IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NOS.: 94-494
94-539

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

Appellants,

vs.

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

Appellees.
_______________________________________/

ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT
DUVAL COUNTY, FLORIDA

**ANSWER BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS
AS AMICUS CURIAE ON BEHALF OF APPELLEES,
M&M DIAGNOSTICS, INC. and PINNACLE MEDICAL, INC.**

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APPELLEE'S FONT CERTIFICATION

Appellee hereby certifies that this brief has been prepared in a proportional font using 10 point print.

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PRELIMINARY STATEMENT

The Academy of Florida Trial Lawyers will be referred to as "The Academy" and the remaining parties will be referred to as indicated in the Answer Brief of PINNACLE MEDICAL, INC.

STATEMENT OF THE CASE AND FACTS

The Academy adopts the Statement of the Case and Facts as set forth in the Answer Brief of PINNACLE MEDICAL, INC.

SUMMARY OF ARGUMENT

A person injured in an automobile accident in Florida is restricted in their right to seek legal redress from a responsible tort feasor. This restriction has been upheld by this Court in great part because the same No-Fault Statute gave to an accident victim the right to prompt, speedy, and assured medical benefits without proving fault.

The original statutory plan, however, has been so modified by the legislature and so interpreted by the Courts that the benefits being given in exchange for the loss of these common law rights are becoming more and more illusory.

In 1990, the legislature amended the No-Fault law to require that medical providers who take an assignment of insured victims rights to personal injury protection would have to submit to mandatory binding arbitration to resolve any claims against the insurance company. This amendment not only affects the medical care providers themselves, but also substantially alters the rights of the insured victims.

From the viewpoint of the medical providers, this amendment violates their rights to due, process, equal protection, and access to Courts, while from the viewpoint of the insured victims, it seriously erodes the benefits that were given in exchange for the loss of rights.

ARGUMENT

THE MANDATORY ARBITRATION REQUIRED OF A MEDICAL PROVIDER ASSIGNEE UNDER NO-FAULT IS NOT SUCH A BENEFIT AS TO SUPPORT A DENIAL OF DUE PROCESS, EQUAL PROTECTION, AND ACCESS TO COURTS.

This Court originally upheld the constitutionality of the Florida Automobile No-Fault Law[1] (hereinafter "No-Fault") in Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974). In doing so, this Court found that No-Fault passed constitutional muster in great part because it contained reasonable trade-offs between rights granted under No-Fault and common law rights taken away. The Amendment under review herein, seriously erodes the rights originally granted and is an unconstitutional violation of the right to due process, equal protection, and access to Courts. Thus, it is important to note not only how mandatory arbitration effects the medical provider, but also how it effects the insured victim.

HISTORICAL AND PRACTICAL ANALYSIS

The original No-Fault act, as noted numerous times by this Court in Lasky, provided for the "speedy", "prompt", and "assured" payment of the insured victim's medical expenses in exchange for the insured victim's loss of certain common law rights to seek judicial redress from the tort feasor. The practical effect of the 1990 Amendment to the No-Fault Act requiring mandatory binding

[1] Sections 627.730-627.7405, Florida Statutes.

arbitration of claims by medical provider assignees is to jeopardize such speedy, prompt, and assured payment of medical benefits.

The original No-Fault Act provided great incentives for insurance carriers to pay promptly without unreasonable contest. They had to pay claims within thirty (30) days of presentation, they were subject to a ten percent (10%) penalty if they did not, and the insurance company alone (not the insured) could be assessed reasonable attorney's fees if they did not pay a valid claim within the thirty (30) day period. These incentives had the affect contemplated by Lasky.

As originally set forth in the No-Fault Act, medical care providers would provide treatment in covered cases because they could be assured that they could make the claims directly (by way of assignment) and thus, control the progress of the claims and if the claims were not paid, either they or the insured victims could pursue the insurance carrier (usually in small claims court) without fear of having to pay the insurance carrier's attorney's fees should they be unsuccessful. This procedure would have been important to medical care providers for many reasons not the least of which was because they could not necessarily control whether or not the personal injury protection benefits were in fact due. §627.736(2), Florida Statutes, provides numerous reasons for non-payment, which would be outside the knowledge or control of the

medical care provider. Thus, if there was a valid defense by the insurer that the medical care provider was unaware of (i.e. for instance, unauthorized use of the motor vehicle), the medical care providers would not be subjected to the exposure of the assessment of attorney's fees in trying to pursue medical benefits that it had innocently and legitimately rendered. It would just not get paid by the carrier.

Under the present statutory scheme, if it is upheld, the medical care provider would be extremely reluctant to provide medical services without payment in advance. This, in and of itself, defeats one of the required trade-offs as discussed in Lasky. In fact, judicial decisions since Lasky and other amendments to the No-Fault Act, call into question whether the insured victim is today receiving any real benefits in exchange for the loss of the aforesaid common law rights. A review of some of these decisions and amendments points out this erosion.

Under the present No-Fault Act, as judicially interpreted, insurers are allowed to provide for a $2,000.00 deductible. The total personal injury protection benefits top out at $10,000.00. Without an assignment to a medical care provider, which could be enforced in Court without the fear of being assessed attorney's fees, medical care providers would be reluctant to front the original $2,000.00 and would be likely to require payment in advance. This is not speedy, prompt, and assured payment of

insured victim's medical expenses. Further, pursuant to this Court's ruling in Hannah v. Newkirk, 675 So.2d 112 (Fla. 1996), the insured victim is denied the right of recovery of this deductible from the tort feasor. The likely affect of this decision when viewed in light of required arbitration is that the insured victim with a deductible will likely go untreated because many cannot afford the initial care and the medical provider will not front the expense.

This continued erosion of rights also violates the principals as set forth by this Court in Kluger v. white, 281 So.2d 1 (Fla. 1973). In Kluger, this Court expressed its rationale in invalidating one section of No-Fault, which is as true today as it was then:

> "We hold therefore 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 pursuant to Florida Statutes, Section 2.01 FSA, 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 overpowering public necessity for the abolishment of such a right and no alternative method of meeting such public necessity can be shown." Kluger, pg. 4.[2]

[2] It is very difficult to reconcile Kluger with Hannah. This Court in Kluger invalidated what was in effect a property damage deductible (actually called a threshold) because the No-

There is no valid reason why an insured victim should be treated any differently from his/her assignee. Conversely, there are valid reasons why medical care providers should not be subjected to the arbitration requirement.

First, §627.736(5), Florida Statutes, provides only the broadest of instruction as to how the arbitration is to take place. It provides in part as follows:

> "Every insurer shall include a provision in its policy for personal injury protection benefits for binding arbitration. In situations where the medical care provider has accepted an assignment of personal injury protection benefits."

This section further provides that:

> "The provisions of Chapter 682 relating to arbitration shall apply."

There are no guaranties in either statute as to limitations of time, the right to broad discovery allowed in civil actions, or control of expenses.

Secondarily, the specifics of arbitration are not prescribed in §682, and would, therefore, be set forth in the document drafted by and for the benefit of the insurance company (i.e. the policy).

Fault Act did not require the insured victim to have his or her own property damage insurance. The almost identical provision relative to the deductible of personal injury protection benefits was upheld in Hannah where the insured was not required to have insurance to cover the deductible and the insured victim was precluded from the recovery of that deductible from the tort feasor.

A policy or contract to which the medical care provider is not a party. The practical affect of this mandatory arbitration, should it be found to be constitutional, is that fewer and fewer medical care providers will either take an assignment of benefits or provide the necessary medical services without payment up front.

The petitioners counter this argument by indicating that the medical care provider can always avoid arbitration by signing an appropriate endorsement of the invoice or medical bill on a form approved by the Department of Insurance. This is an illusory option.

First, such an endorsement can only occur after the medical care provider had already provided the necessary medical service. If the insured victim, for whatever reason, questioned or challenged the bill, or just refused to endorse the bill, the medical provider will go unpaid. Thus, the medical provider would like to avoid this option.

Secondarily, given the complexity of todays medical services and supplies (MRIs, x-rays, and lab work) the total amount of the bill may not be known for some time after the services are provided.

Finally, as to this perceived option, there is nothing in the statute which indicates that the medical care provider could enforce payment on an endorsed invoice. In other words, if the medical care provider endorsed the invoice, could it later sue when

it was not paid or would that be up to the insured themselves. Once again, the medical care provider is looking to be paid and quite appropriately so, but the incentives of the insurance company to do so has been significantly reduced.

Each of the obstacles placed in the path of speedy, prompt, and assured medical payments benefits the insurance companies at the expense of the insured victims. Once again, the guarantee of prompt, speedy, and assured payment of medical benefits is being eroded.

This erosion is further demonstrated by an analysis of other decisions of this Court dealing with the No-Fault Act.

In Mansfield v. Rivero, 620 So.2d 987 (Fla. 1993) this Court held that an insured victim who had been awarded medical benefits by a jury in a trial against the tort feasor, nonetheless would have the amount of available personal injury protection benefits deducted as a set-off even though the insurer had refused to provide such benefits. In such a situation, if the insured victim had not assigned benefits, the insured victim would at least have the same right to have a jury decide his claim against the insurer and to be awarded reasonable attorney's fees. Conversely, if that insured victim had assigned its rights, the medical provider would lose the right of such a determination in Court and expose itself to reasonable attorney's fees. Only the insurance companies and the tort feasors benefit from such a scenario.

Along this same line, in Rollins v. Pizzarelli, 1999 WL 52009 (Fla. 1999) this Court held that future PIP benefits neither accrued nor paid at the time of a verdict awarding future medical benefits would be set-off against a tort feasor verdict. Thus, an insured victim who has a present verdict for future medical benefits would have that verdict reduced, but at least when he/she incurs the medical expense in the future, he/she has the same judicial system to look to to ensure that the PIP carrier pays the benefits and pays attorney's fees if it does not. Conversely, the assignee of the PIP benefits has no such assurances and will be depending upon a totally different system (i.e. arbitration of such future benefits) and will be exposed to the possibility of an award of attorney's fees.

It is a matter of common knowledge that more and more insurance carriers are selling automobile insurance based upon mass media advertising and competitive quotations of rates. These policies are sold with the promise that they contain "required", "mandated", or "legal" coverage. In truth, they contain the absolute minimum allowed benefits. To obtain the lowest rates, the policies also generally contain the $2,000.00 deductible and the insureds seldom have other insurance to cover the deductible. This reality taken in context with the decisions noted previously and coupled with the mandatory arbitration by the medical provider assignee will have the result that fewer and fewer insured victims

will seek medical care at all and that fewer and fewer medical providers will be willing to provide "prompt", "speedy", and "assured" medical services.

REQUIRING MEDICAL PROVIDERS TO ARBITRATE ASSIGNED CLAIMS VIOLATES THEIR RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND ACCESS TO COURTS.

The right of an assignee in contract to have access to the Court for enforcement of that contract pre-dates the Florida Constitution and has become a part of the common law of this State. Spears v. West Coast Builder's Supply Co., (101 Fla. 980) 133 So. 97 (Fla. 1931). Thus, pursuant to the previously quoted passage from Kluger, the legislature is without power to abolish this access to Courts without providing a reasonable alternative to protect the rights of medical providers to redress their claims, unless the legislature can show an overwhelming public necessity for the abolishment of such a right.

In the instant case, the legislature has not stated any public necessity requiring that medical providers be denied their existing rights to access to Courts.

In addition, the alternative is not reasonable this is amply demonstrated by the preceding historical and practical analysis. The arbitration called for in No-Fault is neither guaranteed to be cheaper, more expedient, or fairer than the normal judicial process. If, as argued by the Petitioners, "Arbitration" is in and of itself, enough of a benefit to justify taking away one's access

to Court, then it could be done in every instance. The arguments of the Petitioners would be just as true to all tort victims and if arbitration in and of itself is a significant enough "benefit" in exchange for the loss of access to Courts, then the legislature would be free to do it at will. Such is not the case.

The requirement for mandatory binding arbitration under the No-Fault statute, discriminates between two (2) classes of litigants:

(1) Medical providers who accept assignment[3]; and

(2) Everyone else.

Nowhere has the legislature set forth any reason for such discrimination. The Petitioners address this issue by noting that arbitration is favored and that it can be quicker, cheaper, and more efficient. Once again, if this were a sufficient benefit by itself, the legislature would be authorized to do it in any instance and to take away anyone's access to Court.

In addition, if this were truly the case, why do the medical providers want to avoid arbitration and conversely, why do the insurance companies want it? The reason should be clear, the incentives for prompt, speedy, and assured payment have been eliminated with this mandatory binding arbitration. No matter how the insurance companies couch their argument, that is their desired

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[3] Actually there is a further discrimination as the rights of each medical provider will vary depending upon the specific arbitration language in the insurance policy.

effect, i.e. getting rid of those very incentives.

The Petitioners argue that mandatory binding arbitration does not violate the medical providers right to substantive due process because "it simply shifts the venue for determining entitlement to such benefits from a Court to an arbitration proceeding". For this to be true, taking away ones access to Court and taking away ones constitutionally guaranteed right to a jury trial and replacing it with arbitration would never be a violation of a substantive due process. Substantive due process is violated when a statute does not bear a reasonable relationship to a permissible legislative objective and is discriminatory, arbitrary, or repressive. Lasky, Supra.

No where did the Petitioners argue and hopefully, they would not, that the No-Fault scheme could be broadened to require arbitration by the insured victims. If it could not be required of the insured victims, how can it be in the State's legitimate interest to require it of the medical provider? The rights involved here are substantive rights not withstanding the arguments of the Petitioners.

Further, the mandatory binding arbitration called for in the No-Fault Act has significant procedural due process failings.

First, as demonstrated by the argument in the Historical and Practical Analysis, the statute gives only the broadest indication of how the arbitration is to occur and leaves much to the whims and

caprices of the insurance policies as drafted by the insurance companies.

Secondarily, the confusion among the various courts as to whether or not the statute even requires mandatory binding arbitration points out of the lack of consistency and equality of treatment among the various medical care providers within the State. See Physicians Diagnostics and Rehab, Inc. v. Progressive Casualty Insurance Co., 4 FLW 509C (17th Cir. 1996); Fortune Insurance Company v. American Spine & Pain Rehabilitation Institute, 4 FLW Sup. 632(b) (13th Cir. 1996); Advanced Orthopaedic Institute v. Bankers Insurance Co., 3 FLW Sup. 673 (13th Cir. 1995).

As with access to Courts and due process, mandatory required arbitration also fails the equal protection test guaranteed by Article 1, Section 2 of the Florida Constitution. In order for statutory classifications and distinctions, granting or denying rights to different individuals or entities to pass the equal protection tests they must be rationally related to object of its legislation. Ocala Breeders Sales Company, Inc. v. Florida Gaming Centers, Inc., 19 WL 105106 (Fla. 1st DCA 1999), Hialeigh Race Course, Inc. v. Gulf Stream Park Racing Assoc., 245 So.2d 625 (Fla. 1971).

There is nothing express in the Florida No-Fault Act nor implicit in its operation which indicates that discrimination

between the rights of an insured victim and a medical care provider bears any reasonable relationship to the object of the No-Fault Law. In Fact, as is demonstrated by the Historical and Practical Analysis, the very opposite is true. The effect would be to deny, speedy, prompt, assured payment of medical benefits.

CONCLUSION

There is no rational basis to discriminate between the rights of a medical provider who has accepted an assignment of an insured victims rights and the rights of insured victims who did not give such assignments. Conversely, the objectives of Florida's No-Fault Law would be dis-served by such a distinction.

Given the body of Florida's No-Fault Law, both statutory and judicial, the requirement for mandatory binding arbitration will so erode the benefits that this Court found critical to constitutionality in Lasky as to render them meaningless. Accepting the interpretation urged by the Petitioners will result in the fact that those who can just barely afford the most minimum of automobile insurance will not get speedy, prompt, and assured medical benefits. This should not be allowed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing answer brief has been furnished by U.S. Mail this ____ day of March, 1999, to **Brian D. Degailler, Esquire**, Litchford & Christopher, P.A., Post Office Box 1549, Orlando, Florida 32802, **Clay W. Schacht, Esquire**, Jack, Wyatt, Tolbert & Turner, P.A., Post Office Box 948600, Maitland, Florida 32794-8600, **Christopher S. Reed, Esquire**, Jack, Wyatt, Tolbert & Turner, P.A., Post Office Box 948600, Maitland, Florida 32794-8600, **Harley N. Kane, Esquire**, Greenspan & Kane, P.A., and **Mark Tischhauser, Esquire**, 3134 North Boulevard, Tampa, Florida 33603.

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