Filing # 72390190 E-Filed 05/18/2018 05:24:58 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC18-278

PROGRESSIVE SELECT
INSURANCE COMPANY,

Petitioner,

v.

FLORIDA HOSPITAL
MEDICAL CENTER a/a/o
Jonathan Parent,

Respondent.
_____/

BRIEF OF *AMICUS CURIAE* FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF PROGRESSIVE SELECT INSURANCE COMPANY

William W. Large
Florida Bar No. 0981273
President
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, FL 32301
Telephone: (850) 222-0170
william@fljustice.com

Peter J. Valeta
Florida Bar No. 0327557
Cozen O'Connor
Attorney for *Amicus Curiae*
Florida Justice Reform Institute
123 N. Wacker Dr., Ste. 1800
Chicago, IL 60606
Telephone: (312) 474-7895
pvaleta@cozen.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

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. The members of the Institute have a strong interest in protecting the dual public policies of providing swift payment for medical services resulting from automobile accidents, regardless of fault, while preventing medical providers from imposing excessive and unreasonable charges for those services.

SUMMARY OF ARGUMENT

The Florida PIP Statute (Section 627.736, Fla. Stat.) protects PIP insureds from excessive medical charges by prohibiting providers from billing more than reasonable amounts. The "reasonableness" requirement is satisfied when insurers elect the statutorily authorized fee schedule limitations. And insureds are protected by a prohibition against "balance billing" by providers (i.e., charging insureds for amounts which exceed the fee schedule limitations).

However, the Fifth District majority in *Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr.*, 236 So. 3d 1183 (Fla. 5th DCA 2018), interprets the Florida PIP deductible statute (Section 627.739(2), Fla. Stat.) ("Deductible Statute") in a manner

which increases the medical costs which can be charged to PIP insureds who purchase a deductible beyond reasonable amounts. As Judge Palmer noted in his dissent, under that interpretation, "the deductible could be applied to a charge which is unreasonably high and thus not covered by PIP." 236 So. 3d at 1193.The Fifth District majority's interpretation puts that additional money into the providers' pockets solely at the expense of the insureds.

The Fifth District majority's interpretation negates the statutory protection from excessive medical charges for PIP insureds with deductibles. It also denies those insureds the protections of the prohibition against "balance billing." This interpretation frustrates the legislature's stated goal of regulating the amounts providers can charge for services covered by PIP, and incentivizes providers to charge more than a reasonable amount for their services in order to maximize their recovery at the expense of PIP insureds. This results in greater overall costs and higher co-pays for insureds. Ultimately, the increased costs will put upward pressure on premium rates to the detriment of consumers.

ARGUMENT

I. MEDICAL PROVIDERS RECEIVE AN UNWARRANTED WINDFALL AT THE EXPENSE OF INSUREDS.

There is no question that under the Fifth District majority's decision, providers are paid more when they treat an insured who has a PIP deductible. But

nothing in the Deductible Statute grants providers this windfall. Insureds who elect PIP deductibles agree to pay a larger **share** of their medical expenses, but they do not agree to pay higher prices for those services. And there is no statutory authority to penalize those deductible insureds with higher prices.

The medical bill at issue was a $2,781 hospital charge in the decision below. Under Section 627.736(5)(a)1.b., the statutorily authorized reimbursement limitation for hospital bills permits the insurer to limit PIP benefits payable to 80% of 75% of a hospital's usual and customary charges. Compare how medical bills are treated under a policy without a PIP deductible under a policy with a deductible under the interpretations at issue:[1]

[1] The following calculations are based on the Fifth DCA's description of the medical bill calculations. 236 So. 3d at 1185.

Payment under a PIP policy without a deductible would have been:

$2,781.00	Total hospital charge
x 75%	Applying section 627.736(5)(a)1.b. (statutory limitation)
$2,085.75	
x 80%	Applying section 627.736(5)(a)1. (mandated PIP benefit)
$1,668.50	Amount due in PIP Benefits (paid by insurer)
$ 417.15	20% copay (paid by insured)

The Fifth DCA's decision approved the provider's calculation:

$2,781.00	Total hospital charge
- $1,000.00	Insured's PIP deductible (paid by insured)
$1,781.00	
x 75%	Applying section 627.736(5)(a)1.b. (statutory limitation)
$1,335.75	
x 80%	Applying section 627.736(5)(a)1. (mandated PIP benefit)
$1,068.60	Amount due in PIP Benefits (paid by insurer)

Without Deductible	With Deductible (5th DCA)	With Deductible (Progressive)
The provider receives $2,085.75 • $1,668.60 in PIP benefit payments • $417.15 from the insured's copay	The provider receives $2,335.75 • $1,000 from the deductible • $1,068.60 in PIP benefit payments • $267.15 from the insured's copay	The provider receives $2,085.75 • $1,000 from the deductible • $868.60 in PIP benefit payments • $217.15 from the insured's copay
$2,085.75 equals the statutorily authorized "schedule of maximum charges."	$2,335.75 is $250 **more** than the statutorily authorized "schedule of maximum charges."	$2,085.75 equals the statutorily authorized "schedule of maximum charges."
The insured pays $417.15.	The insured pays $1,267.15.	The insured pays $1,217.15.

Under the Progressive interpretation, the provider receives the exact same amount which the provider would have received under a PIP policy without a deductible—$2,085.75—equal to the statutorily authorized "schedule of maximum charges." The

---

$ 267.15 20% copay (paid by insured)

Progressive's calculation rejected by the Fifth DCA:

$2,781.00 Total hospital charge
x 75% Applying section 627.736(5)(a)1.b. (statutory limitation)
$2,085.75
- $1,000.00 Insured's PIP deductible (paid by insured)
$1,085.75
x 80% Applying section 627.736(5)(a)1. (mandated PIP benefit)
$ 868.60 Amount due in PIP Benefits (paid by insurer)
$ 217.15 20% copay (paid by insured)

Fifth DCA majority's interpretation increases the amount the provider can collect to $2,335.75—$250 more than the provider would have received under a PIP policy without a deductible based on the statutorily authorized "schedule of maximum charges." The provider's increased recovery is at the expense of the insured. The insured pays $50 more for the 20% copay obligation. The insured also has $200 less remaining PIP benefits available.

Nothing in the PIP Statute or the Deductible Statute authorizes use of a PIP deductible to increase the provider's recovery. With a deductible, "the insured (not the insurer) becomes responsible for payment of claims that are otherwise impacted by the deductible amount." *Mercury Ins. Co. of Fla. v. Emergency Physicians of Cent.*, 182 So.3d 662, 667 (Fla. 5th DCA 2015).

Allowing insureds' PIP deductibles to be applied against the billed amount without regard to whether that amount is reasonable creates a windfall for the provider because it receives more than the statutorily authorized "schedule of maximum charges." That windfall is at the expense of PIP insureds who purchased PIP coverage with a deductible and not authorized by the statutes.

II. THE FIFTH DCA DECISION UNFAIRLY DISADVANTAGES INSUREDS WHO PURCHASE PIP WITH A DEDUCTIBLE.

Under the Fifth DCA majority's interpretation of the Deductible Statute, PIP insureds who purchase deductibles are treated differently and worse than PIP

insureds who do not purchase deductibles. But there is no basis in either the PIP Statute or the Deductible Statute to penalize deductible purchasers.

Deductibles provide insureds with an option to obtain PIP coverage at a reduced premium rate because the insured pays the initial portion of any loss suffered. No other changes to PIP coverage, other than assuming responsibility for paying the deductible, are authorized.

But PIP insureds who purchase a deductible are penalized under the Fifth DCA's interpretation. In addition to paying for the windfall providers receive, as noted above, PIP insureds who purchase a deductible are, in essence, denied protection from "balance-billing" by providers.

The PIP Statute protects PIP insureds from providers attempting to collect any amounts in excess of the reasonable charges covered by PIP (*i.e.*, "balance-billing"). The PIP Statute prohibits providers from charging PIP insureds and insurers more than a reasonable amount. "A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered,…." Section 627.736(5)(a), Fla. Stat. The PIP Statute also authorized insurers to elect to limit reimbursement to medical providers for PIP services based upon pre-determined rates set forth in statutory fee schedules. Section

627.736(5)(a)1., Fla. Stat. ("The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges"). 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*, 212 So. 3d 973, 976 (Fla. 2017) ("*Orthopedic Specialists*") ("Reimbursements under section 627.736(5)(a)2 [now 5(a)1.]. satisfy the PIP statute's reasonable medical expense coverage mandate.").

Where an insurer's policy properly elects the authorized fee schedule limitations, its insureds are protected from paying amounts that exceed those limitations. Section 627.736 (5)(a)5. [now renumbered as 5(a)4.], provides:

> If an insurer limits payment as authorized by subparagraph 2. [fee schedule limitations], the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits.

(Emphasis added.) This ensures that when an insurer uses the reimbursement limitations as "an alternative mechanism for determining reasonableness" (*GEICO Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147, 156 (Fla. 2013)), the insured is protected from "balance-billing" by providers (attempting to collect any amounts in excess of the reasonable charges so determined).

The balance-billing limitation is part and parcel of the Florida Legislature's plan for limiting medical costs under PIP. The legislature deliberately set this barrier to prevent providers from imposing charges which exceed the authorized reimbursement limitations of subsection 5(a)1.

Thus, PIP insureds who do not purchase a deductible cannot be charged more than the applicable fee schedule limitations because of the balance-billing prohibition. But the Fifth DCA majority decision denies balance-billing protection for insureds who purchase PIP with a deductible. Under that interpretation, the deductible is applied against the total amount billed, before the authorized reimbursement limitations of subsection 5(a)1. are applied. This allows the provider to collect amounts which exceed the reimbursement limitations and avoid the balance-billing prohibition. For example, in this case, as described above, the provider hospital charge was $2,781.00. The Section 627.736(5)(a)1.b. statutory reimbursement limitation was 75%, establishing $2,085.75 as the maximum recoverable by the provider. Under a non-deductible PIP policy, the provider would receive $2,085.75: $1,668.60 in PIP benefit payments and $417.15 from the insured's copay. And the provider is prohibited from billing the insured for the balance ($2,781.00 - $2,085.75 = $695.25).

But because this insured purchased a PIP policy with a deductible, he is not protected from charges exceeding $2,085.75. The provider collects $2,335.75, which

is $250 **more** than the statutory reimbursement limitation all at the insured's expense (the insured pays an additional $50 in copy and uses up an additional $200 in available PIP benefits).

Thus, the Fifth DCA majority decision treats insureds who purchase PIP with a deductible differently from those who do not. It deprives them of the statutory protection against balance-billing, and allows providers to increase their revenues beyond the statutory limitations at the expense of insureds and Florida citizens as a whole.

But the Deductible Statute does not impose loss of balance-billing protection as part of the election of a deductible; it only obliges the insured to pay the first part of a covered expense up to the amount of the deductible. Nor does the PIP Statute remove the statutory protection against balance-billing for insureds who elect a deductible.

Insureds who purchase PIP with a deductible are entitled to the same benefits and protections when their policies include the insurer's election to apply the statutorily authorized reimbursement limitations as insured who do not elect a deductible. No additional penalty for those insureds is authorized or justified.

III. APPLYING PIP DEDUCTIBLES TO BILLED AMOUNTS IS INCONSISTENT WITH THE LEGISLATURE'S STATED INTENT FOR PIP.

A. The Florida Legislature Has Sought To Limit Medical Costs.

Florida's No-Fault Law was enacted 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) included the general requirement that PIP providers could only charge "reasonable" amounts for treatment and services, Florida courts have been inundated with litigation over whether PIP providers' charges were, in fact, "reasonable."[2] 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.

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

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 v. Virtual Imaging*, 141 So. 3d at 153. The PIP statutes were due to "sunset" in October 2007, but the Legislature reenacted the law, effective January 1, 2008, with significant 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* Section 627.736(5), Fla. Stat.

The amendment permitting reimbursement based upon fee schedules generated another wave of litigation.[3] 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

[3] *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) (Appendix, Pages A.66 - A.481).

confirmed that use of the fee schedule method of reimbursement does in fact satisfy the obligation to pay reasonable medical expenses. *Orthopedic Specialists*, 212 So. 3d at 976 ("Reimbursements under section 627.736(5)(a)2 [now 5(a)1.]. satisfy the PIP statute's reasonable medical expense coverage mandate.")

Providers have now attacked the fee schedule limitations from a new angle: arguing that a PIP 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 established by the applicable fee schedule). The Fifth DCA's endorsement of the providers' argument ignores the Supreme Court's pronouncement in *Orthopedic Specialists* that the fee schedule method of reimbursement **is** payment of reasonable medical expenses.[4]

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 text of the statute, as well as the stated 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,

[4] As the Supreme Court noted, "no insurer can disclaim the PIP statute's reasonable medical expenses coverage mandate." *Orthopedic Specialists*, 212 So. 3d at 977. Likewise, providers cannot disclaim their obligation to "charge the insurer and injured party only a reasonable amount…." § 627.736(5)(a), Fla. Stat.

and results in fewer covered services and higher out-of-pocket costs for the insured and upward pressure on rates to the detriment of consumers.

The effect of the Fifth DCA's interpretation eviscerates the legislature's stated purpose 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. By doing so, the provider not only guarantees a higher recovery for itself, but imposes higher costs on the insured.

B. PIP Deductibles Can Only Be Applied To Reasonable Medical Bills.

Florida's personal injury protection statute has, "[s]ince its inception in 1971… required insurers to provide coverage for **reasonable expenses** for necessary medical services." *See Virtual Imaging*, 141 So. 3d at 153 (citing section 627.736(1)(a), Florida Statutes (1971)) (emphasis added). The plain language of section 627.739(2), recognizes this overriding statutory mandate, explicitly requiring that the deductible be "applied to 100 percent of the **expenses and losses described in s. 627.736.**"

PIP does not cover medical expenses that are not reasonable. The "expenses and losses described in s. 627.736" are, therefore, only "reasonable expenses." Common sense dictates, then, that a PIP deductible could only possibly apply to

reasonable expenses because only those are actually *covered* by the policy. *Gen. Star Indem. Co. v. West Fla. Village Inn, Inc.*, 874 So. 2d 26, 33 (Fla. 2d DCA 2004)("The notion that a deductible could be applied to a loss that is not covered by the policy is fundamentally unreasonable."). The Fifth DCA majority's piecemeal interpretation wholly ignores the words "described in s. 627.736" in stating that the deductible must be applied to 100 percent of billed amount. When an insurer elects to reimburse under PIP coverage pursuant to the fee schedules, **the fee schedule amount is *per se* the reasonable expense "described in s. 627.736" to which the deductible applies**.

The Fourth DCA recently reached the opposite conclusion from the Fifth DCA majority in *State Farm Mut. Auto. Ins. Co. v. Care Wellness Ctr., LLC*, 2018 WL 1315026 (Fla. 4th DCA Mar. 14, 2018). That Court observed:

> Reasonableness is the key throughout these provisions [Section 627.736 references to "expenses"]. Yet the providers effectively argue that their charges need to be reasonable only to the insurer, not the insured. We disagree. The requirement that charges be reasonable applies to the totality of the charges. The statute states that the provider "may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered." § 627.736(5)(a), Fla. Stat. (2013). We think the plain language of the statute is clear. The legislature unambiguously emphasized a requirement that expenses be reasonable. We cannot minimize the importance of this reasonableness requirement. Indeed, our supreme court found that "this provision—the reasonable medical expense coverage mandate—is the heart of the PIP statute's coverage requirements." *Allstate*

> *Ins. Co. v. Orthopedic Specialists*, 212 So.3d 973, 976 (Fla. 2017) (internal quotation omitted).

Care Wellness, 2018 WL 1315026 at *4.[5]

"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 require that a PIP deductible be applied to 100 percent of the reasonable and necessary medical expenses, or those expenses covered by the policy. Accordingly, 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.

C. The Fifth DCA Majority's Suggestion That Insureds Are Able To Protect Themselves From Unreasonable Charges By Providers Is Incorrect And Ignores Reality.

The Fifth DCA majority attempts to justify its interpretation by asserting that insureds are protected from paying unreasonable billed amounts under the deductible because they could contest them, citing various statutory provisions prohibiting false, or misleading, or fraudulent bills or billing practices. 236 So. 3d at 1191. That justification is factually incorrect and ignores reality.

---

[5] *Care Wellness* was followed in *Central Palm Beach Physicians & Urgent Care, Inc. v. Esurance Prop. And Cas. Ins. Co.*, Case No. 8:18-cv-60136, U.S.D.C., S.D. Fla., May 16, 2018 (Dimitrouleas, J.) (Order Granting Defendant's Motion to Dismiss) (Appendix, Pages A.482 - A.490).

First, the fact that false, or misleading, or fraudulent bills or billing practices might be illegal does not mean every unreasonable bill could be challenged on such grounds. This only means that illegal bills are prohibited, not unreasonable ones.[6] It simply ignores the legislature's determination that providers' billings that exceed the statutorily authorized schedule of limitations are *per se* not reasonable.

Second, this suggested "protection" does not address the practicalities facing insureds regarding providers' unreasonable billing. Individual insureds are not usually sophisticated consumers about medical services and billing. They are unlikely to be aware of the statutorily authorized schedule of limitations or other measures for evaluating the reasonableness of providers' charges. The PIP Statute authorizes providers to seek reimbursement directly from PIP insurers. In almost all cases, providers obtain assignments from PIP insureds, assigning the right to their PIP benefits to the provider. Providers bill the PIP insurers directly, utilizing prescribed, standardized forms and complying with applicable coding procedures.[7] And providers collect those PIP reimbursements directly from insurers. Insureds are

[6] Attempts to challenge unreasonable bills as false, misleading, or fraudulent will likely meet strong opposition by providers since their position inherently asserts that their billed amounts are legitimate and reasonable.

[7] Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the OIR, Healthcare Common Procedure Coding System (HCPCS), and Physicians' Current Procedural Terminology (CPT) as specified in Section 627.736(5)(d).

not involved in the provider billing or PIP reimbursement process, except for their bills to pay deductible and copay amounts.

Third, insureds would be forced to risk harassment by collection services and impairment of their credit rating, or incur the expenses and delays of pursuing legal remedies when refusing to pay unreasonable bills. There is no convenient forum or procedure through which insureds can protest unreasonable billing. It is patently unreasonable to impose such risks and costs on individuals when the legislature has already declared a "bright line" test for reasonableness (the statutorily authorized schedule of limitations) which can be applied without risk or cost to insureds.

In short, the theoretical ability of insureds to challenge providers' unreasonable billing against their PIP deductible provides no real "protection" for insureds. It ignores the realities surrounding PIP reimbursement practices and imposes unreasonable and unnecessary risks and burdens on insureds. It provides no excuse for disregarding the legislature's clear determination that the statutorily authorized schedule of limitations establish reasonableness and include inherent protections for insureds against excess billing by providers.

IV. IF THE DEDUCTIBLE STATUTE IS AMBIGUOUS, IT SHOULD BE CONSTRUED IN FAVOR OF INSUREDS' INTERESTS.

It is "the well-established rule in Florida that the PIP statute should be construed liberally in favor of the insured." *Allstate Fire & Cas. Ins. Co. v. Perez ex rel. Jeffrey Tedder, M.D., P.A.*, 111 So. 3d 960, 963 (Fla. 2d DCA 2013). As has

been previously noted, Progressive's interpretation of the deductible application favors the insured's interests. The insured pays less under the 20% copay and because of the statutorily authorized limitations, fewer benefits are expend. Moreover, the provider is prohibited from balance billing insureds for amounts that exceed those limitations. Insureds receive the benefit of the bargain they elected—agreeing to be responsible for the deductible amount of the expenses covered by PIP in exchange for a lower premium. And insureds who elect to purchase PIP coverage with a deductible are not disadvantaged. There is simply no question that to the extent there is any interpretation of an ambiguity required, the insureds receive more coverage and benefits under Progressive's interpretation.

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

The Fifth DCA majority's interpretation benefits only providers, at the expense of insureds, as well as Florida's citizens generally. It would allow and indeed incentivize PIP providers to charge more than is customary for services, which would result in greater costs for insureds. In addition to the greater co-pays insureds may be subjected to in a given claim, that 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 Fifth DCA majority's interpretation of the Deductible Statute is endorsed, the increased costs 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 Fifth DCA majority's interpretation of the Deductible 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 provided per claim.[10] The Legislature has made great strides in 2007 and 2012 to curtail

---

[8] *See* Ins. Consumer Report at 2 (Appendix, Pages A.1 - A.65).
[9] *See* Senate Bill 1474 (died in Judiciary March 11, 2016), and House Bill 1271 (died in Civil Justice Subcommittee March 11, 2016).
[10] Florida Office of Insurance Regulation, *Report on Review of the 2011 Personal Injury Protection Data Call*, p.12 (April 2011) (Available at

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 Fifth DCA majority's interpretation 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. Endorsing the Fifth DCA majority's interpretation of the Deductible Statute would permit PIP providers to maximize their recovery—or even obtain a windfall—at the expense of PIP insureds and the public at large. Adopting Progressive's proposed interpretation would ensure that both insureds and insurers only pay the "reasonable" value of any medical services provided. Progressive's proposed interpretation is consistent with the legislative history and intent of the No-Fault Law.

Respectfully submitted,

By: /s/Peter J. Valeta
Peter J. Valeta
Florida Bar No. 0327557
Cozen O'Connor
Attorney for *Amicus Curiae*
Florida Justice Reform Institute
123 N. Wacker Dr., Ste. 1800

http://www.floir.com/sitedocuments/pip_04-08-2011.pdf) (Attached as Appendix, Pages A.491 - A.582).

Chicago, IL 60606
Telephone: (312) 474-7895
pvaleta@cozen.com

William W. Large
Florida Bar No. 0981273
President
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, FL 32301
Telephone: (850) 222-0170
william@fljustice.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, this 18th day of May, 2018 upon: Rutledge M. Bradford, Esq., debbieb@bradfordlaw.com, 2900 E. Robinson Street, Orlando, Florida 32803; Chad A. Barr, Esq., service@chadbarrlaw.com, chad@chadbarrlaw.com, 986 Douglas Avenue, Suite 100, Altamonte Springs, Florida 32714; Eric Biernacki, Esq., ebiernacki@abdmplaw.com, One South Orange Avenue, Suite 403, Orlando, Florida 32801; Mac S. Phillips, Esq., mphillips@phillipstadros.com; 212 Southeast 8th Street, Suite 103, Ft. Lauderdale, Florida 33316; Douglas H. Stein, doug@algpl.com, 1200 Brickell Avenue, PH 2000, Miami, FL 33131, and Michael C. Clarke, MC-KD@kubickidraper.com, 400 North Ashley Drive, Suite 1200, Tampa, FL 33603.

/s/ Peter J. Valeta
Peter J. Valeta, Esq.
Florida Bar No. 327557

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.

s/ Peter J. Valeta
Peter J. Valeta, Esq.
Florida Bar No. 327557