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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

INITIAL BRIEF OF APPELLANTS

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

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STATEMENT OF THE CASE AND FACTS

Appellants, Nationwide Mutual Insurance Company, Bankers Insurance Company, and Delta Casualty Company, appeal a decision from the Fifth District Court of Appeal holding unconstitutional the binding arbitration and prevailing party attorneys' fee provisions of Florida Statutes section 627.736(5).[1]

Florida Statutes section 627.736 provides for certain mandatory Personal Injury Protection ("PIP") insurance. As part of Florida's Motor Vehicle No-Fault Law, Fla. Stat. § 627.730, PIP insurance is designed to provide, on a first-party basis, the minimum necessary coverage for bodily injury or death arising out of the ownership, maintenance or use of a motor vehicle. Such coverage is provided to the named insured and his resident relatives regardless of fault for the accident. Fla. Stat. § 627.736(1). The tort cause of action is eliminated to the extent that PIP benefits are payable. Fla. Stat. § 627.737(1). However, the PIP carrier is required to pay only those medical expenses which are reasonable, necessary, and related to the subject accident.

Subsection (5) of the PIP statute provides that any medical provider rendering treatment to an insured for bodily injury covered under a PIP policy may charge only a reasonable amount for

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[1] These consolidated cases each reached the Fifth District by pass-through certification from the County Courts. After briefing, the Fifth District on its own motion consolidated these appeals and issued a single en banc opinion disposing of all three appeals. Due to the identity of issues presented and for ease of reference by the Court, the Appellants herein present this brief jointly.

such treatment, and the insurer may make payment for such charges directly to the provider if the insured so approves. That subsection further mandates that each PIP policy provide that disputes between the insurer and provider will be resolved by binding arbitration,[2] governed by Florida Statutes chapter 682, **if** the provider has agreed to accept assignment of the PIP benefits. The statute specifically provides that the prevailing party in such arbitration "shall be entitled to attorneys' fees and costs." Fla. Stat. § 627.736(5).

The Fifth District, in an en banc opinion authored by Judge James Dauksch, held both the arbitration provision and the attorneys' fee provision unconstitutional. Specifically, the Fifth

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[2] The statute provides:

> Every insurer shall include a provision in its policy for personal injury protection benefits for binding arbitration of any claims dispute involving medical benefits arising between the insurer and any person providing medical services or supplies if that person has agreed to accept assignment of personal injury protection benefits. The provision shall specify that the provisions of chapter 682 relating to arbitration shall apply.

Fla. Stat. § 627.736(5).

While there was some question regarding the contents of the Records on Appeal in each of these three appeals, it is undisputed that each insurer's policy contained such a provision. Obviously, the specific clauses are of little significance in this case addressing the facial validity of the statute. Furthermore, to the extent that any Florida policy does not contain the required clause, section 627.736(5) implies the clause in all policies in any event. 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). Thus, a particular carrier's policy language is not at issue here.

District held that these provisions violate the due process rights guaranteed to health care providers by Article I, section 9 of the Florida Constitution, by arbitrarily discriminating against medical providers.

The Fifth District's en banc opinion was issued October 2, 1998, and rendered final by denial of rehearing on October 12, 1998. The Fifth District granted Appellants' Motions for Stay of Mandate pending review by this Court. This appeal timely followed.

SUMMARY OF THE ARGUMENT

Neither the arbitration provision nor the prevailing party attorneys' fee provision in section 627.736(5) is unconstitutional. The Fifth District's conclusion that these provisions illegally discriminate against health care providers should be quashed.

The Fifth District's analysis of the arbitration provision is erroneous first in its failure to identify any right that has been allegedly abridged, and second in its failure to correctly state and apply any constitutional test for infringement of a right. No substantive due process right has been impacted by mandatory arbitration, which does not deny life, liberty, or property. Florida's arbitration code provides ample procedural due process. The "classification" of imposing mandatory arbitration on health care providers who have accepted assignments of benefits is rationally related to a legitimate state interest. No due process or equal protection has been denied by this statute.

Under an access to courts analysis, the provision is likewise valid. Arbitration procedures, judicial review and other protections provide the "access" required, so there is no denial of access to courts in the first instance. Furthermore, health care providers had no right to statutorily mandated insurance benefits prior to 1968, so that right is not "preexisting" and therefore not protected by access to courts at all. Additionally, a reasonable alternative means of redress (arbitration) has been provided, so any denial of access would still be valid. Finally, to the extent that an access to courts right exists, that right belongs to the

insured. These providers have questionable standing to challenge a denial of access to courts for another party's right of redress. Mandatory and binding arbitration provisions have been repeatedly upheld in Florida and other jurisdictions. This provision is equally valid.

Significantly, these statutory provisions are only activated once the provider voluntarily accepts an assignment of benefits from the insured. To the extent that any of the providers' rights are impaired, that impairment stems from their acceptance of the policy benefits, not from the operation of the statute itself.

In fact, that voluntary acceptance of benefits provides an alternative ground for mandating arbitration of these providers' claims regardless of the validity of the statutory arbitration clause. The providers are third party beneficiaries of insurance contracts that contain undisputedly valid arbitration clauses. It is well established that third party beneficiaries are subject to the terms of the contract, including arbitration provisions. The Fifth District did not even need to reach the issue of the validity of the arbitration statute in these cases.

Likewise, the prevailing party attorneys' fee provision is also constitutional. There is simply no constitutional right to be free from liability for another party's attorneys' fees. Prevailing party fee statutes do not deny access to courts, do not impair preexisting rights, and have been repeatedly validated in Florida law. This Court has already determined that health care

providers are a reasonable classification for the purposes of a prevailing party fees statute, and that fact has not changed.

Finally, any constitutional infirmity has been waived by these providers due to their failure to notify the Attorney General of their challenge to the statute.

The decision below should be quashed, with directions to compel arbitration.

ARGUMENT

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

It is well established that state statutes are presumed valid, and that the burden of demonstrating that a statute is unconstitutional lies with the party challenging the provision. 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). As this Court has recognized, "a law is not necessarily discriminatory - hence invalid - because it lacks universality of operation over the state. The test to be applied is whether the exclusion . . . is predicated upon a fair, proper and reasonable classification or premise." Village of North Palm Beach v. Mason, 167 So. 2d 721, 728 (Fla. 1964). This Court can review each of the questions presented on a de novo basis.

Three of the state's District Courts of Appeal have considered and approved the constitutionality of the mandatory arbitration provision at issue here. See Omni Insurance Company v. Special Care Clinic, 708 So. 2d 314 (Fla. 2d DCA 1998) and Southeast Diagnostic Services v. State Farm Mutual Ins. Co., 697 So. 2d 988 (Fla. 4th DCA 1997) (both citing with approval Orion Ins. Co. v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997)). However, the Fifth District held that the statute violated health care providers' due process rights by "discriminating" against them in requiring arbitration only of claims between the carrier and

provider, while claims between the carrier and insured may proceed in the court system.[3]

To properly analyze the question presented as well as the Fifth District's decision below, a basic review of the relevant constitutional provisions is needed. Perhaps one of the factors that led the Fifth District to disagree with three of its sister DCAs on this issue is the Fifth District's apparent blending of several different types of constitutional analysis. The Appellants respectfully submit that the Fifth District's majority opinion calls its analysis a due process test while citing the constitutional provision relating to access to courts, actually applies at least part of an equal protection test, and never distinguishes between substantive and procedural due process, all without ever identifying the actual constitutional right that has allegedly been abridged. The following will address each of these various constitutional questions and will demonstrate that the statute survives them all.

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[3] It should be noted that at least some courts have interpreted the statutory arbitration provision as only mandating that the insurance policy have an arbitration clause, not that the clause be mandatory in nature. See Physicians Diagnostics and Rehab, Inc. v. Progressive Casualty Ins. Co., 4 Fla. L. Weekly Sup. 509c (17th Circuit 1996); Fortune Ins. Co. v. American Spine and Pain Rehabilitation Institute, 4 Fla. L. Weekly Sup. 632b (13th Circuit 1996); Advanced Orthopedic Institute v. Bankers Ins. Co., 3 Fla. L. Weekly Sup. 673 (13th Cir. 1995). Other courts have rejected this interpretation, and found that the statute compels each policy to contain a mandatory, binding arbitration clause. Orion Insurance Company v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997). Of course, where a statute may be interpreted in a manner that upholds its constitutionality, the supreme court must adopt that construction. Department of Insurance v. Southeast Volusia Hospital District, 438 So. 2d 815 (Fla. 1983).

SUBSTANTIVE AND PROCEDURAL DUE PROCESS: Constitutional Tests

The basic due process guarantee in both the Florida and Federal Constitutions applies to "life, liberty and property." Art. I, § 9 Fla. Const. A substantive due process analysis protects these enumerated rights from unwarranted government encroachment, while procedural due process safeguards these substantive rights by ensuring a fair process and proper administration of justice. Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). 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.

Simply put, 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 parties below.

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). The test only applies to determine the validity of a statute that infringes upon a protected right. If there is no infringement, there is no question to resolve.

Even if this statute impacted substantive rights, the Fifth District went well outside the bounds of the proper test for validity of a statute. In determining whether a statute complies with substantive due process protections, the court will limit its analysis to the standard announced and 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.

The Fifth District failed to abide by these admonitions in this case, 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. 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).

Furthermore, this Court has had several previous occasions to review the constitutionality of section 627.736 and its predecessors. In Purdy v. Gulf Breeze Enterprises, 403 So. 2d 1325 (Fla. 1981), this Court affirmed the statutory no-fault scheme, despite the fact that the entire act "discriminates" between automobile accident victims and those persons injured by other types of events. Other classifications have likewise been upheld in the PIP context. See Lasky v. State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974) (validating the exclusion of commercial vehicles from the no-fault scheme); Scherzer v. Beron, 455 So. 2d 441 (Fla. 5th DCA 1984) (holding that the statute constitutionally excluded motorcycles from the no-fault law); Dealers Insurance Company v. Jon Hall Chevrolet Company, 547 So. 2d 325 (Fla. 5th DCA 1989) (validating the distinction between commercial and personal insurers); Verdecia v. American Risk Assurance Co., 543 So. 2d 321 (Fla. 3d DCA 1989); Heidenstrauch v. Bankers Insurance Company, 564 So. 2d 581 (Fla. 4th DCA 1990) (both upholding the deductible provision in the PIP statute in the face of an constitutional challenge). See also Blaylock v. Georgia Mutual Ins. Co., 238 S.E.2d 105 (Ga. 1977) (Georgia's PIP statute provides for arbitration between insurers but not between an insurer and its insured); New Hampshire Ins. Co. v. State Farm Ins. Co., 643 A.2d 328 (Del. 1994) (validating an arbitration provision that applied only to disputes between insurers and self insurers as making a

reasonable classification). The provision here is no less valid, and the decision below should be quashed.

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

Likewise, a procedural due process analysis is relevant only where a substantively protected right is affected by the procedure. Again, no substantive right has been abridged, so the analysis should end here.

Furthermore, there is little question that the arbitration provisions in Florida Statutes chapter 682 afford proper notice and an opportunity to be heard. "Due process does not necessarily require judicial process." Shimko v. Obe, 1997 WL 746431 (Ohio App. 1997) (unpublished opinion validating a mandatory arbitration provision) (citing Reetz v. Michigan, 188 U.S. 505, 507, 23 S.Ct. 390 (1903)). No court has interpreted the Fourteenth Amendment to include a fundamental right to a trial. Guarlnick v. Supreme Court of New Jersey, 961 F.2d 209 (3d Cir. 1992) (validating a compulsory arbitration provision). As discussed in more detail below, there is no question that Florida's arbitration code provides the required notice and opportunity to be heard, in addition to sufficient judicial review and limitations. No procedural due process defect has been proven or even alleged.

EQUAL PROTECTION: Constitutional Test

While no party has raised an equal protection challenge to the statute, the concept will be discussed because the Fifth District's

analysis invokes some equal protection ideas. Equal protection requirements are very straightforward. 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 Fifth District's analysis of section 627.736(5) as an improper classification is incorrect. This Court has recognized 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). This Court further held that the Legislature could rationally conclude that certain types of parties would have fewer financial resources than others, even if the classification

is an imprecise approximation. 386 So. 2d at 552. See also Lasky v. State Farm Insurance Company, 296 So. 2d 9, 17 (Fla. 1974).

In fact, in Lasky, this Court recognized, in construing this very Act, that private individuals are more likely than a business concern to have financial difficultly and are often less able to negotiate their insurance claims. Likewise, in this case, the Legislature could rationally conclude that an individual insured would have fewer resources than a medical provider, especially a provider who has enough of an insurance claims handling system in place to accept assignments of benefits from insureds.

The insured/patient has no control over the amount of money a medical provider decides to charge for a given treatment or service, nor do they control the amount of frequency with which the medical provider instructs them to return for treatment. They generally pay what they are asked and simply come back whenever the doctor tells them to because they assume the doctor is having them return for a medical, as opposed to financial reason. It is the control medical providers exercise over these issues that allows them to be singled out from the insureds/patients and compelled into arbitration over these disputes. There is nothing arbitrary or discriminatory about the process.

It is equally clear 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). Furthermore, as with any

other business, the Legislature can determine that certain classes are better able to withstand the risks of different insurance risks and costs. Dealers Insurance, 547 So. 2d at 327. The Legislature can validly determine that businesses will be subject to more stringent insurance requirements than individuals as cost of doing business in the state. Id. The statute does not violate equal protection.

FLORIDA HAS A LEGITIMATE STATE INTEREST IN ALTERNATIVE DISPUTE RESOLUTIONS.

The legitimacy of the policy effectuated by a statute is relevant in both a due process and equal protection analysis.[4] Although section 627.736(5) does not violate such protections sufficient to reach the issue, a legitimate state interest is nonetheless presented here. Personal Injury Protection insurance is part of Florida's Motor Vehicle No-Fault Law. Fla. Stat. § 627.730. This Court has previously recognized that the legislative objectives in enacting the No-Fault Act include:

> a lessening of the congesting in the court system, a reduction in the concomitant delays in court calendars, a reduction of automobile insurance premiums, and an assurance that persons injured in vehicular accidents would receive some economic aid in meeting medical expenses and the like, in order not to drive them into dire financial circumstances with the possibility of swelling the public relief rolls.

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[4] 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.

Lasky v. State Farm Insurance Company, 296 So. 2d 9, 16 (Fla. 1974).

This Court has also recognized that establishing a public policy is in the unique province of the Legislature:

> The Legislature has the final word on declarations on public policy, and courts are bound to give great weight to legislative determinations of facts. *See American Liberty Ins. Co. v. West & Conyers Architects and Engineers, 491 So. 2d 573 (Fla. 2d DCA 1986).* Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. *See State v. Division of Bond Fin., 495 So. 2d 183 (Fla. 1986), and Miami Home Milk Producers Ass'n v. Milk Control Board, 124 Fla. 797, 169 So. 541 (1936).*

University of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993).

There is no question 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. 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). It is well established that any doubts concerning the scope of arbitration should be resolved in favor of arbitration. Moses H.

Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927 (1983); Fortune v. U.S.A, 684 So. 2d at 209; Ronbeck Construction Co. v. Savannah Club Corp., 592 So. 2d 344 (Fla. 4th DCA 1992); Regency Group, Inc. v. McDaniels, 647 So. 2d 192 (Fla. 1st DCA 1994); Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, 543 So. 2d 359 (Fla. 1st DCA 1989).

Interestingly, in a case decided only two years earlier but not even referenced in the decision below, the Fifth District applied these principles to compel arbitration under this same statute. In State Farm Mutual Automobile Ins. Co. v. Gonnella, 677 So. 2d 1355 (Fla. 5th DCA 1996), the insured attempted to revoke an assignment of benefits after the insurance company sought to compel arbitration with the provider. The Fifth District flatly rejected this tactic, stating that "the legislative intent [of section 627.736(5)] is clear," and that disputes between the carrier and a provider who has accepted an assignment of benefits must be arbitrated. 677 So. 2d at 1356. See also Orion Ins. Co. v. Magnetic Imaging Systems I, 696 So. 2d 475, 477 (Fla. 3d DCA 1997) (quoting with approval this language from Gonnella). Gonnella makes clear that the carrier has **vested** rights in compelling such arbitration, and that not even the insured can impair those rights. 677 So. 2d at 1357.

Notably, a number of courts in other jurisdictions, including the United States Supreme Court, have reviewed and expressly affirmed both mandatory and binding arbitration provisions. Rodriguez v. Shearson/American Express, Inc., 490 U.S. 477, 109

S.Ct. 1917 (1989); Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 105 S.Ct. 3325 (1985); Country-Wide Ins. Co. v. Harnett, 426 F.Supp. 1030 (S.D.N.Y. 1977), affirmed 431 U.S. 934 (1977) (mandatory arbitration is constitutional if it provides for an impartial decision maker, presentation of evidence and witness testimony under oath, assistance of counsel, and judicial review); Board of Trustees of the Western Conference of Teamsters v. Thompson Building Materials, 749 F.2d 1396, 1404-06 (9th Cir. 1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2116, 85 L.Ed.2d 481 (1985); Lyeth v. Chrysler Corp., 929 F.2d 891, 895 (2d Cir. 1991) (mandatory arbitration provision is valid as long as basic procedural due process - notice and opportunity to be heard - are intact); Desiderio v. National Association of Securities Dealers, Inc., 2 F.Supp.2d 516 (S.D.N.Y. 1998) (approving mandatory arbitration of employment claims, including Title VII claims, for certain class of persons involved in the securities trade); Fraternal Order of Police v. City of Choctaw, 933 P.2d 261 (Okla. 1997); City of Bethany v. Public Employees Relations Board, 904 P.2d 604 (Okla. 1995). Jurisdictions to have specifically considered mandatory arbitration clauses in insurance statutes have likewise affirmed their validity. See Neal v. State Farm Ins. Co., 509 N.W.2d 173 (Minn. Ct. App. 1993), reversed on other grounds, 529 N.W.2d 330 (Minn. 1995).

Florida's policy in this regard, both in the general use of alternative dispute resolution, and the specific need to reduce litigation in PIP disputes, is equally legitimate. To the extent

that this Court reaches the issue in either a due process or equal protection analysis, a legitimate public purpose has been established.

ACCESS TO COURTS: Constitutional Test

Although the Fifth District's opinion only invalidates the statute on due process grounds, the court does discuss access to courts principles, and seems to treat access to courts and due process as synonymous terms. This Court made clear in its lengthy analysis in Lasky v. State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974), that these rights are not synonymous or coextensive. Thus, access to courts will be analyzed separately 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 for 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.

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. The Supreme Court of Colorado has considered and specifically approved a very similar mandatory binding arbitration provision in that state's personal injury protection statute. State Farm Mutual Automobile Ins. Co. v. Broadnax, 8276 P.2d 531 (Col. 1992) (en banc). Noting that Colorado's access to courts right was very similar to that employed in other states, the court held that the right guarantees a proper, impartial procedure and some judicial access, although not a court venue itself. The court held that 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,[5] access to courts is afforded to the extent required. 827 P.2d at 536. See also Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628, 640 (4th Cir. 1983) ("it is too late in the day to argue that compulsory arbitration, per se,

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[5] It is clear that de novo judicial review of an arbitration award is neither required nor proper. See Broadnax, 827 P.2d at 537 (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).

denies due process of law . . . Congress may require arbitration so long as fair procedures are provided and ultimate judicial review is available."); Textile Workers Pension Fund v. Standard Dye and Finishing Co., 725 F.2d 843, 855 (2d Cir. 1984) (upholding a mandatory binding arbitration provision); Board of Education v. Harrell, 882 P.2d 511 (N.M. 1994) (compulsory arbitration does not deny access to courts as long as judicial review is available to overturn arbitrary, capricious and unlawful awards).

The same safeguards are provided in Florida's arbitration code. See Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327 (Fla. 1989); Delta Casualty, 721 So. 2d 321, 328 (Harris, J., dissenting). The same analysis applies to section 627.736(5), and the statute allows access to the courts to the degree required under the constitution.

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). Statutory personal injury protection coverage did not even exist until 1971, see Laws of Florida ch. 71-

252 § 7, and the right to direct payment after assignment was not added to the statute until 1977. See Laws of Florida, ch. 77-468 § 33. Thus, even if the arbitration clause did impair the providers' rights, those rights are not preexisting and are therefore not protected by access to courts. See Shova v. Eller, 606 So. 2d 400 (Fla. 2d DCA 1992) (Altenbernd J., dissenting), dissenting opinion approved, 630 So. 2d 537 (Fla. 1993).

Furthermore, a reasonable alternative means of redress has been provided. In Lasky v. State Farm Insurance Company, 296 So. 2d 9, 14 (Fla. 1974), this Court specifically held that a statute (part of the same Act at issue here) that shifted a right of redress from a recovery in tort to recovery under an insurance policy did not deny access to courts, even though the insured would technically not be accessing the court system to get the benefit. This Court concluded that where a comparable benefit is provided, even though accessed without litigation, a reasonable alternative means of redress has been provided and there is no access to courts violation. In later reaffirming this holding in Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982), this Court made clear that the fact that the alternative means of redress may not be equal to or coextensive with the original right of recovery does not change the analysis. "It was the fact that . . . parties were assured prompt recovery of their major and salient economic losses, not all of their economic losses, which this Court found dispositive." Chapman, 415 So. 2d at 17.

In the case of a provider accepting an assignment of benefits, the provider obtains new rights - the right to collect statutorily mandated insurance benefits. By creating new rights, section 627.736(5) necessarily complies with access to courts requirements. See Orion, 696 So. 2d at 477.

In Smith v. Department of Insurance, 507 So. 2d 1080, 1088 (Fla. 1987), this court affirmed that a contractual arrangement can provide the required alternative remedy. In Smith, this Court explained that its decision in Lasky v. State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974), that the no-fault threshold did not deny access to courts was based on the fact that if the defendant vehicle owner failed to obtain the required security, his immunity was nullified and the plaintiff's threshold to recovery was removed. 507 So. 2d at 1088.

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. In fact, this Court has expressly recognized that the right to arbitration is itself a benefit. In University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993), this Court held that the statutory cap on damages for arbitrated medical negligence cases did not violate access to courts, due proces, or a number of other constitutional protections, even though the cap did not apply to non-arbitrated claims. In so holding, 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 addition to judicial review of the arbitration award, any party subject to an arbitration clause, whether the clause is statutory or contractual, has the right to court determination of whether the particular claim is subject to arbitration in the first instance. Piercy v. School Board of Washington County, 576 So. 2d 806 (Fla. 1st DCA 1991). This protection has been frequently employed in the context of the very statute at issue here, with numerous county court cases filed to determine whether the provider has in fact accepted an assignment of benefits or whether the issues disputed are subject to the arbitration provision of the statute or relevant insurance policy. See, e.g., Union American Ins. Co. v. U.S.A. Diagnostics, Inc., 697 So. 2d 560 (Fla. 3d DCA 1997); Fortune Ins. Co. v. U.S.A. Diagnostics, 684 So. 2d 208 (Fla. 4th DCA 1996); U.S. Security Ins. Co. v. Magnetic Imaging Systems I, Ltd., 678 So. 2d 872 (Fla. 3d DCA 1996).

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.

Additionally, it is not entirely clear that a provider even has standing to challenge the arbitration provision. To the extent that the provision impairs the right of access to courts for claims for benefits under the policy, that right is the insured's, not the provider's. The assignment of the cause of action does not necessarily carry with it the assignment of personal constitutional rights. This court explained in Purdy v. Gulf Breeze Enterprises, 403 So. 2d 1325 (Fla. 1981), in addressing the very statute at issue in this case, that a statute that merely prevents a party from recovering money that equitably or actually belongs to another does not deny access to courts.

This analysis was explained in Transcontinental Gas Pipeline Corp. v. Dakota Gasification Co., 782 F.Supp. 336, 341 (S.D. Texas 1991). In Transcontinental Gas, the court not only rejected the argument that an assignee was not subject to a contract's arbitration clause, but also further held that any constitutional or statutory defenses to binding arbitration that may have been available to the original contracting party were not transferrable or assignable to the assignee. The providers here likewise have no standing to assert the insured's personal constitutional defenses to the arbitration clause. The decision below should be quashed.

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

Another important issue must be addressed in regard to all the constitutional challenges presented in this case: these providers voluntarily submitted themselves to this statute by accepting the assignment of benefits. The statute does not even purport to apply to a provider unless he has voluntarily accepted such an assignment.

In Orion Ins. Co. v. Magnetic Imaging Systems I, 696 So. 2d 475 (Fla. 3d DCA 1997), the court rejected an access to courts challenge to the very provision at issue here. The Third District explained that the arbitration provision in section 627.736(5) cannot deny access to courts since it only comes into effect when the provider has voluntarily agreed to accept an assignment of benefits from the insured. As the Orion court recognized, even if arbitration did deny access to courts, the statute does not create the denial - the acceptance of assignment of benefits does.

Significantly, none of the medical providers in these cases have argued, and presumably none could argue, that they were unaware of the statutory arbitration provision when they accepted the assignments of benefits from their patients. Furthermore, there are numerous other examples of cases where a party to the contract is subject to statutorily imposed terms that may or may not appear on the face of the contract itself. The law implies terms into virtually every type of contract used in society. Examples range from environmental regulations that impact

construction contracts and labor regulations that impact employment contracts to FCC regulations that impact broadcasting contracts.

The Fifth District apparently recognized this fact, because the majority opinion discounts this voluntary bargain analysis by assuming that certain health care providers are economically forced to take assignments of benefits to stay in business. As discussed in detail above, this assumption was not only unsupported by any record facts but was a wholly improper expansion of a court's proper role in evaluating the validity of a statute. The Legislature is given the authority to make policy and to generalize that policy to apply to all similarly situated persons. The courts cannot invalidate a statute by surmising some exceptional and unproven facts that may or may not apply to an individual affected by the statute. Of course, this is particularly true in addressing a facial challenge.

The fact that these providers are only subject to the arbitration clause as a result of their voluntary acceptance of assignments of benefits applies equally to dispel all constitutional challenges raised herein. To the extent that their rights have been impaired, that impairment resulted from their decision to accept an assignment, not from the statute.

II. REGARDLESS OF THE CONSTITUTIONALITY OF THE STATUTE, APPELLEES WERE BOUND TO ARBITRATE AS THIRD PARTY BENEFICIARIES OF THE INSURANCE CONTRACTS.

The Fifth District should not even have reached the constitutionality issue in this case, because there is a wholly independent reason that these providers should have been compelled

to arbitrate. As discussed in detail above, section 627.736(5) statutorily implies such a binding arbitration provision in every PIP policy issued in this state. In this case, there is no question that each of the insurance contracts contained such a provision. The contracts themselves are sufficient to bind the providers to arbitrate regardless of the effect or validity of the statute.

It is well established 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).

It is likewise clear 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).

No argument has been raised that an insurer cannot include an arbitration clause in its policy. 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. 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.

In addition to invalidating the arbitration requirement of the PIP statute, the Fifth District also held that the prevailing party attorneys' fee provision was unconstitutional. Although the court's discussion of the attorneys' fee issue is somewhat sparse, the primary basis for the holding is the fact that medical providers who accept an assignment of benefits are subject to a prevailing party fees provision, while insureds' direct claims are governed by Florida Statutes section 627.428, which allows the insured to recover fees from the insurer but provides no right of recovery for a prevailing insurance carrier in disputes directly with an insured or beneficiary. Like the analysis applied to the arbitration provision, the majority opinion in the Fifth District concludes that such a distinction between providers and insureds is "discriminatory."

Respectfully, the Fifth District's quarrel with the attorneys' fees provisions is not only unsupported by the law, but is in fact directed at the wrong statute. It is not section 627.736(5) that "discriminates" between insureds and other claimants. Florida Statutes section 627.428 creates a right of attorneys fees recovery **only** to the insured or beneficiary. Providers would not be entitled to the benefits of section 627.428 regardless of any fees provision in section 627.736.

Furthermore, it is well established that prevailing party attorneys' fee statutes are valid and constitutional. In Hunter v. Flowers, 43 So. 2d 435 (Fla. 1949) (en banc), 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.

This Court has likewise recognized that attorneys' fee provisions simply do not deny access to courts. The right of access to courts found in article I, section 21 of the Florida Constitution applies to rights of **action**. There was no pre-existing common law right to be free from the obligation to pay a prevailing party's attorneys' fees. In fact, as this Court has explained, the true common law rule is the English Rule which requires payment of prevailing party fees, and it is historically inaccurate to state that attorney fee statutes are in derogation of

the common law. See Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1147-48 (Fla. 1985).

In short, litigants of any type simply do not have a constitutional right to be free from obligation for the other party's attorneys' fees. See also 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 imposition of such costs on the opposing party does not deprive the party of any constitutional rights).

Given this historical approval of prevailing party fee entitlement, it can presumed that the primary opposition to this prevailing party fee provision will be that it applies only to claims between providers and insurers. However, 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. For example, Florida Statutes section 57.111 provides for a fees award to a prevailing "small business" party in administrative proceedings. The statute defines "small business" by the type of business, number of employees, and net worth of the business. "Big" businesses and other parties are not entitled to prevailing party fee awards. Likewise, a predecessor version of the medical malpractice statute allowed prevailing party attorneys' fees to be recovered only against non-indigent parties. The statute, and the distinction between parties, was specifically approved as constitutional. See Bayfront Medical Center v. Ly, 465 So. 2d 1383 (Fla. 2d DCA 1985).

Other statutes likewise provide for prevailing party fee awards only in cases involving certain types of parties. See also Fla. Stat. §§ 175.391 and 185.40 (proving for prevailing party fee awards in cases involving pension disputes of municipal police officers and firefighters); Fla. Stat. § 246.227 (nonpublic schools); Fla. Stat. § 320.8325(4) (providing that mobile home anchor installers and manufacturers may be liable for prevailing party fees under certain conditions, and not imposing the same liability on other motor vehicle parts installers and manufacturers); Fla. Stat. § 366.031 (imposing fee liability on electric utilities that provide video service); Fla. Stat. § 403.412 (conditioning entitlement to a prevailing party fee award in a pollution control case on whether the case involved a state permit); Fla. Stat. § 415.111 (providing for prevailing party fees in adult protective services cases involving disabled adults or elderly persons); Fla. Stat. § 447.504(3) (exempting the Public Employees Relations Commission from a prevailing party fee provision); Fla. Stat. § 455.228 (providing prevailing party investigation costs in DPR proceedings only if the Department prevails); Fla. Stat. § 455.637 (providing prevailing party investigation costs in Health Department proceedings only if the Department prevails); Fla. Stat. §§ 501.059, 501.2105, and 501.621 (providing a different standard for prevailing party fees in consumer protection cases initiated by the Department than other cases); Fla. Stat. § 713.16 (distinguishing obligations of owners from other parties in determining prevailing party fees in

construction lien cases). Furthermore, it is a common and accepted practice to include prevailing party fee provisions in arbitration statutes. See Fla. Stat. § 718.1255.

In fact, given the current general "American" rule that each party pays its own attorneys' fees, **any** of the eighty prevailing party fee statutes could be characterized as "classifying" one type of litigant or case to be treated differently than the general rule. This is clear from the many case decisions affirming prevailing party fee statutes after an equal protection and due process analysis. In short, this statute does not "classify" any more than any other prevailing party fee statute.

Turning to the "classification" at issue in this case, 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 Rowe, 472 So. 2d 1145. The statute is valid, and decision below should be quashed.[6]

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[6] Significantly, the Legislature just reconsidered the prevailing party fees provision in the 1998 amendments to the PIP statute and left the provision intact. In fact, the Legislature strengthened the fee-shifting clause and its specific application in arbitration cases by clarifying the definition of "prevailing party" in arbitration proceedings. The staff analyses reveal that this clarification was intended to resolve difficulties in identifying the prevailing party in an arbitration where the provider is awarded an amount less than his last demand but more than the insurer's last offer. See Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 2052 (March 31, 1998). The fact that the Legislature has reviewed and reaffirmed both the arbitration clause and the fee provision as recently as this term

IV. THE PROVIDERS IN THIS CASE HAVE WAIVED ANY FACIAL CONSTITUTIONAL CHALLENGE TO THE STATUTE, SINCE THEY NEVER NOTIFIED THE ATTORNEY GENERAL OF THEIR CHALLENGE.

Florida Statutes section 86.091 requires a party seeking a declaration that a state statute is unconstitutional to serve a copy of their pleadings on the Attorney General or State Attorney, giving the state an opportunity to be heard. See also Orion Ins. Co. v. Magnetic Imaging Systems I, 696 So. 2d 475, 477 (Fla. 3d DCA 1997); Buckley v. City of Miami Beach, 559 So. 2d 310, 312 (Fla. 3d DCA 1990). There is no question that the Appellees failed to give such notice here.

There is likewise no question that arguments regarding the constitutionality of the PIP statute are waivable. See Orion, 696 So. 2d at 475; Fortune Insurance Company v. Everglades Diagnostics, Inc., 721 So. 2d 384 (Fla. 4th DCA 1998); Levine-Britt v. State Farm Mutual Automobile Insurance Company, 625 So. 2d 141 (Fla. 1st DCA 1993); Travelers Ins. Co. v. Furlan, 408 So. 2d 767 (Fla. 5th DCA 1982). The providers here waived these issues and the Fifth District's decision should be quashed for that reason in addition to those addressed above.

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is significant support for the validity of both provisions.

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.

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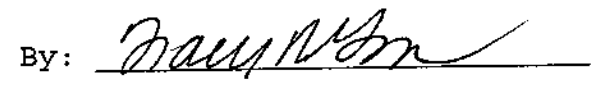
By: 

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; and **MARK TISCHHAUSER, Esquire**, 3134 North Boulevard, Tampa, Florida 33603-5542 on this the 2d day of February, 1999.

Tracy Raffles Gunn, Esquire

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

NOTICE OF FILING

The Appellants, Delta Casualty Company, Nationwide Mutual Fire Insurance Company, and Bankers Insurance Company, by and through undersigned counsel, hereby give notice of their filing the Appendix and the Certificate of Type Size and Style which were inadvertently omitted from filing with the Initial Brief in the above-referenced matter.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed with Courier 10 point print, which is a non-proportionately spaced font and which does not exceed 10 characters per inch.