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IN THE SUPREME COURT OF FLORIDA

Case No. SC18-1390
L.T. Case No. 2D16-4036

MRI ASSOCIATES OF TAMPA, INC, d/b/a Park Place MRI,

Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent.

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**FLORIDIANS FOR FAIR INSURANCE, INC.'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER**

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## STATEMENT OF AMICUS CURIAE'S IDENTITY AND INTEREST

Floridians for Fair Insurance, Inc. ("FFI") is a not-for-profit Florida corporation dedicated to ensuring that the insurance industry acts fairly, honestly, in good faith and in the best interests of Florida's insurance consumers, who are required by law to purchase personal injury protection ("PIP") insurance coverage. FFI has been in existence since 2008 and has submitted *amicus curiae* briefs in several important appeals in this Court involving insurance.[1]

This case is of keen interest to FFI because the opinion below does away with the mutual exclusivity of the two distinct no-fault payment methodologies and thereby creates uncertainty for Florida consumers as to how their car-accident-related medical bills will be paid as well as the extent of their personal responsibility for the unpaid portions of those bills.

## SUMMARY OF THE ARGUMENT

FFI supports and agrees with the Petitioner's position. In this *amicus* brief, FFI will demonstrate the adverse ramifications on Florida consumers if this Court affirms the opinion below.

In short, the opinion below hurts Florida consumers by removing the

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[1] *See, e.g., Progressive Select Ins. Co. v. Florida Hospital Medical Center*, 260 So. 3d 219 (Fla. 2018); *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013) ("*Virtual III*"); *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388 (Fla. 2013). This Court has described FFI as "an advocacy organization for insurance consumers." *Virtual III*, 141 So. 3d at 161, n. 1.

certainty established by this Court in *Virtual III* and *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973 (Fla. 2017), and the PIP statute itself, as to how medical bills will be paid. It is no longer clear who is financially responsible for the balance of a medical provider's bill and for services that are not reimbursable under Medicare or Worker's Compensation. Florida's insured consumers – who are the patients caught in the middle of this dispute between a medical provider and an insurance company – are made to suffer in the wake of the opinion below.

## STANDARD OF REVIEW

FFI agrees that the *de novo* standard of review applies to this appeal "[b]ecause the question presented requires this Court to interpret provisions of the Florida Motor Vehicle No–Fault Law — specifically, the PIP statute — as well as to interpret the insurance policy[.]" *Orthopedic Specialists v. Allstate Ins. Co.*, 212 So. 3d 973, 975 (Fla. 2017), citing, *Virtual III*, 141 So. 3d at 152.

## ARGUMENT

### THE SECOND DISTRICT'S OPINION IS HARMFUL TO CONSUMERS BECAUSE IT CREATES UNCERTAINTY AS TO HOW MEDICAL BILLS WILL BE PAID.

In two prior opinions interpreting the contrasting payment mechanisms contained in § 627.736(5)(a), Fla. Stat. (2008-2019), this Court has repeatedly emphasized that insurers must provide clear and unambiguous notice to Florida's consumers and medical providers detailing how their medical claims will be

reimbursed:

> when the plain language of the PIP statute affords *two different mechanisms* for calculating reimbursements, the insurer must clearly and unambiguously elect the permissive payment methodology in order to rely on it…*because* a policy election *gives notice to the insured* – and to the provider who renders service based on an assignment of benefits in the insured's policy – regarding the amount of PIP coverage the insurer will provide.

*Virtual III*, 141 So. 3d at 158, citing, *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.*, 63 So. 3d 63, 67-68 (Fla. 4th DCA 2011); *See also*, *Orthopedic*, 212 So. 3d at 977 (internal citations omitted). The rationale expressed in these opinions is that *because* both permissive and mandatory reimbursement options exist simultaneously, a clear policy election as to the specific method of reimbursement is essential:

> Because the fee schedule provision of [former] section 627.736(5)(a)2.f. [2008-2011] is permissive and not mandatory, and because the Medicare fee schedules are not the only mechanism for calculating reimbursements, … the insurer cannot take advantage of the Medicare fee schedules to limit reimbursement[2] without notifying

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[2] The disparity between payment under the schedule of maximum charges (also known as the "fee schedule method" and the "Medicare fee schedule method") and the fact-based reasonable amount method is great; the schedule of maximum charges generally results in much lower reimbursement. In *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 90 So. 3d 321, 324 (Fla. 3d DCA 2012) (*Virtual II*), the PIP insurer unlawfully relied on the fee schedule method to pay $1,989.57 for a pair of MRIs as opposed to the usual and customary charges of $2,880 that would have been reimbursed under the fact-dependent method. The *Virtual II* court further noted that the Medicare fee schedules resulted in payment for x-rays in the amount of $435.22 but would have resulted in payment of $1,980 under the fact-dependent method. *Id.*, citing, *MGA Ins. Co. v. All X-Ray Diagnostic Services*, Case No. 3D12-414 (Fla. 3d DCA 2012); *See, also, Geico Indem. Co. v.*

its insured by electing those fee schedules in its policy.

*Virtual III*, 141 So. 3d at 158-59; *Orthopedic*, 212 So. 3d at 977.

The Second District's opinion effectively overruled this Court by stating that "there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer[,]" and that by merely "renumbering [the] subparagraphs" of § 627.736(5), Fla. Stat. (2008-2019) the Legislature "substantially amended [it]." *State Farm Mut. Auto. Ins. Co. v. MRI Associates of Tampa, Inc.*, d/b/a *Park Place MRI*, 252 So. 3d 773, 777-78 (Fla. 2d DCA 2018).

Not so.

To the contrary, the permissive "may" used in the fee schedule provision of former § 627.736(5)(a)2., Fla. Stat. (2008-2011) is *exactly the same* as the current version of § 627.736(5)(a)1., Fla. Stat. (2012-2019): "[t]he insurer may limit reimbursement to 80 percent of the following schedule of maximum charges..." In other words, the permissive nature of the 2008-2011 version of the fee schedule provision *did not change* as a result of the 2012 amendments. Accordingly, the

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*Physicians Grp. LLC*, 47 So. 3d 354, 356 (Fla. 2d DCA 2010) (PIP insurer unlawfully relied on Medicare fee schedules to pay merely $1,122.86 for a $10,800 surgery); *Nationwide Mutual Ins. Co. v. AFO Imaging, Inc.*, 71 So. 3d 134, 137 (Fla. 2d DCA 2011) (fee schedule method is "utilized in computing the minimum amount" payable by PIP); *Allstate Fire & Cas. Ins. Co. v. Stand–Up MRI*, 188 So. 3d 1, 3 (Fla. 1st DCA 2015) (fact dependent reasonable amount method "apparently results in higher reimbursements" than permissive fee schedule method).

mandated requirement that an insurer provide notice of its choice to use the permissive fee schedule reimbursement method *to the exclusion of* the fact-based method is just as critical now as it was *before* the 2012 amendments to the PIP statute.

The Legislature and this Court both recognized that patients and their doctors needed to know what amounts may be properly billed to insurers and patients, and what amounts must be properly paid by patients and insurers. *Virtual III*, 141 So. 3d at 159-160.

They still do.

### A. The balance billing problem.

According to the United States Centers for Medicare & Medicaid Services, "balance billing" occurs when a medical provider bills a patient for the difference between the billed amount and the amount allowed by the third-party payor.[3] In the Florida PIP context, providers who elect the fee schedule method are prohibited from balance billing their patients but providers who elect the fact-based reasonable amount method are not:

> If an insurer limits payment as authorized by subparagraph 1., 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

[3] https://www.healthcare.gov/glossary/balance-billing/ (last visited on August 7, 2019).

> for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits.

§ 627.736(5)(a)4, Fla. Stat. (2012-2019) (emphasis added).[4] This underscores the paramount need for this Court to reaffirm the no-fault statute's two separate and distinct payment methods, and the requirement that an insurer must clearly and unambiguously select one method to the exclusion of the other. If insurers like State Farm are permitted to utilize both payment methods in the same policy *contemporaneously*, uncertainty develops as to whether medical providers can balance-bill their patients (i.e., for the difference between the amounts billed and the amounts allowed under the schedule of maximum charges). In other words, if State Farm elected the default, fact-dependent method, then medical providers are statutorily permitted to balance-bill their patients in order to collect 100 percent of their charge. On the other hand, if State Farm elected the schedule of maximum charges, providers are statutorily prohibited from balance billing. Since the opinion below authorizes State Farm to use both methods in its 9810A policy form, consumers are now uncertain about their exposure to the balance of their

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[4] The statutory text prohibiting balance billing when insurers elect the schedule of maximum charges appeared in former § 627.736(5)(a)5., Fla. Stat., from 2008 through 2011 and currently appears in § 627.736(5)(a)4., Fla. Stat. Additionally, the schedule of maximum charges in the 2008-2011 version of the PIP statute appeared in subparagraph (5)(a)2 but currently appears at subparagraph 1. Aside from the renumbering as part of the 2012 amendments, the text remains the same.

providers' bills.

Allowing the opinion below to stand will eviscerate the prohibition against balance-billing in section 627.736(5)(a)4., Fla. Stat. (2012-2019) and render that subsection meaningless. As this Court has held on numerous occasions, courts should not construe statutes in a manner that renders any part meaningless. *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273, 1286 (Fla. 2000), citing, *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996).

### B. Who pays for services that are not reimbursable under Medicare or Workers' Compensation?

§ 627.736(5)(a)1.f, Fla. Stat. (2012-2019),[5] states that insurers who elect the schedule of maximum charges method do not have to pay for treatment that is not reimbursable under Medicare or workers' compensation:

> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation ***is not required to be reimbursed by the insurer***.

(Emphasis added). In other words, insurers that elect the schedule of maximum charges *do not have to pay* for medical services that Medicare and Worker's

[5] The same language appeared in § 627.736(5)(a)2.f., Fla. Stat. (2008-2011).

Compensation do not reimburse. Insurers that opt to use the default, fact-dependent method, on the other hand, *are required to pay* for these charges. Another question presented by the opinion below is what happens when an insurer elects to use *both* methods contemporaneously? Who then is responsible to pay for services that would be compensable under one method yet non-compensable under the other?

This creates a situation where the obligation for payment of services not covered under the fee schedule method is far from certain, but the statutory text and common sense[6] strongly suggest that it will fall *entirely* on the patient. If the Legislature intended a different result, it could have included language to that effect like it did in section 627.736(5)(c), which states that neither the insurer *nor the insured* is liable to pay for a medical bill that is untimely submitted. In pertinent part, §§ 627.736(5)(c), Fla. Stat. (2012-2019) and 627.736(5)(c)1., Fla. Stat. (2008-2011) each state:

> …the statement of charges must be furnished to the insurer by the provider and may not include, ***and the insurer is not required to pay***, charges for treatment or services rendered more than 35 days before the postmark date or electronic transmission date of the statement…. ***The injured party is not liable for, and the provider shall not bill the injured party for, charges that are unpaid because of the provider's failure to comply with this paragraph.*** Any agreement requiring the injured person or insured to pay for such charges is unenforceable.

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[6] Medical providers are generally not expected to provide services, treatment and care for free.

(Emphasis added).

## CONCLUSION

Pliny the Elder[7] said, "the only certainty is that nothing is certain." This especially rings true with respect to Florida's no-fault insurance scheme.[8] This Court interpreted the 2008 amendments to the PIP statute's payment provisions to require notice of an insurer's election of one of the two mutually exclusive payment options. Once it was clear that a PIP insurer must notify its policyholders of its choice between the two options (not both of the options), Floridians enjoyed certainty as to how their medical bills must be paid in the PIP context.

Not anymore.

On behalf of Florida's insurance consuming public, FFI respectfully requests that this Court reverse the opinion below and hold that the PIP statute continues to have two mutually exclusive payment options and that insurers are still required to pick one to the exclusion of the other.

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[7] Pliny the Elder was a "Roman savant and author of the celebrated Natural History, an encyclopaedic work of uneven accuracy that was an authority on scientific matters up to the Middle Ages." https://www.britannica.com/biography/Pliny-the-Elder (last visited on August 7, 2019).

[8] As noted by this Court, "[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 ever year between 2003 and 2009. *Virtual III*, 141 So. 3d at 152.

## CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief is printed in Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically served on August 13, 2018 upon:

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