**SUPREME COURT OF FLORIDA**

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

Petitioners,

vs.

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

Respondents.
_____/

case Nos. 94,494 and 94,539

Fifth DCA No. 97-1429
97-1588
97-3093

# AMICUS CURIAE BRIEF OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

**JAMES K. CLARK, ESQUIRE**
Attorney for Amicus Curiae
State Farm Mutual Automobile Insurance Company
James K. Clark & Associates
SunTrust International Center, Suite 1800
One Southeast Third Avenue

Miami, Florida 33131
Telephone: (305) 416-2200
Florida Bar No.: 161123

## TABLE OF CONTENTS

## TABLE OF CITATIONS

***Cases:***

***Statutes:***



***Other Authorities:***

## INTRODUCTION

This is an appeal from the Fifth District Court of Appeal which determined that the arbitration requirement of §627.736(5) violates Article 1, Section 9, of the Florida Constitution. That statutory provision provides that every insurance carrier writing coverage for No-Fault benefits shall include a provision in its policy for the binding arbitration of any dispute involving medical benefits which arises between an insurer and any health care provider if that provider has agreed to accept an assignment of No-Fault benefits.

State Farm Mutual Automobile Insurance Company has moved for leave to file this amicus curiae brief on behalf of the Petitioners, Delta Casualty Company, Nationwide Mutual Fire Insurance Company, and Bankers Insurance Company.

Throughout this brief, the Petitioners will collectively be referred to as "the insurers" or "the insurance carriers." The Respondents, Pinnacle Medical, Inc. and M & M Diagnostics, Inc. will be referred to as the "health care providers."

All emphasis throughout this brief will be supplied by the writer unless otherwise indicated.

## POINT ON APPEAL

WHETHER AN ACT REQUIRING BINDING ARBITRATION OF DISPUTES OVER MEDICAL BENEFITS BETWEEN AN INSURER AND A HEALTH CARE PROVIDER VIOLATES A HEALTH CARE PROVIDER'S DUE PROCESS RIGHTS GUARANTEED BY ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

## SUMMARY OF ARGUMENT

It seems difficult to understand why health care providers supplying medical services under the Florida No-Fault Law should eschew arbitration in order to subject a dispute over their medical bills to the vagaries of litigation.

Florida has long favored arbitration over litigation as a means of dispute resolution. Arbitration is desirable because it ensures a convenient and efficient forum for the expeditious resolution of disputes. It is almost always quicker, more efficient, and more economical than formal litigation.

The health care providers, however, have attacked the statutory provision requiring arbitration where an assignment of benefits has been taken as denying their due process right to litigate their claims in court.

When one examines why such an attack would be made on such a favored means of dispute resolution, one need look no further than the provision concerning attorney's fees. Under the arbitration provision of the No-Fault Act, attorney's fees are available to the "prevailing party." This differs from the attorney's fee provision available to an insured under §627.428, Fla. Stat. That provision allows for attorney's fees only where the c*laimant* prevails. Under the arbitration provision attacked here, attorney's fees are a potential for *either party.*

The legislature has broad discretion in legislating insurance matters. The "business of insurance" is imbued with a great public interest in this state and is, accordingly, subject to the legislature's reasonable regulation under its police power. When it enacted the arbitration provision at issue here, the legislature was operating well within its defined ambit.

Health care providers argue that the Act *imposes* upon them an unwanted requirement for mandatory arbitration. This is not the case, however. The No-Fault Act allows payment to be made directly to a health care provider by an insurance company, without formal assignment, if the patient countersigns the invoice, bill, or claim form which is submitted for payment. This is an alternate means by which a health care provider can insure that its charges are paid directly without having to

subject itself to the argued “entanglements” of an arbitration process.

Since the execution of an assignment, then, is completely voluntary on the part of the health care provider, there can be no constitutional inhibition to asking those health care providers who agree to it, to arbitrate disputes involving their medical bills.

Accordingly, the District Court below was wrong in declaring the arbitration provision of the Florida No-Fault Act unconstitutional. That decision should be reversed.

## ARGUMENT, POINT ON APPEAL

### I. ARBITRATION

Given the relative ease and simplicity of the process, it is difficult to understand why a party to a civil dispute would eschew arbitration in order to subject that dispute to the vagaries of litigation.

The public policy in Florida favors arbitration over litigation as a means of dispute resolution. *Roe v. Amica Mutual Insurance Company*, 533 So.2d 279 (Fla. 1988); *Oppenheimer & Co. v. Young*, 456 So.2d 1175 (Fla. 1984); *Intercostal Ventures Corp. v. Safeco Insurance Company*, 540 So.2d 162 (Fla. 4th DCA 1985). Arbitration is desirable because it ensures “the availability of a convenient and efficient forum for the expeditious resolution

of disputes." *Koch v. Waller & Co., Inc.*, 439 So.2d 1041, 1043 (Fla. 4th DCA 1983).

As the *Koch* Court noted,

> Indeed, "[s]peed is one of the great advantages of commercial arbitration." *Necchi Sewing Machines Sales Corp. v. Necchi, S.p.A.*, 369 F.2d 579, 582 (2nd Cir. 1966). To achieve this end, most states have enacted statutory schemes which regulate arbitration and guarantee due process. "Arbitration laws are passed to expedite and facilitate the settlement of disputes and avoid the delay caused by litigation." *Radiator Specialty Co. v. Cannon Mills, Inc.*, 97 F.2d 318, 319 (4th Cir. 1938).
>
> At page 1043.

In the cases at bar, disputes have arisen between health care providers and No-Fault insurance carriers over the reasonableness of the bills submitted for payment under the No-Fault Act.

With the arbitration provisions of the Act, the legislature has established a swift and expeditious means by which these disputes can be determined without resort to litigation.

Indeed, where the issues are straightforward, involving only whether a bill is either unreasonably excessive or unrelated to a car accident, arbitration can decide the matter quickly, within days or weeks. In those unusual occasions where the issue is more complex, the Florida Arbitration Code

provides for appropriate discovery, including depositions. §682.08, Fla. Stat. (1997).

By all objective standards, it would appear that arbitration rather than litigation would be favored by the parties. If one looks to the provisions involving attorney's fees one may sense why medical care providers, and their attorneys, favor the lengthy, often ponderous, and relatively expensive process of formal litigation. One of the arguments made on behalf of the health care providers below for striking the arbitration provision was that these providers, and their attorneys, would not "enjoy" the benefits of §627.428(1), Fla. Stat. This statute allows for attorney's fees only for a prevailing *claimant*. The arbitration provision allows for attorney's fees to be available to the "prevailing party." As such, attorney's fees under the latter provision are a potential for *either party* and could run "both ways".

## II. THE LEGISLATION

It is apodictic that the "business of insurance" is affected with a great public interest and, as such, is subject to the legislature's reasonable regulation under its police power. *Springer v. Colburn*, 162 So.2d 513, 514 (Fla. 1964). The courts have long given the legislature wide discretion in legislating insurance matters. *Dealer's Insurance Co., Inc. v. Jon Hall Chevrolet Co., Inc.*, 547 So.2d 325, 326 (Fla. 5th DCA 1989). In enacting the arbitration provision of the No-Fault Act, the legislature was operating within this well-defined ambit.

The legislation here is obviously an attempt to both reduce court congestion and to expedite the resolution of disputes arising between an insurer and a health care provider under the No-Fault Act by requiring arbitration of these matters. It provides, in part, that

> 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), Fla. Stat.

The Court below felt that this provision violated the health care providers' right to due process by substituting arbitration for litigation. It has been written, though, that

"due process is flexible and calls for such procedural protections as a particular situation may demand." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d 484 (1972), as cited in *Agency for Healthcare Administration v. Associated Industries of Florida, Inc.*, 678 So.2d 1239, 1251 (Fla. 1996). The essence of due process is that fair notice and reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbetts v. Olson*, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law "that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties." *Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990).

Certainly it is too late in the day to espouse the conclusion that arbitration proceedings, sanctioned under the Florida Arbitration Code, do not meet constitutional requirements of procedural due process.

The court below, however, felt that due process was denied the health care providers as a result of an arbitrary and discriminatory application of the arbitration provision to those seeking payment under No-Fault coverages. It reasoned that this arbitration provision was imposed on these providers without their prior consent. In its view,

> The medical provider's voluntary acceptance of an assignment of benefits does not mean that it voluntarily agrees to arbitrate. The arbitration requirement does not originate in any contractual agreement of the medical providers; it is imposed on the provider by statutory fiat. The compulsory nature of the arbitration requirement is not altered by pointing to the medical provider's option to reject assignments from insureds. Acceptance of such assignments may well be an economic necessity for the medical provider to engage in medical practice.

It must be kept in mind, however, that the arbitration process is imposed only upon those health care providers who *voluntarily* have their patients execute an assignment of benefits. Only by so doing do they bring themselves within the provisions of the law.

The language of the lower court's decision implies that medical providers are *required* to accept an assignment of benefits in order to get paid. This is not so. A medical provider can be paid directly by an insurance company, without taking an assignment,

> If the insured receiving such treatment or his or her guardian has countersigned the invoice, bill, or claim form approved by the Department of Insurance upon which such charges are to be paid for as actually having been rendered, to the best knowledge of the insured or his or her guardian.
>
> §627.736(5), Fla. Stat.

This is an alternate means by which a health care provider can insure that its charges are paid directly without having the patient execute an assignment. If a health care provider, then, did not wish to subject itself to mandatory arbitration under the Florida No-Fault Act, it could simply have its patients countersign its bill, invoice, or claim form. In any event, this provision of the No-Fault Act clearly gives the health care provider the option to seek payment directly from the insurance carrier without having to involve itself in the "entanglements" complained of by the providers in this action.

## III. DUE PROCESS

"Those who assert the unconstitutionality of a statute have the burden of showing that beyond all reasonable doubt the statute inevitably conflicts with some designated provision of the constitution." *Tibbetts, supra,* at pages 686-687. It is suggested that neither the court below nor the providers in this matter have demonstrated that, *beyond all reasonable doubt*, this provision is unconstitutional.

In *Lasky v. State Farm Mutual Automobile Insurance Company*, 296 So.2d 9 (Fla. 1974), this Court examined the No-Fault Act to determine whether or not it violated due process. On that occasion, this Court utilized a "reasonable relation" test to determine whether the Act comported with due process requirements. In order to judge the Act under this test, this Court examined the objectives of the legislature to determine whether the provisions of the Act bore a *reasonable relation* to those objectives. In so doing, this Court was careful not to concern itself with the wisdom of the legislature in choosing the means to be used, or whether the means chosen in fact accomplished the intended goal. The concern was merely with the constitutionality of the means chosen.

Here arbitration was chosen by the legislature as a means to provide a quick and expeditious alternative to litigation in determining disputes over medical bills submitted under the No-Fault Act. This lessens court congestion and eliminates the presence of unnecessary parties to the dispute (*i.e.,* the insured). The process is streamlined in order to ensure that these disputes can be handled quickly and economically. Nothing in this statutory scheme deprives the health care provider who wishes *not* to be a part of the procedure of its right to resort to the courts to seek payment from the insured directly.

In summary, under the statutory scheme as enacted, a health care provider who wishes to receive payment directly from an insurance carrier may do either of two things: first, it may ask the patient to countersign its bill, invoice or claim form before submitting it for payment; or, it may take a formal assignment from the patient in order to make claim directly on the patient's insurance carrier. It is only the health care provider who accepts the formal assignment who agrees to participate in arbitration. There is no constitutional impediment in requiring those providers that opt for an assignment to arbitrate their disputes as an alternative to litigation.

## CONCLUSION

The arbitration provisions of §627.736(5), Fla. Stat. (1997) are constitutional, do provide due process, and do not establish unconstitutional classifications. As such, the lower court's decision that the statute is unconstitutional should be reversed. This Court should determine that the statutory scheme enunciated by the legislature is constitutional in all respects.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on February 4, 2000, to **BRIAN D. DEGAILLER, ESQ.**, Litchford &

Christopher, P.A., P.O. Box 1549, Orlando, Florida 32802, Tel: (407) 422-6600; **CLAY W. SCHACHT, ESQ. and CHRISTOPHER S. REED, ESQ.**, Jack, Wyatt, Tolbert & Turner, P.A., P.O. Box 948600, Maitland, Florida 32794-860, Tel: (407) 660-1818; **TRACY RAFFLES GUNN, ESQ.**, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P.O. Box 1438, Tampa, Florida 33601, Tel: (813) 228-7411; **HARLEY N. KANE, ESQ.**, Greenspan & Kane, 301 NE 51st Street, Suite 3160, Boca Raton, Florida 33431-4929; **MARK TISCHHAUSER, ESQ.**, 3134 North Boulevard, Tampa, Florida 33603-5542.

**JAMES K. CLARK & ASSOCIATES**
SunTrust International Center,
Suite 1800
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 416-2200
Florida Bar No.: 161123

By:_____
**JAMES K. CLARK**
Attorney for Amicus Curiae
State Farm Mutual Insurance
Company