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## Automobile Insurance--Florida No-Fault Statute Held Unconstitutional Because It Barred Tort Action by Uninsured Motorists for Claims of Less Than \$550.00

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## RECENT DEVELOPMENTS

**AUTOMOBILE INSURANCE—FLORIDA NO-FAULT STATUTE HELD UNCONSTITUTIONAL BECAUSE IT BARRED TORT ACTION BY UNINSURED MOTORISTS FOR CLAIMS OF LESS THAN \$550.00. *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).**

Clara Kluger was involved in an auto collision, and had neither standard nor limited collision insurance. She was not at fault and attempted to sue defendant for property damage to her auto valued at \$250.00.<sup>1</sup> However, under Florida's no-fault insurance statute she was barred from tort action because her property damage was below the statutory threshold of \$550.00.<sup>2</sup> Thus by her own election under FLA. STAT. ANN. § 627.738 (1972), she became her own insurer with no right to sue in tort unless her property damage exceeded \$550.00. The Supreme Court of Florida has reversed the circuit court and has declared FLA. STAT. ANN. § 627.738 (1972) unconstitutional. The court held that because the right to sue in tort existed prior to the constitution, the legislature could not abolish a tort action unless it provided a reasonable alternative, or could demonstrate an overriding public necessity.

*Kluger v. White* creates yet another constitutional hurdle for other state no-fault programs. This decision presents a strict construction repugnant to the liberal landmark ruling in Massachusetts,<sup>3</sup> and it could create new drafting problems for states such as Oklahoma which have not yet adopted any form of no-fault legislation.

The majority opinion in *Kluger* concluded that FLA. STAT. ANN. § 627.738 (1972) failed to comply with Florida's constitutional provision that the courts shall be open to every person for redress of any

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1. *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

2. FLA. STAT. ANN. § 627.738 (1972), abolishes the right to sue in tort, and requires one to look to his own insurer for property damage recovery, unless he has chosen not to purchase property damage insurance and has suffered property damage in excess of \$550.00.

3. *Pinnick v. Cleary*, 271 N.E.2d 592 (Mass. 1971).

injury. Because of the statute plaintiff fell into a class of accident victims with no recourse against any person or insurer for loss caused by the fault of another. In dicta the court stated that mandatory property damage insurance would be a constitutionally adequate alternative. However, this precipitates the question of whether the requirement of insurance for all motorists is reasonable.

In a vigorous dissent, three justices quoted the language and reasoning of *Pinnick v. Cleary*, and found Florida precedent for a broad alteration of the tort system. In prior cases the Florida Supreme Court had approved a guest statute, abolition of alienation of affection and seduction causes of action, and the Workmen's Compensation Act. They also found that the requisite public necessity was present.

For the greater good of society and social justice, the Legislature thus enacted both our Workmen's Compensation Law, and the no-fault insurance statute *sub judice*.<sup>4</sup>

The dissent recognized that FLA. STAT. ANN. § 627.738 (1972) did not abolish the right of tort action, but rather placed reasonable limitations upon it which were offset by the speed, efficiency, and certainty of no-fault insurance.

The *Kluger* decision presents new, constitutional constructions which are contrapositive to those of the landmark Massachusetts case of *Pinnick v. Cleary*; and though in *Pinnick* personal injury liability was at issue and not the property damage section, the constitutional issues were the same. Both cases involved virtually identical no-fault statutes.

The Massachusetts Supreme Court held that the right to sue in tort for personal injuries, and pain and suffering was not a fundamental right and therefore not guaranteed by the state constitution. Thus a court would find a strong presumption of constitutionality. In addition the court, citing overcrowded courts, the high cost of auto insurance, inefficiency of the negligence system, and inequity in the recoveries of injured plaintiffs, found sufficient factual justification for the statute.<sup>5</sup>

Article 11 of the Declaration of Rights of the Massachusetts Constitution guarantees a remedy by recourse to the laws for all injuries, and is similar to the above mentioned Florida provision. But in con-

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4. *Kluger v. White*, 281 So. 2d 1, 10 (Fla. 1973).

5. *Pinnick v. Cleary*, 271 N.E.2d 592, 602 (Mass. 1971), noted in 40 U. CIN. L. REV. 849 (1971).

struing this article, the Massachusetts court held that this was clearly a protection of procedural rights only and asserted that:

. . . changes in prior law are necessary in any ordered society, and to argue that art. 11 prohibits alterations of common law rights as such, . . . flies in the face of all reason and precedent.<sup>6</sup>

At least one other state has also limited such a constitutional provision to procedural rights.<sup>7</sup>

The *Kluger* decision clearly raises a challenge to the sweeping approval won by no-fault insurance in Massachusetts. In addition, it will have great effect for future no-fault insurance programs as they are tested or adopted in other states.

At the present time Oklahoma does not have a no-fault bill before the legislature,<sup>8</sup> but should a plan be proposed again, the drafters will have to face the constitutional challenge raised by *Kluger*. Oklahoma, like Florida and Massachusetts, also has a constitutional provision requiring the courts to be open to every person.<sup>9</sup> Prior case law construing art. 2 § 6 indicates that Oklahoma would take a Massachusetts approach and find a no-fault property damage statute of this kind constitutional. As early as 1917, the Oklahoma Supreme Court upheld Workmen's Compensation as a legitimate exercise of the police power,<sup>10</sup> and held that art. 2 § 6 did not bar the legislature from abolishing the rules which had theretofore determined liability in the master-servant relationship. One cannot, however, predict whether the court will find the same compelling social need and thus the analogy to Workmen's Compensation cannot be conclusive. But if the court could be convinced that there is a public necessity for no-fault to justify modification of the right to sue in tort, then art. 2 § 6 would

6. 271 N.E.2d at 600.

7. Martel, *No Fault Automobile Insurance In Pennsylvania—A Constitutional Analysis*, 17 VILL. L. REV. 783 (1972).

The prevalent view today, however, is that such provisions are not intended as restraints on the legislature, but rather are meant to preserve procedural fairness for the injured person.

*Id.* at 793.

8. A bill was proposed in 1971, but was never enacted by the legislature. Okla. H.B. 1270 33d Legis. 1st Sess. (1971).

9. OKLA. CONST. art. 2, § 6, provides, "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation. . . ."

10. *Adams v. Iten Biscuit Co.*, 63 Okla. 52, 162 P. 938 (1917). The constitutionality of the statute was reaffirmed in 1927, after it had been amended. *Fox v. Dunning*, 124 Okla. 228, 255 P. 582 (1927); *New Amsterdam Gas Co. v. Rinehart & Donovan Co.*, 124 Okla. 227, 255 P. 587 (1927).

not seem to be a bar to no-fault in Oklahoma. The property damage section might be subject to challenges on other issues. As an example, would mandatory coverage discriminate against the poor who cannot afford the extra cost of property insurance, but whose car is valued at less than \$550.00?

The drafters of a future no-fault bill could avoid the *Kluger* problem entirely by considering two alternative choices. The legislature might first enact a mandatory property damage insurance section requiring minimum coverage of \$550.00. This plan allows a tort action for property damage above \$550.00. Secondly, the legislature could give the auto owner the option of carrying *either* no-fault insurance, with no tort claim for property damage *or* fault insurance under which recovery for damages to his own car would be allowed if he could prove a valid tort claim against another. This has been called "Property Damage Dual Option Coverage."<sup>11</sup>

In conclusion, *Kluger* will no doubt have great impact on present and future no-fault insurance legislation. Hereafter, property damage as well as personal injury sections will be subjected to close judicial scrutiny. A property damage provision must be either an adequate alternative to the tort action which it replaces, or there must be an overpowering public necessity. Finally, the statute must be reasonable and non-discriminatory. There is some indication that Oklahoma might follow the more liberal view of Massachusetts and find that no-fault insurance does provide an adequate alternative. However it is important to remember that future drafters can avoid these constitutional pitfalls completely by adopting legislation which includes either a mandatory property damage insurance section or dual option coverage.

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11. Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241, 260 (1971).