking statute, section 672.4132. *See, e.g.*, *Auto-Owners Ins. Co. v. Petrik*, 915 So. 2d 640, 643 (Fla. 2d DCA 2005).

IV. The Anti-Stacking Provision is void under Florida law regardless of where the Plaintiffs' vehicle was registered or garaged and irrespective of section 627.727(1).

A. The plain language of section 672.727(1) does not state anything at all about stacking.

Subsection (1) of the UM statute requires insurers who issue motor vehicle insurance policies to include uninsured motorist coverage as part of their policies if

two conditions are satisfied: (i) the policy has been delivered or issued for delivery in Florida and (ii) the insured or identified motor vehicle is principally garaged or registered in Florida.[11] § 627.727, Fla. Stat. (2005). But, section 627.727(1), by its plain language, does not state that satisfaction of these two conditions is a prerequisite for application of Florida's judicially-declared pro-stacking policy. Indeed, section 627.727(1) says nothing at all about stacking. Under the circumstances of this case, the plain language of section 627.727(1) merely excused the Insurer from having to provide uninsured motorist coverage to Plaintiffs in the first place. The plain language did not excuse the Insurer from Florida's pro-stacking policy after it issued the Delaware Policy to Florida residents, collected premiums on the Policy, and then stipulated that Florida law would govern the Policy's interpretation.

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[11] Subsection (1) of the UM statute provides in pertinent part:

> No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be 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 unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.

§ 627.727(1), Fla. Stat. (2005). The pertinent language in subsection (1) of the UM statute is virtually the same today as it was in 1961. *See supra* Argument II, at 9-10; *compare* § 627.0851(1), Fla. Stat. (1961) (quoted at note 7 *supra*) *with* § 627.727(1), Fla. Stat. (2008).

Nevertheless, in this case, the federal district court concluded, and the Insurer argued, that the satisfaction of the conditions in section 627.727(1) was a prerequisite under Florida law to trigger Florida's pro-stacking public policy. (Doc. 67, at 7-8; App. 2, at 7-8; Appellee's 11th Cir. Br. 19-25.) Because the vehicle insured by the Delaware Policy was neither garaged nor registered in Florida, the federal district court concluded (correctly) that the latter condition in the uninsured motorist statute was not satisfied, and thus, it further concluded (incorrectly) that Florida's pro-stacking policy did not apply. (Doc. 67, at 7-8; App. 2, at 7-8.) This was error not only because section 627.727(1)'s plain language did not require such a result, but also because of a decision of this Court. *See Gillen v. United Serv. Auto. Assoc.*, 300 So. 2d 3 (Fla. 1974).

B. *Gillen* demonstrates that satisfaction of the conditions in section 627.727(1) is not a prerequisite for invalidating an anti-stacking provision.

In *Gillen*, this Court clarified that Florida's pro-stacking judicial policy did not depend on satisfying the conditions set forth in subsection (1) of the UM statute. 300 So. 2d at 6. The insureds in *Gillen* had two motor vehicle insurance policies for two separate vehicles. *Id.* at 4-5. One policy was delivered and issued in New Hampshire, while the other was delivered and issued after the insureds had moved to Florida. *Id.* at 4-5. The insureds sought uninsured motorist benefits under both the New Hampshire and Florida policies. *Id.* at 5. The insurer denied

benefits under the New Hampshire policy because it had an "other insurance" clause – that is, an anti-stacking provision. *Id.* This Court noted that, under its own precedent, Florida law prohibited enforcement of this anti-stacking provision. *Id.* (citing *Sellers v. U.S. Fid. & Guar. Co.*, 185 So. 2d 689 (Fla. 1966)).

However, the insurer in *Gillen* noted that, under its plain wording, the UM statute applied only if the insurance policy was "'delivered or issued for delivery in [Florida].'" *Id.* at 6 (quoting § 627.0851, Fla. Stat., the predecessor to § 627.727(1), Fla. Stat.). The New Hampshire policy had been issued and delivered in New Hampshire, not in Florida. *Id.* at 5. The insurer argued that, because the UM statute by its plain wording did not apply, the anti-stacking provision should be enforced. *Id.* at 6. This Court disagreed:

> While it is true that the Legislature in its language thus limited the application of the statute, there is no indication that the Legislature necessarily meant to exclude cases such as the one *sub judice*. Given the rationale behind this Court's decision in *Sellers, supra*, that is, that the public policy of this State requires the elimination of [anti-stacking] provisions, there is no reason to limit its scope in a situation such as the present one.

Id.

The reasoning of the insurer's argument in *Gillen* is the same reasoning employed (erroneously) by the federal district court here. In *Gillen*, the insurer relied on the fact that one of the two conditions in the uninsured motorist statute (delivery of the policy in Florida) had not been satisfied to argue that Florida's pro-

stacking policy should not apply. *See id.* This Court rejected this argument. *See id.* Here, the federal district court has relied on the fact that the other one of these two conditions (a motor vehicle garaged or registered in Florida) was not satisfied in order to hold that Florida's pro-stacking policy does not apply. (Doc. 67, at 7-8; App. 2, at 7-8.) This Court should reject the federal district court's reasoning because it is contrary to *Gillen*.

Moreover, it should not matter that this case involves a different unsatisfied statutory condition (a motor vehicle garaged or registered in Florida) than the unsatisfied statutory condition at issue in *Gillen* (delivery of the policy in Florida). The Insurer here has conceded that Florida law applies. (Op. 6 n.5; Doc. 67, at 6; Doc. 74, at 3-4; App. 1, at 6 n.5; *Rando*, 2009 U.S. App. LEXIS 2059, at *6 n.5.) In contrast, the insurer in *Gillen* argued that this Court should apply New Hampshire law – which approved of anti-stacking provisions – because the insurance policy was delivered (i.e., executed) in New Hampshire. 300 So. 2d at 5-7. Although, under the *lex loci contractus* rule, New Hampshire law normally would have applied and would have enforced the anti-stacking provision, this Court held that Florida's paramount, pro-stacking public policy trumped New Hampshire law. *See id.* And, thus, this Court would not enforce the anti-stacking provision. *See id.* If Florida's pro-stacking public policy applies where New Hampshire normally would apply and approve of an anti-stacking provision, surely

Florida's pro-stacking public policy must apply where, as here, the insurer has stipulated that Florida law applies.

In addition, the location of the vehicle insured by the Delaware Policy should be inconsequential because, under Florida law, "uninsured motorist coverage is personal to an insured" and "does not attach to a specific vehicle." *Hines v. Wausau Underwriters Ins. Co.*, 408 So. 2d 772, 773 (Fla. 2d DCA 1982) (citing *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971)). Named insureds on an uninsured motorist policy – like Plaintiffs – are "covered . . . whenever or wherever bodily injury is inflicted upon [them] by the negligence of an uninsured motorist." *Mullis*, 252 So. 2d at 238. For example, insureds are covered if they are injured by an insured motorist while walking, riding a bicycle, or taking a public bus. *Id.* Uninsured motorist protection "does not inure to a particular motor vehicle," but instead protects the named insured against injury inflicted by an uninsured motorist "under whatever conditions, locations, or circumstances." *Coleman v. Fla. Ins. Guar. Assoc.*, 517 So. 2d 686, 689 (Fla. 1988); *accord GEICO v. Douglas*, 654 So. 2d 118, 119 (Fla. 1995).

C. This Court should adhere to *Gillen* and not rely on the Third District's *Woodward* decision.

Gillen is a thirty-five-year-old precedent that has never been questioned or overturned. Numerous times in the last thirty-five years, the Legislature has amended the statutes pertaining to UM insurance. *Supra* Argument II. None of

the amendments still in effect, however, have undermined *Gillen*. Given these numerous amendments to the UM statute and related statutes, this Court must presume that the Legislature has adopted and approved of *Gillen*. *E.g.*, *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1042 (Fla. 2008). Therefore, in this case, this Court should rely on *Gillen* and answer the certified question in the negative.

Rather than rely on *Gillen*, however, the federal district court and the Insurer relied heavily on the Third District's decision in *New Jersey Manufacturers Insurance Co. v. Woodward*, 456 So. 2d 552 (Fla. 3d DCA 1984). (Doc. 67, at 8; App. 2, at 8; Appellee's 11th Cir. Br. 22-24, 27, 28.) The *Woodward* court declined to apply Florida law to a New Jersey auto insurance policy. 465 So. 2d at 553. *Woodward* is distinguishable for primarily two reasons.

First, *Woodward* is not a stacking case. *See id.* Instead, *Woodward* concerned whether the UM coverage limits in the New Jersey policy could be lower than the liability limits in the same policy. *Id.* The UM coverage limits are strictly and expressly regulated by the Legislature and the plain language of the UM statute. *See* § 627.727(2), Fla. Stat. (2005). Indeed, the *Woodward* court itself noted that UM coverage limits were a "Florida ***statutory*** requirement." *Woodward*, 465 So. 2d at 553 (emphasis added) (citing § 627.727(a), Fla. Stat. (1983)). In contrast, Florida's public policy on stacking is a "judicial creation." *United Servs. Auto. Ass'n v. Roth*, 744 So. 2d 1227, 1229 (Fla. 4th DCA 1999).

Unlike the UM coverage limits, Florida's pro-stacking law historically has not been strictly tied to statutory requirements. *See Gillen*, 300 So. 2d at 5-7.

Second, *Woodward* can be distinguished on its facts. In *Woodward*, the insureds did not fairly apprise the insurer that they were moving their permanent residence – as well as the center of the insured risk – to Florida. 456 So. 2d at 553-54; *see GEICO v. Douglas*, 654 So. 2d 118, 119-20 (Fla. 1995) (suggesting that the insured risk is the named insured, not the insured's motor vehicle). By comparison, in this case, the Insurer was fully cognizant that their insureds, the Plaintiffs, had moved their permanent residence and the center of the insured risk to Florida. Specifically, as the federal district court noted: (i) Plaintiffs notified the Insurer that the mailing address on both their Florida and Delaware Policies should be changed to a Florida address; (ii) Plaintiffs garaged in Florida the two cars that they drove, something the Insurer knew because it issued the Florida Policy on these two cars; (iii) Plaintiffs obtained Florida driver's licenses; (iv) Plaintiffs closed on a Florida house; (v) Plaintiffs ultimately were injured in an accident in Florida; and (vi) only the car being driven by the Plaintiffs' daughter remained behind in Delaware. (Doc. 67, at 2-4; App. 2, at 2-4).

In summary, Florida's pro-stacking policy is a judicial creation that does not depend on the location of the insured vehicle or on satisfaction of the conditions in subsection (1) of the UM statute, § 627.727(1), Fla. Stat. (2005). Therefore, this

Court should adhere to the long line of precedent holding that anti-stacking provisions, like the one in this case, are void and unenforceable under Florida law. *Fireman's Fund Ins. Co. v. Pohlman*, 485 So. 2d 418, 419-21 (Fla. 1986); *Gillen*, 300 So. 2d at 6-7; *Tucker v. GEICO*, 288 So. 2d 238, 240-42 (Fla. 1973); *Sellers v. United States Fid. & Guar. Co.*, 185 So. 2d 689, 692 (Fla. 1966).

CONCLUSION

For the foregoing reasons, this Court should answer the Eleventh Circuit's certified question in the negative.

MILLS CREED & GOWDY, P.A.

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Bryan S. Gowdy
Florida Bar No. 0176631
865 May Street
Jacksonville, FL 32204
(904) 350-0075
(904) 350-0086 (facsimile)

and

BABIARZ LAW FIRM, P.A.
Timothy S. Babiarz
Florida Bar No. 0050407
13940 N. US Hwy. 441, Ste. 205
The Villages, FL 32159
(352) 205-7599
(352) 205-7590 (facsimile)

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Angela C. Flowers**, Kubicki Draper (Counsel for Appellee), City National Bank Building, Penthouse Suite, 25 W. Flagler St., Miami, FL 33130, by U.S. mail, this 8th day of April, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney