IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO.: SC00-1649

LILIANA CAHUASQUI

Petitioner,

vs.

U.S. SECURITY INSURANCE COMPANY

Respondent.

/

BRIEF OF AMICUS CURIAE, STATE FARM INSURANCE COMPANIES AND FLORIDA INSURANCE COUNCIL IN SUPPORT OF RESPONDENT

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CERTIFICATE OF FONT STYLE AND SIZE

The amicus curiae, State Farm Insurance Company ("State Farm") and Florida Insurance Council ("FIC"), hereby certify that the style and size of the font utilized through out this brief is Times New Roman 14 point, proportionally spaced.

STATEMENT OF THE CASE AND FACTS

The amicus curiae, State Farm and FIC , adopt the statements of the facts and the case in Respondent's briefs.

SUMMARY OF ARGUMENT

The PIP statute does not prevent an insurer from defending a questionable claim where there exists a coverage defense or where the treatment is not reasonable, necessary or related. While the statute did take away an insured's right to sue in exchange for the prompt payment of valid claims, the statute does not require an insurer to make payment when the claim is not valid. When a insurer contests a claim, it does so because the insurer has a reasonable belief that it does not owe the claim. In that instance, the application of the offer of judgement statute is reasonable to encourage the claimant, like every other civil cases, to settle the claim.

There is no language in the PIP statute which would exempt PIP cases

from being subject to otherwise applicable fee statutes, such as an offer of judgment statute or a frivolous law suit statute like section 57.105, Florida Statutes. Section 627.736(8) is not the exclusive attorney's fees provision applied in PIP cases, that section merely states that it applies in any dispute between an insurer and an insured brought under section 627.428. The legislature did not state that section 627.428 is the only fee authorizing statute which applies in PIP cases.

The insured's right to bring a lawsuit is not denied by the application of the offer of judgment statute. At best, the statute merely affects the insured's decision to continue with the litigation. No right to seek redress is being abolished. The insured can still bring an action and is not being barred from exercising that right. Instead, the offer of judgment merely compels an insured to re-evaluate whether to continue the claim after the offer is filed.

The offer of judgment of statute does not conflict with provisions of the PIP statute or section 627.428. The offer of judgment statute has been applied consistently in other insurance cases without finding conflict with section 627.428. A contested PIP case should not be treated any differently then other contested insurance cases. The policy of encouraging settlement of cases is present with equal, if not more, force in contested PIP cases. Encouraging the settlement of contested cases does not undermine the principles of the PIP

statute, but rather lies at the heart of the statute's purpose.

ARGUMENTS ON APPEAL

A.

THE OFFER OF JUDGMENT STATUTE APPLIES TO PIP ACTIONS AND DOES NOT IMPAIR THE RIGHTS OF INSUREDS UNDER SECTION 627.736 OR SECTION 627.428.

Basic rules of statutory construction compel a finding that the offer of judgment statute does apply to contested PIP claims in litigation. Moreover, the application of the statute does not adversely affect or undermine payment of valid PIP claims not in litigation. The offer of judgment statute states that it applies in civil actions filed in the courts of this state. §768.79, Fla. Stat. (1997). Thus, it applies to PIP claims in litigation. However, non-contested PIP claims, will not be affected by the application of the offer of judgment statute to the contested claims. Thus, it is only the contested PIP claims that are subject to compromise.

Nor is there any reasonable basis to believe insurers will stop making payment on *valid* PIP claims in order to force insureds to file suits, so insurers can then use the OJ statute to make insureds accept an unfair settlement. First of all, applying the offer of judgment statute to a claim in litigation does not affect an insured's pursuit of a valid PIP claim. The sole purpose of the offer of judgment statute is the "early termination of litigation by encouraging

realistic assessments of the claims made". Specifically, the statute is meant to affect a claim in litigation. The application of the offer of judgment statute will only reduce the litigation of *questionable* claims which contribute to the ever growing PIP litigation industry.

[1]

Application of the offer of judgment statute poses an appreciable risk to the insured only if the carrier has a valid defense to the PIP claim. Without such a defense, the carrier risks not only the imposition for PIP benefits, but attorney's fees as well. Consequently, in the absence of a valid defense to payment, an insurer would be gambling at a much higher risk level on the off chance that an insured would settle an otherwise valid claim. This risk alone, is sufficient to safeguard the use of the statute as an "economic tool" to discourage insureds from contesting valid claims. On the other hand, the offer of judgment statute would encourage insureds to compromise and settle questionable claims; like other lawsuits, PIP suits should be settled whenever possible.

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[1] Fraudulent insurance claims are a significant and expensive problem in Florida. In a statewide grand jury report, the Department of Insurance estimated that in 1998, there were $4.8 billion fraudulent claims each year. *See* Statewide Grand Jury Report on Health Care Claims Fraud dated December 8, 1998, Florida Supreme Court Case No. 90,703 (available on the internet @ www.legal.firn.edu/swp).

The purpose of section 627.428 is to discourage insurers from contesting valid claims and to place the insured in the position they would have occupied if the carrier had paid the benefits without causing them to engage counsel and incur obligations for attorney's fees. *Clay v. Prudential Ins. Co.*, 617 So.2d 433, 436 (Fla. 4th DCA 1993). In effect, its purpose is to penalize the carrier for wrongfully contesting the claim causing its insured to resort to litigation to resolve the conflict. *Government Employees Ins .Co. v. Battaglia*, 503 So. 2d 358, 360 (Fla. 5th DCA 1987). Thus, section 627.428 was not intended to guarantee that an insured recover 100% of his economic losses.

Moreover, section 627.736(8) is not the only fee authorizing statute applied in PIP cases. It is undisputed that section 57.105 is applicable in PIP actions. *Pena v. Allstate Ins. Co.*, 523 So.2d 674, 675 (Fla. 3d DCA 1988). The language in section 627.726(8) does not restrict the application of other fee provisions to PIP cases. *But see, Moran v. City of Lakeland*, 694 So. 2d 886 (Fla. 2d DCA 1997)(where the civil rights fee statute specifically states that a defendant can only recover fees under limited circumstances thereby restricting the ability to recover under OJ statute). Section 627.736(8) merely states that section 627.428 applies in disputes between an insured and an insurer. However, this does not mean that section 627.428 is the *only*

fee provision applicable in PIP cases.

Where a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent. *Beyel Bros. Crane & Rigging Co. of S. Fla., Inc. v. Ace Transp.*, 664 So. 2d 62, 64 (Fla. 4th DCA 1995). "The initial responsibility of the court when construing a statute is to give the statutory words their plain and ordinary meaning." *Id*, *citing, City of Miami Beach v. Galbut*, 626 So. 2d 192 (Fla. 1993). Petitioner has failed to explain why the offer of judgment statute should not be applied to PIP suits, when other attorney's fee provisions, like section 57.105 do apply. If the legislature intended to make 627.428 the only fee provision applicable in PIP cases, it would have clearly stated so in the statute. Conversely, the legislature could not have intended to preclude the offer of judgment statute from applying in PIP cases because there was no offer of judgment statute in effect when the statute was enacted . *Gay v. Singletary*, 700 So. 2d 1220, 1220 (Fla. 1997)(since Control Release Program was not created until 1989, legislature could not have intended to control release violations when it enacted section 947.21(2) in 1974).

By providing that section 627.428 applies in "any dispute" under the no-fault act, the legislature emphasized the broad (but not exclusive) applicability of section 627.428 in disputes under PIP law. See *Ivey v.*

Allstate Ins. Co., 25 Fla. L. WeeklyS1103 (Fla. Dec. 7 2000). The specific authorization of attorney's fees in section 627.736(8) does not preclude the legislature from enacting other fee provisions that would apply in PIP cases. The "inclusio unius" rule, while a useful aid in construing statutory provisions, may not be used to engraft additional language not otherwise appearing in a statute. *Jones v. Wisehart*, 245 So. 2d 849, 854 (Fla. 1971)(constitutional provision that grants chief justice of supreme court the authority to temporarily assign judges does not prevent legislature from authorizing a circuit court judge to assign judges for temporary duty). Additionally, the rule does not mean that the application of one statute precludes the additional application of another. *Gay v. Singletary*, 700 So. 2d at 1221 (fact that there is a specific authority delegated in one section of statute to the parole commission does not preclude the commission from exercising its authority on a different program).

Amicus for the Florida Trial Lawyers argue that the legislature must have intended to disallow any other attorney's fees provision from applying in PIP cases because when drafting section 627.736(8), the legislature could have included language making the offer of judgment statute applicable to PIP actions. A court, however, should not resort to statutory construction when the language of

the statute is clear and unambiguous. *McLaughlin V. State*, 721 So. 2d 1170, 1172 (Fla. 1998)(*quoting, A.R. Douglas, Inc. v. McRainey*, 137 So. 157, 159 (1931)). Therefore, since the language of the PIP statute is clear and unambiguous, this Court should not attempt to discern what the legislature intended, and should not hold that section 627.428 applies exclusively in PIP actions.

Under the PIP statute, an insurer is not liable for any medical expense "that is not a reasonable charge for a particular service or if the service is not necessary." *Derius v. Allstate Indem. Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA 1998). Because an insurer is not deprived of the right to defend a contested claim, the PIP statute is not a one-sided affair. § 627.736 Fla. Stat. (1997); *Derius*, at 272. Thus, it logically follows that when a claim is in dispute the offer of judgement statute should be applicable to encourage settlement of claims. This is a policy that is in keeping with the intent of both the PIP and offer of judgment statutes.

B. APPLICATION OF THE SECTION 768.79 TO PIP CASES IS NOT UNCONSTITUTIONAL AND DOES NOT DENY ACCESS TO THE COURT.

An insured's access to the court under the PIP statute is not denied by applying the offer of judgment statute to contested claims. Under the statute,

the insured is still guaranteed swift payment of those claims which are not in dispute and are reasonable and necessary. Simply put, the application of the offer of judgment statute does not preclude an insured from filing suit on a contested claim. Thus, an insured's right to bring the claim to court is not abolished or abrogated.

Furthermore, the protection afforded under the statute is not eroded by the application of the offer of judgment statute. A PIP insured is not prevented from collecting benefits on those claims which are reasonable and necessary. By the same token, an insurer is still compelled to pay *valid claims* in a swift manner. It is only those claims in litigation that are not afforded the same protection, at least until the insured proves by the greater weight of the evidence that the expenses sought are both reasonable and necessary medical services. *Derius*, at 272. The fact that an insured may have to settle a questionable claim does not mean that access to the courthouse has been denied. Additionally, the fact that section 627.428 is a"one-way street" does not preclude the application of other non-conflicting fee provisions.

Because PIP claims are subject to valid defenses which may result in a substantial reduction or elimination of benefits, they should not be exempt from a statute which encourages the early settlement of disputed claims. In all civil cases filed, claims are subject to being settled (i.e. compromised), making it increasingly likely that a claimant will obtain a less than desired result. PIP claimants want this possibility removed. They want a risk free litigation environment, the denial of which, Petitioner asserts, amounts to a denial of access to the court. This statement presumes that PIP insureds are entitled, in every contested case, to take the maximum amount of insurance benefits

without valid opposition. This is incorrect. While the intent of the No-Fault statute is to "guarantee swift payment of PIP benefits", it is not the intent of the law to guarantee a risk free litigation environment when a PIP claim is in dispute. That is, PIP insureds are not immune from the normal risks of litigation simply because they are seeking no-fault benefits. If that were the true intent of the PIP statute, then its provisions would not have provided an insurer with the ability to challenge and defend claims. §627.736, Fla. Stat. (1997).

Once in litigation, the burden shifts to the Plaintiff to prove the claim is both reasonable and necessary. *Derius*, at 272-3. Applying the offer of judgment statute in this scenario, does not preclude an insured from bringing suit anymore than giving an insurer the right to contest a claim does. Because an insurer may contest a PIP claim, a claimant is never guaranteed recovery on those claims. PIP claims are essentially liquidated claims for out-of-pocket medical expenses and lost wages. If the claim is legitimate, the risk of an insured not "beating" an insurer's offer of judgment is minimal. In addition, a PIP insured is not entitled to recovery of all of his economic losses, only his "major and salient losses." *Chapman v. Dillon*, 415 So. 2d 12, 17 (Fla. 1982). Contested PIP claims should not be treated differently than any other litigation claims; they are not risk free, nor should they be. Otherwise, PIP litigants

would use this risk free opportunity to prolong litigation and clog the courts with cases that are otherwise amenable to compromise.

Lastly, courts have traditionally held that attorney's fee provisions do not deny or abrogate the right of access to courts. *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1147-49 (Fla. 1985); *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 504 (Fla. 1982); *Pohlman v. Mathews*, 440 So. 2d 681, 683 (Fla. 1st DCA 1983). In *Rowe*, the court noted that at best, the fee provision could affect the decision of the litigant to bring the lawsuit but it did not deny access to court. Here, the provision can only deter a litigant from continuing with litigation where the possibility of success is unlikely, [2] a result that is behind both the purpose of the offer of judgment statute and the PIP statute: to reduce litigation.

A PIP insured is not forced to accept an offer of judgment unless his/her claim is questionable, as in this case, and the likelihood of success is minimal. This offer does not diminish or affect the protection afforded under the PIP statute to recover promptly on those claims that are valid, nor does it amount to a denial of access to the courts. The effect of the offer is that helps reduce the ever burgeoning PIP litigation machine, which is

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[2] A proposal of settlement/ offer of judgment may not be served earlier than 90 days after service of process. *See* 1.442. (B), Fla. R. Civ. P.

clogging up the judicial system.

C.
THE OFFER OF JUDGMENT STATUTE DOES NOT CONFLICT WITH THE PROVISIONS OF THE PIP STATUTE OR SECTION 627.428.

The three fee statutes which apply in PIP cases – sections 627.428, 768.79 and 57.105 – accomplish distinct policy objectives and operate independently of one another without conflict or inconsistent results.

The courts of this State have consistently applied the offer of judgment statute in insurance cases without finding a conflict with section 627.428. *Weesner v. United Servs. Auto. Ass'n*, 711 So. 2d 1192, 1194 (Fla. 5th DCA 1988); *see also, Pennsylvania Lumbermens Mut. Ins. Co. v. Sunrise Club,* 711 So. 2d 593 (Fla. 3d DCA 1998)(property insurance); *Allstate Insurance Co. v. Manasee*, 715 So. 2d 1079 (Fla. 4th DCA 1988)(UM insurance). In *Weesner*, the court specifically rejected the argument that section 627.428 precludes attorney's fees to an insurer under the offer of judgment statute. *Weesner*, 711 So. 2d at 1194. Furthermore, the argument that PIP cases are different than other insurance cases is without merit. The policy of encouraging settlement of cases applies with equal, if not more, force in contested PIP cases. The out-of-control PIP litigation industry is in need of a tool that controls the prolonged litigation.

Petitioner's reliance upon *Moran v. City of Lakeland*, 694 So. 2d 886 (Fla. 2d DCA 1997) is misplaced. In that case, the second district found a

conflict in applying the offer of judgment statute because there the Legislature explicitly limited the instances where a defendant could recover attorney's fees. Specifically, the district court stated:

> The Civil Rights Attorney's Fees Awards Act of 1976 authorizes the award of a reasonable fee to the prevailing party in a civil rights action. . .'A prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.'

Moran, at 886. Thus because the attorney's fee provision under the civil rights act allowed fees to a defendant only under certain conditions, the court held that fees under the offer of judgment statute were precluded due to the conflict. *Id,* 887. That is not the case here.

The Legislature, in enacting section 627.736(8), did not limit the context in which insurer can obtain fees. It merely provided that section 672.428 applies in PIP cases. There is no language in the statute precluding an insurer from securing fees under the offer of judgment statute. Nor did the legislature state that section 627.428 is the *only* fee authorizing statute applicable in PIP cases. Therefore, *Moran* is distinguishable and inapplicable.

Accordingly, the application of section 768.79 in contested cases does not undermine the basic principles underlying the PIP statute and does not affect the prompt payment of valid claims.

CONCLUSION

Accordingly, the district court's opinion finding that section 768.79 can be applied to PIP cases is correct and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on September 26, 2001, to: **DAVID B. PAKULA, ESQUIRE**, Fazio, Dawson, DiSalvo, Cannon, Abers, Podrecca & Fazio, P.O. Box 14519, Fort Lauderdale, Florida 33302-4519. Telephone: (954) 463-0585; **JUAN C. MONTES, ESQUIRE**, 145 E. 49th Street, Hialeah, Florida 33013-1846. Telephone: (305) 822-2100; **MICHAEL A. NUZZO, ESQUIRE**, 2100 Coral Way, Suite 504, Miami, Florida 33145-2657. Telephone: (305) 858-4810; **TRACY RAFFLES GUNN, ESQUIRE**, Fowler, White, Gillen, Boggs, Villareal & Banker, PA., P.O. Box 1438, Tampa, Florida 33601. Telephone: (813) 228-7411; and **A. HINDA KLEIN, ESQUIRE**, Conroy, Simberg & Lewis, 3440 Hollywood Blvd., 2nd Floor, Hollywood, Florida 33021-6927. Telephone: (954) 961-1400.

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