IN THE SUPREME COURT OF FLORIDA

UNITED AUTOMOBILE INSURANCE COMPANY

CASE NO.: SC00-111
LT Case No.: 3D99-1348

Petitioner,

vs.

MARISOL RODRIGUEZ,

Respondent,

))))))))))/

STATE FARM FIRE & CASUALTY COMPANY

CASE NO.: SC00-112
LT Case No.: 3D99-1481

Petitioner,

vs.

JUANA MARIA PEREZ

Respondent,

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ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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BRIEF OF AMICUS CURIAE GEICO CASUALTY COMPANY, GEICO INDEMNITY COMPANY, GEICO GENERAL INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY

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LAW OFFICES OF HOWARD W. WEBER
Two Urban Centre, Suite 240
4890 West Kennedy Blvd.
Tampa, Florida 33609
Telephone No.: (813) 288-8414
By: Vincent F. Iacono, Esq.
Florida Bar No. 0043710
Attorney for GEICO Companies

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CERTIFICATE OF FONT STYLE AND SIZE

The undersigned counsel hereby certifies that the style and size of type used in this Brief is 14 point proportionately spaced CG Times and is in compliance with this Court's Administrative Order dated July 13, 1998 regarding font requirements.

SUMMARY OF THE ARGUMENT

The decision of the Third District under review should be reversed because it interprets the thirty day payment and medical report provisions of the Florida Motor Vehicle No-Fault Act (No-Fault Act) in a manner which creates irrebuttable or conclusive presumptions in violation of the due process clause of the Florida Constitution. The plain language of the thirty-day payment provision requires that personal injury protection (PIP) benefits be paid within thirty days of the insurer's receipt of the claim and imposes an interest penalty for payments made beyond thirty days unless the insurer has "reasonable proof" that it is not responsible for the payment. Although the No-Fault Act does not define "reasonable proof" and does not place any limitations as to when the reasonable proof can be obtained by the insurer, the decision under review held that reasonable proof, in the form of a doctor's report, must be obtained within the thirty day time frame otherwise an insurer is precluded from defending on the basis that the medical bills are not reasonable, not related and/or not necessary, and the insurer must automatically pay the claim.

By defining and limiting "reasonable proof" to mean a "medical report" the Third District's interpretation creates a conclusive or irrebuttable presumption under the No-Fault Act by depriving insurers of the ability to defend a claim on grounds which are not subject to a medical opinion simply because the insurer did not obtain a medical report. Moreover, the Third District's interpretation of the thirty day provision of the No-Fault Act further creates a conclusive or irrebuttable presumption which violates the due process clause of the Florida Constitution by depriving insurers of the ability to defend

against a claim for medical benefits simply because the insurer's proof was obtained thirty-one or more days after receipt of the claim. Because these conclusive or irrebuttable presumptions violate the due process clause of the Florida Constitution the interpretation of the No-Fault Act in the decision under review must be reversed.

THE EFFECT OF THE DECISIONS IN *UNITED AUTOMOBILE INSURANCE COMPANY v. VILES* AND *PEREZ v. STATE FARM FIRE AND CASUALTY COMPANY* IS TO CREATE CONCLUSIVE OR IRREBUTTABLE PRESUMPTIONS UNDER THE NO-FAULT ACT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FLORIDA CONSTITUTION

The decisions in United Automobile Ins. Co. v. Viles, 726 So. 2d 320 (Fla. 3d DCA 1998) and Perez v. State Farm Fire and Casualty Co., 746 So. 2d 1123 (Fla. 3d DCA 1999) apply certain provisions of the Florida Motor Vehicle No-Fault Act in a way that violate the due process clause of the Florida Constitution by creating conclusive or irrebuttable presumptions which deprive insurers of procedural due process. The court in Viles held that an insurer is precluded from defending a personal injury protection lawsuit, including defenses based upon fraudulent billing, unless the insurer obtains the report of a physician pursuant to Section 627.736(7)(a), Florida Statutes. See Viles, 726 So. 2d at 321. The court in Perez subsequently held, pursuant to Section 627.736(4)(b), that the report must be obtained within 30 days of the insurer being furnished notice of the claim or the insurer will be precluded from defending a PIP lawsuit. Perez, 746 So. 2d at 1125-26. The result is to create conclusive or irrebuttable statutory presumptions against insurers in violation of the due process clause of the Florida Constitution. The decision of the Third District Court of Appeal under review should be reversed.

The due process clause of the Fla. Const. guarantees, in part, that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, Sec. 9, Fla. Const. This Court has long held that "[p]rocedural due process. . . . requires that a defendant be able to rebut a statutory presumption. . . . The test for the constitutionality

of statutory presumptions is twofold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. *Second, there must be a right to rebut in a fair manner."* Agency for Health Care Admin. v. Associated Indus. of Florida, Inc., 678 So. 2d 1239, 1254 (Fla. 1996), quoting Straughn v. K&K Land Management, Inc., 326 So. 2d 421, 424 (Fla. 1976); See City of Coral Gables v. Brasher, 120 So. 2d 5, 9 (Fla. 1960); Goldstein v. Maloney, 57 So. 342 (Fla. 1911). Although the No-Fault Act may otherwise be constitutional, "a ruling of facial constitutionality does not preclude a later action challenging the manner in which [an] Act is applied. Indeed, some provisions of [an] Act may give rise to some serious constitutional issues at a later point in time." Agency for Health Care Admin., 678 So. 2d 1239, 1243 (Fla. 1996). The manner in which the Third District Court of Appeal applied Sections 627.736(7)(a) and 627.736(4)(b) of the No-fault Act in Viles and Perez violate the due process clause of the Florida Constitution by creating conclusive or irrebuttable presumptions.

No conclusive or irrebuttable presumptions are expressly stated in the PIP statute, and nothing in the plain language of the statute compels the creation of such presumptions. Judicial interpretations of statutes which create such presumptions have been reversed by this Court. In Valcin v. Public Health Trust of Dade County, 473 So. 2d 1297, 1306 (Fla. 3d DCA 1984), the Third District Court of Appeal held in a medical malpractice case that statutes requiring hospitals to maintain surgical records created a conclusive, irrebuttable presumption of negligence in the performance of the medical procedure where it is shown that the defendant intentionally failed to make or maintain the records. However, this Court reversed and struck down the conclusive presumption

created by the Third District. See Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987). This Court stated that:

> The conclusive presumption [was] invalid for two reasons. First, it violates due process in its failure to provide the adverse party any opportunity to rebut the presumption of negligence. . . . Second, such a drastic "short circuiting" of the jurors' function is simply unnecessary.

Id. at 599 (citations omitted). Jurors can infer medical malpractice from a finding that records were intentionally not kept or missing. See Id.

Moreover, this Court has held that a statute which seeks to hold a party liable for medical bills but deprives that party of the ability to demonstrate the impropriety of the treatment or billing violates due process. At issue in Agency for Health Care Administration was a portion of the Medicaid Third-Party Liability Act which created a cause of action on behalf of the State of Florida to recover health care expenditures made on behalf of Floridians as the result of the tortious conduct of others. See Agency for Health Care Administration, 678 So. 2d at 1243. A provision of the Medicaid Third-Party Liability Act allowed the State to sue a tortfeasor to recover benefits without identifying the individual recipients for which medicaid payments were made. See Id. at 1245, 1254. This Court found that portion of the Medicaid Act to violate the due process clause of Article I, Section 9 of the Florida Constitution because it prevents a defendant from demonstrating the impropriety of individual payments.

Impropriety could be the result of fraud, misdiagnosis of the

> patient's condition, or unnecessary treatments. The defendant's inability to determine individual Medicaid recipients would also preclude that defendant from proving that its product was never used by the recipient. Hence, the statutory provision results in a conclusive presumption that every Medicaid payment is proper and necessitated by the defendant's product. It is illogical and unreasonable to call this a fair process. A defendant cannot rebut this presumption because there is no mechanism for determining to whom the payments were made. This type of conclusive presumption is violative of the due process provisions of our constitution. . . . and consequently the challenged provision must be stricken as unconstitutional.

Id. at 1254.

The No-Fault Act requires all personal injury protection insurance policies issued in Florida to provide medical benefits for reasonable expenses for necessary medical services arising out of the ownership maintenance or use of a motor vehicle. § 627.736(1), Fla. Stat. (1997). Other than limiting a medical provider's charges to those he or she customarily charges, Section 627.736(5), Florida Statutes, the No-Fault Act does not define what is a "reasonable expense" or what is a "necessary" service. Section 627.736(4)(b) states that benefits paid shall be deemed overdue if not paid within thirty days of written notice to the insurer. Section 627.736(4)(c) provides for an interest penalty to be paid or such overdue benefits. Section 627.736(4)(b) further provides that "any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment." § 627.736(4)(b), Fla. Stat. (1997). However, the No-Fault Act does not define what constitutes "reasonable proof" that an insurer is not responsible for a claim for benefits. It also does not state when the reasonable proof must be obtained.

In Viles, the Third District Court of Appeal held that "reasonable proof" means the report required by Section 627.736(7)(a). Section 627.736(7)(a) provides that:

> An insurer may not withdraw payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the insurer first obtains a report by a physician licensed under the same chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that the treatment was not reasonable, related or necessary.

§ 627.736(7)(a), Fla. Stat. (1997). The decision of Perez under review interprets Section 627.736(4)(b) as requiring the report to be obtained within 30 days of receipt of notice of the loss. The effect of the narrow, restrictive interpretations of the No-Fault Act by Viles and Perez result in conclusive or irrebuttable statutory presumptions.

In United Auto Insurance Company v. Viles, United Auto paid $1,100 to Viles before denying payment for additional chiropractic bills. See Viles, 726 So. 2d at 320. United Auto then defended the breach of contract PIP suit on the grounds that the "bills were fraudulent and not reasonably related to the accident in question." Id. The jury returned a verdict finding that only $2,000 of the claimed chiropractic bills were reasonable and necessary, and United Auto sought judgment in its favor since the $2,000 was within the policy deductible. See Id. at 321. However, the trial court granted the renewed motion for directed verdict and entered judgment in favor of Viles for all outstanding bills in the amount of $3,632.00 "finding that United Auto was **barred from raising the defense** that the bills were not reasonable or necessary because it failed to obtain a physicians [*sic*] report prior to denying payment." Id. (emphasis added) The trial

court certified the following question of great public importance to the Third District Court of Appeal:

> IN ANY CLAIM FOR PERSONAL INJURY PROTECTION BENEFITS IN WHICH THE INSURANCE CARRIER HAS **WITHDRAWN, REDUCED BENEFITS OR DENIED** FURTHER BENEFITS, IS IT A **CONDITION PRECEDENT** PURSUANT TO SECTION 627.736(7)(A), FLORIDA STATUTES, THAT AN INSURER OBTAIN A REPORT BY A PHYSICIAN LICENSED UNDER THE SAME CHAPTER AS THE TREATING PHYSICIAN STATING THAT THE TREATMENT WAS NOT REASONABLE, RELATED OR NECESSARY IN ORDER FOR THE INSURANCE CARRIER **TO DEFEND A SUIT** FOR **REDUCTION, WITHDRAWAL OR DENIAL** OF FURTHER PAYMENTS ON THE GROUNDS OF REASONABLENESS, NECESSITY OR RELATIONSHIP?

Id. (emphasis supplied). The appellate court answered the question in the affirmative. See Id. at 321, 322.

In affirmatively answering the certified question, the Third District Court of Appeal relied upon Section 627.736(7)(a), Florida Statutes, as the only authority pursuant to which an insurer may "reduce," "withdraw" or "deny" benefits, even where the defense was based, in part, upon **fraudulent** billing. See Id. at 320, 321. The court considered Section 627.736(7)(a) to be a "statutory condition precedent" affirming the trial court's ruling "that because United Auto failed to comply with the **statutory condition precedent**, its termination of PIP benefits was ineffective." Viles, 726 So. 2d at 321. This application of Section 627.736(7)(a) results in a conclusive or irrebuttable presumption that United Auto was liable for the disputed bills merely because it did not obtain a report, and despite United Auto's fraud defense and the fact that the jury returned a verdict finding less than the claimed bills to be reasonable and necessary. As in the

decision reviewed by this Court in Public Health Trust of Dade County, the Third District's interpretation of the No-fault Act in Viles creates a conclusive or irrebuttable presumption in violation of due process and unnecessarily short circuits the role of the jury. Moreover, the Third District's interpretation of the Act deprives insurers of demonstrating the very improprieties addressed by this Court in Agency for Health Care Administration, including fraud misdiagnosis or unnecessary treatments, likewise in violation of insurers due process rights.

Subsequent to its decision in Viles, the Third District Court further limited an insurance carrier's ability to dispute claims and defend lawsuits in Perez v. State Farm Fire and Cas. Co.. Although the consolidated cases reached the Third District in different postures, the issue addressed by the court is clearly stated in the certified question of great public importance:

> IN AN ACTION TO RECOVER MEDICAL BENEFITS IN A LAWSUIT UNDER FLA. STAT. SEC. 627.736 WHERE THE ONLY DEFENSE BY AN INSURER IS THAT THE MEDICAL TREATMENT WAS NOT RELATED, NOT REASONABLE AND/OR NOT NECESSARY, **MUST AN INSURER OBTAIN THE REPORT REQUIRED UNDER FLA. STAT. SEC. 627.736(7) CONSTITUTING "REASONABLE PROOF" WITHIN 30 DAYS OF RECEIVING WRITTEN NOTICE** OF THE FACT OF A COVERED LOSS AND OF THE AMOUNT OF SAME **BEFORE IT CAN DEFEND** ON THE BASIS THAT THE MEDICAL BILLS ARE NOT REASONABLE, NOT RELATED AND/OR NOT NECESSARY?

Perez, 746 So. 2d at 1123-24. The Third District Court answered the certified question in the affirmative and held that an insurer must obtain reasonable proof in the form of a medical report within thirty days of receipt of the claim otherwise the insurer is precluded from defending against the claim and simply must pay it. The stringency of the Third

District's interpretation of the provisions of the No-Fault Act stated in the certified question, and the egregious extent to which that interpretation violates due process, are demonstrated by the simple facts of the underlying cases. In both cases the insurers did obtain reports pursuant to which they reduced or denied some benefits. The Third District acknowledged that United Auto obtained a medical report on January 19, 1998, for bills which were submitted on December 17, 1997. See Perez, 746 So. 2d at 1124. With regard to State Farm, the Third District merely pointed out that State Farm did not obtain the report within thirty days. See Id. However, the record and State Farm's brief show that an Independent Medical Examination and records review were conducted within thirty days, and reports of that exam and review were obtained nine days later on the thirty-seventh day after receipt of the bills. (R.114) (Petitioner State Farm's Brief p.3, A. 34, 47). Despite obtaining these reports the Third District's interpretation compels the insurers to pay the claims and precludes them from defending the lawsuits based upon the claims merely because the reports were obtained "late" in the view of the Third District. This interpretation results in a conclusive or irrebuttable presumption that the bills are reasonable, necessary and related and that the insurers are liable for them as such. Thus, the Third District's decision in Perez further expands upon the conclusive or irrebuttable presumptions it created in Viles.

The holdings in Viles and Perez violate due process because they interpret the PIP statute in such a way as to create conclusive or irrebuttable presumptions. In Viles, the court held that United Auto should not have been entitled to present a defense, even where the court acknowledged that the defense was based on fraudulent claims, simply because

United Auto did not obtain a report under Section 627.736(7)(a). The effect of this decision is to render any and all bills submitted to an insurer to be considered medically reasonable, necessary and related simply by virtue of the fact that the insurer did not obtain a report. It does not logically follow from the failure to obtain a report that any claim submitted is a covered event or a covered claim, as the successful defense at the trial level in Viles demonstrates. Furthermore, the decision in Perez more severely infringes on insurer's due process rights where the Third District Court held that an insurer is precluded from defending a PIP lawsuit unless it obtains the report within 30 days pursuant to Section 627.736(4)(b). Here the court simply penalizes insurers for obtaining proof more than 31 days after receipt of the bill. Simply because the report was obtained "late" the court's ruling creates a presumption that the claim is medically reasonable, necessary and related.

These holdings by the Third District deprive insurers of the right to rebut the very presumptions they create contrary to this Court's holdings in Agency for Health Care Administration and Public Health Trust of Dade County. They also drastically and unnecessarily short circuit the function of the jury contrary to this Court's holding in Public Health Trust of Dade County. Furthermore, the decisions of Viles and Perez deprive insurers of the ability to show the impropriety of claims for PIP benefits including those that "could be the result of fraud, misdiagnosis of the patient's condition, or unnecessary treatments." Agency for Health Care Administration, 678 So. 2d at 1254. "It is illogical and unreasonable to call this a fair process. A defendant cannot rebut this presumption because there is no mechanism [to do so]. This type of conclusive

presumption is violative of the due process provisions of our constitution." Id. The conclusive presumptions created by the Third District's interpretations of the PIP statute must be struck as violative of the due process clause of the Florida Constitution.

CONCLUSION

For the foregoing reasons, the decision of the Third District Court of Appeal should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent by U.S. Mail to John H. Ruiz, Esquire, 198 NW 37th Avenue, Miami, FL 33125; Steven E. Stark, Esquire, Bank of America Tower, 17th Floor, 100 Southeast Second Street, Miami, FL 33131; James K. Clark, Esquire, Suite 420, Biscayne Building, 19 West Flagler Street, Miami, FL 33130; Amado Alan Alvarez, Esquire, Sunset International Center, 7000 S.W. 97th Avenue, Suite 209, Miami, FL 33173; Amando A. Brana, Esquire, 3971 SW 8th Street, Suite 301, Coral Gables, FL 33134; Shelley Senecal, Esquire, 100 North Biscayne Boulevard, 2300 New World Tower, Miami, FL 33132; Robert A. Robbins, Esquire, Suite 400, 9200 South Dadeland Boulevard, Miami, FL 33156; David B. Shelton, Esquire, Post Office Box 1873, Orlando, FL 32802; and Peter J. Valeta, Esquire, 150 North Michigan Avenue, Suite 2500, Chicago, IL 60601, this _____ day of June, 2000.

THE LAW OFFICES OF HOWARD W. WEBER

_____

Vincent F. Iacono, Esquire
Florida Bar No. 0043710
Two Urban Centre, Suite 240
4890 West Kennedy Boulevard
Tampa, Florida 33609
Phone: (813) 288-8414
Fax: (813) 288-1699
Attorney for GEICO Companies