Supreme Court of Florida

January Term 2012

No. SC12-157

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Petitioner,

vs.

ROBIN CURRAN,
Respondent.

L.T. 5D09–1488, 5D09–2091

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Florida Statutes

Rules of Procedure

Misc.

Statements of Case and Facts

The case history and facts on which the certified question must be decided are those set forth in the En Banc opinion of the Fifth District.[1] Petitioner's highly selective, one-sided and self-serving presentation in the Initial Brief does not fairly state those facts.

Also in the trial court, at the hearing of the cross-motions for summary judgment regarding coverage, both stipulated that the facts were undisputed. The En Banc opinion sets forth those stipulated letters and correspondence, describing them in detail. Because all the pertinent facts were contained in the correspondence relating to the requested medical examination, this Court (like the Fifth District) can decide this purely legal issue based on settled facts.

Here a précis of them. The insured breached the uninsured motorist (UM) policy provision requiring that, after she gave State Farm notice of her claim for UM benefits, she submit to a scheduled compulsory medical examination (CME)[2]

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[1] 2011 WL 6003288 at *1-*6.

[2] Since they began under rule 1.360, such examinations were called "IME" — the "I" meaning *independent*. But this Court has pointedly noticed there is nothing *independent* about a compulsory "ME" by an insurer's chosen physician. *Allstate Ins. Co. v. Boecher*, 733 So.2d 993, 996 n.4 (Fla. 1999) ("Although still referred to as an IME … the rules of civil procedure recognize that the expert is no longer considered 'independent,' but rather an expert hired by the party requesting the compulsory court-ordered examination. … Thus, rule 1.360(c) specifically provides that the witness 'shall not be identified as appointed by the court'"). And, in this case, the trial Judge stated the following about State Farm's carefully selected CME physician:

by State Farm's duly designated physician before she filed an action against State Farm for UM benefits. She did not then submit to the CME.

Instead, within seven days after the day for which State Farm had finally scheduled the CME, she prematurely sued State Farm for benefits under the UM policy and only then offered to submit to a CME. State Farm refused that offer, instead asking the trial court to hold that her refusal to appear for the finally scheduled CME vitiated forfeited coverage. When the trial court later ruled that coverage had not been lost by her failure to appear, she promptly submitted to a CME by State Farm's chosen physician. Any negative effects on State Farm of a breach of CME lasted only until State Farm refused her offer to submit to CME.

Notably, State Farm did not acknowledge that the Policy text could make the CME requirement a condition precedent only to the filing of an action against State Farm. And it did not request the premature UM action be abated or suspended until the CME requirement was met. Nor did State Farm comply with the pleading requirement in rule 1.120(c) by alleging an express breach of a condition precedent

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> "This Court will take judicial notice that Dr. Uricchio is a well-known orthopedic surgeon in Winter Park, Florida, *used by numerous insurance companies including State Farm for Compulsory Medical Examination* under Rule 1.360 and has been so *for 30 plus years*. Therefore it is somewhat disingenuous for State Farm to say we want Ms. Curran to be examined by Dr. Uricchio because he is an expert in RSD, which the Plaintiff suffers." [e.s.]

Curran v. State Farm Mut. Auto. Ins. Co., 2008 WL 6205904 (Trial Order) (Fla. 18th Cir. Apr. 16, 2008); *see also* R419-20.

to filing an action resulting in prejudice to State Farm in some specified way.[3] Rather, its sole position was that her failure to appear for the initial CME *ipso facto* forfeited all coverage. It argued that the insured's duty to attend the CME was a determinative condition for any UM coverage but cited no Policy text so stating.

To be sure, State Farm never alleged or offered any evidence that plaintiff's delay in submitting to a CME affected the validity of the CME when later done. State Farm never attempted to show that the results of the CME when completed turned out to be materially different from those that would have obtained if she had not initially refused the CME.

Nothing about the meaning of Policy text is in dispute. The provision for a CME is part of a statement of an insured's duties after a motor vehicle accident has occurred and the insured has given State Farm notice of a claim for UM benefits.[4] A different part of the Policy provides that the insured may not file any action against State Farm for UM benefits "*until*" the insured complies with the terms of the Policy contract. The Policy contains no provision stating any consequence or effect if an insured fails to comply with a request for a CME — other than the "*until*" provision by implication barring any suit until compliance.[5] The Policy

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[3] *See* Fla. R. Civ. P. 1.120(c) (denial of performance or occurrence of condition precedent must be made specifically with particularity).

[4] Entitled: "REPORTING A CLAIM — INSURED'S DUTIES."

[5] Grammatically, "*until*" here functions as a subordinate conjunction introducing an adverbial clause specifying at what point in the claims administration process

definitely does not state that UM benefits are forfeited if an insured fails to comply with a CME request.

In spite of the later completed CME and the availability of the resulting report by its chosen physician, State Farm decided not to call its CME physician as a witness at trial.[6] Plaintiff presented substantial evidence that she suffers from Reflex Sympathetic Distrophy (RSD), and the damages Verdict on her personal injury claim was $4,650,589, representing an obvious finding by the Jury that she did in fact suffer from the very serious condition she had alleged.[7]

Issue on Review (Certified Question)

> *When an insured breaches a CME provision in an uninsured motorist contract, in the absence of contractual language specifying the consequences of the breach does the insured forfeit benefits under the contract without regard to prejudice, or does the prejudice analysis described in* Bankers Insurance Company v. Macias, 475 So.2d 1216, 1218 (Fla. 1985), *apply? If prejudice must be considered, who bears the burden of pleading and proving that issue?*

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the insured claiming UM Policy benefits may sue State Farm under the Policy. Giving "*until*" its plain meaning under traditional contract law, the provision is a condition subsequent to contracting but precedent to maintaining an action based on the contract. If the insured breaches by suing before compliance with the CME, the conjunction "*until*" makes clear that the only remedy contemplated by Policy text would be to abate or suspend the UM action and further performance by State Farm "*until*" the insured complies. State Farm never wanted that remedy, just forfeiture instead.

[6] From which one might reasonably infer that the results of the CME did not exactly support State Farm's position as to plaintiff's medical condition.

[7] So, apparently, the Jury found that this "relatively minor accident" caused a much more severe injury than State Farm is willing to concede.

Summary of Argument

Although *Macias* involved a failure to give notice of an accident to a PIP Insurer, its logic applies equally to a breach of a CME in a UM policy. As the En Banc Opinion concluded, both the *Macias* breach of the PIP policy and the CME breach of this UM policy involve conditions subsequent to coverage and relate to claims administration.

Further, this Court's more recent decision in *Custer* emphasizes that, where no regulatory statute applies, the relevant provisions of the Policy itself decide the consequences of a breach of a condition subsequent such as this CME provision. Here the Policy expresses no direct, specifically unique, consequential remedy for the breach of the CME. Under this Court's cases, the party claiming breach of a condition subsequent the Insurer was required to plead and prove actual prejudice for the CME breach, there being no indisputably obvious adverse effects ensuing from mere delay in accomplishing a CME.

To repeat, the Policy itself can be read to make the CME requirement a prerequisite only to an insured filing an action for UM benefits. But the Insurer has never sought to have the premature action abated or suspended until the CME was done. The Insurer sought only to have a declaration that the UM coverage was forfeited by the insured's refusal to submit to an immediate CME even though it neither alleged nor proved any prejudice from that failure.

Argument

The issue presented by the certified question is whether *Bankers Insurance Company v. Macias*, 475 So.2d 1216 (Fla. 1985), required State Farm to plead and prove prejudice resulting from a breach of the CME provision in its UM Policy. The En Banc opinion of the Fifth District also necessarily implicates this Court's more recent decision in *Custer Medical Center v. United Automobile Insurance Company*, 62 So.3d 1086 (Fla. 2010). Both decisions address the breach of a condition subsequent in a medical benefits insurance policy. Neither decision can be fairly read to stand for the proposition that an insured's breach of a condition subsequent like this CME provision *ipso facto* forfeits policy coverage. Rather, both this case and *Custer* follow *Macias* in holding that the kind of breaches of conditions subsequent involved generally require a showing of genuine prejudice to the insurer to result in a forfeiture of the coverage.

Yet, the opening paragraph of State Farm's argument unaccountably asserts:

> "The *established — and heretofore uniform — law of Florida*, including from the Fifth District, *has held* that in insured's refusal to *comply with a policy condition requiring the insured to submit to an examination* is a material breach that *precludes recovery* under the policy." [e.s.]

Initial Brief, at 21. It is striking that, in describing the holding of Florida decisions involving a breach of insurance policy conditions listed after that sentence, State Farm would disingenuously fail to state that none of them actually involved

medical benefits insurance. It is incorrect to argue that the listed cases uniformly treat a breach of all contractual provisions in insurance contracts involving an *examination* in exactly the same way. Not one of the cases can be fairly read to hold that a breach of a condition subsequent for any kind of an *examination* in any discipline is treated in exactly the same manner under Florida insurance law.

In this regard, the Court should take notice that the disciplines of Education, Law and Medicine each employ a different meaning of *examination*.[8] Each different kind of "*examination*" involves entirely different purposes, procedures and skills seeking information unique to the discipline involved. Apparently State Farm thinks all forms of "*examination*" involve the same considerations and consequences.

And so the cases cited by State Farm in that opening paragraph reveal a very specific and definite kind of examination not involving medicine, medical diagnosis or health care benefits. The uniquely distinctive "*examination*" in these authorities first appears in a decision of this very Court, namely *Southern Home Insurance v. Putnal*, 49 So. 992 (Fla. 1909), which concerns a *fire insurance claim*

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[8] *See e.g.* THE COLLINS ENGLISH DICT. [search term *examination*] "1. the act of examining or state of being examined; 2. ***education*** a. written exercises, oral questions, or practical tasks, set to test a candidate's knowledge and skill …; 3. ***medicine*** a. physical inspection of a patient or parts of his body in order to verify health or diagnose disease, b. laboratory study of secretory or excretory products, tissue samples, esp. in order to diagnose disease; 4. ***law*** the formal interrogation of a person on oath, esp. of an accused or a witness." [e.s.]

under a structural casualty policy requiring the insured to submit without counsel to a deposition, denominated an "*examination* [e.s.] under oath" [EUO], immediately after giving the Insurer notice of the claim. The insured submitted a claim to the Insurer, who "straightaway" demanded that the insured submit to the EUO. He refused to do so. The fire insurance policy explicitly provided that *the loss was not payable* until 60 days after the insured had complied with the EUO requirement.

In denying relief to the insured, *Putnal* specifically relied on the policy provision that *no loss was payable* until 60 days after the insured had complied with the EUO requirement. In other words, this Court enforced an explicit policy condition in *Putnal* (admittedly subsequent to contracting but precedent to any liability for payment of a loss) postponing any duty of the insurer to pay benefits until the insured had complied with EUO provision, because that is what the Policy clearly said. By contrast, the present CME condition is plainly not textually linked in any way to State Farm's obligation to pay UM benefits — only indirectly to the insured's timing for filing suit on the claim.

Moreover, the *Putnal* EUO precondition to payment of any loss has long been given singular importance in American law relating to structural casualty insurance when fire loss is concerned.[9] In fire losses the search for evidence about the

[9] *See* Susan J. Miller & Philip Lefebvre, MILLER'S STANDARD INSURANCE POLICIES

structural condition before the fire and its cause originates with the insured. The EUO requirement allows the fire insurer at the very onset of the claim to question the insured under oath without anyone else present to fully establish and explore what an insured's admits to knowing of the events and effects relevant to the loss. It can be crucial to discovering whether there might be grounds to suspect misconduct.

But in UM cases — and for that matter in PIP as well — the insured rarely lacks a history of medical records preceding the accident, and has usually since then incurred a record of medical services for treatment of the injuries claimed to result from the event. And so the insured's medical history, before and after the accident, is often used by the Insurer instead to impeach the insured as to whether the accident caused the current medical condition or that the injury is as severe as claimed.[10] Thus, State Farm's argument that prejudice to the insurer from a breach

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ANNOTATED at 456.1 (4th ed. 1995); 13 APPLEMAN'S INSURANCE LAW & PRACTICE § 3549, at 549-50 (1976) (noting the contention of many Casualty Insurers that insured's noncompliance with EUO provision deprives Insurer of valuable right for which it contracted); *American Reliance Ins. Co. v. Riggins*, 604 So. 2d 535, 535-36 (Fla. 3rd DCA 1992) (holding that insured was "absolutely required" to submit to EUO as provided in policy); *see also Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 95-6 (1884) ("The object of the [EUO] provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath … was to enable the company to possess itself of all knowledge … in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims").

[10] *See* n.2, above. Although the Policy is deemed a consensual agreement, it is counter-intuitive to think that an insured knowingly agreed to unlimited medical

of the CME provision in a UM policy "must follow as the night the day" [IB at 26] is an argument without a premise and at odds with experience. If State Farm did really think that prejudice would be automatic and inexorable, why not insert a specific provision into its form UM Policy making any breach of the CME requirement a forfeiture of UM coverage?

The two decisions identified at the inception of this argument were obviously applied correctly by the Fifth District in its En Banc Opinion. In *Macias* the trial court had found that the insured did not give the PIP insurer notice of the claim *until two years after* the injury was incurred.[11] It concluded that the long delay in

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examinations by physicians picked by an Insurer. Florida health-care law begins with a core principle of self-determination and the personal autonomy of patients to choose their care and caregivers. *See* § 765.102(1), Fla. Stat. (2010) ("The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment"). The mind struggles to accept that purchasers of UM insurance have been duly warned that the Insurer will drop into Policy text a provision (to which they are nonetheless bound) allowing the Insurer to require the insured to submit to CMEs by health care providers not chosen by the insured.

Even more dubious is that prospective insureds understand that they may forfeit policy coverage by opposing a doctor to whom they object. The little katzenjammer rising from the facsimile messages back and forth in this case reflects the disquiet of an insured at the prospect of being diagnostically palpated, pulled, probed and poked by a stranger whom she did not choose. Courts should carefully consider the application, function and consequences attendant to CME provisions in UM insurance where no regulatory statute guides the insurer and protects the insured's legitimate interest regarding the use of such provisions in the way PIP statutes do.

[11] A breach of a condition requiring an insured to give prompt notice of claim is conceivably more prejudicial than any breach of a CME after a claim is being

giving initial notice promptly after occurrence created a presumption of prejudice to the insurer but that the insured could have dispelled any prejudice by proof. On appeal, the District Court reversed upon a holding that the delay in giving initial notice of claim was a breach of the cooperation clause as to which the *insurer* had the burden of proving substantial prejudice.

On review, this Court held that it was error to hold the delay in giving prompt initial notice of claim a breach of the cooperation clause. This Court explained:

> "A notice of accident in most insurance policies is a condition precedent to a claim. *It was so designated in the policy in this case*. Such a condition can be avoided by a party alleging and showing that the insurance carrier was not prejudiced by noncompliance with the condition. The burden should be on the party seeking an avoidance of a condition precedent. A failure to cooperate clause, on the other hand, sometimes relieves an insurer of liability. A failure to cooperate is a condition subsequent and it is proper to place the burden of showing prejudice on the insurer." [e.s.]

475 So.2d at 1218. Prompt notice of claim was thus a required condition precedent to a claim, for which the burden should fall on the insured to show the absence of prejudice from a failure to give prompt notice.

Macias holds that cooperation in the processing and administration of the claim already filed is subsequent to the claim, and the burden is on the insurer to show actual prejudice from an insured's breach of cooperation. Because an essential part

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considered by the insurer. Yet even then *Macias* holds there can be no forfeiture unless it is established that the Insurer was actually prejudiced by the failure to give prompt notice.

of such cooperation lies in not blocking the insurer's access to evidence relevant to the claim — and, unlike prompt initial notice of claim, a CME is really just a form of such required evidence — the burden in this case should be on the insurer to show actual prejudice from the breach of a CME.

More recently this Court applied the logic of *Macias* in *Custer*, which actually involves a CME. There the insurer refused to pay PIP benefits because the insured had failed twice to appear at a CME. The provider with an assignment of the insured's PIP benefits sued the insurer for unpaid medical care already rendered. The insurer alleged an affirmative defense of an unreasonable failure to attend the CME but presented no evidence at trial in support of the defense. On review, this Court analyzed the issue thus:

> "An affirmative defense is an assertion of facts or law by the defendant that, if true, would avoid the action and the plaintiff is not bound to prove that the affirmative defense does not exist. See The defendant has the burden of proving an affirmative defense. *Specifically, a defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as an affirmative defense, for which the defensive pleader has the burden of pleading and persuasion*. Furthermore, this Court [has] recognized that the burden of proving each element of an affirmative defense rests on the party that asserts the defense.
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> Based on the above, under Florida law, the circuit court was correct that [the Insurer] clearly had the burden of pleading and proving its affirmative defense; therefore, it was required to present evidence to the fact-finder that [the insured] unreasonably failed to attend a medical examination without explanation after having received proper notice. …
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> …

> [*M*]*edical examinations in the context of PIP benefits are not scheduled prior to the existence of a policy or prior to an injury but instead occur only after an insured has sustained an accident and submits notice to an insurer after a policy has been issued and injuries have been sustained*. Attendance at a medical examination may be a condition precedent to the payment of subsequent PIP benefits or, perhaps more accurately, *an 'unreasonable' failure to attend a requested medical examination may be a condition subsequent that divests the insured's right to receive further subsequent PIP benefits*. [W]hen parties to an auto insurance policy dispute attendance at a medical examination, neither the insurer nor the insured is contesting the policy's existence …. To the contrary, these parties are simply in a dispute with regard to the insured's continued right to receive subsequent PIP benefits under an existing insurance policy." [e.s., c.o.]

62 So.3d at 1096, 1098-99. *Custer* actually represents a rather categorical holding that an insurer's assertion of failure to satisfy conditions precedent necessary to trigger contractual duties under an existing insurance agreement is an affirmative defense, for which the insurer has the burden of pleading and persuasion.

Moreover by applying plain statutory meaning, this Court held that the *Custer* breach of the CME requirement could result in the denial of only future PIP benefits, not a forfeiture of all. Here, the UM statutes say nothing about a breach of a CME or a forfeiture of any UM benefits consequent therefrom, and the present Policy prescribes no specific consequence for refusing the CME. The *Custer* holding is thus directly applicable to the present case.

The Fifth District's En Banc Opinion correctly applies these decisions to the present case. First it recognizes that, in the absence of any applicable UM statute,

the consequences of a breach of a condition subsequent to contracting, and related to the handling of a claim for benefits after an occurrence, is largely controlled by specific Policy text directed to that consequence. *Curran*, 2011 WL 6003288 at *8 ("While the policy provides that no right of action against the insurer exists until all policy terms have been met, nothing in the language of the policy imposes a forfeiture of benefits in the event of a breach of the duty to submit to a CME."). The En Banc Opinion properly and logically held that in this circumstance the CME provision is akin to a cooperation clause provision — and State Farm itself so regarded the breach in this case by its reservation of rights notice to the insured.

The Fifth District acknowledged that the PIP statute allows an insured to reasonably refuse to attend a CME but the UM statute plainly lacks any provisions about a CME. *Id*. at *9. Yet other provisions in this UM policy dispel any consequence of forfeiture of UM coverage for failing to attend a CME.[12] The policy fails to specify forfeiture as the result of CME breach. The text provides only that the insured's right to file an action against the Insurer is suspended *until* the insured complies with the claims administration provisions. Again, State Farm never sought any abatement or suspension of the action until the CME was

[12] State Farm argues that Curran never argued "at any point" that barring all UM coverage would be an unjustifiable forfeiture. IB at 38 n.13. That is incorrect. Her motion for rehearing en banc extensively argued the impropriety of a forfeiture. She did not use the words *unenforceable penalty* but that idea was certainly conveyed by necessary implication.

attended and, in any event, the insured did attend the CME after the trial court rejected the forfeiture assertion.

The Fifth District properly rejected any reliance on *De Ferrari v. Government Employees Insurance Co.*, 613 So.2d 101 (Fla. 3d DCA 1993), the only UM case involving an insured's breach of a CME. As the Fifth District held, correctly, that *De Ferrari* is not reliably authoritative. To forfeit UM benefits, the Third District had mistakenly relied on a PIP statute explicitly allowing a cancellation of *future* PIP benefits for breach of a CME provision. There is no comparable provision in the UM statute or — indeed! — in State Farm's UM Policy.

The single most cited case relied on by State Farm is probably *Goldman v. State Farm General Insurance*, 660 So.2d 300 (Fla. 4th DCA 1995), which does include a blanket statement that breach of the EUO requirement is material and requires forfeiture.[13] *Goldman* explicitly involves a structural casualty insurance claim with an EUO requirement, not a CME; and *Goldman* expressly follows *Putnal* in its holding. Within its context of fire loss and EUO, *Goldwyn* is unassailable. But the rationale underlying EUOs in fire insurance should not be applied indiscriminately outside of that context and its unique historical justification to policies involving

[13] "An insured's refusal to comply with a demand for an examination under oath is a willful and material breach of an insurance contract which precludes the insured from recovery under the policy." 660 So.2d at 303.

medical benefits insurance claims, as some courts have done.[14] Indeed, some decisions have refused to apply *Goldman* in UM cases.[15]

The other cited decisions in State Farm's opening paragraph, *Edwards v. State Farm Florida Ins. Co*., 64 So.3d 730 (Fla. 3rd DCA 2011); *Starling v. Allstate Floridian Ins. Co*., 956 So.2d 511 (Fla. 5th DCA 2007); *Fassi v. American Fire and Cas. Co*., 700 So.2d 51 (Fla. 5th DCA 1997); and *Stringer v. Fireman's Fund Ins. Co*., 622 So.2d 145 (Fla. 3rd DCA), *review denied*, 630 So.2d 1101 (Fla. 1993), each involve structural casualty insurance instead of personal injury medical benefits insurance. They are inapposite to the certified question.

Hence, State Farm's categorical assertion that Florida insurance law treats the breach of all *examination* provisions in all forms of insurance as material and resulting in a forfeiture of coverage is demonstrably not supported by the cases on which it relies. Not a single one involves a UM policy provision for a CME.

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[14] *See e.g. Amica Mut. Ins. Co. v. Drummond*, 970 So.2d 456 (Fla. 2d DCA 2007) (EUO requirement in PIP insurance is condition precedent to duty to provide coverage); *Progressive Exp. Ins. Co., Inc. v. Menendez*, 979 So.2d 324 (Fla. 3rd DCA 2008) (PIP insurance: holding that failure to give presuit notice of intent to sue renders insurance ineffective, precludes abatement to satisfy notice, and requires dismissal with prejudice), both of which appear to apply the EUO fire insurance rationale to CMEs in personal injury insurance cases without any analysis.

[15] *See Custer Medical Center v. United Automobile Insurance Company*, 62 So.3d 1086 (Fla. 2010) (rejecting *Goldman* as authority to hold that insured in PIP case forfeited benefits by breach of CME requirement); *Saris v. State Farm Mut. Auto. Ins. Co.*, 49 So.3d 815 (Fla. 4th DCA 2010) (rejecting application of *Goldman* to justify UM policy requirement that insured sue underinsured driver causing accident as condition for UM benefits).

Nor should a pleading and proof requirement to demonstrate prejudice[16] for forfeiture of UM coverage because of a breach of a CME requirement necessarily depend on any distinction in the form of the particular medical benefits insurance involved, whether PIP or UM. State Farm's own case authorities rely on a unique purpose and function of an EUO requirement in fire insurance. A CME requirement in medical benefits insurance shares none of those unique aspects of justification in structural casualty insurance and its necessity for an early EUO.

PIP and UM afford a virtually identical form of medical benefits to the insured. Yes, they have differing predicates for their benefits. In PIP insurance, the predicate is simply that the medical services arise from injury suffered from the ownership, maintenance, or use of a motor vehicle but without regard to who may be at fault for the injury inflicted.[17] In UM insurance, the injury suffered must also involve a motor vehicle but includes the additional requirement that the insured be legally entitled to recover damages from the owner/operator of an uninsured (or

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[16] *See Griffin v. Amer. Gen. Life & Acc. Ins. Co.*, 752 So.2d 621, 623 (Fla. 2nd DCA 1999) (compliance with condition precedent to contract not denied with specificity is waived); *Cooke v. Ins. Co. of North America*, 652 So.2d 1154 (Fla. 2d DCA 1995) (same). Because State Farm waived any issue of prejudice by failing to allege and prove it, it is clearly not entitled to have this case remanded for such a belated attempt to do so. State Farm would not thus be denied due process in that regard, for it has forsworn the very process it was given to raise the issue.

[17] § 627.736(1), Fla. Stat. (2011) ("Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to [all insureds] … for *loss sustained* by any such person *as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle*"). [e.s.]

underinsured) vehicle causing the injury arising from the operation or use of the motor vehicle. Hence PIP is not concerned with causation of the injuries, while UM is based on an uninsured causing the accident.[18] In all other respects the medical benefits insurance functions basically in the same way. So it is fair to ask whether the causation issue should have any effect on the consequences of breach of a CME provision in either PIP or UM medical benefits insurance.

Under both PIP and UM the occasion for covered medical services arises only after the Policy is in effect, the occurrence of an event with a vehicle, and a claim to the insurer for benefits. The CME is subsequent to coverage in both forms of insurance but may be precedent to administering a claim or triggering payment of benefits or some other event. As *Custer* held, in PIP insurance a statute may have some effect regarding the proper use of the CME requirement, but there is no such provision in UM statutes. In the present Policy, the CME is indirectly tied only to the filing of an action against the insurer for benefits.

Apart from the issue of fault for causing an injury, there is no discernible difference as to the Insurer's liability for medical benefits arising from the use or

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[18] § 627.727(1), Fla. Stat. (2011) ("No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery 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*" [e.s.]).

operation of a motor vehicle. In both PIP and UM, the insurer pays for medical services arising from the vehicle's use but not for medical services occasioned by a cause, event, condition or reason unrelated to the use of the vehicle. An insurer's requirement for a CME in both PIP and UM is actually based on rule 1.360 and a defendant's right to have plaintiff examined by its own doctor to dispute plaintiff's claim for damages.[19] Hence there is no logical reason to distinguish between PIP and UM as to the consequences of an insured's breach of a CME requirement.

State Farm cannot be taken seriously that it suffers "inherent prejudice" merely by being sued for UM benefits. The Fifth District found no record showing of *any* prejudice, and now on review the only prejudice it is able to conjure is that the premature UM suit caused it to incur costs and fees.[20] This from a motor vehicle liability Insurer whose business is selling litigation defense for profit. It is even more overwrought and hyperbolic to argue that the filing of one more UM suit is a

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[19] State Farm argues that the CME's purpose is to avoid litigation, but the true function and the Insurers' actual use of a CME points otherwise. *See U.S. Security Ins. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000) ("A PIP [CME] *is a potential step in the direction of litigation*. The insured is claiming an entitlement to continued benefits and the insurer is questioning the necessity for same. … The insured and the insurer are certainly not in agreement at this point. *Because the potential is there for an adversarial contest*, the insured should be afforded the same protections as are afforded to plaintiffs for rule 1.360 and workers' compensation examinations"). [e.s.]

[20] If so, the costs and fees would have to be limited to the interval from filing the UM suit to State Farm's refusal of the insured's offer to submit to an immediate CME — a mere matter of days. It would be ludicrous to treat such a trivial cost as the death penalty for all UM benefits. And why doesn't its failure to seek abatement operate to eliminate any perceived prejudice?

"massive overburdening" of the judicial system and, least of all, itself — a liability defense litigation specialist![21]

Respondent thinks it useful to add one final observation about *condition precedent/condition subsequent* analysis. The subject of contractual conditions has longed teased and tormented Judges, lawyers and law Professors. Indeed, for the purposes of this case, Professor Corbin has aptly described this:

> "Whenever a court describes a fact as a condition precedent it invariably throws the burden of proof upon the plaintiff. When the court wishes to throw the burden of proving the fact upon the defendant *it* will frequently bring this about by describing the fact as a condition subsequent. Thus, it is often provided in insurance policies that the contract is to be 'void' in a certain event that may or may not happen; the burden of proving the occurrence of the event is nearly always put upon the defendant company. The occurrence of the event is indeed subsequent to the primary obligation, but its non-occurrence is a condition precedent to any active duty of the defendant to pay, either primary or secondary."[22]

For nearly a century the general law of contracts would hold that State Farm's defense laid upon it the burden to plead and prove breach of this condition subsequent to coverage but precedent to enforcement of the insured's claim to UM benefits and resulting prejudice. Therefore in relying on traditional contract law to decide that this case involves a breach of a condition subsequent without any specified provisions or consequences in the policy for non-performance, the Fifth

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[21] And, to be sure, a UM policy is only one form of liability insurance sold as part of a motor vehicle liability insurance policy.

[22] Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L. J. 739, 749 (1919).

District was hardly creating new law.

Yet modern contract law no longer favors the *condition precedent/condition subsequent* construct in analyzing contractual provisions.[23] An important rationale for newer usage is that a particular *condition* may actually function as both *precedent* and *subsequent* at once.

Which it does in this case. Here the CME is *subsequent* to contracting and the occurrence of an event triggering a claimed right to benefits, but at the same time it appears *precedent* to the insured bringing an action under the contract against the Insurer. Rather than referring to the CME contractual requirement as a *condition* — whether precedent or subsequent — the current view is to use the terms *duty*, *provision* or *requirement* and then study the sequence and function in performance under the contract, as well as the contract's stated consequences for non-

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[23] *See* RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981), comment *e* ("*Occurrence of event as discharge.* Parties sometimes provide that the occurrence of an event, such as the failure of one of them to commence an action within a prescribed time, will extinguish a duty after performance has become due, along with any claim for breach. Such an event has often been called a 'condition subsequent,' while an event of the kind defined in this section has been called a 'condition precedent.' This terminology is not followed here. Since a 'condition subsequent,' so-called, is subject to the rules on discharge in § 230, and not to the following rules on conditions, it is not called a 'condition' in this Restatement. Occasionally, although the language of an agreement says that if an event does not occur a duty is 'extinguished,' 'discharged,' or 'terminated,' it can be seen from the circumstances that the event must ordinarily occur before performance of the duty can be expected. When a court concludes that, for this reason, performance is not to become due unless the event occurs, the event is, in spite of the language, a condition of the duty.").

performance.

In sum, State Farm's position that UM coverage became void when the insured did not immediately comply with the CME simply cannot be sustained as coherent with this Court's decisions. The UM Policy did not specify that the contract would be void if an insured failed to attend a scheduled CME before the insured sued State Farm for UM benefits (e.g., in the example offered by Corbin). Nor has State Farm shown that it was disadvantaged in any legally cognizable way by the insured's initial refusal to submit to the CME before she filed the action. Or that any possible prejudice continued after it refused the insured's offer to submit to a CME shortly after she filed the action.

In light of State Farm's importantly consequential textual omission, there is absolutely no basis under Florida insurance law to claim that the initial non-occurrence of the CME voids the coverage of the UM claim *ipso facto*. The Fifth District's En Banc Opinion lies coherently well within Florida decisions requiring an aggrieved insurer to prove some resulting prejudice from any breach of the CME provision.

Finally, the disapproving concern of some Fifth District Judges about a later bad faith action possibly ensuing is highly misplaced and betrays impermissible prejudging. It ignores that the conduct of insurers is not always entirely in the interest of its insured. For example, in this case the immediate attempt by State

Farm to assert forfeiture when it had the opportunity to have done a CME might reasonably demonstrate to a Jury in a bad faith action that it was willing to use inconsequential breaches of a policy claim administration provision simply to avoid paying benefits. The bad faith law exists because some insurers do not always act fairly to their insureds. It should be of no concern to appellate judges in any prior coverage case that an insured may find it necessary afterwards to seek further remedies available under law to recover for legitimate injuries properly reduced to judgment.

Conclusion

Respondent urges this Court to answer the certified question thus:

A. No, the insured does not forfeit UM benefits for breach of the CME provision when there is no policy textual provision so providing.

B. Yes, under contract law an Insurer seeking a forfeiture for violation of conditions subsequent to claim should have to plead and prove actual prejudice from such a brief.

In doing so, this Court should disapprove *De Ferrari* and confirm that its decisions in *Macias* and *Custer* place the burden on the insurer to plead and prove prejudice arising from a breach of the CME provision in a UM policy.

Certificate of Service

I hereby certify that I served all persons named on the service list below with a true copy of this Answer Brief by electronic mail and by USPS, first class postage

prepaid, this _____ day of April, 2012.

Certificate of Font Compliance

This Petition is set in MS Word 2010, Times New Roman, 14 point font.

Respectfully submitted,

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