o/a 10-6-87

IN THE SUPREME COURT OF FLORIDA

NO. 70,106

WAYNE GOVAN, for himself and other similarly situated individuals,

Petitioner,

v.

INTERNATIONAL BANKERS INSURANCE COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA AUTOMOBILE UNDERWRITERS ASSOCIATION

GOODHART & ROSNER
21 Southeast 1st Avenue
10th Floor
Miami, Florida 33131

-and-

DANIELS AND HICKS, P.A.
Suite 2400, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132-2513
(305) 374-8171

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS.....-ii-

INTRODUCTION..... 1

STATEMENT OF THE CASE AND OF THE FACTS..... 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT

I. WHETHER THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN ITS INTERPRETATION OF SECTION 627.739(2), FLORIDA STATUTES (1985)..... 2

A. The plain language of Section 627.739..... 2

B. Application of statutory interpretation principles..... 4

CONCLUSION..... 6

CERTIFICATE OF SERVICE..... 7

APPENDIX

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

TABLE OF CITATIONS

CASES **PAGE**

Atlas Mutual Insurance Co. v. Wolfort,
506 So.2d. 99 (Fla. 4th DCA 1987).....4

Industrial Fire & Casualty Ins. Co. v. Kwechin,
447 So.2d 1337 (Fla. 1983).....5

Industrial Fire & Casualty Insurance Co. v. Cowan,
364 So.2d 810 (Fla. 3d DCA 1978).....3

International Bankers Insurance Co. v. Govan,
502 So.2d 913 (Fla. 4th DCA 1987).....2,3,4

Kimbrell v. Great American Ins. Co.,
420 So.2d 1086 (Fla. 1982).....4

Lasky v. State Farm Ins. Co.,
296 So.2d 9 (Fla. 1974).....5

Thibodeau v. Allstate Insurance Co.,
391 So.2d 805 (Fla. 5th DCA 1980).....3

OTHER AUTHORITIES

Florida Statutes:
Section 627.736(1)(a) and (b) (1985).....passim
Section 627.739(2) (1985).....passim

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

INTRODUCTION

The Florida Automobile Underwriters Association submits this amicus curiae brief pursuant to the court's order of July 13, 1987. This amicus adopts and incorporates by reference herein the arguments set forth in respondent's brief and presents only supplemental argument on the proper interpretation of Section 627.739(2), Florida Statutes (1985), in the hope that this will be of assistance to the court.

In this brief, the parties will be referred to as the plaintiff and the insurer. All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

This amicus agrees with the statement of the case and of the facts set forth in petitioner's brief.

SUMMARY OF ARGUMENT

The plain language of Section 627.739(2) directs that deductibles be subtracted from the benefits due an insured under a PIP policy. Benefits due are calculated pursuant to Section 627.736(1), which awards eighty percent of medical expense and sixty percent of disability loss, up to the policy limits. The only possible intent of Section 627.739(2) is that the deductible be subtracted from the adjusted losses. Any change in the calculation of PIP insurance benefits should be engineered by the legislature which, in this instance, has failed to act.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

ARGUMENT

I. WHETHER THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN ITS INTERPRETATION OF SECTION 627.739(2), FLORIDA STATUTES (1985).

In International Bankers Insurance Co. v. Govan, 502 So.2d 913 (Fla. 4th DCA 1987), the Fourth District Court of Appeal held that Section 627.739(2), Florida Statutes (1985), requires that PIP deductibles be subtracted from the benefits due an insured after application of the formulas set forth in Section 627.736(1)(a) and (b).[1/] Plaintiff challenges this interpretation arguing instead for the deductible to be subtracted from the total amount of loss incurred. The correct interpretation is the one followed by the Fourth District and should be affirmed on this appeal.

A. The plain language of Section 627.739.

The Florida Motor Vehicle No-Fault law provides for insureds to select a deductible "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." §627.739(2), Fla.Stat. (1985). Plainly, the deductible must be deducted from

---

1/ The Fourth District phrased its issue as "the proper method for determining no-fault medical and wage loss benefits in accord with the provisions of Section 627.739(2), Florida Statutes (1985)." Although Govan did not involve wage losses, the holding necessarily impacts the calculation of benefits under both subsection (a) and (b) of Section 627.736(1).

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

something. The statutory language instructs that it be deducted from "benefits otherwise due," i.e., benefits due absent a deductible.

The benefits due a particular insured under PIP are governed by Section 627.736. Three categories of benefits are recoverable: medical, disability and funeral.[2/] Eighty percent of medical expenses are recoverable and sixty percent of disability benefits are recoverable. Thus, these percentages are applied to the respective losses to determine the benefits due. Only after a determination of benefits due can the statutory language of Section 627.739(2) be applied -- "deductibles . . . to be deducted from the benefits otherwise due."

In Govan, the Fourth District applied the statute in precisely this manner holding that "benefits otherwise due" means the total amount of expenses payable under the policy before application of the deductible. 502 So.2d at 914. This construction is not inconsistent with Thibodeau v. Allstate Insurance Co., 391 So.2d 805 (Fla. 5th DCA 1980), or Industrial Fire & Casualty Insurance Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978). In both cases the courts determined that the benefits due were the amounts the insurer was obligated to pay insured, in each instance the policy limits, and subtracted the deductible from that amount.

[2/] The amount of funeral, burial or cremation expenses recoverable is set by statute and not subject to any deductible. This aspect of benefits will, therefore, not be included in the remaining discussion.

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

B. Application of statutory interpretation principles.

When the language of a statute is plain and its meaning clear, resort to rules of statutory construction is unnecessary. Kimbrell v. Great American Ins. Co., 420 So.2d 1086, 1088 (Fla. 1982). Plaintiff, however, asserts that the statutory language is ambiguous and requires construction. A close examination of plaintiff's proposed interpretation reveals that such construction would itself interject ambiguity and render the statute unworkable.

Subsequent to Govan, the Fourth District decided Atlas Mutual Insurance Co. v. Wolfort, 506 So.2d 99 (Fla. 4th DCA 1987), where an insured again advocated deduction of a $2,000 PIP deductible from the total amount of loss rather than from benefits due under Section 627.736(1). In Wolfort, the court highlighted the impracticality of an alternative interpretation where both medical expenses and lost wages are sought.

> [Insured's] formula is completely dependent upon which losses happen to be submitted first to the insurer and leads to inconsistent results. To subscribe to [Insured'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.

Id. at 101. The no-fault law, as written, makes no provision for resolution of this dilemma.

There is no justification for the introduction of inconsistency into this otherwise clear statute. If the legislature deems what the courts believe to be the plain language of the

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

statute contrary to public policy or understanding, it can revise Section 627.739. The legislature has declined to take such action despite its frequent re-examination of Florida's no-fault law.

During the 1987 session, the Florida legislature had before it a bill that would have codified the statutory interpretation petitioner advocates. House Bill No. 1015 proposed an amendment of Section 627.739(2) to read:

> (2) 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. The amount of a deductible shall be an initial out-of-pocket expense to be met by the policyholder prior to the calculation of benefits described in s. 627.736(1). The amount of a deductible may be applied to reduce the $10,000 limit described in s. 627.736(1). However, the amount of a deductible shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).

(Attached as Appendix A). The Florida legislature failed to enact this bill.

The Florida Automobile Underwriters Association estimates that PIP premiums would rise by approximately twenty-five percent if deductibles are subtracted from the total amount of loss incurred. The resulting larger benefit award would necessitate a higher premium. One of the purposes of the no-fault law was to reduce insurance rates. Industrial Fire & Casualty Ins. Co. v. Kwechin, 447 So.2d 1337 (Fla. 1983); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). Certainly, it should be left for the legislature to initiate a calculation of benefits due

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

that would so drastically impact PIP premiums.

In light of the plain workable language of Section 627.739(2) as interpreted in Govan, and the recent review of Florida's no-fault law by the state legislature, this court should decline plaintiff's invitation to engage in what would amount to a rewriting of the statute.

CONCLUSION

For the reasons set forth above, Amicus Curiae Florida Automobile Underwriters Association submits that the Fourth District was correct in its interpretation of Section 627.739(2) and its decision should be affirmed.

Respectfully submitted,

GOODHART & ROSNER
21 Southeast 1st Avenue
10th Floor
Miami, Florida 33131
-and-
DANIELS AND HICKS, P.A.
Suite 2400, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132-2513
(305) 374-8171

By Elizabeth Clarke
for DAVID N. ROSNER

By Elizabeth Clarke
for MARK HICKS

By Angela C. Flowers
ANGELA C. FLOWERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief was mailed this 27th day of July, 1987, to:

Larry Klein, Esq.
Klein & Beranek, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401

David C. Wiitala, Esq.
Ingalsbe McManus Wiitala & Contole, P.A.
P.O. Box 14125
North Palm Beach, Florida 33408

Richard Kupfer, Esq.
Cone Wagner Nugent Johnson Roth & Romano, P.A.
P.O. Box 3466
West Palm Beach, Florida 33402

Michael Richmond, Esq.
Nova Law Center
3100 S.W. 9th Avenue
Ft. Lauderdale, Florida 33315

Jack W. Shaw, Jr., Esq.
Mathews Osborne McNatt Gobelman & Cobb
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202-3385

Shelley Leinicke, Esq.
Wicker Smith Blomqvist
P.O. Box 14460
Ft. Lauderdale, Florida 33302

Marjorie Gadarian Graham, Esq.
Jones & Foster
P.O. Drawer E
West Palm Beach, Florida 33402

Don Dowdell, Esq.
2124 Deerfield Drive
Tallahassee, Florida 32308

Brian J. Deffenbaugh, Esq.
Florida Dept. of Insurance
Larson Building, Suite 413-B
Tallahassee, Florida 32301

Angela C. Flowers
ANGELA C. FLOWERS

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171