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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 73,488

INTERNATIONAL BANKERS INSURANCE COMPANY,

Petitioner,

vs.

SUSAN ARNONE,

Respondent.

RESPONDENT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PREFACE

International Bankers Insurance Company will be referred to as International and the Department of Insurance will be referred to as the Department.

ISSUE

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE $2,000.00 DEDUCTIBLE APPLIED AS A THRESHHOLD TO RECOVERY AND THEREFORE DOES NOT REDUCE THE $10,000.00 STATUTORILY MANDATED PIP POLICY LIMITS.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the recitation of the Statement of the Case and Facts contained in Petitioner's Brief.

SUMMARY OF ARGUMENT

This Court already decided the proper interpretation of "benefits otherwise due" and it has ruled in a manner consistent with the Respondent, SUSAN ARNONE's, position. Therefore, there is no need to revisit this issue. In addition, the Florida Legislature considered changing the PIP Statute to embrace the position fostered by International herein. However, they did not enact that Bill and, therefore, it never became law.

ARGUMENT

This case involves the interpretation of three words contained within Fla.Stat. 627.739 (2): "Benefits otherwise due". This Court has already visited this issue and made a determination as to the proper interpretation of those words in Govan v. International Bankers Insurance Co., 521 So.2d 1086 (Fla. 1988). In Govan, this Court asked the Department for its advice regarding the proper interpretation of those three words. In its Amicus Brief, (which is contained in the Appendix) the Department said there were three possible interpretations.

(1) Consistent with International's position in Govan, was that the deductible applied only as a threshhold to recovery.

(2) Consistent with Wayne Govan's position, the deductible applied only as a cap thereby lowering the amount of the $10,000.00 policy limit by the $2,000.00 deductible or,

(3) As an alternate method this Court could have found the deductible applied both as a threshhold and as a cap, although the Department admitted this was not a logical approach.

Although at page three of its Amicus Brief filed in this case, the Department indicates that it has historically interpreted these words consistent with International's position in this case, which is applying the deductible both as a threshhold and as a cap, through research we can see that this is definitely not a true statement. At page three of the Department's Amicus Brief in

Govan we see the following statement:

> "The Department of Insurance has not made an official determination by administrative rule or declaratory statement as to the proper interpretation of §627.739 (2)."

It is hard to believe that the Department can now argue to this Court that it has historically taken a position consistent with that proposed by International in this case when three years ago it made the above statement to this Court.

If the Department has now changed its mind, then it must be only as to policies which were written after October 16, 1986, the filing date of its Brief in the Govan case. Ms. Arnone would like to remind this Court that her accident occurred on September 30, 1985, and her policy with International had an effective date of 11/14/84.

This Honorable Court accepted International's interpretation of "benefits otherwise due" when it decided Govan. In essence, this Court had accepted the Fourth District's interpretation of "benefits otherwise due", finding conflict with Thibodeau v. Allstate Insurance Co., 391 So.2d 805 (Fla. 5DCA 1980) and Industrial Fire & Casualty Insurance Co. v. Cowan, 364 So.2d 810 (Fla. 3DCA 1978) and thereby disapproving those two cases.

It is incredible to think that International through identical counsel can now ask this Court to accept the third method of interpreting "benefits otherwise due" when in Govan it was successful in convincing both the Fourth District and this Court that those words should be interpreted as applying the

deductible only as a threshhold to recovery. (The first interpretation enumerated above).

In Govan, this Court made reference to House Bill No. 1015 which was presented to the Legislature during its 1987 session. That House Bill is presented herein in part as follows:

> "(2) Insurers shall offer to each applicant and to each policyholder, upon the renewal of a existing policy, deductibles, in amounts of $250.00, $500.00, $1,000.00, and $2,000.00. The amount of a deductible shall be an initial out-of-pocket expense to be met by the policy-holder prior to the calculation of benefits described in s. 627.736(1). The amount of a deductible may be applied to reduce the $10,000.00 limit described in s.627.736(1). However, the amount of a deductible shall not be applied to reduce the amount of any benefits received in accordance with s.627.736(1)(c)."

The Florida Legislature failed to enact this Bill and therefore refused to adopt the interpretation of "benefits otherwise due" which is being proposed by the Petitioner, International, herein. The Legislature clearly considered codifying International's position and did not.

In summary, the Respondent would point out to this Court that International's position in this case is identical to Wayne Govan's position in Govan. In Govan, International asked this Court to disregard Wayne Govan's position telling us that it was not the correct interpretation. Now, they want this Court to accept Wayne Govan's position as it would seem to better suit their desires. If International wants the PIP Statute to be interpreted as they propose in their Brief, then they should seek to

have the Legislature enact a Bill similar to House Bill No. 1015. Until then, this Court should not disturb the plain reading of the Statute as it exists.

CONCLUSION

The Respondent requests this Honorable Court enter an Order affirming the Opinion of the Fourth District Court of Appeal in this matter in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to all counsel of record on the attached list this 17th day of July, 1989.

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