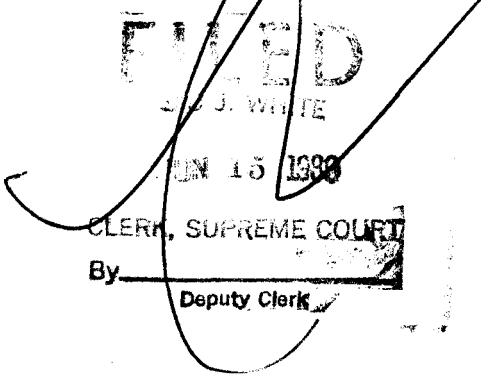
OIA 9-8-89

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 73,488



INTERNATIONAL BANKERS INSURANCE COMPANY,

Petitioner,

vs.

SUSAN ARNONE,

Resp ndent.

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

PETITIONER'S BRIEF ON THE MERITS

LARRY KLEIN, of
KLEIN, BERANEK & WALSH, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

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PREFACE

The parties will be referred to as the insurer and insured. The following symbol will be used:

(R) - Record on Appeal.

ISSUE

DID THE FOURTH DISTRICT ERR IN HOLDING THAT THE $10,000 POLICY LIMITS WERE AVAILABLE FOR PIP COVERAGE, WHERE THE STATUTE PROVIDES THAT THE DEDUCTIBLE **($2,000)** IS "TO BE DEDUCTED FROM THE BENEFITS OTHERWISE DUE"?

STATEMENT OF THE CASE AND FACTS

The insured suffered personal injuries in a motor vehicle accident and sought PIP benefits from the insurer. The policy limits for PIP were $10,000, with a $2,000 deductible. The insured had recoverable PIP expenses in excess of the policy limits, and the issue was whether the maximum she could recover under the policy was $8,000 ($10,000 less the **$2,000** deductible) or **$10,000,** the policy limits. The Fourth District Court of Appeal held that the insured was entitled to the policy limits of $10,000, notwithstanding the deductible of $2,000, and this court has granted review.

SUMMARY OF ARGUMENT

Section **627.739(2),** Florida Statutes **(1985)** provides:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of **$250, $500,** $1,000 and **$2,000,** such amount to be deducted from the benefits otherwise due

each person subject to the deduction. (Emphasis added).

The policy provides that if PIP expenses exceed the policy limits, the insured is entitled to the difference between the limits and the deductible.

The insurance policy in the present case has PIP limits of **$10,000** and a deductible of $2,000. The "benefits otherwise due" are $10,000, according to the statute and prior cases. Subtracting the deductible of $2,000, from the maximum benefits otherwise due of $10,000, leaves **$8,000**. The Fourth District erred in reaching a result which is plainly contrary to the wording of the statute, and its opinion should be reversed.

ISSUE

DID THE FOURTH DISTRICT ERR IN HOLDING THAT THE $10,000 POLICY LIMITS WERE AVAILABLE FOR PIP COVERAGE, WHERE THE STATUTE PROVIDES THAT THE DEDUCTIBLE ($2,000) IS "TO BE DEDUCTED FROM THE BENEFITS OTHERWISE DUE"?

ARGUMENT

In 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),** the Fifth and Third District Courts of Appeal each held that the maximum liability of the insurer for PIP benefits would be the policy limits less the amount of the deductible. In Thibodeau the claimant had **$8,000** in PIP expenses, $5,000 PIP limits, a $4,000

deductible, and the Fifth District held the maximum liability of the insurer would be $1,000. In Cowan the claimant had $40,000 in PIP expenses, $5,000 PIP limits, a **$1,000** deductible, and the Third District held the maximum liability of the insurer would be $4,000. [1]

The Third District and the Fifth District have reached the correct result, because the legislature clearly provided for that result in Section **627.739(2),** Florida Statutes **(1985):**

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of **$250, $500, $1,000** and **$2,000,** such amount to be deducted from the benefits otherwise due each person subject to the deduction. (Emphasis added).

The insurance policy follows the statute, providing:

> The amount of any deductible stated in the schedule or declarations 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 a result of any one accident, and if total amount of such loss and expense exceeds such deductible, the total limits 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) (R **36-43).**

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[1] In Govan v. International Bankers Insurance Company, **521** So.2d **1086** (Fla. **1988),** this court disapproved Thibodeau and Cowan to the extent they were in conflict with Govan; however, Govan involved a different issue, discussed infra, and Thibodeau and Cowan are still controlling in their respective districts as to the issue involved in the present case.

Not only is the opinion of the Fourth District contrary to the statute and the applicable policy provision, but it is also contrary to logic and reason. An insured selects a deductible in order to pay a lower premium. The opinion of the Fourth District, however, makes no distinction between the insured with a deductible and the insured without a deductible, where PIP losses are in excess of the policy limits. If two insureds have PIP losses of $20,000, for example, and they each have policy limits of $10,000, but only one of them has a deductible of $2,000, under the reasoning of the Fourth District they both recover $10,000. This is not fair to the insurer, which has calculated the premium based on a maximum exposure of **$8,000** because of the $2,000 deductible. Nor is it fair to the insured who did not elect a deductible, and thus paid a higher premium. Nor is it fair to the insured who has elected a deductible of $2,000, and has incurred less PIP expenses than his policy limits, because that insured will have benefits reduced by the deductible, while the insured whose expenses exceed the deductible will not be affected by the deductible.

In its opinion in the present case the Fourth District relied on this court's opinion in Govan v. International Bankers Insurance Company, 521 So.2d **1086** (Fla. **1988),** and the Fourth District's earlier opinion in that same case, International Bankers Insurance Company v. Govan, 502 So.2d 513 (Fla. 4th DCA **1986).** In Govan this court affirmed the Fourth District on a different issue, holding that the statutory reduction of benefits (only **80%** of losses are

recoverable) is applied to the medical bills and/or lost wages, prior to the deductible being subtracted. In International Bankers Insurance Company v. Govan, supra, the Fourth District held that the statutory language, "benefits otherwise due," means the total medical expenses "payable under the policy before application of the deductible". 502 So.2d at 914. This court quoted that language when it affirmed, in Govan, and further stated on page 1088 of the opinion:

> Section 627.739(2) provides that the insurer will offer deductibles and "such amount [is] to be deducted from the benefits otherwise due... ." The plain reading of this statute requires a construction that subtracts the deductible from the eighty percent of the medical expenses. In accordance with the district court decision, we also find Govan's suggested construction is not in accordance with the provisions of the statute. While we may disagree with the legislative policy underlying the statue, we have no authority to change the clear intent and purpose of a statute that is not vague and ambiguous. Complaints about this policy should be addressed to the legislature.

Thus, both the Fourth District and this court have recognized that "benefits otherwise due" are benefits payable under the policy. In the present case the Fourth District concluded exactly to the contrary, stating on page 6:

> Therefore we hold the term "benefits otherwise due" means the total amount of "Required Benefits" provided by section 627.736 et seq. payable for a given claim. The amount of such benefits may be subject to a deductible as provided by section 627.739, but the insurance company shall be liable for such expense up to **$10,000.**

Section 627.739(2), Fla. Stat. (1985), which contains the words "benefits otherwise due" provides for deductibles to be offered to insureds and explains how they are to be deducted. The meaning of "benefits otherwise due" could have no meaning other than benefits otherwise due under the policy but for the deductible. In the present case "benefits otherwise due" under the policy but for the deductible would be the policy limits of $10,000.

Our research reveals no cases in Florida or other jurisdictions which are on point or would even be persuasive as to the issue involved in this case. We believe the absence of cases results from the fact that the method of treating a deductible is governed either by statute or the insurance policy. In the present case both the statute and the insurance policy clearly provide that the maximum recovery would be the policy limits less the deductible, and this court has already found that this specific statutory language is not ambiguous. Govan v. International Bankers Insurance Company, supra, 1088.

In the present case the Fourth District granted the insurer's motion to stay the mandate. There were affidavits from six different insurers filed with the motion to stay the mandate. Those affidavits reflect that those insurers have been calculating the benefits due insurers on the same basis as the insurer calculated benefits due in the present case, which was, of course,

contrary to the decision of the Fourth District. Those affidavits further reflect that more than one million dollars may be owed claimants, if the Fourth District's decision is upheld, just by those six insurers. We have been advised that an amicus brief will be filed by the Department of Insurance of the State of Florida. That brief will state that the Department of Insurance has interpreted the statute to mean that the deductible is deducted from the policy limits. In Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985), this court stated on page 989:

> ...a reviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence.

The interpretation of the Department of Insurance is clearly consistent with the intent of the legislature as expressed in the statute in the present case. It goes without saying, of course, that premiums were calculated based on that interpretation, as the amicus brief of the Department of Insurance will confirm.

We have deliberately kept this brief as short as possible, and have avoided any repetition with the amicus brief of the Department of Insurance. We respectfully request that this court consider the Department of Insurance's amicus brief as part of this brief.

CONCLUSION

This court should reverse the decision of the Fourth District in the present case and approve the decisions in Thibodeau and Cowan, supra.

LARRY KLEIN, of
KLEIN, BERANEK & WALSH, P.A.
501 South Flagler Drive
Suite 503 - Flagler Center
West Palm Beach, FL 33401
(407) 659-5455

By: _____
LARRY KLEIN
Florida Bar #043381

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished, by mail, this 14th day of June, 1989, to:

DAVID ROSNER
6067 Hollywood Blvd.
Third Floor
Hollywood, FL 33024

BLACKWELL WALKER FASCELL & HOEHL
Suite 2400 Amerifirst Bldg.
One S.E. Third Avenue
Miami, FL 33131

BARNETT AND CLARK, P.A.
Suite 1003
19 West Flagler Street
Miami, FL 33130

GOODHART & ROSNER, P.A.
21 S.E. 1st Avenue
10th Floor
Miami, FL 33131

DANIELS AND HICKS, P.A.
100 N. Biscayne Boulevard
Suite 2400
Miami, FL 33132-2513

MARK R. McCOLLEM
CHIDNESE & McCOLLEM, P.A.
201 S.E. 12th Street
Fort Lauderdale, FL 33316

WILLIAM O'NEAL
325 John Knox Road
Building L, Suite 200
Tallahassee, FL 32303

By: _____
LARRY KLEIN
Florida Bar #043381