IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

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

Appellants,

v.

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

Appellees.

CASE NOS.: 94,494
94,539

REPLY BRIEF OF APPELLANTS

JOINTLY FILED BY DELTA CASUALTY COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, AND BANKERS INSURANCE COMPANY

CLAY W. SCHACHT, ESQUIRE
Florida Bar No.: 0043834
Jack, Wyatt, Tolbert & Turner, P.A.
Post Office Box 948600
Maitland, Florida 32794-8600
Attorneys for Delta Casualty Company

TRACY RAFFLES GUNN, ESQUIRE
Florida Bar No.: 984371
Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.
Post Office Box 1438
Tampa, Florida 33601
Attorneys for Nationwide Mutual Fire Insurance Company

BRIAN D. DEGAILLER, ESQUIRE
Florida Bar No.: 283703
Litchford & Christopher, P.A.
Post Office Box 1549
Orlando, Florida 32802
Attorneys for Bankers Insurance Company

CHRISTOPHER S. REED, Esquire
Jack, Wyatt, Tolbert & Turner, P.A.
Post Office Box 948600
Maitland, Florida 32794-8600
Co-Counsel for Nationwide Mutual Fire Insurance Company

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed with Courier 10 point print, which has 10 characters per inch.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Decisional Authority

Statutory Authority

Other Authority

REPLY ARGUMENT

Neither Appellees[1/] nor their Amicus supporters have adequately responded to the legal analysis presented by the Insurers in their Initial Brief. Because both the Appellees and the Amicus parties failed to specifically indicate which constitutional arguments were being addressed in certain sections of their briefs, the Insurers' responses are organized in the manner that affords the most logical discussion. A new issue raised by the responding parties is addressed in a new "Point V" below.

I. THE MANDATORY ARBITRATION PROVISION OF SECTION 627.736(5) IS NOT UNCONSTITUTIONAL.

As a threshold matter, none of the responding parties have addressed the fact that statutes are presumed valid, and that the burden of establishing that a statute is unconstitutional lies with the party challenging the law. Lasky v. State Farm Ins. Co., 296 So. 2d 9, 15 (Fla. 1974); Village of North Palm Beach v. Mason, 167 So. 2d 721 (Fla. 1964). Appellees have not met nor even acknowledged that burden, and the arguments and contentions raised by the responding parties do not warrant an invalidation of the statute.

[1/] In the Initial Brief, Pinnacle Medical and M&M Diagnostics were jointly referred to as "the providers." This Court has since granted a motion to appear as amicus curiae by a party calling itself "The Medical Providers." To avoid confusion, the term "Medical Providers" will be used to refer to that amicus party and the term "Appellees" will now be used to refer to Pinnacle and M&M jointly. The term "responding parties" will be used to refer to the Appellees jointly with the amicus parties who support their position.

SUBSTANTIVE AND PROCEDURAL DUE PROCESS

As stated in the Insurers' Initial Brief, the general test applied to determine whether a statute violates substantive due process rights is "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Ins. Co., 296 So. 2d 9, 15 (Fla. 1974). Procedural due process requires fair notice and an opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972); State ex rel Gore v. Chillingworth, 171 So. 649, 654 (Fla. 1936).

Section 627.736(5) Does Not Abridge Substantive Due Process Rights.

Appellees have wholly failed to respond to the fact that there is no substantive due process right to have an insurance claim litigated as opposed to arbitrated. The statute does not change any right to benefits under the policy - it simply shifts the venue for determining entitlement to such benefits from a court to an arbitration proceeding. No life, liberty, or property interest is affected, and, significantly, none was identified by the Fifth District or by the Appellees. Since no substantive due process right has been abridged, there is no need to evaluate the statute under a substantive due process test. See Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893 (1976).

Even if this statute impacted substantive rights, the responsive briefs repeat the error of the Fifth District by considering improper factors in their analysis of the validity of the statute. In determining whether a statute complies with

substantive due process protections, the court will not "concern [it]self with the wisdom of the Legislature in choosing the means to be used, or even with whether the means chosen will in fact accomplish the intended goals." Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15-16 (Fla. 1974). Furthermore, courts must presume the existence of circumstances supporting the validity of the legislature's action, in the absence of evidence to the contrary. Lasky, 296 So. 2d at 17. See generally Chapman v. Dillon, 415 So. 2d 12, 18 (Fla. 1982) (considering the possible, yet unproven, availability of other financial resources as a factor **validating** a statutory limitation on the right of recovery).

Like the Fifth District, the Appellees fail to abide by these admonitions, questioning the effectiveness of the arbitration provision in meeting the legislative objectives and assuming unproven facts such as the supposed economic need for medical providers to take assignments of benefits to stay in practice. In fact, the essence of the Academy of Florida Trial Lawyers' Amicus argument is that the effect of the arbitration clause is to make health care providers "extremely reluctant" to provide medical services. See also M&M Brief, page 39.

Again, this assertion improperly exceeds the bounds of constitutional inquiry, which is limited to whether the statute is rationally related to a legitimate state purpose and not whether it is successful in achieving that purpose or whether it creates some other unintended result. Furthermore, there is no record proof of this assertion, so it is impossible for these Insurers to counter

this argument on a factual basis. However, neither the legislature nor this Court should assume that medical doctors who have taken the Hippocratic oath would systematically and collectively violate that oath and deprive medical treatment to those who are truly injured or sick on the basis of whether their subsequent claim for insurance payment would be arbitrated or tried in a court proceeding.

The Academy apparently reads the No-Fault Act, and this Court's approval of that act in Lasky v. State Farm, 296 So. 2d 9 (Fla. 1974), to have been conditioned on a guarantee of "payment in advance" to the medical providers. Academy Brief, page 6. The Academy cites no authority for this proposition, and provides no basis for this Court to conclude that the Act was in any way designed to benefit health care providers. In fact, M&M Diagnostics, a party whose brief the Academy's was filed to support, admits and even argues that the No-Fault Act did **not** intend to provide security of payment to medical providers. M&M Brief, page 12 (describing this as "a circumstance that clearly never occurred" . . . "this is clearly in contrast to the legislative intent described by this Court in Lasky. . . "). Appellees' reasoning is not even internally consistent, and improperly questions the effectiveness of the statute and the wisdom of the legislature. Adhering to the proper inquiry, without evaluating the effectiveness of the statute, Appellees have presented no basis to invalidate section 627.736.

Section 627.736(5) Does Not Abridge Procedural Due Process Rights.

Appellees' contention that arbitration denies procedural due process is based in part on their attack on arbitration procedures generally, and in part on specific allegations of defects in PIP arbitration procedures. Appellees first argue that arbitration cannot provide due process because the arbitration procedure does not include discovery, and because judicial review of arbitration awards is "limited." Pinnacle Brief, page 16; "The Medical Providers" Brief, page 13. However, the arbitration provisions in Florida Statutes chapter 682 afford what process is due: proper notice and an opportunity to be heard. As discussed in detail in the Insurers' Initial Brief, due process does not necessarily require judicial process, and arbitrations have been approved as a valid procedure both in Florida and throughout the country.

Furthermore, these alleged defects in arbitration procedures do not even exist. Florida Statutes section 628.08 provides a means for taking depositions. The available judicial review is described in detail in the Initial Brief, and affords court control over issues such as which cases should be arbitrated, appointment of arbitrators, application of the correct law, stay of arbitration proceedings, modification or vacation of awards, unfairness in the procedure, and scope of the arbitrators' authority and jurisdiction.

In fact, the very contentions raised by Appellees illustrate that arbitration does include the required safeguards. After contending that judicial review of arbitration proceedings is virtually nonexistent, Pinnacle next complains that the right of

the parties to have a court determine whether the arbitration panel is proper causes too much of a delay in the process.

Pinnacle's specific complaint regarding the scope of judicial review, and sole identified "abolished right" is the fact that the amount of the award cannot be re-tried de novo. See also "Medical Providers" Brief, page 13. This is no different than a jury trial, in which the trial court considering a motion for new trial or the appellate court considering an appeal is very limited in the circumstances under which it can set aside the jury's determination as to the amount of damages. Parties to litigation have no right of de novo reconsideration of damage awards, and the application of the same standard to arbitration awards is simply not unconstitutional. In fact, courts have made clear that de novo judicial review of an arbitration award is neither required nor proper. See State Farm Mut. Auto. Ins. Co. v. Broadnax, 827 P.2d 531 (Col. 1992) (en banc)(quoting Chmielewski v. Aetna Cas. and Surety Co., 591 A.2d 101, 109 (Conn. 1991)); Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1328 (Fla. 1989). Compare Huizar v. Allstate, 952 P.2d 342, 349 (Colo. 1998).

Pinnacle attempts to convince this Court that "with limited exception, sister states have universally held that mandatory binding arbitration statutes with no right of judicial review are unconstitutional violations of due process, access to courts and trial by jury." Pinnacle Brief, page 36. However, this entire point of the brief is irrelevant, since Florida does have a right

of judicial review of the arbitration procedure. Appellees' attack on the whole of Florida's arbitration system should be rejected.

In addition to this general attack on arbitration as a whole, the Appellees' briefs also include a number of specific characterizations of the PIP arbitration process which they contend establish a lack of due process. These are contentions that are wholly unsupported by the Record and to which these Insurers cannot properly respond. including allegations regarding the usual value of the claims involved, the time frames involved in arbitration as opposed to litigation, and the frequency of disputes regarding the appointment of arbitrators.

While there is no Record evidence to either support or dispel these allegations, the single clear fact is that they are irrelevant. The Constitution does not guarantee the fastest and cheapest means of resolving disputes. It guarantees a procedurally fair hearing with proper notice and an opportunity to be heard. Whatever practical defects may exist in arbitration do not rise to the level* of constitutional defect.

It is apparent from the discussion at pages 20 through 23 of its brief that M&M's true attack in this case is on the nature of arbitration. M&M criticizes the process but apparently overlooks the fact that case law from around the country had held that the process is constitutional. If the procedure in a given case involves the parade of horribles listed by M&M, the case can be reviewed by a court. Arbitrators are certainly not free to "disregard the application of law" as M&M contends.

Appellees next contend that arbitration under section 627.736 is "open to abuse" because there are "no rules of arbitration procedure." Pinnacle Brief, page 24. Appellees apparently overlook the fact that chapter 682 provides a code for the conduct of arbitration, and rules for arbitration are contained in the Florida Rules of Civil Procedure. While the code and rules may not contain the specific procedures that Appellees would like, there are procedures in place.

Furthermore, rules of procedure are to be made by the courts and not by the legislature. Article 2, §3, Florida Constitution (separation of powers); Article 5, §2, Florida Constitution (court's rule making authority). A statute certainly cannot be unconstitutional for its failure to violate the separation of powers rule.

Having falsely concluded that Florida law does not provide a procedure for arbitration proceedings, Pinnacle creates the next erroneous step in its argument by asserting, again without record citation or proof, that the insurers are "free to chose the rules to place in the policy," and that insurers "adopt" the code of procedure for arbitrations. Pinnacle Brief, page 24. Pinnacle further asserts that certain carriers who are not even parties to this case and whose policies are not before the court "adopt lop-sided discovery terms and coercive prevailing attorneys fees provisions." Pinnacle Brief, page 24.

While the Insurers are somewhat disadvantaged in responding to a brief so full of non-Record assertions, the falsity of this

statement is apparent even without these non-party carriers' policies being in the Record. The arbitration provision is established by **the statute**, not by a "coercive" term in any individual carrier's policy. Even without the benefit of the non-party contracts relied on by Pinnacle, these Insurers and this Court can conclude that Pinnacle's assertions are false.

It is likewise significant that Pinnacle resorted to attacks on policies allegedly issued by non-party insurers when three insurance carriers are involved in this proceeding. It can only be assumed that Pinnacle was unable to find any of these "lop-sided" or "coercive" provisions in the party Insurers' contracts. Of course, the claimed provisions in the non-Record non-party policies are even more highly suspect because, contrary to Pinnacle's assertions, Florida law does provide specific arbitration procedures. Therefore, the entire assumption that insurers are "free to choose the rules" is faulty.

Pinnacle's disregard of the existence of these rules may explain the next defect in its Answer Brief, which asserts that section 627.736 is unconstitutional because it delegates the "quasi-governmental function" of regulating arbitration to the

insurers.[2/] Pinnacle Brief, page 25-26. Again, the insurers do not regulate arbitration.

Furthermore, if Appellees' dispute is with the procedures adopted by a given company, their remedy is to attack those specific contract provisions as being in violation of Florida law regarding arbitration procedures, not to attack the statute as being unconstitutional. Florida courts have been more than willing to set aside insurance policy provisions that are held to violate Florida public policy, as expressed either by the legislature or the courts.

M&M similarly contends that section 627.736 allows insurance carriers to "'shang hai' medical providers by duping them into an arbitration with rules and provisions which are unknown to them." M&M Brief, page 9. The fact that a group called "The Medical Providers" has been allowed to file an amicus brief in this case, and the fact that Pinnacle cites alleged arbitration provisions of other carriers not even parties to this case, dispels the contention that these medical providers have been caught unaware. If they were not aware of section 627.736, they would presumably never accept an assignment of benefits in the first instance because they would never know that they had such a right. The

---

[2/] While the term "delegation" is used, this does not appear to be a separation of powers or improper delegation argument. It is not entirely clear what challenge is being made, since the assertion appears in the section titled "access to courts" and refers to "procedural due process." Pinnacle Brief, page 26. However, the lack of factual accuracy and the application of the proper tests for access to courts challenges should allow this Court to address the issue.

arbitration provision is clearly stated in the same statute which allows the assignment. A provider who never accepts an assignment is never subject to the arbitration clause. The arbitration does not come from the contract which M&M complains it never sees, but from the very statute that provides the assignment option of which it has already taken advantage.

M&M next contends that the statute is vague and ambiguous because it does not set forth the procedures for arbitration. M&M argues that the statute is unconstitutional because of this alleged vagueness. M&M does not provide any basis for its contention that vague statutes are necessarily unconstitutional, and there is no support for such a sweeping statement. Vague or ambiguous statutes are merely subject to judicial construction, not voided. In fact, ambiguous statutes must be interpreted in a manner that is constitutional where possible. If the mere fact of ambiguity rendered a statute unconstitutional, there would be no room for application of the many rules of judicial construction of statutes, since the plain meaning rule dictates that a court may resort to judicial construction only where an ambiguity exists, and a court would have no need nor opportunity to construe an unconstitutional statute.

M&M may have confused a principle of criminal law which precludes the state from prosecuting a defendant under a statute which does not give adequate notice of the criminality of an offense or other penalty. See Trushin v. State, 405 So. 2d 1126 (Fla. 1982); Warren v. State, 572 So. 2d 1376 (Fla. 1991). This

"void for vagueness" rule does not apply to this civil insurance statute. Dept. of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976) (vagueness doctrine is not applied in the same manner where a crime or penalty is not involved); Loxahatchee River Envt'l. Control v. School Board, 490 So. 2d 390 (Fla. 4th DCA 1986) (statutes regulating businesses are essentially "immune" from vagueness challenge).

Even where the doctrine applies, the fact that several interpretations of the statute are possible does not render it void for vagueness. Daytona Beach v. Delpercio, 476 So. 2d 197 (Fla. 1985). Nevertheless, M&M mistakenly interprets this narrow principle of constitutional law to conclude that due process requires that the providers have specific notice in the PIP statute of each element of the nature of the procedure to be used.

There are several defects in this reasoning. First, again, the legislature is not even entitled to dictate procedure. Second, the due process clause requires notice of the hearing on the substantive issue in the case, not notice of the procedure to be used at that hearing. Finally, the vagueness rule requires that persons have sufficient notice of proscribed or required conduct, not notice of the procedures governing dispute resolution.

M&M contends that the alleged unconstitutional vagueness of the statute is illustrated by the fact that there are numerous court cases determining whether the statute's arbitration provision applies in a given case. Contrary to M&M's assertion, this fact supports the constitutionality of the statute - it illustrates that

the procedures for judicial review of entitlement to arbitration are fully protected in this context.

Essentially, the position of the Appellees is that section 627.736 is necessarily unconstitutional because its arbitration provision is binding and mandatory. However, no court has interpreted the Fourteenth Amendment to include a fundamental right to a trial. See Guarlnick v. Supreme Court of New Jersey, 961 F.2d 209 (3d Cir. 1992) (validating a compulsory arbitration provision). In the Initial Brief, these Insurers cited a number of courts in other jurisdictions, including the United States Supreme Court, which have reviewed and expressly affirmed both mandatory and binding arbitration provisions. Appellees' arguments do not change this result.

EQUAL PROTECTION: Constitutional Test

In response to the Insurers' Initial Brief, the Appellees address equal protection for the first time. As stated in the Initial Brief, as long as a statutory classification is not suspect and does not invade a fundamental right, the classification need only be rationally related to a legitimate state interest. Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986); Glusenkamp v. State, 391 So. 2d 192 (Fla. 1980); Reserve Ins. Co. v. Gulf Florida Terminal Co., 386 So. 2d 550 (Fla. 1980). See also Purdy v. Gulf Breeze Enterprises, 403 So. 2d 1325 (Fla. 1981) (applying an equal protection analysis to the very statute at issue in this case).

Section 627.736(5) Does Not Violate Equal Protection.

The Insurers established in their Initial Brief that the legislature has wide latitude in classifying and regulating commercial transactions, and that the financial resources of the parties is a perfectly valid method of classification. Reserve Ins. Co. v. Gulf Florida Terminal Co., 386 So. 2d 550, 552 (Fla. 1980). See also Dealers Ins. Co. v. Jon Hall Chevrolet, 547 So. 2d 325, 327 (Fla. 5th DCA 1989) (classification between commercial and personal vehicles in the no-fault statute had a rational basis because the legislature could well assume that a commercial insured can bear the risk of loss better than a personal insured). Significantly, the Amicus "The Medical Providers," who were permitted to appear in this based on their alleged knowledge of the practical perspective of business interests of providers, Medical Providers Brief, page 6, admit that providers are "more informed," and have greater knowledge of and ability to handle insurance claims than the individual insureds. Medical Providers Brief, page 15-16.

In response to the equal protection argument, M&M first misstates the test for such a constitutional challenge. M&M Brief, page 32. Next, M&M's sole basis for concluding that the arbitration clause denies equal protection to medical providers who have accepted an assignment is its contention that Florida Statutes section 627.428 establishes a public policy that insurers, who M&M presumes to have economic advantages over all other parties, require "civil policing." Section 627.428 is a one-sided prevailing party attorneys fee provision that grants to **named or**

omnibus insureds and **named beneficiaries** the right to attorneys fees if they prevail in a coverage action against their insurer. It does not apply to the benefit of anyone other than the persons named in the statute. See Romero v. Progressive Southeastern Ins. Co., 629 So. 2d 286 (Fla. 3d DCA 1993); State Automobile Ins. Co. v. Ryder Truck Rental, 627 So. 2d 1326 (Fla. 3d DCA 1993).

The providers are not named or omnibus insureds and are not named beneficiaries. They do not dispute this fact. Instead, they argue that "it is virtually inconceivable" that the legislature would have limited the benefit of section 627.428 to insureds. M&M Brief, page 35. However "inconceivable" M&M may find the legislature's limitation, it is clearly stated in the plain language of the statute.

Because the providers would not have been entitled to attorneys fees under section 627.428, their argument that section 627.736(5) deprived them of that right is completely unsupported. Their true argument appears to be with section 627.428, not with section 627.736.

Furthermore, contrary to the assertion in Pinnacle Medical's Answer brief (page 13), the claims at issue in cases involving a provider who has accepted an assignment of benefits are not "identical" to claims that an insured may make. While the insured's claim can potentially raise any issue relating to the policy terms, the statute, the facts surrounding the accident, or the health care for which benefits are claimed, the provider's claim is limited to the question of reasonableness and necessity of

the medical treatment provided. Thus, there is a rational basis for handling those issues in a different procedure. The statute does not violate equal protection.

FLORIDA HAS A LEGITIMATE STATE INTEREST IN ALTERNATIVE DISPUTE RESOLUTIONS.

As explained in the Initial Brief, this Court will address the legitimacy of the policy effectuated by the statute under both a due process and equal protection analysis.[3/] The Appellees apparently admit that the business of insurance is "affected with a public interest," Springer v. Colburn, 162 So. 2d 513, 514 (Fla. 1964), and that there is a legitimate state interest in regulating insurance. Dealers Ins. Co. v. Jon Hall Chevrolet, 547 So. 2d 325, 327 (Fla. 5th DCA 1996). Appellees do not provide any basis for this Court to depart from the established rule that arbitration is favored under Florida law. See Roe v. Amica Mutual Ins. Co., 533 So. 2d 279 (Fla. 1988); Fenster v. Mkovsky, 67 So. 2d 427 (Fla. 1953); Beach Resorts Int'l, Ltd. v. Clarmac Marine Construction Co., 339 So. 2d 689, 690 (Fla. 2d DCA 1976). See also AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 106 S.Ct. 1415 (1986). As the Fifth District has recognized, this principle applies equally to the arbitration provision at issue here. See State Farm Mutual Auto. Ins. Co. v. Gonnella, 677 So. 2d 1355, 1356 (Fla. 5th DCA 1996). See also Fortune Ins. Co.

3/ An access to courts analysis requires an "overwhelming public necessity" instead of a "legitimate state interest." There is no need to reach the issue of whether there is an overpowering state interest in arbitrating these disputes, since the first several prongs of the access to courts test are not met. This analysis is discussed below.

v. U.S.A. Diagnostics, 684 So. 2d 208 (Fla. 4th DCA 1996) (construing the arbitration provision at issue here, and holding that an insurer's policy can provide an even broader arbitration clause than that required in the statute). There is a legitimate state interest in both insurance regulation and in promoting arbitration. Thus, the statute is valid under both a due process and equal protection analysis.

ACCESS TO COURTS

Appellees and their Amicus supporters have simply misstated and misapplied the test for access to courts protection. It will therefore be restated here. In order to find a violation of the right of access to courts, there must first be a denial of such access. Second, even if a statute denies such access, the statute is invalid only if (1) the right preexisted the 1968 Constitution; (2) no reasonable alternative method of redress is provided; (3) there is no overpowering public necessity for abolishing the action; **and** (4) there is an alternative method of meeting that public necessity. See Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973); Eller v. Shova, 630 So. 2d 537 (Fla. 1993). All of these elements must be proven to invalidate the statute, and the burden of proving these elements rests on the party challenging the law. Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974). For example, if a reasonable alternative means of redress is provided, there is no need to demonstrate an overpowering public necessity nor the absence of an alternative method of meeting the legislative goal. Smith v. Department of Insurance, 507 So. 2d 1080, 1088

(Fla. 1987). Significantly, the existence or nonexistence of a classification is **not** an issue in an access to courts analysis.

Contrary to the arguments presented by M&M, the arbitration provision need not provide a "commensurate benefit." See M&M Brief, page 27. Pinnacle mistakenly contends at page 22 of its brief that the statute is invalid because "[i]t is clear the legislature created no reasonable alternative and did not show an overwhelming public necessity, elements required to deny access to courts under Kluger." Significantly, Pinnacle does not provide any authority for its conclusory statement that these "facts" are "clear." Furthermore, Kluger does not even require an overpowering public necessity because there is a reasonable alternative means of redress. Appellees are mistakenly applying the Kluger elements in the conjunctive rather than the disjunctive.

Applying the correct test, section 627.736(5) is valid under an access to courts analysis for multiple independent reasons. First and foremost, the provision of arbitration as an alternative dispute mechanism is simply not a denial of access to courts. Where the judicial system retains the power to determine the arbitrators' authority, enforce and enter judgments upon the arbitration award, and review the award for legal error, access to courts is afforded to the extent required. The proper scope of judicial review is provided in Florida.

Appellees simply argue that the fact that the providers are not entitled to a "court" proceeding denies access to courts. Appellees list a parade of allegations, wholly unsupported by any

Record proof, that they contend evidence that section 627.736 denies access to courts. Again, Appellees identify no specific problem with the statute here, but limit their attack to the nature of arbitration in general. Unlike Appellees' contentions, which are completely unsupported by case law, the Insurers have provided this Court with a detailed legal analysis of the validity of arbitration proceedings under an access to courts analysis. Appellees' arguments are incorrect, and no access to courts has been denied here. Access to courts does not guarantee access to a jury trial in front of a judge; it guarantees a judicial process, which has been held to include arbitration as long as a certain level of judicial review is afforded, which is the case here.

Additionally, even if a statute does deny access to courts, it is not invalid unless it impairs a preexisting right of redress, fails to provide a reasonable alternative means of redress **and** is without an overpowering public necessity. In this case, at least two of these essential elements are lacking: there is no preexisting right of redress and an alternative means of redress has been provided.

First, health care providers had no right to direct collection of statutorily mandated personal injury protection coverage prior to 1968. Orion Ins. Co. v. Magnetic Imaging Systems I, 696 So. 2d 475, 477 (Fla. 3d DCA 1997). Contrary to M&M's characterization at page 25 of its brief, a finding that the challenged law does not infringe on a preexisting right of redress does not "avoid" the

access to courts issue; it is a finding that access to courts rights have not been abridged.

Pinnacle and M&M argue that the providers had a preexisting right of redress because the right to assign contracts existed at common law. These responses miss the point raised by the Insurers, which is that there was no preexisting right to non-fault personal injury protection benefits. The common law right of assignment is not the right at issue here; it is the right to payment of PIP benefits, which did not exist at common law.

Furthermore, it is well established that personal claims are not assignable. In fact Appellees' Amicus "The Medical Providers" admits this in their brief. Page 9, Medical Providers Brief.

Pinnacle refers to the "provider's substantive right to be paid a 'reasonable amount'," Pinnacle Brief, page 25, but overlooks the fact that this "right" comes only from the statute and the assignment. Medical providers simply had no pre-existing common law right to direct payment from their patient's automobile insurer. No party had a common law right to payment without proof of fault. Appellees have presented no authority to dispute these facts which were established in the Insurers' Initial Brief.

The same defect exists in the reasoning of the Amicus Brief filed by the Academy of Florida Trial Lawyers, which claims that section 627.736 is unconstitutional because, according to the Academy, the predicate for upholding the limitations on tort claims established in the No-Fault Act was the availability of Personal Injury Protection coverage to pay for those claims. Academy Brief,

page 4. However, the first words of the Academy's summary of argument explain why this analysis is irrelevant to this case: the "person injured in an automobile accident" is the only person who had a pre-existing right of redress. Academy Brief, page 3. The medical providers disputing the provision in this case did not.

Similarly, M&M's argument that these claims involve preexisting rights is based on their faulty contention that there is a difference between assignments of benefits that allow direct payment to the provider and assignments of benefits that trigger the arbitration clause in the statute. M&M Brief, page 26. Both and M&M and Pinnacle contend that a provider can take the benefit of the statutory direct payment provisions while avoiding the legal effect of an "assignment of benefits." Pinnacle Brief, page 13; M&M Brief, page 7. Essentially, they contend that the assignment of benefits that entitles the provider to direct payment is different than the assignment of benefits that triggers the arbitration clause (and presumably, the attorneys fee provision).

This argument is faulty because the statute does not refer to two different types of assignments. The clear language of the statute dictates that the assignment of the right to payment is what triggers the arbitration clause. No other assignment is referenced, and it is not clear what other policy benefit could or would be assigned to the health care provider besides the right to payment of benefits.

An assignment of PIP benefits "is defined as 'a transfer or setting over of property or of some right or interest therein, from

one person to another.'" State Farm Fire & Cas. Co. v. Ray, 556 So. 2d 811, 812 (Fla. 5th DCA 1990). The definition of the term "assignment" is very broad in Florida law. This Court has even expressly ruled that an assignment may be oral. Boulevard National Bank of Miami v. Air Metals Indust., Inc., 176 So. 2d 94, 97-98 (Fla. 1965). The only requirement is that the insured transfer or set over property or some right or interest therein. Ray, 556 So. 2d at 812. Direct payment of benefits is a "benefit" under the policy, and perhaps the only one that could reasonably be expected to be assigned to a health care provider. An assignment of the right to direct payment is an assignment of benefits, and therefore triggers the arbitration clause of the statute.

Furthermore, an assignee must accept the terms of the contract assigned to him. The fallacy in Appellees' reasoning is exemplified at page 40 of the Pinnacle brief and page 9 of the M&M brief, where Appellees argue that an assignee can accept assignment of the rights under the policy but not the duties under it. Pinnacle and M&M both admit that the providers have standing to make claims and collect benefits from the insurer only if the insured has assigned those rights to the provider. Pinnacle Brief, page 14, 33; M&M Brief, page 10-13. In summary, access to courts has not been unconstitutionally denied by this statute because the statute does not impair any preexisting right.

Furthermore, a reasonable alternative means of redress has been provided. The right to arbitration is a reasonable alternative means of redress, especially when combined with the new

statutory right of direct claims for statutorily mandated insurance coverage.

"The Medical Providers" argue that the legislature failed to provide an adequate alternative remedy because providers cannot as a practical matter function without accepting assignments of benefits. However, this analysis is incorrect. The requirement of a reasonable "alternative" does not mean that the legislature must ensure that people have the "alternative" of avoiding the legislative dictate. In this case, the statute does not come into effect until the provider accepts an assignment, which he has the "alternative" not to do. Even if providers were required to accept assignment, the Constitution does not require that the providers have the "alternative" to avoid the statute; the word "alternative" refers to the availability of another forum, not the availability of a choice between forums.

The other responsive briefs argue that the mechanism of arbitration is inherently insufficient as an alternative means of redress. This argument is contrary to well established Florida law. Amicus "The Medical Providers" admit that arbitration as a general principle is a valid alternative means of redress, but argue that the particular arbitration proceedings to which they are subjected are unfair. If the Appellees' dispute is with a particular proceeding, their remedy is not to void the entire statute but to challenge the procedure used in a given case. This Court cannot be asked to invalidate a legislative enactment based

on non-Record allegations of improper procedure in certain unidentified arbitration proceedings.

Similarly, "The Medical Providers" repeatedly complain about a "loftier recovery standard" imposed on them but do not explain how the standard allegedly differs. If such manifest injustice occurs in a given arbitration proceeding, that error can be corrected in that case by judicial review. Such alleged errors in specific proceedings are not grounds for invalidating an entire statutory scheme.

Furthermore, Appellees' dire non-Record predictions about the unfairness of arbitration are contrary to University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993), in which this Court specified the benefits to the claimant in an arbitration proceeding:

> the opportunity to receive prompt recovery without the risk and uncertainty of litigation . . . the relaxed evidentiary standard for arbitration proceedings . . . joint and several liability of multiple defendants in arbitration . . . prompt payment of damages after the determination by the arbitration panel . . . interest penalties against the defendant for failure to promptly pay the arbitration award, and . . . limited appellate review of the arbitration award [to avoid] manifest injustice."

618 So. 2d at 194.

In summary, since (1) the required level of access to courts has been provided, (2) the providers had no preexisting right of redress, and (3) a reasonable alternative means of redress has been provided, the statute is valid. There is no need to evaluate whether there is an overpowering public necessity. Each of these three grounds is itself sufficient to deny an access to courts challenge, and the decision below should be quashed.

Providers have no standing to raise access to courts issues.

Neither Respondent addressed the Insurers' point that providers do not have standing to raise constitutional challenges based on alleged impairment of policyholder rights. Pinnacle completely failed to address the issue, and M&M restates the issue but concludes that "there is no need to address" it. M&M Brief, page 15.

THERE CAN BE NO CONSTITUTIONAL CHALLENGE WHEN THE ALLEGED INFRINGEMENT RESULTS FROM THE PARTY'S OWN ACTIONS.

To the extent that mandatory arbitration denies any rights of the providers, the denial is the result of their own conduct in accepting the assignment, not the result of the statute. M&M admits at page 38 of their brief that "[m]edical providers are not required to accept assignments of benefits." A statute cannot be deemed facially unconstitutional when the alleged deprivation of rights is effective only when a person undertakes a voluntary act.

II. REGARDLESS OF THE CONSTITUTIONALITY OF THE STATUTE, APPELLEES WERE BOUND TO ARBITRATE UNDER THE INSURANCE CONTRACTS.

This point on appeal is very simple. The contracts state that arbitration is required. Appellees do not contend that contractual arbitration clauses are void. Therefore, the constitutionality of the statute need not be reached because these cases would be compelled to arbitration due to the contractual provisions even absent the statutory mandate.

In response to this point on appeal the Appellees contend that they are not third party beneficiaries of the insurance contracts.

In making this argument, they rely on general case law relating to named beneficiaries, but wholly fail to respond to the specific cases cited by the Insurers establishing that health care providers are third party beneficiaries of insurance contracts providing coverage for health care. See United States v. Automobile Club Insurance Company, 522 F.2d 1 (5th Cir. 1975); Vencor Hospitals South, Inc. v. Blue Cross and Blue Shield of Rhode Island, 929 F.Supp. 420 (S.D. Fla. 1996); Orion Insurance Company v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997); Pasteur Health Plan, Inc. v. Salazar, 658 So. 2d 543 (Fla. 3d DCA 1995).

Appellees apparently do not dispute that third party beneficiaries are subject to the terms of the relevant contracts, including arbitration clauses. See Orion, 696 So. 2d at 478; Terminix International Co. v. Ponzio, 693 So. 2d 104, 109 (Fla. 1st DCA 1997); Zac Smith & Co. v. Moonspier Condominium Assoc., 472 So. 2d 1324 (Fla. 1st DCA 1985). See also Scobee Combs Funeral Home Inc. v. E.F. Hutton & Co., 711 F.Supp. 605 (S.D. Fla. 1989) (holding that parties were bound by an arbitration provision in National Association of Securities Dealers manual, regardless of the fact that no contract between them contained such a provision); Desiderio v. National Association of Securities Dealers, Inc., 2 F.Supp.2d 516 (S.D.N.Y. 1998) (execution of a U-4 SEC form "inherently represents an agreement to arbitrate" as mandated by the relevant statute, even if the form does not so state). Therefore, since their argument that they are not third party

beneficiaries fails, so does their attempt to avoid the terms of the contracts.

Even if Appellees were not third party beneficiaries, they would be bound by the contract terms as assignees. Appellees contend that the contracts are not binding on them because they were not parties to the contracts. For example, Pinnacle argues at page 43 of its brief that there is no record evidence of any agreement between the provider and the insurer. It apparently believes this to be a crucial point because the entire sentence is presented in italics.

Pinnacle spends much of its 50 page brief arguing that providers cannot be subject to the arbitration clause in the insurance contract because they are not parties to that contract. However, Pinnacle's Statement of the Case and Facts expressly acknowledges that the providers accepted an assignment of benefits from the insureds. Pinnacle Brief, page 11. It is fundamental that an assignee has, after the assignment, an agreement with the other party to the contract. Therefore, upon accepting the assignment, the providers became parties to the insurance contract and were bound by all its terms, whether those terms were "rights" or "duties." Pinnacle admits this fact at page 47 of its brief where it states that the provider-assignee "stands in the shoes" of the insured-assignor.

Furthermore, even if the particular contract did not provide an arbitration clause for provider claims, the statute automatically imposes such a clause into every assignment

situation. Pinnacle seeks to avoid this result by contending that section 627.736 requires the policy to condition its arbitration clause on the provider's affirmative and express assent to that term, apparently again basing the analysis on the faulty premise that an assignee can pick and chose which terms of the assigned contract he chooses to accept. Such a construction is contrary to the plain language of the statute, which Pinnacle admits is unambiguous. Pinnacle Brief, page 41. It is well established that court cannot rewrite clear statutes and cannot insert judicially created terms that do not appear in the statute. In fact, Florida Statutes section 682.02, cited by Pinnacle, establishes that arbitration clauses need not stand alone and can be "included in" any contract.

Pinnacle next contends that the act of accepting an assignment of benefits is insufficient to compel the provider to arbitration, because the assignment document may not reference arbitration. Pinnacle Brief, page 14. Pinnacle apparently assumes that arbitration can only be compelled by express agreement of the parties and not by statute. This assumption is contrary to both established legal principles and common sense. Arbitration can be compelled either by statute or by contract. Contrary to the similar unsupported assertion at page 13 of the M&M brief, section 682.02 does not require a written agreement between the parties in order for arbitration to bind them. That section merely allows contracting parties **not otherwise subject to arbitration** to include

an arbitration provision in their contract. It does not supercede statutory mandates of arbitration.

Thus, regardless of the validity or effect of the statutory arbitration provision in section 627.736(5), these Appellees should have been compelled to arbitration because the contracts so state. The Fifth District's decision should be quashed as improperly holding a statute unconstitutional when the case could have resolved without reaching that issue.

III. THE PREVAILING PARTY ATTORNEYS' FEE PROVISION IN SECTION 627.736 IS CONSTITUTIONAL.

As explained in the Insurers' Initial Brief, it is well established that prevailing party attorneys' fee statutes are valid and constitutional. None of the responsive briefs even attempt to explain how their position can be reconciled with Hunter v. Flowers, 43 So. 2d 435 (Fla. 1949) (en banc), in which this Court explained that the legislature has wide discretion in making statutory classifications, and that a prevailing party fee statute will not be set aside on due process grounds unless the classification is "palpably arbitrary and beyond rational doubt erroneous." 43 So. 2d at 437.

Likewise, Appellees have wholly failed to address the fact that attorneys' fee provisions simply do not deny access to courts since there was no pre-existing common law right to be free from the obligation to pay a prevailing party's attorneys' fees. See Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1147-48 (Fla. 1985). In short, the Appellees have failed to identify any proper constitutional challenge to the fee shifting provision.

See City of Miami v. Murphy, 137 So. 2d 825 (Fla. 1962) (holding that court costs are a part of the burden of litigation and that the imposition of such costs on the opposing party does not deprive the party of any constitutional rights).

The defects in Appellees' analysis are best illustrated by the mathematical example given by M&M at page 29 of its brief. After assuming numbers fully unsupported by the record, M&M compares the provider's possible gain in cases it wins with the risk of paying the insurer's attorneys fees if it loses. Significantly, M&M does not consider the fact that in the nine cases the provider wins, his fees are paid by the insurer. Certainly, if this Court is asked to consider the economic "realities" of arbitration proceedings by making such assumptions and bundling a number of cases together to determine the aggregate financial outcome, both sides of the equation must be calculated by the same rules. If prevailing party attorneys fees are considered in determining the provider's possible losses, they must likewise be considered as potential gains.

Inherent in M&M mathematics is an erroneous presumption that the provider should be entitled to the benefit of a prevailing party fees award but not the risk of such award. However, the Appellees fail to recognize that the provider only benefits from the availability of prevailing party attorneys fees if the case in is arbitration. Section 627.428, which provides that a **named or omnibus insured** or **named beneficiary** involved in coverage litigation with an insurer is entitled to attorneys fees if they

prevail, does not apply to the providers. While the Appellees have argued perfunctorily that providers should be entitled to the benefit of that statute, see page 31 of M&M Brief, they cite no authority for that proposition.[4/] Absent an assignment mandating arbitration under section 627.736(5), the dispute will be litigated in court with no applicable fees provision in favor of either party.

The "Medical Providers" attack on the prevailing party fee provision of section 627.736(5) is directed toward a 1998 amendment which defines when a party "prevails." "Medical Providers" Brief, page 19. This version of the statute is not at issue in this case. Furthermore, even if this Court finds that the definitions adopted in 1998 are invalid, that finding does not affect the general provisions for prevailing party fee awards.

As stated in detail in the Insurers' Initial Brief, the legislature has provided a number of other situations in which certain classes of parties are entitled to prevailing party attorneys' fees while others are not. There is a reasonable basis for distinguishing between medical providers and ordinary insureds. In fact, in validating the prevailing party attorneys' fee provision in a predecessor version of the medical negligence statute, this Court specifically identified medical providers as a reasonable classification for purposes of attorneys' fee provisions. See Florida Patients' Compensation Fund v. Rowe, 472

[4/] See also the attorneys fee motions and oppositions filed in this case.

So. 2d 1145 (Fla. 1985). The statute is valid, and decision below should be quashed.

IV. THE PROVIDERS IN THIS CASE HAVE WAIVED ANY FACIAL CONSTITUTIONAL CHALLENGE TO THE STATUTE.

Notably, none of the Responsive briefs attempt to avoid the conclusion that the constitutional issues raised in this case were waived. The providers here waived these issues and the Fifth District's decision should be quashed for that reason in addition to those addressed above.

IV. APPELLEES' SUGGESTION THAT THE COURT INTERPRET THE ARBITRATION PROVISION AS VOLUNTARY DOES NOT CHANGE THIS ANALYSIS.

Appellees raise a new issue that does not fit into the constitutional analysis presented above. After contending that section 627.736 is per se unconstitutional because it provides for mandatory binding arbitration, both Appellees suggest that this Court can salvage the constitutionality of section 627.736 by interpreting the arbitration clause as non-mandatory. If nothing else, this suggestion is informative because it illustrates the limited nature of the constitutional challenge presented by Appellees: their attack is against mandatory, binding arbitration as a general concept. The concept has already been approved and is not unconstitutional.

Furthermore, such a construction is simply not supported by either the plain language of the statute, or M&M's suggestion that section 627.736 be read in pari materia with section 682.02. Section 627.736(5) simply does not state that the provision should

be voluntary. Typical legislative usage would dictate that "shall include a provision for" is a mandatory clause. Turning to section 682.02, as M&M suggests, does not change this result. Section 682.02 uses the permissive "may" to describe a contractual arbitration clause, not a statutory clause. M&M's argument would require this Court to allow section 682.02's reference to contractual provisions to supercede all mandatory statutory arbitration provisions. M&M cites no authority for the proposition that the legislature intended section 682.02 to affect statutory arbitration clauses, and certainly not so broadly.

In fact, section 682.02 perfectly exemplifies that the legislature uses the permissive "may" when creating permissive arbitration clauses. The legislature nevertheless used the word "shall" in section 627.736(5). Furthermore, the District Courts of Appeal that have addressed the issue have all held the provision to be mandatory in nature. See Omni Insurance Company v. Special Care Clinic, 708 So. 2d 314 (Fla. 2d DCA 1998); Orion Ins. Co. v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997); U.S. Security Ins. Co. v. Magnetic Imaging Systems I, Ltd., 678 So. 2d 872 (Fla. 3d DCA 1996).

Finally, this contention was rejected by the trial court in at a least one of these consolidated cases, and the providers never filed a cross-appeal.

CONCLUSION

The decisions of the Fifth District Court of Appeal should be quashed with directions to enter orders compelling arbitration. This Court should find both the arbitration and attorneys' fee provision of section 627.736(5) constitutional, and should clarify the law in this important area.

Respectfully submitted,

CLAY W. SCHACHT, Esquire
Florida Bar No.: 0043834
CHRISTOPHER S. REED, Esquire
JACK, WYATT, TOLBERT &
THOMPSON, P.A.
2600 Maitland Center Parkway,
Suite 170
Maitland, Florida 32751-4162
Attorneys for Delta Cas. Co.

BRIAN D. DeGAILLER, Esquire
Florida Bar No.: 283703
LITCHFORD & CHRISTOPHER
Post Office Box 1549
Orlando, Florida 32802-1549
Attorneys for Bankers Ins. Co.

TRACY RAFFLES GUNN, Esquire
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
Fla. Bar No.: 984371
Attorneys for Nationwide
Mutual Fire Ins. Co.

By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **HARLEY N. KANE, Esquire**, Greenspan & Kane, 301 NE 51st Street, Suite 3160, Boca Raton, Florida 33431-4929; **MARK TISCHHAUSER, Esquire**, 3134 North Boulevard, Tampa, Florida 33603-5542; **THOMAS J. MAIDA, Esquire and AUSTIN B. NEAL, Esquire**, Foley & Lardner, 300 East Park Avenue, Post Office Box 1819, Tallahassee, FL 32301; **JAMES K. CLARK, Esquire**, SunTrust International Center, Suite 1800, One Southeast Third Avenue, Miami, Florida 33131; **CLAY W. SCHACHT, Esquire**, Jack, Wyatt, Tolbert & Thompson, P.A., 2600 Maitland Center Parkway, Suite 170, Maitland, Florida 32751-4162; **DOCK A. BLANCHARD, Esquire**, Blanchard, Merriam, Adel & Kirkland, P.A., Post Office Box 1869; **RUSSEL M. LAZEGA, Esquire**, The Law Office of Russel Lazega, 12355 (a) West Dixie Highway, North Miami, Florida 33161; and **BRIAN D. DEGAILLER, Esquire**, Litchford & Christopher, Post Office Box 1549, Orlando, Florida 32802-1549 on this the 10 day of May, 1999.

Tracy Raffles Gunn, Esquire