OA 9-8-89

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IN THE SUPREME COURT OF FLORIDA

CASE NO: 73,488

INTERNATIONAL BANKERS INSURANCE COMPANY,

Petitioner,

v.

SUSAN ARNONE,

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA AUTOMOBILE UNDERWRITERS ASSOCIATION

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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INTRODUCTORY STATEMENT

This case is before this court on discretionary review of the decision of the Fourth District Court of Appeal in International Bankers Insurance Co. v. Arnone, 528 So.2d 917 (Fla. 4th DCA 1988). In that case, the Fourth District held that a provision in a personal injury protection ["PIP"] insurance policy that provided for the reduction of the limits of available PIP benefits by the amount of the deductible was not authorized by statute and conflicted with the plain language of Florida's PIP law as construed by this court in Govan v. International Bankers Insurance Co., 521 So.2d 1086 (Fla. 1988). Florida Automobile Underwriters Association ["FAUA"] submits this amicus curiae brief in the hope that the arguments presented herein will be of assistance to the court.

FAUA is an association of nine insurers who, it is estimated, have collectively written five hundred thousand PIP policies in Florida. The total deductibles at issue in those policies are estimated at millions of dollars. The rates charged for the PIP coverage have been structured to reflect the fact that the deductible amounts in those policies would be subtracted from the maximum coverage limits. Should this court adopt the Fourth District's holding in Arnone, the member insurers' potential liability on existing policies is sufficient to push the members towards the brink of insolvency.

The purpose of this amicus brief is to present supplemental argument to that presented in the petitioner's brief that

the Fourth District's decision should be reversed, and that a change in the law, if any, regarding the application of PIP deductibles to reduce coverage limits should be applied prospectively only to insurance policies written after the effective date of this court's decision.

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 THE ARGUMENT

The Fourth District's decision in this case contravenes established decisional law which holds that a PIP deductible is to be subtracted from the policy limits. As expressed by this court in Govan, "benefits otherwise due" refers to the amount that an insured would receive but for application of the deductible. Accordingly, International Bankers correctly paid $8,000 to its insured after deducting the $2,000 deductible from the $10,000 in benefits otherwise due.

In reliance upon the decisions of the Florida courts prior to the Fourth District's decision in this case, and with the express approval of the Florida Department of Insurance ("DOI"), the FAUA member insurers have entered into approximately five hundred thousand contracts for PIP insurance coverage in which they have expressly reserved the right to reduce the maximum PIP benefits claimed by the amount of the deductible and they have set the rates charged for the coverage accordingly.

The premiums charged and collected are inadequate to cover the increased risk that would be imposed ex post facto upon the insurers. The additional claims payments, which could amount to millions of dollars, could jeopardize the solvency of the FAUA member insurers. Accordingly, any decision of this court which reverses the longstanding rule regarding the reduction in maximum PIP benefits by the amount of the deductible must be applied only to those policies written after the effective date of such decision.

ARGUMENT

I

THE PLAIN LANGUAGE OF SECTION 627.739(2) PROVIDES THAT THE MAXIMUM LEVEL OF BENEFITS UNDER A POLICY OF PIP INSURANCE IS REDUCED BY THE AMOUNT OF THE PIP DEDUCTIBLE SELECTED BY THE INSURED.

The issue in this case is whether, under section 627.739(2), Florida Statutes (1985), an insurer may reduce the limits of PIP coverage by the amount of the deductible selected by the insured. By statute, the PIP policies at issue provide coverage for sixty-percent of lost income and earning capacity and eighty-percent of reasonable and necessary medical expenses up to a policy limit of $10,000. The insurers are required by law to offer to their insureds the option of selecting a deductible to the required PIP coverage "in amounts of $250, $500, $1,000 and $2,000." §627.739(2), Fla. Stat. (1985). The PIP statute provides that such amount is to be deducted from the benefits otherwise due each person subject to the deduction. Id.

If the insured opted for no deductible, then clearly the maximum "benefits otherwise due" under a PIP policy would be the coverage limits of $10,000. Consequently, under Florida law, the application of the deductible selected by the insured, reduces the benefits otherwise due ($10,000) by the amount of the deductible. To hold to the contrary (meaning to affirm the Fourth District's decision in this case) necessitates a judicial construction that two identical terms in two related sections of the same Florida Statute are to be given two entirely opposite meanings. More specifically, the term "benefits" under S627.736, Fla. Stat. (pertaining to PIP coverage limits) is expressly defined as including certain medical expenses, wage loss and funeral expense up to a limit of $10,000. But, if the court was to affirm the holding of the Fourth District, the same term "benefits" in a related section, $627.739, Fla. Stat. (pertaining to deductibles as a reduction in benefits), would have to be construed as meaning medical expense, wage loss and funeral expense, up to a limit in excess of $10,000. Consequently, the only way to assure that the term "benefits" under S627.739, Fla. Stat. is construed in the same consistent manner as the term "benefits" under S627.736, Fla. Stat., is for the court to reject the decision of the Fourth District and hold instead that the amount of the deductible selected by the insured reduces the maximum PIP benefits ($10,000) by the amount of the deductible.

Prior to the Fourth District's decision in this case the district courts of this state have consistently held that the

total amount of the PIP coverage provided in an insurance policy was to be reduced by the amount of the deductible selected by the insured. For example, in Industrial Fire & Casualty Ins. Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978), a case where the insured's lost wages and medical expenses totaled approximately $40,000, the insured was covered by a $5,000 PIP policy for which she had selected a $1,000 deductible. The Third District recognized that the PIP statute required that the amount of the deductible be subtracted from the "benefits otherwise due." The court held that the benefits "otherwise due" were the policy limits of $5,000. Based on that reasoning, the court determined that the insured was entitled to $4,000 ($5,000 policy limits minus $1,000 deductible) in PIP benefits.

In Thibodeau v. Allstate Insurance Co., 391 So.2d 805 (Fla. 5th DCA 1980), the Fifth District was faced with the identical issue. There the policy provided for $5,000 in PIP coverage with a deductible of $4,000. The insured incurred $8,000 in medical expenses. Like the Third District in Cowan the Fifth District recognized that the PIP statute required that the amount of the deductible was to be subtracted from the "benefits otherwise due." The court held that the benefit "otherwise due" was $5,000. Subtracting the deductible from that amount, the court determined that the insurer's liability under the statute was $1,000.

In addition, this court, in Govan v. International Bankers Insurance Co., 521 So.2d 1086 (Fla. 1988), specifically

established how PIP coverage is to be determined when the insured has opted for a deductible:

> In our view "benefits otherwise due" means the total amount of the medical expenses payable under the policy before the application of the deductible. In other words, it refers to the amount that an insured would receive in benefits but for the application of the deductible.

Govan at 1087. Under this court's interpretation of the statutory language, the maximum amount that any insured could possibly receive in benefits before the application of the deductible is the total amount of PIP coverage available under the policy, i.e., $10,000. This court's holding in Govan establishes, therefore, that under the plain language of the statute the total PIP benefits available is the difference between the $10,000 policy limit and the amount of the deductible selected.

In the Arnone decision, the rule of law upon which the FAUA members had relied in determining their rates and upon which the DOI had relied in approving those rates was turned on its head. The Fourth District held that the PIP deductible is a threshold to recovery rather than a reduction of the total PIP benefits available under a policy of insurance. Thus, the court directed that the amount of the deductible is to be subtracted from the amount of the total loss incurred rather than from the limits of the policy. The insured is entitled to PIP coverage in that amount, up to the limits of the policy, i.e. $10,000. Under the Arnone interpretation of the PIP statute the total amount of the PIP coverage is unaffected by the deductible when the medical

expenses incurred by an insured are in excess of the total amount of the coverage. In that circumstance, one who has selected a deductible and paid a lower premium and one who has paid a higher premium for no deductible at all would receive the same coverage. This is an inequitable result which can be avoided by this court rejecting the Arnone decision.

As it has been consistently held by the courts, the plain language of §627.739(2) provides that the available PIP benefits are to be reduced by the amount of the deductible selected by the insured. The legislature is presumed to be aware of those judicial decisions when re-enacting the statute. State v. Quigley, 463 So.2d 224 (Fla. 1985). Yet, when it did re-enact §627.739(2), the legislature chose not to amend the statute. Thus the legislature is presumed to have approved and adopted the statutory interpretation as set forth in those decisions. Delaney v. State, 190 So.2d 578 (Fla. 1966). In light of the plain language of the statute as interpreted by Govan, and the continued re-enactment of the unamended statutory language by the legislature, this court must reject the Fourth District's judicial rewriting of the statute. This court should reverse Arnone.

II

ANY CHANGE IN THE LAW WHICH PRESENTLY ALLOWS THE REDUCTION OF PIP COVERAGE LIMITS BY THE AMOUNT OF THE DEDUCTIBLE SHOULD ONLY BE MADE PROSPECTIVELY TO POLICIES ISSUED AFTER THE EFFECTIVE DATE OF THE COURT'S DECISION

The principal enunciated by the Fourth District, if affirmed by this court, would retrospectively increase the levels

of coverage provided by millions of PIP policies written before Arnone. The rates charged by the member insurers for PIP, however, were calculated by the companies and approved by the DOI, in good faith reliance on prior judicial decisions which consistently held that the maximum amount of PIP benefits under an automobile insurance policy may be reduced by the amount of the deductible.

The general rule in Florida is that appellate decisions, even those which overrule earlier ones or establish theretofore unrecognized claims for relief, are to be given retrospective as well as prospective effect. See Parkway General Hospital, Inc. v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981). This rule, however, is subject to the well-recognized exception that

> where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251, 253 (1941). In this case, the appellate decision should not operate to overturn vested rights previously acquired in justified reliance upon a prior rule.

In Florida, insurers are required to submit a rate filing or rate change for approval by the DOI. 5627.0651, Fla. Stat. The DOI reviews the rate filing to determine among other things, whether the rate is adequate to cover projected payments of PIP benefits. §627.0651(5)(a), Fla. Stat. The rates

presently charged by member insurers are based on projected payments of PIP benefits as calculated based on pre-Arnone law. These rates have always been approved by the DOI.

The rates charged by the member insurers are certainly inadequate to cover what would be the increased projected payments of PIP benefits under Arnone. The resulting losses to the insurer members would severely impact the capital and surplus of the companies, which would prohibit some companies from writing additional PIP coverage thereby reducing the amount of available coverage in the marketplace - this is an undesirable result.

In reliance upon the line of decisions that preceded Arnone, and with the approval of the DOI, the FAUA members collectively have entered into approximately five hundred thousand contracts for PIP insurance coverage in which they have expressly reserved the right to reduce the maximum PIP benefits by the amount of the deductible in all cases where the benefits claimed are greater than the policy limits. They have set the rates charged for the coverage they provided accordingly. The Arnone holding results in a significant expansion of coverage under previously approved policies. Retrospective application to policies already in existence would have the effect of requiring the insurers to pay the full policy limits on all claims where the benefits claimed exceed the policy limits even where the insured, by selecting a deductible, has purchased a reduced coverage at a reduced premium. The member insurers' potential liability on the existing policies for additional benefits to the

insureds is estimated to be millions of dollars. These losses would be irretrievable as Florida law absolutely precludes an insurer from recovering past losses by increasing future premiums. If the insurers were forced to pay those benefits, the result would be a windfall to the insureds at the cost of potential insolvency to the insurers.

It is respectfully suggested that a retrospective application of the new rule of law enunciated in this case by the Fourth District would be contrary to the spirit and intent of Florida's automobile insurance rating law, which requires that rates for automobile insurance coverages be approved as adequate and not excessive for the risk being incurred. By allowing prospective rather than retrospective application of any new rule of interpretation, insurance companies will be able to submit new rate filings to the DOI for approval based on the newly established criteria for maximum PIP benefits. This will preclude the undesirable and unnecessary result of a judicial decision which, in effect, mandates that coverage be accorded under policies of insurance with inadequate rates. Simply stated, inasmuch as the DOI cannot legally approve inadequate rates before the fact, this court should not mandate the same inadequate and illegal rates after the fact. As such, any decision in this case which reverses the well established judicial and administrative precedents allowing for the reduction of PIP coverage limits by the amount of the deductible must be prospective and not retrospective in nature.

CONCLUSION

For all of he above and foregoing reasons, the amicus respectfully submits that this court reverse the Fourth District's decision holding that the limits of personal injury protection cannot be reduced by the amount of the deductible selected by the insured. Even if this court should agree with the interpretation of the PIP deductible statute that was announced by the Fourth District, nonetheless, the new rule of law should be applied solely to policies written after the effective date of this decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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