SUPREME COURT OF FLORIDA

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, et. al.,

Petitioners,

vs.

KUNBOK LEE, et. al.,

Respondents.

CASE NO. 86,969
DISTRICT COURT OF APPEAL
CASE NO. 94-2424

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

**BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS,
AMICUS CURIAE, IN SUPPORT OF RESPONDENTS' POSITION**

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TABLE OF CONTENTS

Table of Authorities 2

Statement of the Case and Facts 4

Issue Presented for Review 7

DID THE DISTRICT COURT RULE CORRECTLY WHEN IT RULED THAT THE LIMITATIONS PERIOD FOR AN ACTION FOR BREACH OF A CONTRACT TO PAY PERSONAL INJURY PROTECTION INSURANCE BENEFITS BEGINS RUNNING AT THE TIME OF THE BREACH, WHICH IS THE TIME THE INSURER FAILS TO PAY BENEFITS THAT ARE DUE?

Summary of Argument 8

Argument 11

Conclusion 21

Certificate of Service 22

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TABLE OF AUTHORITIES

CASES

CASE **PAGES**

Andriakos v. Cavanaugh,
350 So. 2d 561 (Fla. 2nd DCA 1977) 13

Donovan v. State Farm Mutual Automobile Insurance Company,
574 So. 2d 285 (Fla. 2nd DCA 1991) 19

Firemen's Insurance Company of Newark, New Jersey v. Olson,
176 So. 2d 594 (Fla. 3rd DCA 1965) 11

Fladd v. Fortune Insurance Company,
530 So. 2d 388 (Fla. 2nd DCA),
review denied, 539 So. 2d 475 (Fla. 1988) 15, 16, 18, 19, 20

Fradley v. County of Dade,
187 So. 2d 48 (Fla. 3rd DCA 1966) 11

Lee v. State Farm Mutual Automobile Insurance Company,
661 So. 2d 1300 (Fla. 3rd DCA 1995) 5, 12

Levy v. Travelers Insurance Company,
580 So. 2d 190 (Fla. 4th DCA 1991) 12, 13, 14, 15, 18, 20

Lewis v. Allstate Insurance Company,
425 So. 2d 100 (Fla. 1st DCA 1982) 13

Lumbermens Mutual Casualty Company v. August,
530 So. 2d 293 (Fla. 1988) 18

Mason v. Yarmus,
483 So. 2d 832 (Fla. 2nd DCA 1986) 11

Penthouse North Association, Inc. v. Lombardi,
461 So. 2d 1350 (Fla. 1984) 11

Roth v. State Farm Mutual Automobile Insurance Company,
581 So. 2d 981 (Fla. 2nd DCA 1991) 19

State Farm Mutual Automobile Insurance v. Chapman,
415 So. 2d 47 (Fla. 5th DCA 1982),
review denied, 426 So. 2d 29 (Fla. 1983) 13

State Farm Mutual Automobile Insurance v. Kilbreath,
419 So. 2d 633 (Fla. 1982) 15, 16, 18, 19

Williams v. Gateway Insurance Company,
331 So. 2d 301 (Fla. 1976) 14

STATUTES

STATUTE **PAGES**

Florida Statutes Section 95.11(2)(b) (1988) 5

Florida Statutes Section 627.730-7405 (1995) 17

Florida Statutes Section 627.733(3)(a)(1988) 13

Florida Statutes Section 627.736 (1988) 17

Florida Statutes Section 627.736(1) (1988) 17

Florida Statutes Section 627.736(4)(b) (1988) 12, 13

Florida Statutes Section 627.737 (1995) 17

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STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers files this brief as an amicus curiae in support of the respondents' position on review. The Academy adopts the statement of the case and facts in the petitioners' brief on the merits, subject to any additions, modifications or corrections the respondents may submit in their brief.

Since this case arose below as an appeal from an order dismissing the respondent's complaint against the petitioners, the complaint sets forth the relevant facts. The petitioners have attached a copy of the complaint to their appendix.

A minor, Minjung Lee, sustained serious injuries in a motor vehicle accident in Card Sound, Dade County, Florida on December 18, 1988. (Petitioners' Appendix 4-5). Minjung was hospitalized at Jackson Memorial Hospital for a time and then died from her injuries on January 23, 1989. (A.5). Jackson Memorial Hospital made a claim on a policy of personal injury protection (PIP) benefits issued by the petitioners to Minjung's parents, the respondents KUNBOK LEE and GISUN LEE. (A.5). Jackson made its claim on February 14, 1989. (A.5). On or about February 18, 1989, the petitioners denied the claim for PIP benefits. (A.17).

The respondents filed an action to collect PIP benefits under the policies the petitioners had issued. They filed their complaint on February 14, 1994. They thus filed within five years after the PIP claim was first made and within five years after it was denied, but over five years after Minjung's accident. The petitioners moved to dismiss the complaint on the ground that on its was barred on its face by the statute of limitations. (A.9). The petitioners did not contest the applicability of the five year statute of limitations provided for breach of written contract actions by Section 95.11(2)(b) of the Florida Statutes. Instead, they argued that the limitations period began running on the date of the accident, December 18, 1988, rather than on the date two months later when the PIP claim was denied. (A.9).

The trial court dismissed the complaint on the ground that it had been filed after the expiration of the limitations period. The district court reversed, holding that the limitations period ran from the time the insurer breached its contract of insurance by failing to pay the claim. Lee v. State Farm Mutual Automobile Insurance Company, 661 So. 2d 1300 (Fla. 3rd DCA 1995). The petitioners have sought review in this Court and have argued again that the limitations period should run from the date of the

accident even though the breach of the insurance contract by failure to pay does not occur until a later time.

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ISSUE PRESENTED FOR REVIEW

DID THE DISTRICT COURT RULE CORRECTLY WHEN IT RULED THAT THE LIMITATIONS PERIOD FOR AN ACTION FOR BREACH OF A CONTRACT TO PAY PERSONAL INJURY PROTECTION INSURANCE BENEFITS BEGINS RUNNING AT THE TIME OF THE BREACH, WHICH IS THE TIME THE INSURER FAILS TO PAY BENEFITS THAT ARE DUE?

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SUMMARY OF ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE LIMITATIONS PERIOD FOR AN ACTION FOR BREACH OF A CONTRACT TO PAY PERSONAL INJURY PROTECTION INSURANCE BENEFITS BEGINS RUNNING AT THE TIME OF THE BREACH, WHICH IS THE TIME THE INSURER FAILS TO PAY BENEFITS THAT ARE DUE, SINCE THAT IS WHEN THE CAUSE OF ACTION ACCRUES.

The district court correctly held that the limitations period for a cause of action to recover benefits under a policy of personal injury protection (PIP) insurance begins to run at the time the insurer fails to pay benefits that are due. The cause of action accrues only when the insurer breaches the insurance contract by failing to pay, so that is the appropriate time to begin the limitations period.

As a general rule, a cause of action for breach of a contract accrues at the time of the breach. Policies of PIP insurance are contracts. A cause of action for breach of a PIP insurance contract therefore accrues at the time of the breach.

By a statute that governs all PIP insurance contracts, the legislature has determined that PIP benefits are overdue if the insurer fails to pay within thirty days after receiving a written claim for benefits in proper form. A PIP insurer that pays a claim before the expiration of the thirty day period has not breached its

contract with the insured. If the insurer pays voluntarily before expiration of the thirty day period, the insured has no reason to bring an action against the insurer and no cause of action. If the insurer fails to pay within the thirty day period, however, the insurer breaches its contract at the end of the thirty day period and the insured then has a cause of action against the insurer. The time when the cause of action for PIP benefits accrues is therefore the time of the breach of contract, the expiration of the thirty day period.

The analysis in the preceding paragraph would not be subject to dispute except that a different rule applies in actions to recover uninsured motorist benefits. This Court has determined that a cause of action for uninsured motorist benefits stems from the insured's cause of action against the potential third party tortfeasor and therefore accrues at the same time as the cause of action against the tortfeasor. The causes of action against the tortfeasor and the uninsured motorist insurer both accrue at the time of the accident in which the tortfeasor injures the insured.

A claim for PIP benefits, however, unlike a claim for uninsured motorist benefits, does not depend on or derive from a cause of action against a potential tortfeasor. Indeed, an insured may recover PIP benefits even if there is no potential tortfeasor.

There is hence no reason to apply the special rule for uninsured motorist cases to PIP cases. A cause of action for PIP benefits, like other causes of action for breach of contract, accrues at the time of the breach.

The district court below correctly held that the limitations period for a cause of action for PIP benefits begins when the insurer breaches the contract by failing to pay benefits that are due. This Court should therefore approve the decision below and disapprove any decisions in conflict with it.

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ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE LIMITATIONS PERIOD FOR AN ACTION FOR BREACH OF A CONTRACT TO PAY PERSONAL INJURY PROTECTION INSURANCE BENEFITS BEGINS RUNNING AT THE TIME OF THE BREACH, WHICH IS THE TIME THE INSURER FAILS TO PAY BENEFITS THAT ARE DUE, SINCE THAT IS WHEN THE CAUSE OF ACTION ACCRUES.

In Florida, the limitations period for an action begins to run only when the cause of action has accrued. Penthouse North Association, Inc. v. Lombardi, 461 So. 2d 1350, 1352 (Fla. 1984). In a case arising from a breach of contract, the cause of action ordinarily accrues at the time of the breach. Firemen's Insurance Company of Newark, New Jersey v. Olson, 176 So. 2d 594, 596 (Fla. 3rd DCA 1965)(fire insurance policy); Fradley v. County of Dade, 187 So. 2d 48, 49 (Fla. 3rd DCA 1966); Mason v. Yarmus, 483 So. 2d 832, 833 (Fla. 2nd DCA 1986). Only at the time of the breach will an injured party be able to discover a violation of the contract and be able to seek redress by a civil action.

Several Florida appellate courts have applied this principle to cases arising from breach of a contract to provide personal injury protection (PIP) insurance benefits. The district court of appeal for the Fourth District has held that a cause of action

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against an insurer for failure to provide PIP benefits does not accrue until the injured party has made a written claim for PIP benefits and the insurer has failed to pay the claim within the time required by statute. Levy v. Travelers' Insurance Company, 580 So. 2d 190, 191 (Fla. 4th DCA 1991). The district courts for the Third and Fourth Districts have for that reason concluded that the limitations period in an action for PIP benefits does not begin to run until the PIP insurer has failed to pay a written PIP claim within the required time. Levy, 580 So. 2d at 191; Lee v. State Farm Mutual Automobile Insurance Company, 661 So. 2d 1300 (Fla. 3rd DCA 1995).

The court in Levy relied on the provision of the Florida Legislature as to when PIP benefits are overdue. Specifically, Section 627.736(4)(b) of the Florida Statutes provides that PIP benefits

> shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. ...
> F.S. s. 627.736(4)(b) (1988).

PIP benefits are thus overdue by statute only if the claimant furnishes the insurer a proper written notice of claim and the insurer fails to pay the claim within thirty days.

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An insurer selling a Florida motor vehicle insurance policy represented as providing PIP benefits must comply with the applicable statutes regulating PIP insurance regardless of any conflicting provisions in the policy. Andriakos v. Cavanaugh, 350 So. 2d 561, 563 (Fla. 2nd DCA 1977); State Farm Mutual Automobile Insurance Company v. Chapman, 415 So. 2d 47, 48 (Fla. 5th DCA 1982), review denied, 426 So. 2d 29 (Fla. 1983); Lewis v. Allstate Insurance Company, 425 So. 2d 100 (Fla. 1st DCA 1982); F.S. s. 627.733(3)(a)(1988). An insurer's failure to pay PIP benefits when they are due under Section 627.736(4)(b) is thus also a breach of the contractual terms of the PIP policy.

The court in Levy concluded that a cause of action for payment of PIP benefits does not accrue until the benefits are overdue, that is, until thirty days after the insurer has received a proper written claim. Until then, the insurer can comply with both its statutory and contractual obligations to pay PIP benefits by voluntarily paying the claim. If the insurer voluntarily pays within the thirty day period set forth in Section 627.736(4)(b), the insurer has not breached its contract to pay PIP benefits and no cause of action arises. If the insurer does not pay a properly presented PIP claim within the thirty day period, it breaches its contractual obligation to pay PIP benefits and the claimant's cause

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of action for breach of contract then accrues. See Levy, 580 So. 2d at 191. Since a cause of action for PIP benefits does not accrue until the insurer has failed to pay the benefits for over thirty days after receipt of a proper written claim, the limitations period in an action for overdue benefits also does not begin to run until the thirty day period has expired. Id.

The position of the district courts in Levy and the case under review not only follows the general rule concerning the beginning of the limitations period in breach of contract actions but also implements a sensible policy. An insured pays a premium in order to purchase insurance coverage. An insured who purchases coverage reasonably expects that the insurer will comply with the terms of the policy and applicable law and will voluntarily pay meritorious claims. As the petitioners themselves argue in their brief on the merits, the purpose of the statutes regulating PIP insurance is to encourage voluntary adjustment of claims rather than litigation. (Petitioners' Initial Brief at 6); Williams v. Gateway Insurance Company, 331 So. 2d 301, 303 (Fla. 1976). The insured has no reason to suspect that the insurer will violate the terms of the policy until the insurer fails to pay a claim. Not until the insurer denies the claim or the claim becomes overdue will the insured have any reason to know that the insurer has breached its

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contract or have any reason to take legal action. Until the insured has given the insurer the statutorily and contractually required opportunity to pay the claim voluntarily, any legal action would be premature and wasteful. The rule that best fosters respect for the rights of the insured as well as efficiency and judicial economy will be the rule articulated in Levy and the case below, that the cause of action for PIP benefits does not accrue until they are statutorily and contractually overdue.

The petitioners rely on the decision of the district court of appeal for the Second District in Fladd v. Fortune Insurance Company, 530 So. 2d 388 (2nd DCA 1988), review denied, 539 So. 2d 475 (Fla. 1988). The court in Fladd held that a cause of action for breach of a contract to pay PIP benefits accrued even before the breach occurred. The court held that a cause of action for PIP benefits accrued not when the PIP benefits were overdue or when the insurer denied the claim but instead when the insured was injured in a motor vehicle accident.

The court in Fladd acknowledged but rejected the argument that a cause of action for PIP benefits did not accrue until the benefits were overdue. Fladd, 530 So. 2d at 389. The court instead relied on a case from this Court dealing with uninsured motorist insurance policies. In State Farm Mutual Automobile Insurance

Company v. Kilbreath, 419 So. 2d 632 (Fla. 1982), the Court had held that a cause of action for benefits under a policy of uninsured motorist insurance accrued at the time the insured was involved in a motor vehicle accident. The district court in Fladd concluded without extensive analysis that the limitations period for actions to recover PIP benefits should run from the same date as the limitations period for actions to recover uninsured motorist benefits. In so doing the court in Fladd failed adequately to consider the differences between PIP claims and uninsured motorist claims and therefore misapplied Kilbreath.

This Court in Kilbreath reasoned that the uninsured motorist statutes give insureds the same cause of action against uninsured motorist insurers that they have against the tortfeasors who cause their injuries. Kilbreath, 419 So. 2d at 634. An insured's cause of action for uninsured motorist benefits therefore derives from the insured's cause of action against the tortfeasor. Id. at 633. Since the cause of action for uninsured motorist benefits derives from the cause of action against the tortfeasor, the Court concluded that both causes of action accrue at the same time. The cause of action for uninsured motorist benefits, like the cause of action against the tortfeasor, therefore accrues at the time of the accident.

A insured's claim for PIP benefits, unlike a claim for uninsured motorist benefits, does not derive from a claim against any potential tortfeasor. The statutes governing PIP insurance provide that PIP benefits are payable for

> bodily injury, sickness, disease or death arising out of the ownership, maintenance or use of a motor vehicle ...
>
> F.S. s. 627.736(1)(1988).

Nowhere do Section 627.736 or the other statutes governing PIP insurance provide that PIP coverage in any way depends on the existence of a third party tortfeasor or on the potential tort liability of any person. F.S. ss. 627.730-627.7405 (1995). Indeed, the statutes specify circumstances where a claimant can recover only PIP without having any right of action in tort. F.S. s. 627.737 (1995). An insured's right to PIP benefits arises from the contract of insurance with the PIP insurer and the statutes governing that contract, whether or not any third party may be liable in tort for the insured's injuries.

Since a claim for PIP benefits neither stems from or depends on any tort claim, there is no reason to tie the accrual of a cause of action for PIP benefits to the accrual of a cause of action in tort. Nothing about PIP claims justifies deviating from general rule that a cause of action for breach of contract accrues at the

time of the breach. The Third District below and the Fourth District in Levy therefore correctly declined to apply Kilbreath to PIP claims, while the Second District in Fladd erroneously applied Kilbreath.

The petitioners rely on this Court's holding in Lumbermens Mutual Casualty Company v. August, 530 So. 2d 293, 295 (Fla. 1988) that the contract rather than the tort statute of limitations applies to actions for uninsured motorist insurance. The petitioners correctly state the holding of August, but August has nothing to do with the rule set forth in Kilbreath. The Court in Kilbreath created a special rule to determine when the limitations period began to run in actions for uninsured motorist insurance because the cause of action for uninsured motorist insurance derives from the insured's cause of action against the tortfeasor. The holding in Kilbreath does not depend on whether an action for uninsured motorist benefits sounds in tort or contract, but instead relies on a principle that where one cause of action derives from another, the two causes of action accrue at the same time. Kilbreath does not apply to actions for PIP benefits because PIP actions, unlike actions for uninsured motorist insurance, do not depend on or derive from the existence of a cause of action against a potential tortfeasor. The inapplicability of Kilbreath to PIP

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actions thus has nothing to do with whether actions for uninsured motorist insurance sound in tort, contract, or both.

The Second District itself has limited the scope of Fladd. In cases where a PIP insurer pays benefits for a time but then refuses further benefits, the Second District concedes that the insured's cause of action accrues at the time of the insurer's refusal to pay further benefits, even if that refusal occurs years after the accident causing the injuries. Donovan v. State Farm Fire and Casualty Company, 574 So. 2d 285, 286 (Fla. 2nd DCA 1991); Roth v. State Farm Mutual Automobile Company, 581 So. 2d 981, 982-83 (Fla. 2nd DCA 1991); See Fladd, 530 So. 2d at 391n.1.

A cause of action for PIP benefits, like most other causes of action for breach of contract, accrues at the time of the breach. In the case of PIP claims the breach occurs when the benefits are overdue, which occurs if the insurer fails to pay for thirty days after receipt of a proper written claim. The limitations period in PIP cases therefore begins running at the time of the breach, when the benefits are overdue. The special rule for uninsured motorist insurance cases set forth in Kilbreath does not apply to PIP cases, since PIP coverage, unlike uninsured motorist coverage, does not derive from any potential tort claim against a third party. The

Court should therefore approve the decisions below and in Levy and should disapprove Fladd.

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CONCLUSION

For the reasons argued above, the Court should approve the decision below and disapprove decisions in conflict with it.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae Academy of Florida Trial Lawyers was mailed this 22nd day of January, 1996, to: John W. Reis, Esquire, SPARKMAN, ROBB, NELSON and MASON, P.A., counsel for Petitioners, 19 West Flagler Street, Suite 1003, Miami, Florida 33130 and on Robert Rosenblatt, counsel for Respondents, Concord Building, Penthouse, 66 West Flagler Street, Miami, Florida 33130-1807.

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