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## Florida's No-Fault Law: To Set-off or Not to Set-off, That is the Question

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# FLORIDA'S NO-FAULT LAW: TO SET-OFF OR NOT TO SET-OFF, THAT IS THE QUESTION<sup>1</sup>

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## I. INTRODUCTION

What comes to mind for most people when they think about torts or personal injury lawsuits is sensational newspaper headlines about a doctor found liable for medical malpractice or a business ordered to pay a huge amount of money because of a product defect.<sup>2</sup> Nowadays, these thoughts are usually quickly followed by some thought about “tort reform” or some vision of wealthy lawyers.<sup>3</sup> This perception of torts or personal injury lawsuits is quite far from the reality of the day to day work of your ordinary plaintiff and defense tort lawyers, especially in Florida.<sup>4</sup> Like most everywhere else, the largest amount of personal injury legal work in Florida concerns automobile injuries.<sup>5</sup> This is not surprising given that Florida has an

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1. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* 127 (Barbara A. Mowat & Paul Werstine eds., Washington Square Press 1992) (1602).

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2. See, e.g., *Firestone Set to Pay \$7.5 Million in Suit*, N.Y. TIMES, Aug. 25, 2001, at C1.

3. See, e.g., *Bush Outlines Medical Liability Reform*, CNN.COM, Jan. 16, 2003, <http://www.CNN.com/2003/ALLPOLITICS/01/16/bush.malpractice/index.html>.

4. The overall award median for all plaintiff verdicts collected from the years 1995 to 2001 was \$41,380. JURY VERDICT RESEARCH SERIES NO. 1.20.8, CURRENT AWARD TRENDS IN PERSONAL INJURY 8 (Catherine Thomas ed., 2002 ed. 2003) (on file with authors). The median compensatory award for Florida from the years 1995-2001 was \$67,500 and the percent of cases that awarded punitive damages in Florida for the years 1995-2001 is two percent. *Id.* at 39, 41.

5. Approximately sixty percent of plaintiff verdicts between 1995 and 2001 were for instances of vehicular negligence. *Id.* at 51.

estimated 13,715,866 licensed motor vehicles<sup>6</sup> and 15,483,582 licensed drivers.<sup>7</sup> Add to these numbers the tourists and business travelers who come to Florida on a yearly basis and the number of motor vehicles and drivers using Florida roadways are staggering.<sup>8</sup> With all of the these motor vehicles and drivers on the road, it is also not surprising that there were 243,294 motor vehicle accidents in Florida last year.<sup>9</sup> Unfortunately, with car accidents, many times personal injury follows. Simple math reveals that based on the number of motor vehicle accidents per year, potentially trillions of dollars of both insurance coverage and insurable losses occur.

This article will focus on Florida's Motor Vehicle No-Fault Law and, in particular, the Personal Injury Protection coverage ("PIP") required by this statute.<sup>10</sup> The first part of this article will describe the legislative purpose and specific provisions of the Florida Motor Vehicle No-Fault Law concerning PIP. The second part of this article will examine the conflicting case law in Florida regarding the application of the PIP provisions to persons who do not have PIP coverage and are injured in a motor vehicle accident. Finally, this article will propose a resolution to the conflicting case law in Florida involving the application of the PIP provisions to uninsured, injured parties.

## II. FLORIDA'S PIP PROVISIONS

Florida's Motor Vehicle No-Fault Law requires anyone owning a motor vehicle to obtain a minimum of \$10,000 in medical coverage.<sup>11</sup> This required insurance is called Personal Injury Protection coverage, or PIP.<sup>12</sup> Auto owners can purchase PIP insurance with a variety of deductibles.<sup>13</sup> PIP coverage kicks in when a person is injured arising out of the use or mainte-

6. Fla. Dep't of Highway Safety & Motor Vehicles, Motor Vehicles Facts & Figures, [http://www.hsmv.state.fl.us/reports/facts\\_mv.html](http://www.hsmv.state.fl.us/reports/facts_mv.html) (last visited Oct. 12, 2005).

7. Fla. Dep't of Highway Safety & Motor Vehicles, Driver License Facts and Figures (Apr. 5, 2005), <http://www.hsmv.state.fl.us/reports/dlfacts.pdf> [hereinafter FHSMV Driver License].

8. Florida welcomed 74.6 million tourists in 2003. VISIT FLORIDA, Research, <http://media.visitflorida.org/about/research> (last visited Oct. 12, 2005). Florida also has 1,653,345 estimated "problem drivers" for 2004-05. FHSMV Driver License, *supra* note 7. These drivers are ones who have had their licenses suspended, revoked, or cancelled or have been refused a driver's license because they are "high risk." *Id.* A percentage of these people undoubtedly continue to travel Florida's roadways illegally.

9. FLA. DEP'T OF HIGHWAY SAFETY & MOTOR VEHICLES, TRAFFIC CRASH STATISTICS REPORT 7 (2003), available at <http://www.hsmv.state.fl.us/hsmvdocs/cf2003.pdf>.

10. See FLA. STAT. § 627.736 (2004).

11. § 627.736(1).

12. See *id.*

13. § 627.739.

nance of a motor vehicle.<sup>14</sup> PIP insurance pays, according to the Florida Statute, regardless of whether the injured party is or is not at-fault for the injuries sustained.<sup>15</sup>

The Florida No-Fault Law PIP provisions also provide limited tort immunity for at-fault car drivers and owners.<sup>16</sup> Under these provisions, the at-fault driver avoids tort liability and is immune from suit, unless the injury caused by the at-fault driver, "consists in whole or in part of:

- (a) Significant and permanent loss of an important bodily function.
- (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
- (c) Significant and permanent scarring or disfigurement.
- (d) Death."<sup>17</sup>

This statutory provision is sometimes referred to as the "permanent injury" or "threshold" requirement.<sup>18</sup> Therefore, under the Florida Motor Vehicle No-Fault Law, an injured person may not bring suit against an at-fault party unless the person's injury meets the definition of the type of injury contained in the foregoing statutory section.<sup>19</sup>

Florida's Motor Vehicle No-Fault Law then goes on to state that even if an injured party satisfies the type of injury requirement to bring suit against an at-fault driver, the "*injured party . . . shall have no right to recover any damages for which personal injury protection benefits are paid or payable.*"<sup>20</sup>

The end result, when all of these statutory provisions are read in conjunction with each other, is that if an injured person's medical bills are paid under a PIP policy and the injured person files suit against the at-fault owner or driver and recovers a judgment against that at-fault owner or driver, the amount of PIP benefits paid to the injured person will be subtracted from the judgment as a set-off.<sup>21</sup>

It seems pretty clear that the Florida Motor Vehicle No-Fault Law and its PIP provisions have attempted to strike a balance between providing

14. § 627.736(1).

15. § 627.736(4)(d).

16. § 627.737.

17. § 627.737(2)(a)-(d).

18. *See id.*

19. *Id.*

20. § 627.736(3) (emphasis added).

21. *See Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 14 (Fla. 1974).

quick payment to the injured person for medical treatment and not subjecting at-fault drivers and owners to double payment for the same injury.<sup>22</sup>

In 1971, the Florida Legislature decided that the traditional “fault” based tort system, when applied to auto accidents, was too slow and inefficient.<sup>23</sup> The legislature also noted that the traditional tort system had “led to inequalities of recovery, with minor claims being overpaid and major claims [being] underpaid.”<sup>24</sup> Florida’s first version of the Florida Motor Vehicle No-Fault Law, entitled the Florida Automobile Reparations Reform Act, took effect on January 1, 1972.<sup>25</sup> One of the key provisions in this original statute and the statute as it exists today is the PIP insurance provision.<sup>26</sup> PIP was designed to provide “medical, surgical, funeral, and disability insurance benefits without regard to fault.”<sup>27</sup> The statute mandates the purchase of PIP insurance for motor vehicles required to be registered in Florida.<sup>28</sup>

At the time of the Act, seventeen percent of all lawsuits filed were automobile related lawsuits.<sup>29</sup> The legislature figured that PIP coverage would reduce the number of motor vehicle accident lawsuits and free up valuable court time.<sup>30</sup> The legislature’s further design was to enable an injured person to receive money quickly to cover out of pocket medical expenses from the injured person’s own insurance company.<sup>31</sup>

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22. See §§ 627.736-.737.

23. *Lasky*, 296 So. 2d at 16.

24. *Id.*

25. Act effective Jan. 1, 1972, ch. 71-252, §§ 1-11, 1971 Fla. Laws 1355, 1355-71.

26. See § 627.731.

27. *Id.*

28. *Id.*

29. *Lasky*, 296 So. 2d at 17 n.15.

30. *Id.* at 20.

31. The Florida No-Fault law requires that all vehicle owners purchase PIP insurance. See § 627.731. Further, the design of the No-Fault law contemplates that both drivers involved in a car crash will be covered under their own no-fault policies. § 627.736. This is evidenced by the multiple provisions written into the Act, which penalize drivers who fail to obtain no-fault insurance. See § 627.733. Section 627.733(4) of the *Florida Statutes* provides that anyone “who fails to have [no-fault insurance] in effect at the time of an accident shall have no immunity from tort liability.” § 627.733(4). Additionally, section 627.733(6) mandates that anyone failing to maintain no-fault insurance shall have their driver’s license suspended until such time that no-fault insurance is obtained. § 627.733(6). Therefore it becomes illegal to drive a car that is not insured under a PIP policy. See *id.* Through these provisions the legislature expects that all motorists will be covered under a PIP policy and those who are not, will no longer be allowed to drive. See *id.* Section 627.736(3) of the *Florida Statutes* provides that “[a]n injured party who is entitled to bring suit under the provisions of ss. 627.730-627.7405 [the Act], or his or her legal representative, shall have no right to recover any damages for which personal injury protection benefits are *paid or payable*.” § 627.736(3) (emphasis added). Unfortunately, the statute provides no guidance in the situation

What the Florida legislature did not anticipate is how to deal with the injured party in a car accident who does not carry the mandatory PIP coverage.<sup>32</sup> Does this uninsured injured party become self-insured for the first \$10,000 in medical bills? If the uninsured injured party receives a judgment against the at-fault party, is the at-fault party's insurance company entitled to a set-off of \$10,000, even though no PIP benefits were paid? The answer to these questions seems to depend on where in Florida the accident occurred.

### III. PIP INSURANCE SET-OFF

Four different Florida District Courts of Appeal have wrestled with the question of whether an at-fault driver or owner is entitled to subtract the amount of statutorily required PIP benefits from a judgment received by an injured party who was required to carry PIP coverage but did not.<sup>33</sup>

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where there are no PIP benefits that are paid or payable. *See* § 627.736. Further, the statute gives no definition of "paid or payable." *See id.* This leads to several different interpretations and clearly conflicting decisions in the different districts of the Florida District Court of Appeal. Thus, this article is necessary to explain the decisions of the different District Courts of Appeal and to propose a solution to this conflict.

Section 627.736(1) of the *Florida Statutes* lays out who is covered by a PIP policy. § 627.736(1). The statute states that a PIP policy covers:

the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle . . . for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle.

*Id.* Therefore, according to the statute, PIP will even be extended to pedestrians if the pedestrian either: owns a motor vehicle which is covered by a PIP policy, or is a third party who neither owns a motor vehicle nor has obtained any PIP insurance. *Id.*

32. *See* § 627.733. Section 627.733 of *Florida Statutes* delineates those who are required to obtain PIP insurance, stating:

(1) Every owner or registrant of a motor vehicle, other than a motor vehicle used as a taxicab, school bus as defined in s. 1006.25, or limousine . . . shall maintain security as required by subsection (3) [of this statute] in effect continuously throughout the registration or licensing period.

(2) Every nonresident owner or registrant of a motor vehicle which . . . has been physically present within this state for more than 90 days during the preceding 365 days shall thereafter maintain security as defined by [this statute].

§ 627.733(1)-(2). Therefore, all those who own a car or who have a car registered in their name are required to maintain a PIP insurance policy. *See id.* Those who do not own a car or have a car registered to them are not required to be covered under a PIP policy. *See id.*

33. *See* *Ward v. Nationwide Mut. Fire Ins. Co.*, 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978); *Cases v. Gray*, 894 So. 2d 268 (Fla. 3d Dist. Ct. App. 2004); *Jedlicka v. Proctor*, 724 So. 2d 668 (Fla. 2d Dist. Ct. App. 1999); *Stephens v. Renard*, 487 So. 2d 1079 (Fla. 5th Dist. Ct. App. 1986); *Reynolds v. Life Ins. Co.*, 399 So. 2d 519 (Fla. 2d Dist. Ct. App. 1981); *Erie Ins. Co. v. Bushy*, 394 So. 2d 228 (Fla. 5th Dist. Ct. App. 1981).

### A. *The No Set-off Appellate Court Decisions*

The first case to confront the PIP set-off issue was *Ward v. Nationwide Mutual Fire Insurance Co.*<sup>34</sup> The *Ward* case was actually the consolidation of two appeals—*Ward v. Nationwide Mutual Fire Insurance Co.* and *Johnston v. United Services Automobile Ass'n.*<sup>35</sup> The plaintiffs in each case were injured while occupying a vehicle owned by someone else, yet both injured plaintiffs owned their own car but had failed to purchase PIP coverage as required by Florida law.<sup>36</sup>

The defendants' insurance policy stated that medical payments (other than PIP benefits) will be available "only over and above any personal injury protection benefits that are *paid or payable* for the bodily injury under this or any [insurance] policy."<sup>37</sup> The injured plaintiffs contended that because the plaintiffs did not purchase PIP insurance, no PIP benefits were *paid or payable* to them.<sup>38</sup> Therefore, the injured plaintiffs argued that the defendants' insurance companies should be responsible for paying the injured plaintiffs' full medical expenses with no set-off for the amount of PIP benefits.<sup>39</sup>

The defendants' insurance companies countered that until the plaintiffs' medical bills exceeded the statutorily required amount of PIP coverage,<sup>40</sup> the insurance companies were not liable to pay for any of the medical expenses incurred by the injured plaintiffs.<sup>41</sup> The insurance companies "argued that PIP benefits should be considered as *paid or payable*, regardless of" whether the plaintiffs purchased coverage or not because section 627.733(4) of the *Florida Statutes*,<sup>42</sup> which is the same provision in effect today, states that:

An owner of a motor vehicle with respect to which security is required by this section who fails to have such security in effect at the time of an accident . . . shall be personally liable for the payment of benefits under s. 627.736. With respect to such benefits, such an owner shall have all of the rights and obligations of an insurer under ss. 627.730-627.7405.<sup>43</sup>

The insurance companies urged the court to give full force and effect to this provision by classifying these injured, but PIP uninsured plaintiffs, as

34. 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978).

35. *Id.*

36. *Id.* at 75–76.

37. *Id.* at 76 (emphasis added).

38. *Id.*

39. *Ward*, 364 So. 2d at 76.

40. The amount of required PIP insurance in 1978 was \$5,000.00. *Id.*

41. *Id.*

42. *Id.* (emphasis added).

43. FLA. STAT. § 627.733(4) (2004).

self-insurers.<sup>44</sup> By doing so, the insurance companies figured that the statutory amount of PIP coverage required should be subtracted from any amount of medical payments ordered in the judgment in favor of the plaintiffs.<sup>45</sup> By allowing such a set-off, the insurance company's obligation to pay any money for medical expenses to these plaintiffs would be extinguished.<sup>46</sup> The insurance companies noted further that to permit injured parties to recover without regard to a set-off for PIP benefits would reward these plaintiffs for failing to comply with the Florida Motor Vehicles No-Fault Law.<sup>47</sup>

The court concluded that although the plaintiffs have failed to obtain the statutorily mandated PIP coverage, the insurance companies are not entitled to a set-off.<sup>48</sup> The court in *Ward* determined that even though a motorist who fails to obtain PIP coverage has, by statute, all the rights and obligations of an insurer, this statutory provision does not actually make that motorist an insurer.<sup>49</sup> The court also remarked that because the legislature already set forth in the statute the penalty for motorists who fail to purchase the required PIP coverage, it is not for this court or for a private insurance company to impose another penalty against an injured, but PIP uninsured motorist.<sup>50</sup>

This issue surfaced again in *Reynolds v. Life Insurance Co. of Virginia*.<sup>51</sup> In *Reynolds*, the plaintiff, who did not carry PIP insurance, was injured while driving his personally owned car.<sup>52</sup> The defendant's insurance company policy provided that "[b]enefits payable under this policy will be reduced by the amount of benefits payable for the same loss pursuant to a Motor Vehicle No-Fault Law, or similar law."<sup>53</sup> The injured plaintiff incurred medical bills well in excess of the PIP benefit amount.<sup>54</sup>

The plaintiff argued that the *Ward* case was precedent and the insurance company is not entitled to a set-off equal to the statutorily required amount of PIP coverage.<sup>55</sup> The defendant insurance company claimed that the *Ward*

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44. *Ward*, 364 So. 2d at 77.

45. *Id.*

46. *Id.*

47. *Id.* at 78.

48. *Id.*

49. *Ward*, 364 So. 2d at 77 (citing *Farley v. Gateway Ins. Co.*, 302 So. 2d 177, 179 (Fla. 2d Dist. Ct. App. 1974)).

50. *Id.* at 78.

51. 399 So. 2d 519 (Fla. 2d Dist. Ct. App. 1981).

52. *Id.* at 519.

53. *Id.*

54. *Id.* at 519–20. The injured plaintiff incurred \$11,000.00 in medical expenses. *Id.* at 519. The insurance company wanted a \$5,000.00 set-off, the amount of statutorily required PIP, and, as such, claimed that the plaintiff was only due \$6,000.00 (\$11,000-\$5,000 = \$6,000). *Reynolds*, 399 So. 2d at 520.

55. *See id.*

case was distinguishable because of the language contained in the defendant's insurance policy.<sup>56</sup> In *Ward*, the policy language in question provided "any personal injury protection benefits that are *paid or payable* . . . under this or any [insurance] policy."<sup>57</sup> In *Reynolds*, the policy language stated "benefits payable . . . pursuant to a Motor Vehicle No-Fault Law."<sup>58</sup> The defendant insurance company claims that the court's reasoning in *Ward* was based on the absence of an insurance policy providing PIP benefits while, in *Reynolds*, the reduction was triggered by the existence of the Florida Motor Vehicle No-Fault Law.<sup>59</sup>

The court, however, was not swayed by the insurance company's argument.<sup>60</sup> Instead the court ruled against a set-off of the amount of required PIP coverage because "PIP benefits will be paid under the required insurance, not directly by reason of the operation of the statute."<sup>61</sup>

In the case of *Jedlicka v. Proctor*, the Second District Court of Appeal rather summarily ruled that no set-offs will be allowed for at-fault defendants who injure PIP uninsured motorists.<sup>62</sup> The court's only comment was "[w]e find merit only on Jedlicka's claim that the trial court erred in reducing his damage award because of his failure to obtain statutorily required personal injury protection."<sup>63</sup> The court went on to say that *Reynolds* and *Ward* are controlling, and it is reversible error to reduce an injured party's damage award because of his or her failure to obtain PIP insurance.<sup>64</sup>

The PIP set-off issue then made its way to the Fifth District Court of Appeal, in the case *Erie Insurance Co. v. Bushy*, where the court reached the same conclusion as the Second District Court of Appeal.<sup>65</sup> The plaintiff in *Erie* was injured while driving his automobile and had failed to obtain PIP insurance.<sup>66</sup>

The court, in discarding the insurance company's argument that the plaintiff was a self-insurer, ruled that

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56. *Id.*

57. *Ward v. Nationwide Mut. Fire Ins. Co.*, 364 So. 2d 73, 76 (Fla. 2d Dist. Ct. App. 1978) (emphasis added).

58. *Reynolds*, 399 So. 2d at 519.

59. *Id.* at 520.

60. *Id.*

61. *Id.*

62. 724 So. 2d 668, 668 (Fla. 2d Dist. Ct. App. 1999).

63. *Id.*

64. *Id.*

65. 394 So. 2d 228, 230 (Fla. 5th Dist. Ct. App. 1981).

66. *Id.*

[h]olding an [injured] owner of [a PIP] uninsured motor vehicle liable as a self-insurer for damages suffered from an [at-fault] insured driver would avoid the express insuring contract provisions in Erie's liability policy. It should make no difference to Erie under its liability policy whether the injured person has or does not have insurance.<sup>67</sup>

Accordingly, the *Erie* court disallowed a set-off to the defendant insurance company.<sup>68</sup>

In another Fifth District Court of Appeal case involving PIP set-offs, *Stephens v. Renard*, the court merely parrots the ruling in *Erie* by stating "that it is error to reduce a[n injured] plaintiff's damage award for her failure to obtain the statutorily required [PIP insurance]."<sup>69</sup>

### B. *The Set-off Appellate Court Decisions*

The Fourth District Court of Appeal, in *Holt v. King*,<sup>70</sup> was the first appellate court to rule in favor of a PIP set-off.<sup>71</sup> At the time of the car crash, King's PIP "policy had been cancelled . . . [for] failure to pay her insurance premium."<sup>72</sup> Prior to trial, King moved to strike Holt's affirmative defense that Holt was entitled to a set-off due to King's failure to obtain PIP insurance.<sup>73</sup> The trial court granted King's motion and disallowed the at-fault defendant a set-off because the court felt bound to follow the *Ward*, *Stephens*, and *Erie* decisions, which disallowed a set-off equal to the amount of required PIP coverage.<sup>74</sup>

The Court of Appeal in *Holt* disagreed with the trial court's decision and held that, under the statutory language of section 627.733(4) of the *Florida Statutes*, King was self-insured to the extent of the PIP coverage that she should have purchased so the defendant insurance company was entitled to a set-off of that amount.<sup>75</sup> Further, the court ruled that Holt, who had purchased his own PIP insurance, was also entitled to limited tort immunity pro-

67. *Id.*

68. *Id.*

69. 487 So. 2d 1079, 1080 (Fla. 5th Dist. Ct. App. 1986).

70. 707 So. 2d 1141 (Fla. 4th Dist. Ct. App. 1998).

71. *Id.* at 1144.

72. *Id.* at 1142.

73. *Id.*

74. *Id.*; see *Ward v. Nationwide Mut. Fire Ins. Co.*, 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978); *Stephens*, 487 So. 2d 1079; *Erie Ins. Co. v. Bushy*, 394 So. 2d 228 (Fla. 5th Dist. Ct. App. 1981).

75. *Holt*, 707 So. 2d at 1143.

vided by the Florida Motor Vehicle No-Fault law.<sup>76</sup> This later ruling meant that not only was the insurance company due a set-off for PIP coverage, but also the plaintiff, King, would have to meet the statutory threshold for damages for the insurance company to have to pay any money for her medical expenses.<sup>77</sup>

The *Holt* court was able to distinguish the *Ward* case because the *Holt* case “did not involve a *tortfeasor’s* right to a set-off pursuant to the statutory tort exemption, but, rather, involved the question of whether public policy relieves an *insurer* of his contractually undertaken duty to a claimant when the claimant has failed to comply with the no-fault laws.”<sup>78</sup>

With regard to *Erie*, the court stated that the Erie Insurance Company had undertaken a contractual obligation to insure the injured party, whereas there was no such obligation in *Holt*.<sup>79</sup>

The court acknowledged that the instant case was factually similar to the *Stephens* case.<sup>80</sup> The court stated that the instant ruling in *Holt* was in direct conflict with the Fifth District’s holding in *Stephens*,<sup>81</sup> which expressly denied a set-off for an at-fault driver causing injury to an uninsured motorist.<sup>82</sup> The conflict between *Holt* and *Stephens* was certified to the Supreme Court of Florida.<sup>83</sup>

After the *Holt* case, the Third District Court of Appeal stepped forward with its decision in *Cases v. Gray*.<sup>84</sup> On appeal, the court simply ruled that “[o]n the authority of, and for the reasons well expressed in *Holt*, we hold that a PIP set-off is required.”<sup>85</sup> Conflict was again certified to the Supreme Court of Florida between *Cases*, *Stephens*, and *Jedlicka*.<sup>86</sup>

It appeared as though the Supreme Court of Florida would hear the *Cases* case and resolve the conflict in the decisions between the Second and Fifth District Courts of Appeal and the Third and Fourth District Courts of Appeal.<sup>87</sup> However, according to the Supreme Court of Florida’s docket, a

76. *Id.*

77. *See id.* at 1144.

78. *Id.* at 1143.

79. *Id.* at 1143–44.

80. *Holt*, 707 So. 2d at 1144.

81. *Id.*

82. *Stephens v. Renard*, 487 So. 2d 1079, 1080 (Fla. 5th Dist. Ct. App. 1986).

83. *Holt*, 707 So. 2d at 1144; *see also* *Cases v. Gray*, 894 So. 2d 268, 268 (Fla. 3d Dist. Ct. App. 2004) (certifying conflict to the Supreme Court of Florida); *Jedlicka v. Proctor*, 724 So. 2d 668, 669 (Fla. 2d Dist. Ct. App. 1999) (certifying conflict to the Supreme Court of Florida).

84. 894 So. 2d 268.

85. *Id.* at 268.

86. *Id.*

87. *Gray v. Cases*, No. SC04-1579, 2004 Fla. LEXIS 2439, at \*1 (Fla. Dec. 20, 2004).

motion to dismiss the *Cases* case for lack of jurisdiction due to an untimely filing was granted on December 20, 2004.<sup>88</sup> In addition, a motion for reinstatement of the *Cases* case on appeal was denied March 11, 2005.<sup>89</sup> Therefore, the conflict in these decisions remains.

#### IV. CONCLUSION

It is almost pure folly to try and predict the outcome if the PIP set-off conflict between the District Courts of Appeal decisions reaches the Supreme Court of Florida. Yet, perhaps in this instance, the answer rests in a plain reading of the Florida Motor Vehicle No-Fault Law.

Subsections (1) and (2) of section 627.737 of the *Florida Statutes* prescribe that if an injured plaintiff has obtained the required PIP coverage, the injured plaintiff may only sue the at-fault defendant for additional damages, including non-economic damages, if the injured plaintiff's injuries meet the statutory threshold for a recoverable injury.<sup>90</sup> This is the limited tort immunity provision that insulates at-fault defendants.<sup>91</sup> However, the Florida Motor Vehicle No-Fault law goes on to provide, in subsection (4) of section 627.733 of the *Florida Statutes*:

An owner of a motor vehicle with respect to which security is required by this section *who fails to have such security in effect at the time of an accident shall have no immunity from tort liability, but shall be personally liable for the payment of benefits under s. 627.736.* With respect to such benefits, such an owner shall have all of the rights and obligations of an insurer under [the No-Fault Law].<sup>92</sup>

This provision of the Florida Motor Vehicle No-Fault Law seems to hold the key to resolving the conflict between the District Courts of Appeal decisions on the PIP set-off issue. The Second District Court of Appeal in *Farley v. Gateway Insurance Co.*, stated that subsection (4) of section 627.733 of the *Florida Statutes* did not render an injured but PIP uninsured plaintiff a self-insurer because an insurer can only be someone who is "in the business of selling insurance."<sup>93</sup> However, this statutory provision clearly

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88. *Id.*

89. *Gray v. Cases*, No. SC04-1579 (Fla. Mar. 11, 2005) (order denying motion for reinstatement).

90. FLA. STAT. § 627.737(1)-(2) (2004).

91. *Id.*

92. § 627.733(4) (emphasis added).

93. 302 So. 2d 177, 179 (Fla. 2d Dist. Ct. App. 1974).

mandates that the automobile owner who fails to purchase PIP insurance takes on the rights and obligations of an insurer.<sup>94</sup> The trick is to figure out what the Florida legislature meant by this statutory provision.<sup>95</sup>

The primary goal of statutory interpretation is to identify the purpose and intention of the legislature in creating the statute, in order to effectuate that intention.<sup>96</sup> The court in *Farley* held that the purpose of “the act was . . . to broaden insurance coverage while at the same time reasonably limiting the amount of damages which could be claimed.”<sup>97</sup>

Perhaps the answer to the PIP set-off issue resides in a simple reading of the exact language of subsection (4) of section 627.733 of the *Florida Statutes*.<sup>98</sup> This statutory provision states that it covers the “owner of a motor vehicle.”<sup>99</sup> The statute goes on to say that an owner of a motor vehicle can lose the limited tort immunity provided by the PIP law if that vehicle owner fails to carry PIP insurance.<sup>100</sup> Applying this section to the injured plaintiff makes no sense because limited tort immunity does not apply to *an injured plaintiff*, but rather to *an at-fault defendant*.<sup>101</sup> Moreover, the remaining part of this statutory provision, which bestows on the PIP uninsured defendant the rights and obligations of an insurer, also seems to logically follow.<sup>102</sup> Under this interpretation of section 627.733(4), if the at-fault defendant fails to purchase PIP insurance coverage, then the limited tort immunity provided for in the statute shall not apply.<sup>103</sup> Consequently, the question is not whether the injured plaintiff carries PIP insurance, but whether the at-fault defendant has purchased PIP insurance that makes a difference. Therefore, when an injured but PIP uninsured plaintiff sustains an injury that does not meet the statutory threshold, the at-fault defendant is not liable to the uninsured injured plaintiff for the amount of damages covered by PIP insurance, if the at-fault defendant has purchased PIP coverage for his own motor vehicle.<sup>104</sup> On the other hand, if the at-fault defendant has not purchased PIP insurance coverage for his own motor vehicle, then the at-fault defendant loses the limited immunity provided for in the statute.<sup>105</sup> In turn, the at-fault

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94. *Id.*

95. *See* Deason v. Fla. Dep’t of Corr., 705 So. 2d 1374, 1375 (Fla. 1998).

96. *Id.* (citing State v. Nunez, 368 So. 2d 422, 423–24 (Fla. 3d Dist. Ct. App. 1979)).

97. *Farley*, 302 So. 2d at 179.

98. FLA. STAT. § 627.733(4) (2004).

99. *Id.*

100. *Id.*

101. *See id.*

102. *Id.*

103. § 627.733(4).

104. § 627.737(1).

105. *See id.*

defendant will be liable for any and all damages sustained by the injured plaintiff, without regard to whether the injured plaintiff has or has not purchased PIP insurance.<sup>106</sup>

Approaching the interpretation of the Florida Motor Vehicle No-Fault Law from this angle eliminates the need to address the PIP set-off issue because it is not a question of set-off, but a question of the application of the limited tort immunity to at-fault defendants. The injured but PIP uninsured plaintiff faces other penalties for failing to carry PIP insurance.<sup>107</sup> Such failure is not relevant to whether or how much an at-fault defendant has to pay.<sup>108</sup> Trying to connect the two issues has led to this conflict of appellate court decisions.<sup>109</sup> Perhaps, the Supreme Court of Florida can avoid the PIP set-off issue by separating, rather than connecting, the rights and obligations of the injured plaintiff and the at-fault defendant. At least, it may be a better approach than torturing the language of the Florida Motor Vehicle No-Fault law to sanction or deny the set-off of the amount of PIP benefits against an injured but PIP uninsured plaintiff.

Will the Supreme Court of Florida ever accept the task of resolving the conflict of the appellate decisions in this matter? Probably not! The Florida Motor Vehicle No-Fault Law is scheduled to be sunset on October 1, 2007.<sup>110</sup> Consequently, the Florida Motor Vehicle No-Fault Law may end, along with this conflict, before the Supreme Court gets a chance to decide the issue. Until then, Florida car owners, drivers, and insurance companies need to pay particular attention to where an automobile accident occurs.

106. *Id.*

107. § 627.733(6).

108. § 627.737(1).

109. *See, e.g.,* Ward v. Nationwide Mut. Fire Ins. Co., 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978); Cases v. Gray, 894 So. 2d 268 (Fla. 3d Dist. Ct. App. 2004); Jedlicka v. Proctor, 724 So. 2d 668 (Fla. 2d Dist. Ct. App. 1999); Stephens v. Renard, 487 So. 2d 1079 (Fla. 5th Dist. Ct. App. 1986); Reynolds v. Life Ins. Co., 399 So. 2d 519 (Fla. 2d Dist. Ct. App. 1981); Erie Ins. Co. v. Bushy, 394 So. 2d 228 (Fla. 5th Dist. Ct. App. 1981).

110. Act effective July 11, 2003, ch. 2003-411, § 19, 2003 Fla. Laws 3816, 3858. The 2003 Laws of Florida provides:

(1) Effective October 1, 2007, sections 627.730, 627.731, 627.732, 627.733, 627.734, 627.736, 627.737, 627.739, 627.7401, 627.7403, and 627.7405, Florida Statutes, constituting the Florida Motor Vehicle No-Fault Law, are repealed, unless reenacted by the Legislature during the 2006 Regular Session and such reenactment becomes law to take effect for policies issued or renewed on or after October 1, 2006.

(2) Insurers are authorized to provide, in all policies issued or renewed after October 1, 2006, that such policies may terminate on or after October 1, 2007, as provided in subsection (1).

*Id.*