O/A 10-6-87

IN THE SUPREME COURT OF FLORIDA

WAYNE GOVAN, for himself and other similarly situated individuals,

Petitioner,

vs. Case No.: 70,106

INTERNATIONAL BANKERS INSURANCE COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION

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PRELIMINARY STATEMENT

Pursuant to the Court's Order of March 18, 1987, the Florida Defense Lawyers Association submits this Amicus Curiae Brief on the issue of the meaning of the provisions of Section 627.739(2), Florida Statutes (1983). This Amicus will not address the question of the propriety of the class action judgment entered by the trial court, but will confine itself to the proper interpretation of Section 627.739(2), Florida Statutes (1983).

In this brief, the parties will generally be referred to as Petitioner and Respondent. For convenience, Personal Injury Protection insurance will be referred to as "PIP." All statutory references are to the 1983 statutes applicable to this case.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE

Amicus Curiae Florida Defense Lawyers Association accepts the Statement of the Case contained in the Initial Brief of Petitioner, except to the extent that it characterizes Respondent's method of calculation as incorrect or improper.

STATEMENT OF THE FACTS

Petitioner Govan was injured in an automobile accident and incurred medical bills in the amount of $5,887.45. His PIP insurance policy with Respondent International Bankers contained a $2,000 "deductible" provision, as authorized by Section 627.739(2), Florida Statutes. Respondent calculated

the amount due Petitioner under his PIP policy by first applying the eighty percent coinsurance provision of Section 627.736(1)(a), Florida Statutes, and then deducting $2,000 from the resulting figure. Petitioner contends that the proper calculation is to deduct the $2,000 from the gross amount of the bills, and then apply the statutory coinsurance provision.

SUMMARY OF ARGUMENT

The statutory construction issue before the Court may be simply phrased as: Which comes first, the coinsurance or the deductible? It is as simply answered: the coinsurance comes first. Section 627.739(2), Florida Statutes (1983), provides that deductibles are to be subtracted from the "benefits otherwise due." Those benefits are clearly prescribed by Section 627.736(1), Florida Statutes (1983), as 80% of reasonable medical expenses plus 60% of lost wages, not to exceed policy limits. Under the unambiguous language of Section 627.739(2) "such amounts" (the deductible) are to be subtracted from the "benefits otherwise due"[1] -- not from the gross amount of medical expenses and lost wages.

Even if the statute itself were unclear, all of the applicable rules of statutory construction point to the same result. Such a construction helps achieve the legislative goal of lowering auto insurance premiums. It maximizes the extent to which a right to bring a common law suit is preserved.

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[1]The statutes does not provide for the deductible to be applied to "the amounts otherwise due," as Petitioner states (Brief at 11, 15), but from the benefits otherwise due.

Furthermore, that construction is supported by other statutory indicia of legislative intent, such as the use of different terminology than is used in another portion of the same Chapter to achieve a different result in the health care context. It is likewise supported by the lack of any statutory mechanism to solve problems which inevitably arise under the opposite construction.

Whether Section 627.739(2), Florida Statutes (1983), is viewed alone or in conjunction with other statutory provisions, and whether it is considered solely on its own language or resort is made to rules of statutory construction, the result is the same. The deductible under a PIP policy must be subtracted after application of coinsurance percentages, not before.

ARGUMENT

THE WORDS "BENEFITS OTHERWISE DUE" CONTAINED IN SECTION 627.739(2), FLORIDA STATUTES (1983), REFER TO THE PERCENTAGES OF MEDICAL BILLS AND LOST WAGES WHICH WOULD BE PAID IN THE ABSENCE OF A DEDUCTIBLE.

The issue presented is the proper interpretation of the statutory language of Section 627.739(2), Florida Statutes (1983), as it applies to the facts of this particular case. That statute provides:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, $1,000, and $2,000, such amount to be deducted from the benefits otherwise due each person subject to the deduction. However, this subsection shall not be applied to reduce the amount of any

benefits received in accordance with s. 627.736(1)(c).[2]

More specifically, the issue before this Court is what constitutes the "benefits otherwise due" from which the statute requires the deduction to be made.

That question is readily answered simply by referring to Section 627.736(1), Florida Statutes (1983). That section provides:

> (1) REQUIRED BENEFITS. - Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to the provisions of subsection (2) and paragraph (4)(d), to a limit of $10,000 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 as follows:
>
> (a) Medical benefits. - Eighty percent of all reasonable expenses for necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services. Such benefits shall also include necessary remedial treatment and services recognized and permitted under the laws of the state for an injured person who relies upon spiritual means through prayer alone for healing, in accordance with his religious beliefs.

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[2]Section 627.736(1)(c) provides for funeral expenses, not to exceed $1,750 per individual.

> (b) Disability benefits. - Sixty percent of any loss of gross income and loss of earning capacity per individual from inability to work proximately caused by the injury sustained by the injured person, plus all expenses reasonably incurred in obtaining from others ordinary and necessary services in lieu of those that, but for the injury, the injured person would have performed without income for the benefit of his household. All disability benefits payable under this provision shall be paid not less than every 2 weeks.
>
> (c) Funeral, burial, or cremation benefits. - Funeral, burial, or cremation expenses in an amount not to exceed $1,750 per individual. The insurer may pay such benefits to the executor or administrator of the deceased, to any of the deceased's relatives by blood or legal adoption or connection by marriage, to any person appearing to the insurer to be equitably entitled thereto, or to any person who has incurred expenses for the burial of the deceased.

The "benefits" referred to in Section 627.739(2) are, patently, the "required benefits" mandated by Section 627.736(1), Florida Statutes (1983). Any doubt that such reference is the legislative intent is quickly removed by noting the statute's proscription against applying the deductibles "to reduce the amount of any benefits received in accordance with s.627.736(1)(c)." These benefits are "due," under Section 627.736(4), Florida Statutes (1983) (captioned "Benefits; When Due"), as the loss accrues and upon receipt of reasonable proof of the loss. The statutes are extremely clear on their face.[3]

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[3]We are astounded at the Academy's statement (Brief at 3) that the statute "is silent with regard to the method of calculating PIP benefits due," and hence that help must be sought outside the terms of the statute. Section 627.739(2), Florida Statutes (1983) plainly requires "such amount [the deductible] to be

(Footnote continued on next page.)

The point becomes apparent when one considers a PIP policy without a deductible as being a policy with a deductible of zero dollars. In that situation, the "benefits otherwise due" are those specified in Section 627.736(1), Florida Statutes (1983): 80% of reasonable medical expenses[4] and 60% of lost wages, up to policy limits.[5] Thus, if an individual with PIP coverage containing no deductible is involved in an accident and sustains damages of $5,000 in reasonable and necessary medical expenses and $5,000 in lost wages,[6] the benefits which are due him under his policy, as required by Section 627.736(1), Florida Statutes (1983), are $7,000 (80% of the $5,000 in medical expenses plus 60% of the $5,000 in lost wages).[7] If the same individual has a PIP policy with a $2,000 deductible, the language of Section 627.739(2), Florida

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(Footnote No. 3 continued) deducted from the benefits otherwise due." Section 627.736(1), Florida Statutes (1983), plainly sets forth what beneits are to be paid in the absence of a deductible -- the benefits otherwise due.

[4]For simplicity, we will generally refer to the benefits payable under Section 627.736(1)(a), Florida Statute, (1983), as being for "medical expenses" or "reasonable medical expenses" and to the benefits payable under Section 627.736(1)(b), Florida Statutes (1983), as being for "lost wages."

[5]Since, as noted above, funeral expenses are not subject to a deductible, and are paid in full up to the statutory amount, they will be disregarded hereafter in this brief.

[6]For simplicity, we will assume that the total amounts all become due at the same time. In actuality, of course, proofs of loss are submitted over a period of time. As discussed infra, that simple fact reveals one of the flaws in Petitioner's theory of statutory construction.

[7]In order to avoid the potential distraction of including an explanation of each mathematical computation used in an example
(Footnote continued on next page)

Statutes (1983), clearly and unequivocally provides for "such amount [$2,000] to be deducted from the benefits otherwise due [$7,000] each person subject to the deduction" -- he is entitled to $5,000.[8]

In short, the interaction of Sections 627.736(1) and 627.739(2) clearly and unequivocally requires that the insurance payment is to be initially calculated under the "Required Benefits" coinsurance formula set forth in Section 627.736(1), thereby producing the amount which constitutes the "benefits otherwise due," and then subtracting from those "benefits otherwise due" the amount of the selected deductible. Where, as in Section 627.739(2), the language of a statute is so plain and unambiguous as to leave no room for construction, the courts presume that the Legislature meant what it said, and will not depart from the legislative language. State ex rel. Florida Jai Alai, Inc. v. State Racing Comm., 112 So.2d 825 (Fla. 1959); Brooks v. Anastasia Mosquito Control Dist., 148 So.2d 64 (Fla. 1st DCA 1963).

(Footnote No. 7 continued) of the statute's operation in this brief, we have included, as an Appendix, an explanation of each such computation, and will provide the Court with footnote references in each such instance.

[8]The Academy uses a technique of assuming the intended answer to claim (Brief at 4-5) that only their version of the calculation "checks out" mathematically. As the Court will see in examining the various calculations set forth in this brief and its appendix, the mathematics "check out" (in the sense of being arithmatically correct) both ways. The question is not one of mathematics, but of determining what the statute says.

The position espoused by Petitioner in this case, we submit, would call for a judicial rewriting of Section 627.739(2), Florida Statutes (1983), in order to specify that the deductible amount would be applied to all medical expenses and lost wages, not just the percentages which the statute specifies as "Required Benefits." Petitioner overlooks the fact that Section 627.739(2), Florida Statutes (1983), requires the deductible amount "to be deducted from the benefits otherwise due," not from "the amount of medical expenses and lost wages sustained." As discussed above, the Legislature has clearly chosen not to subtract the deductible from the gross loss, but rather to subtract it from the benefits which would have been paid had no deductible been selected.

The Academy points out (Brief at 8) the fundamental misperception they share with Petitioner when they assert that a deductible is normally considered to be "an amount to be deducted from the claim." What is an insured's claim under the PIP statutes? It is his entitlement to be paid 80% of his medical expenses and 60% of his lost wages. It is not a claim for the entirety of those medical expenses and lost wages, but a claim for the statutory percentages. It is from that amount, after the coinsurance percentage is applied, that the deductible is, and should be, subtracted. The statute says precisely that.[9]

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[9]The extent to which the Petitioner's suggestions torture the statutory language is seen in the Academy's statement (Brief at 8) that: "'Benefits otherwise due' means 80% of the bills

(Footnote continued on next page.)

When the statutory language is clear and unambiguous, there is no occasion for resort to rules of statutory construction.[10] Reino v. State, 352 So.2d 853 (Fla. 1977); State v. Egan, 287 So.2d 1 (Fla. 1973); White v. Campbell, 215 So.2d 66 (Fla. 4th DCA 1968). Section 627.739(2), Florida Statutes (1983), is clear on its face: the amount payable to a PIP insured whose policy has a deductible is calculated by computing the benefits which would be payable if there were no deductible, and then subtracting the deductible amount from that figure.

Petitioner observes (Brief at 16) that it has not found anywhere else in the Insurance Code a statute permitting a deductible to be subtracted from the benefits payable, rather

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(Footnote No. 9 continued) remaining after the deductible has been paid." The statute itself says that the deductible is "to be deducted from the benefits otherwise due." If the Academy's definition is "plugged in" to the statutory language, the deductible is subtracted twice -- once in determining the "benefits otherwise due" under their definition, and again in subtracting the deductible from that amount. For instance, if an individual with $5,000 in medical expenses had a $2,000 deductible, the Academy's definition of "benefits otherwise due" would equal $2,400 (80% of the $3,000 remaining after the $2,000 deductible). The statute would then require that the deductible ($2,000) "be deducted from the benefits otherwise due," which, by the Academy's definition would leave only $400 to be paid by the insurer ($2,400 "benefits otherwise due" under their definition less $2,000 deductible). We doubt that the Academy intended that result.

[10]The only ambiguity involved in this cause is one which Petitioner's theory would perforce introduce into it. Petitioner would subtract the deductible from the gross loss, and then apply the coinsurance percentages of Section 627.736(1) to the resulting figure. As discussed in some detail infra, such a procedure would introduce a problem the statute does not address: how to apportion the deductible amount in a situation where both wage losses and medical expenses are involved.

than from the amount of the loss. In so arguing, Petitioner overlooks the fact that Chapter 627 contains another provision in which the Legislature has clearly specified precisely the result Petitioner seeks here -- that coinsurance percentages are to be applied after application of the deductible -- but has done so in language wholly different than that of Section 627.739(2), Florida Statutes (1983).

Section 627.6498(5)(b), Florida Statutes (1983), a part of the State Comprehensive Health Association Act, provides that, as to major medical insurance issued under that Act, "if the covered costs incurred by the eligible person exceed the deductible for major medical expense coverage selected by the person in a policy year, the plan shall pay at least 80 percent of any additional covered costs incurred by the person during the policy year."[11] Like the No-Fault Act, the State Comprehensive Health Association Act permits a choice of deductibles - in that Act, $1,000 or $1,500 or $2,000. Section 627.6498(5)(a), Florida Statutes (1983).

A side-by-side comparison of the two statutes demonstrates the legislative intent to reach entirely different results in the two situations:

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[11]Similar wording providing for coinsurance percentages to be applied only after satisfaction of a deductible amount may be found in Section 627.6176, Florida Statutes (1983) and in Section 627.6573, Florida Statutes (1983). Both statutes deal with health insurance.

Section 627.6498(5)(b)	Section 627.739(2)
"... if the covered costs incurred by the eligible person exceed the deductible for major medical expense coverage selected by the person in a policy year, the plan shall pay at least 80 percent of any additional covered costs incurred by the person during the policy year."	"... deductibles, in the amounts of $250, $500, $1,000 and $2,000, such amount to be deducted from the benefits otherwise due each person subject to the deduction."

Section 627.6498(5)(b) plainly provides for 80% coinsurance once covered costs have exceeded the deductible (i.e., the deductible applies first, then the coinsurance factor is applied to the "covered costs" which "exceed the deductible"). Section 627.739(2), on the other hand, plainly provides that the deductible is to be subtracted from the benefits to be paid, a figure calculated by first applying the coinsurance percentages of Section 627.736(1) (i.e., "such amount" (the deductible) is deducted from the "benefits otherwise due," not from "covered costs" which "exceed the deductible").

This statute, unlike Section 627.739(2), Florida Statutes (1983), plainly and expressly provides that coinsurance payments (in a health care context) are to be applied after subtraction of the deductible amount. In Section 627.739(2), Florida Statutes (1983), on the other hand, the Legislature has used entirely different phraseology which expresses just the opposite thought. Had the Legislature intended, as Petitioner claims, that the coinsurance amounts

set forth in Section 627.736(1), Florida Statutes (1983), were to be applied after, rather than before, subtraction of the deductible, it could easily have so stated by using terminology much like it used in Section 627.6498(5)(b), Florida Statutes (1983). It did not. The use by the Legislature of certain language in one instance and wholly different language in another (especially where both are in the same Chapter) indicates that different results were intended, and the courts have so presumed. See, Department of Professional Regulation v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984); Ocasio v. Bureau of Crimes Compensation, 408 So.2d 751 (Fla. 3d DCA 1982).

Here, the language used in Section 629.739(2), Florida Statutes (1983), is wholly different than the language in Section 627.6498(5)(b), Florida Statutes (1983). Even if the language of Section 627.739(2), Florida Statutes (1983), were not on its face clear and unequivocal, contrasting that language with the Legislature's choice of terms in this health insurance provision demonstrates that the Legislature intended a different result under Section 627.739(2), Florida Statutes (1983). That result is, plainly, having the deductible amounts applied to the "benefits otherwise due" (i.e., the 80% of medical expenses and 60% of lost wages which Section 627.736(1), Florida Statutes (1983), sets forth as "Required Benefits" under a PIP policy).

If resort to rules of statutory construction is made, despite the clarity of the statutory language, the Court should start with the primary guide to statutory interpretation -- the

intent and purpose of the Legislature. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). The legislative intent is the polestar by which the courts must be guided, since it is the essence and vital force behind the law. Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969); Dade Fed. S & L Ass'n. v. Miami Title and Abstract Div., 217 So.2d 873 (Fla. 3d DCA 1969). One of the main legislative purposes in enacting our No-Fault Law was a reduction in auto insurance premiums. Industrial Fire & Cas. Ins. Co. v. Kwechin, 447 So.2d 1337, 1339 (Fla. 1983); Lasky v. State Farm Ins. Co., 296 So.2d 9, 16 (Fla. 1974). Plainly, a statutory interpretation which increases the amount of PIP benefits paid will necessarily increase the amount of premium which must be charged in order to make those increased payments, contrary to the legislative intent of reducing premiums.

Petitioner's interpretation of the statute also fails to come to grips with another problem.[12] Reverting to the earlier example of an insured with a $2,000 deductible PIP policy, $5,000 in medical expenses and $5,000 in lost wages, Petitioner would deduct the $2,000 from the $10,000 in combined medical expenses and lost wages, and then apply the coinsurance percentages. But the percentages are different: 80% of medical expenses are covered and only 60% of lost wages. Is the deductible to be applied in an pro rata fashion (in which case,

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[12]In fairness to the parties, we point out that the problem does not arise where, as in this case, only medical expenses are involved, or where only lost wages are involved. Rather, it occurs where both elements are involved.

under Petitioner's theory, $5,600 would be payable), or is it to be applied first to the lost wages (in which case, under Petitioner's theory, $5,800 would be payable), or is it to be deducted first from the medical expenses (in which case, under Petitioner's theory, $5,400 would be payable)?[13] Petitioner provides no answer, nor does the statute. Petitioner's theory thus introduces an ambiguity into an otherwise clear statute.[14]

The fact that the statute provides no answer to this question itself demonstrates that the Legislature did not intend for the deductible amounts to be subtracted prior to applying coinsurance percentages, but rather intended that, as the statute plainly says, the deductible amounts are to be subtracted from the "benefits otherwise due," as calculated by applying the coinsurance percentages of Section 627.736(1), Florida Statutes (1983).

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[13]Calculations are provided in Example 1 of the Appendix.

[14]The possibility of engaging in "game-playing" in the timing of submitting losses was recognized by the Fourth District Court of Appeal in Atlas Mutual Ins. Co. v. Wolfort, 12 F.L.W. 1175 (Fla. 4th DCA, opinion filed May 6, 1987), when it noted (12 F.L.W. at 1176):

> However, Wolfort's formula is completely dependent upon which losses happen to be submitted first to the insurer and leads to inconsistent results. To subscribe to Wolfort's method of calculation could give rise to the use of lost wages to consume the deductible and the subsequent application of the higher percentage recoverable for medical expenses to determine the amount due the insured.

This allocation problem not only creates a statutory "gap," it creates a veritable chasm of immense proportions. Under Section 627.736(4), Florida Statutes (1983), PIP benefits are to be paid as they accrue and proofs of loss are submitted, and are overdue if not paid within 30 days thereafter. Thus, even if the deductible was to be "prorated" between wage losses and medical expenses, the insurer could not know the appropriate ratio until all proofs of loss had been submitted, and hence could not determine the appropriate proration as payments were made. Fresh sets of calculations would have to be made every time a payment was made, or the insurer would have to bear the risk of making an overpayment or incurring the statutory penalties for an underpayment. If the deductible is subtracted after coinsurance factors are applied, the problem simply doesn't arise. Proofs of loss are "collected" until the amount, after coinsurance, exceeds the deductible, and payments then begin pursuant to Section 627.736(1), Florida Statutes (1983).

The allocation problem becomes even more apparent when one considers the impact of Petitioner's theory on the provisions of Section 627.736(4)(f), Florida Statutes (1983). That statute provides:

> Medical payments insurance, if available in a policy of motor vehicle insurance, shall pay the portion of any claim for personal injury protection medical benefits which is otherwise covered but is not payable due to the coinsurance provision of paragraph (1)(a), regardless of whether the full amount of personal injury protection coverage has been exhausted. The benefits shall not be payable for the amount of any deductible which has been selected.

Using the same hypothetical, but adding $1,000 of medical payments insurance coverage, the insured would be entitled to the full $1,000 of that coverage if, as we contend, the deductible is subtracted after the coinsurance percentages are applied.[15] Under Petitioner's theory, on the other hand, the insured would receive $800 in medical payments coverage if the deductible was prorated, $1,000 if it was applied to lost wages first, or $600 if it was applied to medical benefits first.[16] In short, adoption of Petitioner's theory impacts on the provisions of Section 627.736(4)(f), Florida Statutes (1983), as well as Sections 627.736(1) and 627.739(2), Florida Statutes (1983). Furthermore, combining the variations in PIP recoveries with variations in medical payment insurance recoveries in the hypothetical situation would result in a total insurance recovery of either $6,000, or $6,400, or $6,800, depending on how the deductible is to be apportioned between medical expenses and lost wages.[17]

Petitioner argues (Brief at 14) that the District Court's application of "benefits otherwise due" creates a gap where medical expenses in excess of the deductible are not covered by either PIP or medical payment insurance, and that this could not have been the legislative intent. One need look no further than the words of Section 627.736(4)(f), Florida Statutes (1983), to see that Petitioner is wrong. That

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[15]See calculations in Example 2 of Appendix.

[16]See calculations in Example 3 of Appendix.

[17]See calculations in Example 4 of Appendix.

statute provides that medical payments insurance "shall pay the portion of any claim for personal injury protection medical benefits which is otherwise covered but is not payable due to the coinsurance provision." Amounts not paid because of a deductible are not "otherwise covered," a fact the same provision notes by expressly excluding from the section amounts not paid due to the deductible.

Whether the provisions of Sections 627.736(1) and 627.739(2), Florida Statutes (1983), are viewed alone or in conjunction with other provisions of Chapter 627, it is apparent that the Legislature meant precisely what it said: the deductible amount is to be subtracted from the "benefits otherwise due," calculated by use of the coinsurance provisions set forth in the "Required Benefits" section, Section 627.736(1), Florida Statutes (1983).

Petitioner cites Industrial Fire & Cas. Ins. Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978) for the proposition that the "benefits otherwise due" is the policy limit where medical expenses and lost wages exceed policy limits by more than the amount of a deductible.[18] We have no quarrel with

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[18]Petitioner has also asserted conflict with Industrial Fire on the basis that the District Court in the instant case authorized a "double deductible" by permitting an insured to subtract the deductible amount from the policy limits as well. Petitioner is plainly wrong, since (irrespective of deductibles or coinsurance) petitioner's benefits in this case were substantially below policy limits, so the District Court never even reached the question, as the District Court itself observed (slip opinion at 4) in noting its concern over a policy provision which would seem to have that effect.

(Footnote continued on next page.)

that case under the statutes which it was construing. However, we hasten to point out that the statutes there involved were the 1975 and 1976 versions of the act, which did not contain any coinsurance provisions such as are currently found in Section 627.736(1), Florida Statutes (1983).[19] Industrial Fire & Cas. Ins. Co. v. Cowan, supra, simply did not address -- indeed, could not have addressed -- the present question.

It should be noted, moreover, that the Third District has itself indicated, in Villasana v. South Carolina Ins. Co., 394 So.2d 1167 (Fla. 3d DCA 1980), that it does not interpret its prior decision in Industrial Fire & Cas. Ins. Co. v. Cowan, supra, as requiring the deductible to be subtracted from the gross amount of medical bills and lost wages before application of the coinsurance percentages. In that unpublished opinion,[20]

(Footnote No. 18 continued)
Furthermore, neither Industrial Fire nor Thibodeau v. Allstate Ins. Co., 391 So.2d 805 (Fla. 5th DCA 1980), stands for the absolutist proposition that policy limits are necessarily the "benefits otherwise due." In both Industrial Fire and Thibodeau, the medical expenses and lost wages (after application of the coinsurance in Thibodeau, there being no coinsurance in Industrial Fire) were in excess of policy limits, and it was for that reason that policy limits were the "benefits otherwise due" in those two cases.

[19]The coinsurance provisions were first added to the statute effective September 1, 1977. Chapter 77-468, Sections 33, 45, Laws of Florida. The accident in Industrial Fire occurred on February 24, 1977.

[20]We have been furnished with copies of the Third District's unpublished opinion and the trial court's Final Summary Judgment in that case, and attach them to this brief as an Appendix. We recognize the extremely limited precedential value of an unpublished opinion and cite it not for its value in and of itself, but only to demonstrate the Third District's understanding of the import of its own prior decision in Industrial Fire.

the Third District affirmed per curiam a final summary judgment which had calculated the amount due under a PIP policy with a deductible by first applying the coinsurance factors set forth in Section 627.736(1), Florida Statutes, and then subtracting the deductible amount from the resulting figure. If, as Petitioner contends, Industrial Fire stands for the proposition that the deductible is to be subtracted from the gross amounts before application of coinsurance percentages, the same court in Villasana would have reversed the trial court, not affirmed it.

Petitioner's reliance on Thibodeau v. Allstate Ins. Co., 391 So.2d 805 (Fla. 5th DCA 1980), is similarly misplaced. In that case, the insured had suffered more than $8,000 in medical expenses; she had a $5,000 PIP policy with a $4,000 deductible, and claimed that she was entitled to $4,000 in PIP coverage, calculated by subtracting the deductible amount from the full amount of the medical expenses. The Fifth District, without mentioning coinsurance, rejected this contention, as well as the "appealing argument" (391 So.2d at 806) that the general public assumes that there is $5,000 coverage after the insured pays the first $4,000,[21] holding that there was only $1,000 in coverage available. That holding is entirely consistent with subtracting the deductible amount from the "benefits otherwise due." In Thibodeau, the "benefits otherwise due" for medical expenses were the policy limits of

[21]Petitioner makes, and the trial court accepted, the same argument in this cause.

$5,000, since the 80% coinsurance portion of the $8,000 in medical expenses ($6,400) exceeded the policy limits. Since the policy only provided benefits to a $5,000 limit, and the insurance amount exceeded that, the "benefits otherwise due" were the policy limits, and the deductible was properly subtracted from that amount. If, on the other hand, the formula espoused by Petitioner were to be applied, and the deductible amount subtracted from the gross amount of medical bills, with the statutory coinsurance provisions applied thereafter, plaintiff in Thibodeau would have been entitled to $3,200 worth of coverage.[22]

Petitioner's misinterpretation of Thibodeau again goes back to the essential question of this case: what are the "benefits otherwise due"? Plainly, under Section 627.736(1), Florida Statutes (1983), they are the applicable coinsurance portions of medical expenses and lost wages, not to exceed policy limits. In Thibodeau, the policy limits were below the applicable percentage; thus, policy limits were the "benefits otherwise due." In the instant case, the applicable percentage is below policy limits, and hence the coinsurance percentage constitutes the "benefits otherwise due." One need only examine the situation which would occur if there were no deductible to see that this is necessarily so. The point was also briefly touched upon in Kwechin v. Industrial Fire & Cas. Co., 409 So.2d 28 (Fla. 3d DCA 1981), approved, 447 So.2d 1337 (Fla. 1983). After holding the insured's selection of a

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[22]See calculations in Example 5 of Appendix.

deductible ineffective on the facts of the case, the Third District remanded the case with directions, observing (409 So.2d at 30, fn 3): "Of course, the amounts due Kwechin will be 'the benefits otherwise due,' §627.739(1), Fla. Stat. (1977), that is, the eighty percent called for by §627.736, Fla. Stat. (1977), but with no deductible."

In Atlas Mutual Ins. Co. v. Wolfort, supra, the Fourth District adhered to the position it had taken in the instant case, reaffirming that the "benefits otherwise due" were the benefits which would have been payable had there been no deductible -- the amounts remaining after application of the coinsurance percentages.

The only other reported case of which we are aware even tangentially mentioning the question is Allstate Ins. Co. v. Chandler, 390 So.2d 826 (Fla. 3d DCA 1980), a one paragraph per curiam affirmance which provides no guidance.

It is, perhaps, worthy of note that Petitioner's construction of the statute would make the deductible amounts set forth in Section 627.739(2), Florida Statutes (1983), not fixed deductibles as Petitioner implies, but a variable amount which depended on the ratio of medical expenses and lost wages in each case. Thus, for instance, Petitioner's theory, when applied to the $2,000 deductible in the hypothetical discussed above, would change the $2,000 deductible to a deductible of $1,200, or $1,400, or $1,600, depending on how the deductible was applied to the coinsurance payments.[23] Changing the ratio

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[23]See calculations in Example 6 of Appendix.

of wage losses and medical expenses will further vary the amount of the deductible.[24] Since PIP benefits are required to be paid within 30 days of receipt of reasonable proof of loss, the insurer, faced with a flow of medical bills and wage loss claims for the insured, could never know the ultimate ratio of medical expenses and wage losses until all claims had been paid (or, perhaps, until policy limits had been exhausted), and hence could not determine, as claims were being processed, what the "true deductible" was in any given case.

Petitioner argues that the No-Fault Law, as a restriction on the common law right to sue, must be strictly construed, citing Styles v. Y. D. Taxi Corp., Inc., 426 So.2d 1144 (Fla. 3d DCA 1981). In point of fact, that argument cuts contrary to Petitioner's position. Even assuming arguendo that the statute is not clear and unambiguous, and hence requires resort to rules of construction, it is Petitioner's theory, not Respondent's, that is more restrictive of the right to bring a common-law suit.[25] Rather than pushing the statute over the

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[24]See calculations in Example 7 of Appendix.

[25]Section 627.737(1), Florida Statutes (1983), providing the tort immunity, does not apply to amounts not payable due to coinsurance, hence leaving those amounts recoverable in a common law suit. Amounts not paid due to a deductible, on the other hand, may not be so recovered. As shown above, the mechanics of Petitioner's theory necessarily yield a lower amount of "coinsurance withholding" than does Respondent's construction (See calculations in Example 8 of Appendix). In this very case, Petitioner's theory leads to a "coinsurance withholding" of $777.49, while Respondent's construction yields a figure of $1,177.49 (See calculations in Example 9 of Appendix). Thus, it is Respondent's construction of the statutory language which yields a greater right to sue the

(Footnote continued on next page.)

constitutional cliff, as the Academy argues (Brief at 8), the plain terms of the statute, propery interpreted, decrease the statute's intrusion into the right of access to the courts, the very problem involved in Chapman v. Dillon, 415 So.2d 12 (Fla. 1982), which the Academy cites in this regard. Thus, application of the rule cited by Petitioner would lend further credence to the plain statutory meaning.

For the reasons set forth above, we believe that the provisions of Section 627.739(2), Florida Statutes (1983), are clear and unambiguous. Where a statute is clear and unambiguous, there is no need to resort to rules of statutory construction. Kimbrell v. Great American Ins. Co., 420 So.2d 1086 (Fla. 1982); Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960); Starr v. Karst, Inc., 92 So.2d 519 (Fla. 1957). Even if the statute were not clear and unambiguous on its face, however, all of the various rules of statutory construction point to the same result: Respondent is correct.

We submit that the Court need not reach that question, since the statute is, on its face, clear and unambiguous, and mandates that the deductible amounts be subtracted from the benefits otherwise due, which in turn are calculated by

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(Footnote No. 25 continued) tortfeasor, not Petitioner's. If the Court were to apply the rule suggested by Petitioner, and construe the statute in such a manner as to maximize the amount for which a common law suit could be brought, the Court would have to construe the language of the statute in accordance with its plain meaning: that the deductible amount is to be subtracted after, not before, application of the coinsurance percentage.

applying the coinsurance percentages set forth in Section 627.736(1), Florida Statutes (1983), to the amount of medical bills incurred in this case.

CONCLUSION

For the reasons set forth above, Amicus Curiae Florida Defense Lawyers Association submits that the trial court erred in holding that Section 627.739(2), Florida Statutes (1983), mandated that deductible amounts be subtracted from the gross amount of medical bills, and that the coinsurance percentages of Section 627.736(1), Florida Statutes (1983), were to be applied to the resulting amount. To the contrary, we submit, the District Court of Appeal was correct when it held that Section 627.739(2), Florida Statutes (1983), mandates that the gross amount of medical bills be first multiplied by the coinsurance percentages set forth in Section 627.736(1), and that the deductible amount be subtracted from that resulting figure. The decision of the District Court in the instant case does not involve any conflict of decisions, and the writ should be discharged as improvidently granted. Alternatively, the Court should approve the decision of the District Court of Appeal.

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 to Mark L. Weinstein, Esquire, 2750 Northeast 187th Street, North Miami Beach, Florida, 33180; Larry Klein, Esquire, Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida, 33401; Richard A. Kupfer, Esquire, and Rodney G. Romano, Esquire, P. O. Box 3466, West Palm Beach, Florida, 33402; David C. Wiitala, Esquire, P. O. Box 14125, North Palm Beach, Florida, 33408; Shelley Leinicke, Esquire, P. O. Box 14460, Fort Lauderdale, Florida, 33302; and to Brian J. Deffenbaugh, Esquire, Florida Department of Insurance, Larson Building, Suite 413-B, Tallahassee, Florida, 32301, this 9th day of July, 1987.

Attorney