IN THE SUPREME COURT OF FLORIDA

CASE NO: **74,208**

GREAT OAKS CASUALTY INSURANCE COMPANY,

Petitioner,

v.

RAISHA KELLY,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS [1]

A. The Pleadings And Evidence Presented

Raisha Kelly ("Kelly"), filed a complaint for declaratory relief naming Great Oaks Casualty Insurance Company ("Great Oaks"), as the respondent. (R. 1-15). Kelly alleged that on September 28, 1987, she was involved in an automobile accident and incurred $16,701 in medical expenses as a result thereof. She further alleged that she was covered by the provisions of an insurance policy issued by Great Oaks which provided personal injury protection ("PIP") benefits. The policy provided $10,000 PIP coverage and contained a $2,000 deductible. The insurance policy under which Kelly claimed coverage contained the following provision regarding PIP deductibles:

> 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 except that payment for funeral, cremation or burial expenses shall not be subject to any deductibles selected. If the total amount of such loss and expense exceeds such deductible, the total limit of benefits the Company

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1/ Throughout this brief the symbol "R." refers to the record on appeal. All emphasis is added unless otherwise noted.

is obliaated to pay shall be the difference between such deductible amount and the applicable limit of the Company's liability.

Great Oaks tendered $8,000 in full satisfaction of the claim, however, Kelly demanded $10,000. (R. 2). Kelly asked the trial court for a declaration that she was entitled to PIP benefits in the amount of $10,000. Great Oaks filed its answer raising as a specific defense that the complaint failed to state a claim for PIP benefits in excess of $8,000. (R. 41-42). After discovery, Great Oaks moved for summary judgment on the basis that, as a matter of law, the deductible reduced by $2,000 the total benefits otherwise due to Kelly under the PIP insurance policy. (R. 19-21, 26-40).

The outcome of this case turns on a question of legislative intent. Great Oaks asserts that, in 1982 when the Automobile "No Fault" Law was re-enacted after extensive sunset review, the legislature had constructive knowledge (if not actual knowledge) of prior appellate decisions and administrative interpretations by the Department of Insurance ("DOI") which uniformly held that the coverage limits for PIP insurance may be reduced by the amount of the deductible selected by the insured, and that this knowledge therefore became imbued as part of the controlling legislative intent.

In order to establish the longstanding interpretation of the DOI, and in support of its motion for summary, Great Oaks filed three depositions. First was the deposition of David

Goding, the Administrator of Personal Lines, Bureau of Policy and Contract Review of the DOI. (R. 118-243). Mr. Goding stated that all insurers in Florida are required to submit their policy forms to DOI for review and approval, and that the DOI regularly approves PIP insurance policy forms which provide that the maximum PIP coverage shall be reduced by the amount of the PIP deductible. (R. 125-126). Mr. Goding was not aware of any policy with such a provision which had ever been disapproved by the DOI. (R. 125). He further testified that the contractual provision which is contained in the PIP policy covering Kelly had been approved by the DOI. (R. 151).

The second deposition was that of Opal W. Bennett, the Administrator of Field Examinations for the DOI. (R. 244-292). She testified that the DOI has actual knowledge that many automobile insurers in Florida regularly reduce the maximum PIP benefits by the amount of the deductible. (R. 252). Ms. Bennett was unaware of any insurance company which had been cited or fined as a result of paying a maximum of $8,000 under a $10,000 PIP policy with a $2,000 deductible. (R. 253-254).

Ms. Bennett also testified that the DOI prepared a manual for public distribution entitled "Questions and Answers for General Lines Agents and Solicitors." (R. 256-257). In that manual, the DOI explains that the PIP coverage limits are reduced by the amount of the deductible selected by the insured.

> 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.

(R. 290).

The third deposition was that of Kenneth James Ritzenthaler, an actuary for the DOI. (R. 49-117). He testified that the DOI is charged with the statutory duty of reviewing rates charged by insurance companies to ensure that they are not inadequate, excessive or unfairly discriminatory. (R. 60-61). He testified that the relative adequacy of the rates for PIP insurance is affected by the limits of coverage. (R. 66). In general terms, and all other factors being equal, rates that are deemed adequate for higher limits of coverage are likely to be higher than rates that are deemed adequate for lower levels of coverage. (R. 66). In addition, the relative adequacy of rates for PIP insurance is affected by PIP deductibles. (R. 68). In general terms, and all other factors being equal, lower deductibles result in higher rates. (R. 68). This is because lower deductibles result, in effect, in higher coverage which necessitates higher rates in order to assure adequacy. (R. 68). Thus, when the DOI reviews a rate, the adequacy of the rate is dependent upon how the deductible is to be applied. (R. 69).

In addition to the depositions of the DOI administrators, Great Oaks also filed the affidavit of Mark M.

Berkley, Vice President and Legal Counsel to Great Oaks. (R. 22-23). Mr. Berkley attested that Great Oaks had regularly submitted rate filings for PIP insurance to the DOI, based on the good faith assumption that the total coverage limits would be reduced by the amount of the PIP deductible. This assumption was based on the following facts, which are undisputed in this case:

(a) Information and forms promulgated by the DOI provided that the deductible is to be applied in a manner so as to reduce the PIP coverage limits.

(b) Great Oaks' personal passenger automobile insurance policy forms have always provided that the deductible reduces the amount of the PIP coverage limits, and said forms have always been approved by the DOI.

(c) In previous years, changes in premiums for PIP insurance have always been submitted for approval to the DOI and were thereupon approved by the DOI and charged to policyholders based on the premise that the PIP deductible reduces the amount of the PIP coverage limits.

(d) Official DOI audits confirmed without objection the reduction of PIP coverage limits by the amount of the deductible.

(e) At no time has DOI ever promulgated any rule, regulation, informational bulletin, or other instruction to insurers such as Great Oaks, to the effect that PIP deductibles did not reduce the PIP coverage limits by the amount of the deductible.

(f) A settled line of judicial decisions, including a case that involved Great Oaks, affirmed the right of the insurers to offer insurance policies which reduce the PIP coverage limits by the amount of the deductible.

Mr. Berkley stated that Great Oaks would have requested approval of higher rates for PIP insurance if the PIP deductible would not reduce the maximum coverage limits by the amount of the deductible, because the rates presently being charged would have been inadequate to cover the increased risk. Mr. Berkley further stated that Florida law would preclude Great Oaks from recovering losses from previous years' policies through increases in premiums in future years.

In response to Great Oaks' motion for summary judgment, Kelly filed her own motion for summary judgment. (R. 24). Kelly filed no affidavits or any other evidence in support of her motion or in opposition to Great Oaks' motion for summary judgment.

B. The Arguments Presented

The determination of whether Kelly was entitled to $8,000 or $10,000 in PIP benefits called for the trial court to construe S627.739, Fla. Stat. (1987) ("PIP statute"). In particular subsection 2 states:

> 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.

The argument presented by Great Oaks in its motion for summary judgment and accompanying memorandum of law was that the "benefits otherwise due" were the benefits available under the insurance policy but for the deductible. "Benefits otherwise due" are defined in 5627.736, Fla. Stat. (1987) as being certain medical expenses, wage loss and funeral expenses up to $10,000. The deductible is then subtracted from that maximum coverage amount, thus determining the total remaining benefits available to the insured. Under no circumstances is the insured entitled to more benefits than the policy limits minus the amount of the deductible selected by the insured.

In the instant case, Kelly opted for a $2,000 deductible. Thus, Great Oaks argued, since Kelly's medical expenses were in excess of the $10,000 policy limits and subject to a $2,000 deductible, she was entitled to receive $8,000.

To the contrary, Kelly argued that "benefits otherwise due" were the total amount of the covered medical expenses incurred by the insured. It was from that amount that the deductible was to be subtracted thus determining the total amount of benefits available. Since her medical expenses minus the amount of the deductible exceeded the $10,000 policy limits, Kelly argued that she was entitled to receive $10,000.

C. The Trial Court's Determination

The trial court adopted the interpretation of §627.739(2) as promoted by Kelly. (R. 293-295). Specifically, the court ruled:

> It seems, therefore, that the formula is to determine the amount due without reference to the deductible provision. From the amount determined, subtract the amount of the deductible. The claimant receives the lesser of the difference or the limits of the policy; in this case $10,000.

(R. 295).

D. Appellate Proceedinas

Great Oaks timely appealed the trial court's judgment to the Third District Court of Appeal. Pursuant to Florida Rule of Appellate Procedure 9.125(c), Great Oaks suggested to the Third District that the issue raised by the trial court's order be certified to this Court as one of great public importance. On May 23, 1989, the Third District issued its order certifying the judgment of the trial court to this Court. On June 5, 1989, this Court issued its order accepting jurisdiction.

SUMMARY OF THE ARGUMENT

Great Oaks respectfully suggests that the plain reading of §627.739(2), Fla. Stat. (1987) tends to the conclusion that the PIP coverage limits are reduced by the amount of the deductible. Moreover, in 1982, when the statute was re-enacted after extensive sunset review, the legislature would have had constructive knowledge (if not actual knowledge) of prior appellate decisions and administrative interpretations by the DOI, which uniformly construed the statute to allow for the reduction of PIP coverage limits by the amount of the deductible,

and that this knowledge therefore became imbued as part of the controlling legislative intent from that date forward. Lastly, because of Florida's automobile insurance rating law which requires that rates be approved as adequate and not excessive for the risk being incurred, it would be inequitable and unjust for the Court to retrospectively set aside the longstanding judicial and administrative interpretation of the PIP statute in favor of the new interpretation being advanced by the insured herein.

Simply stated, insureds such as Kelly paid an actuarily sound premium for a level of PIP coverage that was specifically provided in an approved policy. Those insureds now seek additional coverage which was not provided in a policy, and for which they did not pay any premium. The Court must reject any argument that insurers such as Great Oaks be required to provide coverage under policies for which an inadequate premium was received. Inasmuch as the DOI cannot legally approve inadequate rates before the fact, the Court should not mandate the same inadequate and illegal rates after the fact, especially when the insurers are forbidden under Florida's insurance rating law from recouping losses from prior years by means of rate increases in subsequent years.

ARGUMENT

A $2,000 DEDUCTIBLE IN A POLICY OF PERSONAL INJURY PROTECTION INSURANCE (PIP) REDUCES FROM $10,000 TO $8,000 THE MAXIMUM BENEFITS THAT ARE PAYABLE UNDER THE POLICY.

This case turns on a question of legislative intent. The Court must determine the intent of the legislature when it enacted and re-enacted the PIP statute. "It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute." State v. Webb, 398 So.2d 820, 824 (Fla. 1981).

The ultimate decision in this case will depend on a complete understanding of the legislative history, judicial precedents, administrative interpretation, and the competing equities of the respective parties. As will be demonstrated, each of these factors clearly supports the insurer's contention that the PIP coverage limits are reduced by the amount of the deductible selected by the insured.

A. The PIP Statute Has Always Provided For The Reduction In Coverage Limits By The Amount Of The Deductible Selected By The Insured.

Florida's Motor Vehicle No-Fault Law was first adopted in 1971 with an effective date of January 1, 1972. Ch. 71-252, Laws of Fla. The statute provided for a recovery of 100 percent of medical expense, 85 percent of wage loss, and $1,000 in funeral benefits up to a maximum of $5,000. In addition, policyholders were allowed to select a deductible in the amount

of either $250, $500, or $1,000, ". . . said amount to be deducted from the amounts otherwise due each person subject to the deduction.'' Ch. 71-252, § 10, Laws of Fla. The DOI was required to adopt rules and regulations, and to promulgate necessary forms, to implement provisions of the act. Ch. 71-242, § 12, Laws of Fla. In furtherance thereof, the DOI required all automobile insurance companies doing business in Florida to adopt an amendatory endorsement in a form promulgated by the department, in order to bring all automobile insurance policies into conformity with the mandates of the new law. (R. 130, 136-137). The form approved by the DOI expressly provided that the amount of the deductible would reduce the PIP coverage limits:

> 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.

(R. 223). Thereupon, policy language to this effect was always approved by the DOI.

In 1976, the legislature increased the maximum deductible to $2,000. Ch. 76-266, Laws of Fla. In 1977, the maximum PIP benefits were changed again to provide for 80 percent of medical expense, 60 percent of wage loss and a maximum of

$4,000, at the option of the policyholder, ". . . to be deducted from the benefits otherwise due each person . . ." Ch. 77-468, Laws of Fla. Likewise, in the following year, maximum PIP benefits were increased to $10,000 and the maximum deductible was increased to $8,000. Ch. 78-374, Laws of Fla.[1/] Finally, in 1982, following an extensive sunset review process, the funeral benefit was increased to $1,750 and the maximum deductible was reduced to $2,000. Ch. 82-243, Laws of Fla.[2/]

Although the maximum coverage limits and the deductible limits have been changed throughout the years, the legislature has never receded from the basic premise, as articulated in the original amendatory endorsement promulgated by the DOI, that the PIP coverage limits may be reduced by the amount of the deductible selected by the insured.

Presently, §627.739(2) expressly provides that PIP "benefits otherwise due" are to be reduced by the deductible selected by the insured. PIP benefits otherwise due are defined in 5627.736, Fla. Stat. (1987), as including certain medical

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1/ By virtue of the PIP deductibles, persons who maintained health insurance policies were able to avoid costly duplication of coverage. See Ch. 77-468, § 37, Laws of Fla. See also, Kwechin v. Indus. Fire & Casualty Co., 409 So.2d 28 (Fla. 3d DCA 1981), aff'd 447 So.2d 1337 (Fla. 1983).

2/ Subsequent changes in the No-Fault law have no direct bearing on the present dispute, except to the extent that, conspicuously lacking, is any legislative revision to counteract previous judicial and administrative interpretation regarding the impact of PIP deductibles on PIP coverage limits. See generally, Ch. 85-320, 86-220, 87-282, 88-370, Laws of Fla.

expenses, loss of wages and funeral expenses up to a maximum of $10,000. In the event the insured opted for no deductible at all, then the maximum "benefits otherwise due" would be $10,000. As such, if the insured opts for a $2,000 deductible, then logically the maximum "benefits otherwise due" would be reduced accordingly to $8,000.

This conclusion is entirely consistent with this Court's decision in Govan v. Int'l Bankers Ins. Co., 521 So.2d 1086 (Fla. 1988). In Govan the issue before the Court was whether the 80 percent co-insurance calculation for medical benefits in S627.736, is made before or after application of the deductible provided for in S627.739. In that case the insured unsuccessfully argued (as the insured is again arguing herein), that "benefits otherwise due" (before application of the deductible) should be considered without regard to the limitations on PIP benefits contained in S627.736. This Court, however, rejected that argument and, based on a plain reading of the statute, held instead that the medical benefits due the insured were first to be reduced by the limitations on benefits imposed by S627.736 and thereupon to be further reduced by the amount of the deductible, as provided in S627.739. Or, as precisely stated in the words adopted by this Honorable Court:

> In our view "benefits otherwise due" means the total amount of the medical expenses payable under the policy before 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. (Emphasis in original.)

Govan, supra at 1087.

The amount that an insured would receive in benefits but for the application of the deductible is the limits of the policy, i.e. $10,000. These are the "benefits otherwise due." As directed by the statute, the total available PIP benefits is determined by subtracting the amount of the deductible from these "benefits otherwise due." §627.739(2), Fla. Stat. (1987).

Thus the plain reading of 5627.739 and 5627.736, and the legislative history thereof, demonstrate quite clearly that the instant contractual provision wholly comports with the law and that insurers may issue PIP insurance policies wherein the amount of PIP "benefits otherwise available" are reduced by the amount of the deductible selected by the insured.

B. In 1982, When The Automobile No-Fault Statute Was Re-Enacted After Extensive Sunset Review, Prior Decisions Of The Courts Of Appeal And Longstanding Administrative Interpretation By The DOI Which Permitted The Reduction In PIP Coverage Limits By The Amount Of The Deductible, Became Imbued As Part Of The Controlling Legislative Intent From The Moment Of Re-Enactment.

1. Prior Judicial Decisions

The legislature is presumed to be aware of pre-existing laws when enacting a new statute. Dickinson V. Davis, 224 So.2d 262 (Fla. 1969). It is also presumed that when re-enacting a statute the legislature is aware of the prevailing judicial construction placed upon it, and intends to adopt it absent a

clear expression to the contrary. State v. Quigley, 463 So.2d 224 (Fla. 1985); Gulfstream Park Racing Ass'n v. Dep't of Business Regulation, 441 So.2d 627, 628 (Fla. 1981).

> "[Wlhere a clause [of a statute] has received a definite construction, the subsequent adoption of that clause by the law-making department carries with the language adopted also the construction put upon it."

Advisory Opinion to the Governor, 96 So.2d 541, 546 (Fla. 1957). See also, Delaney v. State, 190 So.2d 578 (Fla. 1966); Collins Inv. Co. v. Metro. Dade County, 164 So.2d 806 (Fla. 1964). Therefore, the legislature is presumed to have been aware of the long-standing judicial construction of the PIP statute when it last re-enacted the pertinent provisions thereof. A subsequent change in that construction can only be accomplished through legislation. See State v. Wershow, 343 So.2d 605 (Fla. 1977).

Florida's PIP statute has always been interpreted by appellate courts to allow for the reduction of maximum PIP benefits by the amount of the deductible. The cases of Indus. Fire & Casualty Ins. Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978) and Thibodeau v. Allstate Ins. Co., 391 So.2d 805 (Fla. 5th DCA 1980) both held that an insured can only recover the amount of the mandated PIP coverage less the deductible selected by the insured.

In Thibodeau the PIP coverage was $5,000, with a deductible of $4,000. The insured incurred in excess of $8,000

in medical expenses. The Fifth District Court of Appeal held that the insured was entitled to recover $1,000 under the policy. This holding was based on the court's specific finding that the "benefits otherwise due," from which the deductible is to be subtracted, were the stated policy limits:

> This case is controlled by the provisions of section 627.739(1), Florida Statutes (1977). The statute required an insurer to offer the policy owner "deductibles, in amounts of $250, $500, $1,000, $2,000, $3,000, and **$4,000**, said amount to be deducted from the benefits otherwise due each person subject to the deduction . . . As a "resident relative," Sandra was subject to the "deductible" amount of $4,000 under Brian's policy, and the amount "otherwise due" was $5,000. Under this statute, Allstate's total liability was $1,000. (Emphasis in original.)

Thibodeau, supra at 806.

In Cowan, the policy provided for $5,000 in personal injury protection with a $1,000 deductible. The insured's medical expenses and lost wages were approximately $40,000. The Third District Court of Appeal held that the insured was entitled to recover $4,000 under the policy. The court highlighted the statute's provisions as follows:

> Each insurer . . . shall, at the election of the owner, issue a policy endorsement, . . . which endorsement shall provide that there shall be deducted from personal protection benefits that would otherwise be or become due to the policy holder . . ., an amount of either two hundred and fifty dollars, five hundred dollars, or one thousand dollars, again as the policy holder elects, said amount to be deducted from the amounts

> otherwise due each person subject to the deduction. . . . (Emphasis in original.)

Cowan, supra at 811. The court reiterated that under the statutory guidelines, the insured could recover only $4,000 because the amount "otherwise due" under the policy was $5,000, the limits of the policy. Id.

The language of 5627.739 has been consistently interpreted as reducing by the amount of the deductible the total PIP benefits otherwise payable under an insurance policy. There is nothing in the legislative history of the most recent version of the PIP statute that would suggest that the legislature intended a new and different treatment of PIP deductibles than that given by the judiciary. The Thibodeau court actually invited the legislature to amend the No-Fault statute if in fact the result reached was not what the legislature had intended:

> If this result is contrary to public policy or understanding and expectation, the legislature should revise section 627.739(1).

Thibodeau, supra at 806. As discussed previously, even when presented with the opportunity in 1982, the legislature declined to accept that invitation, and chose instead to maintain the present status of the law.

If the legislature disagreed with the prevailing construction of the PIP statute, it could have amended the relevant provisions accordingly. By not amending the PIP statute, the legislature adopted the general construction placed upon it to the effect that PIP coverage limitations are reduced

by the amount of the deductible. "[W]here a statute is re-enacted, and the judicial construction thereof presumed to have been adopted in the re-enactment, the Courts are barred and precluded from changing the earlier construction." Deltona Corp. v. Kipnis, 194 So.2d 295, 297 (Fla. 2d DCA 1966). As a matter of law, this Court must find that the legislature intended to allow insurers to reduce the maximum PIP coverage by the amount of the deductible. Deltona Corp. v. Kipnis, supra.

2. Interpretation By The Department Of Insurance

The construction placed on a statute by officials charged with the duty of executing it should not be disregarded or overturned by the courts except for the most cogent reasons, or unless clearly erroneous. Idle Assets, Inc. v. Dep't of Ins., 424 So.2d 902 (Fla. 1st DCA 1982). Likewise, administrative constructions of statutes by the agency charged with the administration thereof are entitled to great weight. Dep't of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815 (Fla. 1983), appeal dismissed, 466 U.S. 901 (1984); Dep't of Highway Safety & Motor Vehicles v. Meck, 468 So.2d 993 (Fla. 5th DCA 1984), pet. ~~for rev~~. denied, 469 So.2d 748 (Fla. 1985). When the legislature re-enacts a statute, it is presumed to know and adopt the construction placed thereon by the state administrators. State v. Dickinson, 286 So.2d 529 (Fla. 1973).

The Department of Insurance ("DOI") is the state agency charged with the duty of executing Florida's No-Fault statute.

S624.307, Fla. Stat. (1987). It is undisputed in the record of the instant case that the DOI has consistently construed the No-Fault statute so as to allow the reduction of PIP coverage limitations by the amount of the deductible. This construction has been sustained by the courts[3/] and was well known by the legislature at all times when the statute was revised and re-enacted. As such, it cannot now be argued that this well-settled interpretation should suddenly be rejected and that insurance companies should be required to pay benefits after the fact that were not contemplated by the DOI at the time when rates and policy forms were approved for *use* in Florida.

Under Florida law, the terms and conditions of all automobile insurance policies sold in this state must be approved by the DOI. §§627.726, 627.410, Fla. Stat. (1987). It is undisputed in the record that the DOI has always construed the PIP statute to allow policies to be purchased and sold with provisions that reduce the total coverage limitations by the amount of the deductible. In fact, the precise language of plaintiff's insurance policy which is at issue in the instant case, has been expressly approved by the DOI.

In furtherance of statutory requirements, the DOI regularly conducts field audits of books and records of Florida's

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3/ Cowan, supra; Thibodeau, supra. Indeed, it can reasonably be argued that the given interpretation of the statute by the DOI was mandated by these decisions.

insurance companies. By virtue of these audits, the DOI had actual knowledge that insurers were reducing PIP benefits by the amount of the deductibles. According to the DOI this has been, and continues to be, an acceptable practice. (R. 252-254). Indeed, information to this effect is described in detail in a manual which was prepared and promulgated by the DOI. (R. 286-292).[4/]

Moreover, premiums charged for automobile insurance are subject to rate approval by the DOI. Generally speaking, rates

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4/ "Insurance Questions and Answers,'' published by Bill Gunter, Insurance Commissioner and Treasurer, State of Florida (March 10, 1986) provides as follows:

> 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.

(R. 290). The manual provides a detailed explanation regarding the resolution of PIP claims that exceed policy limits (R. 291-292):

> 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.
>
> * * *

(cent.)

must be adequate and not excessive. The DOI has always approved rates based on its interpretation of S627.739 that the total available PIP benefits may be reduced by the amount of the deductible, and insurers in this state have always relied on that interpretation. Those rates would not be adequate under the trial court's interpretation of 5627.739, which effectively raises the amount of PIP coverage. The legislature is presumed to have been aware of the position of the DOI with respect to PIP deductibles and coverage limitations. As such, the legislature's re-enactment of S627.739 without amendment must be considered as an affirmative adoption of that position which reflects the legislative intent. Dep't of Revenue v. Bonard Enter., Inc., 515 So.2d 358 (Fla. 2d DCA 1987), rev. denied, 523 So.2d 576 (Fla. 1988).

C. In Order To Avoid A Manifest Inequity The Court Must Hold, At Least For Policies Written Prior To The Date Of This Court's Decision, That The PIP Coverage Limits May Be Reduced By The Amount Of The Deductible Selected By The Insured.

It is axiomatic that a court is to avoid attributing to a statute a construction which leads to an unreasonable or inequitable result. Carawan v. State, 515 So.2d 161, 167 (Fla. 1987). This is exactly the type of result that would occur if this Court were to adopt the trial court's interpretation of

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[Answer] $9,000 - ($15,000 x 80% = $12,000, subject to $10,000 limit, minus deductible).

Great Oaks was wholly justified in relying on the bright line of prior appellate decisions and administrative interpretations of the DOI, which uniformly held that PIP coverage limits may be reduced by the amount of the deductible selected by the insured. If the Court now opts for an opposing interpretation, one which results in a significant expansion of permissible coverage under previously approved policies, then in effect the Court will be mandating in an ex post facto manner the use of certain insurance policies in this state wherein the premium charged and collected was inadequate to cover the insured risk. Any such decision would create a manifest inequity for the insurer and a windfall advantage for the insured. The insured would suddenly be entitled to receive additional benefits which were never contemplated by the policy, and never paid for by the insured. The insurer, meanwhile, would suddenly be exposed to additional losses which were never contemplated by the policy, and not covered by a lawfully adequate premium. Moreover, under Florida law the insurer would be precluded from "recouping" these losses by means of rate increases in subsequent years.

In short, an affirmation of the trial court's statutory interpretation would result in an unwarranted expansion of coverage in existing and pre-existing policies for which no premium has been charged. Although the effect of that result may seem small in the instant case, the decision of this Court will

have a monumental effect on this state's insurance industry. The collective amount of PIP benefits at issue is very substantial and could impact upon a company's solvency.

The legislature provided for optional deductibles in the PIP statute in an effort to significantly lower the cost of the statutorily required insurance. Chapman v. Dillon, 415 So.2d 12, 18 (Fla. 1982). The companies providing the insurance designed their rate schedules accordingly. Only this Court's determination that the legislature intended to allow insurers to reduce the maximum PIP coverage by the amount of the deductible can preserve the function of the statute. A contrary ruling will simply increase the cost of PIP insurance statewide.

Given the foregoing, and in order to avoid a manifest inequity to insurers such as Great Oaks who relied in good faith on the prior status of the law, the summary judgment entered by the trial court below must be reversed. Even if the Court deems that a change in the law governing PIP deductibles is truly necessary, in the public interest the change must solely be applied to policies written or renewed after the effective date of this Court's decision in this case.5/

5/ If the Court holds that its prior decision in Govan v. Int'l Bankers Ins. Co., 521 So.2d 1086 (Fla. 1988) must be construed as having reversed Indus. Fire & Casualty Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978) and Thibodeau v. Allstate Ins. Co., 391 So.2d 805 (Fla. 5th DCA), which Great Oaks, the DOI and others relied upon in good faith for many years as being the settled law, then for all the reasons previously stated herein, the new rule should be applied solely to policies written or (cont.)

CONCLUSION

The legislative history, past judicial decisions, administrative interpretations, and relative equities of the parties tend to the conclusion that the judgment of the trial court must be reversed, and that a judgment must instead be entered in favor of Great Oaks.

Respectfully submitted,

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to policies written or renewed after the effective date of Govan. Regardless, the summary judgment entered in favor of the plaintiff-Kelly would still have to be reversed because she is proceeding under a policy that predates Govan.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was served by mail this 26th day of June, **1989** to STACEY F. SOLOFF, ESQ., Freshman, Freshman & Traitz, P.A., **5975** Sunset Drive, Suite 701, Miami, Florida **33143.**

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