

O/A 9-8-89

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17 Appendix

IN THE SUPREME COURT OF FLORIDA

INTERNATIONAL BANKERS  
INSURANCE COMPANY,

Petitioner,

Case No. 73,488

vs.

SUSAN ARNONE,

Respondent.

**FILED**  
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JUN 15 1989  
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Deputy Clerk

BRIEF OF DEPARTMENT OF INSURANCE,  
STATE OF FLORIDA, AMICUS CURIAE

On Discretionary Review from the District Court  
of Appeal, Fourth District

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TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTORY STATEMENT .....	1
STATEMENT OF THE CASE AND FACTS .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
HISTORIC INTERPRETATION BY THE DEPARTMENT OF INSURANCE OF SECTION 627.739(2), FLORIDA STATUTES, IS THAT THE DEDUCTIBLE IS SUB- TRACTED FROM THE LESSER OF POLICY LIMITS OR THE AMOUNT REMAINING AFTER APPLICATION OF STATUTORY CO-INSURANCE PERCENTAGES	
CONCLUSION .....	9
CERTIFICATE OF SERVICE .....	10
INDEX TO APPENDIX .....	11

TABLE OF AUTHORITIES

STATUTES :

Section 20.13, Florida Statutes .....	3
Section 624.307, Florida Statutes .....	3
Section 624.313(2), Florida Statutes .....	7
Section 627.062, Florida Statutes .....	3-4
Section 627.0651, Florida Statutes .....	3-4
Section 627.410, Florida Statutes .....	3
Section 627.411, Florida Statutes .....	3
Section 627.736(1), Florida Statutes .....	3
Section 627.739(2), Florida Statutes .....	2-3,5-9
Chapter 77-468, Section 33. Laws of Florida .....	6

## II TOR STATEMENT

In this brief, the parties will be referred to by name. The State of Florida, Department of Insurance, will be referred to as "the Department".

### STATEMENT OF THE CASE AND FACTS

As set forth in the opinion of the District Court of Appeal, Fourth District, in the instant cause, Susan Arnone suffered personal injuries in a motor vehicle accident. International Bankers Insurance Company (hereinafter, "International Bankers") insured Ms. Arnone, affording her personal injury protection (hereinafter, "PIP") coverage in the amount of \$10,000 with a \$2,000 deductible. International Bankers paid \$8,000.00 in PIP benefits to Ms. Arnone or for her benefit. International Bankers took the position that it had paid the full amount of benefits due under the contract, and Ms. Arnone filed suit claiming entitlement to a total of \$10,000 under her PIP coverage.' The trial court entered summary judgment in favor of Ms. Arnone, awarding her \$2,000. International Bankers sought discretionary review in this Court, and by order dated May 10, 1989, this Court accepted jurisdiction.

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<sup>1</sup> The District Court decision does not reflect the precise amount of Ms. Arnone's lost wages and reasonable medical expenses. Apparently, however, the recoverable portion of those items (i.e., 60% of lost income and earning capacity plus 80% of reasonable and necessary medical expenses) exceeded \$12,000, in light of the District Court's opinion.

## SUMMARY OF ARGUMENT

The Department of Insurance is the state agency charged with the duty and responsibility of enforcing the provisions of the Insurance Code. Within that responsibility, the Department is required to examine and approve or disapprove forms of insurance policies and to review rate filings of insurance companies to determine if said rate filings comply with the Insurance Code.

In connection with those statutory responsibilities and duties, the Department has historically approved PIP policies that provide for subtraction of the deductible amount from the \$10,000 policy limits. In approving these policies, the Department has determined that such policy language is consistent with a reasonable interpretation of section 626.739(2), Florida Statutes. In addition, certain publications of the Department, referred to below and attached as an appendix to the brief, have indicated that subtracting the deductible from the policy limits is the method most consistent with the statutory language.

The Department has reviewed rate filings to ensure that rates are not excessive, inadequate, or unfairly discriminatory. Rate filings by many insurers such as International Bankers have been based upon their contract language which subtracts the PIP deductible from policy limits. If deductibles for such policies are now treated as set forth in the opinion by the Fourth District Court of Appeal, rates charged policyholders who elected a deductible could well be inadequate.

The Department's historic position is based on the language of section 627.739(2), Florida Statutes, which provides that the deductible amounts are "to be deducted from the benefits otherwise due each person subject to the deduction". The Department has interpreted this language to provide for a calculation of what benefits would be due if the policy had no deductible, followed by a subtraction of the deductible amount from that figure. Under this interpretation, if the recoverable portion of lost income and medical expenses exceeds the policy limits after application of the co-insurance provisions of section 627.736(1), Florida Statutes, the "benefits otherwise due" would be the policy limits, and not some greater amount.

#### ARGUMENT

HISTORIC INTERPRETATION BY THE DEPARTMENT OF INSURANCE OF SECTION 627.739(2), FLORIDA STATUTES, IS THAT THE DEDUCTIBLE IS SUBTRACTED FROM THE LESSER OF POLICY LIMITS OR THE AMOUNT REMAINING AFTER APPLICATION OF STATUTORY CO-INSURANCE PERCENTAGES

The Department of Insurance is a state agency specifically created by law. Section 20.13, Fla. Stat. It is charged with the duty, among others, of enforcing the provisions of the Insurance Code, Chapters 624 - 651, Florida Statutes. Section 624.307, Fla. Stat. Included among the duties and responsibilities of the Department under the Insurance Code are the examination and approval or disapproval of policy forms pursuant to Sections 627.410 and 627.411, Florida Statutes, and the review of insurance rate filings for, among other types of insurance, PIP coverage pursuant to Sections 627.062 and

627.0651, Florida Statutes. In examining proposed insurance rates, the Department is charged with the responsibility of ensuring that such rates are not excessive, inadequate, or unfairly discriminatory. ~~Id.~~ Both claims magnitude and claims frequency impact on the adequacy or excessiveness of rate filings, since an increase in the size or frequency of claims can change an insurance rate which was, when filed, adequate but not excessive, into a rate that is inadequate for the protection provided.

The rate filings for International Bankers, as well as the rate filings for numerous other insurers providing PIP coverage in this state, have been reviewed by the Department from time to time. In reviewing a rate filing, the Department must examine the rate to determine if it is adequate and not excessive. Sections 627.062 and 627.0651, Fla. Stat. The adequacy of rates for PIP coverage is affected by the treatment of PIP deductibles. Higher deductibles result in lower net effective levels of coverage, thereby permitting lower rates to be adequate under Florida law. When the Department reviewed International Bankers' rates for PIP coverage, International Bankers' policy form, approved by the Department, applied the deductible as a reduction in the total policy limits. A different application of PIP deductibles as provided by the Court, below, would increase the net effective levels of coverage provided, and accordingly, could well require higher insurance premiums in order to ensure that the rate was legally adequate.

Similarly, the policy forms used by companies issuing PIP coverage have been examined and approved by the Department from time to time. The language in International Bankers' policy, providing for subtraction of the deductible amount from policy limits where the recoverable portion of lost wages and medical expenses exceed policy limits, was approved by the Department because it was determined to be reasonably consistent with the statutory direction of how to apply the deductible. Had the Department interpreted the statute to require otherwise, it would not have approved the policy form, since the policy would have been at variance with the requirements of section 627.739(2), Florida Statutes. Because policy language such as that in the International Bankers' policy comports with a reasonable interpretation of the proper application of PIP deductibles under section 627.739(2), Florida Statutes, the Department has approved such policy forms.

To assist insurers, insurance agents, and others in understanding and complying with the requirements of the Insurance Code, the Department has promulgated numerous publications. When the Florida Automobile Reparations Reform Act (hereafter, "the no-fault act") was first enacted, the Department issued a publication advising the industry of various matters which would be necessitated by the implementation of the no-fault act. A copy of portions of that publication is included as an Appendix to this brief. Exhibit 3 to that publication consists of suggested policy language to be added as an amendatory



endorsement to existing policies. On page 4 of that Exhibit, the Department sets forth acceptable language reflecting its contemporaneous interpretation of the provisions of section 627.739(2), Florida Statutes, regarding application of a deductible. That language states:

The amount of any deductible stated in the schedule of this endorsement shall be deducted from the total amount of all sums otherwise payable by the Company with respect to all loss and expense incurred by or on behalf of each person to whom the deductible applies and who sustains bodily injury as the result of any one accident, and if the total amount of such loss and expense exceeds such deductible the total limit of benefits the Company is obligated to pay shall then be the difference between such deductible amount and the applicable limit of the company's liability.  
(Emphasis added).

Thus, at the very inception of the no-fault act, the Department interpreted the legislative language to provide that any deductible amount selected by the insured was to be deducted from policy limits, rather than from any greater amount of wage loss or medical expenses incurred by the insured as a result of a covered accident.

Some years later the Florida legislature amended the no-fault act by first including co-insurance provisions which, in essence, provide PIP coverage for 80% of reasonable and necessary medical expenses and 60% of lost income or lost earning capacity. Ch. 77-468, s. 33, Laws of Fla., effective September 1, 1977. Questions arose thereafter concerning the interplay of the policy limits, deductible, and co-insurance provisions. In March, 1986,

the Department, pursuant to its statutory authority under section 624.313(2), Florida Statutes, promulgated a publication captioned "Questions and Answers for General Lines Agents and Solicitors", and portions of that publication are reproduced in the Appendix to this brief. At page 27 of that publication, the Department reiterated its historic interpretation that the deductible amounts were to be subtracted from policy limits, stating:

The law requires that certain forms of modified coverage be offered, at the time of original application and at each renewal. First, insureds must be offered deductibles of \$250, \$500, \$1,000, and \$2,000. These deductibles are subtracted from any amount otherwise payable for a claim and reduce the total \$10,000 maximum benefit by the deductible amount. (Emphasis added)

Included in that publication were questions and answers illustrating the application of the co-insurance and deductible provisions of the no-fault act. On page 50 of the publication, in question 5d, the Department illustrated its interpretation of the application of section 627.739(2), Florida Statutes: specifically, question 5d posed the following question:

5. Assuming a covered PIP situation, how much would be payable under PIP to an injured person who incurred economic losses as described:

.....  
d. \$15,000 in medical bills, if insured has PIP with \$1,000 deductible.

The correct answer, in accordance with the Department's historic construction of section 627.739(2), Florida Statutes, is set forth on page 56 of the publication, as follows:

d. \$9,000 - (\$15,000 x 80% = \$12,000, subject

to \$10,000 limit, minus deductible).

In short, it has been the Department's historic interpretation of the statute that the proper method of calculation is to apply the co-insurance percentages to the medical expenses and lost income figures, and then subtract the deductible amount from the lesser of either (1) the resulting figure, or (2) the policy limits.

The Department's historic interpretation is based directly on the language of section 627.739(2), Florida Statutes, which requires insurers to offer deductibles in varying amounts, "such amount to be deducted from the benefits otherwise due each person subject to the deduction". Under the plain statutory language, the amount of the deductible is to be subtracted from "the benefits otherwise due" under the policy. In short, the Department has read the statute to allow for at least one reasonable interpretation by which an initial calculation is made of what benefits would be due if there were no deductible, and then a subtraction of the deductible amount from those "benefits otherwise due". Using the example (from the Department's publication) of a PIP insured with \$15,000 in medical expenses, if a PIP policy had no deductible, the benefits which would be due would be \$10,000 (policy limits), since the policy limits are less than the co-insurance amount (\$15,000 times 80% equals \$12,000, which exceeds the \$10,000 policy limits). If the PIP policy has no deductible, the "benefits otherwise due" would be \$10,000 in policy limits. If the PIP policy has a \$1,000

deductible, under the Department's published interpretative examples, the deductible is then subtracted from these "benefits otherwise due", leaving an amount payable of \$9,000.

#### CONCLUSION

The Department of Insurance, which is charged with the responsibility of enforcing the Insurance Code, approving or disapproving policy forms, and reviewing rates, has historically interpreted the statute in question as allowing for insurers to specifically provide in PIP policies that the deductible amount authorized by section 627.739(2), Florida Statutes, is to be deducted from the lesser of the policy limits or the co-insurance amounts which would otherwise be paid. Publications issued by the Department have indicated that this interpretation is the method most consistent with the statute. Under the facts set forth in the Fourth District's opinion in the instant case, this interpretation of this statute calls for a payment by International Bankers of \$8,000, since the \$2,000 deductible would be subtracted from the policy limits, those limits being

less than the co-insurance amount in this case.

Respectfully submitted,

STATE OF FLORIDA, DEPARTMENT  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark Hicks, 100 N. Biscayne Blvd., Suite 240, Miami, Florida 33132-2513, James K. Clark, Suite 1003, 19 W. Flagler Street, Miami, Florida 33130, Goodhart & Rosner, P.A. 21 S.E. 1st Avenue, 10th Floor, Miami, Florida 33131, Larry Klein, 501 S. Flagler Drive, Suite 503-Flagler Center, West Palm Beach, Florida 33401, and Mark R. McCollem, 201 S.E. 12th Street, Ft. Lauderdale, Florida 33316, this 15th day of June, 1989.

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