

**SUPREME COURT OF FLORIDA**

CASE NO. SC05-213

**BRIAN GARNER, et al.,**

Petitioner,

vs.

**SOUTHERN GROUP INDEMNITY, INC.,**

Respondent.

On Review from the Fourth District Court of Appeal,  
Case Nos. 4D01-912, 4D01-1082 & 4D01-1115

**BRIEF ON JURISDICTION OF RESPONDENT  
SOUTHERN GROUP INDEMNITY, INC.**

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## STATEMENT OF THE CASE AND FACTS

As stated in the Fourth District Court of Appeal's opinion below, reported at 888 So. 2d 712 (Fla. 4<sup>th</sup> DCA 2004), when purchasing the Southern Group Indemnity, Inc. automobile insurance policy, Brian Garner signed a form that stated:

You have the option to purchase at a reduced rate, non-stacked (limited) type of Uninsured Motorist Coverage. Under this form if injury occurs in a vehicle owned or leased by you or a family member who resides with you, this policy will apply only to the extent of coverage (if any) which applies to that vehicle under this policy....

888 So. 2d at 717-18. The form had been approved by the Department of Insurance.

888 So. 2d at 718.

Brian's then-resident spouse, Ana Gardiner, was involved in an automobile accident while operating a vehicle she owned that was not insured under the Southern Group insurance policy. One of the issues during trial was whether Brian knowingly accepted limited Uninsured Motorist coverage, as described in the form quoted, supra. The trial judge denied Southern Group's motion for a directed verdict. The jury found UM coverage existed under the Southern Group policy for Brian, individually and as guardian of his injured son, Braden.

In the first decision issued by the Fourth DCA, the court found that no coverage existed because Brian did not have an insurable interest at the time of the accident. On rehearing, the Fourth DCA issued a second opinion in which it found coverage existed because Brian had an insurable interest and did not knowingly select the limited UM

coverage on a form approved by the Department of Insurance, as statutorily required. On a second rehearing motion, the Fourth DCA found that no UM coverage existed, as a matter of law, because Brian had knowingly selected the limited UM coverage on a form approved by the Department of Insurance. It is from that decision that the petitioner now seeks review.

In its final decision, the Fourth DCA noted that the UM statute creates a conclusive presumption that an insured knowingly accepted limited UM coverage if two elements exist: (1) the insured signed a form approved by the Department of Insurance advising of the limited UM coverage; and (2) the form signed by the insured adequately advised the insured of the statutorily permitted limitations on UM coverage. The court held that Southern Group had proven both elements.

First, the court held that the Department of Insurance had approved the limited UM selection form signed by Brian. In the previous opinion issued on the first rehearing, the court concluded that Southern Group had failed to carry its burden of proving Department of Insurance approval, because it did not admit into evidence written proof. In the final opinion, the court reversed itself and found that it was undisputed during trial that the form was approved by the Department of Insurance. 888 So. 2d at 718.

Secondly, the court found that the form signed by Brian complied with the statutory requirement of advising the insured of the following statutorily permitted limitation on UM coverage: “The uninsured motorist coverage provided by the policy

does not apply to the named insured or family members residing in his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.” See § 627.727(9)(d), Florida Statutes. The court stated in its opinion:

We also conclude that the language in the form sufficiently advised Brian of the limitations on the uninsured motorist coverage.... We agree with Mangual v. State Farm Mutual Automobile Insurance, 719 So. 2d 981 (Fla. 5<sup>th</sup> DCA 1998), in which the court held that a very similar provision approved by the Department of Insurance was sufficient notice to the insured of the limitations of the policy. In that case, the application stated: “If injury occurs in a vehicle owned or leased by you or a relative who lives with you, only the policy, if any, on that vehicle applies.” 719 So. 2d at 982. Compare this language to the application language in this case: “If injury occurs in a vehicle owned or leased by you or any family member who resides with you, this policy will apply only to the extent of coverage (if any) which applies to that vehicle in this policy.” In Mangual, the court held that the language informed the insured of the limitation contained in section 627.727(9)(d). Id. at 983. It reasoned that “although [the application] does not recite subsection (9) in full, or any of paragraph (d), it nonetheless appears to provide sufficient notice as to the coverage question at issue by informing Mangual’s parents that if injury occurs in a vehicle owned by a relative who lives with them, only the policy, if any, on that vehicle applies.” Id. As the same circumstance is present in this case, we agree with Mangual.

888 So. 2d at 718-19.

Since Southern Group proved both elements, the Fourth DCA concluded that it was entitled to a conclusive presumption that Garner knowingly selected UM coverage with the limitation authorized in § 627.727(9)(d). Therefore, the court held, the trial court should have directed a verdict in favor of Southern Group on the issue of UM coverage.

Id.

In his brief on jurisdiction, Garner incorrectly asserts that the Fourth DCA based its holding only on the first required statutory element of Department of Insurance approval.

It is clear beyond any doubt, from the four corners of the Fourth DCA's opinion, that the court also found that the UM selection form signed by Garner sufficiently advised him of the limitation on UM coverage authorized by §627.727(9)(d).

### **JURISDICTIONAL ISSUE**

The jurisdictional issue before the Court is whether the Fourth District's decision below expressly and directly conflicts with Kaufman v. Mutual of Omaha Ins. Co., 681 So. 2d 747 (Fla. 3d DCA 1996), or Gonzalez v. Associates Life Ins. Co., 641 So. 2d 895 (Fla. 3d DCA 1994).

## **SUMMARY OF ARGUMENT**

The Third DCA's decisions in Kaufman and Gonzalez, at best, stand for the general proposition that "Department of Insurance approval does not override the explicit terms of a statutory requirement." Kaufman, 681 So. 2d at 749 n. 4, citing Gonzalez, 641 So. 2d at 897 n. 1. The Fourth DCA's decision below does not conflict with that proposition. In addition to finding that the Department of Insurance had approved the UM selection form signed by Garner, the court carefully considered the language of the form and concluded that it sufficiently advised Garner of the statutorily permitted limitation on UM coverage. Therefore, there is no express and direct conflict.

## **ARGUMENT**

**The Fourth District's Opinion Below Does Not Expressly and Directly Conflict with Kaufman v. Mutual of Omaha Ins. Co., 681 So. 2d 747 (Fla. 3d DCA 1996), or Gonzalez v. Associates Life Ins. Co., 641 So. 2d 895 (Fla. 3d DCA 1994).**

At best, the Third District Court of Appeal's decisions in Kaufman v. Mutual of Omaha Ins. Co., 681 So. 2d 747 (Fla. 3d DCA 1996), and Gonzalez v. Associates Life Ins. Co., 641 So. 2d 895 (Fla. 3d DCA 1994), stand for the proposition that notwithstanding the deference that courts give to agency interpretations of a statute, the

courts are charged with the ultimate responsibility of determining statutory compliance. See Kaufman, 681 So. 2d at 749 n. 4; Gonzalez, 641 So. 2d at 897 n. 1. No one quarrels with that general proposition.

The question here is whether the Fourth District Court of Appeal, in its decision below, violated that general proposition thereby arguably placing its decision in conflict with Kaufman and Gonzalez. In other words, did the Fourth DCA in its opinion abdicate its responsibility to determine statutory compliance by giving complete and total deference to the Department of Insurance approval of the UM selection form signed by Garner, without conducting its own analysis of whether the form complied with the statute? The answer to that question is a resounding “NO.”

As quoted in the Statement of Case and Facts section, supra, the Fourth DCA carefully considered the contents of the UM selection form signed by Garner and determined that it sufficiently informed him of the limitations on UM coverage authorized by § 627.727(9)(d). See LaRusso, 888 So. 2d at 718-19. The issue regarding Department of Insurance approval warranted special discussion in the opinion only because in its previous opinion, on the first rehearing motion, the Fourth DCA found that Southern Group had not proven Department of Insurance approval. In its final opinion, on the second rehearing, the court reversed itself on that point and observed that Department of Insurance approval of the UM selection form was undisputed in the trial court. In the final opinion, the court went on to specifically hold that the form complied

with the UM statute by adequately informing the insured of the statutorily authorized limitation on UM coverage. Id.

Hence, there is no express and direct conflict between the Fourth DCA's decision below and the Third DCA's decisions in Kaufman and Gonzalez. It is respectfully submitted that the Court should disregard the irrelevant and meritless merits argument in the petitioner's brief on jurisdiction.

### **CONCLUSION**

It is respectfully submitted that the Court should deny jurisdiction in the absence of the required express and direct conflict.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail on March 29, 2005, to: Edna L. Caruso, Esq., 1615 Forum Place, Suite 3A, Barristers Building, W. Palm Beach, FL 33401; Shelley H. Leinicke, Esq., 515 E. Las Olas Blvd., Suite 1400, P.O. Box 14460, Ft. Lauderdale, FL 33302; Hinda Klein, Esq., 3440 Hollywood Blvd., Second Floor, Hollywood, FL 33021; David Marc Beckerman, Esq., 7000 W. Palmetto Park Rd., Suite 500, Boca Raton, FL 33433-3424; Gregg A. Schlessinger, Esq., 1212 Southeast 3<sup>rd</sup> Ave., Ft. Lauderdale, FL 33316; Carlos A. Rodriguez, Esq., 633 South Andrews Avenue, Suite 203, Ft. Lauderdale, FL 33301; Parkway Insurance Agency, Inc., 125 West Sunrise Boulevard, Ft. Lauderdale, FL 33311; and the Law Offices of Roland Gomez, 8100 Oak Lane, Suite 400, Miami Lakes,

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**CERTIFICATE REGARDING FONT**

The undersigned certifies that this brief uses 14-point Times New Roman type in compliance with Fla. R. App. P. 9.210(a)(2).

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