

**SUPREME COURT OF FLORIDA**

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CASE NO. SC00-1649

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**LILIANA CAHUASQUI,**

Petitioner,

vs.

**U.S. SECURITY INSURANCE COMPANY,**

Respondent.

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**BRIEF OF RESPONDENT ON THE MERITS**

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## I.

### **STATEMENT OF THE CASE AND FACTS**

Petitioner, Liliana Cahuasqui, seeks review of the decision of the Third District Court of Appeal below based on this court's discretionary express and direct conflict jurisdiction. See Art. V § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(iv). The issue on the merits is whether the offer of judgment statute, section 768.79, Florida Statutes (1997), constitutionally applies in suits for personal injury protection (PIP) benefits. The facts are as follows.

Cahuasqui allegedly was injured in an automobile accident which occurred on October 3, 1995. (R. 1). She made a claim for PIP benefits under a U.S. Security insurance policy that was issued to her father, Milton Cahuasqui. (R. 4). U.S. Security denied the claim due to the fact that Mr. Cahuasqui's application for PIP insurance did not list his daughter as an additional resident driver. (Id).

On July 18, 1996, Cahuasqui filed a PIP suit against U.S. Security. (R. 1-2). The insurer raised the material representation defense in its answer. (R. 3-5). On June 13, 1997, the court noticed the case for a jury trial set for August 26, 1997. (R. 123). On June 16, 1997, U.S. Security served a proposal for settlement/offer of judgment, pursuant to Fla. R. Civ. P. 1.442 and section 768.79, Fla. Stat., in the amount of \$1,501.00, inclusive of PIP benefits, interest, penalties, costs and attorney's fees. (R.

124). Cahuasqui did not accept the offer.

A bifurcated trial on the issue of coverage was held on August 26, 1997. The jury found that Milton and Liliana Cahuasqui made a material misrepresentation on the May 31, 1995 application for insurance. (R. 147). On August 28, 1997, the trial judge entered a final judgment in favor of U.S. Security, reserving jurisdiction over the issues of attorney's fees and costs. (R. 151). U.S. Security moved for fees based on its June 16, 1997 proposal for settlement/offer of judgment. (R. 155-56).

The trial judge initially granted U.S. Security's motion for entitlement to attorney's fees. (R. 170). However, on June 4, 1998, Cahuasqui filed a motion to strike U.S. Security's offer of judgment, contending the offer of judgment statute does not apply in PIP suits. (R. 174). After a hearing was held on the issue of fee entitlement, (R. 201-26), the trial court denied U.S. Security's motion for fees. (R. 195-200; 227-32). The court held that the offer of judgment statute does not apply in PIP actions and certified the question as being of great public importance. (Id.).

U.S. Security appealed directly to the Third DCA, which accepted jurisdiction pursuant to Fla. R. App. P. 9.160. Cahuasqui now seeks review of the Third DCA's corrected decision, reported at 760 So. 2d 1101, which holds that the offer of judgment statute constitutionally applies in PIP cases.

### III.

#### SUMMARY OF ARGUMENT

The offer of judgment statute, section 768.79, Fla. Stat., by its own terms applies to “any civil action for damages.” This plainly includes PIP and other insurance cases. The purpose of section 768.79 is to promote the early termination of litigation by encouraging realistic views of the claims made. There is no reason why this rationale should not apply in disputed PIP cases.

There is no language in the PIP statute evidencing a legislative intent to exclude fee statutes other than section 627.428 from applying in PIP cases. Section 627.736(8) merely provides that section 627.428 applies in any dispute under the no-fault act. It does not state that section 627.428 is the only fee statute applicable in PIP cases. Words should not be engrafted on a statute by judicial fiat.

The fact that section 627.428 is a “one-way street” in favor of insureds does not preclude the application of other non-conflicting fee statutes. A prevailing party fee statute, like the one at issue in Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 55 (Fla. 2000), would arguably conflict with section 627.428 because it would create a two-way street depending solely on which party prevails. However, the three fee statutes which apply in PIP cases – sections 627.428, 768.79 and 57.105 – accomplish distinct policy objectives and operate independently of one another

without conflict or inconsistent results.

The application of the offer of judgment statute in PIP cases does not deny insureds access to courts. It has no effect on an insured's decision to file suit. An insured's attorney is guaranteed recovery of all fees incurred up to the date of an insurer's offer of judgment so long as the insured recovers at least one dollar of PIP benefits. Fla. R. Civ. P. 1.442 prohibits an insurer from making an offer of judgment until 90 days after service of process. Thus, in a case with any merit, the insured's attorney is virtually guaranteed recovery of fees for a 90-day period. Most valid PIP claims settle within the first 90 days.

After the expiration of 90 days, the offer of judgment statute does not deter the pursuit of valid claims. PIP claims are essentially liquidated claims for out-of-pocket medical expenses and lost wages. If the claim is legitimate, the risk of the insured's recovery being 25 percent less than a good faith offer is de minimus. On the other hand, if the claim is questionable or invalid (like Cahausqui's) the insured would be well advised to accept a good faith compromise offer.

Access to courts is afforded persons even though they may receive less than the full amount of a disputed claim pursuant to an offer of judgment. The PIP statute does not guarantee full and automatic recovery for all claims regardless of merit.

## IV.

### ARGUMENT

It is respectfully submitted that the decision of the Third DCA below should be approved, or jurisdiction should be denied, for the reasons which follow.

#### **A. The Applicable Standard of Review.**

U.S. Security agrees that this case presents a question of law which is subject to de novo review. See Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

#### **B. The Offer of Judgment Statute Applies in PIP Cases.**

The offer of judgment statute, section 768.79, Fla. Stat. (1997), provides in relevant part:

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

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(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

Prior to 1990, the statute provided that it applied in “any action to which this part applies.” However, in 1990 the legislature amended the statute to apply “[i]n any civil action for damages filed in the courts of this state.” Ch. 90-119, Laws of Fla., § 48. The plain meaning of the statute, as amended, is that it applies in all civil actions for damages. Oruga Corp., Inc. v. AT&T Wireless of Florida, Inc., 712 So. 2d 1141 (Fla. 3d DCA 1998); Beyel Bros. Crane and Rigging Co. of South Florida, Inc. v. Ace Transp., Inc., 664 So. 2d 62 (Fla. 4<sup>th</sup> DCA 1995). The only exceptions to the statute’s applicability are for non-civil cases and civil cases which are not actions for damages. There is no exception for PIP cases.

In Oruga Corp., the Third DCA held that the offer of judgment statute applies in class actions. Notwithstanding plausible public policy arguments advanced by the plaintiff, the court stated: “[W]e cannot, by judicial fiat, exempt class actions from section 768.79 whose plain and unambiguous language states that it is applicable to any civil action for damages.” 712 So. 2d at 1143.

Statutes are not interpreted in a manner that would deem legislative action useless. Beyel Bros., 664 So. 2d at 64. Courts do not construe statutory language so as to render it meaningless. Id. Where a statute is clear and unambiguous, courts do not look behind the statute’s plain language for legislative intent. Id. Instead, they give the statute its plain and ordinary meaning. Id.

[T]here is no ambiguity in the words, “in any civil action for damages.” The plain and ordinary meaning of these words is to cover any claim by a party in a civil action in which money damages are sought from another party to the action. They convey a clear meaning sweeping in all civil actions in which one party seeks damages from another party. The right to damages may arise under tort law; it may arise under contract law; it may arise under property law. If the party seeks damages from another party, then the claim is covered by section 768.79's broad phrase, “civil action for damages.”

Beyel Bros., 664 So. 2d at 64.

The purposes of section 768.79 include the early elimination of litigation by encouraging realistic views of the claims made. Hartford Cas. Co. v. Silverman, 689 So. 2d 346, 348 (Fla. 3d DCA 1997). This important public policy should apply in a PIP case just as it applies in any other civil action for damages.

The PIP statute streamlines an insured's receipt of benefits for out-of-pocket losses by removing the issue of fault. See Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974). However, the statute does not deprive the PIP carrier of all defenses. For example, the carrier may dispute the claim based on a coverage defense, or on the grounds that the medical treatment was not reasonable, necessary or related to the automobile accident. See § 627.736, Fla. Stat. (1997).

In view of the defenses available to the insurer, PIP litigation is not a one-sided affair. Many PIP actions are hotly contested. The policy of encouraging settlements

should apply in these disputed PIP cases the same as in other civil actions for damages. The early resolution of PIP claims is entirely consistent with the intent of the no-fault legislation of relieving the overcrowded court system.

The facts of this case illustrate the point. When U.S. Security made its \$1,501.00 settlement offer, Cahuasqui and her attorney knew the insurer had a valid material misrepresentation defense. As a result of the material misrepresentation, in all likelihood Cahuasqui was going to end up with a zero recovery and no fee award. Nonetheless, Cahuasqui rejected the offer of judgment. Now, she complains that if section 768.79 applies in PIP cases, she and other insureds like her are denied the right to recover 100 percent of their claims.

Cahuasqui overlooks the fact that not all PIP claims have merit. If Cahuasqui had accepted the \$1,510.00 offer, additional unnecessary litigation would have been avoided and she and her attorney would have walked away with a partial recovery. The settlement would not have covered all of Cahuasqui's medical bills, lost wages, fees and costs. However, the result would have been better than recovering nothing. Avoiding unnecessary litigation and obtaining a partial recovery for an invalid claim is an equitable result from any conceivable perspective.

There is no language in the PIP statute which would exempt PIP cases from being subject to otherwise applicable fee statutes, such as an offer of judgment statute

or a frivolous law suit statute like section 57.105, Florida Statutes. Cahuasqui relies on section 627.736(8) of the PIP statute. However, that subsection merely provides that section 627.428 applies in PIP cases, without excluding other fee statutes:

Applicability of provision regulating attorney's fees.—With respect to any dispute under the provisions of ss. 627.730-627.7405 between the insured and the insurer, the provisions of s. 627.428 shall apply.<sup>1</sup>

The legislature did not state that section 627.428 is the only fee authorizing statute which applies in PIP cases. The statute simply provides that section 627.428 applies in any dispute under the no-fault act. The word “only,” or words to that effect, should not be engrafted on the statute by judicial fiat. It must be presumed the legislature deliberately omitted the word “only.” The statute’s plain meaning cannot be disregarded. See Holly v. Auld, 450 So.2d 217, 219 (Fla.1984).

Cahuasqui and amicus curiae, the Academy of Florida Trial Lawyers (AFTL), contend section 627.736(8) is superfluous unless the word “only” is added. However,

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<sup>1</sup> Section 627.428(1) provides in relevant part:

Upon the rendition of a judgment or decree in any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court... shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had.

section 627.736(8), as written, expresses a plain meaning. By providing that section 627.428 applies in “any dispute” under the no-fault act, the legislature emphasized the broad (but not exclusive) applicability of section 627.428 in disputes under PIP law. See Ivey v. Allstate Ins. Co., 774 So. 2d 679, 684 (Fla. 2000). It is unnecessary to wrench any additional meaning from the statute.

Even if section 627.736(8) did not add any meaning to the PIP statute (which is denied), it would serve the valid purpose of providing notice to the public of the applicability of section 627.428 in PIP cases. The 1971 no-fault legislation was a radical change in Florida law. It would have been a glaring omission for the comprehensive legislation to fail to address the issue of fees and to assume everyone already knows that section 627.428 applies.

Courts attempt to give meaning to all parts of a statute, if possible. However, verbiage may not be added to a statute merely to save a provision from arguable superfluity. See e.g., Bouters v. State, 634 So. 2d 246 (Fla. 5<sup>th</sup> DCA 1994) (superfluous phrase disregarded), approved, 659 So. 2d 235 (Fla. 1995); County of Seminole v. City of Lake Mary, 347 So. 2d 674, 675 (Fla. 4<sup>th</sup> DCA 1977) (same).

Cahuasqui and AFTL also cite the “inclusio unius” rule in an attempt to persuade the court that section 627.428 is the only fee statute applicable in PIP cases. The phrase “inclusio unius est exclusio alterius” means, literally, “the inclusion of one

is the exclusion of another.” Black’s Law Dictionary (Rev. 4<sup>th</sup> Ed. 1968). “Under this doctrine, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.” Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997). For example, if a statute provided that apples and oranges may not be picked on Sundays, it could be inferred that the legislature did not intend to extend the same protection to other fruits or to the picking of apples and oranges on days of the week other than Sunday.

The “*exclusio unius*” rule is useful as an aid in construing statutory provisions. However, it may not be used to engraft additional language not otherwise appearing in a statute. See State ex rel. Jones v. Wiseheart, 245 So. 2d 849, 854 (Fla. 1971) (constitutional provision that chief justice of Supreme Court shall exercise authority to temporarily assign justices and judges to various courts does not, under “*exclusio unius*” rule, expressly or impliedly prevent legislature from authorizing a presiding circuit judge to assign a circuit judge for temporary duty in a criminal court to try noncapital felony cases).

“The inclusion of one is the exclusion of another” does not mean “the application of one precludes the application of another.” For example, in Gay v. Singletary, supra, the defendant argued that under the “*exclusio unius*” rule the Parole

Commission lacked authority to deny him credit for time spent on control release, because section 947.21(2) only provides the Commission with such authority with regard to “parole.” The Supreme Court of Florida rejected that argument in view of the legislature’s subsequent creation of a “Control Release Program” which gives the Commission authority over inmates on control release. The court stated:

The fact that there is very specific authority in one section of chapter 947 dealing with credit for time spent on parole does not affect the Parole Commission’s powers, as the Control Release Authority, concerning a different program described in a separate section of that chapter.

700 So. 2d at 1221-22.

By simply providing that section 627.428 applies in PIP cases, the legislature did not express an intent to exclude the application of other fee statutes. In fact, it is uncontested that another fee statute does apply in PIP cases. Section 57.105, Florida Statutes, providing for an award of fees against a party raising a frivolous claim or defense, was in effect when the legislature enacted section 627.736(8) in 1971. Cahuasqui has conceded, and the law provides, that section 57.105 applies in PIP cases. See U.S. Security Ins. Co. v. Cahuasqui, 760 So. 2d 1101, 1105 fn. 10 (Fla. 3d DCA 2000); Pena v. Allstate Ins. Co., 523 So. 2d 674 (Fla. 3d DCA 1988).

It would be illogical to conclude that the legislature intended for section 57.105 to apply in PIP cases, but at the same time it intended to preclude itself from later

enacting another fee statute which would apply in PIP cases. In addition, it cannot be inferred that in 1971 the legislature intended to prevent the application in PIP cases of an offer of judgment statute which did not even exist at that time. See Gay v. Singletary, 700 So. 2d at 1221-22 (since the Control Release program was not created until 1989, the legislature could not have intended to exclude Control Release violations when it enacted section 947.21(2) in 1974).

Nineteen years later, the legislature plainly expressed its intent that section 768.79 applies in PIP cases. In 1990, the legislature presumably was aware of the PIP statute and the applicability of section 627.428 in PIP cases. See Carcaise v. Durden, 382 So. 2d 1236, 1238 (Fla. 5<sup>th</sup> DCA 1980). It could easily have provided that the offer of judgment statute does not apply in PIP cases. Instead, the legislature provided that section 768.79 applies in “any civil action for damages.”

**C. The Offer of Judgment Statute May Be Harmonized With the Insurance Attorney’s Fee Statute.**

Cahuasqui and AFTL contend that because section 627.428 is a “one-way street” in favor of insureds, any fee statute which allows an insurer to recover fees cannot apply in PIP cases. There are two obvious flaws in their reasoning. First, as Cahuasqui and AFTL have conceded, insurers can recover fees under section 57.105 in PIP cases. Secondly, as Cahuasqui and AFTL also have apparently conceded,

section 768.79 applies in insurance cases other than PIP cases.

Even if those logical inconsistencies could be ignored, the fact that section 627.428 is a “one-way street” does not preclude the application of other non-conflicting fee provisions. Section 627.428 is a “one-way street” in favor of insureds because it allows only a prevailing insured to recover fees. A prevailing party fee statute allowing either side to recover fees arguably would conflict with section 627.428. Thus, in Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., 753 So. 2d 55 (Fla. 2000), this court disapproved of a provision of the PIP statute which subjected assignee medical providers to a prevailing party fee provision in arbitration, while insureds suing to recover PIP benefits enjoy the one-way imposition of fees when they prevail against an insurer in court. 753 So. 2d at 59.

However, a fee statute does not necessarily conflict with section 627.428 if it allows an insurer to recover fees on a specific basis other than merely prevailing. The three fee statutes which apply in PIP cases – sections 627.428, 768.79 and 57.105 – accomplish distinct policy objectives and operate independently of one another without conflict or inconsistent results.

Neither section 768.79 nor section 57.105 are prevailing party statutes. Section 57.105 sanctions parties who bring frivolous claims or defenses. Section 768.79 encourages pre-trial settlements by requiring a party to realistically evaluate the claims

made in relation to a settlement proposal. If a plaintiff's ultimate recovery is at least 25 percent less than the amount of an unaccepted good faith offer of judgment, the defendant may recover fees incurred after the date of the offer.

Under section 627.428, an insured who recovers at least one dollar of insurance benefits will be awarded attorney's fees. "The apparent policy underlying [section 627.428] is to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies." Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420, 421 (Fla. 1994). However, the insured may only be awarded fees incurred through the date of the insurer's first settlement offer which equals or exceeds the insured's ultimate recovery. Scottsdale Ins. Co. v. De Salvo, 748 So. 2d 941 (Fla. 1999). "[A]n insured cannot continue to incur attorney's fees and costs or accrue interest and have those awarded against the insurer... after the insurer... has offered the full amount for which it has liability on the date it offers to make the payment." De Salvo, 748 So. 2d at 945, quoting Danis Industries, 645 So. 2d at 421-22.

There are no situations in which sections 627.428 and 768.79 yield conflicting results, either as a practical matter or in the realm of the policy objectives underlying each statute. In view of the De Salvo/Danis Industries rule, if the insurer makes an offer of judgment, the insured's status as prevailing party under section 627.428 is

unaffected regardless of the outcome of the case. The following examples illustrate how sections 627.428 and 768.79 operate in different spheres and do not intersect:

Example 1: If an insured recovers nothing, he or she is not the prevailing party under section 627.428. Awarding fees incurred by the insurer after the date of a good faith settlement offer furthers the goals of the offer of judgment statute. The policy objectives of section 627.428 are not implicated in this scenario.

Example 2: If an insured recovers 75 percent or less than the insurer's offer of judgment, he or she will still recover fees incurred through the date of the offer. The insurer recovers its fees incurred after the date of the offer and those fees are set off against the insured's judgment. § 768.79(1). The statutes are harmonized and the policy objectives of both statutes are achieved.

Example 3: If the insured recovers more than 75 percent of the insurer's offer of judgment but less than the amount of the offer, he or she will be awarded fees incurred through the date of the offer. The insurer will not recover fees. The policies of section 627.428 are accomplished. Section 768.79 does not come into play.

Example 4: If the insured recovers more than the amount of the insurer's offer of judgment, he or she will recover fees incurred through the date of the recovery. The objectives of section 627.428 are achieved without involving section 768.79.

In contending that the statutes "conflict," Cahuasqui and AFTL rely on the rule

of statutory construction which states that specific statutes control over statutes dealing generally with the same subject matter. In addition, they rely on section 768.71(3), Florida Statutes, which provides:

If a provision of this part<sup>2</sup> is in conflict with any other provision of the Florida Statutes, such other provision shall apply.

However, neither the rule of construction nor section 768.71(3) alter the principle that statutes should be harmonized whenever possible. See Littman v. Commercial Bank & Trust Co., 425 So. 2d 636, 638 (Fla. 3d DCA 1983) (courts avoid constructions which give effect to one statute but render another meaningless, unless such a result is unavoidable). The rule concerning specific versus general statutes applies only when there is a “hopeless inconsistency” between the two statutes. State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990). The rule is not applied in a manner which defeats the express language of one of the statutes. Id.

Section 768.71(3) by its own terms only applies in the event of a “conflict” between statutes. Notwithstanding section 768.71(3), courts have strived to harmonize provisions of sections 768.71-81 with other statutes. For example, with regard to the “famous” footnote 3 of Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), this court expressed its belief that any possible inconsistencies between the comparative fault

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<sup>2</sup> The “part” to which section 768.71(3) refers is Part II of Chapter 768, Negligence. Part II is entitled “Damages” and consists of sections 768.71-81.

statute, section 768.81, and other statutes can be harmonized. Id. at 1186. In the footnote, the court provided an example illustrating how section 768.81 could be harmonized with the setoff statutes, sections 46.015 and 768.041.

Subsequently, in Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), the court did, in fact, harmonize the comparative fault statute with the setoff statutes. The court devised a formula whereby the setoff statutes are given effect with regard to damages for which joint and several liability still applies, but no setoff is available for those damages which are now apportioned based on comparative fault pursuant to section 768.81.

Similarly, in Goode v. Udhwani, 648 So. 2d 247 (Fla. 4<sup>th</sup> DCA 1994), the Fourth DCA harmonized section 768.79 with the cost statute, section 57.041. In Goode, the plaintiff prevailed for purposes of the costs statute by obtaining a judgment for money damages against the defendant. However, the defendant prevailed for purposes of the offer of judgment statute because the judgment obtained by the plaintiff was less than 75% of the defendant's pretrial offer of judgment. Under those circumstances, the court held that the plaintiff could recover taxable costs incurred prior to the defense offer of judgment, while the defendant was entitled to recover

costs under section 768.79 incurred after the service of the offer.<sup>3</sup>

In both Wells and Goode, the courts avoided interpretations which would have rendered sections 768.81 and 768.79, respectively, meaningless. Cahuasqui and AFTL's tortured reading of sections 627.428 and 768.79 does exactly what the courts in Wells and Goode sought to avoid. It forces the two statutes to conflict with one another in a manner which renders section 768.79 meaningless.

The cases relied on by Cahuasqui and AFTL involve federal statutes which preempt section 768.79 because they delineate the only circumstances in which a prevailing defendant may recover fees. See Clayton v. Bryan, 753 So. 2d 632 (Fla. 5<sup>th</sup> DCA 2000) (holding section 768.79 is preempted by a federal statute providing fees are awardable to a prevailing defendant only when the court expressly finds that the plaintiff's case was "brought in bad faith and for the purpose of harassment..."); Moran v. City of Lakeland, 694 So. 2d 886 (Fla. 2d DCA 1997) (holding section 768.79 is preempted by a federal statute providing fees are awardable to a prevailing defendant "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant"). Clayton and Moran illustrate U.S. Security's point that a legislature can easily use the word "only" to denote exclusivity. Conversely, if the

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<sup>3</sup> As illustrated in example 2, supra, sections 768.79 and 627.428 are harmonized in precisely the same manner.

word “only” is omitted, it should be presumed exclusivity was not intended.

In view of the absence of any conflict, courts have applied section 768.79 in insurance cases notwithstanding the existence of section 627.428. See e.g., Allstate Ins. Co. v. Manasse, 715 So. 2d 1079 (Fla. 4<sup>th</sup> DCA 1998) (UM insurance); Allstate Ins. Co. v. Silow, 714 So. 2d 647 (Fla. 4<sup>th</sup> DCA 1998) (UM insurance); Pennsylvania Lumbermens Mut. Ins. Co. v. Sunrise Club, Inc., 711 So. 2d 593 (Fla. 3d DCA 1998) (property insurance); State Farm Mut. Auto. Ins. Co. v. Marko, 695 So. 2d 874 (Fla. 2d DCA 1997) (UM insurance); Hartford Cas. Ins. Co. v. Silverman, 689 So. 2d 346 (Fla. 3d DCA 1997) (property insurance); Buchanan v. Allstate Ins. Co., 629 So. 2d 991 (Fla. 1<sup>st</sup> DCA 1993) (UM insurance); Rabatie v. U.S. Security Ins. Co., 581 So. 2d 1327 (Fla. 3d DCA 1989) (liability insurance). The Fifth DCA expressly rejected the argument that section 768.79 does not apply in insurance cases. See Weesner v. United Services Auto. Ass’n, 711 So. 2d 1192, 1194 (Fla. 5<sup>th</sup> DCA 1998).

There is no merit to the contention that PIP cases are somehow different than other insurance cases with regard to whether the offer of judgment statute applies. Like other insurance cases, PIP suits involve disputed issues of law and fact which must be resolved by a judge or jury. The legislature has not given the slightest indication that it did not want the policy of encouraging the early settlement of lawsuits to apply in contested PIP suits.

**D. Applying the Offer of Judgment Statute in PIP Cases Does Not Deny Insureds Access to Courts.**

Cahuasqui and AFTL contend the offer of judgment statute forces insureds to accept less than the full amount of PIP benefits to which they are entitled under the threat of paying the insurer's fees. Therefore, according to their argument, the no-fault system no longer operates as a "reasonable alternative" to a traditional tort suit.

The main fallacy underlying Cahuasqui and AFTL's argument is their assumption that the no-fault act guarantees "swift and virtually automatic" payment in full of all PIP claims regardless of merit. That assumption is erroneous. PIP insureds are not entitled to walk into court and take the maximum amount of PIP benefits without encountering any valid opposition. The PIP statute only guarantees "swift and virtually automatic payment" of claims that have merit.

When insurers fail to make timely payment of meritorious claims, courts are generally not sympathetic when they attempt to deny liability for the insured's fees. Under those circumstances, the phrase "swift and virtually automatic payment" serves as an admonishment to recalcitrant PIP insurers. See e.g., Ivey, supra; Crooks v. State Farm Mut. Auto Ins. Co., 659 So. 2d 1266 (Fla. 3d DCA 1995). The language of section 627.736(8) supports the interpretation that PIP carriers must pay the insured's attorney's fees when they lose "any dispute" under the no-fault act.

However, not all PIP claims have merit. The no-fault act eliminated the issue of fault, but it did not remove valid defenses, such as a lack of coverage, or treatment that is not reasonable, necessary or related to the accident. In view of those valid defenses, many PIP claims are without merit. The no-fault act does not guarantee swift and virtually automatic payment of meritless claims.

Because PIP claims are subject to valid defenses which may result in a substantial reduction or elimination of benefits, they should not be exempt from a statute which encourages the early settlement of disputed claims. Like other civil actions for damages, disputed PIP claims should be compromised whenever possible. PIP insureds do not have the vested right to clog up the court system by pursuing disputed claims that can be settled for a realistic amount.

The offer of judgment statute certainly has no deterrent effect on the filing of PIP suits. The statute has been on the books for about 20 years. Nonetheless, there has been an exponential growth in PIP suits during the past 20 years.<sup>4</sup> PIP litigation has mushroomed into a booming “cottage industry” for attorneys and has,

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<sup>4</sup> There has been no corresponding increase in suits by medical providers against insureds who have accepted offers of judgment. Thus, there appears to be no empirical support for Cahuasqui and AFTL’s concerns about insureds’ exposure to their medical providers if they compromise a PIP claim. In any event, medical providers treat patients at the risk of no insurance, insufficient insurance, or non-payment by the patient. The PIP statute was not intended to eliminate those risks.

unfortunately, given rise to fraud and overutilization by medical providers.<sup>5</sup> The promise of fees for claims not paid within 30 days provides an incentive for filing a multitude of PIP suits, many of which have little or no merit.

Even without considering empirical data, the manner in which section 768.79 operates provides little or no disincentive to the indiscriminate filing of PIP suits. Fla. R. Civ. P. 1.442(b) provides that a defendant may not serve a proposal earlier than 90 days after service of process. Therefore, there is no risk of incurring fee exposure under section 768.79 within the first 90 days, even if the claim lacks merit.

At the same time, there is an excellent chance an attorney can earn a handsome living by indiscriminately filing PIP suits. According to the De Salvo/Danis Industries rule, an insured who recovers at least a dollar of PIP benefits is entitled to an award of fees incurred prior to an insurer's first offer of judgment which equals or exceeds the recovery amount. Thus, an insured is almost guaranteed an award of fees incurred during the first 90 days if the claim has a scintilla of merit.

Most meritorious PIP cases, in which suit is filed because the insurer failed to

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<sup>5</sup> See legislative findings in pending CS/SB 1092, § 1, referencing report of Fifteenth Statewide Grand Jury entitled "Report on Insurance Fraud Related to Personal Injury Protection," found on the internet at <http://legal.firm.edu/swp/jury/fifteenth.html>, which notes, on page 2, that "a number of greedy and unscrupulous legal and medical professionals have turned that \$10,000 [in PIP] coverage into their personal slush fund." The bill has passed the legislature and is awaiting the governor's signature.

timely pay the claim, settle within 90 days without involving section 768.79. After the initial 90-day period, section 768.79 does not deter the pursuit of valid PIP claims. PIP claims are essentially liquidated claims for out-of-pocket medical expenses and lost wages. If the claim is legitimate, the risk of an insured not “beating” an insurer’s offer of judgment is de minimus. The insured only needs to recover more than 75 percent of an offer of judgment to avoid paying fees.

For example, if the maximum available PIP benefits after applying the deductible and 20 percent co-payment is \$5,000.00, and the insurer makes a compromise offer of \$4,000.00, the insured only needs to recover \$3,001.00 to avoid fee exposure. The example assumes the offer is exclusive of fees. If the offer is inclusive of fees, it is even easier for the insured to “beat” it for purposes of avoiding fee exposure. The insured then only needs to recover benefits and fees through the date of the offer totaling \$3,001.00.

Regardless of whether the offer is inclusive or exclusive of fees, it is difficult to conceive of how the insured can fail to beat the offer if the insurer has not raised a valid defense. Cahuasqui and AFTL suggest PIP insurers can raise some off-the-wall defense and then make an offer of judgment, thereby frightening economically challenged insureds into accepting a partial recovery. However, that argument evidences a total, and unrealistic, lack of faith in our jury system. Our system of

justice presumes that the result reached a judge or jury is correct and not arbitrary.

If we assume – as we must – that our justice system produces correct results, it follows that the offer of judgment statute provides no assistance to an insurer raising an invalid defense. An insurer purposely evading payment of a valid claim will only dig a deeper hole for itself by incurring more liability for the insured’s fees.

On the other hand, an insurer has every right to contest a PIP claim when a valid defense exists. In such cases, an insurer should be able to avail itself of section 768.79. At worst, the offer of judgment statute may encourage insureds to compromise disputed PIP claims. The constitutional right of access to the courts does not prohibit the legislature from enacting a statute which accomplishes that desirable objective in the context of PIP cases and other civil actions for damages.

Access to courts may be denied if the legislature abolishes a common law right of action without providing a “reasonable alternative.” However, the legislature’s decision to apply section 768.79 in PIP cases does not prevent the no-fault system from operating as a reasonable alternative to a traditional tort action. In Lasky, the court explained why the PIP statute does not deny access to the courts:

In exchange for the loss of a former right to recover—upon proving the other party to be at fault—for pain and suffering, etc., in cases where the thresholds of the statute are met, the injured party is assured a speedy payment of his medical bills and compensation for lost income from his own

insurer, even where the injured party was himself clearly at fault. Additionally, he can recover for such expenses which are in excess of his policy limits by the traditional tort action, and may recover for intangible damage (pain and suffering, etc.) by means of such suit in all but the limited class of cases above mentioned. Considering this pattern of recovery, together with the fact that coverage is made compulsory by s 627.733... the provisions of... s 627.737... do provide a reasonable alternative to the traditional action in tort, and therefore do not violate the right of access to the courts guaranteed by Art. I, s 21, Fla. Const.

All of the factors mentioned by the court in Lasky – speedier payment of out-of-pocket medical expenses and lost income without regard to fault, the right to sue in court for additional tangible damages and for intangible damages when a tort threshold is met, the mandatory nature of PIP insurance – still exist when the offer of judgment statute is applied. The only difference is that when a disputed claim winds up in court, the offer of judgment statute requires the insured to realistically evaluate the claim in relation to an insurer’s good faith settlement offer.

U.S. Security is not aware of, and Cahuasqui and AFTL have not cited, any case holding that access to courts is denied by virtue of an attorney’s fee provision. To the contrary, it is well settled that attorney’s fee provisions which place a price tag on unsuccessful claims do not violate the right of access to the courts. This court has held that the prevailing party attorney’s fee provision in the medical malpractice statute does not deny access to courts, even though it may affect a plaintiff’s decision as to

whether to bring a law suit. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1147-49 (Fla. 1985).

We reject the Fund's contention that requiring an unsuccessful litigant to pay the prevailing party's attorney's fees constitutes a "penalty" offensive to our system of justice.... In certain causes of action, attorney fees historically have been considered part of litigation costs and the award of these costs is intended not only to discourage meritless claims, but also to make the prevailing plaintiff or defendant whole.... The statute may encourage an initiating party to consider carefully the likelihood of success before bringing an action... We reject the argument that 768.56 so deters the pursuit of medical malpractice claims that it effectively denies access to the courts... We find that an award of attorney's fees to the prevailing party is "a matter of substantive law properly under the aegis of the legislature," in accordance with the long-standing American Rule...

472 So. 2d at 1149. See also Pohlman v. Matthews, 440 So. 2d 681, 683 (Fla. 1<sup>st</sup> DCA 1983) ("the assessment of fees to the prevailing party does not abrogate the right to sue and does not deny access to the courts even though... it may affect the decision to bring a lawsuit").

The result should not be different with regard to the offer of judgment statute when applied in PIP cases. Unlike a prevailing party fee provision like the one at issue in Rowe, the offer of judgment statute does not affect an insured's decision to bring suit. At best, it may affect an insured's decision as to whether to continue to litigate,

rather than compromising the claim, after suit has been filed. Thus, the offer of judgment statute has less of a deterrent effect than a prevailing party fee provision which, according to this court, does not deny access to courts.

Cahuasqui asserts it would be unfair to have forced her to accept U.S. Security's \$1,501.00 offer for claims she felt exceeded that amount. However, that assertion is preposterous in view of Cahuasqui's zero recovery. If Cahuasqui had realistically evaluated the \$1,501.00 offer in relation to U.S. Security's valid coverage defense, she would have concluded it was a fair offer even if it was inclusive of fees.<sup>6</sup>

The fact that Cahuasqui can make such an assertion just goes to show that some PIP insureds, and their attorneys, believe they can operate in an unreal world in which there are no consequences for needlessly prolonging litigation. Contested PIP suits should not be treated differently than other civil actions for damages in which the offer of judgment statute applies without regard to the financial status of the plaintiff or

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<sup>6</sup> The offer in this case was substantial and not "nominal." Therefore, the concerns expressed by Judge Klein in his concurring opinion in Fox v. McCaw Cellular Communications of Fla., Inc., 745 So. 2d 330, 339 (Fla. 4<sup>th</sup> DCA 1998) do not come into play. In any event, even with regard to nominal offers, Florida District Courts of Appeal have unanimously held that the issue of whether such offers are made in good faith is determined on a case by case basis in view of the facts and circumstances surrounding the offer. See e.g., Fox, 745 So. 2d at 333 (majority opinion); Peoples Gas System, Inc. v. Acme Gas Corp., 689 So. 2d 292 (Fla. 3d DCA 1997). The same analysis applies to the issue of whether a PIP insurer's offer of judgment was made in good faith within the meaning of section 768.79.

defendant.<sup>7</sup> No one involved in civil damages litigation is entitled to the risk-free opportunity to needlessly prolong litigation.

**E. The Third DCA's Decision Does Not Expressly and Directly Conflict With Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc.**

U.S. Security respectfully submits that the court should reconsider its decision to accept jurisdiction of this case. Presumably, the court accepted jurisdiction based on express and direct conflict between the Third DCA's decision below and this court's decision in Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc., supra, which declared the PIP arbitration statute, section 627.736(5), unconstitutional.

However, there is an important distinction between the fee provision which the court found to violate due process in Pinnacle Medical and section 768.79. As discussed in section C, supra, the PIP arbitration statute included a prevailing party fee

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<sup>7</sup> There are safeguards built into section 768.79 which prevent inequitable results in insurance and other cases. The trial court may, in its discretion, disallow fees for an offer not made in good faith. § 768.79(7)(a). In addition, the statute requires trial courts to consider the following factors in addition to the usual criteria for fee awards under the lodestar method: (1) the then apparent merit or lack of merit in the claim; (2) the number and nature of offers made by the parties; (3) the closeness of questions of fact and law at issue; (4) whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer; (5) whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting non-parties; and (6) the amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged. § 768.79(7)(b).

provision which arguably conflicted with the “one-way street” fee provision of section 627.428. In Pinnacle Medical, this court expressed its concern that assignee medical providers were subject to the prevailing party fee provision in arbitration, while insureds suing in court were entitled to the one-way imposition of fees.

Section 768.79 is not a prevailing party fee provision and does not conflict with sections 627.428 and 627.736(8). An insurer may not recover fees merely by prevailing. The risk of incurring fees does not exist solely by virtue of the forum in which the PIP claim is being decided. The insured has control of his or her destiny, because he or she may avoid fee exposure by accepting a good faith, realistic settlement offer in a case in which the insurer has raised a valid defense.

Unlike the PIP arbitration statute, the offer of judgment statute does not force an insured or an assignee to submit a claim to a forum without procedural safeguards at the risk of incurring liability for the insurer’s fees if the claim is unsuccessful. The insured may avail itself of all of the procedural safeguards offered by our court system, and its status as a prevailing insured under section 627.428 is unaffected by the applicability of section 768.79, as illustrated by the examples in section C, supra.

V.

**CONCLUSION**

It is respectfully submitted that the court should approve the Third DCA's decision below; alternatively, the court should decline to exercise discretionary jurisdiction due to the absence of express and direct conflict.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on August 11, 2001 to **Michael Nuzzo, Esquire**, 2100 Coral Way, Suite 504, Miami, Florida 33145, Trial Counsel for Respondent; **Juan Montes, Esquire**, Lidsky & Vaccaro, 145 East 49<sup>th</sup> Street, Hialeah, Florida 33013, Counsel for Petitioner; **Barbara Green, Esq.**, 1320 South Dixie Highway, Suite 450, Gables One Tower, Coral Gables, Florida 33146, Counsel on behalf of Florida Trial Lawyers; **Frances F. Guasch, Esq.**, Luis E. Ordonez & Associates, One SE Third Avenue, Suntrust International Center, Suite 1800, Miami, Florida 33131, Counsel on behalf of Florida's Insurance Council and State Farm Mutual Automobile Insurance Company; **Hinda Klein, Esq.**, Conroy, Simberg & Ganon, P.A., 3440 Hollywood Boulevard, Second Floor, Hollywood, Florida 33021, Counsel on behalf of Florida Defense Lawyers Association.

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DAVID B. PAKULA

**CERTIFICATE REGARDING FONT**

The undersigned certifies that this brief uses Times New Roman 14-point font,  
in compliance with Fla. R. App. P. 9.210(a)(2).

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