In the

SUPREME COURT
OF THE STATE OF FLORIDA

Nos. 94,539 and 94,494

DELTA CASUALTY COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY, AND BANKERS INSURANCE COMPANY

Appellants,

v.

PINNACLE MEDICAL, INC. etc.
and M&M DIAGNOSTICS, INC., et al.

Appellees.

Appeal of Decision Rendered by the
Fifth District Court of Appeal

AMICUS CURIAE BRIEF
OF THE FLORIDA INSURANCE COUNCIL
AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Thomas J. Maida, Esquire
Austin B. Neal, Esquire
Foley & Lardner
300 East Park Avenue
Tallahassee, Florida 32301

Attorneys for the Florida Insurance Council
and the National Association of Independent Insurers

Of Counsel:

Perry Ian Cone, Esquire
Chair, Auto Committee, Florida Insurance Council
1430 Piedmont Drive
Tallahassee, Florida 32312

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QUESTIONS PRESENTED FOR REVIEW

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3. Does the attorneys' fees provision of section 627.736(5), Florida Statutes, violate the Florida Constitution?

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CERTIFICATION OF FONT SIZE

Undersigned counsel certify that this brief has been printed in 12 Point Times New Roman type, proportionately spaced.

JURISDICTION

This appeal arises from a decision of the Fifth District Court of Appeal declaring unconstitutional the arbitration and attorney's fee provisions of section 627.736(5), Florida Statutes. Pursuant to Article V, § 3(b)(1) of the Florida Constitution and Rule 9.030(a)(1)(A)(ii) of the Florida Rules of Appellate Procedure, a party has an appeal to the Supreme Court as a matter of right from a decision of a district court of appeal declaring a state statute unconstitutional. Accordingly, this appeal is an appeal as a matter of right. See, e.g., In re Estate of Smith, 685 So. 2d 1206 (Fla. 1996).

STATEMENT OF INTEREST

The Florida Insurance Council ("FIC") is the state's largest and most active trade association for insurance companies. It represents more than 250 companies writing over $12 billion a year in premium volume in Florida, including insurers writing approximately 70 percent of the private passenger automobile insurance written in Florida. FIC's membership includes every kind of insurer - homeowners, auto, commercial, reinsurance, health and life and annuities.

FIC's representation of its members requires it to advance their interests in legislative, administrative and judicial fora. FIC representatives monitor the Florida Legislature, the Florida Department of Insurance, other state agencies involved in insurance regulation and the National Association of Insurance Commissioners. When necessary, FIC retains counsel to represent the interests of its members in rule challenges and legal proceedings. FIC also operates an extensive public affairs program including consumer education activities.

The National Association of Independent Insurers ("NAII") is the nation's largest full-service property and casualty insurance trade association with 619 members in the United States. NAII

members write almost $81.3 billion in annual premiums representing every type of property and casualty coverage, including automobile, homeowners, business insurance, and workers' compensation.

Like FIC, NAII's representation of its members requires it to advance their interests in legislative, administrative and judicial fora. In Florida, NAII representatives monitor the Florida Legislature, the Florida Department of Insurance, and other state agencies involved in insurance regulation. When necessary, NAII supports the interests of its members in rule challenges and legal proceedings.

Many of FIC's and NAII's member companies write, among other coverages, personal injury protection ("PIP") insurance. The decision of the Fifth District Court of Appeal from which this appeal is taken involves the manner in which disputes between insurance companies writing PIP insurance and medical providers who accept assignments of PIP benefits are resolved. Specifically, the Fifth District held that the mandatory arbitration and attorney's fee provisions contained in section 627.736(5), Florida Statutes, violate the constitutional rights of medical providers/assignees.

The mandatory arbitration provision of section 627.736(5), Florida Statutes, requires that disputes between medical provider/assignees and insurers regarding the payment of PIP benefits must be arbitrated. It provides protection for insurers and medical providers from numerous burdensome legal proceedings and permits such matters to be settled in a less formal, less costly manner. In the event that the protection of section 627.736(5) is lost, insurers and providers will incur higher costs in resolving such disputes, which will in turn lead to higher overall losses and eventually higher insurance rates. Thus, the outcome of the instant appeal will impact the interests of those insurers. The effect of striking the attorneys' fees provision of section 627.736(5) will also

produce increased costs to insurers, and consequently, to consumers. FIC and NAII and their respective members thus are critically interested in the outcome of this appeal. FIC and NAII believe that they provide herein important legal and public policy arguments in support of Appellants' position. Together, they respectfully request that this Court carefully consider their amicus brief.

FIC's motion for leave to file this Amicus Brief was granted by the Court in an order dated January 28, 1999. NAII, who shares a common interest with FIC regarding the issues presented, joins in the filing hereof. NAII seeks leave of the Court to join herein in a motion filed herewith.

SUMMARY OF THE ARGUMENT

This case centers upon the constitutionality of a portion of Florida's so-called No-Fault Law. The No-Fault Law provides for, among other things, first party insurance for bodily injuries sustained in an automobile accident. This first party coverage, known as personal injury protection, or "PIP" insurance, covers persons injured in accidents for their own injuries, without regard to fault. The portion of the No-Fault Law challenged by Appellants below requires arbitration of disputes between such insureds and their medical providers, who under the law may seek the insured's first party benefits via assignment. Appellants also challenged the constitutionality of a related provision governing the award of attorney's fees in such a dispute.

The constitutionality of the No-Fault Law is not a novel issue. This Court has reviewed numerous provisions of the Law. In doing so, the Court has provided ample guidance as to what is and is not constitutionally permissible in the context of the No-Fault Law. In all of its decisions, the Court has honored the Legislature's intents and purposes in enacting the law. Thus, the question, distilled to its most basic elements, is whether the arbitration and attorney's fees provisions are constitutionally permissible means of accomplishing worthy objectives.

Appellees' claims were viewed by the lower court in the constitutional light of access to courts and due process. However, their claims are and should be viewed primarily as an access to courts issue, "a rose by any other name . . ." The challenged provisions satisfy easily this Court's requirements for constitutionality of a restriction upon one's right of access to court because the right to seek direct payment under the No-Fault Law did not exist prior to adoption of the Florida Constitution 's Declaration of Rights. Such rights may be abridged by the Legislature where a reasonable alternative remedy is provided. As the dissent below correctly points out, arbitration is

not only a reasonable alternative remedy, it is a favored remedy in Florida.

However, in the event that the challenged provisions are deemed to impact a right existing prior to the Declaration of Rights, they nevertheless satisfy the heightened scrutiny set out by this Court. The No-Fault Law provides a commensurate, significant, and quantifiable benefit in the form of a direct right to payment for medical services provided. Where such a benefit is provided, no access to courts challenge can prevail.

Nor do the challenged provisions violate the due process clause of the Florida Constitution. Under the well established test for determining whether a statute impermissibly impinges upon due process, the statute is valid if it is reasonably related to a permissible Legislative objective and not arbitrary or discriminatory. A requirement that certain claims be submitted to arbitration is consistent with the acknowledged purposes behind the No-Fault Law, i.e. reduction of litigation, and reduction of court crowding. Thus, a more than reasonable relationship exists between the purposes of the law and one of the provisions chosen to achieve the objective.

The challenged provisions also satisfy the arbitrary or discriminatory prong of the due process test because the distinction drawn between the classes of insured and medical provider/ assignee is reasonably related to the objective of the No-Fault Law. Moreover, and perhaps most importantly, the providers/assignee's right to proceed directly against the insurer was **granted** by the No-Fault Law. Prior to the No-Fault Law and the PIP benefits provided for thereunder, there would have been no effective means for a provider to obtain payment directly from a patient's insurer. Under No-Fault, the Legislature went so far as to authorize the creation of a state-sanctioned form for the assignment of benefits. The arbitration and attorney's feed provisions of the statute merely place limitations upon that new right. Consequently, it is entirely appropriate that the challenged

limitations affect only the providers.

The "discrimination" between insureds and provider/assignees alleged by Appellees is in fact a rational distinction because it recognizes the disparate financial positions of the two classes and the inherent differences in two different types of disputes. First, provider/assignees are businesses whose budgets contemplate collections shortfalls and even litigation. Conversely, individual insureds are often unprepared for the financial strain that can result from substantial medical bills and disputes relating to payment thereof. Both the Legislature and the Court have been rightly concerned that placing an insured in such a situation may cause the insured to settle for an unreasonably low level of benefits or even to forego needed medical treatment. Similarly, provider-insurer and insured-insurer disputes tend to be different in ways that make arbitration appropriate in the former case but not necessarily in the latter. Where disputes between PIP claimants and insurers may often relate to coverage and other issues more customarily within the bailiwick of judges, disputes between providers and insurers are more likely to involve issues such as medical necessity and appropriateness of particular treatments and medical procedures and the reasonable cost thereof. Thus, disputes between providers and insurers lend themselves to the substantive expertise of arbitrators more than the traditional legal claims of claimants against their insurers.

The attorney's fees provision challenged below is also constitutionally valid. Such a provision's application to only a defined class of persons has long been upheld by this Court. One good example of such a provision is section 627.428, Florida Statutes, which awards attorney's fees to first party insurance claimants under specified circumstances. The Court has upheld that provision in its many forms despite the fact that it creates a one-sided right to collect attorneys' fees bestowed upon a class ostensibly determined according to financial means. More generally, neither the

Legislature nor this Court have hesitated to uphold provisions recognizing disparate means of different classes of litigants in order to guard the right of access to courts for all classes. While it can be said that to draw any line is to some extent arbitrary, the line drawn with regard to attorney's fees is reasonably related to the goals of the No-Fault Law of which it is a part and is not impermissibly arbitrary or discriminatory.

ARGUMENT

II. THE COMPULSORY ARBITRATION CLAUSE IN SECTION 627.736(5), FLORIDA STATUTES, DOES NOT VIOLATE THE DUE PROCESS RIGHTS GUARANTEED TO MEDICAL PROVIDERS UNDER ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION BECAUSE IT IS REASONABLY RELATED TO A PERMISSIBLE LEGISLATIVE OBJECTIVE AND IS NOT ARBITRARY OR DISCRIMINATORY. [1]

A. The Compulsory Arbitration Requirement In Section 627.736(5), Florida Statutes, Is Reasonably Related To A Permissible Legislative Objective.

The test to be used in determining whether a statute violates the due process clause of the Florida Constitution[2] requires the Court to determine whether the statute (1) bears a reasonable relationship to a permissible legislative objective and (2) is not discriminatory, arbitrary, or

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[1] This same question has been addressed by the other district courts of appeal, who have upheld the challenged arbitration provision. See Orion Insurance Co. v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997); Union American Insurance Co. v. U.S.A. Diagnostics, Inc., 697 So. 2d 560 (Fla. 4th DCA 1997); Liberty Mutual Insurance Co. v. Magnetic Imaging Systems I, Ltd., 696 So. 2d 1302 (Fla. 3d DCA 1997); Southeast Diagnostics Services v. State Farm Mutual Auto Insurance Co., 697 So. 2d 988 (Fla. 4th DCA 1997).

[2] Article I, Section 9, of the Florida Constitution provides:

> SECTION 9. Due Process. — No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Art. I, §9, Fla. Const.

oppressive. Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974). Thus, the first step in determining whether a statute violates the due process clause is to determine whether the statute is designed to achieve a permissible legislative objective. In order to do so, the Court must first identify that objective.

Section 627.736, Florida Statutes, is part of the Automobile Reparations Reform Law, better known as Florida's No-Fault Insurance Law (the "No-Fault Law").[3] This Court has in the past had occasion to consider the Legislature's purpose in enacting Florida's No-Fault Law.[4] In Lasky, the Court determined those purposes to be, in the order set out in that decision: (1) a lessening of congestion in Florida's court system; (2) a reduction in delays in court calendars caused thereby; (3) a reduction of automobile insurance premiums; and (4) an assurance that persons injured in automobile accidents would receive help in meeting medical expenses. Id. at 16. The Court also held the purposes it identified to be legitimate and permissible. Id.

In doing so, it evaluated the objectives of the No-Fault Law as a whole, not merely the objectives of the challenged provision. Id. The very purposes of the No-Fault Law identified in

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[3] Florida's so-called No-Fault Law is comprised of sections 627.730 through 627.7405, Florida Statutes, including section 627.736.

[4] Section 627.731, Florida Statutes (1997), purports to set out the purpose of Florida's No-Fault Law. However, as this Court noted in Lasky, section 627.731 is of little help. Section 627.731 provides:

> **627.731 Purpose.--**The purpose of ss. 627.730-627.7405 is to provide for medical, surgical, funeral, and disability insurance without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience.

Lasky were acknowledged in the Fifth District's opinion in the case at bar.[5] Again, it is important to note that in Lasky, though assessing the constitutionality of a particular provision of the No-Fault Law, the Court considered the purposes of the entire legislation holistically, not merely the provision in question. Lasky, 296 So. 2d at 16. The Court has consistently applied this method of review, particularly in reviewing provisions of the No-Fault Law. See, e.g., Kluger v. White, 281 So. 2d 1 (Fla. 1973); Williams v. Gateway Insurance Co., 331 So. 2d 301 (Fla. 1976); Lumbermans Mutual Casualty Co. v. Castagna, 368 So. 2d 348 (Fla. 1979).

Similarly, under Lasky, the constitutionality of Section 627.736(5), Florida Statutes, cannot be evaluated in a vacuum. It is the No-Fault Law and its first party injury protection in the form of PIP coverage that enables insureds, and consequently their assignees, to obtain medical benefits directly from the insurer. Prior to the No-Fault Law, payment for medical services could only be sought under the bodily injury liability portion of a third party's insurance policy. In such a context, any assignment of an injured person's benefits would have been illusory and of limited, if any, value. It is the creation of the No-Fault Law and PIP insurance and the provision for assignment of benefits contained therein that has enabled the provider to seek payment from the insurer directly. Accordingly, any limitations placed upon a provider's right to seek that direct payment must be viewed as part of a legislative scheme granting him a considerable benefit and a framework whose

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[5] Moreover, any lack of legislative history of the enactment of section 627.736(5) should not trouble this Court. In making a determination of constitutionality, this Court need not be concerned with the Legislature's specific reasons for enacting the challenged provision, but need only determine whether there is a plausible reason for enactment of the provision that passes constitutional muster. Whether that reason in fact underlies the enactment is constitutionally irrelevant. Schwartz v. Kogan, 132 F.3d 1387 (11th Cir. 1998). Nor does the Court concern itself with the wisdom of the Legislature in choosing the means to accomplish its objective or whether those means reasonably accomplish the objective, but only with whether the means chosen are in themselves constitutional. Lasky, 296 So.2d at 15-16.

constitutionality is well-established.

The statute which must bear a reasonable relationship to the above-described objectives in the present case is section 627.736(5), Florida Statutes (1997), which provides:

> **627.736 Required personal injury protection benefits; exclusions; priority. —**
>
> (5) CHARGES FOR TREATMENT OF INJURED PERSONS.--
>
> (c) Every insurer shall include a provision in its policy for personal injury protection benefits for binding arbitration of any claims dispute involving medical benefits arising between the insurer and any person providing medical services or supplies if that person has agreed to accept assignment of personal injury protection benefits. The provision shall specify that the provisions of chapter 682 relating to arbitration shall apply. The prevailing party shall be entitled to attorney's fees and costs. . . . .

§627.736(5)(c), Fla. Stat. (1998).[6]

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[6] This statute is only one part of a grand no-fault scheme. The general attributes of a no-fault framework are well described in No-Fault Auto Insurance: Is Eliminating Pain and Suffering A Viable Option Under the Florida Constitution?, 30 U. Fla. L. Rev. 445, 448, as follows:

> Basically, no-fault automobile insurance requires that each driver insure himself for personal injury protection (PIP coverage) up to a certain limit. The no-fault PIP coverage pays for medical, hospital, and other health-related expenses and for the loss of earnings up to the aggregate PIP liability limit. When an accident results in non serious injuries, each driver collects his monetary losses arising from personal bodily injuries from his own insurer. Additionally, the no-fault law provides that as long as the PIP insurance is purchased as required, owners, registrants, operators, and occupants of the insured vehicles will be exempt from tort liability for all bodily injuries suffered by any person involved in an automobile accident, unless the injuries result in monetary losses that exceed the amount of PIP coverage or the victim meets a personal injury tort threshold. Also, defendants cannot be sued for speculative damages, even if monetary damages exceed PIP coverage, unless the victim meets a personal

The opinion below does not speak directly to the issue of whether section 627.736(5) is reasonably related to the legitimate legislative objectives of the No-Fault Law. However, viewing the compulsory arbitration provision in the light of these objectives, it becomes clear that the requirement is a reasonable means to a permissible end. Every case settled in arbitration is a case which does not reach the court system. In those cases that reach the courts after arbitration, the facts and legal issues should already be in focus such that less court time is required. Fewer cases and less court involvement in those cases obviously reduce congestion in the courts and lessen the delays caused by crowded court calendars. In addition, the arbitration provision accomplishes the goal of reducing automobile insurance premiums by lessening the insurers' litigation costs, which are passed along to insureds through their inclusion in insurance rates. Finally, the legislative scheme under which providers are permitted to accept assignments of PIP benefits in order to facilitate their providing medical treatment to injured persons achieves just that, enabling persons injured in accidents to receive prompt medical treatment, a worthy exercise of governmental power by any reasonable measure.

The court below, while not finding any problem with the objectives of the Legislature or with the relationship between those objectives and the means employed, found that section 627.736(5) is arbitrary and discriminatory. The court found that even if the goal of reducing court congestion was valid, the means by which it was achieved is not. The court based its holding upon the fact that under the statute, "[t]he identity of the owner of the claim is therefore the sole basis for granting or denying access to a court to resolve the identical dispute." Delta Cas. Co. v. Pinnacle Medical,Inc.,

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injury tort threshold.

721 So. 2d 321, 325 (Fla. 5th DCA 1998). In other words, the court found it constitutionally impermissible that, while an injured person may proceed directly to court to resolve a dispute against an insurer, the medical provider / assignee must first submit to arbitration.

As noted in Lasky, the test of arbitrariness or inequality must be carefully applied where the constitutionality of a Legislative determination is in question. In Lasky, the Court wrote:

> But perfection is not required in classification; 'problems of government are practical ones and may justify, if they do not require, rough accommodations,-- illogical, it may be, and unscientific.' Some inequality in result is not enough to vitiate on due process grounds a legislative classification grounded in reason.

Lasky v. State Farm Insurance Company, 296 So. 2d 9, 17 (Fla. 1974), quoting Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913), and citing Lindsley v. National Carbonic Cas. Co., 220 U.S. 61 (1911). This Court has rightly been hesitant to sustain constitutional attacks on various elements of the No-Fault Law. See, e.g., Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325 (Fla. 1981)(holding that the No-Fault Law's distinction between persons injured in auto accidents and persons injured in other types of accidents was not arbitrary or discriminatory); Lumberman's Mutual Casualty Company v. Cartagena, 368 So. 2d 348 (Fla. 1979)(holding that a provision of the No-Fault Law providing for PIP benefits where a person is injured while an occupant of a motor vehicle or if not an occupant of a motor vehicle if injury caused by contact with a motor vehicle was not arbitrary or capricious so as to violate the due process clause); Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982)(agreeing with Lasky that PIP thresholds are not violative of due process, access to courts, or equal protection provisions of the Florida Constitution and upholding various other PIP provisions in the No-Fault Law); But see Kluger v. White, 281 So. 2d 1 (Fla. 1973) (striking down property damage thresholds of the PIP law as violative of the access to courts provision because no

reasonable method provided for obtaining redress for property damage of less than $550).

The Court in Lasky and its progeny seemed to recognize that where the Legislature confers upon a particular class of persons a novel right, such as the right to direct payment created under the No-Fault Law and its assignment mechanism, and then places limitations upon that right, no deprivation of due process can possibly occur. In the context of access to the court system, where the Legislature confers upon a class of persons such a new right to pursue a remedy, and then limits the means by which that class of persons may enforce that right, no violence is done to the Constitution, because the new limitations only come into play when a member of the affected class seeks to exercise the new right.

Medical providers/assignees receive important new rights and benefits under Florida's No-Fault Law. One such benefit is the right to collect via assignment statutorily mandated PIP insurance benefits, brought about both by the creation of a first-party insurance framework in the form of PIP coverage, as well as a specific provision sanctioning such assignments. That right is granted as part of a statutory scheme designed to balance the interests of providers, insureds, and insurers. Under the No-Fault Law insureds need not show fault to receive medical treatment and payment therefor, and insurers are protected to some extent from costly litigation. One component of the protection from burdensome litigation is the requirement that providers, who up to the time of the No-Fault Law would have had no standing to sue an insurer for payment of PIP benefits, would first have to have their claims heard in a less burdensome, less costly forum.

The Legislature's reasoning in "discriminating" between insureds and providers with regard to remedies against an insurer for failure to pay PIP claims is sound and not arbitrary. As discussed in more detail in Section II hereof, insureds and providers are in decidedly different positions in

terms of their ability to withstand financial shortfalls, to enforce their rights to payment, and in other important regards. Additionally, the propriety of utilizing arbitration in disputes between providers and insurers is supported by the inherent attributes of such a dispute. For example, arbitrators, who customarily are business people chosen for their expertise in the particular subject matter of a dispute, are better suited to the more technical type of dispute likely to occur between medical providers and insurers. See, e.g., Tassinari v. Loyer, 189 So. 2d 651 653 (Fla. 2nd DCA 1966). While disputes between PIP claimants and insurers may often relate to coverage and other issues more customarily within the bailiwick of judges, disputes between providers and insurers are more likely to involve issues such as medical necessity and appropriateness of particular treatments and medical procedures and the reasonable cost thereof. These types of disputes are much better suited to members of the medical and insurance professions, who deal with such issues on a daily basis, than to judges who are more efficiently utilized in more traditional contexts where application of the law is a more dominant factor.

Perhaps most disturbing is the realization that in seeking to have this Court invalidate the mandatory arbitration provision contained in section 627.736(5) based upon an argument that it is arbitrary or discriminatory, Appellees in fact seek to have this Court render the No-Fault Law arbitrary and discriminatory. Appellees would have this Court rewrite the compromise of many public interests represented by the No-Fault Law and enacted by the elected representatives of those interests. In rewriting the Legislative scheme, Appellees would have this Court enforce the right of providers to proceed directly against PIP insurers, a right that did not exist prior to enactment of the law, while depriving insurers of the benefit of their bargain and the protections that they were promised under the No-Fault Law. If this Court accepts Appellees' invitation, it will disturb the

delicate balance created under the No-Fault Law. Perhaps more alarming, the Court could begin a process of dismantling a law of great social value one piece at a time.[7]

B. The Fifth District Court of Appeal Misconstrued Lasky v. State Farm Insurance Company in Reaching Its Decision Below.

The Fifth District Court of Appeal found section 627.736(5), Florida Statutes (1997), to be unconstitutional based upon its determination that the mandatory arbitration requirement and the standard for the award of attorneys' fees contained therein are arbitrary and discriminatory because they apply to medical providers who have been assigned the right to collect personal injury protection ("PIP") insurance benefits but not to the assigning insured. The Court found that this inequality violated Article I, Section 9, of the Florida Constitution, Florida's due process clause, basing its finding in large part upon this Court's decision in Lasky v. State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974). In Lasky, the Court described the test to be used in determining whether a statute violates the due process clause of the Florida Constitution. Under Lasky, a court is required to determine whether the statute (1) bears a reasonable relationship to a permissible legislative objective and (2) is not discriminatory, arbitrary, or oppressive. Id. at 15. While this rule is now axiomatic in principal, Appellees, the county court below, and the Fifth District Court of Appeal have all misapplied Lasky to the case at bar.

In Lasky, this Court considered three separate alleged violations of the Florida Constitution which are relevant here, all of which allegedly arose from a restriction upon Lasky's right to seek

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[7]The Florida Legislature has reopened, reviewed and revised the No-Fault Law, and even Section 627.736(5), as recently as 1998 by providing a definition of "prevailing party," as that term is used in the statute. The Legislature apparently declined to amend the arbitration provision reviewed in the Third District's opinion in Orion Insurance Co. v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997).

certain relief in a court of law. Appellants in Lasky alleged that certain provisions of Florida's No-Fault Law violated Article I, Section 2 (Equal Protection), Article I, Section 9 (Due Process of Law), and Article I, Section 21 (Access to Courts), of the Florida Constitution. Id. at 13. The provisions at issue in Lasky required that, in order to obtain damages for pain and suffering in connection with an automobile accident, certain conditions had to be met. Id. at 15.

In deciding Lasky, the Court logically considered first the alleged violation of Lasky's right of access to the courts. The Court found that the challenged provision did not violate Article I, Section 21, of the Florida Constitution because the provision satisfied the Court's own test established in a similar case the year before. In Kluger v. White, 281 So. 2d 1 (Fla. 1973), this Court considered a provision of the No-Fault Law prohibiting any action in tort for property damage arising from an automobile accident unless the insured did not have insurance coverage for its own automobile and unless the damages exceeded $550. Id. at 2. The Court found that the challenged provision in Kluger impermissibly denied a claimant access to the courts. Id. at 5. However, in rendering the Kluger provision unconstitutional, the Court held that a statutory or common law right of access to the courts predating the Declaration of Rights contained in the Florida Constitution could be constitutionally abridged by the Legislature where a reasonable alternative is provided. Id. at 4. Applying the test established in Kluger, the Court in Lasky held that the PIP insurance coverage mandated by the statute provided claimants with a reasonable alternative to a traditional tort cause of action for personal injuries. Id. at 14.

The Lasky Court next considered the allegations as a potential violation of the due process clause. In doing so, the Court acknowledged that in order to pass due process muster, a statute must bear a reasonable relationship to a permissible legislative objective and not be discriminatory,

arbitrary or oppressive. Id. at 15. The Court determined that the legislative objectives of the No-Fault Law were legitimate and permissible. Id. at 15-16. The Court next determined that the threshold limitations upon recovering for intangible damages such as pain and suffering bore a reasonable relationship to the objectives sought to be accomplished. The Court reached this conclusion based upon its analysis of the effect of the challenged provision, as well as the manner in which the provision classified, or discriminated among, classes of persons. The determination of whether the provision was arbitrary or discriminatory in its application was not considered in a vacuum, but rather as a part of the statutory scheme. Because the disparate treatment of various classes of persons was rationally related to the goals of the Legislature in enacting the provision, the provision did not violate the due process clause.

Third and finally, the Court considered the provision in light of the equal protection clause. The Court found that the challenged provision did not violate the equal protection clause because the statutory classifications bore a substantial relationship to the legislative purpose. Id. at 18-19.

In relying upon the due process portion of Lasky to the exclusion of the remainder of the decision, Appellees and the Fifth District Court of Appeal do violence to the integrity of that opinion. The opinion in Lasky addressed a case in which an access to courts claim was framed in terms of violations to many different provisions of the Florida Constitution. However, the analysis is a cohesive one in that the Court focuses throughout upon the objective of the Legislature in creating a statutory scheme, the reasonable relationship of the statutory framework to the objective, and the reasonableness of the scheme in relationship to the classes of persons affected thereby. The opinion below takes out of context one prong of the due process portion of Lasky and magnifies it disproportionately while turning a blind eye to the remainder of the opinion. Instead of evaluating

the relationship between the arbitration requirement and the permissible objectives of the No-Fault Law and determining whether the discrimination between classes characteristic of all statutory law are consistent with that relationship, Appellees and the court below merely cite the distinction between providers and insureds as being violative of Lasky. A careful reading of Lasky and application of the instant facts show that the approach of Appellees and the Fifth District is inconsistent with the spirit of the case upon which they rely.

The dissent in the lower court appears to recognize the majority's "failure to see the forest for the trees." The dissent, instead of focusing upon an analysis of due process inbred with equal protection, focused rather upon the fairness of arbitration as a means of resolving disputes between providers and insurers. Citing numerous decisions of courts of other states upholding mandatory arbitration, Justice Harris concluded that the mandatory arbitration requirement of section 627.736(5), even though mandated for providers without their express consent, satisfied due process if a meaningful right to appeal an arbitration award exists. Justice Harris further concluded that such a meaningful right does exist under Florida law.

II. THE COMPULSORY ARBITRATION CLAUSE IN SECTION 627.736(5), FLORIDA STATUTES, DOES NOT VIOLATE THE RIGHT OF ACCESS TO THE COURTS GUARANTEED TO MEDICAL PROVIDERS UNDER ARTICLE I, SECTION 21, OF THE FLORIDA CONSTITUTION.

Article I, Section 21, requires that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, §21, Fla. Const. Appellants contend that the mandatory arbitration provision of section 627.736(5) does not impermissibly deprive medical providers/assignees of due process and their right of access to the judicial forum because the No-Fault Law provides a reasonable alternative remedy and a commensurate benefit as required by this Court's decision in Kluger v. White, 281 So. 2d 1 (1973),

and its progeny. Additionally, the only disputes subject to the requirement are those in which the provider has knowingly and wilfully accepted an assignment of PIP insurance benefits, which they are by no means compelled to do. Consequently, no violation of due process exists. Moreover, it is an affirmative act of the Florida Legislature in enacting PIP legislation which grants to medical providers the ability to accept assignments of PIP benefits and to seek payment directly from insurers based upon those assignments. The compulsory arbitration requirement of section 627.736(5) merely places limitations on that privilege. Because the provision only limits a right created subsequent to the Constitution, that limitation does not deprive Appellees of their right of access to the courts or of due process.

A. The No-Fault Law Provides A Reasonable Alternative Remedy And A Commensurate Benefit As Required By This Court's Decision In Kluger v. White.

It is well-settled that the Legislature may place limitations upon a class of persons' access to the courts where that class of persons receives a commensurate benefit. In Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992), this Court stated:

> Although courts generally oppose any burden being placed on the right of a person to seek redress of injuries from the courts, the legislature may abrogate or restrict a person's access to the courts if it provides: 1) a reasonable alternative remedy or a commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, *and* finds that there is no alternative method of reaching such public necessity.

Id. at 424 (original emphasis). Thus, under the first prong of the Kluger test, as restated in Siegel, and note that the test is satisfied by satisfying either prong, a statute may abrogate or restrict a party's right of access to the courts if either a reasonable alternative method of redressing one's rights is provided or if the legislature provides the party with a commensurate benefit. Id. Florida's No-Fault

Law satisfies both parts of the first prong in that the arbitration provided thereunder is a reasonable alternative method of dispute resolution and the providers subject to the mandatory arbitration provision receive a benefit commensurate, and more than equivalent to, the right they relinquish. It is also important to note that the Kluger test applies to rights existing prior to adoption of the Declaration of Rights of the Florida Constitution. Kluger, 281 So. 2d at 4. Because the No-Fault system did not exist prior to the Declaration of Rights of the Constitution, section 627.736(5) easily meets the requirements of Kluger.

However, even if the Court were to determine that section 627.736(5) abridges rights predating the Declaration of Rights, the provision would still pass constitutional muster under Kluger. First, the arbitration provided for under section 627.736(5) is a reasonable alternative remedy for the resolution of disputes. Roe v. Amica Mutual Ins. Co., 533 So. 2d 279, 281 (Fla. 1988) (noting that, under Florida law, "arbitration is a favored means of dispute resolution and courts indulge every reasonable presumption to uphold proceedings resulting in an award." Thus, the first part of the first prong of the Kluger test is satisfied by the arbitration provided for under the statute.

Although satisfaction of either part of the first prong of the Kluger test is sufficient, the PIP arbitration provision satisfies the second as well. The statutory right of a provider of personal injury protection benefits to provide services in exchange for an assignment of insurance benefits from an insured confers a significant and quantifiable benefit upon that provider. Without such a right a medical provider would be shouldering the risk that an injured person could not or would not eventually pay for services rendered. Utilizing the system provided under Florida's No-Fault Law, a provider is permitted to seek payment directly from the "deeper pocket," the insurance company,

and to obtain payment in a timelier fashion.[8]

In considering the value of the benefit conferred upon providers by the assignment of PIP benefits, it is important to note that the solvency of persons injured in automobile accidents is by no means secured. A provider dependent solely upon the insured for payment for services provided is at the mercy of the injured person's ability to pay. The injured party may also be experiencing financial stress due to other expenses relating to the accident and may even have been rendered unable to maintain gainful employment. In such an event, legal recourse against the insured in a court of law would not only be futile, but would accumulate legal expenses that also probably could not be paid.

Additionally, by obtaining the right to proceed directly against the insurer via assignment, the medical provider eliminates the possibility that benefits will be received by an insured but diverted to other expenses, leaving the provider unpaid. This danger is enhanced by the financial hardship and extraordinary expenses that often accompany automobile accidents. In the event that an insured is faced with a decision to utilize PIP claims proceeds for either medical benefits already provided or to pay for uncovered repair expenses or other more immediate needs, the provider might go unpaid more often than not. By receiving the right to seek payment from the insurer directly, the provider is assured that any payment for medical bills will reach the party for whom they are intended.

The No-Fault Law thus places the provider in a much more desirable position. The ability

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[8] Prior to no-fault an average of 16 months elapsed between an accident and the time of payment. For losses exceeding $2,500, the average delay was 19 months. See U.S. Department of Transportation, Economic Consequences of Automobile Accident Injuries. This, compared with the requirement of the No-Fault Law that benefits be paid within 30 days of the written notice to the insurer of a covered loss. § 627.736(4), Fla. Stat.

of an insurer to make claims payments is monitored closely by state regulatory authorities. While the provider seeking payment for medical services from an injured individual may be seeking to extract "blood from a stone," the No-Fault Law permits the provider to seek payment directly from a party whose solvency is guaranteed. In the event that a provider must resort to arbitration to obtain payment from an insurer, the provider can be sure that in the event it is found to have a valid claim, payment will be made. No such guarantee exists with the individual, where the most the provider may obtain after a costly venture into the court system is a useless judgment.

Consequently, while a statute abrogating or restricting access to the courts, even one restricting a right existing prior to Florida's Declaration of Rights, need only satisfy either part of the first prong of the Kluger test — that either a reasonable alternative remedy or a commensurate benefit is provided — both are satisfied in the case at bar. It is important to note that only where the first prong of the Kluger test cannot be satisfied does the second prong of the test involving overpowering public necessity and the absence of a reasonable alternative come into play. While the statute at bar arguably meets the standard of public necessity, it need not do so. It meets the first test and thus is constitutional.

The Court has applied the Kluger doctrine in several cases involving the very No-Fault Law involved in the case *sub judice*. For example, Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974), arose from a provision of the No-Fault law denying recovery for intangible items such as pain and suffering unless the plaintiff was able to establish at least $1,000 in tangible damages. The Court held that the first part of the test was satisfied because the No-Fault Law, including the restriction on intangible damages, represented a reasonable trade-off. While under the statutory scheme the Plaintiff relinquished the right to sue for certain types of damages, it received the right to receive

uncontested statutory no-fault benefits. Id. at 15.

The so-called "reasonable alternative remedy" test of Kluger was also applied in a non-No-Fault case analogous to our own in White v. Clayton, 323 So. 2d 573 (Fla. 1975). In Clayton, the Court considered a limitation placed upon recovery in the context of wrongful death actions. Specifically, section 768.21, Florida Statutes (1975), provided that "If the decedent's survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered." § 768.21, Fla. Stat. (1975). Thus, heirs other than lineal descendants or spouses were deprived of a right enjoyed by those two classes. This "discrimination" was challenged as unconstitutional.

In Clayton, this Court upheld the challenged provision of section 768.21 finding that under the new law damages would be higher in some cases and lower in others, but that no right had been abolished. Id. at 575. The Court in Clayton based its holding upon its finding that all heirs, *as a group*, had received a benefit commensurate with the rights that they had lost. Thus the Court upheld the statute even though an alternative remedy was provided to the spouse and lineal descendants but to no other heirs. The lesson of this holding is that where individuals in a group receive a reasonable alternative benefit in exchange for relinquishing a constitutional right, even where that remedy is disparate in its effects among different subgroups, the statute nevertheless passes constitutional muster under Kluger.

The facts of the case at bar are much better from a constitutional standpoint than those in Clayton. The Court made it clear in Clayton that where the Legislature enacts a law depriving a class of certain rights, such as a court remedy known at common law, and provides a benefit commensurate with that deprivation, the benefit need not be spread equally among or even reach all

members of the group in order to be constitutional. Thus, under Clayton, the arbitration requirement in section 627.736(5) would be constitutional in the context of the No-Fault Law even if it conferred a benefit only upon insureds or insurers and not providers.

However, in the case at bar, medical providers receive a valuable, quantifiable benefit that is tied to the arbitration provision. Specifically, the provider is permitted via assignment to seek statutorily mandated benefits from an insurer whose ability to pay is absolutely essential to its continuing in business. In exchange, the provider is required to litigate any claim against the insurer under such an assignment first in arbitration. Given the right to bring its grievance in arbitration and the right to appeal an arbitration award to the judicial system, and the much more secure payment of claims provided for under the No-Fault Law, it could easily be argued that providers not only participate in the benefit of the legislation, but participate disproportionately to the insured and the insurer.

In another case decided by this Court in 1975, Sunspan Engineering and Construction Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975), this Court again applied the Kluger test, but to a different result. The Court in Sunspan held that a provision of the workers' compensation law prohibiting third party tortfeasors from suing an employer to recover damages paid to injured workers violated the due process and equal protection clauses of the Florida Constitution. Id. at 7. However, it is important to note several salient differences between the facts in Sunspan and the instant case. First, Sunspan involved the absolute abolishment of a right of action predating the Florida Constitution, where in the instant case an alternative forum is provided. Second, Sunspan related to the Workers' Compensation Law, not the No-Fault Law.

B. Medical Providers Are Not Compelled to Accept Assignment of PIP Interest Benefits.

In Orion, the Third District Court of Appeal found that section 627.736(5), Florida Statutes, could not successfully be challenged on the ground that it denied access to the courts because medical providers accept the conditions of the statute when they accept the assignment of benefits authorized thereunder. Orion, 696 So. 2d at 477. A medical provider's acceptance of an assignment of personal injury protection benefits accompanied by an arbitration requirement is tantamount to entering into a contract containing a mandatory arbitration clause. See Id., at 478 (holding that arbitration clauses in contracts are binding on third party beneficiaries); see also. Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992) (holding that "Valid laws in effect at the time a contract is made enter into and become part of the contract as if expressly incorporated into the contract.") No reasonable person would argue that a party entering into such a contract could challenge the validity of the contract's arbitration provision on the ground that it denied access to the courts and thus violated Article I of the Florida Constitution. A provider's voluntary acceptance of an assignment thus effectively waives its right to immediate redress in the court systems of our state in exchange for the right to obtain insurance benefits directly from the insurer. See also, The Florida Bar v. Dubow, 636 So. 2d 1287, 1288 (Fla. 1994) (citing the maxim that ignorance of the law is no excuse.)

C. Section 627.736(5) Creates New Rights and May Not Be Challenged as Taking Away an Existing Right Predating the State Constitution.

The constitutional right of access to courts guaranteed by Article I, Section 21, of the Florida Constitution protects only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution. McElrath v. Burley, 707 So. 2d 836 (Fla. 1st DCA 1998), citing, e.g., Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). In McElrath, this principle was applied to circumstances similar to those in the case at bar. McElrath involved a claim that administrative impediments to the bringing a claim of employment discrimination and retaliatory

discharge under Florida law unconstitutionally impinged upon a claimant's access to the court system. The First District disagreed, finding the administrative procedure to be constitutional in part because the rights sought to be vindicated had been created subsequent to enactment of the Declaration of Rights of the Florida Constitution. Specifically, the Court held that because the Legislature had created the claimant's right to bring such actions to court, the state could also place limitations upon that right. Id. at 839.

Like the statutory scheme involved in McElrath, the No-Fault Law containing the right of medical providers to collect PIP benefits was created by statute after adoption of the Constitution's Declaration of Rights. In Orion Insurance Company v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997),[9] that court noted that:

> [T]he statutory No-Fault regime provides medical service providers like Magnetic with the ability to collect via assignment statutorily mandated PIP insurance benefits. In this view, section 627.736(5) creates new rights and may not be challenged as taking away any existing rights which predate the state constitution.

Id. at 477. As noted in Orion, the right of providers to sue directly for payment of medical bills did not exist at common law or by statute prior to adoption of the Constitution's Declaration of Rights, because no first party insurance of the PIP variety existed. Based in part upon that finding, the court held that the statute compelling arbitration was constitutionally valid.

Appellees claim that section 627.736(5) impermissibly singles them out and denies them access to the courts. In doing so, Appellees' seek to avoid the crystal clear rule of Kluger and its progeny. Appellees' avoidance of the law developed under Article I, Section 21, is understandable,

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[9] The case at bar is in direct conflict with Orion Ins. Co. v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997).

as their claim cannot withstand application of the relevant standard. Section 627.736(5) easily meets the standard because it is part of a statutory scheme under which providers relinquish their right to proceed directly to court in exchange for the ability, by assignment, to stand in the shoes of the insured to collect statutorily mandated PIP benefits.

The rule cited in McElrath, as applied to facts similar to our own in Orion, forecloses even Appellees' due process argument. Appellees argue that section 627.736(5) discriminates against providers because only providers are subjected to the mandatory arbitration requirement. However, because it is only providers who receive from the No-Fault Law the *new* right to seek payment of PIP benefits directly from insurers, it stands to reason that the limitation imposed upon this new right applies only to the same class of persons. Stated differently, it is the providers as a class who benefit from the right to accept and act upon assignments of PIP benefits and it is the providers whose right to do so is limited by that same law. It defies logic to allege that a limitation placed only upon the only class receiving the underlying right discriminates unconstitutionally against that class.

As stated in Section II.A. above, medical providers / assignees receive important new rights and benefits under Florida's No-Fault Law. One such benefit is the right to collect via assignment statutorily mandated PIP insurance benefits. However, that right is granted as part of a statutory scheme designed to balance the interests of providers, insureds, and insurers. Accordingly, under the No-Fault Law insureds need not show fault to receive medical treatment and payment therefor, and insurers are protected to some extent from costly litigation. A component of the protection from burdensome litigation is the requirement that providers, who up to the time of the No-Fault law would have had no standing to sue an insurer for payment of PIP benefits, would first have to have their claims heard in a less burdensome, less costly forum.

III. THE ATTORNEYS' FEES PROVISION OF SECTION 627.736(5), FLORIDA STATUTES, DOES NOT ARBITRARILY DISCRIMINATE AGAINST MEDICAL PROVIDERS BY SUBJECTING THEM TO A DIFFERENT STANDARD THAN IS APPLIED TO INSUREDS.

In addition to their assertion that the mandatory arbitration provision of section 627.736, Florida Statutes, violates the Florida Constitution, Appellees below also asserted that the attorney's fees provision of that same statute impermissibly discriminates against providers by requiring that they meet a different standard than insureds in order to obtain an award of attorneys' fees. The attorneys' fees provision of section 627.736(5) provides that the "prevailing party" in the arbitration required thereunder would be entitled to attorneys' fees and costs.[10] By contrast, Appellees contend, an insured bringing an action against its own insurer would be entitled to attorneys' fees under a

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[10] Section 627.736(5), Florida Statutes was amended last year by Chapter 98-270, Laws of Florida, to include a detailed definition of the term "prevailing party." The definition is applicable to any arbitrations commenced on or after the effective date of the Act. Chapter 98-270 added the following language:

> 1. When the amount of personal injury protection benefits determined by arbitration exceeds the sum of the amount offered by the insurer at arbitration plus 50 percent of the difference between the amount of the claim asserted by the claimant at arbitration and the amount offered by the insurer at arbitration, the claimant is the prevailing party.
>
> 2. When the amount of personal injury protection benefits determined by arbitration is less than the sum of the amount offered by the insurer at arbitration plus 50 percent of the difference between the amount of the claim asserted by the claimant at arbitration and the amount offered by the insurer at arbitration, the insurer is the prevailing party.
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> 3. When neither subparagraph 1. Nor subparagraph 2. Applies, there is no prevailing party. For purposes of this paragraph, the amount of the offer or claim at arbitration is the amount of the last written offer or claim made at least 30 days prior to the arbitration.

more lenient standard contained in section 627.428, Florida Statutes, which provides:

> **627.428 Attorney's fee.--**
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> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§627.428(1), Florida Statutes (1997).

It is important to note that the two standards are applied not only to two different classes of persons, i.e., medical providers and insureds, but also to two different types of proceedings, arbitration and civil court actions. These differences provide ample support for the difference in standards created by the Legislature. Arbitration is designed to resolve disputes in a less costly manner. Thus, there is a decreased need to provide for attorneys' fees in arbitrations as opposed to civil court actions. Where the costs of bringing a civil court action might be prohibitive to the extent of discouraging valid claims, the costs of arbitration are unlikely to reach that level. Moreover, it is wholly permissible for the Legislature to create classifications which place disparate burdens on parties having disparate means. See, e.g., Reserve Insurance Co. v. Gulf Florida Terminal Co., 386 So. 2d 550, 552 (Fla. 1980) (upholding legislature's treating differently "mom & pop" bailors because of their minimal resources); Lasky v. State Farm Ins. Co., 296 So. 2d 9, 17 (Fla. 1974) (holding that Legislature's distinction between private and commercial vehicles proper because private persons are under more economic pressure to accept inadequate offers of settlement); Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992) (holding that bond requirement would

have been valid if Legislature had included provision allowing courts to assess litigants' ability to post bond and waive the requirement if appropriate).

The two classes involved here are individual insureds and persons or companies in the business of providing medical services for a fee. Medical providers are more likely to have the means to pay the costs of vindicating their right to payment of PIP benefits than individual insureds. In the event that the individual insured is unable to obtain the PIP benefits to which he is entitled, he is out-of-pocket for those expenses at best, and is at worst going without needed medical treatment. His only two alternatives are to file a claim in civil court, and attempt to bear all of the additional expenses inherent in full-fledged litigation, or to succumb to the financial pressure and accept a settlement that is less than the amount to which he is entitled.[11] On the other hand, the professional medical provider presumably operates within a budget that contemplates unpaid or delinquent accounts, attorneys' fees and other similar or related expenses of doing business. That medical provider is thus much more able to bear the burden of arbitration or litigation, and is less likely to be either coerced into accepting an inadequate payment or prevented from vindicating its rights in the forum provided. For that reason, medical providers are less likely to be dissuaded from bringing valid claims due to financial reasons than an insured similarly situated.

The type of classification that Appellees would call discrimination is common in the context of the field of insurance. One very relevant example involves section 627.428 itself. Pursuant to the statute, those persons who are named or omnibus insureds or named beneficiaries of insurance

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[11] One study has concluded that the prompt payment of economic losses provided for under Florida's No-Fault Law has enabled claimants to negotiate more effectively and receive a more appropriate settlement. Little, No-Fault Auto Reparations in Florida: An Empirical Examination of Some of its Effects, 9 U. Mich. J. Law Reform 1, 36 (1975).

policies are entitled to attorneys' fees whenever a judgment is entered against the insurer. However, other parties with claims against the insured whose claims would be covered by the same insurance policy are not entitled to attorneys' fees under the relaxed standard of section 627.428. Appellees would apparently assert that such differentiation is unconstitutional. However, a more reasonable analysis would indicate that the Legislature has identified a group that for many reasons must not be dissuaded from obtaining required benefits from insurance companies and has provided for that group of persons a more lenient attorneys' fees standard.

By excluding third parties from the benefits of section 627.428, the Court essentially deprives them of an opportunity to obtain attorney's fees in certain circumstances. This is true even though such third parties may be injured individuals, providers, or other insurance companies. Given the fact that section 627.428 then potentially discriminates between persons who could be on equal financial footing and equally entitled to the benefits of an insurance contract, it seems that under Appellees' analysis and the Fifth District's ruling, section 627.428 must be unconstitutionally discriminatory. However, the fact is that the Legislature must be permitted to make reasonable distinctions regarding availability of attorneys' fees, and thus, not only is section 627.428 constitutional, but the attorneys' fees provision of section 627.736(5) is constitutional as well. See, e.g., Continental Cas. Co. v. Gold, 194 So. 2d 272 (Fla. 1967) (upholding the constitutionality of former section 627.428). This "discrimination" between various classes of persons regarding availability of attorneys' fees is a part of Florida's statutory scheme. The distinction drawn by section 627.736(5), Florida Statutes, is reasonable and not discriminatory or arbitrary. It can be said that drawing any line is to some extent arbitrary in that the line could conceivably be drawn in several other places; however, it is not that type of "arbitrariness" which is unconstitutional.

CONCLUSION

The Court is well aware of the dangers of overturning statutes based upon constitutional challenges. In Metropolitan Dade County v. Bridges, 402 So. 2d 411(Fla. 1981), this Court wrote that:

> A legislative enactment is presumed valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution. Whenever reasonably possible and consistent with the protection of constitutional rights, courts will construe statutes in such a manner as to avoid conflict with the constitution.

Id. at 413-414. The Court should be particularly hesitant to do so in the context of insurance law, where the state is entitled to a broad scope of authority, and in the area of social reform. The statute involved in the instant case is both related to the regulation of insurance and is an integral component of a large scheme of social reform. Moreover, it is axiomatic that the party challenging the constitutionality of a statute has the burden of demonstrating clearly that the act is invalid. Village of North Palm Beach v. Mason, 167 So. 2d 721 (Fla. 1964). Appellees in the instant case have failed to carry that burden.

Accordingly, Amicus, the Florida Insurance Council and the National Association of Independent Insurers, respectfully request that this Court adopt the holdings and reasonings of the Third District Court in Orion Insurance Co. v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1975), and reverse the opinion of the lower court in the case at bar.

Respectfully submitted this 2nd day of February, 1999.

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Thomas J. Maida, Esquire
Florida Bar No. 275212

Austin B. Neal, Esquire
Florida Bar No. 7749
Foley & Lardner
300 East Park Avenue
Post Office Box 1819
Tallahassee, FL 32301
Telephone: (850) 222-6100
Facsimile: (850) 224-3101
Attorneys for the Florida Insurance Council and the National Association of Independent Insurers

OF COUNSEL:

Perry Ian Cone, Esquire
Florida Bar No. 0440922
Chair, Auto Committee
Florida Insurance Council
1430 Piedmont Drive
Tallahassee, Florida 32312
Telephone: (305) 715-0000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **Amicus Curiae Brief Of The Florida Insurance Counsel** has been served upon **Clay W. Schacht, Esquire, Christopher S. Reid, Esquire**, 2600 Maitland Center Parkway, Suite 170, Maitland, FL 32751-4162, **Brian D. DeGailler, Esquire**, Post Office Box 1549, Orlando, FL 32802-1549, **Harley N. Kane, Esquire**, 301 N.E. 51st Street, Suite 3160, Boca Raton, FL 33431-4929, **Mark Tischhauser, Esquire,** 3134 North Boulevard, Tampa, FL 33603-5542 and **Tracy Raffles Gunn, Esquire**, Post Office Box 1438, Tampa, FL 33601 by First Class Mail this 2nd day of February, 1999.

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Austin B. Neal