IN TEE SUPREME COURT OF FLORIDA

INTERNATIONAL BANKERS
INSURANCE COMPANY,

Petitioner,

vs.

Case No.: 73,488

SUSAN ARNONE,

Respondent.

_____/

BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS, AMICUS CURIAE

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

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STATEMENT OF THE CASE AND FACTS

ponden / nvo n a vehicle cc dent in Broward y lor da At th time, she was n ur y the titioner for per ury pr t (ben up to 5 , The i pr coverage t n d a 0 PIP luc t As a resul of l acciden d ncu er PIP n es e $15,0001. The t oner i Respondent p imi s the i t amount ($8,000) ssum: that was the maximum amount of benefits it was requ to pay uant to i po i and under the aw pondent f l . l tl to a total of $10,000 in PIP ge Th Fourth Di rict Court of App l af irme the ummar judgment of th al i and ruled that Respondent was n tl d to the licy limi of $10,000. Th court r discr tionar i

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[1]Though the record is not clear on the exact amount of covered expenses incurred by Respondent, the only way in which Respondent could have received $10,000 in PIP benefits pursuant to the Fourth District's opinion is if her covered expenses equalled or exceeded $15,000.

SUMMARY OF THE ARGUMENT

Section 627.736, Florida Statutes (1985), requires insurers writing PIP policies to provide coverage up to a limit of $10,000. These policies will provide medical and disability benefits and will pay 80% of the medical and 60% of the disability expenses to covered persons who incur these losses as a result of the ownership, maintenance or use of a motor vehicle. Deductibles of $250.00, $500.00, $1,000.00 and $2,000.00 are permitted. These amounts are deducted from the benefits otherwise due each person subject to the deduction. Section 627.739(2), Florida Statutes (1985). Petitioner asserts that the "benefits otherwise due" are defined as its policy limits and the deductible is taken from the policy limit to determine the benefits it must pay.

Thus, under the Petitioner's theory, the deductible is not used in its traditional manner, i.e., as a threshold to recovery. Rather, the deductible is used as a means to reduce coverage and is therefore improper. Under Petitioner's policy, a claimant would never receive the $10,000 worth of coverage mandated by Section 627.736, Florida Statutes (1985). By attempting to reduce PIP limits, Petitioner has violated Florida law.

ISSUE

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE RESPONDENT WAS ENTITLED TO $10,000 IN PIP COVERAGE?

ARGUMENT

In Govan v. International Bankers Insurance Company, 521 So.2d 1086 (Fla. 1988), this Court assumed jurisdiction because of a conflict between the district courts of appeal as to the method of calculating personal injury protection benefits. The Court, agreeing with the PIP carrier's position in that case, held that personal injury benefits are calculated by multiplying the total amount of medical bills by the percentage of coverage afforded by the PIP statute. The resulting amount is the "benefit otherwise due" each person, without the deductible. Then, the deductible is subtracted from the benefits otherwise due to arrive at the amount that the insurance company must pay.[2] Logically, the amount of benefits payable to a claimant cannot exceed the policy's $10,000 limit.

In Govan, this Court noted its disapproval with Thibodeau v. Allstate Insurance Company, 391 So.2d 805 (Fla. 5th DCA 1980) and Industrial Fire and Casualty Insurance Company v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978), to the extent of their conflict

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[2]The calculation mandated by this Court in Govan was:

Plaintiff's total medical bills	$ 5,887.45
Percentage payable pursuant to statute	x .80
Benefits due, but for deductible	$ 4,709.96
Less deductible	2,000.00
Benefits payable	$ 2,709.96

Govan v. International Bankers Insurance Company, 521 So.2d at 1087.

with its opinion and the Fourth District Court of Appeal's opinion in International Bankers Insurance Company v. Govan, 502 So.2d 913 (Fla. 4th DCA 1987). Petitioner, in this case relies upon Cowan and Thibodeau. The only apparent conflict between Cowan, Thibodeau and Govan is in the interpretation of the term "benefits otherwise due" and the application of the deductible in a manner which would reduce coverage.

In Cowan, the claimant incurred covered expenses of approximately $40,000.00. She was insured under a PIP policy providing $5,000.00 in coverage subject to a $1,000.00 deductible. The claimant argued that because her losses greatly exceeded the total amount of coverage under the policy, she was entitled to the full $5,000.00. The Third District Court of Appeal disagreed with claimant's position and held that pursuant to statute, the "amount otherwise due" was the $5,000.00 policy limit and that the deductible was taken from that amount. Cowan, 346 So.2d at 811.

In Govan, this Court disapproved of Cowan and held that the "benefits otherwise due" were determined by multiplying the total incurred expense by the percentage of coverage under the PIP statute. The deductible is then subtracted from the "benefits otherwise due" to determine the amount which the insurer must pay.

Petitioner also relies on Thibodeau v. Allstate Insurance Company, 391 So.2d 805 (Fla. 5th DCA 1980), for its position that

claimants are not entitled to the $10,000.00 coverage mandated by the PIP statute.

In Thibodeau, the claimant incurred over $8,000.00 in medical expenses and was insured by a policy providing $5,000.00 in PIP coverage with a $4,000.00 deductible. The claimant asserted that she was entitled to the full amount of coverage ($5,000.00) afforded under the policy. The court, relying on Cowan, held that the amount "otherwise due" the claimant was $5,000.00 and that the $4,000.00 deductible was to be taken from that amount. Thibodeau, 391 So.2d at 806.

This Court in Govan specifically approved of the decision in International Bankers Insurance Company v. Govan, 502 So.2d 513 (Fla. 4th DCA 1987), and disapproved of Thibodeau and Cowan to the extent of their conflict with the Fourth District's opinion in Govan. Govan v. International Bankers Insurance Company, 521 So.2d 1086 (Fla. 1988). The central conflict between the opinions was the interpretation of "benefits otherwise due." Nevertheless, Petitioner argues that language in the Fourth District Court of Appeals's opinion in Govan states that "benefits otherwise due" means the total amount of medical benefits "payable under the policy". Govan, 502 So.2d at 514. However, a complete reading of the Fourth District Court of Appeals' decision in Govan shows that the Court did not consider the term "benefits otherwise due" to be synomymous with policy limits. Rather, the Court noted a sharp conflict between its

interpretation of the term "benefits otherwise due" and the Cowan and Thibodeau opinions by reasoning:

> "We acknowledge that our holding appears to conflict with the opinions of two of our sister courts. See Thibodeau v. Allstate Insurance Co., 391 So.2d 805 (Fla. 5th DCA 1980); Industrial Fire & Casualty Insurance Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978). Those cases appear to hold that "benefits otherwise due" refers to the no-fault benefit limits, such as the $10,000.00 limit involved herein. If that were true, the "deductible" would not be a deductible at all in the manner that word is normally used, i.e., as an amount to be deducted from the claim, but rather would simply be a means of providing for lower policy limits. We do not believe the legislature would have authorized lower policy limits in such an indirect and unusual fashion, especially since section 627.736(1)(a) specifically mandates coverage in the amount of at least $10,000.00. We are not aware of any statutory provision authorizing lesser limits. The International Bankers no-fault policy at issue in this case does contain a provision which, consistent with the holdings of Cowan and Thibodeau, reduces the policy limit by $2,000.00. We are concerned with this provision in that it appears to utilize the $2,000.00 deductible a second time, after it has already been used in the traditional manner discussed above as a threshold to recovery. [Footnote omitted].

Govan, 502 So.2d at, 914.

Petitioner argues that Cowan and Thibodeau are correct because Section 627.739(2), Florida Statutes (1985), provides that the maximum amount of benefits it is required to pay is policy limits minus deductible. Petitioner's reliance on the statute is misplaced. The statute states that the deductible amount is to be deducted from the benefits due each person subject to the deduction. However, the statute does not state

that the "benefits otherwise due" are the insurer's policy limits. Petitioner's assertion that policy language limiting recoverable benefits to policy limits minus deductible is not supported by statute and is simply not authorized by law.

Petitioner and the Florida Automobile Underwriters Association (FAUA) have asserted in their briefs that the Fourth District's decision in Arnone yields illogical results because the opinion makes no distinction between the insured with a deductible and the insured without a deductible where PIP losses are in excess of policy limits. Thus, they argue that under the Arnone decision there would be no difference between insureds whose losses greatly exceed $10,000 because the insured will always receive $10,000 regardless of the deductible amount. Petitioner fails to recognize that it can, and most likely does, charge more for policies with no deductible and that these no deductible insureds will receive $10,000 after incurring $12,500 in medical expenses; while insured's with a $2,000 deductible would only receive $10,000 after incurring $15,000 in medical expenses[3]. Thus, the presence of a deductible continues to have a logical bearing on the amount that the Petitioner would charge for its coverage. Those who choose a deductible run the risk of

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[3] $12,500 Insured's with no deductible.
x.80
$10,000

$15,000 Insured's with a $2,000 deductible.
x.80
$12,000
$<2,000>
$10,000

having to incur greater medical expenses in order to be entitled to the full $10,000 in coverage mandated by law while those without a deductible have paid more for their coverage up front and have to incur less expense before entitlement to the $10,000 in coverage mandated by law.

In addition, both Petitioner and FAUA fail to mention that insureds with deductibles are treated differently than those without deductibles in all cases where policy limits are not exhausted. Assuming that only medical expenses are insured, an insured with a deductible of $2,000.00 must incur $2,500.00 in medical expenses before any PIP benefits are due. An insured without a deductible is paid at 80% from dollar one. Thus, in all cases in which the medicals are less than $2,500.00, the deductible policy would certainly be less costly since no benefits are paid. In fact, as illustrated in footnote 3 herein, deductible and no deductible policies do not cost the insurance company the same amount until $15,000.00 in medical expenses are incurred.

FAUA in its Amicus brief contends that the Fourth District Court of Appeals' interpretation of Section 627.739(2) Florida Statutes (1985), in Arnone is inconsistent with the amount of benefits available under Section 627.736 Florida Statutes (1985). FAUA urges that the term "benefits" is susceptible to two different meanings if the Arnone decision is accepted. While §627.736 requires benefits to a limit of $10,000, FAUA asserts that in certain deductible cases, the deductible is applied to

benefits which may exceed the $10,000 coverage amount. FAUA is correct in asserting that the deductible is to be deducted from an amount which may exceed the benefits payable under the policy. However, the benefits which must be paid the insured are invariably controlled by section 627.736 and these are amounts up to $10,000 after applying the deductions of section 627.739, Florida Statutes (1985).

In effect, the Petitioner, FAUA, and the Department of Insurance (DOI) are attempting to utilize the policy deductible twice. For example, assume that a person covered under Petitioner's policy was involved in an accident incurring $15,000.00 in medical expenses, and covered by a PIP policy providing $10,000.00 in coverage, with a 2,000.00 deductible. Applying the Govan formula, set out below, he would be entitled to the full $10,000.00 of coverage afforded by the policy. Pursuant to this Court's opinion in Govan, the calculation would be as follows:

Claimant's total medical bills:		$15,000
Percentage payable pursuant to statute	x	.80
Benefits due but for deductible:		$12,000
Less deductible	-	2,000
Benefits Payable		$10,000

However, under Petitioner's theory, the deductible would be used again to reduce the benefits payable by the company to $8,000.00. Therefore, the Petitioner is using the deductible

twice and is denying Respondent the benefits to which she is entitled under the law.

Petitioner next urges that the only reasonable meaning of section 627.739(2), Florida Statutes (1985) is that deductibles are to be taken from the policy limits since such limits are the "benefits otherwise due". First, if the legislature would have intended benefits otherwise due to be synonymous with policy limits, it clearly could have said so. Second, had the legislature provided that benefits otherwise due means policy limits it would have been authorizing deductibles as a method to reduce coverage and would have in effect usurped the requirement of Section 627.736 Florida Statutes (1985) that coverage up to $10,000 must be provided by insurers writing PIP policies in Florida.

FAUA asserts in its brief that the legislature is presumed to be aware of judicial decisions when re-enacting a statute and that when §627.739(2) was re-enacted that legislature did not amend it despite its awareness Cowan and Thibodeau. Thus, FAUA avers that the legislature is presumed to have approved of these decisions and cites State v. Quigley, 463 So.2d 224 (Fla. 1985) and Delaney v. State, 190 So.2d 578 (Fla. 1966) for these propositions. FAUA argues that because the legislature did not change the pertinent PIP statutes after Cowan and Thibodeau that it sanctioned those opinions.

FAUA is incorrect. First, S627.736 clearly and unambiguously requires coverage up to $10,000. Thus, there is no

reason to change the statute when it is the Cowan and Thibodeau opinions and not the statute, which are incorrect.

Second, as Delaney held: "In this state, as in most others, the rule prevails that in reenacting a statute, the legislature is presumed to be aware of constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions". Delaney v. State, 190 So.2d 578, at 581. (Emphasis supplied).

Prior to this Court's opinion in Govan which clearly outlined that "benefits otherwise due" were determined by multiplying the total amount of covered expenses by the percentage of coverage afforded by the PIP statute, there was no judicial construction by the highest court of this state on the term "benefits otherwise due". Thus, FAUA's assertion that insurers could rely on the silence of the legislature lacks merit.

Petitioner, FAUA, and the DOI assert in their briefs that because the DOI approved the rates charged to PIP insurers and because the DOI may have been aware that the maximum amount of benefits payable under a policy would be policy limits minus deductible, that such policies are proper[4].

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[4]The Academy of Florida Trial Lawyers adopts the Respondent's Motion to Strike the DOI's brief and further adopts the Respondent's objection to Motion for Leave to Appear as Amicus Curiae filed by the DOI. There is no record showing that Petitioner relied on the approval of the DOI for its rates and as such the DOI's brief to the extent it utilizes non-record materials in support of its position is improper.

It is the province of the courts of this state, and not of a department of the government, to determine whether the laws of the state are being complied with. In matters pertaining to automobile insurance coverage the decisions of the courts in interpreting the statutorily mandated amount of coverage as opposed to policy language submitted by the insurer (and presumably approved by the DOI) have been the standard used to determine whether coverage provided by the carrier complies with the law.

A primary example is Uninsured Motorist Coverage and policy language which attempts to limit the coverage mandated by law. Uninsured Motorist Coverage is provided under Chapter 627 of the Florida Statutes, the same chapter which mandates PIP coverage up to $10,000. Consistently, this Court and the Courts of Appeal have held that policy language which attempts to limit the statutorily mandated coverage is impermissible. See Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971); Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1 (Fla. 1972); Auto Owners Insurance Company v. Bennet, 466 So.2d 242 (Fla. 2d DCA 1984); Lee v. State Farm Mutual Automobile Insurance Company, 339 So.2d 670. (Fla. 2d DCA 1976). The policies in the above cases contained terms which varied from those of the uninsured motorist statute. Logically, these policies must have been examined by the DOI and logically the insurers must have relied on the approval of the DOI to issue these policies. Nevertheless, this type of policy language was

stricken because it was at variance with the legislature's intent that uninsured motorist coverage be made available to all persons who would have had liability coverage under the policy. Quite simply, and with all deference to the DOI, this leads to the inescapable conclusion that the DOI isn't always correct and that the Department and PIP insurers should look to the language of the statute requiring coverage, up to $10,000, and not to methods which could substantially reduce such coverage.

The FAUA next asserts that this Court's decision should only have prospective application if this Court holds that Respondent is entitled to the $10,000 policy limit. Though FAUA quite candidly recognizes that appellate decisions are to be given both retrospective and prospective effect, it pleads as an exception that it relied to its detriment on prior decisions and thus the new decision should have prospective effect only.

FAUA's point fails for the following reasons. The exception which it alleges is applicable to this case encompasses a situation where a statute has received a given construction by a court of supreme jurisdiction and then is overturned by that same court. In those situations, requiring retrospective application of the new decision would be unfair to those who had acted in reliance on the prior one. However, that situation is not before the court today. This court, will decide for the first time whether PIP deductibles are to be used as a threshold to recovery or as a method to reduce coverage. As such, this Court's decision should have both prospective and retrospective

application. Melendez v. Drois & Krump Mfg. Co., 515 So.2d 735 (Fla. 1987) and Fla. Forest & Park Service v. Strickland, 18 So.2d 251 (Fla. 1949).

FAUA next argues that in reliance on Arnone, and that with DOI's approval, they have entered into 500,000 PIP contracts where they have reserved the right to reduce coverage by the amount of the deductible. Further, Petitioner avers, referring to affidavits filed by six PIP carriers below in support of Petitioner's motion to stay the Arnone mandate, that these six insurers may owe over one million dollars if the Arnone decision is affirmed. Neither of these allegations are supported by competent record evidence. Rather, they are merely self-serving conclusions and allegations which should not be considered by the Court. Additionally, if these insurers would seriously face irretrievable damage should this Court uphold Arnone and apply its rule retrospectively then perhaps this Court should question whether these carriers should even be writing insurance in this state. If the information contained in those affidavits is correct, then one bad faith claim or one serious accident could force any of these carriers into insolvency.

For example, analyzing the affidavit of the six carriers by reducing the period of time alleged in each to a one year basis, and adjusting the amounts to be paid by each carrier accordingly, the average amount that will be paid in one year will be $105,219.50 per carrier. This simply amounts to full $10,000 payments in five policies covering $10,000 per person and $20,000

per occurrence. These carriers would have this Court believe that paying limits on ten PIP claims will place them on the brink of insolvency. If their reserves are insufficient to pay ten full PIP policies these carriers should not be writing insurance in Florida.[5]

Finally, the policy in question and all policies providing for PIP coverage in the State of Florida provide that "if any policy provision is contrary to any law to which it is subject, such provision is amended to conform thereto". In effect, Defendant is admitting that even its policy, which has been reviewed by the DOI, may be wrong and is subject to correction by the proper application of the laws of this State to its terms. Thus, Petitioner recognizes that it is the Supreme Court of this State, and not policy language, which reduces coverage and a governmental agency which approves the reduction, which should interpret Florida law mandating PIP coverage up to $10,000.

CONCLUSION

Based upon the foregoing reasons, the AFTL respectfully requests that this Court affirm the Fourth District Court of Appeal holding that insurers cannot reduce the $10,000 in PIP coverage mandated under the law by the amount of the deductible. Further, AFTL requests that this Court apply this decision both prospectively and retrospectively so as to provide all insured's the benefits they are entitled to by law.

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[5] AFTL is aware of two pending cases in the Eleventh Judicial Circuit in which the insurers, including a member of FAUA have already agreed to Class Action Orders requiring payments of the deductibles in the event this Court affirms Arnone.

Respectfully submitted,
The Academy of Florida Trial Lawyers

BY: Paul F. King
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13 day of July, 1989 to: Brian Deffenbaugh, Esq., 412 Larson Building, Tallahassee, Florida 32399; Mark Hicks, Esq., 100 N. Biscayne Blvd., Suite 240, Miami, Florida 33132; James K. Clark, Suite 1003, 19 W. Flagler Street, Miami, Florida 33130; David Rosner, 21 S.E. 1st Avenue, 10th Floor, Miami, Florida 33131; Larry Klein, Esq., 501 S. Flagler Drive, Suite 503-Flagler Center, West Palm Beach, Florida 33401; and Mark R. McCollem, 201 S.E. 12th St., Ft. Lauderdale, Florida 33316 this 13 day of July, 1989.

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