IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-278

PROGRESSIVE SELECT INSURANCE COMPANY,
Petitioner,

v.

FLORIDA HOSPITAL MEDICAL CENTER, INC.
as assignee of Jonathan Parent,
Respondent.

On Discretionary Review of a Question
Certified by the Fifth District Court of Appeal
to Be of Great Public Importance

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

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INDEX TO APPENDIX TO
PETITIONER'S INITIAL BRIEF ON THE MERITS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to: **Rutledge M. Bradford, Esquire**, debbieb@bradfordlaw.com and rmb.service@bradfordlaw.com, 2900 East Robinson Street, Orlando, Florida 32803; **Chad A. Barr, Esq.**, service@chadbarrlaw.com, chad@chadbarrlaw.com, 986 Douglas Avenue, Suite 100, Altamonte Springs, Florida 32714; **Eric Biernacki, Esq.**, ebiernacki@abdmplaw.com, One South Orange Avenue, Suite 403, Orlando, Florida 32801; and **Mac S. Phillips, Esq.**, mphillips@phillipstadros.com, 212 Southeast 8th Street, Suite 103, Ft. Lauderdale, Florida 33316, by e-mail on this **9th** day of **May**, **2018**.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

PROGRESSIVE SELECT INSURANCE COMPANY,

Petitioner,

v.

Case No. 5D16-2333

FLORIDA HOSPITAL MEDICAL CENTER A/A/O JONATHAN PARENT,

Respondent.
_____/

Opinion filed February 9, 2018

Petition for Certiorari Review of Decision from the Circuit Court for Orange County Acting in its Appellate Capacity.

Douglas H. Stein, of Bowman and Brooke, LLP, Coral Gables, for Petitioner.

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Lawrence M. Kopelman, of Lawrence M. Kopelman, P.A., Fort Lauderdale and Mac S. Phillips and Chris Tadros, of Phillips Tadros, P.A., Fort Lauderdale, as Amicus Curiae Floridians for Fair Insurance, Inc.

ON MOTION FOR REHEARING AND MOTION TO CERTIFY

SAWAYA, J.

Progressive Select Insurance Company has filed a motion for rehearing and a motion to certify a question of great public importance to the Florida Supreme Court. We grant the motion for rehearing and the motion to certify. We withdraw the previous opinion and substitute the following in its stead.

This certiorari proceeding concerns the proper methodology to determine the application of the deductible authorized under section 627.739(2), Florida Statutes (2014), when personal injury protection ("PIP") benefits are sought by an insured. The decision we review (rendered by the circuit court in its appellate capacity) provides that, when calculating the amount of PIP benefits due to the insured, section 627.739(2) requires the deductible to be subtracted from the total medical care charges before applying the statutory reimbursement limitations provided in section 627.736(5)(a)1.b., Florida Statutes (2014). The respondent, Florida Hospital Medical Center, contends that the court applied the correct law in utilizing this methodology. Progressive argues that the statutory limitations must be applied first and the deductible subtracted from that amount. The issue is thus framed, and we must decide whether the circuit court properly interpreted the pertinent statutory provisions and applied the correct methodology. This issue has generated numerous conflicting decisions by the county and circuit courts,[1] so

[1] See, e.g., Progressive Select Ins. v. Fla. Hosp. Med. Ctr., 24 Fla. L. Weekly Supp. 318a (Fla. 9th Cir. Ct. June 14, 2016); Progressive Select Ins. v. Fla. Hosp. Med. Ctr., 24 Fla. L. Weekly Supp. 200a (Fla. 9th Cir. Ct. June 14, 2016); cf. Advantacare of Fla., LLC v. Geico Indem. Co., 23 Fla. L. Weekly Supp. 841a (Fla. 7th Cir. Ct. July 24, 2015); Progressive Am. Ins. v. Munroe Reg'l Health Sys., Inc., 23 Fla. L. Weekly Supp. 707a

we issue this opinion to provide precedent and a basis of continuity for future trial court rulings. See Fla. Med. & Injury Ctr., Inc. v. Progressive Express Ins., 29 So. 3d 329, 331 (Fla. 5th DCA), review denied, 46 So. 3d 567 (Fla. 2010).

Factual and Procedural Background

A discussion of the circumstances surrounding the accident that led to the insured's claim for PIP benefits is not particularly helpful to resolve the issue before us, so we will not dwell on that aspect of the underlying case. It is enough to say that after the insured, Jonathan Parent, was involved in an automobile accident, he incurred bills for the medical care he received from Florida Hospital. Those bills exceeded the deductible amount of $1000 provided in the insurance policy issued by Progressive. As is typical in these cases, Parent assigned his PIP benefits under the policy to Florida Hospital (hence the designation "a/a/o" in the caption, which means "as assignee of"). The bill Florida Hospital sent to Progressive for Parent's treatment calculated the amount owed as follows:

$2,781.00	Total hospital charge
- $1,000.00	Parent's PIP deductible
$1,781.00	
X 75%	Applying section 627.736(5)(a)1.b.
$1,335.75	
X 80%	Applying section 627.736(5)(a)1.
$1,068.60	Amount Due

Progressive remitted payment, but it used a different payment methodology when applying section 627.736(5)(a)1.b.'s reimbursement limitation provision:

$2,781.00	Total hospital charge
X 75%	Applying section 627.736(5)(a)1.b.

(Fla. 18th Cir. Ct. Apr. 17, 2015); Garrison Prop. & Cas. Ins. v. New Smyrna Imaging, LLC, 23 Fla. L. Weekly Supp. 708a (Fla. 18th Cir. Ct. Jan. 12, 2015).

	$2,085.75	
-	$1,000.00	Parent's PIP deductible
	$1,085.75	
	X 80%	Applying section 627.736(5)(a)1.
	$ 868.60	Amount Due

Florida Hospital thereafter filed suit against Progressive in the county court seeking the $200 difference between what it calculated the PIP benefit amount to be and what Progressive paid. After Progressive filed an answer denying liability and asserting affirmative defenses, both parties filed motions for summary judgment.

The county court entered a final summary judgment in favor of Florida Hospital in the amount of $200, plus interest, thus adopting Florida Hospital's argument that the plain language of section 627.739(2) required Progressive to subtract Parent's deductible from Florida Hospital's total charges before applying section 627.736(5)(a)1.b.'s reimbursement limitation. Progressive appealed, and the circuit court affirmed the county court's judgment. This certiorari proceeding followed.

Before continuing further, it is necessary to note the limitations of our review. Second-tier certiorari review is limited to determining whether the circuit court: (1) accorded procedural due process and (2) applied the correct law. Dep't of High. Saf. & Motor Veh. v. Alliston, 813 So. 2d 141, 144 (Fla. 2d DCA 2002). Here, the pertinent inquiry is whether the circuit court applied the correct law when interpreting sections 627.736(5)(a)1.b. and 627.739(2) to determine whether the county court utilized the correct methodology to apply the deductible. Certiorari relief can be granted only if Progressive demonstrates that there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. Futch v. Fla. Dep't of High. Saf. & Motor Veh., 189 So. 3d 131, 132 (Fla. 2016). Clearly established law derives from a variety of legal

sources, including the interpretation of statutes. Allstate Ins. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003).

Statutory Analysis

In order to determine whether the circuit court applied the correct law, we must analyze the statutory provisions at issue, which are an integral part of the Florida Motor Vehicle No-Fault Law.[2] Florida's No-Fault Law has historically been a complicated body of legislation, and the constant revisions and amendments since its inception[3] have contributed to its complexity. See Fla. Med., 29 So. 3d at 337. As will be seen a little later, however, instances may arise when the historical development of the law reveals clear legislative intent. When interpreting the provisions of the No-Fault Law, the Florida Supreme Court has explained that the statutes "must be liberally construed in order to effect the legislative purpose of providing broad PIP coverage for Florida motorists." Blish v. Atlanta Cas. Co., 736 So. 2d 1151, 1155 (Fla. 1999); see also Vasques v. Mercury Cas. Co., 947 So. 2d 1265, 1269 (Fla. 5th DCA 2007) ("[B]oth this court and the Florida supreme court have held the provisions of Florida's No-Fault Act must be construed liberally in favor of the insured.").

We begin our analysis with section 627.739, which states in pertinent part:

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[2] Section 627.730, Florida Statutes (2014), provides that "[s]ections 627.730-627.7405 may be cited and known as the 'Florida Motor Vehicle No-Fault Law.'"

[3] Referring just to section 627.736, which is commonly known as the PIP statute, the court in GEICO General Insurance v. Virtual Imaging Services, Inc., 141 So. 3d 147, 152 (Fla. 2013), stated that "[s]ince the PIP statute was first enacted in 1971, the Legislature has amended the statute numerous times, including every year between 1987 and 1999, and again every year between 2003 and 2009."

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, and $1,000. The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1). However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).

§ 627.739(2), Fla. Stat. (2014) (emphasis added). This statute distinguishes between "expenses and losses" and "benefits." The second sentence states that the deductible "must be applied to 100 percent of the expenses and losses." In the very next sentence, the statute provides that "[a]fter the deductible is met, each insured is eligible to receive up to $10,000 in total benefits." Thus, the statute indicates that the deductible applies to "100 percent of the expenses and losses" whereas "benefits" refers to the calculated amount after the deductible has been applied to the total expenses and losses and after application of the statutory reimbursement limitations found in section 627.736.

"Expenses and losses" are not defined in the statute, but they are described in section 627.736(1). Section 627.736(1)(a) specifically provides that the insured may be entitled to "[e]ighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services." § 627.736(1)(a), Fla. Stat. (2014) (emphasis added). Similarly, section 627.736(1)(b) refers to "[s]ixty percent of any loss of gross income and loss of earning capacity" and "all expenses reasonably incurred in obtaining from others ordinary and necessary services" associated with the disability of an insured. § 627.736(1)(b), Fla. Stat. (2014) (emphasis added).

In addition to describing expenses and losses, section 627.736(1) also describes benefits and establishes separate methodologies (80% reimbursement limitation for

medical expenses and 60% reimbursement limitation for disability expenses and losses) for calculating how much of the expenses and losses will be paid as benefits. On the other hand, section 627.739 requires that the deductible must be applied to "100 percent of the expenses and losses." In other words, the 80% and 60% methodologies in section 627.736(1) are intended to limit reimbursements in order to establish benefits. They are not intended to describe the application of the deductible under the 100% methodology provided in section 627.739(2).

Specifically, Progressive contends that the reimbursement limitations contained in section 627.736(5)(a)1.b. should be applied to reduce the expenses and losses and that the deductible should be subtracted from that reduced amount to arrive at the benefit amount owed to the insured. We disagree because, using that methodology, the deductible is not being applied toward 100% of the expenses and losses as required by section 627.739(2). Section 627.736(5)(a)1. provides the insurer with an option to determine benefits pursuant to a schedule of reimbursement limitations. This statutory provision is part of legislative amendments enacted in 2008. It states in pertinent part:

> 1. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> . . . .
>
> b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.

§ 627.736(5)(a)1., Fla. Stat. (2014) (emphasis added). "The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'" Fla. Bar v. Trazenfeld, 833 So. 2d 734, 738 (Fla. 2002).

We believe that application of the optional reimbursement limitations to establish a reduced amount of expenses and losses from which the deductible amount is subtracted would render meaningless the requirement in section 627.739(2) that "[t]he deductible amount must be applied to 100 percent of the expenses and losses." See Borden v. E.-Eur. Ins., 921 So. 2d 587, 595 (Fla. 2006) ("It is . . . a basic rule of statutory construction that 'the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.'").

Historical Development of Section 627.739(2)

The Legislature knows how to write statutory provisions that would require the deductible amount to be subtracted from the benefits due under the policy, which are determined after the reimbursement limitations are applied. Indeed, the prior version of section 627.739(2) stated:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, $1,000, and $2,000, such amount to be deducted from the benefits otherwise due each person subject to the deduction. However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).

§ 627.739(2), Fla. Stat. (1999) (emphasis added). The Florida Supreme Court reviewed the emphasized provision and held that the clear meaning of the statute required that the benefits due under the policy be calculated utilizing the reimbursement limitation (which at that time was 80% of the medical expenses) and that the deductible amount was to be subtracted from that calculation. Govan v. Int'l Bankers Ins., 521 So. 2d 1086, 1088 (Fla. 1988) ("The plain reading of this statute requires a construction that subtracts the deductible from the eighty percent of the medical expenses."); see also Int'l Bankers Ins.

v. Arnone, 552 So. 2d 908, 911 (Fla. 1989) ("Under the statutory scheme, the deductible amounts are to be deducted from 'benefits otherwise due.' . . . Section 627.736(1) defines the parameters of the benefits otherwise due under a PIP policy as including eighty percent of certain medical expenses and sixty percent of lost wages . . . ."). Therefore, under this prior version of the statute, the deductible was required to be satisfied from the amount that was actually payable out of the policy benefits.

In Govan, the Florida Supreme Court lamented the methodology required by the prior version of section 627.739(2) and invited the Legislature to address the issue:

> While we may disagree with the legislative policy underlying the statute, we have no authority to change the clear intent and purpose of a statute that is not vague and ambiguous. Complaints about this policy should be addressed to the legislature.*
>
> * We note the legislature, during the 1987 session, failed to enact a bill which would have amended the statute to make it consistent with the statutory interpretation presented here by the petitioner. House Bill 1015.

521 So. 2d at 1088. In response to Govan and Arnone, the Florida Legislature in 2003 amended section 627.739(2) to require:

> (2) . . . The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1).

§ 627.739(2), Fla. Stat. (2003).[4] The obvious intent of the Legislature was to replace the term "benefits otherwise due" with "expenses and losses" in determining what the

[4] In its motion for summary judgment filed in the county court, Florida Hospital relied on the 2003 Senate Staff Analysis and Economic Impact Statement to argue that the intent of the 2003 amendments was to apply the deductible before reducing the medical expenses pursuant to the statutory reimbursement limitations. Specifically, the pertinent part of the staff analysis provides:

deductible would be applied to, moving the term "benefits" to the next sentence, which discusses the insurer's liability after the deductible is satisfied. Thus, the current version of the statute provides a clear distinction between "expenses and losses" for purposes of applying the deductible and "benefits" that are due to the insured after the reimbursement limitations are applied.

The legislative amendment in 2003 constituted a substantive change in the sequence of applying the deductible in PIP cases. The Legislature, by requiring that the deductible be applied to 100% of the expenses and losses, abandoned the previous methodology of subtracting the deductible from the benefits due under the policy after applying the reimbursement limitations. Despite this legislative change in 2003,

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> [The bill] [a]mends s. 627.739, F.S., relating to PIP deductibles, to change the calculation of the PIP deductible to require that it must be applied to 100 percent of medical expenses, rather than to the current 80 percent of expenses that PIP pays. This provision has the effect of requiring PIP to pay more in benefits than it does now if a deductible is elected. For example, under current law: $5,000 medical bill, PIP pays 80 percent, or $4,000, minus $2,000 deductible = $2,000. Under this provision: $5,000 medical bill, minus $2,000 deductible, is $3,000. PIP pays 80 percent X $3,000 = $2,400.

Fla. S. Comm. on Banking & Ins., CS for SB 32-A (2003) Staff Analysis 16 (May 15, 2003). We have not relied on this report in our analysis. We note it here because it confirms our conclusion about how the deductible should be applied under section 627.739(2). See Townsend v. R.J. Reynolds Tobacco Co., 192 So. 3d 1223, 1229 (Fla. 2016) (noting that, after examining a staff analysis of the enacting law, "[a]lthough it is not necessary to delve into the legislative history of section 55.03(3), Florida Statutes (2010), because the language is clear and unambiguous, the legislative history nevertheless confirms our reading of the statute"); Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 368 (Fla. 2013) ("The legislative summary in a staff analysis regarding FDUTPA affords further support for the principal [sic] . . . ."); Larimore v. State, 2 So. 3d 101, 109 n.4 (Fla. 2008) ("This interpretation is confirmed by Senate staff analyses on chapter 99-222, Laws of Florida . . . ."); G.G. v. Fla. Dep't of Law Enf., 97 So. 3d 268, 273 (Fla. 1st DCA 2012) ("Our decision does not rely on staff analyses. . . . The staff analyses support the position advocated here by G.G., not FDLE.").

Progressive and the dissent argue that the methodology advanced in the previous version of section 627.739 (as interpreted by the Florida Supreme Court in Govani and Arnone) should continue to be applied by the courts under the current version of the statute. We do not believe that the Legislature would find it necessary to amend the statute as it did in 2003 if, as Progressive and the dissent essentially argue, there was to be no change in the methodology. As we have previously indicated, the Legislature does not intend to enact useless legislation. See Dennis v. State, 51 So. 3d 456, 463 (Fla. 2010); Borden, 921 So. 2d at 595; State v. Goode, 830 So. 2d 817, 824 (Fla. 2002); Macchione v. State, 123 So. 3d 114, 119 (Fla. 5th DCA 2013).

The court in Govan noted that during the 1987 legislative session, the Legislature failed to enact a bill that would change the methodology described in the prior version of section 627.739(2). Similarly, it should be noted here that during the 2016 legislative session, the Florida Legislature failed to enact a proposed bill that would amend section 627.739(2) to incorporate the methodology of subtracting the deductible amount after the reimbursement limitations are used to determine the benefits due under the policy. Specifically, the proposed amendment stated:

> Section 5. Subsection (2) of section 627.739, Florida Statutes, is amended to read:
>
> 627.739 Personal injury protection; optional limitations; deductibles.—
>
> (2) Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, and $1,000. The deductible amount must be applied to 100 percent of the expenses and losses covered under personal injury protection benefits coverage issued pursuant to ~~described in~~ s. 627.736. If an insurer has elected to apply the schedule of maximum charges authorized under this chapter, the amount of

> expenses and losses applicable to the deductible will be limited to 100 percent of such authorized reimbursement limitations or fee schedules. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1). However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).

Fla. SB 1036 (2016) (words stricken are deletions; words underlined are additions); see also Fla. HB 659 (2016) (same). This amendment incorporates the same methodology Progressive and the dissent argue should apply under the current version of section 627.739(2). The Legislature did not adopt this amendment.

The dissent labels this failed amendment a clarification of the current statute. We disagree. The thirteen-year span between enactment of the current statute and introduction of the failed amendment establishes that it would have been a substantive revision. See Parole Comm'n v. Cooper, 701 So. 2d 543, 544-45 (Fla. 1997) ("[I]t is inappropriate to use an amendment enacted ten years after the original enactment to clarify original legislative intent."); State Farm Mut. Auto. Ins. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995) ("It would be absurd . . . to consider legislation enacted more than ten years after the original act as a clarification of original intent . . . ."); Macchione, 123 So. 3d at 117. Moreover, the title to the bill incorporating the failed amendment states:

> An act relating to automobile insurance; . . . amending s. 627.739, F.S.,; revising applicability; providing a limitation to an amount of expenses and losses applicable to a deductible related to personal injury protection benefits under a certain condition . . . .

Fla. SB 1036 (2016). The title of a proposed law may reveal whether the Legislature intended to substantively change a statute or to clarify its provisions. See Hassen v. State Farm Mut. Auto. Ins., 674 So. 2d 106, 109-10 (Fla. 1996); see also Earth Trades, Inc. v.

T & G Corp., 108 So. 3d 580, 585 (Fla. 2013); Kasischke v. State, 991 So. 2d 803, 809 (Fla. 2008); State v. Webb, 398 So. 2d 820, 825 (Fla. 1981) ("The title is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent." (citation omitted)); Macchione, 123 So. 3d at 118. There is nothing in this language indicating that the amendment was intended to be a clarification.

The "Unreasonable Bill" Argument Advanced by Progressive and the Dissent

Progressive and the dissent argue that the methodology they advance will ensure that the medical provider does not render a bill for services that is unreasonable. The reasonableness of the medical bills for services rendered to Parent in the instant case is not an issue raised by any party in these proceedings. Indeed, Progressive stated in its petition for writ of certiorari that "the point of contention in this case is whether the deductible applies to a charge before the charge is limited by the 75% payment limitation provided by Florida Statute § 627.736(5)(a)1.b, or after the charge is limited by the 75% payment limitation." In any event, we reject this argument for several reasons.

First, it overlooks the distinctions between a deductible and a statutory reimbursement limitation, and it disregards the reason the Legislature approved the applicable provisions. The deductible provisions of section 627.739(2) were enacted to allow for reductions in the amount of the premiums charged by the insurer and to determine the amount of risk through self-insurance the insured has agreed to assume. See Mercury Ins. of Fla. v. Emergency Physicians of Cent., 182 So. 3d 661, 667 (Fla. 5th DCA 2015). Coverage under the policy is not triggered until the deductible amount is met. Id. On the other hand, once coverage is triggered under the policy, the statutory reimbursement limitations provide a methodology for determining the amount of benefits

due to the insured. See Virtual Imaging, 141 So. 3d at 153 (explaining that the reimbursement limitations enacted in 2008 "provided, in part, more specific guidelines regarding a PIP insurer's ability to limit reimbursements" (emphasis added)). As this court explained in Mercury Insurance, "[t]he meeting of the contracted-for deductible unlocks the insured's right to access his/her $10,000 in PIP benefits." 182 So. 3d at 667. This court further explained:

> This interpretation is consistent with the recognized purpose of a deductible. As was noted in General Star Indemnity Company v. West Florida Village Inn, Inc., 874 So. 2d 26, 33-34 (Fla. 2d DCA 2004):
>
> > A "deductible" is "a clause in an insurance policy that relieves the insurer of responsibility for an initial specified loss of the kind insured against." Merriam-Webster's Collegiate Dictionary 471 (deluxe ed. 1998).
> >
> > . . . .
> >
> > "Generally, the functional purpose of a deductible, which is frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay will ripen." Int'l Bankers Ins. Co. v. Arnone, 552 So. 2d 908, 911 (Fla. 1989).
>
> Thus, an insured enters into a contract with an insurance company and agrees to be subject to a deductible in exchange for a reduced monthly premium. In effect, the insured agrees to "self-insure" for the deductible amount. Where an accident occurs, the insured (not the insurer) becomes responsible for payment of claims that are otherwise impacted by the deductible amount in the insurance policy.

Id. We do not believe that the Legislature intended the statutory reimbursement limitations to be applied to expenses and losses that fall within the insured's deductible, which the insured alone is obligated to pay and which are not recoverable as benefits under the policy.

Second, the insured certainly has the right to contest any bill that the insured is required to pay to meet the deductible. The Legislature has provided that an "insured is not required to pay a claim or charges . . . [t]o any person who knowingly submits a false or misleading statement relating to the claim or charges." § 627.736(5)(b)1., Fla. Stat. (2014). Moreover, medical care providers are prohibited from rendering any bill for services that is false or fraudulent, and those that do may suffer severe criminal and civil penalties. See § 817.234(1)(a), Fla. Stat. (2014). Section 817.234 also prohibits a medical care provider from rendering a bill it does not intend to collect from the insured in order to meet the deductible amount and trigger coverage under the policy. § 817.234(7)(a), Fla. Stat. (2014) ("It shall constitute a material omission and insurance fraud . . . for any service provider, other than a hospital, to engage in a general business practice of billing amounts as its usual and customary charge, if such provider has agreed with the insured or intends to waive deductibles or copayments, or does not for any other reason intend to collect the total amount of such charge.").

Third, it bears repeating that the provisions of the No-Fault Law must be construed in favor of the insured. Interpreting the pertinent statutory provisions in a manner that supports the methodology urged by Progressive and the dissent would not further the principle of providing broad PIP coverage to the insured. Rather, as established by the calculation made by Progressive in its benefits payment (which is discussed at the beginning of this opinion), that interpretation would allow the insurer to pay less in benefits than would otherwise be due.

Finally, the dissent bases its argument on a quote from the decision in Garrison, 23 Fla. L. Weekly Supp. at 708a. The quote states that several sections in 627.736,

which are specifically cited by the Garrison court, refer to expenses "covered by the policy." We believe this decision is flawed because not one of the provisions of section 627.736 cited by the court in Garrison contains the language "covered by the policy." In any event, there are an equal number of circuit court opinions that reach the opposite result, and we believe they are the better reasoned decisions.

Conclusion

We conclude that application of the methodology advanced by Progressive and the dissent would require that we revert to the provisions of section 627.739(2) that were in effect before the 2003 amendment. It is not for this court to pick and choose which version of the statute to apply; we must apply the law as it currently exists. Section 627.739(2) currently requires that the deductible be applied to 100% of the expenses and losses, and that is the version the circuit court properly applied. We see no divergence from the correct law in the circuit court's decision, and we see no violation of a clearly established principle of law that results in a miscarriage of justice. Accordingly, we deny the petition for writ of certiorari.

We certify the following question to the Florida Supreme Court as a matter of great public importance:

> WHEN CALCULATING THE AMOUNT OF PIP BENEFITS DUE AN INSURED, DOES SECTION 627.739(2), FLORIDA STATUTES, REQUIRE THAT THE DEDUCTIBLE BE SUBTRACTED FROM THE TOTAL AMOUNT OF MEDICAL CHARGES BEFORE APPLYING THE REIMBURSEMENT LIMITATION UNDER SECTION 627.736(5)(a)1.b., OR MUST THE REIMBURSEMENT LIMITATION BE APPLIED FIRST AND THE DEDUCTIBLE SUBTRACTED FROM THE REMAINING AMOUNT?

PETITION DENIED and QUESTION CERTIFIED.

EDWARDS, J., concurs.
PALMER, J., concurring in part, dissenting in part, with opinion.

PALMER, J., concurring in part and dissenting in part. 5D16-2333

I concur with the majority in certifying the question to the Florida Supreme Court. I otherwise respectfully dissent.

As the circuit court for the Eighteenth Judicial Circuit observed in Garrison Property & Casualty Insurance Co. v. New Smyrna Imaging, LLC:

> As an initial step under s. 627.739(2), the insurer must first determine what are the "expenses and losses described in s. 627.736," in order to apply the deductible to 100% of those expenses and losses. Section 627.736 contains several references to expenses, almost all of which are described as or used in the context of reasonable expenses or expenses "covered by the policy." Section 627.736(1)(a), (1)(b), & (6)(b), Fla. Stat. (footnote omitted). Thus, when read together, section 627.739 and section 727.736 require that a PIP deductible be applied to 100% of the reasonable and necessary medical expenses, or those expenses covered by the policy.

23 Fla. L. Weekly Supp. 708a (Fla. 18th Cir. Ct. Jan. 12, 2015). Section 627.739(2)'s references to section 627.736 necessarily include references to the reimbursement limitation of section 627.736(5)(a)1.b. and, therefore, "100 percent of the expenses . . . described in s. 627.736" includes the reimbursement limitation set forth in the current section 627.736(5)(a)1.b.

The majority concludes that "medical expenses" are not the same as "medical benefits" under the PIP statute. I disagree. Medical expenses covered under PIP are limited to those services and expenses which are reasonable and necessary. See Geico Gen. Ins. Co. v. Virtual Imaging Servs. Inc., 141 So. 3d 147 (Fla. 2013). Under the majority's interpretation of section 627.739(2), the deductible could be applied to a charge which is unreasonably high and thus not covered by PIP. "The notion that a deductible

could be applied to loss that is not covered by the policy is fundamentally unreasonable." Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc., 874 So. 2d 26, 33 (Fla. 2d DCA 2004).

The majority relies on the fact that the Legislature failed to enact a proposed law in 2016 which explicitly recognized the calculation method propounded by Progressive as evidence that that calculation method is not supported by the current law. However, the Bill Analysis and Fiscal Impact Statement for that bill explained that the proposed amendment sought to "clarify that the PIP deductible applies to expenses and losses covered under PIP benefits and coverage." Fla. S. Bill Analysis & Fiscal Impact Statement of Jan. 25, 2016, § 5 for Bill SB 1036, p. 5. The use of the word "clarify" indicates that the proposed language was consistent with the current state of the law.

I would grant the petition for certiorari and quash the circuit court's order.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Appellant,

v.

CARE WELLNESS CENTER, LLC a/a/o **VIRGINIA BARDON-DIAZ,**
Appellee.

No. 4D16-2254

[March 14, 2018]

Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John D. Fry, Judge; L.T. Case No. CONO 14-7576 (70).

Nancy W. Gregoire of Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, and Scott E. Danner of Kirwan, Spellacy & Danner, P.A., Fort Lauderdale, for appellant.

Marlene S. Reiss of Law Offices of Marlene S. Reiss, Esq., P.A., Miami, Thomas J. Wenzel of Cindy A. Goldstein, P.A., Coral Springs, and Stuart L. Koenigsberg of A Able Advocates–Stuart L. Koenigsberg, P.A., Miami, for appellee.

Peter J. Valeta of Cozen O'Connor, Chicago, Illinois, for Amicus Curiae, Florida Justice Reform Institute.

Matthew C. Scarfone of Colodny Fass, P.A., Sunrise, for Amicus Curiae, Property Casualty Insurers Association of America.

Mac S. Phillips of Phillips|Tadros, P.A., Fort Lauderdale, and David M. Caldevilla of de laParte & Gilbert, P.A., Tampa, for Amicus Curiae, Floridians For Fair Insurance, Inc.

KUNTZ, J.

Application of the deductible when an insured seeks benefits under a personal injury protection (PIP) policy of vehicle insurance is an issue the circuit and county courts have inconsistently resolved. In each case, the healthcare provider argues the deductible must be applied to the total billed charges, before reducing the charges under section 627.736(5)(a)1.,

Florida Statutes (2013), a statutory fee schedule the legislature has found to be reasonable. On the other hand, the insurer argues the billed amount must be reduced to the amount in the approved fee schedule before applying the deductible and issuing payment.

Here, the county court agreed with the provider, granted the provider's motion for summary judgment, and certified the following question to be of great public importance:

> PURSUANT TO FLA. STAT. § 627.739, IS AN INSURER REQUIRED TO APPLY THE DEDUCTIBLE TO 100% OF AN INSURED'S EXPENSES AND LOSSES PRIOR TO APPLYING ANY PERMISSIVE FEE SCHEDULE PAYMENT LIMITATION FOUND IN § 627.736(5)(A)(1), FLA. STAT. (2013)?

We previously exercised our discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(4)(A) to answer the certified question, which we rephrase as follows:[1]

> PURSUANT TO SECTIONS 627.736 AND 627.739, FLORIDA STATUTES (2013), IS AN INSURER REQUIRED TO APPLY A POLICY DEDUCTIBLE TO THE TOTAL AMOUNT OF A PROVIDER'S INVOICES TO AN INSURED PRIOR TO APPLYING ANY FEE SCHEDULE FOUND IN § 627.736, FLA. STAT.?

For these reasons, we answer the rephrased certified question in the negative. In the context of PIP benefits, the legislature mandates a provider that has treated an injured party charge the "insurer and injured party only a reasonable amount." § 627.736(5)(a), Fla. Stat. (2013). The legislature also established two methods of determining reasonableness; one being the fee schedule. To apply the fee schedule to the billed charges only after applying the deductible, as the provider argues, would allow the provider to recover different amounts depending on the amount of the deductible. It would also allow the provider to recover more than the amount found to be reasonable in the fee schedule. This would render meaningless the portion of the statute precluding a provider from charging more than a reasonable amount.

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[1] We address the same issue in two other cases decided today. *See also USAA Gen. Indem. Co. v. Gogan, M.D. a/a/o Tara Ricks*, No. 4D16-3313 (Fla. 4th DCA Mar. 14, 2018); *Progressive Select Ins. Co. v. Blum, M.D., P.A. a/a/o Vanesso Moreno*, No. 4D16-4311 (Fla. 4th DCA Mar. 14, 2018).

To ensure the statute is applied as written, we hold that an insurer must reduce the provider's charges to the statutorily-approved permissive fee schedule *before* applying the deductible. As a result, we reverse the decision of the county court and remand for further proceedings consistent with this opinion. We also certify conflict with the Fifth District in *Progressive Select Insurance Co. v. Florida Hospital Medical Center a/a/o Jonathan Parent*, 43 Fla. L. Weekly D318 (Fla. 5th DCA Feb. 9, 2018). We now turn to a more in-depth discussion of the case before us.

Background

State Farm, the insurer, issued a PIP policy to Ms. Bardon-Diaz, the insured, who elected a $1,000 policy deductible. Following an automobile accident, the insured received medical treatment at Care Wellness Center, the provider, for injuries related to the accident. At that time, the insured executed an assignment of benefits, assigning "any rights or benefits under my policy of insurance with State Farm, for any service and/or charges provided by the above-named medical provider." The assignment also specifically referenced the "status of PIP payments that are due to" the provider.

The insurer received bills for services from all providers totaling $1,812, an amount reduced to $825.96 after the insurer applied the fee schedule. The provider in this appeal submitted three bills to the insurer for the insured's treatment, but the deductible was applied to only two. The total amount billed for the two bills was $385.00 and, after the insurer applied the fee schedule, the two bills were reduced to $258.60. The policy deductible consumed all $258.60.[2]

The provider filed a complaint for breach of contract in county court, alleging that the insured was covered by the vehicle insurance policy and received treatment from the provider. The provider further alleged that the insured "gave notice of covered losses and made demand for PIP benefits from [insurer] for reasonable, necessary, and related medical, rehabilitative and/or remedial treatment." Later, the provider amended its complaint and alleged that the insurer "reduced [the provider's] bill and subsequently applied the reduced amounts to the deductible." The provider's amended complaint stated that the provider "does not dispute that [the insurer's] policy clearly and unambiguously puts its insured on notice of its election to limit reimbursements to the 'permissive' fee

[2] The provider also submitted additional invoices for other treatment. State Farm applied the fee schedule to those invoices and, because the deductible had been satisfied, paid the invoices.

schedule rate." The provider also acknowledged the existence of the policy deductible.

The provider challenged the insurer's application of the deductible, alleging "the reduction of [provider's] bills prior to applying said bills to the deductible resulted in an underpayment of [provider's] bills." More specifically, the provider alleged that it "believe[s] that [the insurer] is permitted to limit only reimbursed charges to the 'permissive fee schedule' rate pursuant to the subject policy of insurance" and that the provider "believe[s] that bills that are applied to a deductible are not 'reimbursed' or 'paid.'"

Both parties moved for summary judgment on applying the deductible. After holding a hearing, the court granted the provider's motion for summary judgment. The court later amended the summary judgment order, finding for the provider and certifying the issue as presenting an issue of great public importance.

Analysis

At issue is the proper application of a PIP-claim deductible. Because this involves the interpretation of both a statute and an insurance policy, we have *de novo* review. *See Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147, 152 (Fla. 2013) (citations omitted).

First, we discuss the Florida Motor Vehicle No-Fault Law, *see* §§ 627.730–.7405, Fla. Stat. (2013)—specifically, the PIP statute. Next, we focus on the cornerstone of the PIP statute: reasonableness. Then, we discuss the Fifth District's recent opinion interpreting the same provisions of the statute at issue in this case. Finally, we offer our interpretation of the statute and apply it to this case.

a. *The PIP Statute*

Florida enacted the PIP statute in 1971. Since its inception, the statute "has required insurers to provide coverage for reasonable expenses for necessary medical services." *Virtual Imaging*, 141 So. 3d at 153. The legislature has amended the statute several times, and these amendments "were designed to regulate the amount providers could charge PIP insurers and policyholders for the medically necessary services PIP insurers are required to reimburse." *Id.*

One of these amendments added a provision that allowed an insurer to limit reimbursements for medical services to a statutory fee schedule,

which the legislature has found to be reasonable. *Id.* (citing § 627.736(5)(a)2., Fla. Stat. (2008) (stating that an "insurer may limit reimbursement to 80 percent of the following schedule of maximum charges," and various categories of service follow with a designated schedule)).[3] For example, the amendment included a provision allowing the insurer to limit reimbursements to "200 percent of the allowable amount under the participating physician's schedule of Medicare Part B." *Id.* at 156 (citing § 627.736(5)(a)2.f., Fla. Stat. (2008)). To use this fee schedule, the insurer must provide notice to the insured within the policy of insurance. *See id.* (citing § 627.736(5)(a)5., Fla. Stat. (2008)).

The parties agree that the insurer properly put the insured on notice of its intent to apply the fee schedule. They also agree on the amount of the applicable deductible. So our issue is narrow. We must determine the proper application of a PIP policy deductible, governed by section 627.739, Florida Statutes, and the PIP benefit statutory section, or section 627.736, Florida Statutes.

To accomplish this task, we first look to the plain language of the PIP deductible statute. The relevant subsection allows the insurer to provide a deductible, and provides the terms of its application:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, and $1,000. The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1). However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. 627.736(1)(c).

§ 627.739(2), Fla. Stat. (2013). The dispositive issue in this appeal is to determine what the following phrase means: "the deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736." To determine the meaning of the phrase "expenses and losses," section 627.739(2) must be read along with section 627.736.

Section 627.736 contains several references to "expenses," and each section includes, directly or indirectly, a requirement that the expenses be

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[3] The relevant provisions cited by our supreme court in *Virtual Imaging* have since been renumbered to section 627.736(5)(a)1. *See* Ch. 2012-197, § 10, Laws of Fla.

reasonable. *See, e.g.*, § 627.736(1)(a), (1)(b), (4), (4)(f), (6)(b), (6)(c), Fla. Stat. To highlight two of those provisions, section 627.736(1)(a) references "reasonable expenses for medical services," and section 627.736(6)(b) requires a provider to furnish a written report stating why the items charged were medically necessary and why the amount charged is reasonable.

b. *Reasonableness*

Reasonableness is the key throughout these provisions. Yet the providers effectively argue that their charges need to be reasonable only to the insurer, not the insured. We disagree. The requirement that charges be reasonable applies to the totality of the charges. The statute states that the provider "may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered." § 627.736(5)(a), Fla. Stat. (2013). We think the plain language of the statute is clear. The legislature unambiguously emphasized a requirement that expenses be reasonable. We cannot minimize the importance of this reasonableness requirement. Indeed, our supreme court found that "this provision—the reasonable medical expense coverage mandate—is the heart of the PIP statute's coverage requirements." *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 976 (Fla. 2017) (internal quotation omitted).

With reasonableness in mind, courts have stated that a PIP insurer is an "indemnitor against liability for reasonable and necessary medical expenses incurred by persons the PIP or medpay provisions cover." *Kaklamanos v. Allstate Ins. Co.*, 796 So. 2d 555, 561 (Fla. 1st DCA 2001), *approved*, 843 So. 2d 885 (Fla. 2003). The court in *Kaklamanos* defined expense as "the same as a debt," and the expense "has been incurred when liability for payment attaches." *Id.* (citation omitted). So a "reasonable expense" is the amount the insurer must pay, *see, e.g.*, *Tri-Cty. Diagnostic & Imaging Ctrs., LLC v. Windhaven Ins. Co.*, 25 Fla. L. Weekly Supp. 114a (Fla. Palm Beach Cty. Ct. Mar. 14, 2017), and it is the limit a medical provider is entitled to charge, *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014).

As PIP benefits are established only for reasonable charges, we must next review how to determine reasonableness. Our supreme court has explained that there are two different methods to calculate reasonableness. *Orthopedic Specialists*, 212 So. 3d at 976. Under the first method—found within section 627.736(5)(a)—reasonableness is a fact-dependent inquiry determined by considering various factors. *Orthopedic*

Specialists, 212 So. 3d at 976 (citing *Virtual Imaging*, 141 So. 3d at 155–56). Under the second method—found within section 627.736(5)(a)1.—an insurer may limit reimbursement to eighty percent of a schedule of maximum charges set forth in the PIP statute. § 627.736(5)(a)2., Fla. Stat. (2013). "Reimbursements made under section 627.736(5)(a)2. satisfy the PIP statute's reasonable medical expenses coverage mandate." *Orthopedic Specialists*, 212 So. 3d at 976 (citing *Virtual Imaging*, 141 So. 3d at 150, 156–57).

Now, returning to the PIP deductible statute, we first note our sister district's interpretation of this section. Then, we offer our interpretation. Again, that section states "the deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736." § 627.739(2), Fla. Stat. (2013).

c. *The Fifth District's Interpretation of the PIP Deductible Statute*

A divided panel of the Fifth District recently interpreted this same provision of this statute. *Parent*, 43 Fla. L. Weekly at D318.[4] Judge Sawaya's majority opinion agreed with the circuit court's conclusion that "when calculating the amount of PIP benefits due to the insured, section 627.739(2) requires the deductible to be subtracted from the total medical care charges before applying the statutory reimbursement limitations provided in section 627.736(5)(a)1.b., Florida Statutes (2014)." *Parent*, 43 Fla. L. Weekly at D318. As the provider argues here, the majority opinion explained that the current version of the statute distinguishes between "expenses and losses" and "benefits," stating:

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[4] Prior to our issuance of this opinion, the Fifth District issued this February 9, 2018 opinion on a motion for rehearing and for certification to the Florida Supreme Court. The opinion on rehearing certifies the following question to the Florida Supreme Court:

> WHEN CALCULATING THE AMOUNT OF PIP BENEFITS DUE AN INSURED, DOES SECTION 627.739(2), FLORIDA STATUTES, REQUIRE THAT THE DEDUCTIBLE BE SUBTRACTED FROM THE TOTAL AMOUNT OF MEDICAL CHARGES BEFORE APPLYING THE REIMBURSEMENT LIMITATION UNDER SECTION 627.736(5)(a)1.b., OR MUST THE REIMBURSEMENT LIMITATION BE APPLIED FIRST AND THE DEDUCTIBLE SUBTRACTED FROM THE REMAINING AMOUNT?

Parent, 43 Fla. L. Weekly at D322. On the same day it issued the opinion on rehearing in *Parent*, the Fifth District also released an opinion on rehearing in a

> [Section 627.739(2)] distinguishes between "expenses and losses" and "benefits." The second sentence states that the deductible "must be applied to 100 percent of the expenses and losses." In the very next sentence, the statute provides that "[a]fter the deductible is met, each insured is eligible to receive up to $10,000 in total benefits." Thus, the statute indicates that the deductible applies to "100 percent of the expenses and losses" whereas "benefits" refers to the calculated amount after the deductible has been applied to the total expenses and losses and after application of the statutory reimbursement limitations found in section 627.736.

Id. at D319.

The majority opinion also cited as persuasive authority a proposed amendment to the statute the legislature did not approve in 2016. *Id.* at 320-21. The majority opinion asserted the proposed amendment would have changed the statute to reflect the view of the insurer. *Id.* We find it unnecessary to consider whether the Fifth District majority or dissent correctly interpreted the language of the proposed amendment. Legislative inaction on a proposed bill "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)). Similarly, the Seventh Circuit explained the insignificance of proposed legislation:

> [p]roposed legislation can fail for many reasons. Some Members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the 'clarification' into the statute over opposition; still others may be indifferent, or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill sits in a queue while a contentious proposal is debated. No surprise, therefore, that the Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance.

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second case and certified the same question of great public importance. *See Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr. a/a/o Louis Pena*, 43 Fla. L. Weekly D322a (Fla. 5th DCA Feb. 9, 2018).

N.A.A.C.P. v. Am. Family Mut. Ins. Co., 978 F.2d 287, 299 (7th Cir. 1992) (internal citations omitted). Whatever the reason the legislature declined to enact the proposed amendment to the statute has no bearing on our interpretation of the statute that it did enact.

Ultimately, the Fifth District concluded "that Section 627.739(2) currently requires that the deductible be applied to 100% of the expenses and losses" and only then may an insurer reduce the billed amount to the amount the legislature has found reasonable. *Id.* at 321.

Judge Palmer dissented, finding the majority incorrectly concluded that "medical expenses" are different than "medical benefits" under the PIP statute. *Id.* at 322 (Palmer, J., dissenting). He found the majority's conclusion that the deductible must be first applied to the billed charge, no matter if the PIP policy covers the charge, "fundamentally unreasonable." *Id.* We find Judge Palmer's position to be more persuasive.

d. *Our Interpretation of the PIP Deductible Statute and its Application to This Case*

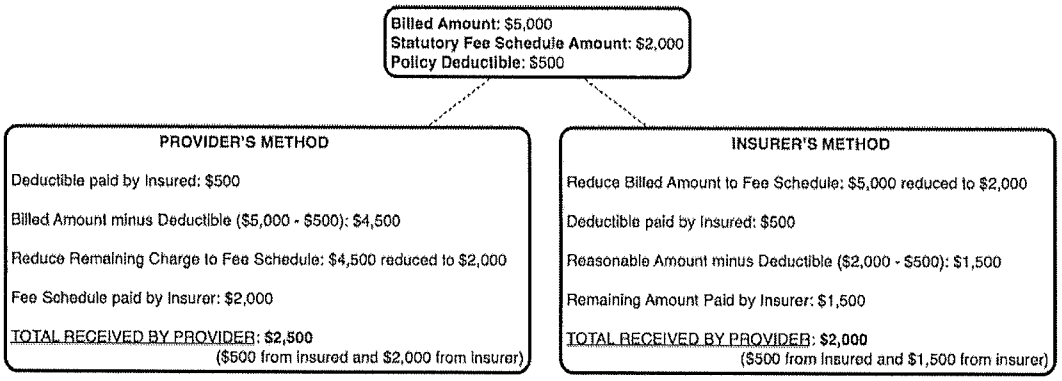
Reading section 627.739(2) along with section 627.736, as the statute expressly requires, the deductible must be applied to 100% of the reasonable and necessary expenses. Consistent with this conclusion, in *Northwoods Sports*, we explained that "in order to activate the right to claim PIP payments . . . the provider's bills must be compensable under the statute in that they have been determined to be reasonable and necessary" and "[u]ntil the necessity of the services and reasonableness of the charges is settled, their compensability under PIP is not established." 137 So. 3d at 1057. In other words, there is no PIP claim until the provider's bill is reduced, if necessary, to the amount set forth in section 627.736(5)(a)1. If there is no PIP claim until the amount is reduced to the amount found to be reasonable by the legislature, then there is nothing to apply the deductible to until the amount is reduced. Because the deductible applies to expenses as described in section 627.736, the deductible is applied to the amounts after the reduction.

This interpretation is also consistent with a general understanding of insurance deductibles. Logically, "the deductible only applies to losses covered under the policy of insurance, not simply the total bills submitted." *Better Chiropractic & Rehab Ctr. LLC v. Geico Indem. Co.*, 22 Fla. L. Weekly Supp. 378b (Fla. Miami-Dade Cty. Ct. Sept. 25, 2014) (citing *Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc.*, 874 So. 2d 26, 33–34 (Fla. 2d DCA 2004)). As the Second District held in *West Florida Villages*, "[t]he

notion that a deductible could be applied to loss that is not covered by the policy is fundamentally unreasonable." 874 So. 2d at 33.

To apply the deductible to the billed charge irrespective of whether the charge was reasonable—or even covered—would effectively render the deductible meaningless. The insurer offers the PIP coverage at different premiums depending on the amount of the deductible selected by the insured. If the policy coverage were not relevant to the deductible, then the insurer would have no reason to offer reduced premiums in exchange for a higher deductible. Such a system cannot be what the legislature intended when it enacted a law that requires a provider charge the "insurer and injured party only a reasonable amount." § 627.736(5)(a), Fla. Stat. (2013). The legislature established what is reasonable through the adoption of predetermined fee schedule limitations.[5]

To take the fee schedule out of the abstract, we apply it to the hypothetical scenario shown below:

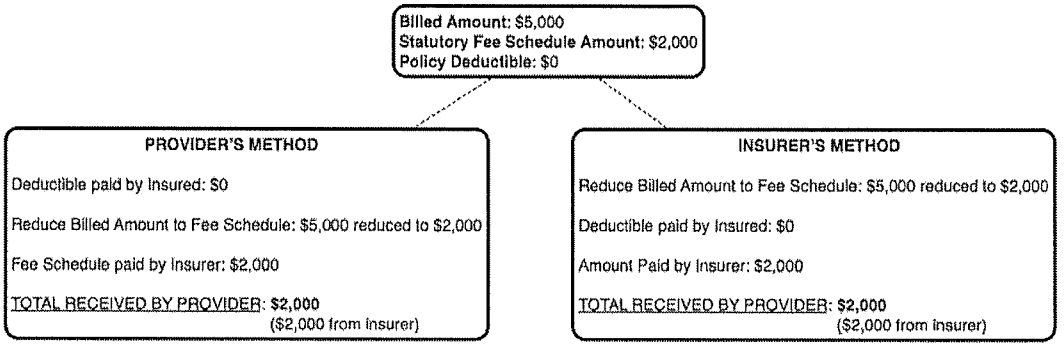


In this example, applying the deductible to the billed charge, before reducing the charge to the amount on the fee schedule, allows a provider to charge the insurer and injured party an amount more than a "reasonable fee." This, as we know, would be contrary to the plain language of the statute. The insurer's proposed method, however, results

[5] In further support, section 627.736(9), Florida Statutes (2013) presents another example of the legislature recognizing the limits on the amount the insurer and insured may pay a provider. This subsection allows an insurer to waive the deductible and pay more than otherwise allowed by the statute if the insured elects to use the insurer's preferred provider. To apply the deductible in the manner sought by the providers would allow for payment beyond the maximum amounts, but not in the specific situation authorized by the legislature in this subsection.

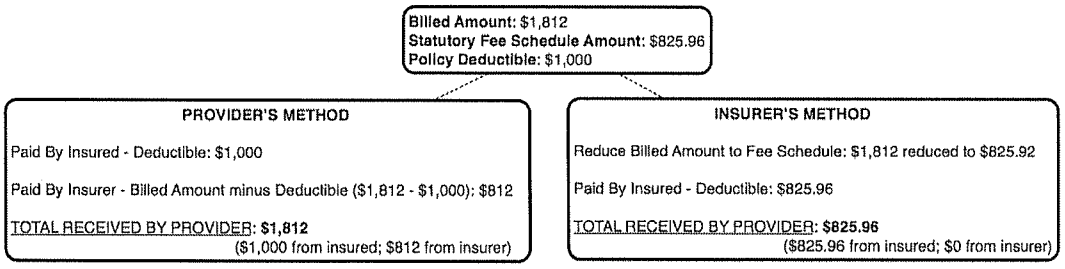
in the provider being paid the amount the legislature has determined to be reasonable.

Shown below is the same example, but without a deductible:



In this example, the provider receives the same payment regardless of which method is used. This is consistent with the plain language of the statute, which establishes a maximum payment to be paid by the insurer and insured. The legislature did not indicate that maximum payment could be exceeded if the insured elected a policy deductible, and we cannot write such an exception into the statute.

The fact that in some circumstances, such as in this case, the insurer is not required to pay the provider because the deductible is unmet does not change the analysis. The chart below represents the dollar figures at issue in the present case:



Collectively, the providers billed $1,812. After applying the fee schedule, the insurer reduced the amount to $825.96. Incidentally, the insured's deductible was $1,000 so the insurer was not required to pay the provider. Nevertheless, the providers were still entitled to collect the $825.96 in the form of the deductible from the insured. This, as the legislature has found, is reasonable for the specific charges at issue. Because the legislature has established reasonableness as the maximum charge, the provider is

simply receiving what the legislature has permitted. Nothing more, nothing less.

For these reasons, the county court erred when it entered summary judgment in favor of the provider. As noted, the parties agree that the insurer elected to use the second methodology, which allows for application of the statutory fee schedule. The insurer was thus entitled to reduce the billed charges to those considered reasonable by the legislature and under the insurance policy. Here, the insurer reduced the billed charges in a manner consistent with section 627.736(5)(a)(1). That amount represents the maximum the provider can charge the insurer and injured party, and is the limit the insurer and injured party must pay. It is also the amount to which the policy deductible logically applies.

Conclusion

The PIP statute allows insurers to offer policies with varying deductibles. § 627.739(2), Fla. Stat. The statute instructs that the deductible is to be applied to 100% of the expenses and losses described in section 627.736, Florida Statutes. The expenses and losses described in section 627.736 require that all expenses be reasonable, and the statute provides that the amount charged to both the "insurer and injured party" must be reasonable. The statute also determines what is reasonable—a predetermined fee schedule. To apply the deductible to the total amount billed, even if the amount exceeds the statutory fee schedule, would render portions of the legislation meaningless.

Instead, we must apply the statute in the manner that the legislature intended. A provider may not bill the insurer and injured party more than is reasonable. The insurer may reduce the amount of the provider's bill to a reasonable amount, as provided on the fee schedule. Then, after determining the reasonable amount, the insurer may apply the deductible.

We answer the rephrased certified question in the negative, reverse the judgment in favor of the provider, and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded; conflict certified.

FORST, J., concurs.
GROSS, J., dissents with opinion.

GROSS, J., dissenting.

I dissent for the reasons set forth in my dissent to the Court's opinion in *USAA Gen. Indem. Co. v. Gogan a/a/o Tara Ricks*, No. 4D16-3313 (Mar. 14, 2018).

* * *

Not final until disposition of timely filed motion for rehearing.

238 So.3d 937 (Mem)
District Court of Appeal of Florida,
Fourth District.

USAA GENERAL INDEMNITY COMPANY, Appellant,
v.
William J. GOGAN, M.D., a/a/o Tara Ricks, Appellee.

No. 4D16–3313
|
March 14, 2018

Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Daniel J. Kanner, Judge; L.T. Case No. COCE–10–016026(55).

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Opinion

Kuntz, J.

We are presented with the following question, certified by the county court, to be of great public importance:

> IN A PERSONAL INJURY PROTECTION MATTER, IS AN INSURER REQUIRED TO APPLY THE DEDUCTIBLE TO THE TOTAL BILLED AMOUNT, OR TO THE TOTAL BILL AFTER SAID BILL IS REDUCED BY ANY APPLICABLE STATUTORY REDUCTION(S) AS CONTAINED IN FLORIDA STATUTE SECTION 627.736(5)(a)(1)?

We rephrase the certified question as follows:

> PURSUANT TO SECTIONS 627.736 AND 627.739, FLORIDA STATUTES (2013), IS AN INSURER REQUIRED TO APPLY A POLICY DEDUCTIBLE TO THE TOTAL AMOUNT OF A PROVIDER'S INVOICES TO AN INSURED PRIOR TO APPLYING ANY FEE SCHEDULE FOUND IN § 627.736, FLA. STAT.?

For the reasons explained in our opinion in *State Farm Mutual Automobile Insurance Co. v. Care Wellness Center, LLC a/a/o Bardon–Diaz*, No. 4D16–2254, —— So.3d ——, 2018 WL 1315026 (Fla. 4th DCA Mar. 14, 2018), also issued today, we answer the rephrased certified question in the negative, reverse the county court's summary judgment, and remand for further proceedings consistent with our opinion. We also certify conflict with *Progressive Select Insurance Co. v. Florida Hospital Medical Center a/a/o Jonathan Parent*, 236 So.3d 1183, 2018 WL 792012 (Fla. 5th DCA Feb. 9, 2018).

Reversed and remanded; conflict certified.

Forst, J., concurs.

Gross, J., dissents with opinion.

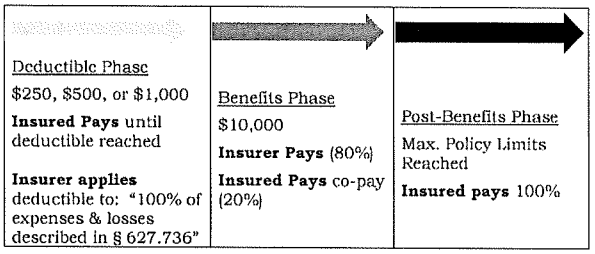
Gross, J., dissenting.

I agree with the result reached by the Fifth District in *Progressive Select Ins. Co. v. Florida Hospital Med. Ctr. a/a/o Jonathan Parent*, No. 5D16-2333, 236 So.3d 1183, 2018 WL 792012 (Fla. 5th DCA Feb. 9, 2018) (hereinafter *Florida Hospital a/a/o Parent*). Applying the plain language of the PIP statute in light of its history, leads to the conclusion that insurers cannot use the Medicare fee schedule to reduce providers' bills to the insured before the deductible has been satisfied.

The issue in this case is whether section 627.739(2), Florida Statutes (2010), which mandates that an insured's deductible be applied to "100 percent of the expenses and losses described in section 627.736," allows an insurer to (1) reduce a provider's claim to an amount allowed under a fee schedule found at section 627.736(5)(a) 2, Florida

Statutes (i.e., "200 percent of the applicable Medicare Part B fee schedule") and (2) apply the insured's unsatisfied deductible to that lower amount. [1]

Under the PIP statute, medical claims following a motor vehicle accident are processed by insurers in three distinct phases: The Deductible Phase; the Benefits Phase; and the Post–Benefits Phase. The following chart demonstrates these phases:



The insurer seeks to use the fee schedule to reduce providers' bills during the Deductible Phase. The provider argues, and the lower court agreed, that the insurer may use the fee schedule to reduce providers' bills only during the Benefits Phase, or when the insurer is actually paying the provider.

1. RULES OF STATUTORY CONSTRUCTION

"The first principle of statutory construction is that legislative intent must be determined primarily from the language of the statute." *Golf Channel v. Jenkins*, 752 So.2d 561, 564 (Fla. 2000). If a statute is unambiguous, it must be given its plain and obvious meaning. *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.*, 63 So.3d 63, 66 (Fla. 4th DCA 2011). Where a statute is ambiguous and statutory construction is required, the legislative intent "is the polestar that guides" a court's inquiry. *Blish v. Atlanta Cas. Co.*, 736 So.2d 1151, 1155 (Fla. 1999).

> In matters requiring statutory construction, courts always seek to effectuate legislative intent. Where the words selected by the Legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent ... It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.

Heredia v. Allstate Ins. Co., 358 So.2d 1353, 1354–55 (Fla. 1978) (internal case citations omitted).

"Where possible, it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act." *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So.2d 14, 16 (Fla. 1977). The Florida Motor Vehicle No–Fault Law should be liberally construed with any ambiguity interpreted "to effectuate the legislative purpose of providing broad PIP coverage for Florida motorists." *Malu v. Security Nat. Ins. Co.*, 898 So.2d 69, 74 (Fla. 2005); *see generally Derius v. Allstate Indem. Co.*, 723 So.2d 271, 274 (Fla. 4th DCA 1998). However, if the Act is not vague or ambiguous, it should not be construed in such a way as to broaden coverage. *Govan v. Int'l Bankers Ins. Co.*, 521 So.2d 1086, 1088 (Fla. 1988).

Two statutes are at issue here: section 627.739, Florida Statutes (the "Deductible Statute") and section 627.736, Florida Statutes (the "PIP Statute").

The Deductible Statute cross-references the PIP Statute. "[A] cross-reference to a specific statute incorporates the language of the referenced statute as it existed at the time the reference was enacted, unaffected by any subsequent amendments to or repeal of the incorporated statute." Preface to Florida Statutes, at viii; *see also Overstreet v. Blum*, 227 So.2d 197, 198 (Fla. 1969) ("the adoption of another statute by specific reference takes the second statute as it then exists, unaffected by any subsequent amendment or repeal unless a contrary intent clearly appears.").

The Deductible Statute's cross reference to the PIP Statute was inserted in 2003 and revived and reenacted in 2007 (effective 2008). Ch. 2007–324, § 15, Laws of Fla. Therefore, under *Overstreet*, this court should look to the 2007 version of the PIP Statute to determine what the Legislature intended when it directed that the deductible be applied to "expenses and losses described in section 627.736."

2. THE DEDUCTIBLE STATUTE (§ 627.739)

"A 'deductible' is 'a clause in an insurance policy that relieves the insurer of responsibility for an initial specified loss of the kind insured against.' " *General Star Indem. Co. v. West Florida Village Inn, Inc.*, 874 So.2d 26, 33 (Fla. 2d DCA 2004) (quoting *Merriam–Webster's Collegiate Dictionary* 471 (deluxe ed. 1998)). "[T]he functional purpose of a deductible, which is frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay will ripen." *Int'l Bankers Ins. Co. v. Arnone*, 552 So.2d 908, 911 (Fla. 1989). The deductible amount is chosen by the insured and the insured is responsible for payment of claims until the deductible is satisfied. *Mercury Ins. Co. v. Emergency Physicians of Cent.*, 182 So.3d 661, 667 (Fla. 5th DCA 2015). Once the deductible is met, the insured's right to access PIP benefits is "unlocked." *Id.*

Section 627.739 provides:

> (2) Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, and $1,000. The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1).

The focus in this case is the second sentence:

> The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736.

Particularly, what are the "expenses and losses described in section 627.736" and why did the Legislature specify that the deductible amount must apply to "100 percent" of those expenses and losses.

A second consideration is the third sentence:

> After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1).

The third sentence differentiates the "expenses and losses described in section 626.736" from the "total benefits described in section 627.636(1)." The term "benefits" refers to "the payment of medical bills" by the insurer. *U.S. Sec. Ins. Co. v. Silva*, 693 So.2d 593, 595 (Fla. 3d DCA 1997).

The second and third sentences were placed in the statute in 2003 after the Florida Supreme Court found that the previous version of the statute allowed insurers to reduce an insured's benefits by the amount of the deductible. *Arnone*, 552 So.2d at 908. The following table compares the pre–2003 and post–2003 versions of the Deductible Statute:

Deductible Statute (§ 627.739(2))	
Pre-2003 Version	Post-2003 Version
Insurers shall offer to each applicant and to each policyholder ... deductibles, in amounts of $250, $500, $1,000 and $2,000, *such amount to be deducted from the benefits otherwise due* each person subject to the deduction.	Insurers shall offer to each applicant and to each policyholder ... deductibles, in amounts of $250, $500, and $1,000. The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1).

Ch. 2003–411, § 9, at 31, Laws of Fla.
The Legislative History explains the change:

> The bill changes the calculation of the PIP deductible to require that *it must be applied to 100 percent of medical expenses, rather than to the current 80 percent of expenses that PIP pays.* It also changes the calculation of the PIP deductible so that the full $10,000 in PIP benefits can be obtained. This latter provision has the effect of requiring PIP to pay more than it does currently if a deductible is elected.

Senate Staff Analysis and Economic Impact Statement, CS/SB 32–A, May 15, 2003 (emphasis added). The Legislature thus clarified the statute to prevent an insurer from amplifying the effect of a deductible by injecting a reimbursement limitation into the calculation, a tactic similar to what the insurer urges in this case. As the Fifth District explained:

> The obvious intent of the Legislature was to replace the term "benefits otherwise due" with "expenses and losses" in determining what the deductible would be applied to, moving the term "benefits" to the next sentence, which discusses the insurer's liability after the deductible is satisfied. Thus, the current version of the statute provides a clear distinction between "expenses and losses" for purposes of applying the deductible and "benefits" that are due to the insured after the reimbursement limitations are applied.

Florida Hospital a/a/o Parent, 236 So.3d at 1188–89, 2018 WL 792012 at *5.

3. THE PIP STATUTE (§ 627.736)

Section 627.736 is entitled "Required personal injury protection benefits; exclusions; priority; claims." The statutory framework provides:

> (1) REQUIRED BENEFITS.—Every insurance policy ... shall provide personal injury protection to the named insured ... to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, ... as follows:
>
> (a) Medical benefits.—Eighty percent of all reasonable expenses for medically necessary medical ... services....
>
> (b) Disability benefits....
>
> (c) Death benefits....
>
> (2) AUTHORIZED EXCLUSIONS....
>
> (3) INSURED'S RIGHTS TO RECOVERY OF SPECIAL DAMAGES IN TORT CLAIMS....
>
> (4) BENEFITS: WHEN DUE....
>
> (5) CHARGES FOR TREATMENT OF INJURED PERSONS.—
>
> (a)1. Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered...
>
> 2. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> * * *
>
> f. For all other medical services, supplies, and care, 200 percent of the applicable Medicare Part B fee schedule....
>
> * * *
>
> 5. If an insurer limits payment as authorized by subparagraph 2., the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the co-insurance amount or maximum policy limits....

§ 627.736(1)–(5), Fla. Stat. (2007); Ch. 2007–324, §§ 13, 20, 23, Laws of Fla. (effective Jan. 1, 2008).

Subsection 627.736(1) requires an insurer to provide a minimum of $10,000 in "required benefits" to cover expenses and losses an insured sustains as a result of bodily injury sustained in a car accident. § 627.736(1)(a)–(c).

Subsection 627.736(5) covers medical "charges." Subparagraph (5)(a)1. mandates that a medical provider charge an "insurer and injured party" "only a reasonable amount" "for a bodily injury covered by personal injury protection." Subparagraph (5)(a)2. permits "the insurer" to "limit reimbursement" to a provider to a "schedule of maximum charges."

> The provision in the PIP statute authorizing insurers to limit reimbursements for medical services rendered pursuant to the Medicare fee schedules, which is at issue in this case, has its genesis in a series of changes the Legislature made to the PIP statute, beginning in

> 2001, that were designed to regulate the amount providers could charge PIP insurers and policyholders for the medically necessary services PIP insurers are required to reimburse.

Geico General Ins. Co. v. Virtual Imaging Srvs., Inc., 141 So.3d 147, 153 (Fla. 2013).

> Under section 627.736, Florida Statutes (2008), the PIP statute, an insurer may elect to calculate medical reimbursements in one of two ways: (a) it can pay a reasonable amount consistent with subsection (5)(a)1. of the statute; or (b) it can elect to apply the Medicare fee schedules, as set forth in Subsection (5)(a)2. of the statute.

Northwest Ctr. for Integrative Med. & Rehab., Inc. v. State Farm Mut. Auto. Ins. Co., 214 So.3d 679, 682 (Fla. 4th DCA 2017); *see also Kingsway*, 63 So.3d at 67 (under section 627.736, an insurer may "choose between two different payment calculation methodology options."). "Reimbursements made under section 627.736(5)(a) 2. satisfy the PIP statute's reasonable medical expenses coverage mandate." *Allstate v. Orthopedic Specialists*, 212 So.3d 973, 976 (Fla. 2017). The PIP coverage "mandate" is that the insurer "shall" reimburse eighty percent of reasonable expenses for medically necessary services." *Id.* (quoting *Virtual Imaging*, 141 So.3d at 155).

Subparagraph 627.736(5)(a)5. prevents "balance billing," prohibiting the provider from billing or attempting to collect from the insured "any amount exceeding the payment made from the insurer." *Green v. State Farm Mutual Auto. Ins. Co.*, 225 So.3d 229, 231 (Fla. 4th DCA 2017). If the provider's charge exceeds the statutory "maximum charge," and the insurer "limits payment" to the statutory "maximum charge" allowed by the fee schedule, even if the provider's charge is reasonable, the provider "may not bill or attempt to collect from the insured any amount in excess of such [fee schedule] limits." § 627.736(5)(a) 5.

4. READING THE PIP AND DEDUCTIBLE STATUTES TOGETHER

Under the Deductible Statute, the insurer must apply the deductible "to 100 percent of the expenses and losses described in § 627.736." After the deductible is exhausted, the insured "is eligible to receive up to $10,000 in total benefits described in § 627.736(1)."

As used in the statute, the term "expenses and losses" is something different from "benefits" required by law. Where it is applicable, the Medicare Fee Schedule is a limitation on benefits, not on a provider's charge—an "expense" or "loss" that the insured becomes obligated to pay before the deductible is satisfied.

While the phrase "expenses and losses" is not defined in the PIP Statute, the statute uses the terms to describe actual losses realized by the insured. Subsection 627.736(1) requires insurers to cover insureds for "loss sustained by [the insured] as a result of bodily injury." Sub-parts (a) and (b) to subsection (1) discuss medical expenses; loss of income and earning capacity; and "expenses reasonably incurred" in obtaining household services for chores the insured would ordinarily have performed. § 627.736(1)(a)-(b).

The PIP Statute includes three types of "benefits"—Medical Benefits; Disability Benefits; and Death Benefits. Medical Benefits payable by the insurer are a percentage of reasonable medical expenses. § 627.736(1)(a) (requiring medical benefits to be paid at 80% of expenses). Disability Benefits payable by the insurer are a percentage of loss of income and earning capacity and expenses incurred to reimburse the insured for necessary services. § 627.736(1)(b) (requiring disability benefits to be paid at 60% of loss and expenses). "[T]he 80% and 60% methodologies in section 627.736(1) are intended to limit reimbursements in order to establish benefits. They are not intended to describe the application of the deductible under the 100% methodology provided in section 627.739(2)." *Florida Hospital a/a/o Parent*, 236 So.3d at 1186–87, 2018 WL 792012 at *3.

The insurer argues that the fee schedules found in section 627.736(5)(a) 2. should be applied to lower the medical providers' bills during the Deductible Phase, and that those lower bills should be applied to satisfy the

deductible. This interpretation of the statutes will result in the insurer paying less because the providers' charges will be reduced and more of the providers' bills would be applied to satisfy the insured's deductible (which the insurer does not pay).

The insurer's interpretation of the statutes is not supported by the plain language of § 627.736(5)(a) 1. and 2. which permit a provider to charge the insurer and the insured a reasonable amount for services while allowing the insurer to "limit reimbursement" to the provider based on a fee schedule. During the Deductible Phase, however, the insurer is not reimbursing the medical provider; it is the insured who is paying the provider. Section 627.736(5)(a) 2. and its schedule of "maximum charges" is triggered only after the deductible has been satisfied and the insurer is reimbursing the provider—i.e., during the Benefits Phase.

As the Fifth District observed:

> We do not believe that the Legislature intended the statutory reimbursement limitations to be applied to expenses and losses that fall within the insured's deductible, which the insured alone is obligated to pay and which are not recoverable as benefits under the policy.

Florida Hospital, a/a/o Parent, 236 So.3d at 1191, 2018 WL 792012 at *8.

I also agree with the Fifth District that the plain language of the Deductible Statute negates the insurer's argument. Section 627.739(2) mandates that the deductible "must be applied to 100 percent" of the insured's expenses and losses. 100 percent means, well, 100 percent. All. Everything. Total. It does not mean 80% of "200 percent of the applicable Medicare Part B fee schedule," which is a reimbursement limitation. As the Fifth District wrote:

> We believe that application of the optional reimbursement limitations to establish a reduced amount of expenses and losses from which the deductible amount is subtracted would render meaningless the requirement in section 627.739(2) that "[t]he deductible amount must be applied to 100 percent of the expenses and losses."

Florida Hospital a/a/o Parent, 236 So.3d at 1187, 2018 WL 792012 at *4.

For these reasons, I would rephrase the question certified by the county court as follows:

> PURSUANT TO FLA. STAT. § 627.739, IS AN INSURER REQUIRED TO APPLY THE DEDUCTIBLE TO 100% OF AN INSURED'S EXPENSES AND LOSSES PRIOR TO APPLYING ANY PERMISSIVE FEE SCHEDULE PAYMENT LIMITATION FOUND IN FLORIDA STATUTE SECTION 627.736(5)(a) 1. (2013)?

I would then answer the question in the affirmative.

All Citations

238 So.3d 937 (Mem), 43 Fla. L. Weekly D570

Footnotes

1 In the 2010 version of the PIP Statute, the fee schedule was set forth at subparagraph (5)(a)2. The statute was amended effective January 1, 2013, and the fee schedule is now found at subparagraph (5)(a)1. Ch. 2012–197, § 10, at 20–21, Laws. of Fla. The 2010 version of the PIP Statute applies to this case. Unless otherwise indicated, references to the Florida Motor Vehicle No–Fault Law are to the 2010 version of the statute.

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238 So.3d 852 (Mem)
District Court of Appeal of Florida,
Fourth District.

PROGRESSIVE SELECT INSURANCE COMPANY, Appellant,
v.
David A. BLUM, M.D., P.A., a/a/o Vanessa Moreno, Appellee.

No. 4D16–4311
|
[March 14, 2018]

Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John D. Fry, Judge; L.T. Case No. 14–12198(70).

Attorneys and Law Firms

Douglas H. Stein of Association Law Group, P.L., Miami, for appellant.

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Opinion

Kuntz, J.

We are presented with the following question, certified by the county court to be of great public importance:

> PURSUANT TO FLA. STAT. § 627.739, IS AN INSURER REQUIRED TO APPLY THE DEDUCTIBLE TO 100% OF AN INSURED'S EXPENSES AND LOSSES PRIOR TO APPLYING ANY PERMISSIVE FEE SCHEDULE PAYMENT LIMITATION FOUND IN § 627.736(5)(A)(1), FLA. STAT. (2013)?

We rephrase the certified question as follows:

> PURSUANT TO SECTIONS 627.736 AND 627.739, FLORIDA STATUTES (2013), IS AN INSURER REQUIRED TO APPLY A POLICY DEDUCTIBLE TO THE TOTAL AMOUNT OF A PROVIDER'S INVOICES TO AN INSURED PRIOR TO APPLYING ANY FEE SCHEDULE FOUND IN § 627.736, FLA. STAT.?

For the reasons explained in our opinion in *State Farm Mutual Automobile Insurance Co. v. Care Wellness Center, LLC a/a/o Bardon–Diaz*, No. 4D16–2254, —— So.3d ——, 2018 WL 1315026 (Fla. 4th DCA Mar. 14, 2018), also issued today, we answer the rephrased certified question in the negative, reverse the county court's summary judgment, and remand for further proceedings consistent with our opinion in case number 4D16–2254. We also certify conflict with *Progressive Select Insurance Co. v. Florida Hospital Medical Center a/a/o Jonathan Parent*, 236 So.3d 1183, 2018 WL 792012 (Fla. 5th DCA Feb. 9, 2018).

Reversed and remanded; conflict certified.

Forst, J., concurs.

Gross, J., dissents with opinion.

Gross, J., dissenting.
I dissent for the reasons set forth in my dissent to the Court's opinion in *USAA Gen. Indem. Co. v. Gogan a/a/o Tara Ricks*, No. 4D16–3313, 238 So.3d 937, 2018 WL 1315053 (Fla. 4th DCA Mar. 14, 2018).

All Citations

238 So.3d 852 (Mem), 43 Fla. L. Weekly D569

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