IN THE SUPREME COURT OF FLORIDA

CASE NO.SC00-111
DCA CASE NOS.99-01348, 99-01481

UNITED AUTOMOBILE INSURANCE COMPANY,

Defendant/Petitioner,

v.

MARISOL RODRIGUEZ,

Plaintiff/Respondent.

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

This is an appeal from a decision of the Third District Court of Appeal addressing a Certified Question from the County Court affirming Final Summary Judgment in favor of the insured for medical bills she submitted under the Personal Injury Protection ("PIP") coverage of her insurance policy. Throughout this Brief, the Respondent, the Plaintiff below, Marisol Rodriguez, will be referred to as "Rodriguez." Her PIP carrier, the Petitioner, the Defendant below, United Automobile Insurance Company, will be referred to as "United Automobile." When applicable, references to matters of the record will be made by the letter "R." and the appropriate page number.

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the size and style of type used in Respondent's Answer Brief is 14 point Times New Roman, a font that is proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Rodriguez accepts the statement of the case and facts in the United Automobile's initial brief.

ISSUE ON APPEAL

United Automobile has stated the issue on appeal as follows:

> **WHETHER AN INSURER IS REQUIRED TO OBTAIN THE REPORT REQUIRED UNDER FLORIDA STATUTE SECTION 627.736(7) WITHIN 30 DAYS OF RECEIVING WRITTEN NOTICE OF THE FACT OF A COVERED LOSS [AND] THE AMOUNT OF THE SAME IN ORDER TO DEFEND AN ACTION TO RECOVER MEDICAL BENEFITS UNDER SECTION 627.736 ON THE BASIS THAT THE MEDICAL BILLS ARE NOT REASONABLE, NOT RELATED, AND/OR NOT NECESSARY. United Automobile's Initial Brief at 9.**

SUMMARY OF THE ARGUMENT

The trial court properly granted Summary Judgment in favor of Rodriguez where Rodriguez established that she had submitted "reasonable proof" of losses and expenses to United Automobile and where United Automobile failed to obtain "reasonable proof" within thirty days that it was not responsible for payment. Since United Automobile asserted no coverage defenses, United Automobile was required to obtain a report as required by Florida Statute Section 627.736(7) to defend on the basis that the treatment was not reasonable, not related and/or not necessary within thirty days.

Since United Automobile failed to obtain "reasonable proof" within thirty days, it had no basis to claim that it was not responsible for payment of the claimed medical bills within the statutory time period. United Automobile's claim that it could obtain the "reasonable proof" after the expiration of thirty days and still defend the claim would in effect create a tolling exception not found in Florida Statute Section 627.736(4).

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDMENT IN FAVOR OF RODRIGUEZ WHERE (1) RODRIGUEZ ESTABLISHED BY COMPETENT EVIDENCE IN THE RECORD THAT THE INSURER HAD RECEIVED "REASONABLE PROOF" OF COVERED LOSSES AND EXPENSES THAT WERE INCURRED BY RODRIGUEZ AND COVERED BY THE POLICY, (2) THE INSURER, UNITED AUTOMOBILE, HAD NOT PAID THE COVERED LOSSES AND EXPENSES WITHIN 30 DAYS OF THEIR RECEIPT, DESPITE NOT HAVING ANY COVERAGE DEFENSES, AND DESPITE NOT HAVING OBTAINED "REASONABLE PROOF" TO ESTABLISH THAT IT WAS NOT RESPONSIBLE FOR PAYMENT OF THE LOSSES AND EXPENSES WITHIN 30 DAYS OF THEIR RECEIPT.

A. Introduction

Florida's No-Fault Law was intended to provide for swift payment of medical treatment for injuries arising out of an automobile accident, without the need for protracted litigation or other delay. Crooks v. State Farm Mut. Auto. Ins. Co., 659 So. 2d 1266, 1268 (Fla. 3d DCA 1995)("the plain meaning and intent of Section 627.736(4)(b), is to guarantee swift payment of PIP benefits"). Since the inception of this Law in 1971, the courts have interpreted the No-Fault act so as to promote the intent of law of swift payment.[1] In

[1] The primary goal of the courts in interpreting a statute is to determine and give meaning to the legislature's intent. Tyson v. Lanier, 156 So. 2d 833 (Fla. 1963); Palma v. State Farm Fire & Cas. Co., 489 So. 2d 147, 148-149 (Fla. 4th DCA

return for this benefit of "swift payment," the public gave up its right to collect non-economic damages from an at-fault party, unless certain "threshold damages" were established. See §627.737, Fla. Stat. (1997). Accordingly, the public was promised a worry-free, delay-free, attorney-free, litigation-free system for the payment of medical bills without any regard to fault.

Thus, having denied an injured person other means of obtaining payment for medical care and after taking away important legal rights, the legislature set up a system whereby payment of PIP benefits would create little dispute or delay. To accomplish this goal, Florida Statute Section 627.736 established clear guidelines for an insurer to pay medical bills presented to it for payment. Based on the plain language of the statute, when an insurer wishes to contest a medical bill, it must initiate a good faith investigation of the PIP claim and must obtain "reasonable proof" within thirty days of receiving notice of covered loss and amount of same that it is not responsible for payment in order to deny payment. Absent such proof, the medical bill is "due and payable" within thirty days from receipt as per subsection (4).

Specifically, Florida Statute Section 627.736(4)(b) states that medical bills are due and payable within thirty days of receiving notice of a covered

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1983)("Uncertainty should be resolved by an interpretation that best records with the public benefits.").

loss and amount of same. The only exception to this general rule wherein the insurer is allowed to avoid payment within thirty days is where the insurer obtains within thirty days "reasonable proof to establish that the insurer is not responsible for payment." §627.736(4)(b), Fla. Stat. (1997). Over the years, insurers have attempted to avoid the thirty day time frame, but the courts have uniformly held that there is no provision within the law to extend the time for payment unless the insurer has "reasonable proof" within thirty days of receiving notice of a covered loss and amount of same that the medical treatment was not reasonable, related and/or not necessary.

In the instant appeal, United Automobile has asked this Court to determine if there is a thirty-day requirement for an insurer to pay a No-Fault claim after having received notice of a covered loss and amount of same unless it has obtained a report constituting "reasonable proof" that the medical treatment rendered or to be rendered is not reasonable, related and necessary. United Automobile's argument is that failure to comply with the thirty-day requirement only exposes it to statutory interest and attorney's fees.[2] Rodriguez asserts that where the insurer has no coverage defenses and admits

[2] It is important to note that United Automobile for purposes of this appeal has conceded that it received "reasonable proof" of losses and expenses and that it failed to itself obtain "reasonable proof" within thirty days of receipt of reasonable proof of losses and expenses to establish that it was not responsible for payment of the losses and expenses.

that it received "reasonable proof" of covered losses and expenses that its failure to comply with the thirty-day requirement prevents the insurer from defending on reasonableness, relatedness and necessity of the medical treatment.

United Automobile's interpretation of Florida Statute Section 627.736 is flawed for two reasons. First, its interpretation runs contrary to almost thirty years of case law that has interpreted and implemented the no-fault act. Second, should United Automobile's interpretation prevail, the legislative purpose of "swift payment" in enacting the no-fault act would be nullified.

B. <u>The Relevant Subsections of Florida Statute Section 627.736</u>

Florida Statute Section 627.736(4) states in pertinent part:

> **(4) Benefits; when due.--Benefits due from an insurer under ss. 627.730- 627.7405 shall be primary, except that benefits received under any workers' compensation law shall be credited against the benefits provided by subsection (1) and shall be due and payable as loss accrues, upon receipt of "reasonable proof" of such loss and the amount of expenses and loss incurred which are covered by the policy issued under ss. 627.730-627.7405.**
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> *** * ***
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> **(b) Personal injury protection insurance benefits paid pursuant to this section shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. If such written notice is not furnished to the**

insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. However, any payment shall not be deemed overdue when the insurer has "reasonable proof" to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer…[3]

(c) All overdue payments shall bear simple interest at the rate of 10 percent per year.

Florida Statute Section 627.736(7) states in pertinent part:

(7) Mental and physical examination of injured person; reports.--

(a)…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

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[3] United Automobile in footnote 1 of its initial brief contends that the recent 1998 statutory amendments to Florida Statute Section 627.736 support its position. However, quite the contrary is correct because the amendments provide a tolling of the thirty-day requirement if the insurer requests additional information within 20 days of receipt of "reasonable proof." The amendments to Section 627.736 do not alter the requirements contained within Section 627.736(4)(b) requiring an insurer to make payment within 30 days. The Legislature had the opportunity to make changes, but it did not do so and, instead, made changes to provide insurers with a tolling mechanism if the insurer complies with the statute.

be withdrawn, stating that treatment was not reasonable, related, or necessary.

C. Statutory Scheme

When an insured receives medical treatment as a result of an automobile accident, the insured must submit "reasonable proof" of the losses and expenses in order to receive PIP benefits. §627.736(4), Fla. Stat. (1997). Once the insured submits such "reasonable proof," the thirty-day time frame is triggered in which an insurer must obtain "reasonable proof" that the medical treatment received was not reasonable, related, and/or necessary. §627.736(4)(b), Fla. Stat. (1997). If the insurer obtains "reasonable proof," the insurer has met the requirements under the statute to toll the time for payment.[4] If the insurer fails to obtain "reasonable proof" then the insurer has failed to dispute the "reasonable proof" submitted by the insured and as result cannot later argue that the medical treatment was not reasonable, related and necessary.

The thirty-day time frame is only triggered, if the insured submits "reasonable proof"[5] of a covered losses and expenses. In the case of Amador

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[4] Because Florida Statute Section 627.736(7)(a) requires a report before PIP benefits can be withdrawn based on the defense of reasonable, relatedness and necessary, a report complying with Florida Statute Section 627.736(7)(a) obtained within thirty days can be the only means of "reasonable proof" for the defense of reasonable, related and necessary. However, where the carrier asserts other defenses "reasonable proof" is not limited to a report and can based on other matters not at issue in this case.

[5] The Petitioners as well as the Amicus Curiae raise a red herring by claiming that the decision in Perez would require insurers to pay unreasonable, unrelated,

v. United Auto. Ins. Co., 748 So. 2d 307, 308 (Fla. 3d DCA 2000), the court discussed what would constitute "reasonable proof" by the insured in submitting his or her PIP claim for the loss and expenses incurred. In Amador, the court stated that the insured could define "reasonable proof" in its policy of insurance, but the definition should not thwart the thirty-day scheme. Specifically, in Amador, the insured had defined "reasonable proof" as consisting of an insured submitting to an examination under oath. The court did not object to the insurer requiring an examination under oath, but reiterated that said examination had to be conducted within thirty days in order to be in harmony with the scheme of the No-Fault act. Specifically, the court noted that Amador's claim for PIP benefits was received by the insurer on April 28, 1997, however, the insurer did not request an examination under oath until June 24, 1997. As a result the court held "that United Auto's request for an examination under oath from the insureds beyond the 30-day statutory period was "unreasonable." Id. at 308-309.

Additionally, in the case of Fortune Ins. Co. v. Pacheco, 695 So. 2d 394 (Fla. 3d DCA 1997), Judge Cope in a specially concurring opinion discussed in

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and/or unnecessary expenses merely because the insurer fails to act promptly. In arguing this point, examples of treatment totally unrelated to an accident are described to support the argument. However, the important issue is whether the examples given qualify as "reasonable proof" of covered losses and expenses because if the information provided does not constitute "reasonable proof" to the insurer then the thirty days do not start to run.

detail the requirement of the insured submitting "reasonable proof of such loss" to the insurer in order to trigger the thirty-day timeframe for the insurer to investigate the PIP claim. Judge Cope stated that "an insurer is allowed to prescribe what must in the proof of loss, so long as the required contents are "reasonable" and consistent with the statute." Id. at 396. Hence, the rationale behind the Third District decisions provides protection for the insured that complies with the statutory scheme and provides "reasonable proof" of losses and expenses in being paid for the major and salient economic losses while at the same time protecting insurers from not having to pay absurd claims where the insured has not provided "reasonable proof" of covered losses and expenses. See Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974).

D. Cases Interpreting Florida Statute Section 627.736)(4)(b)

1. Dunmore v. Interstate Fire Ins. Co.

For the last twenty-five years, courts have stated that an insurer has the burden to authenticate a PIP claim within thirty days of receiving written notice of the fact of a covered loss and the amount of same. Fortune Ins. Co. v. Pacheco, 695 So. 2d 394 (Fla. 3d DCA 1997); Crooks v. State Farm Mut. Auto. Ins. Co., 659 So. 2d 1266 (Fla. 3d DCA 1995); Dunmore v. Interstate Fire Ins. Co., 301 So. 2d 502 (Fla. 1st DCA 1974). In Dunmore, the court held that:

> **the statutory language is clear and unambiguous. The insurance company has thirty days in which to verify the claim after receipt of an application for benefits. There is no provision in the statute to toll this time limitation. The burden is clearly upon the insurer to authenticate the claim within the statutory time period. To rule otherwise would render the recently enacted "no fault" insurance statute a "no-pay" plan--a result we are sure was not intended by the legislature. Dunmore at 502, quoted in, Pacheco at 395 and in Crooks at 1268.**

Thus, the Dunmore decision started a long line of cases that have held that the express terms of Florida Statute Section 627.736(4)(b) do not provide for tolling of the thirty day payment period unless the insurer has "reasonable proof" to establish that the insurer is not responsible for the payment. Pacheco at 395-396; and Crooks at 1268-1269. Furthermore, the courts have held that the intent of the legislature in enacting the no-fault laws, was to ensure prompt payment of PIP benefits. Martinez v. Fortune Ins. Co., 684 So. 2d 201 (Fla. 4th DCA 1996); Crooks v. State Farm Fire & Cas. Co., 659 So. 2d 1266 (Fla. 3d DCA 1995); Dunmore v. Interstate Fire Ins. Co., 301 So. 2d 502 (1st DCA 1974). Therefore, the courts of this state have also held that the no-fault statute should be liberally construed in favor of the insured. Farmer v. Protective Cas. Ins. Co., 530 So. 2d 356 (Fla. 2d DCA 1988); Palma v. State Farm Fire & Cas. Co., 489 So. 2d 147 (Fla. 4th DCA 1986); Williamson v.

Fortune Ins. Co., 4 Fla. Law Weekly Supp. (17th Judicial Circuit, Case No. 95-4767, 12/12/96).

2. Fortune Ins. Co. v. Pacheco

In Fortune Ins. Co. v. Pacheco, 695 So. 2d 394 (Fla. 3d DCA 1997), in an en banc decision, the court held that there is no tolling of the thirty day time period unless the insurer has "reasonable proof" that it is not responsible for payment. In Pacheco, the insured timely notified the insurer and provided the insurer with medical reports, a copy of the police report and a PIP application. On the twenty-fourth day after Pacheco made his claim for medical expenses, the reviewing company for the insurer requested one of Pacheco's health care providers to provide diagnostic testing results including graphs and x-rays. Fortune did not pay the claim until after the thirtieth day and after Pacheco had filed suit for his PIP benefits. The insurance policy had the following language:

> **"reasonable proof" of claim shall include but not be limited to: a) properly completed Florida Application for No-Fault Benefits; and b) accident report as specified in Chapter 316 of Florida Statutes; and c) all medical expenses incurred as a result of the accident and all supporting medical records. Pacheco at 395.**

Pacheco moved for summary judgment claiming that he filed a lawsuit and incurred attorney's fees because the insurer failed to timely pay his PIP benefits. The insurer argued that the terms of the policy required Pacheco to submit all medical records and therefore, payment of PIP benefits was not

untimely until the thirtieth day after it received the medical records it had requested from Pacheco's health care provider. The trial court entered summary judgment in favor of Pacheco and the appellate court affirmed. The court stated that once the insured provides the insurer with notice of a covered loss and amount of same, the insurer must pay unless it has within thirty days "reasonable proof" that it is not responsible for payment. In Pacheco, the insured provided medical bills, medical reports, a PIP application, and a copy of the police report. The court rejected Fortune's argument that it had not received "reasonable proof" of losses and expenses and affirmed the trial court's ruling that the police report and PIP application constituted "reasonable proof" of claim and that the insurer was obligated to pay the claim within thirty days unless it had obtained reasonable proof to believe that it is not responsible for payment. Pacheco at 396.[6]

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[6] In 1998, the Florida Legislature responded to the Pacheco decision by amending the Florida Statute Section 627.736(6)(b), which allowed the insurer to request medical records from the insured's treating physician and request that the treating physician sign under oath a statement that the medical services he or she rendered were reasonable, related and necessary as a result of the automobile accident. This amendment kept intact the ability of the insurer to request medical records and a sworn statement, but added to the subsection by providing the insurer a tolling mechanism of the thirty-day requirement if it requested medical documentation within twenty days of receiving notice of the amount of covered loss. However, the Legislature did not make any changes to section (4)(b) thereby leaving intact the Pacheco court's interpretation of the thirty-day requirement. The following are the two sentences that were added to section (6)(b):

> If an insurer makes a written request for documentation

In Pacheco, the insurer also argued, as United Automobile has argued in the case at bar, that required verification within thirty days might result in the insurer having to pay unreasonable, unrelated and/or unnecessary claims that could be fraudulent. The Third District was unimpressed by such argument stating that if fraud were suspected, an adequate remedy was provided through the Division of Insurance Fraud. Pacheco at 396 fn. 1.

3. United Auto Ins. Co. v.Viles

In the case of United Auto. Ins. Co. v. Viles, 726 So. 2d 320 (Fla. 3d DCA 1999), the court held that an insurer must comply with the procedural requirements of Florida Statute Section 627.736 prior to withdrawing or terminating PIP benefits. Compliance with the procedural requirements of Florida Statute Section 627.736 is a condition precedent that if not complied with makes the termination of PIP benefits ineffective. Furthermore, the Court in Viles stated that:

> **This language is part of the independent medical examination requirement of section 627.736(7) which**

> under this paragraph within 20 days after having received notice of the amount of a covered loss under paragraph (4)(a), the insurer shall pay the amount or partial amount of covered loss to which such documentation relates in accordance with paragraph (4)(b) or within 10 days after the insurer's receipt of the requested documentation, whichever occurs later. For purposes of this paragraph, the term "receipt" includes, but is not limited to, inspection and copying pursuant to this paragraph.

> **is "intended to give insurers an opportunity to determine the legitimacy of a claim so that an appropriate decision can be made as to whether benefits should be paid." U.S. Security Ins. Co. v. Silva, 693 So.2d 593, 596 (Fla. 3d DCA 1997). The quoted language from section 627.736(7)(a) sets up a procedural requirement that an insurer cannot withdraw payment of a treating physician unless the decision is supported by an expert that the treatment does not comply with the statutory criteria. If the insurer were to act without complying with such a procedural requirement, any termination of payment would be ineffective. In this procedural hurdle, we do not discern a legislative intent to alter the burden of proof in a lawsuit for PIP benefits. Viles at 32, quoting from, Derius v. Allstate Indemnity Co., 723 So. 2d 271 (Fla. 4th DCA 1998).**

Therefore, both Viles and Derius stand for the proposition that an insurer is required to have a report from a physician licensed under the same Chapter as the insured's treating physician before the insurer can defend on the reasonableness, relatedness and medical necessity of the medical bills submitted by the insured. These two cases were silent as to whether the report had to be obtained within thirty days of receiving notice of the claim and the amount of same, until the thirty day issue was addressed by the Third District when it rendered its opinion in the consolidated cases of Perez and Rodriguez, which are the two cases currently under review by this Court.

4. Jones v. State Farm Mut. Auto. Ins. Co.

United Automobile ignores the plain wording of the Florida Statute Section 627.736 and the long line of cases cited above and instead relies, in part, upon dicta found in Jones v. State Farm Mut. Auto. Ins. Co., 694 So. 2d 165 (Fla. 5th DCA 1997). In Jones, the issue before the Fifth District Court of Appeal was whether the trial court order granting summary judgment in favor

of the defendant, the insurer, was proper where the plaintiff, Jones, refused to submit to an Independent Medical Examination ("IME"). The Fifth District Court reversed summary judgment because it held that a question of fact existed as to whether Jones' refusal to submit to an IME was reasonable under the circumstances. Jones at 167.

The Fifth District Court stated that "State Farm's failure to pay the claim in thirty days does not relieve Jones from the obligation to submit to an independent medical examination" even though State Farm failed to have "reasonable proof" within the thirty day period that it was not responsible for payment. Id. at 166. The Fifth District Court reasoned that the failure to obtain such proof within the thirty-day period exposes the insurer to statutory interest and attorney's fees when a claim is overdue, but does not preclude the insurer from contesting the claim. However, since Jones failed to attend an IME, the carrier could assert a coverage defense and deny payment if Jones' refusal to attend was unreasonable.[7] In the case at bar, the trial judge as well

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[7] Rodriguez concedes that coverage defenses remain as viable defenses even where the carrier has not obtained the requisite report under Florida Statute Section 627.736(7) within thirty days of written notice of the fact of a covered loss and the amount of same. These defenses include but are not limited to: (a) unlisted driver, (b) no consent to drive vehicle, (c) failure to cooperate, (d) material misrepresentation, or (e) injury during the commission of a felony.

However, the specific defense that benefits were not reasonable, not related and/or not necessary requires that the insured obtain the report required under Florida Statute Section 627.736(7) within thirty days.

as the district court interpreted this language as dicta. The District court stated:

> **Jones addressed a summary judgment granted despite the existence of genuine issues of material fact regarding whether the insured had reasonably failed to submit to an independent medical examination. In view of this fact, the Fifth District stated that the insurer was not precluded from presenting its defense. This comment, however, was clearly dicta as it was necessary to the disposition of the case. Perez v. State Farm Fire & Cas. Co., 746 So. 2d 1123, 1126 (Fla. 3d DCA 1999).**

However, United Automobile relies on this dicta claiming that the law does not require an investigation be completed within thirty days as a prerequisite to denying payment. Instead, United Automobile contends that it is free to conduct its investigation months and even years after bills have been submitted, and it then obtains an opinion that treatment is not necessary, the insurer may simply deny payment of benefits with impunity.

5. Fortune Ins. Co. v. Everglades Diagnostics, Inc.

In the case of Fortune Ins. Co. v. Everglades Diagnostics, Inc., 721 So. 2d 384 (4th DCA 1998), the insurer received medical claims that it denied within thirty days of their receipt and at the same time demanded arbitration. The court decided that the insurer could compel arbitration after thirty days from the date when it received notice of a claim and the amount of same.

Contrary to the issue in the case at bar, the issue in Everglades was whether the insurer was required to demand arbitration within thirty days, not whether the insurer had to obtain "reasonable proof" within thirty days. In fact, the insurer denied the claims within thirty days and thus, could arguably allege that it had "reasonable proof" within the statutory time frame. The court in Everglades held that the arbitration provision did not require that arbitration be requested within the thirty day provision and therefore, stated that there is no "30-day requirement on the enforcement of the subsection (5) arbitration provision." Everglades at 385.

6. AIU Ins. Co. v. Daidone

In the most recent case addressing the issue before this Court, the Fourth District Court of Appeals in the case of AIU Ins. Co. v. Daidone, 2000 WL 873694 (4th DCA 2000) certified conflict with the case at bar. In Daidone, the court held that that the insurer's failure to obtain "reasonable proof" that it was not responsible for payment did not prevent the insurer from contesting the bill on the basis that the bill was not reasonable, related and necessary. Id. The court in its opinion misconstrues the holding in Perez by stating that the Perez court held that medical bills that were unreasonable, unrelated and unnecessary would have to be paid because the insurer failed to have a report within thirty days. However, what the Daidone court stated was that the

holding in Perez cannot be found anywhere in the decision. The Perez court stated that "once an insurer receives notice of a loss and medical expenses, it must pay within thirty days unless, pursuant to Section 627.736(4)(b), it has obtained reasonable proof to believe that it is not responsible for the payment." Perez at 1126. Hence, contrary to the Fourth District statements in Daidone about the holding in Perez, the Perez court analyzed the facts of Perez and Rodriguez, and acknowledged that the insured had provided "reasonable proof" of covered losses and expenses that went unpaid, despite the insurer's failure to obtain "reasonable proof" within thirty days that it was not responsible.

6. Analysis of United Automobile's Argument

Contrary to United Automobile's contention, United Automobile was required to obtain "reasonable proof" within thirty days of written notice of the fact of a covered loss and the amount of same in order to defend on the basis that the Rodriguez' medical bills were not reasonable, not related and/or not necessary. The "reasonable proof" to rebut Rodriguez' claim must be obtained by the insurer within thirty days of being furnished with written notice of loss and amount of same. Essentially, "reasonable proof" is a defense that an insurer can assert to withhold payment within thirty days, which United Automobile must

establish. United Automobile failed to timely obtain what it alleges constitutes "reasonable proof" to rebut Rodriguez' PIP claim and concedes that it has no coverage defense, thus, the trial court was correct in entering final summary judgment in favor of Rodriguez as was the Third District Court of Appeal for affirming the judgment. Having failed to comply with the thirty-day time limit, the No-Fault act simply prevents further argument or delay, in order to assure prompt payment of, what the insured had already established was "reasonable proof" of covered losses and expenses. Imposing a thirty-day time limit to either pay or deny a claim under a policy in which coverage is not disputed is not the equivalent of establishing coverage by estoppel where no coverage exists in the first instance, as United Automobile suggests. In fact, the undisputed evidence in this matter is that coverage was admitted and that United Automobile also admitted that it received "reasonable proof" of covered losses and expenses.

Since United Automobile asserted no coverage defenses, and conceded that it received written notice of the fact of a covered loss and the amount of same from Rodriguez and that 30 days passed without it having obtained "reasonable proof" that it was not responsible for payment, United Automobile was obligated to pay the claimed medical

bills. Any other result would render the No-Fault Act a No-Fault "No Pay Plan" in which proper authentication is performed only where the insurer is forced to do so in order to defend its position in court, a result the Legislature did not intend. See Dunmore at 502.

Presently, the courts have clearly ruled that the mere suspicions of an insurance adjuster do not qualify as proof that payment is not due. However, if this Court interprets the statute as allowing an insurer to contest the reasonableness, relatedness and/or necessity of care, regardless of when it actually conducts its investigation in order to obtain "reasonable proof" that payment is not due, the practical effect of such a ruling will be to allow adjusters to deny PIP claims based merely on their unqualified suspicions, since the insurer would still be entitled to obtain the required statutory "reasonable proof," necessary to back up its adjuster's suspicions, if and when the claim has to be defended in court. Clearly, such a result runs afoul of the statutory scheme, which is to guarantee "swift payment."

Furthermore, United Automobile's argument that the trial court's ruling alters the burdens as announced in Derius is misplaced because Rodriguez provided competent evidence at the hearing of the Motion for Summary Judgment that she provided written notice of the fact of a

covered loss and the amount of same and that United Automobile had failed to obtain "reasonable proof" within thirty days to create a genuine issue of material fact. As such, once Rodriguez established the absence of any genuine issue of material fact, it was United Automobile's burden to introduce evidence that created a genuine issue of material fact within thirty days as required by Florida Statute Section 627.736(4)(b). Lenhal Realty, Inc. v. Transamerica Commercial Finance Corp., 615 So. 2d 207 (Fla. 4th DCA 1993)(when movant has tendered competent evidence in support of its motion, the burden shifts and falls on the other party to come forward with opposing evidence to show that a question of material fact exists).

United Automobile concedes that it failed to obtain "reasonable proof" that it was not responsible for payment within the thirty-day period. R. 206-208. However, United Automobile takes the position that failure to do so only subjects it to paying interest and attorney's fees if it eventually is found liable.

As has been previously addressed throughout this brief, United Automobile concedes that it raised no coverage defenses and that the only defense that it seeks to raise at the trial court is the defense that the medical treatment received by Rodriguez was not reasonable, not

related and/or not necessary. R. 206-208. As a result, United Automobile concedes that a policy of insurance was in full force and effect that amongst other coverages, was required to provide coverage for No-Fault benefits as required by Florida Statute Section 627.736. R. 206-208. United Automobile also concedes that it received written notice of the fact of a covered loss and the amount of same as Rodriguez was required to provide pursuant to Florida Statute Section 627.736. R. 206-208. United Automobile also concedes that within thirty days from receipt of written notice of the fact of a covered loss, it had not obtained "reasonable proof" that it was not responsible for payment of the incurred medical expenses by Rodriguez. R. 206-208. Notwithstanding, United Automobile's contention is that the "reasonable proof" which is a statutorily mandated prerequisite before an insurer can toll the time within which it is required to pay claimed benefits, subjects it to nothing more than interest and attorney's fees should it ultimately be found liable.

United Automobile's contention is incorrect because otherwise the term "reasonable proof" would have no meaning as its application would have no effect or bearing on any insurer.

7. Analysis of Florida Statute Section 627.736(4)(b) as it pertains to the "reasonable proof" that is mandated for an insurer to toll the time frame within which to pay.

A close review of United Automobile's argument reveals that the requirement to obtain "reasonable proof" as statutorily mandated would have absolutely no significance if the insurer were able to obtain the "reasonable proof" after the expiration of the thirty day period from the insurer's receipt of written notice of the fact of a covered loss and the amount of same because the insurer would not incur any penalty if it failed to obtain "reasonable proof" within thirty days.

1. <u>Insurer obtains "reasonable proof" within thirty days from receipt of written notice of the fact of a covered loss.</u>

If an insurer alleges that it has obtained "reasonable proof" within thirty days of receipt of written notice of the fact of a covered loss and the amount of same, then arguably, the insurer has obtained what it contends is the "reasonable proof" necessary to toll the time for the payment of No-Fault benefits. §627.736(4)(b), Fla. Stat. (1997). Under this scenario, the insurer has arguably met the condition precedent to being able to raise the defense that it is not responsible for payment of the No-Fault benefits by virtue of the fact that it claims that within thirty days it had "reasonable proof" that the treatment was not reasonable, not related and/or not necessary. Thereafter, since the insurer arguably has created a genuine issue of material fact,

summary judgment could not be properly granted in favor of the insured and the matter would have to be decided by a judge, if a jury trial is not requested and by a jury if a jury trial is requested. A judge or jury would decide if the insurer in fact had "reasonable proof" that it was not responsible for payment. If a judge or jury decides that the insurer did have "reasonable proof," then the insurer does not owe any amounts for any of the claimed No-Fault benefits nor would it owe any amount for interest and/or attorney's fees. Conversely, if a judge or jury determines that the insurer did not have "reasonable proof," the net effect would be that the insurer was found not to have "reasonable proof" within the thirty day time period from receipt of written notice of the fact of a covered loss and the amount of same and therefore, was not authorized to toll the time for payment and must therefore pay the principal amount of the claimed No-Fault benefits plus interest and attorney's fees. Also, a judge or jury could determine that an insurer had "reasonable proof" within thirty days to establish that it was not responsible for payment of a portion of the claimed No-Fault benefits and still find it liable for the remaining portion.

Under either of the scenarios, the insurer would have to pay the claimed No-Fault Benefits plus interest and attorney's fees on those No-Fault benefits for which it did not have "reasonable proof" to establish that it was not

responsible to pay. However, the interest always starts to accrue after the expiration of thirty days from receipt of written notice of loss and the amount of same. Hence, although arguably an insurer can allege that within thirty days it has obtained "reasonable proof" to establish that it is not responsible to pay claimed No-Fault benefits, the ultimate determination as to whether or not it did obtain "reasonable proof" within thirty days of written notice of the fact of a covered loss or the amount of same would be decided by a judge or jury depending on whether or not a trial by jury was requested. However, under these scenarios, the insurer can at a minimum, justify that it arguably had "reasonable proof" to establish that it was not responsible for payment within the thirty day time limitation prescribed by Florida Statute Section 627.736 (4)(b) and thus, has met the burden under the statute to toll the time to pay or claim that it is not responsible for payment. Such an interpretation gives meaning to the relevant provisions of the law, and advances the legislative goal of "swift payment."

2. <u>Insurer concedes that it has not obtained "reasonable proof" to establish that it is not responsible for payment within thirty days from written notice of the fact of a covered loss and the amount of same and no coverage defenses are asserted.</u>

United Automobile contends that an insurer can fail to obtain "reasonable proof" within thirty days of written notice of the fact of a covered loss and the amount of same and still defend on the grounds that the treatment was not reasonable, not related and/or not necessary. According to United Automobile, the "reasonable proof" can surface at any time subsequent to the expiration of thirty days from the date that the insurer received written notice of the fact of a covered loss and the amount of same.[8] In essence, according to this position, so long as an insurer has alleged that it has obtained some type of a "reasonable proof" to establish that it is not responsible for payment irrespective of when it is obtained, the insurer could nevertheless defend the action. United Automobile contends that when it obtains "reasonable proof" subsequent to the expiration of thirty days from the date it has received written notice of the fact of a covered loss and the amount of same exposes it to nothing more than interest and attorney's fees. However, United Automobile fails to point out that this result is no different than the result if the insurer were to allege that it has "reasonable proof" to

[8] So long as the insurer complies with the requirements for defending a Motion for Summary Judgment and/or any and all pretrial requirements as it pertains to the disclosure of witnesses and exhibits.

establish that it is not responsible for payment of the claimed No-Fault benefits within thirty days. Hence, under either scenario, the result is the same in the event the insurer claims to have obtained "reasonable proof" that it is not responsible for payment, and a judge or jury later determines that it did not have "reasonable proof," the insurer would have to pay the No-Fault benefits plus interest and attorney's fees.[9]

According to United Automobile's position, the exact result would occur if the insurer were to obtain "reasonable proof" after the expiration of written notice of the fact of a covered loss and the amount of same if a judge or jury were to determine that it has no "reasonable proof." Hence, under either scenario, there would be no significance to obtaining "reasonable proof" within the thirty day period from the date that the insurer received written notice of the fact of a covered loss and the amount of same. This result would be tantamount to discarding the statutory thirty day time frame within which the insurer is required to authenticate the claim.

"Reasonable Proof" only comes into play when the insurer claims that within the thirty day time period it has obtained "reasonable proof" that it is not responsible for payment. Otherwise, the term "reasonable proof" would have no significance and would be obviated because the term would have no

[9] The interest under either scenario would start to run from receipt of written notice of the fact of a covered loss and the amount of same.

application to No-Fault claims. United Automobile's interpretation of the statute would never inflict any different penalty on the insurer regardless of whether or not "reasonable proof" was obtained before or after the thirty days. Undoubtedly, the term "reasonable proof" was legislatively created and statutorily mandated to ensure payment within thirty days of the receipt of written notice of the fact of a covered loss and the amount of same within the statutory time frame unless the insurer obtains "reasonable proof" that it is not responsible.

United Automobile incorrectly argues that the purpose of the thirty-day requirement in which to have "reasonable proof" is to determine whether attorney's fees and interest are applicable if the insured prevails. This proposition is incorrect because attorney's fees in a PIP scenario are governed by Florida Statute Section 627.428.[10] Any disputes between the insured and the insurer over a PIP claim are regulated by Florida Statute Section 627.428 pursuant to Florida Statute Section 627.736(8). An insured is entitled to attorney's fees if the expenses were found to be covered and the insurer did

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[10] Florida Statute Section 627.736(8) states in pertinent part:

> (8) Applicability of provision regulating attorney's fees.-- With respect to any dispute under the provisions of ss. 627.730-627.7405 between the insured and the insurer, the provisions of s. 627.428 shall apply.

not have "reasonable proof" within thirty days entitling the insured to a judgment entered in his or her favor triggering the right to attorney's fees pursuant to Florida Statute Section 627.428.[11] Any other result would in effect toll the time within which to pay.

8. The holding in the case of <u>Pioneer Life Ins. Co. v. Heidenfeldt</u> is inapplicable to the case at bar.

United Automobile contends that the case of <u>Pioneer Life Ins. Co. v. Heidenfeldt</u>, 25 Fla. L. Weekly D231 (Fla. 2d DCA January 9, 2000) is instructive on whether there is a thirty-day requirement. However, <u>Pioneer</u> does not discuss the No-Fault Statute, instead, <u>Pioneer</u> interprets Florida Statute Section 627.613.[12] The court in <u>Pioneer</u> held

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[11] Fla. Stat. §627.428 states in pertinent part:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

[12] Florida Statute Section 627.613(2) states the following:

> Health insurers shall reimburse all claims or any portion of any claim from an insured or an insured's assignees, for payment under a health insurance policy, within 45 days after receipt of the claim by the health insurer. If a claim or

that "[b]ased on our reading of section 627.613, we hold that a failure to comply with the notice requirements of section 627.613(2) does not result in forfeiture of an insurer's right to deny benefits when the benefits sought are excluded from the insurance coverage." Id. United Automobile fails to address the statutory difference behind the Florida No-Fault Act and Florida Statute Section 627.613(2), namely that the No-Fault Act was implemented to guarantee "swift payment." Additionally, unlike in Pioneer where the medical benefits requested to be paid were not covered, in Perez "reasonable proof" of covered losses and expenses was provided.

9. Allstate and the FIC are incorrect by contending that Perez expands PIP coverage to medical expenses which are not reasonable, related and necessary.[13]

Allstate and the FIC repeatedly overlook the fact that Florida Statute Section 627.736(4) requires that the insured submit "reasonable

> a portion of a claim is contested by the health insurer, the insured or the insured's assignees shall be notified, in writing, that the claim is contested or denied, within 45 days after receipt of the claim by the health insurer. The notice that a claim is contested shall identify the contested portion of the claim and the reasons for contesting the claim.

[13] This section is in response to the amicus brief submitted by Allstate Ins. Co. ("Allstate") and the Florida Insurance Coucil ("FIC").

proof" of losses and expenses in order for the thirty-day timeframe to be triggered in which the insurer must obtain a report stating that the medical bills are not reasonable, related and necessary in order to defend on the basis that medical bills are not reasonable, related or necessary. Therefore, the statutory scheme requires both the insured and the insurer to act reasonably and, thereby, the intent of the Legislature of "swift payment" can be achieved.

Allstate claims that the failure by an insurer to comply with the statutory mandates should not prevent it from contesting the medical bills on the basis that the bills are not reasonable, related or necessary. However, such as result falls squarely within the scope of the No-Fault Act. In fact, insureds also have obligations that must be met in order for an insured to collect insurance benefits. If these obligations are not met their claims are summarily dismissed. Goldman v. State Farm Fire General Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995)(insured's refusal to comply with demand for examination under oath is willful and material breach of insurance contract which precludes insured from recovery under policy); DeFerrari v. Government Employees Ins. Co., 613 So. 2d 101 (Fla. 3d 1993)(insured's refusal to attend requested examination by

orthopedic surgeon was not reasonable, and thus insurer was entitled to deny coverage based on failure to attend requested examination).

10. GEICO is incorrect when it contends that Perez creates an irrebuttable presumption.[14]

The thirty-day requirement of Florida Statute Section 627.736(4)(b) does not create an irrebuttable presumption because the insurer can contest a medical bill on the basis that said bill is not reasonable, related or necessary as a result of an automobile accident. The only thing the insurer must do in order to contest is to obtain "reasonable proof" within thirty days and this thirty-day time frame is not triggered until the insured submits "reasonable proof" of losses and expenses. Therefore, there is no violation of due process.

As stated above, insureds forgo the ability to claim insurance benefits, if they fail to meet the condition precedent of an insurance policy, for example failure to attend an examination under oath or failure to attend an independent medical examination may result in a denial of coverage. Goldman v. State Farm Fire General Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995); DeFerrari v. Government Employees Ins. Co., 613 So. 2d 101 (Fla. 3d 1993). Accordingly, insurers should be held to the same standard of meeting the mandates of the Florida

[14] This section is in response to the amicus brief submitted by GEICO Cas. Co. (GEICO).

Statute Section 627.736, which are incorporated into the insurance policy.

CONCLUSION

Based on the foregoing facts and authorities, Rodriguez respectfully submits that this Court should affirm the Third District decision in the instant matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mail on July 7, 2000 to: James K. Clark, Esquire, Clark, Robb, Mason & Coulombe, Suite 720, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; Steven Stark, Esquire, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., NationsBank Tower, 17th Floor, 100 Southeast Second Street, Miami, Florida 33131; Peter J. Valeta, Esquire, Ross & Hardies, 150 North Michigan Avenue, Suite 2500, Chicago, Illionois 60601; David B. Shelton, Esquire, Rumberger, Kirk & Caldwell, P.O. Box. 1873, Orlando, Florida 32802; Howard W. Weber, Esquire, Two Urban Centre, Suite 240, 4890 West Kennedy Blvd., Tampa, Florida 33609; Robert A. Robbins, Esquire, Suite 400, 9200 South Dadeland Blvd., Miami, Florida 33156.

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