THE SUPREME COURT OF FLORIDA

INTERNATIONAL BANKERS INSURANCE COMPANY, PETITIONER, VS. SUSAN ARNONE, RESPONDENT.	**	CASE NO. **73,488**
GREAT OAKS CASUALTY INSURANCE COMPANY, PETITIONER, VS. RAISHA KELLY, ETC., RESPONDENT,	**	CASE NO. **74,208**

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

REPLY BRIEF OF PETITIONER GREAT OAKS CASUALTY INSURANCE COMPANY, ON THE MERITS

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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.

A. Great Oaks concurs with the Court's decision in Govan v. International Bankers Insurance Company.

The position being asserted by Petitioner, Great Oaks Casualty Insurance Company, is entirely consistent with this Court's prior ruling in Govan v. International Bankers Ins. Co., 521 So.2d 1086 (Fla. 1988). In Govan this Court rejected the insured's argument that "benefits otherwise due" means aggregate medical expense, irrespective of policy limitations. Instead the Court concluded that "benefits otherwise due" means benefits under the policy. Said benefits are governed by S627.736, which limits PIP benefits to eighty percent of the aggregate medical expense. As such, the co-insurance provision is applied to reduce aggregate medical expense before applying the deductible.

In effect the Court in Govan held that PIP "benefits otherwise due" in 5627.739, Fla. Stat. (1987) are subject to the limitations imposed on PIP benefits in S627.736, Fla. Stat. (1987). That is exactly the position being advanced by Great Oaks in the instant case. Great Oaks concurs with that position. Simply stated, net benefits to the insured constitute benefits otherwise due under the policy (to wit: eighty percent of all medical expense up to a limit of $10,000), less the amount of the deductible.

The following examples demonstrate the computation of PIP benefits pursuant to the Govan formula, applying both the eighty percent co-insurance provision and the $2,000 deductible. The Court will observe that under no circumstances does the insurer receive the benefit of the deductible "a second time" in any given case.[1]

No Deductible:				
Med. Expenses	$2,000	$5,000	$10,000	$20,000
Co-Insurance	.80	.80	.80	.80
Net Med. Exp.	$1,600	$4,000	$ 8,000	$16,000
Deductible	(-0-)	(-0-)	(-0-)	(-0-)
Net Benefit	$1,600	$4,000	$ 8,000	$10,000 [3]
$2,000 Deductible:				
Med. Expenses	$2,000	$5,000	$10,000	$20,000
Co-Insurance	.80	.80	.80	.80
Net Med. Exp.	$1,600	$4,000	$ 8,000	$16,000
Deductible	($2,000)	($2,000)	($ 2,000)	($ 2,000)
Net Benefit	$ -0- [2]	$2,000	$ 6,000	$ 8,000 [3]

1/ This concern was first raised by the Fourth District in International Bankers Ins. Co. v. Govan, 502 So.2d 913, 194 (Fla. 4th DCA 1986): "We are concerned with this provision in that it appears to utilize the $2,000 deductible a second time, after it has already been used in the traditional manner ... as a threshold to recovery."

2/ Obviously, in no case would the insured receive benefits if the net medical expense is less than the deductible.

3/ In both of these examples, the net medical expenses exceed policy limits by $6,000. In the first example the benefits due the insured would be $10,000, the maximum PIP benefits provided by the policy. And in the second example the net benefits are reduced by the amount of the deductible.

The specific facts of Govan and Kelly would therefore give rise to the following calculations based on the application of both the co-insurance provision and the $2,000 deductible:

	Govan	Kelly
Med. Expenses	$5,887.45	$16,701.00
Co-Insurance	.80	.80
Net Med. Exp.	$4,709.96	$13,360.80
Deductible	($2,000.00)	($ 2,000.00)
Net Benefit	$2,709.96	$ 8,000.00

In Govan's case, the recovery would be precisely as stated in that decision. In Kelly's case, the recovery is $8,000 ($10,000 less the $2,000 deductible). If Kelly had opted for no deductible, then her recovery would have been $2,000 higher, or $10,000.

Kelly claims that despite the deductible she is still entitled to receive $10,000. In other words, Kelly claims that she is entitled to receive the exact same benefits ($10,000) as another insured who incurred the exact same medical expense but who paid a much higher premium for an insurance policy with maximum ("no deductible") coverage. But, in order to accept Respondent's argument, the Court would have to conclude that the phrase "benefits otherwise due" in 5627.739 means certain aggregate benefits that could be in excess of $10,000, despite the fact that under no circumstances could benefits ever exceed $10,000 in a policy of PIP insurance. Consequently, Respondent's argument makes no sense at all.

B. The interpretation of the Department of Insurance, being well within the range of possible statutory interpretation, must be given due deference by the Court.

From the initial adoption of the PIP Statute in 1971 to and including the present date, the Department of Insurance ("DOI"), has always read the statute to allow for the reduction of maximum PIP coverage limits by the amount of deductible selected by the insured. Respondent does not dispute this fact, nor does Respondent deny that an administrative agency such as DOI is afforded wide discretion in the interpretation of a statute it administers. PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988); Department of Revenue v. First Union Nat'l Bank, 513 So.2d 114 (Fla. 1987); Department of Envt'l Regulation v. Goldring, 477 So.2d 532 (Fla. 1985). Contemporaneous construction and long acquiescence by the legislature in a particular construction are entitled to great weight. Johnson v. State, 91 So.2d 185 (Fla. 1957); Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815 (Fla. 1983).

Nonetheless, despite almost two decades of consistent construction by the DOI and by the appellate courts of this state, Respondent now suggests that this longstanding construction is "clearly erroneous". However, in this instance a plain reading of the statute suggests a contrary conclusion. Section 627.739 provides that the deductible reduces PIP "benefits otherwise due". Those benefits are defined in § 627.736 as including eighty percent of all medical expenses up

to a limit of $10,000. Thus, under a plain reading of the statute, the application of the deductible in 5627.739 reduces the benefits otherwise due in 5627.736 by the amount of the deductible.

Depending on one's point of view, it can conceivably be argued that either the decision of the Fourth District in Arnone v. International Bankers, 528 So.2d 917 (Fla. 4th DCA 1988), or those of the Third District and the Fifth District in Industrial Fire & Casualty Ins. Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978) and Thibodeaux v. Allstate Ins. Co., 391 So.2d 805 (Fla. 5th DCA 1980), represents a "more desirable" interpretation of the PIP Statute. But regardless of whichever interpretation one prefers, there is no denying that the statutory interpretation contained in Industrial Fire and Thibodeaux (which is also the longstanding interpretation of the DOI), is well within the range of "possible interpretation" of the determinative statute. And the reviewing court will always defer to an interpretation of an administrative agency that is within the range of possible interpretation. Natelson v. Department of Ins., 454 So.2d 31 (Fla. 1st DCA 1984), review denied, 461 So.2d 115 (Fla. 1985).

Obviously, an insured such as Respondent, who received the benefit of the lower premium that accrues under the Industrial Fire-Thibodeaux interpretation, might in the aftermath of an automobile accident suddenly prefer the increased medical benefit that accrues under the Arnone interpretation. But, in

the final analysis, the relative desireability of "lower premiums and lower benefits" (Industrial Fire and Thibodeaux) as opposed to "higher benefits and higher premiums" (Arnone) is a matter for legislative determination. Unless and until the legislature manifests a contrary intention, it is sufficient to conclude that the DOI's interpretation of the statute, in conformity with the Industrial Fire and Thibodeaux decisions, is well within the range of possible interpretation and must therefore be given all due deference by the Court.

C. The statutory interpretation of the Department of Insurance was implicitly affrimed bv the leaislature.

In this case, the carrier's argument is even more compelling because the legislature is presumed to have known the longstanding position of the DOI when the statute was reenacted in 1982 after extensive sunset review. "The legislature is presumed to have been aware of the Department's foregoing position. Not having thereafter amended the relevant legislation, the legislature may be considered to have thereby implicitly affirmed that position as reflecting legislative intent." Department of Revenue v. Bonard, 515 So.2d 358, 359 (Fla. 2d DCA 1987), review denied, 523 So.2d 576 (Fla. 1988), citing Johnson v. State, 91 So.2d 185 (Fla. 1957) and White v. Johnson, 59 So.2d 532 (Fla. 1952).

D. The legislature adopted the statutory construction of the Industrial Fire and Thibodeaux decisions when the PIP Statute was re-enacted in 1982 after extensive sunset review.

Prior to Arnone, Florida's PIP statute was always interpreted by appellate courts to allow for the reduction of maximum PIP benefits by the amount of the deductible. The cases of Industrial Fire & Casualty Ins. Co. v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1980) and Thibodeaux 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 amount of the deductible.

Absent a clear expression to the contrary, it is presumed that the legislature intended to adopt the judicial construction accorded by the Industrial Fire and Thibodeaux decisions when it re-enacted the PIP statute after extensive sunset review. 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).

> "[W]here 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, 556 (Fla. 1957). See ~~also~~, Delaney v. State, 190 So.2d 578 (Fla 1966); Collins Inv. Co. v. Metropolitan Dade County,, 164 So.2d 806 (Fla. 1964); Bermudez v. Florida Power and Light Co., 433 So.2d 565 (Fla. 3d DCA 1983), review denied, 444 So.2d 416 (Fla.

1984). A subsequent change in that construction can only be accomplished through legislation. Deltona Corp. v. Kipnis, 194 So.2d 295, 297 (Fla. 2d DCA 1966), citing Rabinowitz v. Keefer, 100 Fla. 1723, 132 So. 297 (1931) and Grimes v. State, 64 So.2d 920 (Fla. 1953).

Notwithstanding the above cited authorities, Respondent suggests that the legislature must be presumed to have been ignorant of the prevailing judicial construction placed on the PIP statute because the appellate cases construing same (Industrial Fire and Thibodeaux) were merely district court and not Supreme Court decisions.

However, decisions of the district courts of appeal represent the law of Florida, unless and until overruled by the Supreme Court. Stanfil v. State, 384 So.2d 141 (Fla. 1980). Therefore, the DOI was bound by Industrial Fire and Thibodeaux; Great Oaks and other insurers had every right to rely on those decisions; and the legislature must be presumed to have had knowledge of the rule of statutory construction contained therein. Certainly, this will not be the first case where the Supreme Court held that the legislature is presumed to be cognizant of the judicial construction of a statute by the district courts of appeal when contemplating changes to the statute. See, e.g., State v. Quigley, 463 So.2d 224, 226 (Fla. 1985); Adler-Built Indus., Inc. v. Metropolitan Dade County, 231 So.2d 197, 199 (Fla. 1970); Collins Inv. Co. v. Metropolitan Dade County, 164 So.2d at 809.

Given the fact that Industrial Fire and Thibodeaux represented the prevailing judicial construction at the time, the legislature must be presumed to have had knowledge of those decisions.

In Thibodeaux, the Fifth District Court of Appeal actually invited the legislature to amend the PIP Statute if in fact the result reached was not what the legislature had intended. Thibodeaux v. Allstate Ins. Co., 391 So.2d at 806. But, as previously stated, when presented with the opportunity to amend the statute in 1982, the legislature declined to accept that invitation and chose instead to maintain the present status of the law.[4/]

4/ Respondent seeks to refute this point by suggesting that Industrial Fire and Thibodeaux were merely district court decisions, and were "clearly erroneous." As such, Respondent argues that these decisions should have been ignored. But the illogical underpinings of Respondent's argument can be demonstrated by simply "turning the tables." Assume for a moment that the Third District in Industrial Fire and the Fifth District in Thibodeaux had ruled that PIP policy limits were not reduced by the amount of the deductible. Surely, automobile insurers in this state would have been bound by those decisions, and insureds such as Respondent would now be arguing, and correctly so, that the legislature's subsequent acquiesence to these decisions is a further manifestation of original legislative intent.

E. Failure to subsequently amend the statute reaffirms the original legislative intent that PIP deductibles may be applied to reduce coverage limits.

Respondent relies most heavily on the fact that the legislature in 1987 failed to enact HB 1015. Respondent suggests that the bill, as presented to the legislature, would have expressly authorized the reduction in PIP coverage limits by the amount of the deductible. And, Respondent argues, by not enacting this bill the legislature "refused to adopt the interpretation of the term 'benefits otherwise due' which is being urged upon this Court by the Petitioner." (Respondent's Brief p.10-11).

Admittedly, a subsequent legislative enactment (one which is approved by both houses of the legislature) may be indicative of prior legislative intent. Parker v. State, 406 So.2d 1089, 1092 (Fla. 1981); Gay v. Canada Dry Bottling Co., 59 So.2d 788, 790 (Fla. 1952). However, the mere introduction of a bill which is not enacted into law cannot be construed as manifesting legislative intent of anything. Indeed, in this instance the bill in question was never even considered by either the full House of Representatives or the Senate. (Appendix p.3). It is incredulous to suggest that a single House member who introduces new legislation to amend an existing statute many years after it was first enacted (or last re-enacted) can somehow dictate legislative intent as to the original enactment.

Although no decisive conclusion can be drawn from the non-enactment of legislation, in this instance if non-enactment means anything, it means that the legislature deemed the new legislation to be unnecessary given the existing status of the law as interpreted by the courts and the Department of Insurance.

Lastly, the Court should be aware that HB 1015 as originally presented to the Florida Legislature, provided that the application of the PIP deductible "shall not reduce the mandated coverage level." (Appendix p.1). In other words, as originally introduced, the bill would have "overruled" Industrial Fire and Thibodeaux, by providing express statutory authority for the rule of construction now being urged by the Respondent. In committee, the bill was amended to become CS/HB 1015, which struck the operative language in existing law that the amount of the deductible reduces "the benefits otherwise due." In addition, the amended bill (CS/HB 1015) struck all of the new language in the original bill and substituted instead language to the effect that the deductible "may be applied to reduce the $10,000.00 limit described in §627.736(1)." (Appendix p.2). Simply stated, the non-enactment of CS/HB 1015, which would have expressly allowed the reduction of coverage limits by the amount of the deductible is no more indicative of legislative intent regarding the underlying statute than the non-enactment of the original bill, HB 1015, which would have expressly prohibited the reduction of coverage limits by the amount of the deductible.

F. An ex post facto application of the Court's decision would result in a manifest inequity to insurers such as Great Oaks who relied in good faith on prevailing appellate and administrative interpretations of the PIP statute.

Respondent correctly states Petitioner's position that if the Court finds for Respondent in this case, it 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." (Respondent's Brief, p.12, quoting Petitioner's Brief, p.22).

However, Respondent tries to dissuade the Court from considering the merits of this position (and implicitly from considering the public policy ramifications of its decision) by arguing that the question of whether the premium charged would be inadequate to cover the insured risk was not raised as an issue with the trial court.

As a practical matter, only the Supreme Court can decide on grounds of public policy whether a new decision, (especially, one which resolves a conflict between district courts of appeal), should be limited to prospective as opposed to retrospective application. As such, this is not an issue that needs to be presented at the trial court level.

But, notwithstanding, in this case (despite Respondent's erroneous statement to the contrary), Great Oaks expressly presented the issue to the trial court in the form of a Memorandum in Support of its Motion for Summary Judgment. (R. 26-40). In part, the Memorandum stated as follows (Memorandum, P. 10, R. 35):

"Conversely, if the Court was to opt 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 approving 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. This would clearly be contrary to law and contrary to legislative intent."

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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CERTIFICATE OF SERVICE

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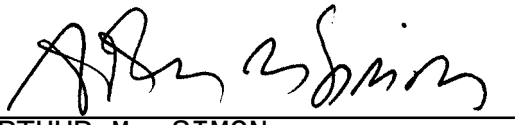
By: 
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