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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 73,488

INTERNATIONAL BANKERS  
INSURANCE COMPANY,

Petitioner,

vs.

SUSAN ARNONE,

Respondent.

**FILED**  
SID. WHITE  
JAN 9 1989  
CLERK, SUPREME COURT  
By \_\_\_\_\_ Deputy Clerk

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

PETITIONER'S BRIEF ON JURISDICTION

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## PREFACE

The parties will be referred to as the insurer and insured.  
The following symbol will be used:

A - Petitioner Insurer's Appendix.

## STATEMENT OF THE CASE AND FACTS

The following facts are all shown in the opinion of the Fourth District Court of Appeal. Insured suffered personal injuries in a motor vehicle accident and had \$10,000 of personal injury protection coverage, with a \$2,000 deductible, with insurer. Insurer paid insured \$8,000 in PIP benefits and contended this was the full amount of benefits due under the policy. Insured filed suit and claimed it was entitled to an additional \$2,000, taking the position that the full amount of benefits due under the policy was \$10,000. The trial court agreed with insured and the Fourth District affirmed in a 7-page opinion. Insurer seeks review based on express and direct conflict.

## SUMMARY OF ARGUMENT

In the present case the Fourth District has held that where there is PIP coverage in the amount of \$10,000, with a \$2,000 deductible, and PIP expenses exceed the policy limits, the insurer is liable to pay PIP expenses of up to \$10,000. This holding is in conflict with Industrial Fire and Casualty Insurance Company v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978), and Thibodeau v. Allstate Insurance Company, 391 So.2d 805 (Fla. 5th DCA 1980). In Cowan the

claimant had \$40,000 in PIP expenses, \$5,000 PIP limits and a \$1,000 deductible. The Third District held the maximum liability of the company would be \$4,000, not the \$5,000 policy limits. In Thibodeau the claimant had \$8,000 in PIP expenses, \$5,000 PIP limits, and a \$4,000 deductible. The Fifth District held the maximum liability of the company would be \$1,000, not the \$5,000 policy limits.

There is a conflict between the three districts as to whether the maximum liability of an insurer for PIP expenses is the policy limits or the policy limits less the deductible.

#### ARGUMENT

#### ISSUE

DOES THE DECISION OF THE FOURTH DISTRICT CREATE CONFLICT?

In the present case the policy provided \$10,000 for PIP coverage, with a \$2,000 deductible. The Fourth District held the maximum liability of the insurer was \$10,000.

In Thibodeau v. Allstate Insurance Company, 391 So.2d 805 (Fla. 5th DCA 1980), the PIP coverage was \$5,000, with a \$4,000 deductible. Insured suffered in excess of \$8,000 in medical expenses. In holding that the maximum liability under the PIP coverage was \$1,000 (the coverage less the deductible), the Fifth District stated on page 806:

This case is controlled by the provisions of section 627.739(1), Florida Statutes (1977). The statute required an insurer to offer the policy owner "deductibles, in amounts of \$250, \$500, \$1,000, \$2,000, \$3,000, and \$4,000, said amount to be deducted from the benefits otherwise due each person subject to the deduction . . . ." (Emphasis in original). As a "resident **relative**," Sandra was subject to the "**deductible**" amount of \$4,000 under Brian's policy, and the amount "otherwise due" was \$5,000. Under this statute Allstate's total liability was \$1,000. Industrial Fire & Casualty Insurance Company v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978).

In Industrial Fire & Casualty Insurance Company v. Cowan, 364 So.2d 810 (Fla. 3d DCA 1978), the policy provided \$5,000 PIP coverage with a \$1,000 deductible, and the insured had medical expenses and lost wages of approximately \$40,000. The trial court held insured was entitled to \$5,000 and the Third District reversed, stating on page 811:

Section 627.739, Florida Statutes (1975 and 1976), reads in part as follows:

\* \* \* \* \*

"each insurer \* \* \* shall, at the election of the owner, issue a policy endorsement, which endorsement shall provide that there shall be deducted from personal protection benefits that would otherwise be or become due to the policy holder an amount of either two hundred and fifty dollars, five hundred dollars, or one thousand dollars, again as the policyholder elects, said amount to be deducted from the amounts otherwise due each person subject to the deduction. \* \* \* [emphasis in original]

The amount "**otherwise due**" under the policy is \$5,000.00. Section 627.736(1), Florida Statutes (1975). The maximum liability of the company under these circumstances would be \$4,000.00.

We anticipate that the insured may argue that Thibodeau and Industrial Fire were disapproved by this court in Govan v. International Bankers Insurance Company, 521 So.2d 1086 (Fla. 1988). That case involved a different issue, which was how benefits are computed where the expenses incurred are less than the policy limits. By statute only 80% of expenses were recoverable. § 627.736(1) (a), Fla. Stat. (1983). The issue in Govan was whether, in computing benefits payable under the policy, the statutory 80% was applied prior to deducting the deductible or vice versa. The Fourth District held that the 80% calculation should be made before subtracting the deductible. International Bankers Insurance Company v. Govan, 502 So.2d 913 (Fla. 4th DCA 1986). This court affirmed in Govan, supra. At the end of this court's opinion this court stated:

Accordingly, we approve the decision of the district court of appeal, and disapprove Thibodeau and Industrial Fire to the extent of their conflict with our decision.

502 So.2d at 1088.

The issue before this court in Govan was not the same issue as existed in Thibodeau and Industrial Fire, supra. Industrial Fire and Thibodeau did not discuss which comes first, the 80% or the deductible. Accordingly Thibodeau and Industrial Fire are still good law as to their holdings that the limits of PIP coverage are not recoverable where there is a deductible. Both of those cases hold that the most the insured can recover is the full amount of PIP coverage less the deductible selected by the insured. That

issue was not involved in Govan nor was it discussed by this court in Govan, and it is presently creating much confusion in this state about the payment of PIP claims.

CONCLUSION

There is express and direct conflict and this court should grant review.

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CERTIFICATE OF SERVICE


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