

## SETOFF OF PERSONAL INJURY PROTECTION BENEFITS

Florida Statute 627.736(3) provides that in an automobile negligence suit the Plaintiff may not recover personal injury protection benefits paid or payable as a result of the accident. The Plaintiff may put into evidence the special damages which formed the basis of the payment of PIP benefits but the jury is instructed not to award the portion of those special damages that relate to personal injury protection benefits.

The words "payable" has been interpreted in varying ways. In *Pizzarelli v Rollins*, 704 So.2d 630 (Fla. 4th DCA 1997), the Fourth District interpreted that phrase to mean medical bills which have been incurred prior to trial but have not yet been processed by the personal injury protection carrier. The Fifth District took a different approach in *Kokotis v DeMarco*, 679 So.2d 296 (Fla. 5th DCA 1996). In that case, the Fifth District concluded that the term "payable" includes not just those bills incurred but all expenses which will result from a covered injury even though they have not yet been accrued. Under the latter interpretation, the Fifth District concluded that when a jury awards future medical expenses and there remains personal injury protection benefits which have not yet been exhausted, the amount of those benefits must be setoff from the amount of the special damages.

In *Rollins v Pizzarelli*, 24 F.L.W. S69 (Fla., Feb. 4, 1999), the Supreme Court was asked to settle the conflict between these two decisions. The issue was raised because the Plaintiff went to trial with a little over \$500.00 available in unpaid PIP benefits. The jury awarded \$5,000.00 in future medical expenses. The trial court concluded that the amount of the unpaid PIP benefits had to be set off from the future medical expense award. It just so happened that that \$500.00 made the difference between whether or not Plaintiff received attorney's fees on the basis of an offer of judgment made prior to trial. Thus, the value of that \$500.00 setoff was magnified immensely.

The Supreme Court cited the Fifth District's interpretation of the statute and concluded that the definition of the word "payable" requires a setoff from any awarded special damages of any amounts available to the Plaintiff under personal injury protection coverage which remain unpaid. The Supreme Court based its reasoning on the purpose behind the adoption of the no-fault system.

We find that the definition of 'payable' adopted by the Fifth District in *Kokotis* is more in keeping with the spirit of the no-fault statutory scheme. See also *State Farm Mut. Auto. Insurance Co. v Klinglesmith*, 717 So.2d 569, 571-72 (Fla. 5th Dca 1998) (Harris, J.,

dissenting). The no-fault scheme immunizes tortfeasors from liability for a victim's nonpermanent medical expenses to the extent of the victim's PIP benefits. The Fourth District's interpretation of 'payable' would extinguish a portion of this immunity (the remaining PIP coverage) and potentially permit a victim to collect a double recovery for future

medical expenses. Such a result would be contrary to the no-fault statutory scheme. See *Purdy v Gulf Breeze Enters.*, 403 So.2d 1325, 1329 (Fla. 1981). ('To prevent the injured persons from receiving double recovery, the legislature has provided that any PIP benefits they have received from their insurers will be set off from the amount they are entitled to recover from the tortfeasors.') Therefore, we adopt the definition of 'payable' from the Fifth District in *Kokotis*.

This opinion was a product of a four to three divided Court with the dissent led by Justice Pariente. She points out that the personal injury protection carrier, who is not a party to the action, is not bound by the jury's determination of the amount of special damages. Thus, a setoff of all available PIP benefits might result in the anomalous situation of the PIP carrier refusing to pay for medical expenses which it considered to be unreasonable or unnecessary. This would leave the Plaintiff with a setoff of an amount that will never be recouped from the PIP carrier. That being said, the majority opinion is now the law of Florida and any verdict which results in a recovery of special damages which potentially is covered by remaining PIP benefits will now be set off by the amount of those unpaid benefits.

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