IN THE DISTRICT COURT OF APPEAL, STATE OF FLORIDA
FOURTH DISTRICT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant/Appellant.

v.

CARE WELLNESS CENTER, LLC, a/a/o Virginia Bardon-Diaz,
Plaintiff/Appellee.

CASE NO.: 4D16-2254

L.T. CASE NO.: CONO 14-7576 (70)

JOINT BRIEF OF *AMICI CURIAE* FLORIDA JUSTICE REFORM INSTITUTE AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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Florida Justice Reform Institute

Amicus curiae, Florida Justice Reform Institute (the "Institute"), is Florida's leading organization of concerned citizens, business owners, business leaders, doctors, and lawyers who are working towards the common goal of promoting predictability and personal responsibility in Florida's civil justice system and promoting fair and equitable legal practices.

Many of the Institute's members are PIP insurers. These members have relied upon the traditional law that deductibles are intended to apply only to those amounts actually payable under the PIP policy; here, for State Farm, those are the amounts deemed reasonable under the statutory fee schedule. Many of the Institute's members are also frequently named defendants in personal injury lawsuits brought by injured plaintiffs. More and more, the claims against them for medical damages are grossly and unreasonably inflated. The Institute is working to ensure the transparency of plaintiffs' reasonable and necessary medical expenses so that juries award damages verdicts based on reality and not provider overbilling.

Property Casualty Insurers Association of America

Property Casualty Insurers Association of America ("PCI") is composed of nearly 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write $202 billion in

annual premium, 35 percent of the nation's property casualty insurance. Member companies write 42 percent of the U.S. automobile insurance market, 27 percent of the homeowners market, 33 percent of the commercial property and liability market and 34 percent of the private workers compensation market, including a significant portion of the property and casualty insurance market in Florida. Like all automobile insurers in Florida, the members of PCI have a strong interest in protecting the dual public policies of providing swift payment for medical services resulting from automobile accidents, regardless of fault, and preventing medical providers from engaging in abusive practices.

SUMMARY OF ARGUMENT

This appeal involves an ongoing dispute regarding the interpretation of section 627.739, Florida Statutes, and the manner in which PIP insurers are to apply policy deductibles. The plain language of section 627.739(2), Florida Statutes requires that the deductible be "applied to 100 percent of the expenses and losses described in s. 627.736." Care Wellness Center—and other medical providers—tenuously argue that insurers must apply the deductible to the full amount billed by the provider, without regard to whether the amount billed is a "reasonable" amount that would be covered by the policy or subject to a fee schedule limitation. On the other hand, insurers contend that the deductible should

apply only to the "reasonable" cost of medical services, as determined by the statutory fee schedules incorporated into the policy.

The providers' position on this issue is contrary to traditional law regarding deductibles, which are intended to apply only to amounts actually payable under the insurance policy. Amounts which exceed the "reasonable" value of medical services are not amounts payable under the policy. Furthermore, the providers' interpretation would frustrate the legislature's stated goal of regulating the amounts providers can charge for services covered by PIP, and would incentivize providers to charge more than the customary fee for their services in order to exhaust the deductible and maximize their recovery. This would result in greater overall costs to the insurer and higher co-pays for the insured. Ultimately, the increased costs to insurers would put upward pressure on rates to the detriment of consumers.

ARGUMENT

I. REQUIRING APPLICATION OF THE DEDUCTIBLE BEFORE APPLYING THE STATUTORY FEE SCHEDULE WOULD THWART THE LEGISLATURE'S STATED GOAL OF ENSURING ONLY REASONABLE MEDICAL EXPENSES ARE COVERED BY PIP.

Florida's No-Fault Law was enacted in 1971. Its purpose was to "'provide swift and virtually automatic payment so that the injured insured may get on with his [or her] life without undue financial interruption.'" *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 683–84 (Fla.2000) (quoting *Gov't Emps. Ins. Co. v. Gonzalez,* 512

So.2d 269, 271 (Fla. 3d DCA 1987)). Unfortunately, PIP has always been plagued by a small number of health care providers that grossly inflate charges for medical treatment and services reimbursable by PIP insurance. This overbilling has affected virtually all Florida citizens in the form of higher PIP premiums. Even though section 627.736(5)(a), Florida Statutes, included the general requirement that PIP providers charge only "reasonable" amounts for treatment and services, Florida courts have been inundated with litigation over whether PIP providers' charges were, in fact, "reasonable."[1] This litigation also cost Florida citizens higher PIP premiums as insurers had to cover the defense costs (along with providers' attorneys' fees in many cases), as well as heightened judicial administrative costs to handle the ballooning number of PIP suits.

The Legislature has amended the PIP statute several times to combat this problem and "to regulate the amount providers could charge PIP insurers and policyholders for the medically necessary services PIP insurers are required to reimburse." *GEICO Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147, 153 (Fla. 2013). The PIP statutes were due to "sunset" in October 2007, but the Legislature reenacted the law, effective January 1, 2008, with significant

[1] *See* Office of Ins. Consumer Advocate, Report on Fla. Motor Vehicle No-Fault Ins. (Personal Injury Protection) at 35-40 (Dec. 2011) (available at http://www.myfloridacfo.com/ica/docs/PIP%20Working%20Group%20Report%2012.14.2011.pdf)(Attached hereto as Appendix Pages 1-65).

changes. One such change was a provision permitting insurers to limit reimbursement to medical providers for PIP services based upon pre-determined rates set forth in statutory fee schedules. *See* § 627.736(5), Fla. Stat.

The amendment permitting reimbursement based upon fee schedules resulted in another wave of litigation regarding the means by which insurers could avail themselves of the fee schedule method of reimbursement.[2] The statute's purpose of limiting reimbursement to only the "reasonable" amounts charged for medically necessary services was delayed in the wake of several legal rulings which limited an insurer's ability to use the fee schedule method of reimbursement authorized by the new law. *See Geico v. Virtual Imaging*, 141 So. 3d at 148; *Kingsway Amigo Insurance Co. v. Ocean Health, Inc.*, 63 So.3d 63 (Fla. 4th DCA 2011). The Supreme Court recently confirmed that use of the fee schedule method of reimbursement does in fact satisfy the obligation to pay reasonable medical expenses. *Allstate Ins. Co. v. Orthopedic Specialists*, 42 Fla. L. Weekly S38a, 2017 WL 372092, *3 (Fla. Sup. Ct., Case No. SC15-2298, Jan. 26, 2017) ("*Orthopedic*

[2] *See* Florida Office of Ins. Regulation: Review of Personal Injury Protection Legislation at 31 (Sept. 13, 2016) ("the fee schedule changes that went into effect in 2007 led to an unexpected deluge of lawsuits related to their application and the 'reasonableness' of the amount paid") (available at http://www.floir.com/siteDocuments/FLOIRReviewPIP20160913.pdf) (Attached hereto as Appendix Pages 66 - 481)

Specialists") ("Reimbursements under section 627.736(5)(a)2 [now 5(a)1.]. satisfy the PIP statute's reasonable medical expense coverage mandate.")

Providers are trying to attack the fee schedule method of reimbursement in this case from a new angle: arguing that the deductible should be applied to all amounts billed by a medical provider (without regard to "reasonableness") rather than only to the "reasonable" cost of such services (as set forth in the applicable fee schedule). This flies in the face of the Supreme Court's pronouncement in *Orthopedic Specialists* that the fee schedule method of reimbursement **is** payment of reasonable medical expenses.[3]

As explained below, interpreting section 627.739(2), Florida Statutes, to require application of the deductible to only "reasonable" charges for necessary medical services is consistent with the plain language of that subsection, as well as the legislative intent and purpose of the PIP statute as a whole. On the other hand, interpreting that section to require application of the deductible to all amounts billed—regardless of whether the charges are "reasonable"—defies the purpose and legislative intent of the statute, and results in fewer covered services for the

[3] As the Supreme Court noted, "no insurer can disclaim the PIP statute's reasonable medical expenses coverage mandate." *Orthopedic Specialists,* 2017 WL 372092, *4. Likewise, providers cannot disclaim their obligation to "charge the insurer and injured party only a reasonable amount…." Section 627.736(5)(a)1., Fla. Stat.

insured, greater costs for the carrier, and upward pressure on rates to the detriment of consumers.

Section 627.739(2), Florida Statutes, has always instructed how the deductible should be applied to those reasonable amounts for services which are covered by PIP. Prior to 2003, the statute stated that the deductible was "to be deducted from the benefits otherwise due." That language was ultimately interpreted by the Florida Supreme Court as mandating application of the 80% co-insurance requirement (the co-pay) before the deductible was applied. *Int'l Bankers Ins. Co. v. Arnone*, 552 So. 2d 908 (Fla. 1989). The practical effect of this interpretation was that insureds who purchased a policy including a deductible would be deprived of the full $10,000 limits of PIP coverage because it is applied to "benefits otherwise due."

In 2003, section 627.739, Florida Statutes, was amended to ensure PIP claimants could access the full $10,000 in PIP benefits and to reverse the decision in *Arnone*. Specifically, in 2003, section 627.739(2), Florida Statutes, was amended to state that the "deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1)." *See* Ch. 2003-411, § 9, Laws of Fla.[4] Per this amendment, the

[4] The amendment also eliminated the option for a $2,000 deductible.

deductible must be applied prior to the calculation of the 80% payable amount under PIP. As explained in Appellant State Farm's Initial Brief, the legislative history of this amendment of section 627.739, Florida Statutes contains no suggestion that it was intended to eliminate the requirement that providers be reimbursed for only reasonable medical expenses.

The providers' position—that the deductible should be applied before turning to the fee adjustments mandated under section 627.736(5)(a)1., Florida Statutes—is unsupported by the plain text of the statute and undermines the very purpose of the 2003 amendments. The statute, as amended, states that the deductible must be applied to 100% of the "expenses and losses ***described in s. 627.736***." (Emphasis supplied.) Section 627.736, Florida Statutes, contains several references to expenses, almost all of which are described as or used in the context of reasonable expenses or expenses "covered by the policy." § 627.736(1)(a), (1)(b), (4), & (6)(b), Fla. Stat.[5] Furthermore, section 627.736(5), Florida Statutes, expressly states that a PIP provider "may charge the insurer and injured party only

[5] The term "deductible" itself appears once in subsection (9) of section 627.736, Florida Statutes, which permits insurers to include preferred provider options for PIP. It states that in doing so, "the insurer … may waive or lower the amount of any deductible that applies to such medical benefits." Subsection (9) ties the deductible to PIP benefits, *i.e.*, amounts otherwise payable under the coverage. Accordingly, section 627.739(2), Florida Statutes should be construed *in pari materia* to require application of deductibles to available coverage benefits, not excessive amounts charged by providers beyond the "reasonable" expense limitation of PIP coverage.

a reasonable amount pursuant to this section for the services and supplies rendered…." (Emphasis added.) Therefore, the "expenses and losses described in s. 627.736" do not refer to the amount billed by the provider, but are expressly limited to a "reasonable amount" pursuant to subsection (5), which includes the fee schedule limitations. When read together, sections 627.739 and 627.736, Florida Statues require that a PIP deductible be applied to 100 percent of the reasonable and necessary medical expenses, or those expenses covered by the policy. Therefore, when the policy calls for reimbursement according to fee schedules, the "reasonable and necessary medical expenses" to which the deductible applies are determined with reference to such fee schedules.

II. THE PROVIDERS' INTERPRETATION HAS THE POTENTIAL TO CREATE ABSURD RESULTS AND DOES NOT FURTHER THE LEGISLATURE'S INTENT.

Under Florida law, statutes will not be construed in a manner that leads to an unreasonable or absurd result. *City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993). The providers' interpretation of this statute would thwart the legislative intent and result in the insured paying more for fewer services. The inequity of the providers' asserted interpretation is demonstrated by the hypothetical presented in State Farm's initial brief (IB at 18). For a hypothetical billed amount of $5,865, the provider recovers more ($4,500) than the legislatively determined fee schedule limitation ($3,500). Meanwhile, the insured has his or her

available remaining benefits reduced by $800 and incurs an additional $200 in copay obligation. .

The effect of the providers' interpretation eviscerates the legislature's stated goal of regulating the amounts providers can charge for services covered by PIP. A provider can maximize the amount of benefits it receives and exceed the statutorily authorized limitation by charging a greater amount, without limitation, in order to exhaust the deductible and increase the provider's total recovery.[6] By doing so, the provider not only guarantees a higher recovery for itself, but imposes higher costs on the insured.[7]

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[6] The providers' interpretation is also inconsistent with the PIP statute's requirement that insurers must offer insureds the option to purchase coverage with a deductible. §627.739(2), Fla. Stat. Insurers must provide PIP coverage at a reduced premium when the insured elects a deductible. §627.739(4), Fla. Stat. Deductibles provide insureds with an option to obtain coverage at a reduced premium rate because the insured pays the initial portion of any loss suffered. Thus, the deductible statute mandates the terms of the contract—the insurer must accept a lower premium if a deductible is elected—in exchange for which, the point at which the insurer must start paying benefits for a loss is delayed till the deductible is reached. But the providers' proposed statutory interpretation would require application of the deductible to the billed amount regardless of whether that amount is actually subject to payment of benefits. This deprives the insurer of the benefit its contract provides in exchange for accepting a lower premium because the deductible would be expended against non-covered billings. This would be an impairment of a statutorily mandated contract obligation and right.

[7] Providers' interpretation is inconsistent with and provides an end-run around the balance billing limitation in section 627.736(5)(a)(4), Florida Statutes. Because, under their interpretation, the deductible is applied before the authorized reimbursement limitations of subsection 5(a)(1) are applied, the insured must pay amounts that exceed those payment limitations to satisfy the deductible. But

In fact, if the fee schedule is not applied to services that fall within the policy deductible, the insured would be able to obtain fewer services before exhausting PIP coverage. Providers would be incentivized to bill greater amounts for services that fall within the deductible, which would lead to the deductible being exhausted faster. In that case, the insured's $1,000 deductible would buy fewer services than it would if the fee schedule applied, and the insured would ultimately obtain fewer services before his or her PIP coverage is exhausted.

The providers' interpretation also creates practical problems associated with its implementation. If the fee schedule is not applied to ***services*** that fall under the deductible, issues may arise when a particular service overlaps the deductible threshold. Consider an example where a provider charges, $600 and $800 each for two services that have fee schedule values of $400 and $600, respectively. Under the providers' interpretation, the fee schedule would not be applicable to these two *services* and the total billed amount would be $1,400. The insured would be obligated to pay the $1,000 deductible, but the provider would arguably be entitled to an additional $400 for its services.

In this example, the carrier is only responsible for "reasonable" medical expenses—$1,000 in this example—and cannot be required to pay the additional $400. On the other hand, requiring the insured to pay the additional $400 would

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subsection 5(a)(4) prohibits the provider from balance billing the insured for amounts exceeding those authorized limitations.

undermine the prohibition against "balance billing" the insured by charging the insured the difference between the billed amount and the "reasonable" amount covered by insurance. *See* § 627.736(5)(a)(4), Fla. Stat. Although the trial court was concerned that State Farm's proposed interpretation would lead to greater costs to insureds, this example illustrates that the opposite is true. The providers' proposed interpretation would lead to greater costs to insureds in exchange for fewer services, and would thwart the purpose and legislative intent behind the law.

III. THE COSTS OF INFLATED MEDICAL BILLS ARE ULTIMATELY BORNE BY ALL FLORIDA CITIZENS.

The providers' proposed interpretation benefits only themselves, at the expense of not only PIP insurers and their insureds, as well as Florida's citizens generally. It would allow and indeed incentivize PIP providers to charge more than is customary for the same services, which would result in greater costs for insurance carriers and their insureds. In addition to the greater co-pays insureds may be subjected to in a given claim, the providers' interpretation could lead to greater insurance premiums for the public at large.

For instance, after the fee schedule method of reimbursement was first introduced in 2008, it became an intensely litigated issue and the cost of litigation resulted in substantially increased PIP premiums with an estimated cost to

consumers of $1 billion.[8] If the providers' interpretation of the statute is adopted, the increased costs to insurers would almost certainly result in another spike in PIP premiums for the public.

Incentivizing providers to bill more than the customary amount for medical services also exacerbates the problem of phantom damages. Phantom damages are the difference between medical expenses billed by a health care provider and the amount actually paid by a plaintiff and its insurer. These inflated bills are appearing with greater frequency in Florida courtrooms in support of damages claims in personal injury cases. In fact, in recent years Florida and other states have attempted to introduce "Truth in Damages" legislation[9] to curtail the use of "phantom damages" in support of personal injury actions. The providers' interpretation of the statute would only magnify this problem.

Overbilling for medical services has been a serious problem in Florida PIP law for years. According to a 2011 Data Call performed by the Florida Office of Insurance Regulation, Florida was well above the national average with regard to both the amount billed by providers per service and the number of services

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[8] *See* Office of Ins. Consumer Advocate, Report on Fla. Motor Vehicle No-Fault Ins. (Personal Injury Protection) (Dec. 2011) (available at http://www.myfloridacfo.com/ica/docs/PIP%20Working%20Group%20Report%2012.14.2011.pdf) (Attached hereto as Appendix Pages 1-65).

[9] *See* Senate Bill 1474 (died in Judiciary March 11, 2016), and House Bill 1271 (died in Civil Justice Subcommittee March 11, 2016).

provided per claim.[10] The Legislature has made great strides in 2007 and 2012 to curtail abusive billing practices and protect the insured's ability to obtain swift payment for reasonable medical services without regard to fault. The issue before this Court presents an important opportunity to further the legislature's intent, protect Florida's insureds, and prevent further abuse. Adopting the providers' proposed interpretation of the statute would foster yet another opportunity for overbilling.

CONCLUSION

The issue before this Court may have far reaching implications on the insurance market, the public, and the civil justice system. Adopting the providers' proposed interpretation of the statute would permit PIP providers to maximize their recovery—or even obtain a windfall—at the expense of PIP insurers, their insureds and the public at large. Adopting State Farm's proposed interpretation would ensure that both insureds and insurers only pay the "reasonable" value of any medical services provided, and would prevent unscrupulous providers from engaging in abusive billing practices. State Farm's proposed interpretation is consistent with the legislative history and intent of the No-Fault Law.

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[10] Florida Office of Insurance Regulation, *Report on Review of the 2011 Personal Injury Protection Data Call*, p.12 (April 2011) (Available at http://www.floir.com/sitedocuments/pip_04-08-2011.pdf) (Attached as Appendix Pages 482-519).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because it was prepared using Times New Roman 14 point font.

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