Third District Court of Appeal

State of Florida, July Term, A.D. 2011

Opinion filed November 30, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-2595
(Consolidated with) 3D10-2667
Lower Tribunal Nos. 09-7100; 09-7101

Geico Indemnity Company,
Appellant,

vs.

Virtual Imaging Services, Inc.,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Linda Singer Stein, Judge.

Banker Lopez Gassler and Mark D. Tinker; Shutts & Bowen and Frank A. Zacherl, Douglas G. Brehm, and Maria N. Vernace, for appellant.

Kane and Kane and Harley N. Kane; Ausley and McMullen and John Beranek, for appellee.

Fowler White Boggs and Edward K. Cottrell and John P. Marino (Jacksonville); Hala Sandridge (Tampa), as Amici Curiae, for appellant.

Before CORTIÑAS and ROTHENBERG, JJ., and LEVINE, Associate Judge.

CORTIÑAS, J.

This appeal presents identical certified questions submitted in two Personal Injury Protection ("PIP") cases. The defendant in each case, Geico Indemnity Company ("Geico"), had tendered payment to Virtual Imaging, LLC ("Virtual Imaging") for MRI services provided to Rafael Bojos and Merelis Gomez (the "Insureds") in accordance with separate automobile insurance policies. Virtual Imaging objected to Geico's determination of the amount due under the policies. In each case, the county court entered summary judgment in favor of the plaintiff, Virtual Imaging. On appeal, the cases were consolidated, and the county court certified the following question as a matter of public importance:

> May an insurer limit provider reimbursement to 80% of the schedule of maximum charges described in F.S. 627.736(5)(a) if its policy does not make a specific election to do so?

We answer the certified question in the negative.

Within Florida's Motor Vehicle No-Fault Law, sections 627.730 – 627.7405, Florida Statutes (2008), is the section governing PIP coverage, section 627.736 (the "PIP statute"). The PIP statute requires insurers to pay "[e]ighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services." § 627.736(1)(a). In 2007, the Legislature amended the PIP statute to incorporate Medicare fee schedules. Section 627.736(5)(a)(2)(f)

provides that an insurer may limit reimbursement to providers of MRI services to 80 percent of "200 percent of the allowable amount under the participating physicians schedule of Medicare Part B." Relying on the Medicare fee schedule, Geico reimbursed Virtual Imaging for MRI services provided to the Insureds in the amounts of $1,014.46 and $975.50, respectively. Virtual Imaging disputed the reimbursement, arguing that Geico was obligated under the policies to pay 80% of the amount billed, or $1400 for each of the Insureds. In support of this view, Virtual Imaging points to the language in each policy indicating "the Company [Geico] will pay . . . 80% of medical expenses," defining "medical expenses" as "reasonable expenses for necessary medical, surgical, [and] X-ray . . . services."

Virtual Imaging points this Court to two cases, one of which is directly on point. In Kingsway Amigo Insurance Co. v. Ocean Health, Inc., 63 So. 3d 63, 64 (Fla. 4th DCA 2011), an insurance company, relying on section 627.736(5)(a)(2)(f), paid medical bills at 80% of 200% of the Medicare Part B schedule. This amount was less than 80% of the amount billed by the service provider. The Fourth District found that the language of the policy controlled, and that "[t]he applicable policy made no reference to the permissive methodology of subsection 627.736(5)(a)(2)." Id. at 67. In making its ruling, the court adopted the analysis found in State Farm Insurance Co. v. Nichols, 21 So. 3d 904 (Fla. 5th DCA 2009). In Nichols, which involved homeowner's insurance, "the insurer

argued that it was entitled to pay in accordance with the limitation language in a statute that was not specifically mentioned in the policy, while at the same time the policy provided a means to determine payment." Kingsway, 63 So. 3d at 67. The court in Nichols rejected this argument. In Kingsway, the court similarly ruled that "[i]f the [Insurer] wanted to take advantage of the permissive fee schedule, it should have clearly and unambiguously selected that payment methodology in a manner so that the insured patient and healthcare providers would be aware of it." Id. (internal citations omitted).

This Court is faced, as were the courts in Kingsway and Nichols, with a dispute regarding whether there is a conflict between the language in the policies and the language in the PIP statute. Geico argues that its payment to Virtual Imaging was consistent with both the PIP statute and the policies issued to the Insureds. According to Geico, the permissive language of section 627.736(5)(a)(2) is present in the policies for two reasons. First, section 627.7407(2) states that "[a]ny personal injury protection policy in effect on or after January 1, 2008, shall be deemed to incorporate the provisions of the Florida Motor Vehicle No-Fault Law, as revived and amended by this act." (emphasis added). Consequently, the policies must be read so as to include the provision stating that Geico "may limit reimbursement to 80 percent" of the requisite amount on the Medicare Part B fee schedule. Second, the policies themselves clearly state that reimbursements will be

made "in accordance with the Florida Motor Vehicle No-Fault Law, as amended . . . ." Therefore, Geico argues, no conflict between the statute and the policies arises. Both the policies and the statute clearly state that reimbursements will be made for 80% of reasonable medical expenses, while section 627.736(5)(a)(2), which is incorporated into the policies by language found both in the policies and the PIP statute, clarifies that Geico may determine the specific amount constituting "reasonable medical expenses" by referring to the Medicare Part B fee schedule. Geico asks this Court to rule that Kingsway was wrong to find that the PIP statute "allows an insurer to choose between two different payment calculation methodology options." Kingsway, 63 So. 3d at 67. According to Geico, there is only one methodology: 80% of reasonable medical expenses.

This argument is at best flawed. In this case, Geico was faced with at least two ways of reimbursing reasonable medical expenses: (a) reimbursing Virtual Imaging for 80% of the amount billed, or (b) reimbursing them for 80% of 200% of the amount listed on the Medicare fee schedule. When two distinct payment amounts are possible under the statute, it is misleading to insist that there is only one calculation methodology being used. Furthermore, as section 627.736(5)(a)(2) provides that insurers "may" consult the Medicare fee schedule, it follows that, under the statute, insurers who choose not to do so have recourse to some alternative means for determining a reimbursement amount. This is clearly, as

Kingsway indicated, affording insurers a choice between two different payment calculation methodologies.

Geico's position is further weakened by the ambiguities that necessarily result from incorporating section 627.736(5)(a)(2) into the policies under section 627.7407(2). The policies state that Geico will pay 80% of all reasonable medical expenses. If, as Geico insists, we read them also to state that Geico will pay 80% of 200% of the maximum allowable amount under the physician fee schedule of Medicare Part B, we must reconcile the reference to "reasonable medical expenses" with the reference to the Medicare fee schedule. It is possible to conclude that "200% of the maximum allowable amount under the fee schedule" is being used to define "reasonable medical expense." It is also, however, possible to conclude that there are simply two alternatives present in the policies: that Geico will either pay 80% of reasonable medical expenses, or that it will pay 80% of 200% of the maximum allowable amount under the fee schedule. Because the policies nowhere expressly define the former with reference to the latter, Geico's interpretation is not the only logical or necessary reading of the text. Furthermore, even if the logical equivalency of the two methods were established, the permissive language of section 627.736(5)(a)(2) itself creates ambiguity. A provision indicating that an insurer may limit reimbursements leaves unclear whether this option will be exercised, and therefore provides no indication to policyholders as to

a crucial aspect of their policies: the amount the insurer will pay for necessary medical services.[1] A policy indicating that an insurer may distribute reimbursements according to one method without clarifying alternative methods or identifying the factors to be considered in selecting among methods is ambiguous. Ambiguities in insurance contracts are resolved in favor of the insured.[2] See, e.g., State Farm Mutual Auto. Ins. Co. v. Menendez, 70 So. 3d 566, 570 (Fla. 2011). Therefore, even if Geico were correct that section 627.736(5)(a)(2) is incorporated into the policies, the resulting ambiguity regarding which method Geico would use in determining a reimbursement amount supports the conclusion that Geico should have reimbursed Virtual Imaging for the greatest amount possible within the language of the policies.

We answer the certified question in the negative, and affirm the summary judgments granted by the trial court.

Affirmed.

LEVINE, Associate Judge, concurs.

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[1] Though this action was brought by the service provider and not the policyholders, the distinction is immaterial. Virtual Imaging was an assignee beneficiary of both policyholders. An assignee "stands in the shoes of the assignor and may enforce the contract against the original obligor in his own name." Price v. RLI Ins. Co., 914 So. 2d 1010, 1013 (Fla. 5th DCA 2005) (citing Lauren Kyle Holdings, Inc. v. Heath-Peterson Constr. Corp., 864 So. 2d 55, 58 (Fla. 5th DCA 2003)).

[2] As has been noted, Virtual Imaging stands in the shoes of the policyholders, and the benefit of the interpretation passes to it.

ROTHENBERG, J. (dissenting).

GEICO Indemnity Company ("GEICO") appeals two final orders from the Miami-Dade County Court granting Virtual Imaging, LLC's ("Virtual Imaging") motions for summary judgment in two separate actions. In these cases, the trial court certified the following question as an issue of great public importance: "May an insurer limit provider reimbursement to 80% of the schedule of maximum charges described in F.S 627.736(5)(a)[3] if its policy does not make a specific election to do so?" This Court accepted discretionary jurisdiction under Florida Rule of Appellate Procedure 9.160(e)(2) and consolidated the two cases for all purposes on appeal. Virtual Imaging has only challenged GEICO's application of section 627.736(5)(a)2.f., which is the subsection that applies to Virtual Imaging's claim. We, therefore, limit our review to Virtual Imaging's specific challenge.

This appeal arises from two separate actions filed by Virtual Imaging, a provider of magnetic resonance imaging ("MRI") services, against GEICO to recover additional personal injury protection ("PIP") benefits. Virtual Imaging provided MRI services to Rafael Bojos and Merelis Gomez (collectively, "the insureds") under their GEICO automobile insurance policies for injuries they sustained in separate automobile accidents in 2008. Under an assignment of

[3] The trial court was referring specifically to the fee schedule in section 627.736(5)(a)2.

insurance benefits, Virtual Imaging billed GEICO $1800 for each of the MRI services.

The insureds' policies state: "[T]he Company will pay, **in accordance with and subject to the terms, conditions, and exclusions of the Florida Motor Vehicle No-Fault Law, as amended**, to or for the benefit of the injured person: (a) 80% of medical expenses . . . ." (emphasis added). The term "Medical expenses" is defined in the policies as "**reasonable** expenses for medically necessary [services]." (emphasis added).

Relying on the fee schedule provided in section 627.736(5)(a)2.f., Florida Statutes (2008) ("the PIP fee schedule"), which states, "The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges: . . . 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B," GEICO reimbursed Virtual Imaging eighty percent of the 200 percent allowable under the Medicare Part B schedule. Under this formula, Virtual Imaging was reimbursed $1,014.46 and $975.50, for its services to Rafael Bajos and Merelis Gomez, respectively, which was less than eighty percent of the amounts Virtual Imaging charged.

Virtual Imaging filed suit against GEICO for the outstanding balance. The parties entered into a joint stipulation, narrowing their positions to the legal question at issue on this appeal, and filed cross-motions for summary judgment.

The trial court, relying on State Farm Florida Insurance. Co. v. Nichols, 21 So. 3d 904 (Fla. 5th DCA 2009), determined that, since the fee schedule in subsection (5)(a)2.f. is permissive, it is not "legally required" and therefore not automatically incorporated into the policies by operation of law. Based on this reasoning, the trial court concluded the "plain language" of the policies controlled and entered final summary judgment in favor of Virtual Imaging.

On appeal, Virtual Imaging maintains that: (1) GEICO may not limit reimbursement based on the PIP fee schedule because GEICO's policies neither reference nor make an election to use the PIP fee schedule; and (2) when, as here, insurance policies provide greater coverage than the amount required by the fee schedule, the terms of the policy must control. The majority concludes that the PIP statute provides two separate methodologies for the reimbursement of reasonable medical expenses and, because the language of subsection (5)(a)2. is permissive, the incorproration of subsection (5)(a)2. in the insureds' policies creates an ambiguity which must be interpreted in favor of the insureds.

Our standard of review is de novo. See Allstate Ins. Co. v. Holy Cross Hosp., Inc., 961 So. 2d 328, 331 (Fla. 2007) ("[T]o interpret provisions of the Florida Motor Vehicle No-Fault Law . . . the standard of review is de novo."). For the reasons that follow, I respectfully disagree with both Virtual Imaging and the majority, and issue the following dissent.

THE PIP LAW

The 2008 version of Florida's Motor Vehicle No-Fault statute, which governs and mirrors the language in the insureds' policies, mandates that PIP insurers "**shall** provide personal injury protection to the named insured . . . [for] eighty percent of all **reasonable** expenses for medically necessary . . . services," up to $10,000. § 627.736(1)(a), Fla. Stat. (2008) (emphasis added). To avoid unnecessary litigation regarding the "reasonableness" of a medical charge, Florida's Motor Vehicle No-Fault statute was amended in 2007 to include section 627.736(5)(a)2., which provides a reimbursement fee schedule for all PIP claims. The fee schedule set forth in section 627.736(5)(a)2.f., which is at issue in this appeal, provides, in pertinent part:

> 2. The insurer **may limit reimbursement** to 80 percent of the following schedule of **maximum charges**:
>
> f. For all other medical services [including MRI services], supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B.

(Emphasis added). The amended statute became effective on January 1, 2008,[4] and governs the insureds' policies. The parties agree that because their policies went into effect after January 1, 2008, there is no issue regarding retroactive application of the reenacted, amended PIP statute to their policies.

[4] See Ch. 2007-324, § 21, Laws of Fla. (2007).

PIP INSURERS MAY CALCULATE REIMBURSEMENT UTILIZING THE PIP FEE SCHEDULE WITHOUT SPECIFICALLY ELECTING TO DO SO IN THEIR POLICIES.

Virtual Imaging argues that by utilizing the reimbursement fee schedule, GEICO breached its contracts because: (A) the insureds' policies make "absolutely no reference to the new Medicare fee schedule"; and (B) an insurer may not rely on the fee schedule when reimbursing providers without including specific language in the policy stating that payment will be made pursuant to the PIP fee schedule. Essentially, Virtual Imaging contends, and the majority agrees, that section 627.736(5) provides for two separate methodologies for reimbursement of medical costs: (1) to pay 80 percent of reasonable costs under subsection (5)(a)1.; or (2) to pay 80 percent of 200 percent of the allowable amount under the Medicare Part B schedule; and that the insurer must elect and specify which methodology it will use in the policy. I disagree.

A. The fee schedule was incorporated by law into the insureds' policies.

Section 627.7407(2) states, "**[a]ny personal injury protection policy in effect on or after January 1, 2008, shall be deemed to incorporate the provisions of the Florida Motor Vehicle No-Fault Law, as revived and amended by this Act.**" (emphasis added). It is uncontested that the insureds' policies were in effect on or after January 1, 2008. Further, the fee schedule provision is located squarely within the confines of the Florida Motor Vehicle No-

Fault Law. See § 627.730, Fla. Stat. (2008) ("Sections 627.730-627.7405 may be cited and known as the 'Florida Motor Vehicle No-Fault Law.'"). Thus, the fee schedule was statutorily incorporated into the insureds' policies.

Additionally, in Grant v. State Farm Fire & Casualty Co., 638 So. 2d 936, 938 (Fla. 1994), the Florida Supreme Court specifically held that "where a contract of insurance is entered into on a matter surrounded by **statutory limitations** and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become part of the contract." (emphasis added) (citations omitted). The PIP fee schedule was therefore clearly incorporated by law into the insureds' policies.

B. The insureds' policies also specifically incorporate by reference Florida's Motor Vehicle No-Fault Law, as amended.

"A document may be incorporated by reference in a contract if the contract specifically describes the document and expresses the parties' intent to be bound by its terms." Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc., 743 So. 2d 627, 631 (Fla. 1st DCA 1999); see also OBS Co. v. Pace Constr. Corp., 558 So. 2d 404, 406 (Fla. 1990) ("It is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing."). The ability to incorporate by reference applies equally to statutes. See Century Vill., Inc. v. Wellington E, F, K, L H, J, M, & G, Condo. Ass'n., 361 So.

2d 128, 133 (Fla. 1978). The insureds' policies state that reimbursements will be made "**in accordance with, and subject to the terms, conditions, and exclusions of the Florida Motor Vehicle No-Fault Law, as amended.**" (emphasis added). This language unequivocally evinces the parties' intent to be bound by the terms of the Florida Motor Vehicle No-Fault Law, which includes the PIP fee schedule. Thus, it is clear that the fee schedule provided in subsection (5)(a)2.f. was incorporated by reference and became a part of the contract.

Consequently, the fact that GEICO's policies do not make specific reference to the Medicare fee schedule is irrelevant. Requiring GEICO to amend its existing policies, or create new ones, to incorporate a fee schedule that is already incorporated by law and by reference into the insureds' policies is contrary to Florida law. See Northbook Prop. & Cas. Ins. Co. v. R & J Crane Serv., Inc., 765 So. 2d 836, 839 (Fla. 4th DCA 2000) ("Generally, all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention.") (citation omitted).

C. PIP insurers may utilize the fee schedule to calculate reimbursement without electing to do so in their policies.

Virtual Imaging's argument that GEICO must "elect" to use the fee schedule in the policy contravenes the plain language of the fee schedule. Section

627.736(5)(a)2. begins with the words: "The insurer may limit reimbursement to the following schedule of maximum charges . . . ." This provision contains neither an election requirement nor any conditional language. The permissive words "insurer may" clearly show that this provision grants the **insurer** the unconditional, unilateral right to limit reimbursement according to the fee schedule, and does not provide for or contemplate any objection by an insured. It would therefore be a strained reading to conclude that an "election" must be made as a condition precedent to use of the fee schedule. "Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law." United Auto. Ins. Co. v. Rodriguez, 808 So. 2d 82, 85 (Fla. 2001). Accordingly, I would find that the PIP statute unambiguously permits PIP insurers to calculate reimbursement under the fee schedule without electing to do so in their policies.

Despite the PIP statute's clear guidance, the majority has determined that the PIP fee schedule's functionality is "ambiguous." "[W]hen a statute is unclear or ambiguous as to its meaning, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent." Murray v. Mariner Health, 994 So. 2d 1051, 1061 (Fla. 2008). Rather than examining the legislative intent behind the enactment of the PIP fee schedule, the majority resolves the ambiguity

in favor of the insured because it is an insurance contract. However, a study of the legislative history, which is "the polestar that guides a court's inquiry under the Florida No-Fault Law," Rodriguez, 808 So. 2d at 85, demonstrates that the majority's interpretation is at odds with the legislative intent behind the enactment of the fee schedule.

Virtual Imaging argues, and the majority agrees, that the PIP statute merely authorizes insurers to offer policies that limit reimbursement to the PIP fee schedule. Under this reading, some insurers would offer policies electing to limit reimbursement under the fee schedule while others would not. In this free market construct, some consumers would accept such a limitation, but others would seek out insurers who do not limit their reimbursements in this way. The fallacy in this interpretation is that it describes the situation as it existed **prior** to implementation of the PIP fee schedule, while the fee schedule was enacted to **remedy** the broken PIP reimbursement system.

Prior to the enactment of the fee schedule, the Florida Supreme Court in Holy Cross confirmed that PIP insurers were authorized to offer policies which limit reimbursement to eighty percent of a contractually agreed-upon rate, stating:

> First, there is no provision in . . . the entire PIP statute that specifically precludes an insurer from entering into a contract with a provider to create an agreed-upon fee schedule for reduced rates. See [Nationwide Mut. Ins. Co. v.] Jewell, 862 So. 2d [79], 83 [(Fla. 2007)]. Second, payment at a reduced rate does not violate subsection (1)(a) so long as the insurer pays "eighty percent of all *reasonable expenses*." §

> 627.736(1)(a), Fla. Stat. [(2006)] (emphasis supplied). What a provider customarily charges or has previously accepted **are important factors** for determining whether a fee is reasonable. See § 627.736(1)(a), Fla. Stat. . . . Accordingly, "[i]f a provider has agreed in a valid and enforceable contract to accept payment for services at a particular rate, that rate would necessarily be a 'reasonable amount for the services . . . rendered.'" Jewel, 862 So. 2d at 86 (quoting § 627.736(5)(a), Fla. Stat.).

Holy Cross, 961 So. 2d at 335 (emphasis added).

The "factors" for determining the reasonableness of a fee that the Court referenced are found in section 627.736(5)(a)1., which has been in effect since 2003:

> With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community, and **various federal and state medical fee schedules applicable to automobile and other insurance coverages**, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

(emphasis added). The Florida Supreme Court's opinion in Holy Cross clearly demonstrates that prior to the enactment of the fee schedule, insurers were authorized to offer policies that contractually limit reimbursement based on the factors outlined in subsection (5)(a)1., including "federal fee schedules" such as Medicare, and consumers were free to accept or reject them.

This, however, was the system the Florida Legislature found to be broken. Indeed, the legislative history is replete with evidence demonstrating that providers

abused their calculation leverage, leading to widespread fraud and inflation of prices. Prior to the fee schedule's enactment, when presented with an "unreasonable" bill, PIP insurers were often forced to pay the amount billed because their sole alternative was costly litigation. In September of 2000, Florida's Fifteenth Statewide Grand Jury issued a report titled "Report on Insurance Fraud Related to Personal Injury Protection," detailing the dilemma.[5] The report explained:

> [A] number of greedy and unscrupulous legal and medical professionals have turned [the] $10,000 [PIP] coverage into their personal slush fund. Paying kickbacks for patients, abusing diagnostic tests, grossly inflating costs by engaging in sham transactions and filing fraudulent claims of injury, these individuals think nothing of enriching themselves by exploiting the misfortunes of others. The result is loss of coverage and marginal medical treatment for those who are injured, as well as higher insurance rates for all drivers.
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> . . . .
>
> **Because there is no fee schedule set by the government in PIP claims**, and because of the strict rules regarding PIP claims, . . . insurance companies must pay almost any amount billed. For example, a lumbar MRI scan would typically be billed on average at $1,700 to a PIP insurer. Medicare, however, would only pay $592 for that same test, a workers compensation carrier would only pay $546, and a typical preferred patient plan would on average pay $653.

(Emphasis added). The grand jury concluded its report by recommending that the Florida Legislature "[c]onsider adopting a fee schedule for reimbursement under

[5] This report is available at the Attorney General's website at: http://myfloridalegal.com/pages.nsf/Main/9ab243305303a0e085256cca005b8e2e

the PIP statute similar to the schedule employed in the worker's compensation statute."

In 2001, the Florida Legislature adopted the grand jury's findings and enacted a fee schedule for a **narrow** class of PIP claims. See § 627.736(5)(b), Fla. Stat. (2001). Specifically, the Legislature stated:

> The legislature finds that the Florida Motor Vehicle No-Fault Law is intended to deliver medically necessary and appropriate medical care quickly and without regard to fault, and without undue litigation or other associated costs. The legislature further finds that this intent has been frustrated at significant cost and harm to consumers by . . . fraud, medically inappropriate over-utilization of treatments and diagnostic services, [and] inflated charges . . . . Many of these practices are described in the second interim report of the Fifteenth Statewide Grand Jury . . . . The Legislature . . . adopts and incorporates in this section by reference as findings the entirety of the Grand Jury report.

Fla. SB 1092 (2001); Ch. 2001-271, § 1 Laws of Florida.

After several years, however, the Florida Legislature concluded that a fee schedule for only a narrow class of PIP claims was insufficient to drive down the costs of PIP. In a report commissioned in 2005 and prepared for the Florida Senate by the Committee on Banking and Insurance, the Committee found that "[p]remium rates for PIP increased significantly from 2002 to 2003," and that this increase was attributable to an "increased amount paid for the average PIP claim." Comm. on Banking & Ins., Florida's Motor Vehicle No-Fault Law, Report No. 2006-102 at 62 (2005).

To remedy this problem, the Committee recommended that the Florida Legislature:

> 1. Reenact the no fault law,[6] provided that additional reforms are enacted to control costs, most importantly, a medical fee schedule as listed below.
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> 2. Adopt a medical fee schedule for PIP, set at a specified percentage above the Medicare fee schedule. In addition to helping control PIP medical costs, a fee schedule would also **reduce litigation over the reasonableness of medical fees** and thereby reduce PIP loss adjustment expenses and attorney fee awards by insurers.

Id. at 96-97. In making this recommendation, the Committee cited New York,[7] New Jersey,[8] and Oregon[9] as states that have enacted PIP fee schedules to contain PIP costs. Id. at 64. Notably, each of these fee schedules limits reimbursement of PIP charges to a specified maximum amount, and none of them contain an election requirement.

In 2007, based on the Committee's report and recommendations, the Florida Legislature enacted a fee schedule for all PIP claims. See Ch. 2007-324, § 19, Laws of Fla. (2007) (stating that the reenactment of the No-Fault Law and the creation of the PIP fee schedule "was intended to be remedial and curative in nature"). Against a backdrop of widespread billing fraud, the PIP fee schedule was designed to curtail the calculation leverage historically wielded by providers by

[6] The No-Fault Law was scheduled to be automatically repealed on October 1, 2007. See 2003 amendment.
[7] N.Y Ins. Law § 5108(b).
[8] N.J. Rev. Stat. 39:6A-4.6 (2004).
[9] Or. Rev. Stat. § 742.525 (2004).

statutorily affording insurers the unilateral option of limiting reimbursement under a safe harbor schedule of maximum charges.

In sum, the Florida Supreme Court's decision in Holy Cross demonstrates that prior to the enactment of the PIP fee schedule, insurers were authorized to do what the majority concludes the PIP fee schedule authorizes them to now do. The Legislature, however, determined that the PIP reimbursement system as it previously existed was broken, and enacted the PIP fee schedule to cure the problem. Accepting Virtual Imaging's interpretation, therefore, would render the statute superfluous. Because "[s]tatutory language is not to be assumed superfluous" and "a statute must be construed so as to give meaning to all words and phrases contained within that statute," Terrinoni v. Wesward Ho!, 418 So. 2d 1143, 1146 (Fla. 1st DCA 1982), I submit that even if the PIP statute were ambiguous, the legislative history does not support the majority's interpretation.

SECTION 627.736 DOES NOT PROVIDE FOR TWO SEPARATE REIMBURSEMENT METHODOLOGIES.

The majority concludes that section 627.736 provides for two separate methodologies for reimbursement: (1) payment of eighty percent of all reasonable medical expenses under section 627.736(1)(a); and (2) payment of eighty percent of the fee schedule provided in section 627.736(5)(a)2. I respectfully disagree. There is only one reimbursement methodology under the PIP statute—that the insurer must reimburse the insured eighty percent of reasonable medical expenses.

To satisfy the mandatory reimbursement requirement, subsection (5)(a)1. authorizes consideration of federal and state medical fee schedules in determining what is "reasonable"[10]; subsection (5)(a)2. identifies a particular fee schedule that the Legislature has concluded is reasonable; and payment under the fee schedule provided in subsection (5)(a)2. satisfies the PIP statute's mandatory reimbursement requirement.

THE POLICIES DO NOT PROVIDE FOR GREATER COVERAGE THAN THE PIP STATUTE.

Relying on Nichols and Kingsway Amigo Insurance. Co. v. Ocean Health, Inc., 63 So. 3d 63 (Fla. 4th DCA 2011), Virtual Imaging contends that the insureds' insurance policies provide "greater coverage" than the PIP statute's permissive reimbursement provision, and, therefore, the terms of the policies must control. However, because the insurance policies do not provide "greater

[10] Section 627.736(5)(a)1. states:

> With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various **federal and state medical fee schedules** applicable to automobiles and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

(Emphasis added).

coverage" than the PIP fee schedule, Nichols is inapplicable, and for the reasons that follow, I submit that Kingsway was incorrectly decided.

In Nichols, the Fifth District was confronted with a dispute between homeowners regarding the timing of reimbursement to insureds under Florida's sinkhole insurance provisions. The insureds' policies in Nichols required State Farm to submit payment to the insureds within sixty days of the filing of an appraisal award and State Farm's receipt of proof of loss, while section 627.707(5)(b), Florida Statutes (2007), a permissive statute that was not mentioned in the insureds' policies, enabled the insurer to withhold payment until the policyholder entered into a contract for repairs. Under the circumstances presented to the Nichols court, the insureds' policies and the permissive statute required distinct performances; payment was due sooner under the policies than under the statute. The Fifth District concluded that because the language in the statute was permissive and not in conflict with the policy language, the policy was binding on the parties to the insurance contract. Id. at 904.

In Kingsway, the Fourth District was confronted with the same legal question at issue in the instant appeal. As in Nichols, the court in Kingsway determined that the insureds' policies, which mirror the PIP statute's mandatory reimbursement requirement, and the permissive PIP fee schedule, provide two distinct payment methodologies, and payment under the policies would amount to

greater coverage than under the PIP fee schedule. Kingsway, 63 So. 3d at 67. Applying the logic of Nichols, the Fourth District held that when the insurance policy provides "greater coverage" than the amount required by a permissive statute not mentioned in the policies, the terms of the policy will control, and that if the insurer wants to utilize the permissive fee schedule, it must clearly select that payment methodology. Id.

Interestingly, although the majority cites to Kingsway, the majority opinion conflicts with Kingsway, and is decided on completely different grounds. Although both the majority and the Fourth District conclude that the PIP statute provides for two different methodologies for reimbursement, the Fourth District concluded that the statute's provisions are **unambiguous,** but because the insureds' policies did not specify the payment methodology contained in subsection (5)(a)2., the insurer could not limit its reimbursement under this provision. Id. In contrast, the majority concludes that the statutes are **ambiguous** and because "[a]mbiguities in insurance contracts are resolved in favor of the insured," the insurer could not limit reimbursement to eighty percent of the fee schedule provided in subsection (5)(a)2. without electing to do so in the policy.

As to the issue of "greater coverage," the majority concludes that since the PIP fee schedule language is permissive, and because the coverage in the insureds' policies provides broader coverage than the PIP fee schedule, the policy language

should control. The majority's interpretation is premised on the notion that the insureds' policies and the PIP statute provide different reimbursement options. Specifically, as the majority states: "Geico was faced with at least two ways of reimbursing reasonable medical expenses: (a) reimbursing Virtual Imaging for 80% of the amount billed, or (b) reimbursing them for 80% of 200% of the amount listed on the Medicare fee schedule." This analysis, however, incorrectly assumes that the "amount billed" by providers is "reasonable." Indeed, decades of widespread fraud and overbilling have proved that the amount providers bill is often far from reasonable. And under the majority's interpretation, the recourse for insurers is litigation. As has already been established, however, the PIP statute was intended to reduce litigation by circumscribing the calculation leverage historically abused by providers.

Contrary to the majority's interpretation, the insureds' policies do not provide greater coverage than the fee schedule. The PIP statute mandates that all PIP insurers "**shall** provide personal injury protection to the named insured . . . [for] eighty percent of all **reasonable** expenses for medically necessary . . . services." § 627.736(1)(a) (emphasis added). Because there are no exceptions listed in the statute, this reimbursement requirement is unequivocally **mandatory** across the board. Thus, **any** PIP reimbursement of less than eighty percent of reasonable medical expenses would be a statutory violation.

Reading the PIP fee schedule with reference to the PIP statute's mandatory reimbursement requirement, it follows that the Legislature intended any reimbursement under the PIP fee schedule to satisfy the mandatory reimbursement requirement. I therefore disagree with the majority's conclusion that it is "possible to conclude that there are simply two alternatives present in the policies: that Geico will either pay 80% of reasonable medical expenses, or that it will pay 80% of 200% of the maximum allowable amount under the fee schedule." Construing the statute in such a manner creates an "absurd" situation where one of the statute's provisions plainly violates another. Since "[s]tatutes, as a rule, 'will not be interpreted so as to yield an absurd result,'" State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995) (quoting Williams v. State, 492 So. 2d 1051, 1054 (Fla. 1986)), I disagree with Virtual Imaging's contention that the PIP statute contains two conflicting payment methodologies. There is only one payment methodology under the PIP statute—eighty percent of reasonable medical expenses—and payment under the PIP fee schedule has been legislatively determined to satisfy this requirement.

In sum, while the policies and statute in Nichols required distinct performances, namely the submission of payment at different times, in this appeal, the insureds' policies and the PIP fee schedule require the same performance—payment of eighty percent of reasonable medical expenses. Nichols is therefore

inapplicable. Additionally, as is clear from the PIP statute's **mandatory** reimbursement requirement, the PIP fee schedule outlines a safe harbor method for satisfying both the policy and statutory reimbursement requirements.

CONCLUSION

The PIP fee schedule was incorporated by law and by reference into the insureds' policies. Consequently, the fact that GEICO did not specifically elect in the insureds' policies to calculate reimbursement according to the fee schedule is of no moment. Further, because the PIP statute mandates reimbursement of eighty percent of reasonable medical expenses in **all** PIP reimbursement cases, there can only be one reimbursement requirement under the PIP statute: eighty percent of reasonable medical expenses. Thus, the PIP fee schedule must be construed as a safe harbor reimbursement method of satisfying the PIP statute's mandatory reimbursement requirement. For the foregoing reasons, I would answer the certified question in the affirmative and, to the extent that this analysis conflicts with Kingsway, I would respectfully certify conflict with the Fourth District.