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

Case No.: 3D16-1818; Case No.: 3D17-392
CONSOLIDATED

L.T. No. 2015-1946 CA-01

OCEAN HARBOR CASUALTY INSURANCE,

Appellant,

v.

MSPA CLAIMS 1,

Appellee.

BRIEF OF AMICUS CURIAE – FLORIDA JUSTICE REFORM INSTITUTE

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PREFACE

The class representative plaintiff/appellee MSPA Claims 1, LLC is referred to as "MSP." The defendant/appellant Ocean Harbor Casualty Insurance is referred to as "Ocean Harbor." Citations to the parties' Joint Appendix appear as "A. __", and citations to the supplemental appendix submitted with Ocean Harbor's Initial Brief appear as "SA.__".

The Medicare Secondary Payer Act is referenced as the "MSP Act." With respect to quoted material, unless otherwise indicated, emphasis is supplied and citations and internal punctuation have been omitted.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, business owners, business leaders, and lawyers, who share the common goal of promoting predictability in Florida's civil justice system by eliminating wasteful civil litigation and promoting fair and equitable legal practices. The Institute has a strong interest in ensuring that Florida trial courts protect its members' due process rights by rigorously analyzing whether Rule 1.220's requirements are met before allowing a case to proceed as a class action.

SUMMARY OF THE ARGUMENT

Class action litigation meaningfully impacts Florida businesses, citizens and courts. A class action is unique because a court-appointed representative and class counsel are empowered to conduct and settle litigation for absent class members, who are bound by the outcome. When classes are improperly certified, defendants and absent class members are deprived of due process and limited judicial resources are unnecessarily consumed.

This is a textbook example of a case unsuitable for class certification. MSP has filed dozens of 'carbon copy' cases against Florida insurers, seeking certification of a class of Medicare Advantage Organizations ("MAOs") allegedly

entitled to recover double damages for unpaid PIP benefits under the MSP Act.[1] This is the first of such cases to reach certification, so the instant decision is very significant to the Institute and its members.

Apparently unconcerned with class counsel's Florida Bar disciplinary history (based on conduct this Court found fraudulent), the trial court appointed class counsel who is adverse to absent class members and appointed a class representative whose owners are class counsel's immediate family members and business associates. These conflicts destroy adequacy of representation and jeopardize the due process rights of Ocean Harbor and absent class members. Inadequate representation threatens the finality of any class settlement or judgment; lack of finality, in turn, spawns exponential and duplicative litigation and wastes judicial resources.

To conclude that common questions predominate and that class treatment is superior, the trial court relied on class counsel's software, which projects damages based on liability assumptions. This contradicts the law, and denies due process, because a PIP insurer is not liable for an MSP Act claim unless the plaintiff proves that benefits are available and owed for a particular medical bill. Because liability

[1] The Eleventh Circuit analyzed the theory of liability in *MSP Recovery, LLC v. Allstate Insurance Co.*, 835 F.3d 1351 (11th Cir. 2016).

for the thousands of claims purportedly at issue only can be determined on an individual basis, class treatment is not superior.

The order on review is a bellwether for multiple class actions involving the same class counsel and representative, the same or very similar classes and the same legal issues. Like the parties to this case, the parties to the follow-on cases need and deserve assurance that a class will be certified only after the trial court has rigorously analyzed whether Rule 1.220's requirements are met. If allowed to stand, the instant order could lead to serial improvident class certifications that will unduly burden the judicial system, as well as Florida businesses and citizens, for years to come.

ARGUMENT

Like businesses across the country, Florida companies face staggering exposure in class actions. One study shows that seventy-five percent of "routine" class actions feature exposure over $2 million; in seventy-five percent of "bet-the-company" cases, exposure exceeds $15 billion or more.[2] In 2016, class action defense expenses topped $2.1 billion and accounted for over ten percent of **all** litigation spending.[3] Nearly seventy percent of companies are defending at least

[2] Carlton Fields Jorden Burt, *The 2017 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 16 (available at www.classactionsurvey.com, last visited June 21, 2017).

[3] *Id*. at 3-4.

one class action; on average, most companies manage six class actions annually and this number is expected to rise, as it has for the last several years.[4]

As this Court has explained, "class actions create the opportunity for a kind of legalized blackmail" because:

> By aggregating and magnifying claims, certification makes it more likely that a defendant will be found liable and results in significantly higher damage awards. … [C]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

Ramon v. Aries Ins. Co., 769 So. 2d 1053, 1056 (Fla. 3d DCA 2000); *Castano v. Am. Tobacco Co*., 84 F.3d 734, 746 (5th Cir. 1996)[5] (noting that "certification dramatically affects the stakes for defendants…magnifies and strengthens the number of unmeritorious claims … [and] creates insurmountable pressure on defendants to settle", leading to the risk of what has "been referred to as judicial blackmail").

I. TRIAL COURTS MUST RIGOROUSLY ANALYZE WHETHER RULE 1.220'S REQUIREMENTS ARE MET TO PROTECT DUE PROCESS RIGHTS.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*,

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[4] *Id*. at 11-12.

[5] Because Rule 1.220 "is patterned upon Federal Rule of Civil Procedure 23", this Court "look[s] to federal law for interpretive guidance." *Leibell v. Miami-Dade Cty.*, 84 So. 3d 1078, 1083 (Fla. 3d DCA 2012).

133 S. Ct. 1426, 1432 (2013). Class certification implicates serious due process considerations because absent class members are "made parties to the litigation involuntarily and will be bound by whatever results may follow … despite their lack of participation in, or perhaps even knowledge of, the proceedings." *Costin v. Hargraves*, 283 So. 2d 375, 377 (Fla. 1st DCA 1973); *Grosso v. Fid. Nat'l Title Ins. Co.*, 983 So. 2d 1165, 1170 (Fla. 3d DCA 2008) (same). For these reasons, "[t]he standards for maintaining a class action must be applied carefully." *Ramon*, 769 So. 2d at 1056.

Because "class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private lawsuit", actual—not presumed—conformance with the requirements of Rule 1.220 "is indispensable." *Baptist Hosp. of Miami, Inc. v. DeMario*, 661 So. 2d 319, 321 (Fla. 3d DCA 1995); *see also Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (explaining that "the presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation"). Accordingly, "[a] class action may be certified only after the trial court determines, on the basis of a **rigorous analysis**, that the elements of the class action rule have been satisfied." *DeMario*, 661 So. 2d at 321; *Comcast*, 133 S. Ct. at 1432 (same).

The trial court's obligation to rigorously analyze whether Rule 1.220's requirements are met is not a mere formality—it protects bedrock due process rights. For this reason, "the trial court's consideration of the merits during class certification review **must not result in a determination on the merits or a shift in focus from deciding whether a litigant's claim is suited for class certification**." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 106 (Fla. 2011).

The trial court leapfrogged over Rule 1.220's requirements and improperly determined the merits. The hundred page order—which is almost identical to the proposed order MSP submitted—is a complex dissertation on the merits of MSP's claim. Under the guise of certification analysis, the trial court 'disallowed' many of Ocean Harbor's affirmative defenses, including several that are determinative—on an individualized basis—of whether Ocean Harbor is liable at all. The order violates Ocean Harbor's due process rights by establishing a virtually irrebuttable presumption that Ocean Harbor is automatically liable to a class of thirty-seven MAOs for double damages on countless medical bills for 3300 individuals who may—**or may not**—have been entitled to benefits under PIP policies issued by Ocean Harbor.

The trial court accepted MSP's contention that doubts regarding certification should be resolved "in favor of certification, especially in the early stages of

litigation." SA.40 (quoting *Sosa*, 73 So. 3d at 105).[6] This presumption is inconsistent with a rigorous analysis and ignores the constitutional considerations relative to class certification; it also renders meaningless the well-established principle that "the proponent of class certification carries the burden of pleading and proving the elements required under rule 1.220." *Sosa*, 73 So. 3d at 106; *Brown*, 817 F.3d at 1233 ("The party *seeking* class certification has the burden of proof.") (italics in original).

II. INADEQUATE REPRESENTATION DEPRIVES ABSENT CLASS MEMBERS OF DUE PROCESS AND JEOPARDIZES FINALITY.

The party seeking certification must prove adequacy of representation, which is "not to be presumed." *City of Tampa v. Addison*, 979 So. 2d 246, 255 (Fla. 2d DCA 2007); *London v. Wal-Mart Stores, Inc*., 340 F.3d 1246, 1253 (11th Cir. 2003) (same). The adequacy determination requires an inquiry into (1) whether class counsel is qualified and competent to conduct the litigation and (2) whether the class representative has interests antagonistic to the rest of the class. *Addison,* 979 So. 2d at 253-254.

[6] The instant decision was made two years after the complaint was filed, **not** in "the early stages of litigation", so this principle is inapplicable. Furthermore, the quoted language from *Sosa* is *obiter dicta*, as it does not concern a "rule, principle, or application of law" that was "necessarily involved in the case or essential to its determination." *Doherty v. Brown*, 14 So. 3d 1266, 1267 (Fla. 1st DCA 2009). That is particularly true since the *Sosa* majority itself recognized that the plaintiff bears the burden to plead and prove each element of Rule 1.220.

Adequacy is not only a requirement of Rule 1.220, it is a requirement of the Due Process Clause. *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940) (noting constitutional requirement that "the named plaintiff at all times adequately represent the interests of the absent class members"); *Addison*, 979 So. 2d at 253 ("[D]ue process requires that the class representative adequately represent the interests of the other class members."); *Nelson v. Wakulla Cty.*, 985 So. 2d 564, 576 (Fla. 1st DCA 2008) (Due process requires the trial court to "evaluate the adequacy of both the representatives and counsel for the class."). Thus, the "**class representative and his or her counsel serve the class in a fiduciary capacity** … [and] undertake the litigation to protect and defend the dependent class members they serve." *Grosso*, 983 So. 2d at 1173. The trial court erred by certifying this class because MSP "failed to prove that its representation would not be antagonistic to the class." *Courtesy Auto Grp. v. Garcia*, 778 So. 2d 1000, 1003 (Fla. 5th DCA 2000) (reversing certification for lack of adequacy); *see also Dade Cty. Police Benev. Ass'n, Inc. v. Metro. Dade Cty.*, 452 So. 2d 6, 9 (Fla. 3d DCA 1984) (affirming dismissal of class claims and noting adequacy concerns where questions existed regarding conflicts among representatives and class members).

Adequate representation is crucial to protect absent class members "from their own class counsel, who may be tempted to engage in self-dealing, as well as their own class representatives, who may not exercise sufficient independent

control over the litigation to prevent breaches of duty to the class."[7] Yet "the adequacy inquiry usually is the least-rigorously examined requirement for certification … courts routinely wave their blessings over class counsel and proposed class representatives and presumptively make findings of adequacy on nonexistent or scant factual showings."[8]

That happened here. As a threshold matter, the trial court disregarded Mr. Ruiz's troublesome Florida Bar disciplinary history. A.236; SA.234-235. To establish his adequacy as class counsel, Mr. Ruiz submitted a declaration stating that he was admitted to the Florida Bar in 1992 and has "been a member in good standing of the Florida Bar since that date." Mr. Ruiz did not disclose that less than five years earlier, he pled guilty to violating Rule 4-8.4(d) of the Rules Regulating the Florida Bar (conduct prejudicial to the administration of justice) and consented to entry of a disciplinary order.[9]

The disciplinary proceedings arose from conduct this Court found fraudulent in *Mejia v. Ruiz*, 985 So. 2d 1109 (Fla. 3d DCA 2008). There, Mejia sued an entity in which Mr. Ruiz was a half owner. Mr. Ruiz appeared as the defendant's counsel;

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[7] Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 Vand. L. Rev. 1687, 1695 (2004).

[8] *Id*. at 1692.

[9] *The Fla. Bar v. Ruiz*, 76 So. 3d 939 (Fla. 2011). Copies of Mr. Ruiz's declaration, the Bar complaint, the referee's report and Mr. Ruiz's Conditional Guilty Plea for Consent Judgment are submitted as an appendix to this brief.

on the very day Mr. Ruiz filed the answer, the defendant sold its only asset and distributed half the proceeds to Mr. Ruiz. *Id*. at 1111. After Mejia obtained a judgment and discovered that the defendant entity had been stripped of its only asset and Mr. Ruiz had pocketed the proceeds, she initiated proceedings supplementary. On review, this Court ruled for Mejia and identified "several badges of fraud"—including five separate actions Mr. Ruiz took in the litigation to deceive Mejia and the court regarding Mr. Ruiz's relationship to the defendant and his participation in, and benefit from, the fraudulent transfer. *Id*. at 1113-14.

This background exposes Mr. Ruiz's credibility shortcomings and demonstrates a history of improper self-dealing that is wholly inappropriate for class counsel—who must serve the absent class members as a **fiduciary**. The possibility of similar conduct in this case cannot be overstated, because the class representative MSP is effectively the alter-ego of Mr. Ruiz. MSP is wholly-owned by MSP Recovery Services, LLC, which is majority-owned by John Ruiz, Jr., a college student who is Mr. Ruiz's son. SA.61. Likewise, Mr. Ruiz's wife, father, sister and co-counsel Frank Quesada have ownership and management roles in MSP, its parent entity and several related entities. A.233-234; A.1459-60, 1462, 1519-21, 1546-47, 1875-79; *see also* Amended Initial Brief at 13-15.

Putting aside Mr. Ruiz's disturbing disciplinary history and his close familial and business relationships with MSP's owners, adequacy is lacking for

another reason. Although Mr. Ruiz undisputedly has sued and recently threatened to sue several absent class members, the trial court concluded no conflict exists because such litigation "involved group health plans and not the Class Member's Medicare Advantage Plans." SA.65 (underlining in original). That 'distinction' is utterly illusory, and the authorities upon which the trial court relied are inapposite as they involve disqualifications of counsel where a lawyer represented a party and later took an adverse position against the same party.

The instant adequacy challenge is not based on prior representation—it is based on Mr. Ruiz's direct **adversity** to his theoretical clients, the absent class members he must serve as a fiduciary. Moreover, Ocean Harbor did not seek to disqualify Mr. Ruiz and was not burdened to prove his inadequacy. *Cf., Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 648 F.2d 1020 (5th Cir. 1981) (cited at SA.64, 65) (reversing order granting defendant's pre-certification motion to disqualify class counsel; holding that burden of proof on a disqualification motion is on movant). Theorizing that adequacy of class counsel may be presumed "absent specific proof to the contrary" (SA.65), the trial court disregarded overwhelming evidence of Mr. Ruiz's inadequacy.

Mr. Ruiz—who has been disciplined by the Florida Bar for self-interested, fraudulent conduct—has actual and present conflicts with absent class members and shares close family and business ties with the class representative. These

conflicts destroy adequacy. *E.g*., *London*, 340 F.3d at 1255 (historical personal and financial ties between representative and class counsel created potential and present conflicts of interest and destroyed adequacy).

As one court has explained:

> **An attorney whose fees will depend upon the outcome of the case and who is** also a class member or **closely related to a class member cannot serve the interests of the class with the same unswerving devotion as an attorney who has no interest other than representing the class members** … [because] whenever an attorney is confronted with the potential for choosing between actions which may benefit himself financially and an action which may benefit the class he represents there is a reasonable possibility that some specifically identifiable impropriety will occur.

Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978). The trial court's conclusion that the relationships between Mr. Ruiz and MSP's ownership/management do not present adequacy-destroying conflicts is irreconcilable with "the natural assumption that … [persons who] enjoy a close personal and familial relationship … [are] inclined to support each other's interests." *Susman v. Lincoln Am. Corp*., 561 F.2d 86, 95 (7th Cir. 1977). And where—as is the case here—class counsel's attorney's fees will exceed the class representative's recovery, the "requirement for a stringent examination of the class representative" to determine adequacy is heightened. *London*, 340 F.3d at 1254.

These requirements exist because "courts fear that a class representative who is closely associated with the class attorney would allow settlement on terms less

favorable to the interests of absent class members." *Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684, 700 (S.D. Fla. 2015) (there should "be a genuine arms-length relationship between class counsel and the named plaintiffs … uninfluenced by family ties or friendships"). Stated simply, "[i]n answering questions of when to settle and how much to settle for, a named representative who is an employee of class counsel may arrive at answers which benefit not the class, but the class counsel." *Shroder v. Suburban Coastal Corp*., 729 F.3d 1371, 1376 (11th Cir. 1984). This concern is present even where attorney's fees are awardable directly from the defendant and not from a common fund created for class relief. *Id*.

Because over sixty percent of class actions are settled,[10] settlement considerations are not academic or inconsequential to this or any other class action. Unlike ordinary private settlements, in class action settlements "the **law relies** upon the **fiduciary obligations of** the class representatives, and **especially, class counsel**, to protect" absent class members. *In re Dry Max Pampers Litig*., 724 F.3d 713, 717-18 (6th Cir. 2013); *Grosso*, 983 So. 2d at 1173. Such reliance is misplaced where class counsel and the class representative share a close relationship; it is downright foolhardy where class counsel's family members own and manage the class representative and class counsel is directly adverse to absent class members. And where class counsel has a history of lack of candor to the

[10] *The 2017 Carlton Fields Jorden Burt Class Action Survey*, at 2.

court in connection with his own self-interest, such reliance is fairly characterized as reckless.

MSP's order skirts these glaring adequacy deficiencies by suggesting that the trial judge is the "gatekeeper" for class action settlements and thus will protect the absent class members' interests. SA.63, n.25. This result-oriented platitude ignores that class counsel and the representative (**not** the court) serve the absent class members as fiduciaries; it also overlooks that in class settlements, the "court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *Dry Max*, 724 F.3d at 718; *see also Susman*, 561 F.2d at 95 (rejecting argument that court's control of class settlement and attorneys' fee award would overcome inadequacy where "the close relationship between plaintiff and [class] counsel creates an inherent conflict of interest").

Summarizing, Mr. Ruiz—whose immediate family members and close business associates are principals of MSP and its affiliate entities—stands to potentially recover substantial attorneys' fees for representing this class. Particularly given the self-interested conduct underlying Mr. Ruiz's disciplinary history, there simply is no objective or credible assurance that MSP will act independently to control and manage Mr. Ruiz's representation of the class for the benefit of absent class members. Beyond that, MSP is not "similarly situated" to

the MAO insurers the trial court appointed MSP and Mr. Ruiz to represent—MSP is **not** an MAO, it is a collection company that Mr. Ruiz and his family created solely to sue insurers. And Mr. Ruiz undisputedly has sued and threatened to sue the very insurers that are the class members. It is difficult to imagine a more conflict-riddled class representation scenario.

Inadequate representation has consequences beyond conduct of the litigation itself. After a class is certified, the defendant, the absent class members, and the judicial system all have a strong interest in finality of the resolution, whether by settlement or by judgment. Absent class members can attack finality where adequacy was lacking in the first place.[11]

The instant adequacy problem is acute and extends well beyond the instant case. MSP is the putative class representative in dozens of carbon copy class actions pending in Florida courts, and Mr. Ruiz is lead counsel for MSP in those cases. Allowing multiple class actions to proceed where class counsel shares close family and business ties with the representative and is adverse to absent class

[11] The Agent Orange class action demonstrates the importance of adequacy to finality. After years of litigation, Agent Orange manufacturers settled Vietnam veterans' product liability claims. *See In re "Agent Orange" Prod. Liab. Litig*., 597 F. Supp. 740 (E.D.N.Y. 1984). Fifteen years later, two veterans sued the manufacturers; a district court dismissed, finding the class settlement barred the claims. The Second Circuit reversed, holding that the veterans were deprived of due process because they were inadequately represented in the class litigation; the Supreme Court affirmed. *Stephenson v. Dow Chem. Co*., 273 F.3d 249, 261 (2d Cir. 2001), *aff'd*, 539 U.S. 111 (2003).

members is obviously problematic. Left intact, this flawed adequacy determination will jeopardize the propriety and finality of any resolution of this case **and** the propriety and finality of resolutions of any future cases that follow the deficient adequacy standards used here.

III. THE TRIAL COURT'S PREDOMINANCE AND SUPERIORITY CONCLUSIONS ARE NOT THE PRODUCT OF A RIGOROUS ANALYSIS AND OPERATE TO DENY DUE PROCESS.

MSP sought certification under Rule 1.220(b)(3), so in addition to proving numerosity, commonality, typicality and adequacy, MSP was required to prove that common questions "predominate" over individual questions and class treatment is "superior" to other proceedings. *Id*. Predominance does not exist where "individualized proof of liability" is necessary. *E.g*., *Chase Manhattan Mortg. Corp. v. Porcher*, 898 So.2d 153, 158 (Fla. 4th DCA 2005). A class action is unmanageable and superiority is lacking where the trial court must make individualized liability determinations by conducting numerous "mini-trials masquerading as a class action." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 880-81 (Fla. 2d DCA 2007).

The trial court accepted MSP's erroneous premise that a PIP insurer is automatically liable to MAOs that pay medical bills for Medicare enrollees who also are PIP insureds. That is not the law. The mere existence of a PIP policy does **not** "conclusively demonstrate[] liability" under the MSP Act. *MSP Recovery*, 835

F.3d at 1361. Before Ocean Harbor can be held liable to MSP or any absent class member, MSP must "prove, with evidence" that Ocean Harbor actually owes PIP benefits for each medical bill at issue. *Id*. In other words, the liability-defining inquiry is not whether an MAO paid a medical bill for an enrollee who was insured under an Ocean Harbor PIP policy, it is whether Ocean Harbor was obligated to pay PIP benefits in connection with that specific medical bill at all.

Individual issues predominate because Ocean Harbor's liability for each medical bill for 3300 Medicare-eligible car accident victims who may have been insured under an Ocean Harbor PIP policy can only be determined on a bill-by-bill, file-by-file, individualized basis. The relevant individual inquiries include, but are not limited to: (a) whether coverage was in place and benefits were available; (b) whether the bill at issue relates to injuries arising from a covered automobile accident, and if so, whether the charge was for a necessary treatment and the amount charged was reasonable within the meaning of the PIP statute; (c) whether the statutory pre-suit notice requirement was met; and (d) whether Ocean Harbor owes any amount on a particular bill.

The statutory pre-suit notice requirement is but one example of the many liability questions that only can be answered on an individualized basis, and it alone precludes certification of the instant class. Before an insurer can be sued for unpaid PIP benefits, a pre-suit notice containing specific, detailed information

particular to **each individual bill** for which benefits are sought must be submitted. § 627.736(10), Fla. Stat. (2012). Failure to comply with this statutory requirement is an absolute, substantive defense to liability in an action for PIP benefits because it provides an insurer "an additional period of time to meet its obligation under the statute, and an action for a claim of benefits cannot be initiated until the additional time for payment has expired." *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873, 878-880 (Fla. 2010) (reciting history and purpose of pre-suit notice requirement); *see also Shenandoah Chiro., P.A. v. Nat'l Spec. Ins. Co.*, 526 F. Supp. 2d 1283, 1287-88 (S.D. Fla. 2007) (§ 627.736(10) "clearly establishes a condition precedent to filing suit, and the failure to comply with this condition precedent eliminates the availability of a remedy").

Nonetheless, the trial court declared the pre-suit notice requirement "immaterial." SA.95-97. This precipitous merits determination highlights a fundamental due process problem that pervades the order on review. Because compliance with the statutory pre-suit notice requirement is a condition precedent to initiating a lawsuit for PIP benefits, non-compliance with the requirement is a complete defense to liability. With the stroke of her pen over MSP's order, the trial judge abrogated this legislative mandate for an entire class of plaintiffs and rendered MSP "unable to defend against individual claims where there may be no liability. **By any standard, this would amount to a violation of substantive due**

process of law." *Rollins*, 951 So. 2d at 874. And because the statute requires each pre-suit notice to provide individualized and bill-specific information, the class members cannot travel on a 'representative' notice. *See Shenandoah*, 526 F. Supp. 2d at 1290 (allowing class-wide pre-suit notice in PIP benefits action would "eliminate the carefully crafted and detailed notice requirement set out in the Florida PIP statute"); *Bristol W. Ins. Co. v. MD Readers, Inc.*, 52 So. 3d 48, 52 (Fla. 4th DCA 2010) ("[A] class action for [PIP] benefits would be a practical impossibility, because each provider must serve the statutory notice.") (Warner, J., concurring).

Superiority is lacking, and due process violations loom, for another reason. MSP's plan to prove "thousands of claims" relies on software Mr. Ruiz developed. SA.70-78. The software cross-references vehicular accident reports with data concerning Medicare-eligible accident victims and the identities of their PIP insurers. Simply put, the software is a statistical damages projector that assumes liability in 100% of cases where a Medicare-eligible person who may have been covered under a PIP policy received medical treatment for which an MAO may have reimbursed. But a statistical damages model that operates to eliminate individualized liability defenses contravenes basic due process requirements because "it assumes what remains to be proved: that the individual members of the putative class have a right to a recovery in the first place." *Rollins*, 951 So. 2d at

875; *Comcast*, 133 S. Ct. at 1433 (class certification improper where statistical damages methodology "identifies damages that are not the result of the wrong").

The trial court accepted MSP's invitation to error—and altogether vitiated Ocean Harbor's due process rights—by certifying a class where **any** liability determination necessarily requires an individual claims process. As a matter of law, the only way to ascertain Ocean Harbor's liability to any class member for any payment allegedly made for treatment of an MAO enrollee who may have been covered under an Ocean Harbor PIP policy is by conducting a bill-by-bill, file-by-file inquiry. This begs the question: if liability for each claim must be determined on the back end, what good does it do to certify a class on the front end? The short answer is "none." The erroneous premises of the order certifying this class guarantee an attack on any resolution of this case, which will waste judicial resources in connection with this litigation and in the parallel and secondary suits that are certain to follow.

CONCLUSION

For these reasons, and those set forth in Ocean Harbor's initial brief, the Institute respectfully submits that this Court should reverse the order on review and hold that class certification was improperly granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2017 a true and correct copy of the foregoing was furnished by E-mail to all counsel listed below.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 because it was prepared using Times New Roman 14-point font.

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