IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1257

TRAVELERS COMMERCIAL INSURANCE COMPANY,

Petitioner,

v.

CRYSTAL MARIE HARRINGTON,

Respondent.
_____/

BRIEF OF AMICUS CURIAE PERSONAL INSURANCE FEDERATION OF FLORIDA

CYNTHIA S. TUNNICLIFF
Florida Bar Number: 0134939
GERALD D. N. BRYANT
Florida Bar Number: 58288
PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A.
215 South Monroe Street, Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: 850/222-3533
Facsimile: 850/222-2126
E-Mail: cynthia@penningtonlaw.com
jbryant@penningtonlaw.com

TABLE OF CONTENTS

PAGE

CITATION OF AUTHORITIES

CASES **PAGE**

CITATION OF AUTHORITIES continued

CASES **PAGE**

FLORIDA STATUTES

LAWS OF FLORIDA

CITATION OF AUTHORITIES continued

PAGE

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTEREST OF AMICUS

The Personal Insurance Federation of Florida is a trade group whose membership represents 45 percent (45%) of the Florida automobile market and more than 25 percent (25%) of the homeowners market. The organization is dedicated to improving Florida's personal lines market by ensuring company solvency and expanding the availability of coverage through competitive pricing. PIFF has worked with the legislative and executive branches of government, as well as state regulators, the business community and consumer groups "to make Florida a better place in which to insure a vehicle or home."

This case is of interest because it involves two issues of interest to PIFF. The first issue is whether the policy exclusion for uninsured motorist ("UM") benefits conflicts with section 627.727(3), Florida Statutes, when an insured's vehicle is operated by a permissive user and causes injury to an insured passenger which exceeds the driver's liability insurance and the liability payments under the insured's policy. The second issue is whether UM benefits are stackable under section 627.727(9), Florida Statutes, where such benefits are claimed by an insured under the policy, but a non-stacking election was made by the purchaser of the policy. PIFF members will be substantially affected and bound by the decision of this Court in the above-styled case.

SUMMARY OF ARGUMENT

The First District Court of Appeal certified the following question of great public importance:

> WHETHER THE FAMILY VEHICLE EXCLUSION FOR UNINSURED MOTORIST BENEFITS CONFLICTS WITH SECTION 627.727(3), FLORIDA STATUTES, WHEN THE EXCLUSION IS APPLIED TO A CLASS I INSURED WHO SEEKS SUCH BENEFITS IN CONNECTION WITH A SINGLE-VEHICLE ACCIDENT WHERE THE VEHICLE WAS BEING DRIVEN BY A CLASS II PERMISSIVE USER, AND WHERE THE DRIVER IS UNDERINSURED AND LIABILITY PAYMENTS FROM THE DRIVER'S INSURER, WHEN COMBINED WITH LIABILITY PAYMENTS UNDER THE CLASS I INSURED'S POLICY, DO NOT FULLY COVER THE CLASS I INSURED'S MEDICAL COSTS.

The First DCA answered this question in the affirmative. However, this holding is belied by the legislative history of section 627.727(3)(b). With respect to underinsured motorist benefits, the Legislature always contemplated the existence of two insurance policies: one that provides liability benefits to the victim on behalf of the tortfeasor, and another that provides underinsured motorist benefits to the victim. The Legislature never contemplated recovery of liability and UM benefits from the same policy. Here, the Appellee was entitled to (and received) liability benefits from the policy covering the driver of the car, as well as liability benefits from the policy covering Appellee. The amount of liability and UM benefits available under the Appellee's policy were identical. Thus, because

Appellee received the maximum amount of coverage that the Legislature intended her to receive, the policy exclusion denying her the ability to also recover UM benefits does not conflict with section 627.727(3)(b).

The First District Court of Appeal also certified a second question of great public importance:

> WHETHER UNINSURED MOTORIST BENEFITS ARE STACKABLE UNDER SECTION 627.727(9), FLORIDA STATUTES, WHERE SUCH BENEFITS ARE CLAIMED BY AN INSURED POLICYHOLDER, AND WHERE A NON-STACKING ELECTION WAS MADE BY THE PURCHASER OF THE POLICY, BUT WHERE THE INSURED CLAIMANT DID NOT ELECT NON-STACKING BENEFITS.

The First DCA likewise answered this question in the affirmative. However, the entirety of the First DCA's holding is based on the fact that the current version of section 627.727(1) allows any named insured to reject UM coverage "on behalf of all insureds" under the policy. The First DCA held that because the Legislature did not include this phrase in section 627.727(9), the Legislature must have intended to require written acceptance of non-stacked coverage from each person insured under the UM policy. This holding is contradicted by the legislative history of the statute. At the time subsection (9) was enacted, subsection (1) did not include the phrase "on behalf of all insureds." Instead, the relevant language of both subsections was substantially identical:

> If this form is signed by a named insured it shall be a conclusive presumption that there was an informed, knowing rejection of coverage or election of lower limits.

Fla. Stat. § 627.727(1) (1987).

> 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.

Fla. Stat. § 627.727(9) (1987).

Significantly, by this time courts had already interpreted subsection (1) to allow any named insured to reject UM coverage on behalf of all other individuals insured under the same policy. Thus, when the Legislature enacted subsection (9), it declined to include the phrase "on behalf of all insureds" because such language was superfluous in light of the courts' interpretation of subsection (1). It was not until three years after subsection (9) was enacted that the Legislature added the phrase "on behalf of all insureds" to subsection (1) in order to clarify that the courts' interpretation of its intent was correct. There was no reason to also clarify subsection (9) because it had not been the subject of any litigation regarding its meaning. Thus, the legislative history of the two subsections shows that Legislature clearly intended them to be interpreted in the same manner.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF SECTION 627.727(3)(b) SHOWS THAT THE LEGISLATURE NEVER INTENDED TO PERMIT RECOVERY OF BOTH UM BENEFITS AND LIABILITY BENEFITS UNDER THE SAME POLICY

Since its creation, the purpose of the UM statute has been "to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party." Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971). However, as originally enacted, "UM coverage came into play only when the offending owner or operator carried no liability insurance whatsoever." Shelby Mut. Auto. Ins. Co. of Shelby, Ohio v. Smith, 556 So. 2d 393, 393 (Fla. 1990). That is, "the tortfeasor had to be *completely* uninsured before such coverage was required to be applicable. Even if an accident victim's recovery from the tortfeasor's insurer was less than his damages, the statute did not originally require uninsured vehicle coverage to be available for further compensation." Williams v. Hartford Acc. & Indem. Co., 382 So. 2d 1216, 1218 (Fla. 1980) (emphasis supplied).

In 1973, the Legislature amended the UM statute to explicitly provide for underinsured motorist coverage in addition to uninsured motorist coverage. Ch. 73-80, Laws of Fl. As part of the new law, section 627.727(2)(b) – later renumbered as subsection (3)(b) – was created to state:

(2) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:

(a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency;

(b) Has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person.

Ch. 73-80, Laws of Fl. This statute remained essentially unchanged from 1973 until 1989. Shelby Mut. Auto. Ins. Co. of Shelby, Ohio v. Smith, 556 So. 2d 393, 393-94 (Fla. 1990).

The original purpose of underinsured motorists' coverage was "to allow the insured the same recovery which he would be entitled to against a tort-feasor had the tort-feasor been insured to the same extent as the insured himself." U.S. Fidelity & Guaranty Co. v. Warmack, 386 So. 2d 1284, 1286 (Fla. 1st DCA 1980); Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978). To that end, the amended UM statute allowed the insured victim to recover bodily injury benefits from the underinsured tortfeasor's liability insurer and underinsured motorist benefits from the victim's own UM insurer. Ch. 73-80, Laws of Fl. However, one of the issues which both the Legislature and courts wrestled with over the next decade was whether the benefits received from a tortfeasor's liability insurer

should be treated as "excess" insurance (so that, for example, an insured with $15,000 in UM coverage who received $10,000 from the tortfeasor's liability insurer could recover up to $25,000) or as a reduction in the limits of the UM coverage (so that the same insured could only recover $5,000 from his UM insurer, for a total of $15,000). Bulone v. United Services Auto Ass'n, 660 So. 2d 339, 402-03 (Fla. 2nd DCA 1995).

The Legislature ultimately determined that UM coverage should be excess over liability coverage. Ch. 84-41, Laws of Fla. However, when the Legislature amended the UM statute to provide for excess UM coverage, it neglected to amend the definition of "uninsured motor vehicle" in section 627.727(3)(b). This created the possibility for unintended – and undesirable – consequences. For example:

> Under the amended statute, an insured with $15,000 in UM coverage and $10,000 in liability coverage from the tortfeasor met the prerequisites for an uninsured/underinsured motor vehicle and recovered the UM coverage over and above the liability coverage, for total benefits of $25,000 ($10,000 + $15,000). Under a literal reading of the statute, however, the insured in this example who purchased $10,000 in UM coverage rather than $15,000 did not just receive $5,000 less in UM coverage, but instead recovered none, because the UM coverage did not exceed the liability coverage as required by the unchanged definition of "uninsured motor vehicle."

See Louis K. Rosenbloum and Gregory M. Yaffa, Florida Automobile Insurance Law, § 4.8 (8th ed. 2012).[1] Suffice it to say that "[m]any people believed this result was not the best policy." Bulone, 660 So. 2d at 403. Thus, in 1989 the Legislature corrected its oversight in failing to amend the definition of uninsured motorist coverage "to clear up Legislative intent that UM coverage is excess." See Ch. 89-243, Laws of Fl.; Florida House of Representatives, Insurance Committee, Final Staff Analysis & Economic Impact Statement, CS/HB 331. The Staff Analysis described the reason for the amendment as follows:

> PRESENT SITUATION:
>
> The 1988 Motor Vehicle Reform Act, Chapter 88-370, eliminated excess uninsured motorist coverage effective October 1, 1989. Until that date, a motorist who is not at fault in an accident with a motorist who has liability insurance will be eligible to collect his own UM coverage up to the policy limit, regardless of whether the at fault motorist has liability insurance. For example, if Motorist A, who has $100,000 of UM coverage, incurs $150,000 in medical bills from an accident caused by Motorist B, who has 10,000 in liability insurance, Motorist A can collect $10,000 from Motorist B's policy, plus $100,000 on his own UM policy, for a total of $110,000. Given the same set of circumstances after repeal of excess UM coverage, Motorist A would receive only $100,000. Motorist A would collect only $90,000 (the "difference in limits") from his own UM policy because the $10,000 he collects from Motorist A's liability policy is deducted from the $100,000 UM limit.
>
> ...

[1] The Florida Supreme Court, in Shelby Mutual Insurance Co. of Shelby, Ohio v. Smith, 556 So.2d 393 (Fla. 1990), would ultimately confirm that this interpretation of the statute was correct.

> Presently, Shelby Mutual v. Smith, 527 So. 2d 830 (Fla. 4th DCA 1988), and USF & G v. Woolard 523 So. 2d 798 (Fla. 1st DCA 1988) conflict and the Shelby court cited some analyses which concluded that while the Legislature had intended to create excess coverage, the Legislature should amend s. 627.727(3)(b) to clear up an ambiguity in the law.

To that end, section 627.727(3)(b) was amended to state:

> (3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; or
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages ~~limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person~~.

See Ch. 89-243, Laws of Fl. This is the version of section 627.727(3)(b) which remains in effect today and which the First DCA in this case held to conflict with the "your auto" exclusion of the Travelers policy.

The legislative history discussed supra belies the First DCA's holding. The 1989 amendment to subsection (3)(b) did not change the fact that the subsection contemplates the existence of two insurance policies: one that provides liability benefits to the victim on behalf of the tortfeasor, and another that provides underinsured motorist benefits to the victim. As this Court has previously stated,

there is no evidence that the 1989 amendment "was intended to enable class II insureds who are injured in a single-car accident to recover both liability and UM benefits under the same policy." Travelers Ins. Co. v. Warren, 678 So. 2d 324, 327 (Fla. 1996). This is because the Legislature *never* contemplated or intended that any victim – whether a class I or a class II insured – be able to recover UM benefits and liability benefits from the same policy.

Here, the owner of the vehicle was insured under one policy and the operator of the vehicle was insured under another. The Appellee was entitled to – and received – benefits under the liability coverage section of the operator's policy. And while the Appellee herself was named as an insured under the owner's policy, the Appellee was also entitled to – and received – benefits under the liability coverage section of the owner's policy. The amount of the benefits under the liability section of the owner's policy equaled the amount of benefits under the UM section of the policy. Thus, the Appellee was protected to the full extent contemplated and intended by the Legislature.

II. THE LEGISLATIVE HISTORY OF SECTIONS 627.727(1) AND 627.727(9) SHOW THAT THE LEGISLATURE INTENDED TO ALLOW A NAMED INSURED TO ACCEPT NON-STACKED UM COVERAGE ON BEHALF OF ALL INSUREDS

When the UM statute was first enacted in 1961, it required insurers to issue policies containing UM coverage unless "any insured named in the policy shall

reject the coverage." Fla. Stat. § 627.0851(1) (1961).[2] Although the statute was amended numerous times throughout its first three decades, this provision remained essentially unchanged. Courts interpreting this provision concluded that any named insured could reject UM coverage on behalf of all insureds even though the statute did not include the phrase "on behalf of all insureds." Continental Ins. Co. v. Roth, 388 So. 2d 617, 618 (Fla. 2nd DCA 1980).

In Roth, the son – who was a named insured – was injured in a hit-and-run accident while riding in a covered vehicle. The father – who was also a named insured – had rejected UM coverage on behalf of the entire family. Nevertheless, the son argued that "as a named insured who had not rejected the U/M coverage, [he] was not bound by his father's rejection." Id. at 617. At the time, the statute stated in relevant part:

> No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be

[2] Subsection 627.0581(1) originally stated: "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, in not less than limits described in § 324.021(7), under provisions filed with and approved by the insurance commissioner, 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; provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage." (Emphasis supplied.)

> 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, resulting therefrom. However, the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy shall reject the coverage.

Fla. Stat. § 627.727(1) (1979) (emphasis supplied).[3]

The Second DCA rejected the son's argument based on its interpretation of the statute, stating:

> We hold that any named insured, as the statute says, may reject U/M coverage for all insureds named or additional. This holding makes the most sense to us, both as legislative interpretation and as logical result: We envision no rational apportionment of the U/M premium among named insureds, should some want the coverage, and others not; nor can we believe that it was the intention of the legislature, Continental, or the Roths, that a bargain for U/M coverage be struck per capita, within each policy, rather than on a policy-by-policy basis.

Id. (emphasis supplied.) Thus, even in the absence of the phrase "on behalf of all insureds" in the text of section 627.727(1), the provision allowing "any insured named in the policy" to reject coverage was interpreted to allow any named insured to reject UM coverage on behalf of all other insureds.

Though any named insured could reject coverage on behalf of all others, the rejection had to be a "knowing" rejection. Quirk v. Anthony, 563 So.2d 710, 713-

[3] The statute was renumbered as section 627.727, Florida Statutes, in 1971. See Fla. Stat. § 627.727(1) (1971).

14 (Fla. 2nd DCA 1990) (citing Kimbrell v. Great American Ins. Co., 420 So.2d 1086 (Fla.1982)). At the time, a written document was not statutorily required to establish a knowing rejection. Thus, whether UM coverage had been "knowingly" rejected usually presented a question of fact for a jury to determine. Id. at 714 (citing Kimbrell). To remedy this inefficiency, the statute was amended "to create an environment in which UM was still promoted by the state, but a valid rejection of the coverage could be obtained by a carrier without a great risk of litigation concerning the rejection." Id. Specifically, in 1982 the statute was amended to state that the insured must reject UM coverage "in writing." Ch. 82-242, Laws of Fl. In 1984, the statute was again amended to require that the written rejection be made on a form approved by the Insurance Commissioner. Ch. 84-41, Laws of Fl. Effective October 1, 1984, section 627.727(1) stated in relevant part:

> However, the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy rejects the coverage in writing. ...
>
> The rejection or selection of lower limits shall be on a form approved by the Insurance Commissioner. The form shall fully advise the applicant of the nature of the coverage and shall state that the coverage is equal to bodily injury liability limits unless lower limits are requested or the coverage is rejected. ...
>
> If this form is signed by a named insured it shall be a conclusive presumption that there was an informed, knowing rejection of coverage or election of lower limits.

Fla. Stat. § 627.727(1) (1984) (emphasis supplied).

Importantly, the subsection still did not include the phrase "on behalf of all insureds." It was not until 1990 that the statute was amended to state, as it currently does, that "the coverage required under this section is not applicable when, or to the extent that, an insured named in the policy makes a written rejection of the coverage on behalf of all insureds under the policy" and that if the appropriate form is signed by a named insured "it will be conclusively presumed that there was an informed, knowing rejection of coverage or election of lower limits on behalf of all insureds." Ch. 90-119, Laws of Fl. Again, though, by this time at least one court had determined that the pre-1990 version of the statute already allowed for any named insured to reject UM coverage on behalf of all insureds. This is why the Staff Analysis and Economic Impact Statement of the Florida House of Representatives, Committee on Insurance for CS/SB 2670 (the bill which enacted Ch. 90-119) states:

> Section 39. This section amends 627.727(1), F.S., the uninsured motorist (UM) coverage statute, to clarify that a named insured is authorized to reject UM coverage or to select limits for UM coverage on behalf of all insureds. (Emphasis supplied.)

Legislative clarification of a previously enacted statutory provision is not a change in substantive law when the amendment is enacted soon after controversies regarding the law's interpretation arise. Lowry v. Parole and Probation Commission, 473 So. 2d 1248, 1250 (Fla. 1985). The Legislature's characterization of an amendment is not necessarily dispositive of its true nature.

This amendment's purpose, however, as stated in Roth, was to clarify that the previous intent of the Legislature was to allow any named insured to reject coverage on behalf of all insureds. Such clarification would obviate the need for further litigation on the issue. It is for this reason that West's Florida Statutes Annotated (1991) describes the amendment as "nonsubstantive":

> Laws 1990, c. 90-119, § 39, eff. Oct. 1, 1990, in subsec. (1), made nonsubstantive changes; in the second sentence, substituted "makes a written rejection on behalf of all insureds under the policy" for "rejects the policy in writing"; and, in the ninth sentence, added "on behalf of all insureds".

Notwithstanding the foregoing, the First DCA in this case held that "the legislature's use of different language in separate parts of the statute suggests that different meanings were intended" and therefore the presence of the phrase "on behalf of" in the current version of section 627.727(1) indicates that the legislature did not intend for section 627.727(9) to allow the named insured, applicant, or lessee to accept non-stacked UM coverage "on behalf of" all other insureds. The polestar of statutory construction, though, is legislative intent. Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 367 (Fla. 2013). The canons of statutory construction are used to help ascertain legislative intent, not supersede it. See id. Section 627.727(9), which provides for the written acceptance of non-stacked UM coverage on a form approved by the Office of Insurance Regulation, states:

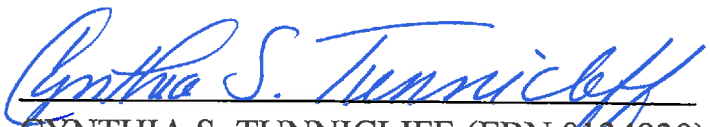
> If this form is signed by a named insured, applicant, or lessee, it shall be conclusively presumed that there was an informed, knowing acceptance of such limitations.

This subsection was created in 1987 by HB 1029, enacted as Chapter 87-213, Laws of Florida. The staff analyses of both HB 1029 and its companion bill, CS/SB 829, are silent with respect to whether the intent of the foregoing language requires written acceptance by each and every insured. However, at the time the bill was passed, subsection (1) still lacked the phrase "on behalf of all insureds"; nevertheless, courts had concluded that any named insured could in fact reject UM coverage on behalf of all insureds. The Legislature is presumed to be aware of existing case law interpreting statutory provisions. Barnett v. Dept. of Management Services, 931 So. 2d 121, 127 (Fla. 1st DCA 2006). Thus, by using language in subsection (9) that was nearly identical to the existing language in subsection (1) – which, again, had already been interpreted by at least one DCA to allow a written rejection by one insured "on behalf of all insureds" – the 1987 Legislature clearly intended that subsection (9) be interpreted in the same manner to allow "a named insured, applicant, or lessee" to accept non-stacked coverage on behalf of all insureds.

III. CONCLUSION

For the foregoing reasons, both questions certified by the First DCA should be answered in the negative and the First DCA's opinion should be reversed.

Respectfully submitted,



CYNTHIA S. TUNNICLIFF (FBN 0134939)
GERALD D. N. BRYANT (FBN 58288)
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street, Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: 850/222-3533
Facsimile: 850/222-2126
E-Mail: cynthia@penningtonlaw.com
jbryant@penningtonlaw.com

CERTIFICATE OF COMPLIANCE

In compliance with Fla. R. App. P. 9.210(a), the font size used in this Amicus Curiae Brief is Times New Roman, size 14.

Cynthia S. Tunnicliff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Electronic Mail, this 4th day of April, 2013, to

James P. Waczewski, Esquire
Luks & Santaniello, LLC
2509 Barrington Circuit, Suite 109
Tallahassee, Florida 32308-6801
jwaczewski@ls-law.com

Jack W. Shaw, Jr., Esquire
1555 Howell Branch Road
Suite C210
Winter Park, Florida 32789-1171
jack@jackshawpa.com

Stephen C. Bullock, Esquire
Brannon, Brown, Haley & Bullock, P.A.
Post Office Box 1029
Lake City, Florida 32056-1029
scb@bbattorneys.com

Cynthia S. Tunnicliff