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Deductibles and Florida No-fault Automobile Insurance: “We regret to inform you. . . .”

Michael Flynn*

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I. INTRODUCTION

Insurance is purposefully made mysterious to exclude you [the consumer] from any role other than to sign a check.¹

There are more than 12,000,000 registered owners of automobiles in the state of Florida.² As in most states, Florida law requires all registered automobile owners to purchase a minimum of \$10,000 in no-fault personal injury protection ("PIP") insurance.³ Florida's PIP insurance is cheap. The cost for PIP insurance can be as little as \$36 per year, per registered

* Professor of Law, Nova University Shepard Broad Law Center. B.A. *Magna Cum Laude* Gonzaga University, 1973. J.D. *Cum Laude* Gonzaga University, 1977. The author thanks Steven Bell, J.D., Nova University Shepard Broad Law Center, 1992 for his research work and assistance in the preparation of this article.

1. RALPH NADER & WESLEY J. SMITH, *WINNING THE INSURANCE GAME* xviii (1990).

2. Florida Drivers License Bureau Statistics, August, 1991. This is an estimate based on the Bureau's January 1, 1991, figure of 11,612,402 registered automobile owners and drivers. The Bureau estimate takes into account the annual percentage increases in the number of registered drivers in Florida from the prior year.

3. FLA. STAT. § 627.736(1) (Supp. 1992).

automobile owner.⁴ In addition, most registered automobile owners select

4. The lowest recorded rate is \$18 per six months of coverage as offered by USAA in Jacksonville. The rate a particular driver pays depends on a variety of factors. These factors include age, sex, marital status, driving record, use of the car, number of miles the car is driven, the make and model year of the car, and the area where the driver lives. See FLORIDA DEP'T OF INS., 1988 AUTOMOBILE INSURANCE SHOPPERS' GUIDE 13 (1988).

Here is a sample of the various rates which the top insurers in Florida, by area, charge their customers. The rates shown in the following chart are only the PIP portion of the premium charged to the insured every six months.

<u>Company Name</u>	<u>Alachua</u>	<u>Ft. Lauderdale</u>	<u>Hillsborough</u>
1. Allstate	\$61	\$151	\$81
2. Allstate Indemnity	\$68	\$212	\$85
3. GEICO	\$48	\$124	\$86
4. Liberty Mutual Fire	\$57	\$111	\$82
5. Nationwide Mutual Fire	\$69	\$135	\$89
6. State Farm Mutual	\$48	\$95	\$64
7. State Farm Fire & Casualty	\$59	\$120	\$79
8. USAA	\$25	\$42	\$32
9. FJUA	\$75	\$223	\$106

<u>Company Name</u>	<u>Miami</u>	<u>Jacksonville</u>	<u>Orange</u>
1. Allstate	\$145	\$63	\$65
2. Allstate Indemnity	\$174	\$76	\$80
3. GEICO	\$129	\$59	\$63
4. Liberty Mutual Fire	\$128	\$58	\$64
5. Nationwide Mutual Fire	\$152	\$69	\$72
6. State Farm Mutual	\$84	\$51	\$52
7. State Farm Fire & Casualty	\$104	\$63	\$65
8. USAA	\$44	\$18	\$25
9. FJUA	\$188	\$86	\$95

<u>Company Name</u>	<u>Lee</u>	<u>Pensacola</u>	<u>Volusia</u>
1. Allstate	\$77	\$81	\$72
2. Allstate Indemnity	\$78	\$78	\$90
3. GEICO	\$76	\$61	\$66
4. Liberty Mutual Fire	\$54	\$66	\$61
5. Nationwide Mutual Fire	\$71	\$70	\$85
6. State Farm Mutual	\$67	\$51	\$59
7. State Farm Fire & Casualty	\$83	\$63	\$74
8. USAA	\$22	\$20	\$28
9. FJUA	\$84	\$93	\$104

<u>Company Name</u>	<u>Leon</u>	<u>Pinellas</u>	<u>W. Palm Beach</u>
1. Allstate	\$45	\$73	\$83
2. Allstate Indemnity	\$60	\$80	\$104

a \$2,000 deductible which further reduces the cost of PIP insurance.⁵ The deductible obligates the insured to pay the amount of the deductible before the insurance company's obligation to pay PIP benefits ripens.⁶ Consequently, for a small price, PIP insurance provides \$10,000 worth of peace of mind in the event of an automobile accident. That is what an insured expects. That is what Susan Arnone expected, too.

3. GEICO	\$41	\$73	\$85
4. Liberty Mutual Fire	\$49	\$63	\$85
5. Nationwide Mutual Fire	\$50	\$78	\$97
6. State Farm Mutual	\$37	\$60	\$77
7. State Farm Fire & Casualty	\$46	\$74	\$96
8. USAA	\$16	\$21	\$31
9. FJUA	\$68	\$96	\$117

Id.

Insurers specifically use a combination of factors to determine the cost of PIP insurance including the risk potential of insuring a particular driver. For instance, Allstate refers to the method of determining risk as the "cost-based pricing" system where the factors include the type of car, the driver, use of the car, and location of the car. *See ALLSTATE AUTO COMMUNICATIONS, HOW AUTO INSURANCE RATES ARE SET* (1991).

5. Telephone Interview with Miriam Meister, Representative of the Professional Insurance Agents Trade Association (Aug. 26, 1991). According to the trade organization representing auto insurance agents, the primary concern of the insurance consumer is cost. While there is no national collection of information from all auto insurers, common sense indicates that more consumers would choose the highest deductible. By selecting the highest deductible, the insured is lowering the premium cost. For many insureds, the selection of the highest deductible is a choice forced by economic considerations. A consumer survey by the Insurance Information Institute, a media relations group funded by insurers, reveals that "Americans are frustrated with automobile costs: Roughly three out of four insured vehicle owners nationwide reject the idea that automobile insurance costs are about right." *INSURANCE INFO. INST., INSURANCE PULSE* ch. 3 (1990). Further, most consumers cite low premiums as the number one reason for choosing a particular insurance company. *Id.*

6. *FLA. STAT. § 627.739(2)* (1991). Florida, Hawaii, Massachusetts, Minnesota, and New York require the insurance companies to offer authorized deductible amounts which are established by either a statute or the state insurance department. Delaware, Kentucky, Michigan, New York, Oregon, and Pennsylvania allow the insured to choose any amount of deductible. *See IRWIN E. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 3.07*, at 3-65 (2d ed. 1991).

The glossary in the 1991 version of the Automobile Insurance Shoppers' Guide gives the definition of a deductible as "[t]he amount which a policyholder must pay, per claim or accident, before an insurance company pays its share." *FLORIDA DEP'T OF INS., 1990-1991 AUTOMOBILE INSURANCE SHOPPERS' GUIDE* 22 (1990).

In the 1988 Guide, the deductible is explained by the following paragraph: "By law, you are allowed to buy a PIP policy with a deductible of up to \$2,000. A deductible is the amount you must pay from your own pocket before your insurance starts paying." *FLORIDA DEP'T OF INS., AUTOMOBILE INSURANCE SHOPPERS' GUIDE* 4 n.4 (1988).

Susan Arnone purchased a \$10,000 PIP insurance policy, which carried a \$2,000 deductible, from International Bankers Insurance Company. Unfortunately, Ms. Arnone was injured in an automobile accident. Susan Arnone's medical bills exceeded her \$10,000 PIP policy limit and were much more than she could afford to pay. Ms. Arnone properly paid her \$2,000 deductible and requested her insurance company to pay the \$10,000 policy limit of her PIP insurance. Her insurance company refused. Instead, the insurer advised that it would pay only \$8,000 under Susan Arnone's \$10,000 PIP insurance policy. The insurance company reasoned that because Ms. Arnone chose a \$2,000 deductible, she purchased only \$8,000 worth of PIP coverage.⁷

The Supreme Court of Florida, in the consolidated cases of *International Bankers Insurance Co. v. Arnone* and *Great Oaks Casualty Insurance Co. v. Kelly*,⁸ agreed with the insurance company's calculations. The Florida Supreme Court ruled that despite the statutory requirement that registered automobile owners in Florida must obtain \$10,000 worth of no-fault PIP insurance, the insurance company would not be obligated to pay PIP benefits equal to the required policy limits of \$10,000.⁹

The *Arnone* decision released insurance companies, who have issued over twelve million \$10,000 PIP insurance policies in Florida, from the payment of as much as twenty-four billion dollars in PIP insurance benefits.¹⁰ Was Florida's PIP statute intended or expected to provide this windfall for insurance companies?

7. *International Bankers Ins. Co. v. Arnone*, 552 So. 2d 908, 909 (Fla. 1989).

8. 552 So. 2d 908 (Fla. 1989).

9. *Id.* at 911 (holding that the authorized deductible amounts must be subtracted from the lesser of 80% of the eligible medical benefits or the statutorily mandated coverage limit of \$10,000).

10. See Florida Drivers License Bureau Statistics, *supra* note 2 and accompanying text. The \$24 billion windfall discussed in the text does not account for the actual percentage of drivers who did not purchase PIP insurance, the exact percentage of insureds who select a \$2,000 deductible, and for the exact amount of PIP benefits paid out by insurers during any calendar year. The \$24 billion figure represents the theoretical maximum windfall to insurers.

The top three auto insurers in Florida are: State Farm with 21.5% of the insureds; Allstate with 17.8% of the insureds; and GEICO with 3.6% of the insureds. *Corrections*, SUN-SENTINEL, Aug. 20, 1991, at 3D. The 10 largest auto insurers in the nation are: State Farm with 20.41% of the insureds; Allstate with 12.14%; Farmers with 5.32%; Nationwide with 3.82%; USAA with 2.74%; Aetna with 2.67%; GEICO with 1.99%; Liberty Mutual with 1.77%; Travelers with 1.7%; and California State Automobile Assoc. with 1.66%. Andy Dorsett, *Largest Insurers*, SUN-SENTINEL, Aug. 18, 1991, graphic at 1D.

The purpose of this article is to examine and evaluate the relationship between deductibles and Florida's mandatory, no-fault PIP insurance. First, this article will examine the purpose of no-fault insurance statutes and, in particular, the typical no-fault insurance system as evidenced by Florida's Motor Vehicle No-Fault Law. Next, this article will describe how insurance companies sell and how consumers purchase no-fault automobile insurance. Then, this article will examine Florida case law interpreting the no-fault law, and the relationship of deductibles to the payment of required PIP insurance benefits. Finally, this article will comment on Florida case law and its impact on consumers, and suggest a revision to the Florida PIP insurance statute.

II. THE PURPOSE OF NO-FAULT AUTOMOBILE INSURANCE

Several states have some form of no-fault automobile insurance statute.¹¹ The term "no-fault insurance" means that the insured/injured party receives insurance benefits regardless of who was at fault in causing the automobile accident.¹² No-fault insurance is the result of public dissatisfaction with the cost and delay involved before compensation for automobile accident injuries is received.¹³ No-fault insurance operates on the premise that prompt payment of compensation by the insured's own insurance carrier serves the public interest better than the costs and delays traditionally encountered in attempting to recover damages from the person at fault.¹⁴

Florida is a typical example of a pure, no-fault jurisdiction. Four elements characterize a pure, no-fault system: (1) no-fault insurance is required in order to own and operate an automobile; (2) there is a statutory level of benefits afforded to any person covered by no-fault insurance; (3) the "at fault" party is immune from suit for any losses covered by a no-fault insurance policy; and (4) there is a limitation on the availability of non-

11. Twenty-four jurisdictions have some form of no-fault automobile insurance law. The majority are compulsory but a few are optional. See Josephine Y. King, *Survey: State No-Fault Systems Attorney's Guide to Statutory Provisions; The Statutory Architecture of State No-Fault Systems*, 4 PACE L. REV. 297 (1984); see also SCHERMER, *supra* note 6, § 1.02, at 1-12.

12. JONATHAN L. ALPERT, *FLORIDA MOTOR VEHICLE NO-FAULT LAW* 23 (1984).

13. ROBERT E. KEETON, *INSURANCE LAW—BASIC TEXT* 246 (1971).

14. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 16 (Fla. 1974); see also Robert A. Henderson & Patrick F. Maroney, *Motor Vehicle Insurance Reform: Revisiting the Uninsured Driver*, 16 FLA. ST. U. L. REV. 789, 790 (1988).

economic damages, including pain and suffering.¹⁵ Florida is one of sixteen jurisdictions utilizing a pure, no-fault system.¹⁶ States which have not adopted a pure, no-fault insurance law still require a modified version of no-fault insurance which provides a minimum amount of insurance coverage.¹⁷

Section 627.731 of the Florida Statutes states that the purpose of Florida's no-fault insurance law is:

[t]o provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in [Florida] . . . and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain and suffering, mental anguish, and inconvenience.¹⁸

The intended result of a no-fault law is to guarantee that an injured party receives prompt and definite financial assistance after an automobile accident.¹⁹ In theory, no-fault insurance reduces the uncertainty of receiving financial assistance, court congestion and delay, and also reduces the premium cost for all types of automobile insurance.²⁰ In *Lasky v. State Farm Insurance Co.*,²¹ the Florida Supreme Court emphasized that the legislative purpose of PIP insurance is to provide a mandatory minimum of insurance benefits to protect an injured party from financial hardship and to avoid swelling the public relief roles.²²

The nucleus of Florida's no-fault insurance law requires that:

15. See King, *supra* note 11, at 299.

16. *Id.* The other pure no-fault jurisdictions include Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah. See *generally id.* at 301-72.

17. See *id.* at 377-97. Jurisdictions utilizing a no-fault system which is not pure are designated as quasi no-fault systems. In these systems there is no threshold limitation imposed on the traditional tort recovery system nor is tort immunity granted, and first party benefits are expanded. The quasi no-fault states are Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas, and Virginia. *Id.*

18. FLA. STAT. § 627.731 (1991).

19. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 16 (Fla. 1974).

20. *Id.*

21. *Id.* at 9.

22. *Id.* (involving a constitutional challenge to the Florida no-fault law in which the validity of the limitation of tort recovery was upheld).

Every insurance policy . . . shall provide personal injury protection to 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 to a limit of \$10,000 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 vehicle²³

Under Florida law, PIP insurance pays for: 1) eighty percent of all reasonable expenses for necessary medical, surgical, x-ray, dental, and rehabilitative services; 2) sixty percent of loss of gross income and earning capacity; and 3) a death benefit of \$5,000 per individual.²⁴ The key element of Florida's PIP insurance statute, which is typical of most no-fault insurance statutes,²⁵ is that a PIP insurance policy must provide a minimum benefit

23. FLA. STAT. § 627.736(1) (Supp. 1992).

24. *See id.* § 627.736(1)(a)-(c).

25. State no-fault insurance laws may differ as to the total amount no-fault benefits available, but most states by 1982 had placed a cap on no-fault benefits, ranging from \$2,000 in Massachusetts to \$62,975 in Colorado. *See* EMMETT J. VAUGHAN, *FUNDAMENTALS OF RISK AND INSURANCE* 473 (3d ed. 1982). Three states have no minimum benefit: Michigan, New Jersey, and Pennsylvania. *See id.*

The following chart shows the breakdown of the various states employing updated no-fault insurance statutes:

<u>STATE</u>	<u>BENEFITS</u>	<u>TYPE OF NO-FAULT LAW</u>
Arkansas	\$25,000	Optional First Party
Colorado	\$25,000	Compulsory
Connecticut	\$20,000	Compulsory
Delaware	\$15,000	Compulsory
D.C.	\$10,000	Compulsory
Florida	\$10,000	Compulsory
Georgia	\$15,000	Compulsory
Hawaii	\$25,000	Compulsory
Kansas	\$25,000	Compulsory
Kentucky	\$10,000	Compulsory
Maryland	\$20,000	Compulsory
Massachusetts	\$10,000	Compulsory
Michigan	\$20,000	Compulsory
Minnesota	\$25,000	Compulsory
New Jersey	\$15,000	Compulsory
New York	\$10,000	Compulsory
North Dakota	\$25,000	Compulsory
Oregon	\$25,000	Compulsory
Pennsylvania	\$10,000	Compulsory
South Carolina	\$15,000	Compulsory

of \$10,000.²⁶ Consequently, mandatory PIP insurance differs from the voluntary purchase of other types of automobile insurance because Florida law, rather than the insured, dictates the type and amount of insurance coverage.²⁷ In conjunction with the purchase of PIP insurance, Florida mandatory no-fault law requires an insurer to offer each potential insured or policyholder a deductible in the amount of \$250, \$500, \$1,000 or \$2,000.²⁸ The purpose of requiring insurance companies to offer a deductible was noted by the Florida Supreme Court in *Industrial Fire & Casualty Insurance Co. v. Kwechin*.²⁹ In *Kwechin*, the supreme court explained the election of a deductible avoids requiring redundant, duplicate, and therefore, uncollectible insurance benefits.³⁰ The court ruled that by allowing for a deductible, an insured can purchase the minimum PIP insurance coverage of \$10,000 and avoid, to a certain extent, any overlap with other insurance coverage.³¹ The majority of Florida insureds, typical of most jurisdictions,

South Dakota	\$15,000	Optional First Party
Texas	\$20,000	Optional First Party
Utah	\$20,000	Compulsory
Virginia	\$25,000	Compulsory

Id. (supplying each state's type of no-fault law); *see King, supra* note 11, at 297 (supplying updated benefit amounts); *see also SCHERMER, supra* note 6, § 1.02, at 1-12.

26. FLA. STAT. § 627.736(1) (Supp. 1992).

27. *See NADER & SMITH, supra* note 1, at 81. "Most of the terms in a no-fault insurance policy remain the same as in a fault policy. The major difference is the personal injury protection coverage, known as PIP. The PIP portion of the insurance policy pays for the no-fault benefits that are mandated by state laws." *Id.*

"Liability insurance is designed to protect you against the costs of being sued." *Id.* "[M]edical payments coverage . . . is designed to pay for some of the medical consequences that can result [from an] accident." *Id.* at 89. "The part that protects the value of your vehicle . . . from an impact with another vehicle or object . . . is called collision coverage." *Id.* at 91-92. "Loss caused by flying objects, fire, theft, windstorm, hail, malicious mischief, riot, hitting an animal, etc. is . . . commonly called comprehensive coverage." NADER & SMITH, *supra* note 1, at 92.

In Florida, one may drive without comprehensive auto insurance coverage; however, one may not drive without PIP insurance coverage. Automobile owners who fail to purchase PIP coverage may have their vehicle registration revoked. *See* FLA. STAT. § 627.733(6) (1991).

28. FLA. STAT. § 627.739(2) (1991).

29. 447 So. 2d 1337 (Fla. 1983).

30. *Id.* at 1339.

31. *Id.* "To require payment for coverage which is redundant, therefore uncollectible, would be inequitable. Hence, section 627.739 provides for a deductible to prevent overlapping coverage." *Id.*

choose the highest deductible amount of \$2,000 to maximize the reduction in premium cost and justify such deductible in light of collateral insurance coverage.³² The up-shot of choosing a deductible is that the higher the deductible, the lower the premium cost for PIP insurance. Furthermore, the *Kwechin* court ruled that insurance agents, acting on behalf of an insured, possess a heightened duty to fully disclose and inform the insured what the deductible means, how the deductible affects PIP insurance coverage, and whether the insured's collateral insurance coverage warrants choosing a deductible.³³

III. THE MAKING OF A NO-FAULT INSURANCE CONTRACT

*The typical applicant buys [insurance] 'protection' much as he buys groceries.*³⁴

Under Florida's and most states' no-fault insurance law, the consumer has no choice but to purchase PIP insurance upon buying or leasing an automobile.³⁵ However, the consumer does have a choice of insurance

32. See *supra* notes 4, 5 and accompanying text. A recent survey asked insured automobile owners the following question: "When did you last discuss with your insurance agent or insurance company the possibility of raising the amount of your deductible?" The owners answered as follows:

When I last bought a car	25%
When I last changed insurance companies	10%
When my insurance was last renewed	29%
Never—I have always had the same deductible	29%
Don't Know	7%

INSURANCE INFO. INST., *supra* note 5, at ch. 3. These answers reveal that most automobile owners prefer to have a higher deductible, and that some owners have no idea about their deductible. See *id.*

33. *Kwechin*, 447 So. 2d at 1337-40. Prior to a 1982 amendment, the insurer was required to explain to the insured that a deductible could be obtained only where there was collateral coverage. See FLA. STAT. § 627.739 (1981).

In writing the dissenting opinion in *Kwechin*, Justice Boyd remarked that the court's holding imposes an inequitable duty on "insurance agents . . . to inquire into the financial affairs of all persons selecting one of the optional deductibles available with personal injury protection coverage and to counsel with such individuals concerning the coverage and deductible selected." *Kwechin*, 447 So. 2d at 1340 (Boyd, J., dissenting).

34. 7 WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 900, at 34 (3d ed. 1963) [hereinafter JAEGER].

35. See generally King, *supra* note 11. Most states require proof of no-fault insurance in order to register a car. See COLO. REV. STAT. § 10-4-702 (1992); CONN. GEN. STAT.

companies. Consumers tend to pick a PIP insurer two ways: Either they choose the company with whom they already have obtained other types of insurance or “open the yellow pages to the insurance listings, close their eyes, and point.”³⁶ In either case, insurance companies know the consumer’s primary concern is cost.³⁷ Armed with this knowledge, the experienced PIP insurance underwriter simply waits for the consumer to inquire and then pitches the product.

The consumer’s inquiry usually begins with a phone call or a visit to an insurance agent.³⁸ In either case, the insurance companies equip their

ANN. § 14-112 (West 1993); DEL. CODE ANN. tit. 21, § 2118(a) (1992); D.C. CODE ANN. § 35-2106(a), (b) (1992); FLA. STAT. § 627.733 (1991); GA. CODE ANN. § 33-34-4 (Supp. 1992); HAW. REV. STAT. § 431:10C-117 (Supp. 1992); KAN. STAT. ANN. § 40-3104 (Supp. 1975); KY. REV. STAT. ANN. § 304.39-080 (Baldwin 1991); MD. ANN. CODE art. 48A, § 539 (1992); MASS. GEN. LAWS. ANN. ch. 90, § 34A (West 1993); MICH. COMP. LAWS § 500.3102(2) (1991); MINN. STAT. § 65B.49 (1992); N.J. REV. STAT. § 39:6A-4 (1991); N.Y. VEH. & TRAF. LAW §§ 310-321 (McKinney Supp. 1993); N.D. CENT. CODE § 39-16.1-11 (1991); S.C. CODE ANN. § 38-77-140 (Law. Co-op. 1991); UTAH CODE ANN. § 31A-22-302 (1992); VA. CODE ANN. § 46.2-472 (Michie 1992). See SCHERMER, *supra* note 6, § 1.02 at 1-12.

Arkansas is an optional no-fault state. ARK. CODE ANN. § 23-89-203 (Michie 1992). Oregon does not require compulsory insurance, but if a liability policy is issued, then no-fault insurance must be provided. OR. REV. STAT. § 742.520 (1991). South Dakota is an optional no-fault state in which insurers must offer “supplemental coverage” as an option. S.D. CODIFIED LAWS ANN. § 58-23-7 (1992). In Texas, an automobile owner must have liability insurance which includes no-fault coverage unless rejected by the insured. TEX. INS. CODE ANN. art. 5.06-3(a) (1993).

36. NADER & SMITH, *supra* note 1, at 21.

37. *Id.* at 63. Smith and Nader have noted that:

Now, because of the tremendous increases in the price of auto insurance in many parts of the country, the topic is one that generates anger, controversy, and resentment—even before the envelope containing the bill is opened. . . . For one thing, auto insurance is mandatory in many states. That means that consumers can’t ‘Just Say No,’ thereby reducing the incentives of the companies to keep the prices low.

Id.

38. When it comes to getting information before purchasing auto insurance, the top source for most consumers is an insurance agent. The next best sources for information regarding insurance, according to most Americans, is friends or relatives. INSURANCE INFO. INST., *supra* note 5, at ch. 1.

When asked about what kinds of information concerning insurance would be most helpful, consumers responded as follows:

Explanations on the different types of insurance	39%
How to shop for insurance	21%
How to choose a good insurance agent	13%
What to do if you have a complaint	9%

agents with the tools necessary to close a deal. Most agents give a prospective consumer a pamphlet which summarizes the coverages and the premiums.³⁹ If the consumer inquires over the phone, the agent tells the

How to file a claim	7%
(None of these)	6%
(Don't know)	5%

Id. at ch. 131.

39. In a personal visit by the author to Florida State Discount Insurance and Auto Tags, Inc., in Fort Lauderdale, Florida, the agent provided a summary of coverages and a premium statement which can be used to figure the amount of insurance which is being purchased. See FLORIDA STATE DISCOUNT INSURANCE AND AUTO TAGS, INC., SUMMARY OF COVERAGES AND PREMIUM (1991).

In talking to a representative of Knight Auto Insurance in Davie, Florida, the author was provided with a packet of standard forms, referred to as the "Mickey Mouse forms" which are kept on file with the insured's application. The agent is able to help with the application process through the use of computers. After the applicant is accepted, the insured pays the first premium payment which is sent to the insurer. The agent has constant contact with the insurer and thus can answer any questions which the applicant might ask. See KNIGHT AUTO INSURANCE, ELECTION OF PERSONAL INFURY [sic] PROTECTION WITH A DEDUCTIBLE (1991). The following is a reproduction of the "Mickey Mouse forms" which a prospective insured must fill out prior to leaving the agent's office:

ELECTION OF PERSONAL INFURY [sic] PROTECTION WITH A DEDUCTIBLE

I hereby certify that I fully understand that if I or my dependent relatives are injured in an accident under which Personal Injury Protection benefits would be payable by the _____ Insurance Company, my other medical/disability/loss of use insurance must pay for the first \$ _____ of the medical/disability/loss of use benefits before my Personal Injury Protection purchased from . . . [Insurance] Agency will start paying benefits. If I or my dependent relatives have no other medical/disability/loss of use insurance, I or my dependent relatives must personally be responsible for the first \$ _____ of the loss and will hold the . . . [Insurance] Agency and the _____ Insurance Company completely harmless.

I certify that I have read and understood the above paragraph.

Witness _____ Insured _____

Id. It is interesting to note that the original "Mickey Mouse form" which the insured must fill out contained a spelling error in its title ("infury" instead of "injury"). This form notifies the insured of the deductible, and there is a power of attorney on the bottom of the form in order to insure payment of the premium. See *id.*

The back of a typical application for auto insurance contains the following explanation of the PIP deductible:

\$10,000 NO-FAULT COVERAGE (EXPLANATION & OPTIONS)

consumer what the pamphlet says.⁴⁰ The typical insurance company pamphlet contains one paragraph describing PIP insurance.⁴¹ This

With reference to my application for auto insurance through the _____ Auto Insurance Agency, I understand that Personal Injury Protection (PIP) benefits pay for **MEDICAL AND REIMBURSEMENT FOR LOSS OF INCOME**. Deductibles which reduce the amount of PIP benefits paid to me and/or my resident dependent relatives, are available in amounts of \$250, \$500, \$1,000 and \$2,000. **A WORD OF CAUTION:** Most PIP is carried without a deductible of any amount and **DEDUCTIBLES ARE NOT RECOMMENDED**. I hereby select a PIP deductible by marking the appropriate box below with an "X." I agree that the _____ Auto Insurance Agency has no responsibility to advise me as to the provisions or conditions of any **OTHER INSURANCE** that I may have and that I understand that any **OTHER INSURANCE** may also exclude coverage for the personal injury deductible. In consideration of the _____ Auto Insurance Agency offering the PIP deductible elected by me, I hereby agree to indemnify the _____ Auto Insurance Agency from all claims, loss, damage, injury, liability, costs and expenses whatsoever kind or nature (including attorney's fees), howsoever, the same may be caused resulting directly or indirectly from my election of a deductible on personal injury protection. I acknowledge the price, indicated to the right of this explanation of personal injury protection benefits to eliminate any deductible that I have elected, has been quoted to me.

See id.

40. In the USAA pamphlet a variety of insurance products are available. The range of products is wide, from life to auto insurance. There are even a few related non-insurance products such as credit cards and new car price lists. *See YOUR GUIDE TO USAA SERVICES* (1990). For each product which may interest a consumer, there is an "800" number to call in order to obtain assistance with information. For example, auto insurance is advertised on page seven of the guide with a corresponding number to call. *Id.* at 7.

41. Allstate's brochure only has one paragraph which refers to no-fault insurance in general. Under a section boldly labeled as "NO-FAULT COVERAGE," the brochure provides, "coverage for injury, death, loss of services, and loss of income suffered by you, your covered passengers, or covered family members. (No-Fault Coverage is not available in every state. Ask an Allstate agent for details.)" *See ALLSTATE INS. CO., ALLSTATE... MORE VALUE FOR YOUR AUTO INSURANCE DOLLAR!* (1990) [hereinafter *INSURANCE DOLLAR*]. Allstate does publish a brochure concerning the no-fault insurance system, but the publication is meant more as a political statement on the position of the insurance company concerning legislation which could affect no-fault. *See ALLSTATE INS. CO., THE NO-FAULT SYSTEM—HOW DOES IT WORK IN FLORIDA?* (1989) [hereinafter *NO-FAULT SYSTEM*]. The consumer is told that higher rates are the only logical result if the system is not changed. Yet, this comprehensive explanation of the Florida no-fault system has no information concerning how the election of a deductible affects the amount of benefits received. *See id.*

The State Farm brochure also fails to give a person the full details of how the deductible affects the amount of PIP benefits received. The brochure states under the "limits of liability" section that "[t]he most we pay under No-Fault for each insured for all losses and expenses from one accident is \$10,000 (less any deductible . . . \$250 up to \$2,000)." *STATE FARM INS. CO., LIKE A GOOD NEIGHBOR, STATE FARM IS THERE* (1989) [hereinafter *GOOD NEIGHBOR*]. While the State Farm brochure provides more information than most, this statement still does not inform the applicant of the "double deductible" effect. *See id.* For

paragraph informs the consumer of the mandatory minimum amount of PIP insurance coverage required by Florida law.⁴² In addition, insurers supply their insurance agents with brochures containing the most frequently asked questions and answers about PIP insurance.⁴³ The insurance agent usually offers the brochures if the prospective consumer asks the questions.⁴⁴ The consumer does not have the opportunity to read or even look at the actual PIP insurance policy until much later.⁴⁵

From the foregoing information, the consumer must decide whether to apply for PIP insurance with that particular insurance company. Although a prospective consumer may have a choice of insurers, the consumer does not have a choice of the actual terms of a PIP insurance policy. Florida statutes and the Florida Department of Insurance prescribe the content of a PIP insurance policy.⁴⁶ Consequently, the consumer's choice of PIP insurance companies primarily involves a comparison of premium rates for standardized coverage.

To be considered for coverage, the consumer must then fill out an application for PIP insurance either in person or over the phone.⁴⁷ The

a discussion of "double deductible" effect see *infra* notes 72 & 81 and accompanying text.

42. See INSURANCE DOLLAR, *supra* note 41; NO-FAULT SYSTEM, *supra* note 41; GOOD NEIGHBOR, *supra* note 41.

43. Typical of the question and answer brochures are ones dealing with rates or payment of the auto insurance premium. The question and answer format is used by both Allstate and State Farm in their publications. See ALLSTATE AUTO COMMUNICATIONS, HOW AUTO INSURANCE RATES ARE SET—A GUIDE TO ANSWER YOUR QUESTIONS ABOUT AUTO INSURANCE COSTS (1991) [hereinafter ALLSTATE AUTO COMMUNICATIONS]; STATE FARM INSURANCE CO., Q. WHAT CAN I EXPECT FROM STATE FARM'S MONTHLY PAY PLAN? A. LOOK INSIDE FOR DETAILS (1991) [hereinafter STATE FARM INSURANCE].

44. The brochures were obtained by the author on August 15, 1991 only after asking a series of questions to which the insurance agent did not know the answer. See ALLSTATE AUTO COMMUNICATIONS, *supra* note 43; STATE FARM INSURANCE, *supra* note 43.

45. "The agent in fact prepares the contract when he writes the application, because the policy, which the applicant does not see until delivered and does not sign, follows an acceptance as a matter of course." JAEGER, *supra* note 34, at 39.

46. Section 624.05 defines "Department" as Department of Insurance. FLA. STAT. § 624.05 (1991). For a discussion of the role that the department plays in approving rates and insurance policy coverage, see *State Farm Mut. Auto Ins. Co. v. Chapman*, 415 So. 2d 47 (Fla. 5th Dist. Ct. App. 1982), *review denied*, 426 So. 2d 29 (Fla. 1983). In *Chapman*, a rule that the Department had set forth regarding the definition of a motor vehicle was found to be in violation of the Florida statutes despite the reliance of the insurer on the rule promulgated by the Department. *Id.* at 48-49.

47. "In writing the application, the agent does what the company sent him to do. He negotiates for the company, asks questions for the company, writes down answers for the company, and makes the return for the company." JAEGER, *supra* note 34, at 30.

application requires the prospective consumer to choose a deductible, if any, and quotes the premium cost for mandatory \$10,000 of PIP insurance. The insurance agent then sends the application along with the first month, quarter or semi-annual premium to the insurance company.⁴⁸ Upon receipt of the application and the required premium, the insurance company must decide to accept or reject the prospective insured's application. Upon rejection, the consumer is notified and the premium is refunded.⁴⁹ Upon acceptance, the insurance company issues a PIP policy which states the date coverage begins.⁵⁰ Only upon issuance of the PIP policy does the insured have the opportunity to read and review the exact terms of the PIP insurance policy.⁵¹ The typical PIP policy provides as follows:

Regardless of the number of persons insured . . . the total aggregate limit of personal injury protection benefits available under the Florida Motor Vehicle No-Fault Law, as amended, from all sources combined, including this policy, for all loss and expense incurred by or on behalf of any one person who sustains **bodily injury** as the result of any one accident shall be \$10,000. . . . Regardless of whether payments are made under the Florida Motor No-Fault Vehicle Law, as amended, or under Extended Personal Injury Protection, the \$10,000 limit indicated in the preceding paragraph shall be the maximum payable under this endorsement.⁵²

Accordingly, the insured believes that a Florida no-fault PIP insurance policy obligates payment of the mandatory \$10,000 insurance benefits required by Florida law. Yet the insurance companies believe that a Florida

48. See INSURANCE INFO. INST., *supra* note 5, at ch. 1.

49. With the advance in communications and computers, an agent at Florida State Discount Insurance and Auto Tags, Inc., can obtain the acceptance or rejection right within minutes; however, receipt of the actual policy is delayed by the mail. See *supra* note 39.

50. In obtaining insurance from USAA, after the application was filled out by the agent over the phone at the "800" number, the actual policy detailing the coverage was sent to the insured after a few weeks. See *supra* note 40.

51. See NADER & SMITH, *supra* note 1, at 42. Under a boldly stated section labeled as a "consumer alert," the authors' note that

[f]requently you will not receive the actual policy until after you have decided to buy. You will also often have the right to inspect the policy and cancel. When you receive your policy, *read it* to make sure the promises about the terms of the policy made to get you to buy were actually kept in the contract itself. Few of us do this, but we should.

Id. at 42. (emphasis added).

52. SUSAN J. MILLER & PHILLIP LEFEBVRE, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 83 (1991). These are standard provisions in a Florida PIP policy.

no-fault PIP insurance policy only obligates payment of the mandatory \$10,000 of insurance benefits less the amount of any deductibles for insureds who select a deductible.⁵³ This conflict concerning the payout of mandatory no-fault insurance benefits has only surfaced in Florida under Florida's version of a typical no-fault insurance law. Since there is no legislative history directly on point, both insureds and insurers have had to look to the Florida courts to resolve the issue of the amount of PIP benefits payable to insureds with a deductible.⁵⁴

IV. COMPUTATION OF NO-FAULT INSURANCE BENEFITS UNDER FLORIDA LAW

Section 627.739 of the Florida Statutes regarding no-fault PIP insurance deductibles states that:

Insurers shall offer to each applicant and to each policy holder . . . deductibles, in amount, of \$250, \$500, \$1,000 and \$2,000, such amount to be deducted from the benefits otherwise due each person subject to the deduction.⁵⁵

The application of this provision to the Florida statutory \$10,000 PIP insurance requirement is crucial in carrying out the purposes of the no-fault law. For over ten years, Florida courts have struggled with the application of the deductible in relation to the payment of the required PIP benefits. This struggle has produced a peculiar series of court opinions unique to Florida and to this issue.

*Industrial Fire & Casualty Insurance Co. v. Cowan*⁵⁶ presented the Florida Third District Court of Appeals with this issue. In *Cowan*, the plaintiff was injured in an automobile accident and incurred medical expenses and other losses of approximately \$40,000.⁵⁷ Cowan's PIP policy provided for the \$5,000 of PIP insurance coverage required by Florida law at the time.⁵⁸ The insured selected a deductible of \$1,000.⁵⁹ Cowan claimed that upon his payment of the deductible, the insurance company was

53. See *International Bankers Ins. Co. v. Arnone*, 552 So. 2d 908 (Fla. 1989).

54. See *id.*

55. FLA. STAT. § 627.739 (1991).

56. 364 So. 2d 810 (Fla. 3d Dist. Ct. App. 1978).

57. *Id.* at 811.

58. *Id.*

59. *Id.*

obligated by law to pay \$5,000 in PIP insurance benefits.⁶⁰ The insurance company countered that the insured, by choosing a \$1,000 deductible, reduced the coverage limits of the PIP insurance policy by \$1,000, the amount of the deductible.⁶¹ Consequently, the insurance company argued that it was only obligated to pay a maximum of \$4,000 in PIP benefits to Cowan.⁶² The Third District Court of Appeal sided with the insurance company.⁶³ Relying on the Florida PIP statute in effect at the time, the court ruled that the amount of any deductible was “to be deducted from the amounts otherwise due each person subject to the deduction”⁶⁴ Based on this statutory language, the court calculated that the “amount otherwise due” under the Cowan PIP policy equaled the required \$5,000 PIP policy limits and then subtracted the \$1,000 deductible to conclude that the maximum liability of the insurance company was \$4,000.⁶⁵ The court did refer to the section of the Florida statute that required Cowan to obtain \$5,000 worth of PIP insurance.⁶⁶ However, the court did not address any argument regarding the legislative purpose or intent behind this requirement, and merely inserted the \$5,000 PIP policy limits as the “amount ‘otherwise due’” referenced in the PIP statute.⁶⁷ In sum, the court equated the “amount otherwise due” with the statutorily required policy limits for Florida PIP insurance.

Two years after *Cowan*, the Fifth District Court of Appeal was presented with the same issue in *Thibodeau v. Allstate Insurance Co.*⁶⁸ Thibodeau incurred over \$8,000 in medical expenses from injuries she sustained as a passenger in an automobile accident. Under the Florida PIP law in effect at the time, Thibodeau was covered under a \$5,000 PIP

60. *Id.*

61. *Cowan*, 364 So. 2d at 811.

62. *Id.*

63. *Id.* The Third District Court of Appeal reversed the trial court decision which held that the plaintiff was entitled to \$5,000, the maximum PIP benefits, because the amount of the insured’s PIP covered expenses was \$40,000. *Id.*

64. *Id.* (quoting FLA. STAT. § 627.739 (Supp. 1976)). The only policy language that the court considered concerning the deductible stated: “This Policy Contains \$1,000 Deductible on Personal Injury Protection.” *Id.* No policy language was cited by the court indicating the insured was informed that the selection of a deductible altered the maximum payable PIP benefits.

65. *Cowan*, 364 So. 2d at 811.

66. *Id.* The court referred to section 627.736 of the Florida Statutes, which is the section requiring PIP insurance coverage. *Id.* (citing FLA. STAT. § 627.736 (1975)).

67. *Id.* The court stated: “The amount ‘otherwise due’ under the policy is \$5,000.00.” The court then cites as its authority section 627.736(1) of the Florida Statutes. *Id.*

68. 391 So. 2d 805 (Fla. 5th Dist. Ct. App. 1980).

insurance policy which included a \$4,000 deductible. Thibodeau claimed that after payment of the \$4,000 deductible, the insurance company was obligated to pay \$5,000 in PIP insurance benefits. The insurance company, relying upon *Cowan*, argued that the insurance company's maximum PIP liability was \$1,000 because of Thibodeau's \$4,000 deductible. Thibodeau argued that Florida's PIP statute was ambiguous and misleading.⁶⁹ Thibodeau further argued that any person reading Florida's PIP insurance law and Thibodeau's PIP policy would conclude that \$5,000 of PIP insurance would require the insurance company to pay \$5,000 in PIP insurance benefits after payment of any deductible.⁷⁰ The court acknowledged that Thibodeau's argument was "appealing."⁷¹ The court also confessed that the insurance company's argument clearly bestows the deductible with a double effect; a reduction of the PIP insurance policy limits as well as a threshold to payment of any PIP insurance benefits.⁷² However, the court, without legislative history for guidance, passed Thibodeau's argument to the Legislature and ruled, consistent with *Cowan* and the insurance company's argument, that the "amount otherwise due" language of the Florida PIP statute means the statutorily required PIP insurance policy limits.⁷³

The question of computing PIP insurance benefits under a PIP insurance policy with a deductible laid dormant for six years until the Fourth District Court of Appeal was presented with the issue in *International Bankers Insurance Co. v. Govan*.⁷⁴ In *Govan*, the insured purchased \$10,000 in PIP insurance as required by Florida law at the time. Govan also selected a \$2,000 deductible. The insured incurred over \$5,000 in medical expenses from injuries sustained in an automobile accident.⁷⁵ At issue was whether the payment of eighty percent of Govan's medical bills, as required by Florida's PIP insurance statute, should be computed before

69. *Id.* at 806. "The appellant argues the [insurance] policy statement of '\$5,000 coverage' is ambiguous and misleading because under no circumstances is \$5,000 ever payable if it is subject to a deduction." *Id.*

70. *Id.* "[T]he general public assumes, upon reading such a statement, that there is \$5,000 coverage after the insured pays the first \$4,000." *Id.*

71. *Thibodeau*, 391 So. 2d at 806.

72. *Id.*

73. *Id.* "If the result is contrary to public policy or understanding and expectation, the legislature should revise [Florida Statute] section 627.739(1)." *Id.*

74. 502 So. 2d 913 (Fla. 4th Dist. Ct. App. 1986), *aff'd*, 521 So. 2d 1086 (Fla. 1988).

75. *Id.* Govan's total medical bills were \$5,887.45 which was below the \$10,000 maximum limit of PIP benefits mandated in Florida Statute § 627.736(1)(a). *Id.*

or after the deductible is subtracted from the total medical bills.⁷⁶ In ruling that the insurance company's obligation to pay 80% of the insured's medical expenses should be based on the total medical bills before subtraction of any deductible, the Fourth District Court of Appeal took issue with the *Cowan* and *Thibodeau* decisions.⁷⁷ The *Govan* court held that the "benefits [amounts] otherwise due" language of the Florida PIP statute meant the total amount of medical expenses incurred by the insured before application of the deductible.⁷⁸ The court noted its conflict with the *Cowan* and *Thibodeau* decisions and criticized those decisions by stating:

Those cases appear to hold that "benefits otherwise due" refers to the no-fault benefit limits, such as the \$10,000 limit involved herein. If

76. *Id.* at 913-14. The issue breaks down mathematically as follows:

The insurer claimed that *Govan's* total medical bills should be multiplied by 80%, the maximum amount payable under Florida law, and then that sum should be further reduced by the deductible to arrive at the amount of PIP benefits payable to *Govan*. The math looks like this:

TOTAL MEDICAL BILLS		\$5,887.45	
80% PAYABLE	(x)	.80	
<hr/>			
DEDUCTIBLE	(-)	\$2,000.00	
<hr/>			
BENEFITS PAYABLE		\$2,709.96	

Govan claimed that the total of his medical bills should first be reduced by the deductible and then that sum should be multiplied by 80% to reach the total amount of PIP benefits payable by the insurer. The math looks like this:

TOTAL MEDICAL BILLS		\$5,887.45	
DEDUCTIBLE	(-)	\$2,000.00	
<hr/>			
80% PAYABLE	(x)	.80	
<hr/>			
BENEFITS PAYABLE		\$3,109.96	

Note that the \$400 difference between the insurance company's and *Govan's* formula remains constant regardless of the insured's deductible amount. See also *Govan v. International Bankers Ins. Co.*, 521 So. 2d 1086, 1087 (Fla. 1988) (breaking down the figures graphically in its opinion).

77. See *Govan*, 502 So. 2d at 914.

78. *Id.*

that were true, the "deductible" would not be a deductible at all in the manner that word is normally used, i.e., as an amount to be deducted from the claim, but rather would simply be a means of providing for lower policy limits. We do not believe the legislature would have authorized lower policy limits in such an indirect and unusual fashion, especially since [Florida Statutes] section 627.736(1)(a) specifically mandates coverage in the amount of at least \$10,000.00. We are not aware of any statutory provision authorizing lesser limits.⁷⁹

The court also noted that the *Govan* PIP insurance policy language regarding deductibles paralleled the *Cowan* and *Thibodeau* PIP insurance policy terms.⁸⁰ The court expressed some concern that the PIP policy provisions regarding deductibles could be construed to support the use of a PIP deductible twice; first, to reduce the PIP policy limits and second, as a threshold to payment of PIP benefits.⁸¹ However, the court declined to comment further on the policy language because that issue was not before the court and regardless of the policy language, the court based its decision on the "plain meaning" of the language of the Florida PIP statute.⁸²

The Fourth District Court of Appeal's decision in *Govan* was affirmed on appeal by the Florida Supreme Court in *Govan v. International Bankers Ins. Co.*,⁸³ In sum, the Florida Supreme Court in *Govan* equated the "amounts [benefits] otherwise due" language of Florida's PIP insurance law with 80% of the insured's total medical expenses rather than the PIP insurance policy limits.⁸⁴ Pursuant to the Supreme Court's ruling in *Govan*, insurance companies would be obligated to pay out the statutorily required PIP insurance policy limits of \$10,000 in benefits when 80% of the insured's medical expenses minus any deductible equals or exceeds \$10,000.⁸⁵

79. *Id.*

80. *Id.*

81. *Id.*

82. *Govan*, 502 So. 2d at 914.

83. 521 So. 2d 1086, 1087 (Fla. 1988). The court used a plain-meaning analysis to rule that the PIP statute required that 80% of the medical benefits must be computed first, and then the amount of any deductible should be subtracted to arrive at the total amount of PIP benefits payable by the insurer. *Id.* at 1088. The court dismissed *Govan*'s argument that Florida's PIP statute was vague and ambiguous in an interesting footnote where a failure of the Legislature to amend section 627.739(2) of the Florida Statutes results in a "plain reading" of the statute. *Id.*

84. *Id.* at 1087-88.

85. *See id.* For example, if *Govan*'s medical expenses were \$15,000 or more, then the insurance company would be obligated to pay \$10,000 in PIP benefits. The math looks like this:

The Fourth District Court of Appeal's decision in *International Bankers Insurance Co. v. Arnone*⁸⁶ was predictably consistent with the same court's opinion in *Govan*. The Fourth District Court of Appeal in *Arnone* extensively cited the *Govan* opinion in concluding that Ms. Arnone's \$2,000 deductible acted as a threshold to the payment of the PIP insurance policy limits in the event that eighty percent of the covered medical expenses equaled or exceeded the required \$10,000 PIP policy limits.⁸⁷ Under the facts of the *Arnone* case, eighty percent of her covered medical bills minus the \$2,000 deductible did exceed her \$10,000 PIP insurance policy limits. The court rejected the insurance company's argument that a deductible reduces the face amount of a PIP insurance policy because Florida law requires \$10,000 worth of PIP insurance coverage.⁸⁸

The appeal of the Fourth District Court of Appeal's decision in *Arnone* presented the Florida Supreme Court with the opportunity to clarify the calculation of no-fault PIP insurance benefits subject to a deductible. The supreme court in *Arnone* reaffirmed the *Govan* method of computing PIP insurance benefits whereby eighty percent of the insured's total medical expenses must be computed before subtracting the amount of any deductible.⁸⁹ In doing so, the supreme court quashed the Fourth District Court of Appeal's decision,⁹⁰ and ruled that under the facts of *Arnone*, the "benefits [amounts] otherwise due" language of the Florida PIP statute means *the lesser* of eighty percent of the insured's medical expenses minus any deductible, or the statutory PIP insurance policy limits minus any deductible.⁹¹ Consequently, because eighty percent of Susan Arnone's medical expenses minus her \$2,000 deductible is greater than her mandated

TOTAL MEDICAL BILLS		\$15,000.00
80% PAYABLE	(x)	.80
<hr/>		
		\$12,000.00
DEDUCTIBLE	(-)	\$ 2,000.00
<hr/>		
BENEFITS PAYABLE		\$10,000.00

86. 528 So. 2d 917 (Fla. 4th Dist. Ct. App. 1988).

87. *Id.* at 918-19.

88. *Id.* at 918. "We do not believe the legislature would have authorized lower policy limits in such an indirect and unusual fashion, especially since [Florida Statute] section 627.736(1)(a) specifically mandates coverage in the amount of a least \$10,000.00. We are not aware of any statutory provision authorizing lesser limits." *Govan*, 502 So. 2d at 914.

89. *International Bankers Ins. Co. v. Arnone*, 552 So. 2d 908, 910 (Fla. 1989).

90. *Id.* at 911.

91. *Id.*

\$10,000 PIP policy limits minus her \$2,000 deductible, Ms. Arnone's \$10,000 PIP policy with a \$2,000 deductible only obligates the insurance company to pay out \$8,000 in PIP benefits. In effect, the supreme court's ruling in *Arnone* sanctions the use of a deductible not only as a threshold to the payment of PIP insurance benefits, but also as a reduction of the amount of statutorily required PIP insurance. As support for its ruling, the supreme court mentioned the Florida Department of Insurance's interpretation of the Department approved standard PIP insurance policy provision concerning deductibles and the "internal consistency" rule of statutory construction.⁹² The supreme court did not expound a further explanation of these bases for its ruling, nor did it make any reference to legislative intent or legislative history to support its ruling and did not address any other issues regarding Florida's no-fault PIP insurance law.⁹³ In sum, the Florida Supreme Court's decision in *Arnone* means that an insurance company will never be obligated to pay PIP insurance benefits to a Florida insured equal to the statutorily required \$10,000 policy limits if the insured selects a deductible.

V. THE IMPACT OF THE FLORIDA SUPREME COURT'S DECISION IN *ARNONE*

An insurance coverage dispute between an insured and an insurer is not uncommon.⁹⁴ Courts have traditionally relied on finding an ambiguity in the insurance contract or on the doctrine of unconscionability to resolve coverage disputes in favor of an insured.⁹⁵ Conversely, courts have

92. *Id.* at 910. "Reading these sections *in pari materia*, it is plain that the statutorily defined 'required benefits' are the benefits otherwise due from which the deductible amount is to subtracted." *Id.* at 911.

93. *See Arnone*, 552 So. 2d at 911. The supreme court cited *American Nurses Ass'n v. Passaic Gen. Hosp.*, 484 A.2d 670, 673 (N.J. 1984) as authority to define the functional purpose of a deductible.

94. There have been thousands of cases where the insured is at variance with the insurer. *See* ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 6.1(a), at 614 (1988).

95. *See id.* "The doctrine that ambiguities in contract documents are resolved against the party responsible for the drafting is a well recognized principle of contract interpretation. This doctrine was one of the first, and continues to be one of the most widely used approaches, which courts employ to ameliorate harsh effects that would otherwise result from insurance policy terms." *Id.* at 628-29. "In some cases, for example, the unambiguous language of an insurance policy provision provides so little coverage that it would be unconscionable to permit the insurer to enforce it." *Id.* at 638.

traditionally relied on the plain meaning rule and the sanctity of contract doctrine to hold in favor of an insurer.⁹⁶ However, no-fault PIP automobile insurance differs from other types of traditional insurance.⁹⁷ No-fault PIP insurance is a creation of statute.⁹⁸ Consequently, absent specific legislative history to the contrary, courts must consistently decide PIP insurance coverage disputes based on statutory language drafted and designed to accomplish a specific legislative purpose.⁹⁹ Accordingly, the Florida courts must forgo decision making that undermines or disregards the Legislature's intended purpose in enacting a no-fault PIP insurance statute.¹⁰⁰ The Florida Supreme Court twice failed its task in *Arnone*.

The supreme court initially failed to provide a consistent interpretation of the "benefits otherwise due" provision of Florida's PIP insurance statute. The court, by affirming *Govan*, ruled that for insureds who chose a deductible, the "benefits otherwise due" language of the PIP statute means that payable PIP insurance benefits equal eighty percent of the total medical expenses minus the deductible.¹⁰¹ The court later ruled in *Arnone* that for

For other comments and articles concerning unconscionability see generally Robert Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970); Robert Dugan, *The Application of Substantive Unconscionability to Standardized Contracts—A Systematic Approach*, 18 NEW ENG. L. REV. 77 (1982); M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

96. "If the language employed is clear and unambiguous, the meaning of the plain wording must prevail ('plain meaning' rule). Courts must enforce, not write, contracts of insurance and their language must be given its plain, ordinary, and popular meaning." WILLIAM F. YOUNG & ERIC M. HOLMES, *CASES AND MATERIALS ON INSURANCE* 55 (2d ed. 1985) (citing *Tobin v. Beneficial Standard Life Ins. Co.*, 675 F.2d 606, 608 (4th Cir. Ct. App. 1982)); see also the plain meaning cases cited in CURTIS M. CANTON ET AL., *The Rules of Insurance Policy Construction and the Myth of the "Sophisticated Insured,"* in *INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES* 1990, at 9 (PLI Litig. & Admin. Practice Course Handbook Series No. 385, 1990).

97. See FLA. STAT. § 627.736(1) (Supp. 1992).

98. See *King*, *supra* note 11, at 299; see also SCHERMER, *supra* note 6, § 1.02 at 1-12.

99. 49 FLA. JUR. 2D *Statutes* § 114 (1984); see also *White v. Pepsico*, 568 So. 2d 886, 889 (Fla. 1990) (service of process statute); *Byrd v. Richardson-Greenshields Sec. Inc.*, 552 So. 2d 1099, 1102 (Fla. 1989) (workers' compensation statute); *Tampa-Hillsborough County v. K.E. Morris Alignment Serv.*, 444 So. 2d 926, 928-29 (Fla. 1983) (eminent domain statute); *State v. Webb*, 398 So. 2d 820 (Fla. 1981); *Wakulla County v. Davis*, 395 So. 2d 540, 542-43 (Fla. 1981) (statutory attorney fee statute); *Schultz v. State*, 361 So. 2d 416 (Fla. 1978); *State ex rel. Triay v. Burr*, 84 So. 61 (Fla. 1920).

100. See *infra* note 114.

101. *Govan*, 502 So. 2d at 914.

insureds who chose a deductible, the "benefits otherwise due" language of the PIP statute means the mandatory PIP insurance policy limits minus the deductible.¹⁰² The two formulas for calculating no-fault insurance benefits are inconsistent. Under the *Govan* formula, if eighty percent of the insured's covered medical bills minus the deductible equals or exceeds the \$10,000 statutorily required policy limits, then the insured's PIP insurance benefits would equal \$10,000.¹⁰³ Under the *Arnone* formula, the insured's PIP insurance benefits would never be more than the \$10,000 statutorily required policy limits minus the amount of the deductible.¹⁰⁴ The *Arnone* opinion belies the court's stated allegiance to its guideline of internal consistency in statutory interpretation.¹⁰⁵

The court's failure to be consistent and pick one formula for the computation of PIP insurance benefits raises other questions. Why did the court concoct two formulas and two interpretations for the "benefits otherwise due" statutory language? The only difference between *Govan* and *Arnone* is the amount of medical expenses. In *Govan*, the insured incurred over \$5,000 in medical expenses,¹⁰⁶ while in *Arnone*, the insured had over \$10,000 in medical bills.¹⁰⁷ However, the common thread in both of these cases was that the insurance company won. Consequently, the supreme court's inconsistent interpretations of the Florida PIP insurance law produces a consistent result: the insurance companies pay out less in PIP insurance benefits—a potential multi-billion dollar windfall!¹⁰⁸

The supreme court also failed to follow its own prior court opinions and the express legislative purpose of Florida's PIP insurance law. The court's ruling in *Arnone* prohibits any insured who chooses a deductible from receiving the statutory minimum \$10,000 of PIP insurance benefits.¹⁰⁹ Regardless of the Florida Department of Insurance's interpretation of the deductible provisions of the PIP statute, the court must look to the legislative history (nonexistent for this issue), the Legislature's expressed purpose for the statute, the actual language used in the statute, and prior precedent for guidance in statutory interpretation.¹¹⁰ The court in *Kwechin*

102. *Arnone*, 552 So. 2d at 910-11.

103. *See Govan*, 502 So. 2d at 914.

104. *See Arnone*, 552 So. 2d at 911.

105. *See id.*

106. *Govan*, 502 So. 2d at 913.

107. *Arnone*, 552 So. 2d at 909.

108. *See supra* note 10 and accompanying text.

109. *See Arnone*, 552 So. 2d at 911.

110. *See id.* at 910-11; *see also* FLA. STAT. § 627.736(1) (Supp. 1992); *Heredia v. Allstate Ins. Co.*, 358 So. 2d 1353, 1354-55 (Fla. 1978) (PIP case); *Van Pelt v. Hilliard*, 78

clearly stated that the legislative purpose of an insurance deductible was to avoid requiring duplicate and uncollectible insurance benefits; not to reduce insurance policy limits.¹¹¹ Furthermore, the court in *Lasky* ruled that the legislative purpose of Florida's PIP statute was to provide a mandatory \$10,000 of no-fault PIP insurance benefits.¹¹² Finally, the court in *Praetorians v. Fisher*¹¹³ stated that the Florida statutes governing insurance contracts must be liberally construed so as to protect the public.¹¹⁴ The court in *Arnone* disregarded not only the explicit language of the PIP statute requiring \$10,000 of PIP insurance benefits, but also its own precedent to the detriment of Florida automobile owners, drivers and passengers.

The supreme court's reluctance to provide a single formula for the computation of PIP insurance benefits for insureds who choose a deductible requires legislative repair. The primary goal of any legislative remedy must be to clearly disclose the amount of PIP insurance benefits an insured purchases when choosing a deductible. There have been several attempts, spearheaded by The Academy of Florida Trial Lawyers, to legislatively correct the Florida Supreme Court's *Arnone* decision.¹¹⁵ The 1993 Regular Session of the Florida Legislature yielded House Bill 2139, which included an amendment to the Florida PIP statute designed to override the *Arnone* decision.¹¹⁶ House Bill 2139 merely adds the following language to the text of section 627.739(2) of the Florida Statutes after the "benefits otherwise due" language of this section:

After the deductible is met, an insured shall be eligible to receive up to the \$10,000 in total benefits described in s. 627.736(1).¹¹⁷

So. 693, 694-95 (Fla. 1918); *Curry v. Lehman*, 47 So. 18 (Fla. 1908); *Suazo v. Delbusto*, 587 So. 2d 480, 481 (Fla. 3d Dist. Ct. App. 1991), *aff'd sub nom.*, *Travelers Indem. Co. v. Suazo*, 614 So. 2d 1071 (Fla. 1992).

111. *Industrial Fire & Casualty Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983).

112. *Lasky v. State Farm Ins.*, 296 So. 2d 9, 16 (Fla. 1974).

113. 89 So. 2d 329 (Fla. 1956).

114. *Id.* at 333.

115. The Academy of Florida Trial Lawyers ("AFTL") Proactive Legislation Summaries from 1989 through 1993 indicate that AFTL has proposed legislation to overrule the *Arnone* case. See ACADEMY OF FLORIDA TRIAL LAWYERS, AFTL PROACTIVE LEGISLATION SUMMARIES (1993).

116. Fla. HB 2139, § 12 at 18-19 (1993). Fla. SB 1044 (1993) was the identical bill considered by the Florida Senate. This article will only reference Fla. HB 2139, § 12 at 18-19.

117. *Id.*

This proposed amendment explicitly requires insurance companies to pay out PIP insurance benefits equal to the statutorily mandated PIP policy limits of \$10,000 after the insured satisfies any deductible.¹¹⁸ The proposed amendment would overrule the Florida Supreme Court's decision in *Arnone*. House Bill 2139 was not enacted by the Florida Legislature during the 1993 Regular Session, but will be re-introduced in the 1994 Regular Session of the Florida Legislature.¹¹⁹ The proposed amendment is appealing to consumers and unappealing to insurance companies because the amendment increases the pay out of PIP benefits. The sponsors and supporters premise this proposed amendment on the Legislature's express statutory language to provide \$10,000 in PIP benefits under Florida's no-fault law¹²⁰ and on common sense. Could the Florida Legislature have been so gripped by nonsense that it would enact a PIP statute requiring \$10,000 of PIP insurance coverage, and then never require insurance companies to pay out \$10,000 in PIP benefits?¹²¹ Putting aside the debate over the propriety of the *Govan* formula for computing PIP benefits,¹²² the proposal to require the insurance companies to pay out PIP benefits to the extent of the face value of the required PIP insurance policy limits merits adoption by the Florida Legislature. By adopting the proposed amendment, the Legislature would reinstate the mandatory \$10,000 of PIP insurance benefits for insureds who chose a deductible¹²³ and eliminate the insurance companies' windfall.¹²⁴ In addition, the Legislature would send a message to the

118. *Id.*

119. Senate Bill 1044 passed the Florida Senate, but the Florida House of Representatives failed to act on the bill before the close of the 1993 regular legislative session. House Bill 2139 was not reported out of the Appropriations Committee of Florida House of Representatives and therefore, never voted on by the Florida House of Representatives. Report of Legislation, 1993 regular session of the Florida Legislature.

120. See FLA. STAT. § 627.736(1) (Supp. 1992).

121. The answer to this rhetorical questions is "no." However, the answer given by the Florida Supreme Court in *Arnone* was "yes." The Florida Supreme Court's answer violates one of the traditional rules of statutory construction: a statute must be construed so as to avoid an unreasonable, illogical, ridiculous or abused result. 49 FLA. JUR. 2D *Statutes* § 121 (1984); see also FLA. STAT. § 627.736(1) (Supp. 1992); *Tyson v. Lanier*, 156 So. 2d 833 (Fla. 1963); *City of St. Petersburg v. Siebold*, 48 So. 2d 291 (Fla. 1950); *State v. Sullivan*, 116 So. 255 (Fla. 1928); *McLellan v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 811 (Fla. 4th Dist. Ct. App. 1979); *State Farm Mut. Auto. Ins. Co. v. O'Kelley*, 349 So. 2d 717 (Fla. 1st Dist. Ct. App. 1977), *cert. denied*, 357 So. 2d 188 (Fla. 1978) (PIP statute); *Gracie v. Deming*, 213 So. 2d 294 (Fla. 2d Dist. Ct. App. 1968).

122. See *Govan*, 502 So. 2d at 913.

123. FLA. STAT. § 627.736(1) (Supp. 1992).

124. See Florida Drivers License Bureau Statistics, *supra* note 2.

Florida Supreme Court and the Florida Department of Insurance that Florida's PIP insurance law means what it is supposed to mean. The Legislature would also send a message to insurance companies that if an insured purchases \$10,000 in PIP insurance, then insurance companies better be prepared to pay out \$10,000 in PIP insurance benefits. Finally, the Legislature would send a message to Florida consumers that the puzzling words of a no-fault, PIP insurance policy and the clever sales efforts by insurance agents will not amount to a reduction in the required no-fault PIP insurance benefits.¹²⁵

VI. CONCLUSION

The insurance contract is carefully prepared by the insurance company with over two centuries of experience. The insured is a neophyte. . . .¹²⁶ Under these circumstances the law . . . must become avowedly pragmatic. The first step in the administration of justice is the recognition that man is not made for the law, but that the law is made for the man.¹²⁷

Despite the best of intentions, Florida's no-fault automobile insurance seems to have sunk into the same interpretive quagmire of most other types of insurance.¹²⁸ Perhaps, it is time for Florida to put aside the favorite "It is an insurance case!" rationale to explain away court opinions like *Arnone*.¹²⁹ Otherwise, it is just a matter of time before all of us reach into our mailbox only to find a letter from our insurance company that says "We regret to inform you"¹³⁰

125. See ALLSTATE AUTO COMMUNICATIONS, *supra* note 43; JAEGER, *supra* note 34, at 30, 39; see also JAEGER *supra* notes 45, 47 and accompanying text; NADER & SMITH, *supra* note 1, at 63; STATE FARM INSURANCE, *supra* note 43;

126. Thompson v. Occidental Life Ins. Co. of Cal., 567 P.2d 62, 65 (N.M. Ct. App.), *cert. denied*, 569 P.2d 414 (N.M. 1977) (Sutin, J., concurring in part, dissenting in part).

127. JEROME FRANK, LAW AND THE MODERN MIND 252 (1936).

128. See KEETON & WIDISS, *supra* note 94, at 614.

129. *Id.* at 615 n.1. The generalization was used to explain these one-time unpredictable insurance cases where there was a variance between the policy provisions and the insured's position. *Id.*

130. NADER & SMITH, *supra* note 1, at xvii.