In the

SUPREME COURT
OF THE STATE OF FLORIDA

Case No: 94,539 and 94,494

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

Appellants

v.

PINNACLE MEDICAL, INC.
and
M&M DIAGNOSTICS, INC.

Appellees

Appeal of the Decision Rendered by
The Fifth District Court of Appeal

AMENDED ANSWER BRIEF OF M&M DIAGNOSTIC, INC.

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Appellee's Font Certification

The Appellee, M&M Diagnostic, Inc. hereby certifies that the font used in this Appellate Brief is 14 point, proportionately spaced Arial.

Terms & Conventions

In the following brief certain conventions have been followed to allow for more coherent reading:

(1) The term "he" has been used a gender neutral term.

(2) The "insurance carriers" refers to the Appellants collectively

(3) "Delta" or "Delta Casualty" refers to Delta Casualty Insurance Company

(4) "Bankers" refers to Banker's Insurance Company.

(5) "Nationwide" refers to Nationwide Mutual Fire Insurance Company.

(6) Florida Statute section 627.736(5) is often referred to as the "PIP or No-Fault Statute"

(7) References to "PIP Arbitration" refer to the provisions of Florida Statute section 627.736(5) and Florida Statute Chapter 682.

Statement of Case & Facts

The Appellee, adopts the statement of case and facts set forth in the brief of Co-Appellee, Pinnacle Medical, Inc., in order to minimize unnecessary repetition.

Summary of the Argument

The arbitration portion of Florida Statute 627.736(5) can be construed in a constitutionally acceptable fashion as the plain language of the statute states that an insurance carrier is merely obligated to provide a binding arbitration provision in each PIP insurance policy. This is consistent with the public policy of encouraging the use of alternative dispute resolution measures as a means of allowing parties to resolve their claims as fairly and efficiently as possible. It is only upon extending the construction of this section to impose mandatory binding arbitration upon the parties that the legislatures pronouncement becomes constitutionally infirm.

If this court feels compelled to construe the arbitration provision of Fla. Stat. section 627.736(5) as mandating binding arbitration, there are a number of constitutional defects that emerge in the legislature's scheme. First, the health care provider is improperly denied access to the Florida

Courts and to a trial by jury for the resolution of disputes with the insurance carrier. The arbitration process, as designed in section 627.736(5), is not a fair substitute for the litigation process as it provides few benefits and many catastrophic disadvantages for the health care provider.

Second, equal protection guarantees are violated as the disparate treatment associated with the arbitration process are focused, not on the rights at issue, but merely upon identity of the parties. This classification is clearly arbitrary as the insured is permitted to litigate the exact same issues and rights while a health care provider, who obtains those very rights by an assignment of benefits is barred from the courtroom, forced to arbitrate and is subjected to a devastating attorney's fee provision. Ironically, non-health care providers such as factoring and collection companies that accept such assignments would be immune from an obligation to arbitrate as would a health care provider who uses a different legal vehicle to obtain standing such as a power of attorney or an assignment of the insured's cause of action against the insurance company.

Third, due process guarantees also wilt under the heat of constitutional scrutiny as the provisions of section 627.736(5) create a "wild west" legal environment where no party can be sure of even basic

parameters such as burden of proof and evidentiary standards, applicability of legal precedent, consistent rulings from case to case as the rule of law is foreclosed by “panel shopping” and the security of effective appellate review to ensure justice and equity is stripped away. It is not enough that the legislature merely provide notice and an opportunity to be heard as urged by the insurance carrier appellants in this matter. Medical providers should be provided meaningful notice and an opportunity to be heard and this is more than merely granting those that may be legislatively condemned the chance to cry out in pain or anger with little or no hope of help or redemption.

Argument

I. THE ARBITRATION PROVISION OF FLORIDA STATUTE SECTION 627.736(5) CAN BE CONSTRUED TO BE CONSTITUTIONAL IF THIS COURT CONCLUDES THAT THE PROVISIONS OF THAT SECTION CREATE AN ELECTIVE ARBITRATION PROCESS AS OPPOSED TO A MANDATORY ONE.

(A) Elective binding arbitration avoids any constitutional conflict issue.

This court has long accepted the proposition that when a statute can be interpreted in a manner which upholds its constitutionality, a court is obligated to adopt such an interpretation rather than declaring the statute unconstitutional. Department of Insurance v. Southeast Volusia Hospital District, 438 So. 815 (Fla. 1983). Florida law is equally clear that when a statute is clear and unambiguous the courts should construe the statute as drafted without interpretation and should refrain from speculation as to legislative intent. Holly v. Auld, 450 So. 2d 217 (Fla. 1984); Pearlstein v. Malunney, 500 So. 2d 585 (Fla. 2d DCA 1986);Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779 (Fla. 1st DCA 1960); Florida jai Lai, Inc. v. Lake Howell Water & Reclaimation Dist., 274 So. 2d 522 (Fla. 1973). As Judge Whittemore astutely noted in Advanced Orthopedic Insitutute v. Bankers Insurance Company, 3 Fla. Law. Weekly Supp. 673 (13th Judicial Circuit, June 30th 1995), the first appellate case to address this issue, Florida

Statute section 627.736(5) does not mandate that binding arbitration occur, it merely requires that provisions for such a process are provided for in the insurance policies at issue. Florida Statute section 627.736(5), as amended in 1990, reads as follows:

> " ... 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 an insurer and any person providing medical services or supplies if that person has agreed to accept assignment of personal injury benefits. The provision shall specify that the provisions of chapter 682 shall apply. The prevailing party shall be entitled to attorney's fees and costs."

While this may be a subtle distinction, it is an important one that is oft overlooked or overshadowed by the binding nature of the elective arbitration process. State Farm Mutual Automobile Insurance Company v. Gonella, 677 So. 2d 1355 (Fla. 5th DCA 1996) (court stated in dicta that legislative intent was to compel mandatory binding arbitration, this same court is the court that held the arbitration provision of Florida Statute section 627.736(5) unconstitutional due to the mandatory nature of same.) An interpretation that the binding arbitration process is elective is clearly consistent with the public policy of the State of Florida of promoting the use of alternative dispute resolution (ADR) methods as a means of achieving legitimate state goals such as relieving congestion in the court system

while providing as many voluntary options as possible for parties to resolve their differences. Roe v. Amica Mutual Ins. Co., 553 So. 279 (Fla. 1988); Beach Resorts International, Ltd., v. Clarmac Marine Construction Co., 339 So. 2d 689 (Fla. 2d DCA 1976).

In contrast, it has never been the policy of the State of Florida to promote ADR methods as a means to arbitrarily minimize the quality or quantity of justice available to its citizens. This is evidenced through the plethora of voluntary or non-binding ADR methods such as mediation, non-binding arbitration, or limited binding arbitration. A voluntary binding arbitration process is also consistent with the terms of Florida Statute section 682.02 which is specifically incorporated into the PIP arbitration process. Florida Statute section 682.02 essentially reads as follows:

> "Two or more parties *may* ... include in a written contract a provision for the settlement by arbitration of any controversy arising between *them* relating to such contract."

The language of Florida Statute section 682.02, clearly contemplates an agreement in writing between the parties sought to be bound to arbitration. More importantly the use of the word *may* indicates the elective nature of that process. As Florida Statute section 682.02 is specifically incorporated into Florida Statute section 627.736(5), this court should

conclude that the intent of the legislature was to provide an elective process through which medical providers could obtain rights through the acceptance of an assignment of benefits and then agree in writing, if it chose to do so, with an insurance carrier to binding arbitration as an alternative to the litigation process. U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983). While the insurance carriers would have this court adopt an interpretation that mandates binding arbitration, such an interpretation would essentially create the only instance in Florida law where mandatory binding arbitration is legislatively imposed and such a reading directly contrasts the clear language of the statute. See for example, Fla. Sta. Sec. 766.106 (1997); Fla. Stat. sec. 44.103 (1997); Fla. Stat. Sec. 651.123(1997); Fla. Stat. 718.112 (1997); Fla. Stat. Sec. 718.1255 (1997); Fla. Stat. Sec. 719.106(1)(1) (1997).

(B) Medical providers do not elect arbitration merely by accepting assignment of benefits

In this vein, the insurance carriers have argued that by accepting an assignment of benefits a medical provider agrees to submit to the arbitration contemplated by Florida Statute section 627.736(5) and reiterate the flawed logic in Orion for support. To cure these flaws, the insurance carriers argue that a medical provider who accepts an

assignment of PIP benefits voluntarily agrees to arbitrate by the conduct of accepting an assignment of PIP benefits. While this assumption may initially have some appeal in a vacuum, reality easily intervenes to dispel the fallacy. One need look no further than the insurance policies filed in this case to illustrate the point as each insurance policy in this matter has vastly different provisions addressing the arbitration process and the parties respective obligations. These range from Delta Casualty's policy which merely recites the statutory language to Banker's policy which unilaterally sets out discovery provisions, more onerous prevailing party definitions, fee multiplier exclusions, claim exclusions and venue provisions, many in contravention to Florida common law. Arbitration agreements ordinarily require mutuality of obligation. R.W. Roberts Construction Co. Inc. v. St. Johns River Water Management District, 423 So. 2d 630 (Fla. 5th DCA 1982). Bearing in mind that third party medical providers have little or no access to the insurance polices at issue, one cannot legitimately state that a medical provider voluntarily agrees to engage in binding arbitration under the myriad of undisclosed terms and obligations associated with the various insurance policies merely by accepting an assignment of benefits from the insured. Parties should not be compelled to arbitrate matters they did not intend to arbitrate. Paine

Webber, Inc. v. Hess, 497 So. 2d 1323 (Fla. 3d DCA 1986). In essence there must be an agreement to be bound by the arbitration and to the nature of the dispute to be resolved by that method. Banker & Shippers, Ins. Co. v. Gonzalez, 234 So. 2d 693 (Fla. 3d DCA 1970). Given the wide variations, even within the insurance policies before this court, one cannot say that the medical providers assent to arbitrate the myriad of disputes that may arise under the unilateral terms set forth by the insurance carriers. Beyond strained reason, the insurance carriers ask this court to accept that the Florida legislature intended that insurance carriers be provided the ability to "shang hai" medical providers by duping them into an arbitration with rules and provisions that are unknown to them and which cannot be avoided because they have accepted an assignment of benefits.

Assignments of medical benefits serve a variety of purposes for medical providers, injured people and insurance carriers. They allow the physicians to deal directly with the insurance carriers, to defer payment obligations and avoid pre-payment with the insured being reimbursed, and secure the medical provider's collections which ensure that the physicians will be paid for their services. Most of the legal documents assigning such benefits are not PIP specific as many patients have a variety of collateral

payments sources such as medicare, medicaid, health insurance, etc. Even systems such as medicare require a specific election by a physician to accept an assignment of medicare benefits specifically as reflected in HCFA form 1500, block 27 with a specific disclosure as to the effect of that action. None of these circumstances exist to place a medical provider on notice of the results of such an election and a medical provider has no standing to compel such information absent accepting the very document which would, according to the insurance carriers, bind him regardless. A medical provider should be permitted to make a knowing election to engage in an arbitration process before being exposed to the various unilateral provisions of the multitude of insurance polices in existence.

(C) *Medical providers are incidental third party beneficiaries, and even if considered to be intended third party beneficiaries , would not be obligated to arbitrate any claim the insured is not obligated to arbitrate.*

Finally, the insurance carriers again attempt to defend the logic of Orion, by claiming that by taking assignments of benefits, the medical providers are third party beneficiaries and therefore are bound to arbitrate. There is little dispute that a medical provider can be a third party beneficiary to a PIP insurance contract, however, such a classification does not obligate a medical provider to arbitrate a claim. It is only upon

attaining the status as an intended third party beneficiary that a medical provider can be bound to arbitration as arbitration agreements are personal covenants. Federated Title Insurers, Inc. v. Ward, 538 So. 2d 890 (Fla. 3d DCA 1989); Karlen v. Gulf & Western Indus., Inc., 336 So. 2d 461 (Fla. 3d DCA 1976). The failing in the Orion, logic, however, is the disregarding of a basic tenet of contract law, the distinction between incidental and intended third party beneficiaries. When one reads Orion, it becomes clear that the court describes an intended third party beneficiary's obligations while using the generic term of "third party beneficiary." A third party beneficiary is one for who the intent of the contracting parties to primarily benefit. Roberts v. Lloyd, et. al., 685 So. 2d 102 (Fla. 4th DCA 1997); Tartell v. Chera, 668 So. 2d 1105 (Fla. 4th DCA 1996); Maryland casualty Co. v. State of Florida, Dept. of Gen. Serv., 489 So. 2d 57 (Fla. 2d DCA 1986). This would require a finding that the primary intent of the insured in purchasing a PIP policy to primarily benefit the medical providers as would the intent of the insurance carriers in selling same. Similarly, one expect to have found some legislative pronouncement to the effect that the purpose of the No-Fault Act was to resolve part of the health care crisis because medical providers required more security or payment for their services, a circumstance which clearly never occurred. This is clearly in contrast to the

legislative intent described by this court in Lasky, which was to ensure that people injured in accidents received medical care regardless of fault and were able to avoid the pitfalls of liability based litigation as condition of receiving that care. The insurance carriers contention would also violate the basic concept that insurance policies are predicated upon indemnification concepts where the insured is the primary beneficiary of both receiving medical care and reimbursement for same.

Further, to be an intended third party beneficiary, the class beneficiaries must be identifiable. In this instance, the only time the effected class becomes identified is after an assignment of the insured's rights has been made. This also creates the odd logic flow of the medical provider having no rights until he is assigned the rights of the insured , who should have no rights since the PIP contract would primarily be for the benefit of medical provider and not the insured. Ironically, by becoming a third party beneficiary, the medical provider actually receives far fewer rights, even after the insured assigns the full value of his or her remaining rights.

Even assuming that one could contort a medical provider into an intended third party beneficiary, he would not be obligated to engage in arbitration unless the insured would be similarly bound as arbitration

provisions are personal covenants. Federated Title Insurers, Inc. v. Ward, 538 So. 2d 890 (Fla. 4th DCA 1989); Karlen v. Gulf & Western Industries, Inc., 336 So. 2d 461 9Fla. 3d DCA 1976). This is also consistent with the requirements of Florida Statute Chap. 682 as incorporated into Florida Statute 627.736(5) which requires a written agreement between the parties sought to be bound by arbitration. Although a written contract exists between the insured and the insurance company, no such agreement exists between the medical provider and the insurer so as to satisfy the provisions of section 682.02. There is no authority within section 682.02 that permits parties to bind incidental or intended third parties to such terms.

II. IF THIS COURT DETERMINES THAT FLORIDA STATUTE SECTION 627.736(5) MANDATES BINDING ARBITRATION BETWEEN MEDICAL PROVIDERS AND INSURANCE COMPANIES, SECTION 627.736(5) FAILS A VARIETY OF CONSTITUTIONAL CHALLENGES.

A. *The provisions of Florida Statute section 627.736(5) violate the parties dues process rights in a variety of ways.*

(1) **Medical providers do have standing to raise constitutional arguments.**

The insurance carriers argue that a medical provider is not entitled to dispute the constitutionality of Florida Statute section 627.736(5) with respect to the arbitration provision. In support of this the insurance carriers cite to this courts opinion in Purdy v. Gulf breeeze Enterprises, 403 So. 2d 1325 (Fla. 1981). As set forth by the insurance carriers, Purdy, addresses issues that are associated with benefits owned by another. In the case at bar, however, the medical provider with an assignment of benefits is seeking collection of money owed directly to them as a matter of having the benefits assigned, having provided the services, and through the operation of Florida Statute section 627.736 (5) which allows for the direct payment of medical charges to the medical providers.

The most obvious distinction between the assertions cases such as Transcontinental Gas Pipeline Corp. v. Dakota Gasification, Co., 782 F.

Supp. 336 (S.D. Texas 1991), which the insurance carriers claim supports their argument, and the case at bar is, it is the rights of the medical providers that have been impaired, not the rights of the insured. There is no need to address the transferability of the constitutional challenge as the insured is never compelled to arbitrate and retains full access to the courts. More importantly, there is no case cited by the insurance carriers that suggests that one who holds an assignment, by operation of accepting an assignment, waives all of his or her constitutional rights.

(2) **The arbitration provision of Florida Statute section 627.735) is unconstitutionally vague and ambiguous and as a result, the arbitration provision of Florida Statute section 627.736(5) does not provide proper notice or a meaningful hearing as contemplated by Article I, section 9, of the Florida Constitution.**

On this issue the insurance carriers omit a fundamental portion of the holding set forth in Fuentes v. Shevin, 407 U.S. 67, S.Ct. 1983, 32 L. Ed. 2d 556, which they cite, and the multitude of similar cases on this black letter principle. Due process is not satisfied by merely providing notice and an opportunity to be heard. By omitting the word “meaningful” from the equation, the due process analysis proper to this case is turned on its head. Procedural due process is a flexible concept that calls for such protections as the situation demands. Morrisey v. Brewer, 408 U.S. 471 ,

92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). What due process may require in dealing with one set of interests may be different in another. Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). Although the courts are empowered to interpret ambiguities in legislative acts, they are not empowered to completely reconstruct statutory provisions when the legislature has failed in its task of providing clear directives for the citizens of Florida. Bill Smith, Inc. v. Cox, 166 So. 2d 497 (Fla. 2d DCA 1964). The United States Supreme Court has set forth an excellent test to determine when a statute s is ambiguous which is to examine the number of conflicting interpretations of the statutory language by the lower courts. Given the numerous, varied and conflicting interpretations, the ambiguity and vagueness is obvious. Cf. Advanced Orthopedic Institute v. Banker's Insurance Company, 3. Fla. Law Weekly Supp. 673 (13th Judicial Circuit, June 30th 1995); Omni Insurance Company v. Special Care Clinic, 708 So. 2d 314 (Fla. 2d DCA 1997); Physician's Diagnostic & Rehab., Inc., v. Progressive Insurance Company, Case No. 96-09408, (Fla. 17th Judicial Circuit, December 1996); Nationwide Mutual Fire Insurance Company v. American Spine Rehabilitation Institute, 5 Fla. Law Weekly Supp. 27 (13th Judicial Circuit, 1996); Fortune Insurance Company v. American Spine and Pain Rehabilitation Institute, Case No. 95-7053(A) (Fla. 13th Judicial

Circuit 1996); Costa v. Fidelity National Insurance, 4 Fla. Law Weekly Supp. 130. If the legally sophisticated minds of the various trial courts cannot agree upon the interpretation of Fla. Statute section 627.736(5) one must certainly conclude that the language used is to ambiguous to pass constitutional muster. Further, if any interpretation of the statute is undertaken by the courts, the arbitration provision should be liberally construed in favor of the medical providers and insureds. Palma v. State Farm Fire & Casualty Co., 489 So. 2d 147 (4th DCA 1986).

(A) The ambiguity and vagueness destroys any meaningful notice

In the case at bar, while the medical providers may be provided some notice and be entitled to a hearing, the nature of these events renders them meaningless rather than meaningful. As illustrated previously, the legislature has essentially delegated the obligation of including binding arbitration language to the insurance companies. First, there are a number of definition difficulties that prevent medical providers and insurance carriers from truly understanding their respective obligations and the applicability the arbitration provisions of section 627.736(5). Prime examples of these crucial terms are “medical provider”, “claims dispute”, and “assignment of PIP medical benefits.”

Florida Statute section 458.305(3) specifically defines the practice of

medicine and this excludes chiropractors, who are licensed under section 460.403(3)(a), pharmacists, who are licensed under section 465.003(12), and dentists, who are licensed under section 466.003(3). This also would not include the Appellee, who is an unlicensed technician who provides only a technical service from a prescription much like a medical equipment supplier does. The term “medical provider” creates unreconcilable confusion as to the identity of the affected entities unless one assumes that the legislature intended to affect any practitioner of the healing arts. It is inaccurate, however, to extend such an assumption as the legislature has opted for the term “health care provider” when referencing to practitioners of the healing arts in a general sense as exemplified in Florida Statute section 766.101(1)(a)(2)(b), where a clear definition was provided showing that intent.

Similar problems arise with the term “claims dispute.” There is no guidance as to what constitutes a claim, let alone when a claim is disputed for the purposes of imposing binding arbitration upon the parties and raises many questions which cannot be answered consistently such as whether an insurance carrier’s mere lack of timely payment is a “dispute” or whether a prospective refusal to pay as a result of an IME is claim when no charges are yet at issue? Given the lack of definition, it is possible for an

insurance carrier to tender a reduced payment, declare a dispute and demand arbitration and then seek fees as a prevailing party even if the medical provider accepted the reduced value as the demand for arbitration sets the clock ticking under the prevailing party fee standard. State Farm Mutual Automobile Ins. Co. v. Gonella, 677 So. 2d 1355 (Fla. 5th DCA 1996). While admittedly extreme, this circumstance is clearly plausible and would have a devastating chilling effect on medical providers. Again, one need only look at the insurance policies before this court to understand the point as Banker's contends that an "IME termination" is not a claim subjected to arbitration while such "claims" are arbitrable under the other two policies.

The courts have also struggled with ambiguities over the nature of "an assignment of PIP benefits." As exemplified in Orion, the court concluded that what it described as a "directive to pay" was an assignment of benefits. A "directive to pay" actually assigns no rights, but is merely instruction from the insured to the insurance carrier that benefits are to be paid directly to medical provider, a process recognized by section 627.736(5), yet that court considered same to be an assignment. Similar disputes are common regarding the use of powers of attorney (which assign no benefit rights merely decision making ability), assignments of

causes of action (which assign an entire cause of action), or variations of same, all of which assign various rights of the insured to other entities.

Finally, the provisions of Florida Statute section 682.02, as recited above, provide additional support that for a medical provider to be bound to arbitration there would need to a be a written document between the medical provider and the insurance company to support such an election. Clearly, if the medical provider was a party to such an agreement, he would be bound by the terms of the arbitration. Without such a document, Florida Statute section 682.02 would suggest that any arbitration imposed upon a medical provider would be invalid. Wiggs & Maale Construction Co. v. Stone Flex, Inc., 263 So. 2d 607 (Fla. 4th DCA 1972).

(B) The ambiguities and vagueness destroy any meaningful hearing

Similarly, there is no meaningful hearing provided to the medical providers as there is extraordinary ambiguity and vagueness associated with arbitration process itself. Although, Florida Statute Chapter 682 controls the arbitration process, little guidance is actually provided. Neither Chapter 682 nor section 627.736(5) set forth crucial parameters such as the number of arbitrators on a panel, the criteria for the election of same, what burden of proof must be met to support the arbitrators findings, the nature or types of evidence that are permissible, discovery matters, etc.

Given the numerous areas of ambiguity and vagueness, this Court would essentially be forced undertake the work of the legislature in repairing section 627.736(5) order to conform to the constitutional requirements of due process. In fact it is actually error for the court to provide discovery beyond that provided by Florida Statute Chapter 682 even if the medical provider requested same. Grenstein v. Baxas Howell Mobley, Inc. 583 So. 2d 402 9Fla. 3d DCA 1991).

The most volatile aspect of this issue is that the arbitration process as conceived essentially substitutes the rule of law for the rule of man, a concept our forefathers rejected long ago, as parties scramble not to address the issues in cases, but to sculpt the panel members to their liking based upon past performance. The lack of any criteria for the election of arbitrators allows insurance carriers to elect their own adjusters, counsel and experts as arbitrators with impunity and this does nothing to stabilize the integrity of that process. Further the lack of any binding precedent and an inability to seek redress for failing to follow the law renders the arbitration process a “wild wild west” where parties can continually pursue or defend upon illegal or invalid claims as long as the arbitrators on any particular panel permit same. Affiliated Marketing, Inc. v. Dyco Chemicals and Coatings, Inc., 340 So. 2d 1240 (Fla. 2d DCA 1976); Schurnacher

Holding, Inc. v. Noriega, 542 So. 2d 1327 (Fla. 1989). Factored into this confusion are the insurance carriers unilateral attempts to provide the lacking structure as reflected in the Banker's insurance policy which provides discovery only for the Bankers and imposes conditions precedent not reflected in Chapter 682.

An additional defect which deprives medical providers of a meaningful hearing is the virtual lack of appellate review associated with the arbitration panel decision. The parameters set out for appeal of an arbitration order are essentially set forth in Fla. Statute section 682.20 and they are limited essentially to orders (1) denying arbitration, (2) granting a stay of arbitration (3) denying or conforming an award (4)modifying or correcting an award (5) vacating an award without rehearing. Even the limitations associated with vacating an award an severely restricted to essentially fraud, corruption and undue means. Fla. Stat. section 682.13. Errors of law are not a valid basis for the reversal of an arbitration award. Schurnacher Holding, Inc. v. Noriega, 542 So. 2d 1327 (Fla. 1989). A high degree of conclusiveness is attached to an arbitration award. Broward County Paraprofesional Assn v. McComb, 394 So. 2d 471 (Fla. 4th DCA 1981). Given these circumstances, this court would condone compelling a medical provider to a forum where he would have no idea of the issues at

hand, the burden of proof he is to carry, the type of evidence he can submit, only to have the arbitrators completely disregard the application of law, and remain barred from remedy. Such a process gives new meaning to the term "railroaded" and would do little to foster the faith in our system of justice that has come under fire so many times.

B. A mandatory binding arbitration provision, as contemplated by Florida Statute section 627.736(5) would result in an unconstitutional denial of access to the courts and to a jury trial as guaranteed in Article I, section 21 and 22 of the Florida Constitution.

(1) The Kluger/Echarte test

Historically, the citizens of Florida have enjoyed the right of full and free access to the Florida courts for redress of their injuries under Article I, section 21, of the Florida Constitution. This right has been closely guarded by the enforcement of an extremely high burden upon the legislature should it be inclined to intrude upon those rights. Kluger v. White, 281 So. 2d 1 (Fla. 1973). Florida has also long favored the use of voluntary arbitration agreements as an alternative to litigation and the courts have gone to great lengths to enforce those agreements. However, the State of Florida has never sanctioned the use of mandatory binding arbitration as a convenient means of arbitrarily of barring its citizens from the courthouse.

The seminal case on this issue is University of Miami vs. Echarte, 618 So. 2d 189 (Fla. 1993). In Echarte, this court examined the constitutionality of an arbitration provision under Florida Statute, Chapter 766, addressing malpractice issues. Following the principles set forth in Kluger, and its progeny, this court established a two pronged test used in addressing an access to courts constitutional challenge. First, the Legislature may restrict access to the courts if it demonstrates an overpowering public necessity and that no less onerous alternatives exist. Second, the Legislature can provide a commensurate benefit to the parties denied such access. Echarte, 618 So. 2d at 194. There is no dispute that the focus in the case at bar is on whether or not mandatory binding arbitration provides a commensurate benefit for being denied full access to the courts and the right to a jury trial as there was no legislative showing of an overpowering public necessity or the lack of less onerous alternatives.

(2) The PIP statute did not create a new cause of action

In support of its position, the insurance carriers rest primarily on the logic in Orion Insurance Company v. Magnetic Imaging Systems, Ltd., 696 So. 2d 475 (Fla. 3d DCA 1997), to illustrate that an access to the courts challenge should be rejected. Ironically, the court in Orion, actually avoided the constitutionality issue by stating that the rights at issue did not

predate the enactment of the Florida Constitution citing Chrysler Corp. v. Pitsirelos, 689 So. 2d 1132 (Fla. 4th DCA 1997). This conclusion is plainly unfounded as Pitsirelos, relied upon Kluger, which specifically addressed the proscription of "causes of action" and not the rights sought to be enforced. Florida Statute section 627.736(1) provides as follows:

> "(1) REQUIRED BENEFITS - Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to..."

The plain language of the No-Fault act does not create a new cause of action but merely sets forth the benefits required of insurance policies. The cause of action that accrues from a PIP claim is actually predicated upon the breach of an insurance agreement, a cause of action that long predates the 1968 Florida Constitution. This is bolstered further when one considers that the No-Fault Act was created as a substitute to the existing right to sue a tortfeasor for the losses covered by PIP. Similarly, one cannot argue that section 627.736(5) creates some new cause of action for the medical providers as the right to litigate PIP claims under an assignment of benefits was recognized almost a decade before the arbitration clause was added. Parkway General Hospital, Inc. v. Allstate Insurance Company, 393 So. 2d 1171 (Fla. 3d DCA 1981). Finally, in arguing that medical providers were not permitted to directly pursue

payment from an insurance carrier until the 1977 amendment, the insurance carriers confuse the right of a medical provider to pursue a claim based upon an assignment of benefits with the provision of section 627.736(5) that permits an insurance company to issue payment directly to a medical provider upon receipt of a countersigned bill. This amendment does not empower a medical provider to enforce payment directly from an insurance carrier as the statute provides that an insurance carrier *may* make such payment. It is only a directive from an insured or an assignment of benefits that allows the medical provider to enforce payment.

(3) PIP arbitration does not provide a commensurate benefit.

With this in mind, this court should focus its assessment upon whether or not the arbitration scheme provided in section 627.736(5) provides a commensurate benefit to medical providers from being denied access to the courts. Webster's dictionary defines commensurate as being "(1) equal in measure or extent (2) corresponding in size, amount or degree..." Merriam Webster's Collegiate Dictionary, 10th Edition, 1993. Given this definition, its is no surprise that the insurance carriers spend little time outlining the benefits provided to medical providers by arbitration and focus on merely attempting to justify arbitration as a process in

general. There is no dispute that arbitration as a process has a great deal to offer under a variety of circumstances, however, those circumstances do not exist in this instance. This misdirection exists because the overwhelming result of the arbitration process specific to section 627.736(5) is that medical providers receive virtually no benefit at all and are heavily penalized for their involvement. In fact, the sole benefit addressed by the insurance carriers, the creation of new standing, is at best a codification of existing case law. Parkway General Hospital v. Allstate.

In reality, the arbitration provision of the PIP statute actually penalizes medical providers and renders the process virtually untenable. In order to fully appreciate the effect, one must compare the usual benefits of arbitration to those present in the case at bar. These primary benefits are, less expense, faster resolution, expert judges and informal proof and evidence. First, the expense of PIP arbitration is inherently greater than that associated with the litigation process. Under the scheme at issue, a medical provider can submit a bill, receive no payment or response, and never learn of the reason until he is before the arbitration panel. As there are no issue limiting vehicles, such as discovery, requests for admissions or summary proceedings, the parties are required to “bring the kitchen

sink" to the final hearing which results in added expense to accommodate for even the most minor issues. This is amplified by the lack of defined burdens of proof or evidentiary standards which often require parties to retain experts or, at great expense to ensure they are not outgunned. The most damaging expense, however, is associated with compensating the judges for their services, a cost not present in small claims or county court where virtually PIP cases are litigated. If the parties retain the typical three member panel, a requirement in Banker's policy, the cost of a one day hearing is $3,600.00 if each arbitrator charges a nominal $150.00 per hour. Given that each party is responsible for ½ of the cost of the panel, it is virtually impossible for a medical provider to effectively participate in the arbitration process when the cost of the panel alone is almost half the value of the entire PIP policy at issue. These issues must be compared to the circumstances county court litigation where the filing fees are nominal, the judge is free, the jury is free, there are summary processes and discovery available to narrow the issues, a pre-trial conference is held to narrow the issues, and many jurisdictions provide additional ADR methods such as mediation at no cost to the litigants.

The most crushing penalty, however, is the impact of the prevailing party attorney fee substituted for the provisions of Florida Statute section

627.428 which provides for “one way” attorney’s fee awards such that the medical provider or an insured is entitled to fees if the prevail while the insurance carrier is not. While at first blush it may appear that the risks to the parties are equal under a prevailing party standard, it is easy to illustrate the disparity. The most important thing to remember is that an award of attorney’s fees does not inure to the benefit of the party, but to their lawyers. If a medical provider disputes an insurance carrier’s refusal to pay a $100.00 charge over 10 cases and prevails in 9 of them, he will be awarded a total value of $900.00. However, if on the tenth claim, the medical provider was required to pay even a nominal attorney’s fee award of only $1,000.00, to the insurance carrier’s attorney’s the medical provider actually nets a loss of $100.00 while proving that the insurance carrier wrongfully refused to pay legitimate charges 90% of the time. While the insurance carriers may argue that this is an acceptable result, one must also remember that insurance carriers have no economic loss until a judgement is entered as they retain the money at issue. The medical provider, in contrast, loses value upon rendering medical care to the insured and is forced to seek payment from the insurance carrier or forgo payment as the injured party usually cannot pay in advance for medical care as this was the reason they purchased insurance. Finally, if one

applies the attorney's fee standards associated with the recent October 1, 1998, amendment or Banker's insurance policy, it becomes clear that medical providers are even less likely to be able to maintain legitimate disputes with insurance carriers with the inclusion of a "no prevailing party" result. If there is no prevailing party, the medical provider is still responsible for the attorney fees or expenses incurred in disputing a charge with the insurance company. This "offset" results in a an effective reduction of the medical providers billings, while a similar result has little impact on the insurance carrier for whom payment of benefits or attorney's fees is a cost of doing business for which they are compensated through premiums.

The very intent behind Fla. Stat. Section 627.428, has been long been recognized to level the great economic leverage advantages held by insurance carriers and to promote the civil policing of wrongful insurance carrier payment denials. Insurance Company of America v. Lexow, 602 So. 2d 528 (Fla. 1992). This public policy should not change merely because of the identity of the policing party. One would think that the legislature would encourage the most efficient parties to act as policemen over insurance carrier misconduct. Having the medical provider pursue such claims satisfies this public policy interest while also minimizing the exposure of the insured, who seeks only medical care and not a legal fight

with his insurance carrier over every medical service he is provided. While the insurance carriers argue that the attorney's fee provision in this case does not preclude access to the courts, the chilling effect associated with the prevailing party attorney's fee, in conjunction with the volatility of the arbitration process, will have that effect. In effect, the insurance carrier's argument on this point boils down to the fact that they would rather be policed as inefficiently as possible.

C. *The arbitration provision of Fla. Sta. 627.736(5), as applied to medical providers, violates the equal protection guarantees of the Florida Constitution.*

The seminal case addressing the issue of equal protection arguments in constitutional challenges is Lasky v, State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974), in which this court considered such an argument leveled at the tort threshold associated with Florida Statute 627.737. In Lasky, this court announced that the test used in an equal protection analysis is whether or not the statutory classifications are non-arbitrary and with any differences bearing a substantial relationship to a legislative purpose, this is essentially referred to as the rational basis test. It is the contention of the Appellee, M&M diagnostic, that a mandatory binding arbitration provision as set forth in Florida Statute 627.736(5) is

unreasonable, arbitrary and bears no relationship to a legitimate legislative purpose and there is no construction of that statute that would allow this court to find otherwise.

Essentially, Florida Statute section 627.736(5) creates four relevant classes of PIP claimants. First, the contracting insured, second, a medical provider with an assignment of benefits , third a medical provider with a document other than an assignment of benefits and finally, a non-medical provider with an assignment of benefits. It is easy to illustrate that these classifications are completely arbitrary when one attempts to "plug in" various legislative purposes or goals. If the results are contradictory, then the arbitrary nature of the classifications becomes apparent.

The first assertion raised by the insurance carriers is that the legislature intended to classify the parties based upon financial resources and that this is inherently valid. Reserve Ins. Co. v. Gulf Florida Terminal Co., 386 So. 2d 550, 552 (Fla. 1980); Dealers Insurance Co. v. Jon Hall Chevrolet , 547 So. 2d 325 (Fla. 5th DCA 1989). The insurance carriers also rely heavily on Lasky as support for the contention that the legislature could have assumed that medical providers are in a better position financially to pursue clams in arbitration. Such reliance is misplaced however, when one considers that each of the cases cited by the

insurance carriers addresses a situation where the courts considered disparate treatment over inherent rights of various classes. In this case, the medical providers have *derivative* rights obtained from the insured and they are only barred from the courts upon receiving the rights of the insured, who is *not* compelled to arbitrate. The focus of this court's inquiry should be on whether there is a rational basis to impair the rights of a medical provider, which he receives from an insured, when the insured is not encumbered similarly.

As illustrated previously, medical providers are no more economically capable of pursuing an insurance carrier over billing disputes than an insured. Common sense dictates that even the wealthiest physicians would be unable to economically compete with insurance companies that earn billions of dollars in yearly profit. In evaluating the viability of the classifications, however, the insurance carriers intermingle two separate issues, the economics of the arbitration process and the risks of the attorney's fee exposure. It is interesting that the insurance carriers now suggest that medical providers are better able to shoulder the higher expense of arbitration which was supposed to be a for benefit medical providers due to the lesser expense under an access to courts challenge. Such an argument is even more inconsistent when one considers that

there are many non-medical providers who are not subjected to arbitration, such as collection agencies and wealthy factoring companies, that are on equal or better economic footing with the medical provider.

As to the attorney's fee issue, there is little question that medical providers are not in a better position to absorb the risks associated with a prevailing party standard. As set forth above, there is no rational basis to isolate medical providers with assignments of benefits as being more or less advantaged as the other classes with respect to this issue. The very intent behind Fla. Stat. Section 627.428, has been long been recognized to level the great economic leverage advantages held by insurance carriers and to promote the civil policing of wrongful insurance carrier payment denials. Insurance Company of America v. Lexow, 602 So. 2d 528 (Fla. 1992). It is virtually inconceivable that this public policy would be intended solely for insureds and not for the real party in interest medical providers seeking the exact same enforcement, of the exact same bills, through an assignment of the exact same rights held by the insured. By creating such an indiscriminate class, the only result is a group a medical providers hat are disenfranchised from enforcing the same rights as the insured from whom they inherited the benefits.

Similar inconsistencies exist when one considers the "claims

handling experience" basis for discriminating against medical providers who accept assignments of PIP benefits. While some medical providers , such as hospitals and large clinics, have entire departments to handle such matters, the vast majority of medical providers such as family physicians, dentists, medical supply companies, and small chiropractors do not have such resources available. Again, the arbitrariness is obvious when one considers that non-medical providers with assignments are not obligated to arbitrate, such as factoring or collection companies, nor are medical providers if they pursue the same dispute in the name of the insured with powers of attorney or assignments the insured's of causes of action.

Next the insurance carriers suggest that isolating medical providers with assignments of PIP benefits is acceptable because they have control over the amount billed and portray insureds as unintelligent lemmings. How this justifies such a classification is unclear, beyond the fact that the premise is patently incorrect. The ethical rules promulgated by the various practice boards clearly require that patients have full access to their records as does Florida Statute section 455.241. It is also a general practice for most insurance carriers to provide EOB's (explanation of benefits) or PIP payouts to their insured and the legislature contemplated patient disclosure through the direct payment provision of Florida Statute

section 627.736(5).Further, PIP insureds are not captive patients as found in HMO or PPO plans and are free to select the physicians they feel will provide the best service or the most economical one. Even more inconsistent is that the nature of the service rendered has nothing to do with the obligation to arbitrate as the focus is solely upon the identity of the individual. If an insured assigned his lost wage claim, a benefit under PIP coverages, to a medical provider as security for medical treatment, the medical provider would still be obligate to arbitrate any dispute over such payment.

Even if one goes beyond the reasons provided by the insurance carriers and compares the legislative goals of the PIP statute generally, as set forth in Lasky, which are (1) lessening of court congestion (2) reduction of premiums (3) and assurance that injured citizens receive economic aid in meeting medical expenses, we see that the arbitration process achieves none of these goals through binding medical providers with assignments of benefits. Arbitrarily compelling medical providers to arbitration does not lessen court congestion over PIP benefits. In fact, the punitive nature of the present scheme is likely to increase litigation as medical providers refuse to accept assignments of benefits and force insureds into a posture suing their own insurance company over each disputed bill or forgoing the

medical care they need. Additionally, as non-medical providers are not barred from court, such entities will become more active in enforcing patient and providers rights.

One can clearly not expect a reduction of premiums through the arbitration process unless it is used as an illicit club to beat down legitimate medical billing or to chill medical providers into inaction. No premium reductions were instituted in the Florida insurance industry as a result of PIP arbitration nor can one expect to see increased premiums should the arbitration process fall. In essence the only change that one would expect to see is increased profit margins for the insurance carriers and lowered standards of medical care for patients as physician's become increasing frustrated with their ability to receive payment for the service they render to injured people. If the insurance industry bases its premiums upon its ability to illegally deny legitimate claims and to stave off those that challenge such conduct, there are greater problems afoot than any arbitration process can cure.

Finally, such discrimination does little to further the insured's ability to receive medical care. Medical providers are not required to accept assignments of benefits

and they are usually accepted as a courtesy to the insured and to ensure

that payment is made to the medical providers directly, ensuring continuity of payment and continued care. If the legislature imposes an abusing forum upon the medical providers that destroys their right to seek payment directly, the expected result is that medical providers will merely refuse to accept assignments of benefits in lieu of pre-payment or payment when the services are rendered. This will only result is more injured people who are unable to afford medical care as doctors become unwilling to risk providing services without immediate payment. While lack of medical treatment may make insurance companies happier through increased profits, this result does nothing to serve the legislative interest in ensuring that Florida citizens receive medical care for their injuries in motor vehicle accidents.

Conclusion

The arbitration provision of Florida Statute section 627.736(5) can be construed in a constitutional fashion if this court accepts the statute as written by the legislature. Under this concept, the legislature would require that each policy of No-fault insurance contain an elective provision for the binding arbitration of disputes between medical providers and insurance companies. Such a result would solve a number of problems. First, any constitutional issue would essentially be avoided as the voluntary nature of such an election would silence such arguments. Further, insurance carriers

would be free to expand the paltry parameters set forth under Florida Statute Chapter 682 and the parties could make agreements to arbitrate various issues or claims without fear of being compelled to a disadvantageous forum.. The public policy of encouraging alternative dispute resolution methods would be served in addition to preserving the constitutionality of the statute. Additionally, such a ruling would allow the free market to determine whether arbitration truly provides a commensurate benefit in lieu of access to the courts. If arbitration is a fair and effective alternative, as promoted by the insurance carriers, medical providers will likely flock to reap its benefits. If, however, PIP arbitration is merely a quagmire promoted by the insurance industry to trap medical providers and plunder the citizens of Florida for their insurance premiums while impairing their ability to receive medical care, PIP arbitrators will join the lonely Maytag repairman in the unemployment line. Clearly, if the legislature had intended to mandate binding arbitration they could have merely used the word mandatory or something to that effect, yet they chose not to.

This court should also reject the insurance carrier's attempts to rewrite Florida law to reach bizarre, yet economically profitable results. There should be no doubt that medical providers are, at best, incidental

third party beneficiaries under PIP insurance agreements. As such they cannot be compelled to arbitrate under a contractual provision which does not compel such an obligation from the insured. To accept the position that medical providers are intended third party beneficiaries to PIP contracts defies the basic premise that PIP benefits were designed to provide Florida insureds a benefit for being denied the ability to sue a tortfeasor in exchange for some level of guaranteed medical care. Certainly, it would come as a great shock for the insured's of Florida to learn that the benefits that they were promised for their loss of rights, and for which they pay monthly premiums, were actually primarily intended by the legislature to benefit medical providers.

Similarly, this court should also reject the insurance carriers contention that by accepting an assignment of PIP benefits, medical providers consent to the arbitration process. As illustrated through the various insurance policies in this case, it is virtually impossible to suggest that medical providers consent to such varied arbitration provisions sight unseen without having any ability or right to fully appreciate the rights and obligations they may assume in such an election. Any election of arbitration should be knowing and made with full knowledge of the parties obligations.

If, however, this court deems that the legislature intended to impose mandatory binding arbitration upon medical providers, the Appellees ask that this court have the courage to protect the citizens of Florida against such intrusion upon their constitutional rights. There should be little question that the numerous ambiguities within the PIP arbitration process will only lead to voluminous litigation because the legislature failed to provide the appropriate guidelines, guidelines it has provided in other legislative enactments. It is equally clear that these ambiguities deny medical providers the meaningful notice and hearings that result in fair and impartial decisions and that they are powerless to avoid these circumstances without refusing to accept assignments of benefits, a practice which allows Florida insureds to receive medical care without the necessity of prepaying for medical care and seeking reimbursement at a time when they can least afford such expense, after a motor vehicle accident.

This court should also weigh the value of the arbitration process as a quid pro quo for the denial of access to the courts and to a trial by jury. With the number of difficulties illustrated in this brief alone, this court should question the propriety of such an exchange. Along these lines this court should also consider the fact that the change in attorney's fees

standard actually creates a penalty to medical providers which clearly offsets any perceived advantages offered by the arbitration process and creates a devastating chilling effect on a medical providers ability to enforce the payment of legitimate charges.

The change in attorney's fee standards creates an equal protection violation that is clearly arbitrary and serves no legitimate legislative purpose. While medical providers with assignments of benefits are placed at risk under a prevailing party attorney's fee standard, the exact same providers are not subjected to same under other legal vehicles such as powers of attorney, while non-medical providers and insureds are equally immune. What legitimate legislative purpose could be achieved by such a narrowly defined classification has not be explained by the insurance carriers, and is unlikely to be explained because it would require the greatest of intellectual indulgence. However, if this court does find that the attorney's fee provision alone does unfairly and arbitrarily discriminate against medical providers who have or wish to accept assignments of benefits, this defect should not negate the entirety of the arbitration process. Should this court find accordingly, it would be legally appropriate to negate the offending provision and permit arbitration with the attorney's fees addressed under Florida Statute 627.428.

In Fine, arbitration as a process clearly has great potential to allow the resolution of PIP disputes in a meaningful fashion. Unfortunately, the ambiguities and confusion associated with the legislature's scheme render the present system unworkable, and if mandated, unconstitutional. By striking the attorney's fee provision, or even the entire statutory arbitration process itself, this court need not condemn arbitration as a potential method of dispute resolution. Rather, this court should permit the legislature to re-think this process in a more concrete fashion before they continue to dig a quagmire that engulfs all parties and all classes of litigants to the detriment of all of Florida's citizens.

Respectfully Submitted,

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Certificate of Service

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