THE SUPREME COURT OF FLORIDA

CASE NOS. 94,494 and 94,539

DELTA CASUALTY COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and BANKERS INSURANCE COMPANY,
Appellants

District Court of Appeal, 5th District
Case Nos.: 97-1429
97-1588
97-3093

vs.

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

Appellees.
_____/

ANSWER BRIEF OF PINNACLE MEDICAL, INC.

GREENSPAN & KANE
Attorneys for Appellee Pinnacle
301 YAMATO ROAD #3160
BOCA RATON, FL 33431
(561) 995 - 8180

By_____

CHARLES J. KANE, ESQ.
FBN: 093536

By_____

HARLEY N. KANE, ESQ.
FBN: 0972487

TABLE OF CONTENTS

Appellee's Font Certification

Appellee hereby certifies that this brief has been prepared in a proportional font using 14 point print.

TABLE OF AUTHORITIES

Caselaw

Constitution, Rules, & Statutes

Annotations and Treatises

PREFACE

The parties will be referred to as follows:

Delta Casualty Ins. Co., Bankers Ins. Co., and Nationwide Mutual Fire Ins. Co. will be collectively referred to as the "Appellant".

Pinnacle Medical, Inc. and M & M Diagnostics, Inc. will be collectively referred to as the "Appellee".

The decision herein of the Fifth District Court of Appeals will be referred to as *"Delta"*

The decision of the Third District Court of Appeals in Orion Insurance Company v. Magnetic Imaging Systems I, Ltd., 696 So.2d 475 (Fla. 3rd DCA 1997), will be referred to as "*Orion*".

F.S.§627.736(5) will sometimes be referred to as "the PIP statute".

STATEMENT OF THE CASE AND FACTS

This case came to this Court after three separate cases were consolidated into one appeal by the Fifth DCA. The facts are undisputed. In each case, the insured was covered by Appellant's policy of insurance for Personal Injury Protection (P.I.P.) benefits. Appellee provided services in exchange for an executed assignment of benefits from the

insured. Appellant denied the Appellee's claim as not medically necessary. Appellee sued. Appellant moved to compel arbitration. The trial court found the PIP statute unconstitutional as violating of Art. I, §§ 9 and 21 of the Florida Constitution.

Appellant appealed. The Fifth District affirmed holding the PIP statute unconstitutionally denies healthcare providers equal protection of the law, violates their right to due process of law, and denies their right of access to court all as protected and guaranteed under the Florida Constitution.

SUMMARY OF THE ARGUMENT

If the PIP statute requires mandatory binding arbitration, it denies providers equal protection of law, due process and access to courts, all constitutionally guaranteed by Article I, §§2, 9, and 21 of the Florida Constitution.

Arbitration does not provide the same safeguards traditionally afforded to those who go to court: the right to discovery, evidence weighed in accordance with legal principles and judicial review. The statute creates two classes of litigants - (1) medical service providers, and (2) everyone else - and then proceeds to deny the right to litigate

certain legitimate claims in court based on who owns the claim. Even though the claims are identical, the statute treats the claims differently based on who owns the claim. Access to courts may be limited under standards laid out in Kluger v. White, but the PIP statute does not meet those standards.

If the PIP statute provides a scheme for arbitration that is both mandatory and binding, such scheme is unique in Florida law. No other state has divided the right of access to court for enforcement of a property right based on who owns that right. Numerous other jurisdictions have held that mandatory binding arbitration statutes with no right of judicial review are unconstitutional violations of rights to due process, access to courts and trial by jury.

Orion confuses the statutory "direction to pay" with the common law assignment of benefits and thereby erred in its analysis.[1] The common law right to enforce an assigned chose in action predates the Florida Constitution and was long embedded in the common law.

---

[1]State Farm points out the distinction in its brief at page 3 but fails to address *Orion's* confusion of these two methods of payment. But then State Farm proceeds to lead to error by suggesting it is the provider rather than the insured that executes the assignment. The provider merely accepts delivery. The distinction is meaningful as the conduct of acceptance can have a variety of meanings other than intention to adhere to an arbitration agreement not binding on the assignor.

Joinder of the Attorney General is not required where there is no action for declaratory relief. Contract restrictions on assignment of an accrued benefit are not enforceable.

Despite a novel attempt to rewrite third party beneficiary contract law in *Orion*, arbitration agreements are personal covenants binding only on parties to a written agreement to arbitrate. Appellee is merely the assignee of the insured, not an intended third party beneficiary. The insured had no obligation to arbitrate. There is no evidence that the Appellee undertook an obligation to arbitrate its claim against the insurer. The theory posited in *Orion* that acceptance of an assignment of benefits makes the provider a volunteer is based on supposition, not fact. Mere conduct of accepting assignment creates no express written agreement where the acceptance document, if any, makes no reference to arbitration.

A plain meaning analysis of the PIP statute finds no clear expression of legislative intent that the "binding provision for arbitration" designed by insurers be mandatory without the need for a separate writing clearly complying with F.S.§ 682.02. Thus, if the statute is not ambiguous it does not mandate binding arbitration. If it is

ambiguous, then under well established rules of statutory construction, the statute does not mandate arbitration and insurers are obliged to offer binding arbitration signified by a separate written agreement between the insurer and the provider.

Coercive and costly procedural design imbedded in the PIP policies by insurers makes PIP arbitration a slow and chillingly expensive process in which both forum charges and prevailing party fee provisions destroy any effective means of presenting what are mostly small claims.

ARGUMENT

I. MANDATORY BINDING ARBITRATION VIOLATES ARTICLE I, SECTIONS 2, 9, and 21 (EQUAL PROTECTION OF LAW, DUE PROCESS, AND ACCESS TO COURTS) OF THE FLORIDA CONSTITUTION.

Equal Protection and Due Process

Due process of law has been defined as a course of legal proceedings according to those rules and principles established in our system of jurisprudence for the protection and enforcement of private rights, South Florida Trust Co. v Miami Coliseum Corp., 101 Fla. 1351, 133 So. 334 (Fla. 1931); Ryan's Furniture Exchange v McNair, 120 Fla. 109, 162 So. 483 (Fla. 1935); Smetal Corp. v. West Lake Invest. Co.,

126 Fla. 595, 172 So. 58 (Fla. 1936); State ex rel. Gore v Chillingworth, 126 Fla. 645, 171 So. 649 (Fla. 1936). Arbitration, by its very nature, is vastly different than a judicial proceeding. Important rules and principles, central to the concept of due process, are not necessarily available in arbitration.

When parties agree to arbitrate, they give up some of the constitutionally protected due process safeguards traditionally afforded to those who go to court. Affiliated Marketing, Inc. v Dyco Chemicals & Coatings, Inc. 340 So.2d 1240 (Fla. 2nd 1976) , cert den 353 So.2d 675. Among them are the right to discovery[2], to have the evidence weighed in accordance with legal principles[3], and the right to judicial review[4].

---

[2] The Florida Arbitration Code does not provide for discovery within the arbitration itself. A trial court errs in permitting discovery to proceed where the arbitrators did not expressly authorize it. Greenstein v Baxas Howell Mobley, Inc. 583 So.2d 402 (Fla. 3rd 1991).

[3] Affiliated. 340 So.2d 1240 (Fla. 2nd DCA 1976), cert den 353 So.2d 675. Indeed, errors of law in arbitration awards cannot be corrected by application to the courts in Florida. Schnurnacher Holding, Inc. v. Noriega, 542 So.2d 1327 (Fla. 1989).

[4] The standard of judicial review applicable to challenges of awards made by arbitrators is very limited and a high degree of conclusiveness attaches to an arbitration award. Broward County Paraprofessional Asso. v McComb 394 So.2d 471 (Fla. 4th DCA 1981) (holding that the trial court did not err in failing to set aside a provision of the arbitrator's award where it could not be concluded that the arbitrator had acted beyond his authority). The reason is because the parties

An essential element of due process is an opportunity to defend in an orderly proceeding before a tribunal having jurisdiction of the cause. Burton v Walker, 231 So.2d 20 (Fla. 2nd DCA 1970). Due process requires that the court determining the rights of parties has jurisdiction. McDaniel v McElvy, 91 Fla. 770, 108 So. 820, 51 ALR 731 (Fla. 1926); Pacific Mills v Hillman Garment, Inc., 87 So.2d 599 (Fla. 1956). Due process embraces the right to be heard before a competent tribunal. *16 Am Jur 2d, Constitutional Law Sec. 580, 581.* Where one submits to the jurisdiction of courts for the determination of legal rights, there is the privilege of having the merits adjudicated by the proper judicial tribunal. Palm Shores, Inc. v Nobles, 149 Fla. 103, 5 So.2d 52 (Fla. 1941). The tribunal must be an impartial one, one that has no substantial pecuniary interest in the outcome of the decision. *16 Am Jur 2d, Constitutional Law §582*. That courts must apply to admitted facts a correct principle of law is a fundamental and essential element of the judicial process. A litigant cannot be deprived of that by a judge's failure or refusal to perform that duty. State v Smith, 118 So.2d 792 (Fla. 1st

---

themselves have chosen to go this route in order to avoid the expense and delay of litigation. West Palm Beach v Palm Beach County Police Benev. Asso. 387 So.2d 533 (Fla.4th DCA 1980); Applewhite v Sheen Financial Resources, Inc. 608 So.2d 80 (Fla. 4th DCA 1992).

DCA 1960).

The *test to be applied* in considering whether a statute violates substantive due process is (1) can the state justify infringing on personal rights and liberties, and (2) does the statute bear a reasonable relationship to a legitimate legislative objective without being arbitrary. Gurell v Starr, 640 So.2d 228 (Fla. 5th DCA 1994). *But the legislature made no findings in the PIP statute to justify constitutional infringement.* There is no evidence in the record of any legislative intent on this issue. The constitutional guaranty of due process of law requires that statutes operate alike upon all under practically similar conditions, and if a statute, in providing a regulation, arbitrarily or unjustly discriminates between persons or corporations similarly conditioned with reference to the duties regulated, the organic provisions securing property rights may be violated. Seaboard Air Line R. Co. v Simon, 56 Fla. 545, 47 So. 1001 (Fla. 1908); Rabin v Conner , 174 So.2d 721 (Fla. 1965). Mandatory binding arbitration under the PIP statute creates two classes of litigants; (1) medical providers who accept assignment and (2) everybody else. The trial court correctly found that:

> [t]he statute allows access to the courts for or against the insured, but denies it for claims for or against the

> medical provider. It is readily apparent that the objective of the act is to deny the right to litigate certain legitimate claims in court based on who owns the claim. Given the people's right to redress wrongs in court provided by Article I, section 21, Florida Constitution, such an objective cannot be considered a legitimate one.

Mandatory binding arbitration strips providers of their constitutional rights to equal protection of law by arbitrarily setting them apart from all other possible owners of the chose in action and denies due process protection by denying them the opportunity to conduct discovery, have the case decided by existing case law, and precluding judicial review of the case on its merits.

Access to Courts

If the plain meaning or the interpretation of the PIP statute indicate that the legislature intended providers be required to submit to mandatory binding arbitration, the statute unconstitutionally restricts their right of free access to courts. Florida Constitution, Article I, Section 21.

As stated by Judge Whittemore in Advanced Orthopedic Institute v. Bankers Ins. Co., 3 Fla. Law Weekly 673 (13th Cir. 1995) , F.N. 5, if the legislature intended to mandate binding arbitration of all PIP disputes between providers and insurers, that would be tantamount to closing the courthouse doors to those parties. Such a statutory mandate does not pass constitutional

muster under Kluger v. White, 281 So.2d 1 (Fla. 1973).

A. KLUGER v. WHITE PLACED SEVERE RESTRICTIONS ON THE LEGISLATURE'S ABILITY TO DENY ACCESS TO COURTS.

In *Kluger*, this Court set forth standards for statutes restricting access to courts. This Court struck down a statute which abolished a right of action in tort for property damage arising from an auto accident. It held that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State, the legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries unless *the legislature* can show an overwhelming public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

The first requirement of *Kluger*, that the common law right not predate the Florida Constitution, fails as the right of an assignee to sue for breach of contract to enforce assigned rights easily predates the Florida Constitution and has become a part of the common law of the state. West Florida Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209 (Fla. 1917); Allen v. Lamon, 99 Fla. 1041,

128 So. 254 (Fla. 1930); Spears v. West Coast Builders' Supply Co., 101 Fla. 980, 133 So. 97 (Fla. 1931). Actions by assignees of contract rights date well back into the English common law.[5] Therefore, under *Kluger*, the legislature is without power to abolish this right unless it either (I) provides some reasonable alternative to protect the rights of the people of the state to redress for injuries or (II) shows an overwhelming public necessity for the abolishment of the right and no alternative method of meeting such public necessity. Id.

The PIP statute contains none of the *Kluger* requirements. A question also arises when the statute is read in light of the entire Florida Statutes: **Why is this statute different from all other statutes?** No other Florida statute provides for mandatory binding arbitration. The statutes contain many provisions for arbitration of disputes. The many Florida arbitration schemes fall into two categories. First, in some instances, there are provisions for mandatory non-binding arbitration, most often as an administrative precursor to

---

[5]Debts are assignable in equity by parol. Fashion v. Atwood (1680)2Cas. In Ch.36; 22 ER 835, LC; Heath v. Hall (1812) 4 Taunt 326, 128 ER 355. An assignment of a chose in action need not be by deed. Howell v. MacIvers (1792) 4 Term Rep. 690, 100 ER 1247; Future debts are assignable. Percy v. Clements (1874) 43 LJCP 155, 30 LT 264, 22 WR 80. Unascertainable amounts are assignable. Pooley v. Goodwin (1835) 4 Ad & El 94, 1 Har & W 567, 5 Nev LMKB 466, 111 ER 722. Moneys due or to become due are assignable. Brice v. Bannister (1878) 3 QBD 569, 47 LJQB 722, 38 LT 739, 26 WR 670, CA. Even tort damages were assignable if and when recoverable. Glegg v. Bromley (1912)3 KB 474, 81 LJKB 1081, 106 LT 825, CA.

seeking any judicial remedy. See, e.g., Fla. Stat. ch. 44.103 (1997); Fla. Stat. ch. 651.123 (1997); Fla. Stat. ch. 718.112(2)(l) (1997); Fla. Stat. ch. 718.1255 (1997); Fla. Stat. ch. 719.106(1)(l) (1997); Fla. Stat. ch.723.0381 (1997); Fla. Stat ch. 766.107 (1997). In other instances, the scheme provides for voluntary, binding arbitration. See, e.g., Fla. Stat. ch. 44.104 (1997);Fla. Stat. ch. 681.109(1997); Fla. Stat. ch. 766.106 (1997); Fla. Stat. ch. 766.201(2) (1997); Fla. Stat. ch. 766.207-212 (1997). *However, not a single arbitration provision could be found which provides for arbitration that is both* ***mandatory and binding***.

It is clear the legislature created no reasonable alternative and did not show an overwhelming public necessity, elements required to deny access to courts under *Kluger*. Failure to meet the requirements is demonstrated by comparing two statutes which purport to create mandatory arbitration: (1) F.S. §718.1255 (a system of mandatory non-binding arbitration for condominium disputes where all the requirements enunciated under *Kluger* are present) and (2) F.S.§ 627.736(5) (where the *Kluger* requirements are absent).

The legislature is presumably aware of existing statutory law and case law. Bidon v. Department of Professional Regulation, 596 So.2d 450 (Fla. 1992). Violation of the guarantees of the Florida constitution as interpreted in

Kluger is illustrated by considering the following aspects: legislative findings, rules of engagement, and binding v. non-binding. F.S. §718.1255 creates a reasonable alternative to access to courts whereas F.S.§ 627.736(5) does not.

i. Legislative Findings:

a. F.S.§ 627.736 (5)- No legislative findings[6] or pronouncements.

b. F.S.§ 718.1255 - The legislature makes the specific findings[7] required.

---

[6] In F.S. 627.731 the legislature states the purpose of the no-fault law.

627.731. Purpose - The purpose of ss. 627.730-627.7405 is to provide for medical, surgical, funeral, and disability insurance benefits 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.

Nowhere does the legislature discuss anything related to arbitration or denying access to courts.

[7] 718.1255. - (3) Legislative findings.

(a) The Legislature finds that unit owners are frequently at a disadvantage when litigating against an association. Specifically a condominium association, with its statutory assessment authority, is often more able to bear the costs and expenses of litigation than the unit owner who must rely on his own financial resources to satisfy the costs of litigation against the association.

(b) The Legislature finds that the courts are becoming overcrowded with condominium and other disputes, and further finds that alternative dispute resolution has been making progress in reducing court dockets and trials and in offering a more efficient, cost-effective option litigation. However the legislature also finds that alternative dispute resolution should not be used as a mechanism to encourage the filing of frivolous or nuisance suits.

(c) There exists a need to develop a means of alternative dispute resolution.

(d) The high cost and significant delay of circuit court litigation faced by

ii. Rules of Engagement

a. F.S. §627.736(5) - The only language present proscribing rules for arbitration is: "[t]he 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." Chapter 682 proscribes no rules of arbitration procedure. This leaves providers open to abuse by insurers who are free to choose the rules to place in the policy. This is particularly onerous if the statute is mandatory because providers are usually called upon to render service or provide supplies without having an opportunity to see the policy and the particular terms that vary from insurer to insurer. Insurers usually just provide an I.D. card to the insured who sometimes does not receive the policy until long after it is issued and usually never has it available to show to the provider when service is initiated. Many insureds lose their policies and are unable to exhibit them to the provider.

Insurers do not adopt any code of procedure that is remotely fair. Some, such as State Farm, Allstate, and others, adopt lop-sided discovery terms and

---

unit owners in the state can be alleviated by requiring nonbinding arbitration thereby reducing delay and attorney's fees while preserving the right of either party to have its case heard by a jury, if applicable, in a court of law.

coercive prevailing attorneys fees provisions. Examples of this unfairness that predate the inception of this case and the recent 1998 PIP statute amendments are provisions that appeared in State Farm and Allstate policies and policies of other insurers that required providers to provide complete discovery of their records without a reciprocal right of discovery from the insurer and included a prevailing party standard for attorneys fees that mirrors the incredibly coercive provision adopted by the legislature in 1998[8] where a provider may be vindicated in the claim through final hearing in arbitration only to have won the battle and lost the war because the winnings were not 50% greater than the difference between the amount claimed and the amount offered. This legislative tinkering with a provider's substantive right to be paid a "reasonable amount" through a coercive statute is clearly harmful and discriminatory as it effects both the amount a provider may economically assert and the forum where it can be heard, both quite different from what and where the insured may effectively assert.

Surely procedural due process requires more. For that very reason the legislature delegated regulatory authority over non-binding arbitration to a state agency under F.S.§718.1255 and Congress took a similar approach in the

[8]Laws 1998, c. 98-270 §2, eff. Oct. 1, 1998.

securities industry.[9] Yet Chapter 682 says nothing about a code of procedure and the legislature has delegated this quasi-governmental function to insurers without any requirement of advance notice to providers as to content, without any express requirement for a subsequent clear agreement on acceptance of these terms with no means to object --- not procedural due process in any sense of the term.

b. F.S.§718.1255 states as follows:

> (4) Mandatory nonbinding arbitration of disputes.-- The Division of Florida Land Sales, Condominiums, and Mobil Homes of the Department of Business and Professional Regulation shall employ full-time attorneys to act as arbitrators to conduct arbitration hearings provided by this chapter... The department shall promulgare rules of procedure to govern such arbitration hearings... (b) At the request of any party to the arbitration, such arbitrator shall issue subpoenas for the attendance of witnesses and the production of books, records, documents, and other evidence and any party on whose behalf a subpoena is issued may

---

[9]Congress has delegated to the Securities and Exchange Commission the obligation to oversee arbitration in securities disputes between brokers and customers. All self-regulatory organizations ("SRO") in the securities industry now follow a Uniform Code of Arbitration Procedure adopted in 1989 that levels the playing field in these cases. Each SRO is required to supervise the arbitrations and provides lists of arbitrators. The National Association of Securities Dealers publishes its awards and requires certain disclosures from the arbitrators to participants before selection is required. Similar rules are in force in other SRO's and commercial arbitration forums, e.g., NYSE and American Arbitration Association.

> apply to the court for orders compelling such attendance and production... Discovery may, in the discretion of the arbitrator, be permitted in the manner provided by the Florida Rules of Civil Procedure.

F.S. §718.1255 is a reasonable alternative because the legislature created an administrative agency to level the playing field between the parties and because it provides for trial de novo. These guarantees are not present in F.S. §627.736(5). Unlike the cost-free single arbitrator provided by the state under F.S. §718.1255, providers are abused by a very costly three arbitrator panel on small claims. The chilling effect shown below is obvious and is exactly what the insurance industry seeks to continue to enjoy. One reason insurers want this arbitration scheme to continue is to keep forum charges so costly that many providers will decline to pursue their rights. This allows insurers to abuse their power.

The assertion that rates will go up if this case is affirmed is as baseless as any claim that PIP premiums went down after the arbitration provision was adopted in 1990. The record is simply silent on both points. Undoubtedly insurers will always strive to improve their profits, but that profit motive must be deemed irrelevant when it impinges on guaranteed constitutional rights.

Florida PIP arbitration is not quicker, more efficient or more economical

than litigation. Most PIP disputes are small claims. A basic PIP policy provides $8000.00 in benefits. Rarely does the amount in controversy exceed $5000.00. The small claims rules provide quick, efficient, and economical relief. While arbitration may be a reasonable alternative for litigants engaged in costly circuit court litigation, it is not a reasonable alternative to small claims litigation. The small claims rules require a pretrial conference within thirty-five (35) days of the filing of the action. F.R.C.P. 7.090(b). There the court is required to consider most issues relative to the trial and set a trial date within sixty (60) days thereafter. F.R.C.P. 7.090(d). Within three months following filing, a provider can have its claim heard. Arbitration without procedural rules does not resolve that quickly. PIP arbitration is governed by the procedure adopted by the insurer in the policy. There is no required governmental oversight and procedure is usually weighted in favor of the insurer. The provider has no say in the procedure. All the policies require a three-member panel with party arbitrators selecting a neutral. Rarely does the selection resolve quickly without the intervention of a court to compel the appointment of the neutral arbitrator as party arbitrators usually espouse the positions of their respective parties and jockey for a not so neutral middle arbitrator. Then five attorneys (three arbitrators and counsel) must arrange a mutually acceptable time, generally many months in the future. Disputes often

arise over discovery, witnesses, documents, etc. delaying the final hearing date while arbitrators consider skirmishes typically resolved at the pretrial conference.

In small claims court a provider can pursue the claim for a reasonable filing fee - usually less than $100.00. In the three arbitrator scheme, each arbitrator typically charges between $150.00 and $250.00 per hour for their time. Many arbitrators will not participate unless paid in advance for their services. Often the forum charge will exceed the amount sued for and is thousands of dollars more than the small claims filing fee. Small claims arbitration is slower, less efficient, and more costly than litigation. Those costs alone have a chilling effect separate from prevailing fees.

iii. Binding v. Non-Binding

The greatest blow to constitutional protection exists where the PIP statute creates binding arbitration with *no right of appeal or trial de novo*. Compare F.S.§ 718.1255. This section creates non-binding arbitration with the right to trial de novo in court if either party is unhappy with the arbitration results. This type of mandatory arbitration is a reasonable alternative and is a constitutional implementation of legislative intent. Mandatory binding arbitration with no appeal right and without a provision for trial de novo is not a reasonable alternative. cf. Chrysler Corp v. Pitsirelos, 721 So.2d 710 (Fla. 1998).

Neither has the legislature shown[10] an overwhelming public necessity for abolishing the right and no alternative method of meeting such public necessity. Id. No legislative language recognizing an overwhelming public necessity is present here, as in Carter v. Sparkman, 315 So.2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041(1977). There, the legislature stated in the preamble to the challenged statute's chapter that the problem relating to medical professional liability insurance had grown to crisis proportion, and the Court held the pre-litigation malpractice mediation panel requirement did not violate the constitutional guaranty of access to courts. Id. Here the legislature has made no pronouncement of a crisis of medical providers PIP cases. Since no case has been made *by the legislature* for such an overwhelming necessity, the PIP statute does not fall under the narrow exceptions expressed in *Kluger*. Neither has the legislature shown there is no alternative method of meeting the undeclared public necessity. Surely truly voluntary binding arbitration or mandatory non-binding arbitration are two such reasonable alternatives to the abolition of access to courts by a mandatory binding arbitration scheme.

---

[10]At page 20 of their Initial Brief, Appellants incorrectly suggest that Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974) requires the Appellee to meet what is *actually the legislature's burden* under *Kluger*: (1) show there is an overpowering public necessity for abolishing the action and (2) no alternative method of meeting that public necessity.

Orion is Wrong

In *Orion* the Third District Court of Appeals based its ruling on several errors:

(1) Confusion of the "direction to pay" created in the PIP statute with the long standing common law right of an assignee of a chose in action to enforce that right;

(2) Failing to observe that PIP insurance benefits were created to replace a common law right to sue that predated the Florida Constitution;

(3) Misapplication of traditional contract law concepts of third party beneficiary responsibility;

(4) Failing to observe the difference between an assertion that the PIP statute can be construed to save its constitutionality as distinguished from an allegation otherwise found in a pleading. There was no application made below under Chapter 86 seeking to declare the statute unconstitutional in this case nor was any recited in the opinion in *Orion*; and

(5) Failing to note that contract restrictions on assignment of an accrued benefit are unenforceable.

The PIP statute created a means for the insured to retain ownership of the benefit but to direct the insurer to pay directly to the provider. The statute provides that the insured "may" endorse the claim form to authorize this

procedure. This provision avoided the long standing practice whereby providers required insureds to execute a power of attorney authorizing them to endorse the insured's name on the check or draft given in payment. Many providers still utilize this power of attorney method anyway.

An assignment of benefits is effected differently. There is no requirement for endorsement of the claim form and providers desiring an assignment of benefits usually do so by separate written instrument signed by the insured.[11] Providers often make provision for both the direction to pay and the assignment of benefits (and sometimes the power of attorney as well) on the same form signed by the patient at or before the time service is rendered. No useful purpose is served by confusing the statutory direction to pay with common law assignment. This confusion led the Third District to err in its conclusion that the legislature could take away "a newly created right."

If, however, the Third District was focusing on the PIP benefit itself as the newly created right, the Third District failed to observe that the entire No-Fault law was created to replace a common law right of recovery that predated

---

[11]An equitable assignment can be created in parol, or partly in writing and partly oral, and may be completed merely by delivery of the subject assigned. McClure v. Century Estates, Inc., 96 Fla. 568, 120 So.4 (Fla. 1928); Sammis v. Engle, 19 Fla. 800 (Fla. 1883).

the Florida Constitution. It is disingenuous to suggest that a common law right that predates the constitution can be replaced by a statutory right which can then be taken away without the need to pass constitutional muster. If this practice is sanctioned, then the legislature is free to codify the common law at will and just as easily deny constitutional guarantees as a result of codification. This circular reasoning belies the further error in *Orion*.

The PIP statute made no change in the common law of assignments or contract law. In fact, the Third District previously addressed these distinctions when deciding the standing to sue of a PIP provider who had accepted an assignment of benefits. In Parkway General Hospital, Inc. v. Allstate Insurance Co., 393 So.2d 1171 (Fla. 3rd DCA 1981) the court correctly held providers usually have no right to enforce a PIP policy benefit as they are not third party beneficiaries, but in *Parkway* the provider did have that right as an assignee. Perhaps more correctly stated, the provider is not an "intended third party beneficiary" bound by and with the right to enforce a contract, but is merely an "incidental third party beneficiary" not so bound or with standing to enforce. An "intended third party beneficiary" is a party for whom the contract is primarily made and who has a direct right of enforcement. Roberts v. LLoyd, et al., 685 So.2d 102 (Fla. 4th DCA 1997); Tartell v. Chera, 668 So.2d 1105,

1106 (Fla. 4th DCA 1996); Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd., U.S., 647 So.2d 1028 (Fla. 4th DCA 1994); Maryland Casualty Co. v. State of Fla. Dept. of Gen. Serv., 489 So.2d 57 (Fla. 2nd DCA 1986). PIP insurance is an indemnity contract where the insured, not the provider, is entitled to receive the benefit at the time of loss. The provider has no right of direction or ownership of the claim based solely on the making of the agreement and cannot be an "intended third party beneficiary". Standing is acquired and rests solely on assignment of the chose in action in the same manner that assignment to a bank or anyone else would accomplish.

None of the cases cited in *Orion* or by Appellants involved agreements where the primary parties had not bound themselves to arbitration from the outset. Zac Smith & Co. v. Moonspinner Condominium Assoc., 472 So.2d 1324 (Fla. 1st DCA 1985) was a case brought by an association asserting third party standing under an A.I.A. contract that actually bound both initial parties to arbitrate. In Terminix International Co. v. Ponzio, 693 So.2d 104 (Fla. 1st DCA 1997) Ponzio asserted intended third party beneficiary status in a contract where the primary parties bound themselves to arbitration. Pasteur Health Plan, Inc. v. Salazar, 658 So.2d 543 (Fla. 3rd DCA 1995) makes no holding and recites no dicta bearing on an application of third party beneficiary theory

to the case. There is merely a footnote in which the Court observed that one of the parties referred to itself in the pleadings as assignee, or in the alternative, as third party beneficiary. The federal cases cited have utterly no application to the point at issue: whether parties can reserve their respective right of free access to courts but impose arbitration on an assignee of one of them without the assignee's express written consent. Indeed, there is no federal counterpart to Article I, §21 of the Florida Constitution.

Orion fails to discuss the long and well established rule that contract restrictions against assignment of an accrued benefit are unenforceable. Aldana v. Colonial Palms Plaza, Ltd., 591 So.2d 953 (Fla. 3rd DCA 1991); Paley v. Cocoa Masonry, Inc., 433 So.2d (Fla. 2nd DCA 1983); Cordis Corp. v. Sonics International, Inc., 427 So.2d 782 (Fla. 3rd DCA 1983); see also, footnote 6, infra. Once an insured is injured in a motor vehicle accident, entitlement to indemnification for the costs incurred in securing treatment arises. It does not matter that the amount involved or the identity of the provider are then unknown.

B. APPELLANTS' CITATION OF *DEALERS* IS INAPT.

The Appellee contends, and the lower courts ordered, that if the PIP

statute is read to mandate binding arbitration, it violates the Due Process[12] and Access to Courts[13] provisions of the Florida Constitution. The Appellant cites Dealers Insurance Company, Inc. v. Jon Hall Chevrolet Company, Inc., 547 So.2d 325 (Fla. 5th DCA 1989) for the proposition that creating two classes of litigants is not unconstitutional. But *Dealers* did not involve separating entitlement to access to court based on ownership of the claim. A simple review of F.S.§627.7405, the reimbursement statute involved, reveals that the legislature had shifted ultimate liability to owners and insurers of commercial vehicles which encourages commercial vehicle safety. It is clear that this case does not apply or even comment on the issues raised in this appeal. *Dealers* dealt solely with the **Equal Protection**[14]clause of the Florida Constitution. It never mentions the **Due Process**[15]or **Access to Court**[16] clauses of the Florida Constitution. *Dealers* simply does not apply as the Fifth District noted below.

---

[12] Florida Const. Art. I § 9

[13] Florida Const. Art. I §21

[14] Florida Const. Art. I §2

[15] Florida Const. Art. I §9

[16] Florida Const. Art. I §21

C. WITH LIMITED EXCEPTION, SISTER STATES HAVE UNIVERSALLY HELD THAT MANDATORY BINDING ARBITRATION STATUTES WITH NO RIGHT OF JUDICIAL REVIEW ARE UNCONSTITUTIONAL VIOLATIONS OF DUE PROCESS, ACCESS TO COURTS, AND TRIAL BY JURY.

Arbitration is a proceeding voluntarily initiated by the parties, and at common law its basis is their voluntary act. Some statutes, however, have provided for what is known as "compulsory arbitration" which has been defined as an arbitration proceeding to which the consent of at least one of the parties is enforced by statutory provisions. 55 ALR2d 440,441 §5. Generally, when the effect of statutes has been to coerce parties to submit to arbitration, without any agreement or assent on their part to do so, the courts have declared them unconstitutional as depriving the parties of liberty and property without due process of law, or as depriving parties of their constitutional right to trial by jury. Dorchy v. Kansas, 264 U.S. 286, 68 L.Ed. 686, 44 S.Ct. 323; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 67 L.Ed. 1103, 43 S.Ct. 630, 27 A.L.R. 1280; Graves v. Northern P.R. Co., 5 Mont. 556.

A distinction may be drawn between directly coercive statutes, the effect of which is to close the courts to litigants by compelling resort to arbitrators for final determination of rights, and statutes designed merely to aid the courts by

providing for arbitration in certain cases but reserving a right of appeal to the courts. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N.E. 211; Re Smith, 381 Pa. 223, 112 A.2d 625, 55 A.L.R.2d 420, app. dismissed 350 U.S. 858, 100 L.Ed. 762, 76 S.Ct. 105. Statutes of the latter class have generally been held valid.

Mandatory binding arbitration is not a reasonable alternative to a court of law. Mengel Company v. Nashville Paper Products and Specialty Workers Union, No. 513, 221 F.2d 644 (6th Cir. 1955); City of Bessemer v. Personnel Board of Jefferson County, 420 So.2d 6 (ALA. 1982); State v. Nebraska Association of Public Employees, 239 Neb. 653, 477 N.W.2d 577 (Neb. 1991); See also Arbitration and Award §9, 5 Am Jur 2d 526; and Constitutionality of Arbitration Statutes, 55 A.L.R. 2d 439.

Other Appellants' Cases Distinguished

State Farm Automobile Insurance Co. v. Broadnax[17], 827 P.2d 531 (Colo. 1992) was prospectively overruled by the Colorado legislature effective 7/1/91 before the decision was published. The repealed mandatory arbitration provision

[17]The *Broadnax* opinion notes that "State Farm also has the right to resort to the formal judicial system should it find an arbitrator's order adverse to its interest." *Broadnax* at 535 - 537. Was this pursuant to the trial de novo feature of the Colorado Mandatory Civil Arbitration Act? Why was Colorado arbitration undesired by State Farm yet desired now in Florida?

made no distinction between insureds and providers or insureds and assignees. Thus, primary parties and assignees were both mandated to arbitrate. In 1991, the Colorado PIP statute was amended to expressly preserve the rights of all parties to access to court and now requires a subsequent written agreement between the insurer and other party to invoke arbitration. Colorado Laws §10-4-708(1.5). Colorado's Mandatory Civil Arbitration Act was a 3 year pilot experiment that resulted in repeal eff.7/1/91. Colo. Laws 1990, H.B.90-1067 §5.

Arbitration is not a reasonable alternative to a court of law. Appellants' citation of University of Miami v. Echarte , 618 So.2d 189 (Fla. 1993) is inapt as that case considered non-mandatory arbitration under the medical malpractice statute where one party had the right to invite (i.e. offer) the other to arbitrate which invitation could only be accepted by a separate writing clearly indicating an intent to arbitrate. Without that separate writing, arbitration is deemed declined![18]

Appellants assertion at page 12 of their brief that this Court has held that providers can be freely classified differently is a sweeping generalization of the subject without demonstrating a single instance in which access to court without trial de novo appeared in the statute under scrutiny or in which a constitutional right was treated differently between classes owning identical claims.

---

[18]F.S.§766.106(10).

A right to judicial determination of whether there is a binding agreement to arbitrate, whether the claim is arbitrable or if arbitration has been waived is not judicial review or meaningful access to courts on the claim itself. Providers clearly have standing and the citation of Purdy v. Gulf Breeze Enterprizes, 403 So.2d 1325 (Fla. 1981) is disingenuous. *Purdy* upheld a set-off against an insured in an action against a tortfeasor for a claim already collected by the insured from the insurer. In the instant case, the claim has yet to be paid. To suggest that the assignee-owner of an unresolved and unpaid claim cannot assert all rights that attach to the claim is absurd. There is nothing personal about the right to equal protection of the law, access to court, due process and trial by jury that leaves the rights personally in the hands of the assignor. Appellants' cite Transcontinental Gas Pipeline Corp. v. Dakota Gasification Co., 782 F. Supp. 336, 341 (S.D. Texas 1991) but omit its facts which show that where a party acquires both the rights *and assumes the duties* under a contract it is just as bound by its terms as were the original parties. A pipeline company petitioned to compel arbitration by the purchaser of a coal gasification plant that acquired the plant from the mortgage guarantor, the Department of Energy, who had acquired the plant by foreclosure. The pipeline company still held its right to arbitration under the contract with the original owner. The agreement was reinstated by the Department of Energy. The

trial court held that when the United States succeeded to ownership it also assumed the duties to arbitrate and that the purchaser of the plant did not acquire the government's statutory or constitutional defenses it alone may have asserted. Thus, again a case where the primary parties were bound to arbitrate is presented which is not the case here. The assignor is simply not a party to the contract between the insured-assignor and the insurer. Moreover, Appellee assert's its own rights. The assignor-insured would never have had to assert defenses to a motion to compel an agreement not made by or binding on the insured!

II. NEITHER THE STATUTE NOR THE INSURANCE POLICY CAN FORCE APPELLEE TO ACCEDE TO MANDATORY BINDING ARBITRATION WITHOUT EXPRESS WRITTEN CONSENT.

Florida Statute §627.736(5) provides, in relevant part:

> "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."

In construing a statute, a court must confine itself to the four corners of the statute itself, the evidence it receives, and the law it is required to consider by judicial notice. A court must not attribute to the legislature an intent beyond

that expressed. Bill Smith, Inc. v. Cox, 166 So.2d 497 (Fla 2nd DCA 1964). Since the record contains no evidence of legislative history, the trial court ruled the statute is not ambiguous[19] and that it's plain meaning requires the Appellant to arbitrate. To apply a plain-meaning analysis, the three relevant sentences of the statute must be considered together, giving effect to all three sentences as well as the statute as a whole. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So.2d 522 (Fla. 1973). These three sentences were added in 1990[20] without any alteration of the expressed purpose of the the P.I.P. statute which provides:

> **627.731.** Purpose
> The purpose of ss. 627.730-627.7405 is to provide for medical, surgical, funeral, and disability insurance benefits 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.

The legislature intended the statute to be construed liberally in favor of

---

[19] Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to rules of statutory construction. Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (Fla. 1918); A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157 (Fla. 1931); Marshall Lodge v. Woodson, 139 Fla. 579, 190 So. 749 (Fla. 1939); Wagner v. Botts, 88 So.2d 611 (Fla. 1956); State v. Stuler, 122 So.2d 1 (Fla. 1960).

[20] Chapter 90-119, §40, eff. Oct. 1, 1990.

providing swift and ready access to treatment of injured persons without regard to fault. Palma v. State Farm Fire & Cas. Co., 489 So.2d 147 (Fla 4th DCA 1986). Any construction of legislative intent that serves to detract from this purpose must be suspect and where it serves to deny providers their constitutional rights,[21] such construction is doubly suspect and must yield to any other reasonable construction that preserves the statute's ability to conform to the constitution. State ex rel. Ervin v. Cotney, 104 So.2d 346 (Fla. 1958); Redwing Carriers, Inc. v. Mason, 177 So.2d 465 (Fla. 1965); Smith v. Ayres, 174 So.2d 727, cert. den. and app. dismd. 382 U.S. 367, 15 L.Ed.2d 425, 86 S. Ct. 549.

The first sentence commands insurers to include a provision in their policies. It does not prescribe the content of the provision other than to require that it include reference to binding arbitration of claims by providers or suppliers if they have agreed to accept assignment of P.I.P. benefits. Such acceptance agreement can only be between the provider or supplier and the insured. *This record is devoid of any evidence of agreement between the Appellant and the Appellee, which is the usual and customary circumstance in the case of assignment of insurance benefits.*

Nothing in this first sentence expressly or clearly states that providers are denied access to the courts and must arbitrate their claims. Courts must refrain from speculating as to what the legislature intended. Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1st DCA 1960); Re Estate of Jeffcott, 186 So.2d 80 (Fla. 2nd DCA 1966). If the language of the statute is clear and not entirely

[21] Article I, §§2, 9, 21 and 22, The Florida Constitution.

unreasonable or illogical in its operation, a court has no power to go outside the statute in search of excuses to give a different meaning to the words used in the statute. Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960).

Surely a reasonable plain meaning application of this first sentence authorizes insurers to draft a provision that offers providers the opportunity to arbitrate under fair terms and procedures if they signify acceptance of the offer in the form of an express written agreement saying so. Can it reasonably be argued that the language used by the legislature precluded that?[22] Thus, the first sentence, standing alone, cannot be a basis to compel an assignee to arbitrate as this sentence operates only as a command to insurers and does not create any statutory "agreement" to which the assignee is made a party.

A. THERE MUST BE AN EXPRESS WRITTEN ARBITRATION AGREEMENT BETWEEN THE PARTIES SOUGHT TO BE COMPELLED TO ARBITRATE.

The second sentence requires that the provision "specify that Chapter 682 relating to arbitration shall apply." This requires consideration of F.S. §682.02 which provides:

> "Two or more **parties** may agree **in writing** to submit to arbitration any controversy existing between them at the time of the agreement, or **they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them** relating to such contract or the failure or refusal to perform the whole or any art thereof. Such agreement or provision shall be valid, enforceable and irrevocable without

[22] It is all too easy to conclude that because the insurance industry or some civic group vied for arbitration that this means the provision was intended to be mandatory. But surely the citizens of this state have the right to inferences not so cynical or sinister.

> regard to the justiciable character of the controversy,; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder." (Emphasis added).

This statute clearly indicates, as does the previously cited case law, that the **parties** may agree to arbitration of a dispute **between them**. See Fortune Insurance Company v. U.S.A. Diagnostics,684 So.2d 208 (Fla. 4th DCA 1996). Nowhere does the statute say the parties may agree to impose binding arbitration on a third party assignee of rights under the contract without the express written consent of that assignee. It is error to grant application under Florida Arbitration Code where parties do not agree in writing to arbitrate. Wiggs & Maale Construction Co. v. Stone Flex, Inc., 263 So.2d 607 (Fla. 4th DCA 1972). Chapters 682.02 and 682.03 do not apply if the parties did not agree *in writing* to submit any controversy between them to arbitration. Id. The only clearer indication the legislature could have given that F.S. §627.736(5) does not mandate arbitration would have been for it to repeat the actual language of F.S. §682.02. Instead, they merely referred to the Arbitration Code. For purposes of determining legislative intent, the legislature is presumably aware of the existing statutory law and case law. Bidon v. Department of Professional Regulation, 596 So.2d 450 (Fla. 1992); Dowell v.

Gracewood Fruit Co., 559 So.2d 217 (Fla. 1990). If the legislature intended to create a mandatory binding arbitration scheme, would they have merely referred to the Arbitration Code and actually chosen to omit the word "mandatory"?

Holding that the PIP statute requires mandatory arbitration without agreement to arbitrate places it squarely in conflict with F.S. §682.02. If possible, courts must avoid construction that places a particular statute in conflict with other apparently effective statutes covering the same general field. Markham v. Blount, 175 So.2d 526 (Fla. 1965). Where the force of both can be preserved without destroying their evident intent, it is the court's duty to do so. Id.

If the statute was intended to remove the mutuality requirement for agreements to arbitrate, it is in derogation of the common law. The common law is not to be changed by doubtful implication and no statute is to be construed as altering the common law farther than its words and circumstance import. E.g., State v. Egan, 287 So.2d 1 (Fla. 1973). Statutory abrogation by implication of an existing common law remedy, particularly if the remedy is long established, is not favored. Thornber v. City of Ft. Walton Beach, 568 So.2d 914 (Fla. 1990). Unless the statute is clear and explicit that it changes

the common law, it will not be intended to change the law. City of Hialeah v. State ex rel. Morris, 183 So. 745 (Fla. 1938); State ex rel. Martin v. Michell, 188 So.2d 684 (Fla. 4th DCA 1966).

B. ARBITRATION AGREEMENTS ARE PERSONAL COVENANTS BINDING ONLY ON THE PARTIES TO THE AGREEMENT.

The party seeking to compel arbitration must present evidence of an enforceable *written* agreement to arbitrate between the parties. F.S. §682.02. Failure to show that the party to be compelled signed the agreement to arbitrate fails to carry the burden. Shearson, Lehman, Hutton, Inc. v. Lifshutz, 595 So.2d 996 (Fla 4th DCA 1992). Florida law is clear that arbitration agreements are personal covenants, binding only on the parties to the covenant. Federated Title Insurers, Inc. v. Ward, 538 So.2d 890 (Fla. 4th DCA 1989), citing Karlen v. Gulf & Western Industries, Inc., 336 So.2d 461 (Fla. 3rd DCA 1976).

An agreement to arbitrate is only valid between the parties to the agreement. F.S. §682.02. Only the Appellee's assignor, the insured, and the Appellant were parties to the insurance contract. The Appellant does not contend that the insured was required to arbitrate and has not shown that the Appellee executed any assumption agreement. The mere assignment of the benefits of a personal contract does not cast upon the assignee conditions and

obligations not imposed by the contract on the assignor. Jenkins v. City Ice & Fuel Co., 118 Fla 795, 160 So. 215 (Fla. 1935); Paulson Engineering Co. v. Klapper, 7 Fla. Supp. 162 (Fla. 11 Cir. Ct); Sans Souci v. Division of Florida Land Sales & Condominiums, 448 So.2d 1116 (Fla. 1st DCA 1984); Kornblum v. Henry E. Mangels Co., 167 So.2d 16, 10 ALR3d 812 (Fla. 3rd DCA 1964).

The Appellee 'stands in the shoes' of the assignor-insured with the same rights. Since the assignor-insured cannot be compelled to arbitrate, the Appellee cannot be compelled to arbitrate. Notwithstanding the novel approach to contract theory taken in *Orion*, Appellant failed to show that Appellee is a "party" to an agreement to arbitrate, a necessary prerequisite under F.S. §682.02.

The arbitration provision contains no personal covenant of the insured to arbitrate PIP claims disputes. Instead, the policy or the statute purport to covenant on behalf of unknown assignees to commit them to binding arbitration. There exists **no authority in Florida law** under which one who is not a party to a contract can be bound by the promise of another to arbitrate. There is no writing evidencing Appellee's intent to arbitrate. But the written agreement to arbitrate must evidence the parties' intent and must otherwise fulfill the requirements of a valid and enforceable contract. See e.g., Wiggs &

Maale Construction Co. v. Stone Flex, Inc., 263 So.2d 607 (Fla. 4th DCA 1972) (error to grant application under Florida Arbitration Code where parties did not agree in writing to arbitrate); Eugene W. Kelsey & Son, Inc. v. Architectural Openings, 484 So.2d 610 (Fla. 5th DCA 1986), rev. denied, 492 So.2d 1330 (Fla. 1986).

CONCLUSION

If the PIP statute requires assignee-providers to submit to mandatory binding arbitration it violates their rights to Equal Protection of Law, Due Process, Access to Courts and Trial by Jury - rights which are specifically enumerated in Article I, Sections 2, 9, 21and 22 of the Florida Constitution.

This legislation is fraught with potential for abuse. Delegating to insurers the right to design their respective arbitration provisions led to excessive forum charges through costly three member panels, unfair unilateral prehearing disclosure requirements and coercive prevailing party fee designs. Undoubtedly, insurers are clever enough to redesign new provisions that will further tilt an already uneven playing field.

The repackaging of common law rights as codified new rights should not be sanctioned as a basis for denying the constitutional guarantees that attached to the replaced rights. The potential for abuse is obvious. Sanction authorizes

the legislature to close the courthouse door and deny other constitutional guarantees on the mere whist of the prevailing legislative breeze.

The statute cannot serve to bind the Appellee to arbitrate its claim because the Appellee is not a party to a written agreement to arbitrate.

The findings and judgment of the lower court are correct and should be affirmed if Your Honors find that the PIP statute does mandate binding arbitration. If, however, the statute is ambiguous and application of the plain meaning rule preserves the statute by requiring a separate written agreement to arbitrate between Appellant and Appellee, then the decision should be affirmed as any error is harmless in this case. There is no written agreement between the Appellant and Appellee wherein they both agreed to arbitrate.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail on March 24, 1999 to Clay W. Schacht, Esq., Christopher S. Reid, Esq. 2600 Parkway, Suite 170, Maitland, FL 32751-4162, Brian D. DeGailler, Esq, PO Box 1549, Orlando, FL 32802-1549, Tracy Raffles Gunn, Esq., PO Box 1438, Tampa, FL 33601, Thomas J. Maida, Esq. and Austin B. Neal, Esq., PO Box 1819, Tallahassee, FL 32301; Perry Ian Cone, Esq., 1430 Piedmont Drive, Tallahassee, FL 32312; James K. Clark, Esq., Suite 1800, Suntrust International Center, One SE Third Ave., Miami, FL 33131; Mark Tischhauser, Esq. 3134 North Boulevard, Tampa, FL 33603; Dock A. Blanchard, Esq. 4 SE Broadway, PO Box 1869, Ocala, FL 34478-1869.

GREENSPAN & KANE
Attorneys for Appellee Pinnacle
301 YAMATO ROAD #3160
BOCA RATON, FL 33431

(561) 995 - 8180

By_____
CHARLES J. KANE, ESQ.
FBN: 093536
By_____
HARLEY N. KANE, ESQ.
FBN: 0972487