IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 70,106

WAYNE GOVAN, etc.,

Petitioner,

vs.

FOURTH DCA CASE NO. 85-2661

INTERNATIONAL BANKERS
INSURANCE COMPANY,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

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PREFACE

The parties will be referred to as the plaintiff and the insurer.

STATEMENT OF FACTS

Insurer agrees with those facts set forth on page 3 and most of page 4, except for plaintiff's "correct method of calculation." The remainder of plaintiff's statement of facts is argument.

SUMMARY OF ARGUMENT

The issue before the Fourth District in the present case was whether the 80% provided by statute is applied first or the deductible provided by the policy is subtracted first. This was not the issue in either of the two cases cited for conflict. In suggesting apparent conflict the Fourth District overlooked that the medical expenses in the cases cited for conflict far exceeded the policy limits, while the medical expenses in the present case were lower than the policy limits. The "benefits otherwise due" in those cases were the policy limits because the medical expenses of the insureds substantially exceeded the policy limits, even after the 80% reduction was applied. If the reasoning of the Fourth District in the present case is

applied to the cases relied on for conflict it becomes clear there is no conflict because the results are the same.

ARGUMENT

ISSUE

DOES THE DECISION OF THE FOURTH DISTRICT PRESENT CONFLICT?

Although the Fourth District stated on page 3 of its opinion that the decision "appears to conflict" with the cases on which plaintiff relies, there is no conflict. Both the Fourth District and the plaintiff have overlooked that in the two cases cited for conflict the actual medical expenses were in excess of the policy limits. In the present case the medical expenses were less than the policy limits. If the calculating method approved by the Fourth District in the present case were applied to the two cases relied on for conflict, the results in those cases would be exactly the same. Therefore there is no conflict.

As plaintiff recognizes on page 3, where he sets out the applicable portions of Section 627.736, the statute provides for medical benefits of 80%, not 100%. Thus, as the Fourth District has correctly recognized, prior to applying any deductible contained in the policy, the benefits due under the statute would be 80% of medical

expenses. This plaintiff elected a $2,000 deductible in his insurance policy, which is then deducted from the benefits due under the statute. There is no double deductible as plaintiff argues on page 7. The only deductible is the $2,000 deductible elected by the plaintiff and authorized by law. The 80% is not a deductible. It is the amount of benefits set by the legislature.

As the Fourth District recognized, Section 627.739(2) provides that the amount of the deductible, $2,000 in the present case, shall be deducted "from the benefits otherwise due each person subject to the deduction." The "benefits otherwise due" can only have one meaning, the benefits which would be due under the policy before application of the deductible. By statute those benefits would be 80% of the medical expenses, unless they exceed the policy limits.

In the two cases relied on by plaintiff for conflict the opinions did not even mention the issue involved in the present case, which is which comes first, the 80% or the $2,000 deductible. Moreover the reasoning applied by the Fourth District in the present case, if applied to the facts in those cases, would result in the same decisions which those courts reached.

In Thibodeau v. Allstate Insurance Company, 391 So.2d 805 (Fla. 5th DCA 1980), the medical expenses were in excess of $8,000. The policy only provided $5,000 in coverage for PIP benefits with a $4,000 deductible. Since the coverage was only $5,000, the "benefits otherwise due" were only $5,000. After reducing that by the deductible of $4,000 plaintiff was owed $1,000.

The Fourth District mistakenly said that its holding appears to conflict with Thibodeau because in Thibodeau the court appeared to hold that "benefits otherwise due" refers to the no-fault benefit limits. That statement is incorrect. What the Fourth District failed to understand was that "benefits otherwise due" in Thibodeau was $5,000 (the policy limits) because the medical expenses were in excess of $8,000. Applying 80% to the $8,000 expenses would still result in expenses in excess of $5,000. In the present case the policy limits were $10,000, more than the actual medical expenses.

That same distinction, as well as another, exists in Industrial Fire & Casualty Insurance Company v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978). In that case the policy limits were $5,000 and the medical expenses and lost wages were approximately $40,000. As in Thibodeau, the court

stated the benefits "otherwise due" were $5,000, there was a deductible of $1,000, and plaintiff was entitled to $4,000. There is another more important distinction because in that case the accident occurred on February 24, 1977, and the court was applying the 1975 version of 627.736(1) which did not have the 80% provision. The 1975 statute provided for payment of all medical expenses.

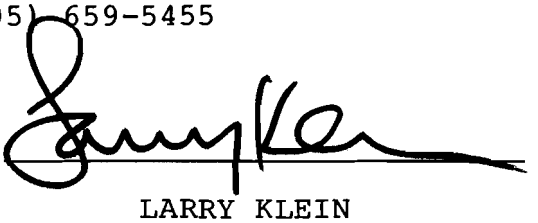
"Benefits otherwise due" mean amounts due under Section 627.736, which must be read in conjunction with the policy limits. If the medical expenses are less than the policy limits, then "benefits otherwise due" are 80% of the total medical expenses. If medical expenses exceed the policy limits, then benefits otherwise due are 80% of the medical expenses, but not more than the policy limits.

In the present case the Fourth District held that "benefits otherwise due" are determined by applying the 80% provision of the statute and then subtracting the deductible contained in the policy. In the two cases relied on for conflict the courts did not even discuss this issue, but simple arithmetic shows that using the Fourth District's method in the present case results in the same amounts reached by the Fifth District and the Third District.

CONCLUSION

There is no actual conflict in the present case and review should be denied. If this court determines that review should be granted, it is submitted that briefs on the merits and oral argument are unnecessary. The only issue is the meaning of the phrase "benefits otherwise due." Everything which can be said about that issue has been said by the Fourth District in its opinion and in these jurisdictional briefs. If this Court grants review the opinion of the Fourth District should be approved.

LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, mail, this 12th day of March, 1987, to:

DAVID C. WIITALA
INGALSBE, McMANUS WIITALA
& CONTOLE, P.A.
P. O. Box 14125
North Palm Beach, FL 33408

SHELLEY LEINICKE
WICKER SMITH BLOMQVIST
P. O. Box 14460
Fort Lauderdale, FL 33302

RICHARD KUPFER
CONE WAGNER NUGENT
JOHNSON ROTH & ROMANO, P.A.
P. O. Box 3466
West Palm Beach, FL 33402

MARJORIE GADARIAN GRAHAM
JONES & FOSTER
P. O. Drawer E
West Palm Beach, FL 33402

MICHAEL RICHMOND
Nova Law Center
3100 S.W. 9th Avenue
Fort Lauderdale, FL 33315

DON DOWDELL
2124 Deerfield Drive
Tallahassee, FL 32308

JACK W. SHAW, JR.
1500 American Heritage
Life Bldg.
Jacksonville, FL 32202

BRIAN J. DEFFENBAUGH
Fla. Depart. of Insurance
Larson Bldg. -Suite 413-B
Tallahassee, FL 32301

LARRY KLEIN