

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1649

L.T. NO. 98-03337

LILIANA CAHUASQUI,

Petitioner,

vs.

U.S. SECURITY INSURANCE CO.,

Respondent

**AMICUS BRIEF OF
THE ACADEMY OF FLORIDA TRIAL LAWYERS**

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STATEMENT OF INTEREST OF AMICUS

This case presents an important question about the PIP system and the right of access to courts which has divided the lower courts: whether the offer of judgment / proposal for settlement statute applies in PIP cases. The trial court certified this issue as one of great public importance; the Third District accepted it as a question of great public importance; and the Academy of Florida Trial Lawyers agrees. The Academy expects the decision in this case to affect many, if not most, PIP cases. The decision in this case will affect every decision and recommendation our members will make regarding settlement of PIP cases.

The Academy of Florida Trial Lawyers is a large voluntary statewide association of trial lawyers specializing in litigation in all areas of the law. Many Academy members represent claimants in PIP cases. For many of these clients, PIP is an important resource, or the only resource, available to obtain medical treatment for their injuries, or to compensate for lost wages needed to obtain such basics as shelter and food.

The lawyer members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The Academy has been involved as amicus curiae in cases in the Florida appellate courts and this Court involving all aspects of the tort and insurance systems, including the PIP system, as

well as numerous cases involving the right of access to courts, including the present case when it was presented to the Third District.

The Academy agrees with the parties, and with the District Court, that this is a matter of great public importance. The issue arises frequently and, at least until the decision below, the lower court opinions were conflicting.

The Academy believes its input may assist the Court in resolving the issues raised in this case, and that this Court's decision will have a tremendous impact on its members and their clients.

STATEMENT OF FACTS

The Third District, in its Corrected Opinion, held that U.S. Security Insurance Co. was entitled to fees under the Offer of Judgment Statute, §768.79, Florida Statutes, and Fla. R. Civ. P. 1.442, because Ms. Cahuasqui, a PIP claimant, had rejected U.S. Security's offer made under the statute, and U.S. Security had defeated her PIP claim. U.S. Security Insurance Co. v. Cahuasqui, 760 So.2d 1101 (Fla. 3d DCA 2000). According to Ms. Cahuasqui's answer brief filed below, Ms. Cahuasqui had claimed coverage for medical bills in the amount of \$11,967.50, and lost wages totaling \$2,028.00. She had rejected U.S. Security's offer to pay only \$1,501.00.

SUMMARY OF THE ARGUMENT

The Offer of Judgment / Proposal for Settlement statute does not and cannot apply in PIP cases.

The no fault system was carefully designed to provide prompt payment of expenses to accident victims. While taking away their right to sue the tortfeasor in some cases, the legislature gave the victims the right to prompt payment from their own insurer. It armed the insured with the right to court awarded attorney's fees to ensure enforcement of that right.

The PIP statute specifically provides that fees in PIP cases shall be awarded in accordance with §627.428. That specific statute controls over the more general provisions of §768.79, which applies in civil actions generally. Moreover, §768.71(3) provides that, when a provision of that part of Chapter 768 conflicts with another statute, the other statute controls. And application of the offer of judgment statute in PIP cases would be contrary to the purpose of the PIP statute, to provide “swift and virtually automatic” payment of benefits, and to discourage insurance companies from contesting valid claims by awarding fees to insureds but not to insurers.

The offer of judgment statute cannot constitutionally apply in PIP cases. The Legislature cannot take away a common law right without providing a reasonable alternative. In enacting the PIP system, the Legislature took away the injured insured's right to sue the tortfeasor in some circumstances. In exchange, the insured got the right to prompt and virtually certain recovery of expenses from the PIP insurer. Application of the offer of judgment statute makes that “quid pro quo” no

longer prompt and no longer certain. It would make the legislative alternative to a tort suit inadequate and unreasonable by giving the insured less than the coverage she paid for, in exchange for her right to sue in tort.

An insured who has paid premiums to obtain prompt payment of benefits without litigation, who has been injured and has incurred medical bills and lost wages, should not be compelled either to accept less than she paid for or to risk becoming obligated to pay the insurance company's attorneys' fees.

ARGUMENT

The Offer of Judgment Statute Does Not, and Constitutionally Cannot, Apply in PIP Cases

The application of the offer of judgment statute to award fees to an insurer from a PIP insured is contrary to both the express language and the intent of the PIP statute, and violates the right of access to courts provision of Article I, section 21 of the Florida Constitution.

The PIP statute, §627.736(8) provides:

Applicability of provision of regulating attorney's fees.--With respect to any dispute under the provisions of ss. 627.730-627.7405 between the insured and the insurer, the provisions of §627.428 shall apply.

Section 627.428(1), the insurance attorney's fees statute, provides:

Upon the rendition of a judgment or decree in any of the courts of this state against an insurer and in favor of any named or omnibus insured ... the trial court... shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or

compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had.

The Offer of Judgment Statute, §768.79, provides, in part:

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees...if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer...

Article I, §21 of the Florida Constitution guarantees:

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

A. The Offer of Judgment / Proposal for Settlement Statute does not Apply in PIP Cases.

Basic rules of statutory construction and interpretation compel a finding that the offer of settlement statute does not apply in PIP suits.

Florida's Motor Vehicle No-Fault Law is contained in §§627.730 through 627.7405 of the Florida Statutes. The no fault law has its own provision on attorney's fees, §627.736(8), which specifically provides that, in disputes between the insured and insurer in PIP cases, "the provisions of §627.428 shall apply."

The language of the statute is plain, clear and unambiguous - the statute expressly refers to only section 627.428 as applicable "with respect to any dispute under the provisions of §§627.730 - 627.7405 between the insured and the insurer."

The PIP statute does not include the general offer of settlement statute as applicable in PIP benefits disputes between insured and insurer.

Under the doctrine of inclusio unius est exclusio alterius, the legislature's express inclusion of only a particular item or situation mandates an inference that what the legislature did not include by specific reference was intended to be omitted or excluded. Industrial Fire & Casualty Insurance Co. v. Kwechin, 447 So.2d 1337, 1339 (Fla. 1983).

A specific statute addressing a narrow class of cases governs over a general statute. The more specific statute is considered an exception to the general terms of the more comprehensive statute. McKendry v. State, 641 So.2d 45, 46 (Fla. 1994).

For example, in Rollins v. Pizzarelli, 761 So.2d 294 (Fla.1999), the Supreme Court followed the Fourth District's application of the more specific no-fault statute rather than the general collateral source statute on the question of setoffs reducing jury's award of future medical benefits by remaining PIP benefits. (The Supreme Court did, however, disagree with the Fourth District's interpretation of that more specific statute). Similarly, in Foreman v. E.F. Hutton & Company, Inc., 568 So.2d 531 (Fla. 3d DCA 1990), this Court held that a specific statute governing fee awards in RICO cases controlled over the general statute applicable to fee awards in any civil action found to have been brought frivolously or in bad faith.

Here, a specific statute covering a particular subject area, attorney's fees for insurance claims, should control over a general statute covering the same and other subjects in more general terms, attorney's fees in all civil actions.

Furthermore, the Legislature, in enacting §627.736(8), must have intended something more than just to make §627.428 apply in PIP cases. By its plain terms, §627.428 already applies in PIP cases, as it does in any other dispute between an insured and an insurer. The additional language in §627.736(8) is not necessary to make it apply. Therefore, the Legislature must have intended something more: it must have intended §627.428 to be the only attorney's fees statute to apply in PIP cases. Otherwise, the language is superfluous.

Moreover, the Legislature has expressed its intent that the offer of settlement statute not prevail over the more specific attorneys' fees statute. The offer of settlement statute, section 768.79, Florida Statutes, is part of Chapter 768. Section 768.71(3), Florida Statutes, states:

If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply.

See generally, e.g., Frazier v. Metropolitan Dade County, 701 So. 2d 418 (Fla. 3d DCA 1997) (applying §768.71(3) to require that provisions of wrongful death act prevail over provisions of §768.81).

Thus, while the insurer and the District Court below placed great emphasis on the seemingly all-inclusive language of the offer of settlement statute, "In any civil action for damages filed in the courts of this state," that language is necessarily tempered by the caveat in section 768.71(3).

U.S. Security argued below, and the Third District found, that to fail to apply §768.79 to PIP cases would "render useless" the language at the beginning of §768.79(1), which begins, "in any civil action for damages filed in the courts of this state ...". But that language must be read in the context of §768.71(3). Section 768.71(3) makes the sections which follow it inapplicable if they conflict with any other statute. U.S. Security's argument would "render useless" the language in §768.71(3).

When the Legislature added that language to §768.79 in 1990, it did not repeal §768.71(3). Contrary to U.S. Security's argument, it would make the most sense to construe the language as pertaining only to "any civil action for damages" where another statute does not conflict. If the Legislature had intended to repeal §768.71(3), it would have said so.

Read together, the two statutes (§768.71(3) and §768.79) mean that §768.79 applies to all civil actions for damages filed in the courts of this state, unless, in a particular case, it conflicts with another statute. If §768.79 conflicts with another statute, the other statute governs.

Certainly, the Legislature has had plenty of opportunities to amend the PIP fee provision, §627.736(8), to include a reference to the offer of settlement statute if the offer of settlement statute were in fact intended to apply "with respect to any dispute under the provisions of §627.736 - 627.7405 between the insured and the insurer." The Legislature has not taken this step, and for good reason. As we discuss in point B, to do so would be a denial of the constitutional right of access to courts.

Moreover, application of §768.79 to PIP cases would defeat the purpose of the attorney's fees provision of the PIP statute -- to give the insured, economically weakened by medical bills and lost wages, the financial power to contest the denial of a valid claim. U.S. Security would have this Court ignore the vast disparity in power and resources between the insured and the insurer, which so obviously influenced the Legislature when it passed §627.736(8) and §627.428, allowing fee awards to a prevailing insured, but not to a prevailing insurer.

These statutes create a "one-way street offering the potential for attorneys' fees only to the insured or beneficiary." Danis Industries v. Ground Improvement Techniques, Inc., 645 So.2d 420 (Fla. 1994); Nationwide Mut. Fire, Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 55, 59 (Fla. 2000).

The purpose of §627.428 is to "discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts."

Ins. Co. Of North America v. Lexow, 602 So. 2d 528, 531 (Fla. 1992); Danis Industries, 645 So.2d at 421.

This Court recently reiterated that purpose in Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So.2d 55, 59 (Fla. 2000). The Court noted there that PIP insureds enjoy a “one way street” on attorney’s fees. It held that a provision substituting “prevailing party” fees when a health care provider accepts an assignment of benefits “does nothing to further the prompt payment of benefits or to discourage insurers’ denials of valid claims” 753 So. 2d at 59. Thus, this court recognized that allowing the award of fees to PIP insurers violates the purpose and intent of the PIP statute.

The disparity in power and resources of insureds and insurers means that the offer of judgment statute would have a much greater impact on a PIP insured than it does on an insurer. To use an example posited by U.S. Security in its brief in the District Court: Suppose the medical bills in a PIP case total \$5,000 after applying the deductible and co-payment, and the insurer offers \$4,000 to settle. U.S. Security contends that the insured only needs to recover a judgment of \$3,001.00 to avoid having to pay the insurance company’s fees. But suppose, in addition, that the insured has a very good case against the insurance company, but works at Burger King and has very minimal resources. Any risk of having to pay the insurance company’s attorney’s fees, no matter how unlikely that risk is, would be frightening

to that insured. The insured may not be willing — or able — to take that risk. So the insured may settle for less than the amount she is owed, and be stuck with a \$1,000 bill from her doctor — on top of her deductible — that she cannot pay.

Instead of buying protection with her PIP policy, she has bought devastating debt.

At the same time, the insured cannot effectively use \$768.79 against the insurer. The insurer's situation would be the same whether it accepts or rejects an offer of judgment. The insurer is already going to be liable to the insured for attorney's fees if the insured prevails. If the insured does not prevail, the insurer will not have to pay fees under either statute. No insurance company is ever going to be impressed or affected by any offer an insured may make under the offer of judgment statute.

Allowing insurance companies to make offers of judgment under the statute in PIP cases will not reduce litigation. There still will be plenty of litigation. The only difference will be that the insureds will be the defendants, in cases brought by their health care providers for unpaid bills. Litigation by health care providers for unpaid bills is exactly what PIP is supposed to prevent. People like Ms. Cahuasqui will be subjected to such litigation, even though they paid for PIP coverage to protect them from exactly that problem.

That is not how PIP is supposed to work.

U.S. Security says good public policy justifies the application of the general offer of settlement statute to PIP suits. They argue that PIP suits are motivated by fees and the offer of settlement statute will deter this motive. They also argue the offer of settlement statute will help to dissuade frivolous lawsuits.

Scottsdale Insurance Company v. DeSalvo, 748 So. 2d 941 (Fla.1999) eliminates any fee-driven motive. Under DeSalvo, the PIP carrier's exposure to attorney's fees to its insured stops from the point in the litigation when the carrier makes "the first offer of settlement which exceeds the recovery amount, including the damage award and attorney's fees, costs, and interest the insured would have received if the insured had accepted that offer of settlement on the date it was made." *Id.*

Unlike the result reached by this Court in DeSalvo, application of the offer of judgment statute in the context of a PIP claim, or any other claim under §627.428, creates a one-way street going the wrong way. An insurer may create pressure on an insured to settle by making an offer of judgment and imposing on the insured the risk of attorney's fees. But the insured does not get the same power from the offer of judgment statute. Such a result is contrary to the language and purpose of the PIP statute and §627.428. Section 768.79 should not be applied in those cases.

B. Applying §768.79 in PIP Cases Would Constitute an Unconstitutional Denial of Access to Courts by Eliminating the “Quid Pro Quo” of Prompt and Virtually Automatic Payment of Medical Bills and Expenses, Promised in Exchange for the Right to Sue the Tortfeasor.

The majority below held that applying the offer of judgment statute in PIP cases would not be an unconstitutional denial of access to courts because “attorney’s fees provisions, which place a ‘price tag’ on unsuccessful claims, do not violate the right of access to courts.” U.S. Security Insurance Co. v. Cahuasqui, 760 So.2d 1101 (Fla. 3d DCA 2000). The majority’s analysis overlooked an important point. It is not merely the existence of the attorney’s fees provision, but the interaction of that provision with the PIP statute, that creates the unconstitutional burden on the right of access to courts. The legislature in the PIP statute already has taken away the right to sue in tort. Instead, it substituted what was supposed to be the prompt and virtually automatic payment of important out-of-pocket expenses under the PIP system. Applying the offer of settlement statute to PIP suits makes those payments no longer prompt, and no longer automatic. It has an unconstitutional chilling effect on the already limited access to courts.

Article I, §21 of the Florida Constitution guarantees:

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This provision means that, where a right of access to courts for redress of a particular injury is a part of the common law of the state, the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

The right to sue in tort for damages suffered in an automobile accident was long established under the Florida common law.

In Lasky v. State Farm Ins. Co., 296 So. 2d 9, 15 (Fla. 1974), this Court held the PIP statute constitutional because:

In exchange for the loss of a former right to recover — upon proving the other party to be at fault — for pain and suffering, etc., in cases where the thresholds of the statute are not met, the injured party is assured a speedy payment of his medical bills and compensation for lost income from his own insurer, even where the injured party was himself clearly at fault.

Were it not for the requirement of "swift and virtually automatic payment", see Ivey v. Allstate, 774 So.2d 679, (Fla. 2000), the no fault scheme, by taking away the

right to sue in tort, would violate the right of access to courts under Article I, §21, Florida Constitution. Compare Lasky, supra. with Kluger v. White, 281 So. 2d 1 (Fla. 1973) (property damage provision of no fault statute unconstitutional denial of access to courts where no provision for prompt recovery from own insurer).

The intent of the no-fault statute is "to guarantee swift payment of PIP benefits." Crooks v. State Farm Mutual Auto. Ins. Co., 659 So. 2d 1266, 1268 (Fla. 3d DCA 1995); Ivey, supra. The no-fault law was enacted to provide an alternative to litigation of the less serious claims resulting from motor vehicle accidents. Prior to the enactment of the no-fault law, claimants were entitled to sue in tort regardless of the amount of the claim or the insurance coverage of either party. The enactment of the no-fault statute provided for immunity from certain tort claims, and set up a system of insurance coverage regardless of fault for such claims. Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974).

The law requires the owner of a motor vehicle to maintain security, by insurance or otherwise, for the payment of no-fault benefits. 296 So. 2d at 13. If the owner does not maintain the required security, he is not entitled to immunity. 296 So. 2d at 14.

In exchange for the loss of the right to sue in tort, the accident victim received the right to "the *speedy* payment by his own insurer of medical costs, lost wages, etc. ..." 296 So. 2d at 14. (emphasis added). While there were also other benefits

conferred by the statute, it was this "prompt recovery of his major, salient out-of-pocket losses" that was the heart of the benefits conferred on the claimant. *Id.*

"[T]he foundation of the legislative scheme is to provide *swift and virtually automatic payment* so that the injured insured may get on with his life without undue financial interruption" Government Employees Ins. Co. v. Gonzalez, 512 So. 2d 269, 270 (Fla. 3d DCA 1987)(emphasis added); Ivey v. Allstate, *supra*. As this Court recognized in Industrial Fire & Casualty Insurance Co. v. Kwechin, 447 So.2d 1337, 1339 (Fla. 1983), central to the earlier decision in Lasky to uphold the no-fault law was the assurance that persons would in fact receive "some economic aid in meeting their medical expenses and the like, in order not to drive them into dire financial circumstances ..."

Application of the offer of judgment statute to PIP claims would vitiate the requirement that payment be "swift" and "virtually automatic." It would place an alarming obstacle in the way of an insured seeking payment of a PIP claim. Indeed, many insureds would likely give up their valid PIP claims rather than face the risk of having to pay the insurance company's attorney's fees should they be unsuccessful.

No matter how meritorious the insured's claim against her PIP insurer may be, there is a substantial risk inherent in our jury system. No realistic attorney, claimant or judge can predict the outcome with any true probability. The result is that reasonable-minded PIP claimants will be forced to accept offers of settlement that do

not cover their out-of-pocket medical or other expenses that PIP was designed to cover — not because they think that is all they deserve — but because they do not want to run the risk of attorney fee exposure.

The courts have found that even nominal offers can serve as the basis of an award of attorney's fees after a defendant insurer prevails. See, e.g., Fox v. McCaw Cellular Communications, 745 So.2d 330 (Fla. 4th DCA 1998) (\$100.00 offer); Weesner v. United Services Auto. Ass'n, 711 So.2d 1192 (Fla. 5th DCA 1998) (\$100.00 offer); State Farm Mutual Auto Ins. Co. v. Marko, 695 So.2d 874 (Fla. 2^d DCA 1997) (\$1.00 offer). A financially struggling insured, faced with some kind of coverage defense, might forego entirely the PIP to which she is entitled, rather than risk entry of judgment against her for a large award of fees.

A PIP claimant should not have to compromise or give up PIP benefits simply because of the risk that if she does not prevail on a meritorious claim she will have to pay attorney's fees to her PIP carrier - a financial exposure which could far exceed the amount of benefits in dispute. Few reasonable persons would take that financial risk. The law should not place PIP claimants in that dilemma when the law has already restricted the claimant's right of access to courts to seek redress against the tortfeasor. PIP claimants should not be intimidated from pursuing the alternative remedy the Legislature gave them.

When swift economic aid from the PIP carrier, which was the quid pro quo for taking away access to courts, is not forthcoming, the insured has no choice but to sue his PIP carrier for it. He cannot sue the tortfeasor. The no fault law has denied that access to court. Applying the offer of settlement statute to PIP cases has a chilling effect on the PIP insured's already limited access to court to recover his economic losses from an automobile accident.

Application of the offer of judgment statute to PIP cases would render that assurance of speedy payment hollow. Application of the offer of judgment statute makes the payment no longer swift and no longer certain. PIP insureds, who are likely to be financially strapped as a result of the accident, loss of work, and payment of their deductibles, will be unduly pressured to accept offers for less than the amount they are entitled to, because even if the risk of losing were slight, the consequences of losing would be so devastating. The result would deny insureds access to courts just as surely as if the insurer were standing in the courthouse door.

The unequal economic power of an insurance company and the injured insured should not be casually shrugged off. The Legislature was well aware of this imbalance when it enacted §627.736(8) and §627.428, allowing fees only to the insured. As this Court pointed out in Ivey:

Florida law is clear that in 'any dispute' which leads to judgment against the insurer and in favor of the insured, attorney's fees shall be awarded

to the insured. See §§627.736(8), 627.428(1). ... That is, under PIP law, the focus is outcome-oriented. If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees.

774 So.2d at ___. At least one appellate judge has recognized that a gross imbalance in the impact of the offer of judgment statute may violate Article I, §21. See Fox v. McCaw Cellular Communications of Florida, Inc., 745 So.2d 330, 339 (Fla. 4th DCA 1998) (Klein, J., concurring). Article I, §21, does not permit this Court to ignore the very real impact §768.79 has on the ability of injured insureds with legitimate claims to recover the benefits due them.

The Legislature can only take away a right to sue if the alternative it provides is "reasonable". Kluger, 281 So.2d at 5. Taking away the right to sue in exchange for a right to recover only a fraction of the benefits for which one has paid premiums is not "reasonable."¹ Allowing the use of the offer of judgment statute in a PIP case would thus violate the right of access to courts.

¹ This is not the same as allowing an insured to purchase PIP coverage with a substantial deductible. An insured who chooses PIP with a large deductible has paid a lower premium. Here, an insured has paid a full premium for full coverage, but is not receiving what she paid for as a result of the insurer's skillful use of the offer of judgment statute.

C. The Offer of Judgment Statute Cannot Be Harmonized With the Insurance Attorney's fees Statute in a PIP Case.

U.S. Security argued below, and the District Court found, that the two statutes can be harmonized. The court failed to consider the effect of the offer of judgment statute in a variety of factual scenarios. It also ignored the fundamental difference between PIP cases and other cases.

The District Court's opinion did not carefully examine the entire statutory scheme of §768.79. It also failed to consider what happens under the statutes, from the perspective of a prevailing plaintiff. If it had done so, it would have seen that the conflict between that statute and §627.428, as incorporated into the PIP statute, is hopeless.

There are at least three likely circumstances in which the statutes cannot be reconciled: (1) an insured serves a demand for judgment, prevails at trial, and recovers a judgment at least 25% greater than the demand; (2) an insured serves a demand for judgment, prevails at trial, but fails to recover a judgment at least 25% greater than the demand; and (3) a defendant insurer serves an offer of judgment, the plaintiff prevails at trial, but the plaintiff's judgment was at least 25% less than the offer.

In all three of these situations, *the plaintiff prevailed at trial*. Under the plain language of §627.428, the plaintiff would be entitled to an award of *all* her attorney's fees incurred since the filing of the suit. If §768.79 applies, however, the result in

each case would be entirely different. In the first example, the plaintiff would only be entitled to recover fees “from the date the offer was served” under §768.79(6)(b), not all of her fees as under §627.428. In the second example, the plaintiff would be entitled to recover *no* fees.² And, in the third example, the plaintiff not only would be deprived of an award of fees, but would be required to pay the defendant insurer’s attorney’s fees as well.

These results for a prevailing plaintiff insured under §768.79 cannot be reconciled with §627.428 or with the PIP statute.

Moreover, any discussion of whether the PIP statute conflicts with any other statute must contemplate this basic premise: In PIP cases, the legislature has taken away the insured’s right to sue the tortfeasor. The only reason that this is allowable under the constitution is that the insured is guaranteed prompt and almost certain payment of her medical bills and lost wages by her own insurer. Any statute which interferes with that guarantee conflicts with the basic purpose of the PIP statute. As this Court recognized in Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 55 (Fla. 2000), allowing fees to a prevailing insurer is contrary to the purpose of the PIP statute to encourage prompt payment of benefits and to discourage denial of valid claims.

² These results make the offer of judgment statute useless to claimants, as we noted on p.11, *supra*.

Thus, even if it were correctly decided — which we do not concede — Weesner v. United Services Auto. Ass’n, 711 So.2d 1192 (Fla. 5th DCA 1998) is inapposite. Weesner involved uninsured motorist coverage, not PIP coverage. Nor are other cases, in which the courts have harmonized different statutes, applicable here. In none of those cases did the application of one statute undermine the most basic principles underlying the other statute.

Far more analogous is Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997). In Moran, the plaintiff brought an action under 42 U.S.C. §1983, a part of the Civil Rights Act. The defendant filed an offer of judgment, which the plaintiff declined. The court then granted summary judgment in favor of the defendant. The defendant moved for attorneys’ fees and costs pursuant to Fla. R. Civ. P. 1.442 and §768.79, which the trial court granted. The Second District reversed. The court held that the statute conflicted with the Civil Rights Attorney’s fees Awards Act of 1976, 42 U.S.C. §1988. Section 1988 is construed to provide that “a prevailing defendant may recover an attorney’s fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.” 694 So.2d at 886. The court in Moran held that, “because section 1988 allows the award of attorney’s fees to prevailing defendants in a much more limited context than does section 768.79(1), section 1988 preempts section 768.79(1).” 694 So.2d at 887.

In so ruling, the Second District must have realized that Congress was cognizant of the very real imbalance of power between plaintiffs and defendants in civil rights cases when it passed §1988. The Civil Rights Attorney's fees Awards Act was intended to correct that imbalance of power and encourage plaintiffs to pursue their civil rights. See In re: Estate of Smith, 644 So. 2d 158, 159 (Fla. 4th DCA 1994). To allow application of the offer of judgment statute in that situation would have undermined the basic purpose of the attorney's fees statute.

The Fifth District in Clayton v. Bryan, 753 So. 2d 632 (Fla. 5th DCA 2000) followed Moran and held that the offer of judgment statute could not be applied to award fees to a defendant in an action under the Federal Fair Debt Collection Practices Act, 15 U.S.C. §1692. The federal statute allowed fees to a prevailing defendant only if the plaintiff brought the suit in bad faith to harass the defendant. The court held that to allow fees to the prevailing defendant under §768.79, when the plaintiff did not bring the suit in bad faith, would be contrary to the federal statute. The court did not reconcile the two statutes.

Similarly, in the present case, application of the offer of judgment statute in a PIP case would undermine the basic purpose of the PIP statute. The insured could not proceed without facing the threat of having to pay the insurer's attorney's fees.

This is a far greater threat than the possibility of not recovering all of her own attorney's fees, as in Danis Industries Corp. v. Ground Improvement Techniques,

Inc., 645 So.2d 420 (Fla. 1994) or Scottsdale Ins. Co. v. DeSalvo, 748 So.2d 941 (Fla. 1999). A PIP insured whose attorney takes the case on a contingency fee basis — almost always for a court awarded fee — usually will not be obligated to pay the attorney if the recovery of fees from the insurance company is limited under Danis or Scottsdale.³ That is far less of a risk to the insured than application of the offer of judgment statute. Under the offer of judgment statute, the insured will have to pay the insurer's attorney, as well as the health care provider.

The trial court's power under the statute to consider certain factors in determining the amount of the fee is small comfort to an insured, injured and obligated to pay medical bills, facing an unknowable exercise of discretion by a trial judge at some unknown future date. The statute does not permit a trial court to deny a claim for fees entirely. TGI Fridays, Inc. v. Dvorak, 663 So.2d 606, 613 (Fla. 1995). Even a small award of fees to an insurer can exceed the amount of a PIP claim. Even a small award of fees can be devastating to an insured who has been injured, who has lost a paycheck, and who does not have the funds to pay those fees. The PIP statute was never intended to leave an insured, who has a legitimate claim, the choice of either accepting less than the insurance company owes, or litigating with the sword of Damocles hanging over her head.

³ As U.S. Security noted in its brief below, the fee award often exceeds the PIP claim; therefore, the claimant's attorney usually does not have to dip into the PIP recovery for his fees.

The Court should not allow the application of the offer of judgment statute to upset the very delicate balance of power the Legislature has created in the PIP statute.

CONCLUSION

The offer of judgment statute and rule do not apply in PIP cases. They cannot constitutionally be applied in PIP cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to: MICHAEL A. NUZZO, ESQUIRE, 2100 Coral Way, Suite 504, Miami, Florida 33145; DAVID B. PAKULA, ESQUIRE, Fazio, Dawson, DiSalvo, Cannon, Abers, Podrecca & Fazio, P.O. Box 14519, 633 South Andrews Avenue, Ft. Lauderdale, FL 33302; and JUAN MONTES, ESQUIRE, Lidsky & Vaccaro, 145 East 49th Street, Hialeah, FL 33013 this _____ day of March, 2001.

Respectfully submitted,

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