OIC 10-6-87

IN THE SUPREME COURT OF FLORIDA, TALLAHASSEE, FLORIDA

WAYNE GOVAN, etc.,

Petitioner,

v.

INTERNATIONAL BANKERS INSURANCE COMPANY,

Respondent.

CASE NO. 70,106

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS (AFTL) SUPPORTING POSITION OF PETITIONER

THE ACADEMY OF FLORIDA TRIAL LAWYERS
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PREFACE

The Petitioner on this appeal is Wayne Govan, who was the Appellee before the 4th DCA. The Respondent is International Bankers, which was the prevailing Appellant before the 4th DCA.

AFTL adopts and agrees with the arguments set forth in the Petitioner's Brief and incorporates those herein by reference. This Amicus Brief attempts to avoid repeating the same arguments already set forth and presents only supplemental argument, which AFTL hopes will be of assistance to this Honorable Court in reaching its decision.

POINT ON APPEAL

F.S. 627/739(2) IS SILENT AS TO THE METHOD OF CALCULATING PIP BENEFITS AND THE "BENEFITS OTHERWISE DUE" CLAUSE REFERS ONLY TO THE INSURER'S MAXIMUM EXPOSURE UNDER THE POLICY.

STATEMENT OF THE CASE AND FACTS

AFTL adopts the Petitioner's Statement of the Case and Facts and incorporates the same herein by reference.

SUMMARY OF ARGUMENT

The "benefits otherwise due" clause found in F.S. §627.739 refers only to the insurer's maximum exposure under the policy. The statute is silent with regard to the method of calculating PIP benefits due. Therefore, the method must be determined by going outside the statute for guidance and referring to the commonly accepted definition of a deductible as well as to Fla. Stat. 627.736(a), and common rules of statutory construction.

ARGUMENT

POINT ON APPEAL:

> FLORIDA STATUTE 627.739(2) IS SILENT AS TO THE METHOD OF CALCULATING PIP BENEFITS AND THE "BENEFITS OTHERWISE DUE" CLAUSE REFERS ONLY TO THE INSURER'S MAXIMUM EXPOSURE UNDER THE POLICY

Both Industrial Fire and Casualty Insurance Company v. Cowan and Thebedeau v. Allstate Ins. Co. stand for the proposition that the "benefits otherwise due" clause contained in Fla. Stat. 627.739(2) refers only to the insurer's maximum exposure (i.e. that up to $10,000.00 can be paid out after the insured pays the deductible). The 4th DCA held in the case at bar that the clause "means the total amount of medical expenses payable under the policy before application of the deductible." Id. AFTL contends that neither that specific clause nor the statute itself speak at all to the method of calculation.

In addition, AFTL contends that the "benefits otherwise due" clause is unclear and disagrees with Defendants' assertions that the clause is clear and unambiguous. The confusion raised by the case at bar was thoroughly articulated by the Department of Insurance Amicus Curiae before the 4th DCA and illustrates the ambiguity and uncertainty.

The proper method of calculating the PIP deductible can be determined by using the same method used for checking simple arithmetic problems. For example, to confirm that 5 - 3 = 2, one adds the number 2 plus the number 3 and the answer should be the number 5.

Similarly, the amount (co-payment) owed by the insurer, should equal the total medical bills minus the amount (co-payment) owed by the Plaintiff Insured. Since Fla. Stat. 627.736(a) requires the insurer to pay 80% of the medical bills, then the Plaintiff must logically be left to pay the remaining 20%. The deductible should be applied first since, by definition, a deductible is "the portion of an insured's loss to be borne by the insured before he is entitled to recover from the insurer." [e.s.] Black's Law Dictionary 372 (5th ed. 1979). Thus, the deductible is applied first. That is the commonly understood meaning of a deductible and what a person of average intelligence and understanding would expect to pay before his insurance would start to pay. If the Legislature intended to create an entirely new breed of deductible, then it should have done so in language which is clear and forceful.

Therefore, Respondent's liability equals $5,887.45 minus $2,000.00 (deductible) minus 20%, which is 80% of the amount above $2,000.00. Only Petitioner's method checks out in this equation so that the $2,000.00 deductible plus Petitioner's 20%, plus Respondent's 80% equals the total amount (i.e. $2,000.00 plus $777.49 plus $3,109.96 equals $5,887.45).

In shocking contrast, Respondent's method requires Plaintiff not only to pay his $2,000.00 deductible but more than 30% of the remainder, while the PIP carrier pays

only about 69% of the remainder. Respondent's method is a "slight of hand" mathematical illusion which is clearly inconsistent with Fla. Stat. 627.736(a), the statute that requires the PIP carrier to pay 80% of the medical bills. One statute should not be construed in a manner that creates conflict with another statute.

Respondent asserts that Petitioner's example of an $8,000.00 deductible is unrealistic. Perhaps a clearer and more realistic example is the case of a $2,000.00 PIP deductible and total medicals of $2,500.00. Using Respondent's method, Respondent would say to this Court and to its insureds, "we owe you nothing" since 80% of $2,500.00 equals $2,000.00 minus the deductible of $2,000.00 equals zero. Thus, the face of the policy tells the insured there is a $2,000.00 deductible, but the insurer says "I don't pay a dime until you have paid $2,500.00."

Well known rules of statutory construction support Petitioner's method of calculating the PIP deductible. The statute should be construed so as to give effect to the evident legislative intent, even though it may be read by some to contradict the strict letter of the statute (especially when interpreting a remedial statute). Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986); Griffis v. State, 356 So.2d 297 (Fla. 1978). Separate statutes (i.e. §§627.739 and 627.736(a)) should be read in pari materia. State v. Rodriguez, 365 So.2d 157 (Fla. 1978).

A statute should not be construed so as to bring unreasonable or absurd consequences when it is fairly susceptible of another construction that will aid in accomplishing the manifest intent of the Legislature. Leach v. State, 293 So.2d 77 (Fla. 1st DCA 1974). Surely, telling an insured that he has a $2,000.00 deductible but he must pay $2,500.00 before his insurance company pays anything is both unreasonable and absurd. Any statute which impedes access to the courts (such as the no-fault statutes) should be construed most favorably for the insured. Cf. Green v. Broward General Medical Center, 356 So.2d 877 (Fla. 4th DCA 1978).

In Palma v. State Farm, 489 So.2d 147 (Fla. 4th DCA 1986), the 4th DCA noted that the PIP statute in the No-Fault Act is remedial and should be construed, whenever possible, in favor of the insured. In Holloway v. State Farm, 370 So.2d 452 (Fla. 4th DCA 1979), involving a question of how to apportion PIP benefits with med pay benefits, the 4th DCA held that the method of calculating PIP benefits should be done in the manner most advantageous to the insured, when it is not entirely clear how the Legislature intended it should be apportioned.

Several years ago this court upheld the constitutionality of the No-Fault Act in Chapman v. Dillon, 415 So.2d 12 (Fla. 1982) but Justices Overton and Sundberg noted in concurring opinions that, in light of the changes to the PIP statute, which now allow for sizeable deductibles and

reduced benefits, the PIP statute now comes "perilously close to the outer limits of constitutional tolerance." AFTL, as amicus curiae, would respectfully submit that the interpretation argued for by Respondent may push the statute over the praecipe of constitutionality. A statute, of course, should be interpreted, whenever possible, in a way that avoids raising questions as to the statute's constitutional validity. State ex rel Shevin v. Metz Const. Co., 285 So.2d 598 (Fla. 1973). This is yet another reason to adopt the common sense interpretation of the statute argued for by the Petitioner in this case.

Even the 4th DCA in the case at bar stated that the manner in which the word "deductible" is normally used is "an amount to be deducted from the claim." International Bankers Ins. Co., 502 So.2d 913 (Fla. 4th DCA 1986). The claim is the total amount of the medical bills. The deductible is the amount that the insured should pay before the insurance company pays anything. "Benefits otherwise due" means 80% of the bills remaining after the deductible has been paid. Any other construction leads to the unreasonable and absurd result that an insured with a $2,000.00 deductible must pay more than $2,000.00 before the insurer pays anything. In addition, such a result would work a fraud upon Florida's insurance consumers who have a common understanding of what a "deductible" is supposed to mean.

The Academy of Florida Trial Lawyers respectfully urges this Honorable Court to hold that the "benefits otherwise due" clause does not refer to the method of calculating the PIP payments due but rather refers only to the maximum amount of dollars that the insurer may be liable to pay out, that the calculation of benefits must be determined through the application of other statutes i.e. 627.736(a) and common rules of statutory construction, and that therefore the proper method of calculating PIP benefits is to apply the deductible to total medical bills and require payment of the remaining 80%.

CONCLUSION

The "benefits otherwise due" clause of Fla. Stat. 627.739 refers only to the insurer's maximum possible exposure for payment. The statute is silent with regard to the method of calculation. The only logical and fair method of calculation, and the only method consistent with Fla. Stat. 627.736(a) is that the insurer/Respondent is liable for 80% of the bills remaining after the insured/Petitioner has paid his $2,000.00 deductible, up to a maximum exposure of $8,000.00.

Respectfully submitted,

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