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IN THE SUPREME COURT OF FLORIDA

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

UNITED AUTOMOBILE INSURANCE COMPANY,

Defendant/Petitioner,

v.

MARISOL RODRIGUEZ,

Plaintiff/Respondent.

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

RESPONDENT'S BRIEF ON JURISDICTION

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned certifies that this brief was printed in proportionately spaced 14 point Times New Roman type.

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INTRODUCTION

Throughout this Brief, the Respondent, Marisol Rodriguez, will be referred to as "Rodriguez." Her PIP carrier, the Petitioner, United Automobile Insurance Company, will be referred to as "United Automobile."

STATEMENT OF THE CASE AND FACTS

Rodriguez accepts the statement of the case and facts in the United Automobile's Brief on Jurisdiction.

SUMMARY OF ARGUMENT

This Court should not accept jurisdiction of the instant action since there is no direct and express conflict between the decision of the Third District and other District Courts. The Third District held that pursuant to Fla. Stat. ***5627.736*** that where the only defense by an insurer is that the medical treatment was not reasonable, related and necessary, the insurer must obtain the report required under Fla. Stat. §627.736(7) constituting "reasonable proof' within 30 days of receiving written notice of **a** covered loss and of the amount of same before it can defend on the basis that the medical bills are not reasonable, related and necessary. The Fifth and Fourth District have not addressed the issue decided by the Third in the case *sub judice* and as such, have not held otherwise. The cases cited by United Automobile are factually and legally distinguishable. The first case dealt with

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whether an insurer is required to attend an IME. The second case dealt with the time frame in which an insurer can demand arbitration of a PIP claim. The third case dealt with who had the burden of proof once the insurer had complied with the $627.736 by obtaining a report based on an IME constituting "reasonable proof' that the medical treatment was not reasonable, related and necessary. There is simply no express and direct conflict between the Third District and other Districts.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE JURISDICTION BECAUSE THE DISTRICT COURT'S OPINION DOES NOT CONFLICT WITH *JONES, EVERGLADES* OR *DERIUS*.

Rodriguez respectfully submits that this Court should not accept jurisdiction to review the Third District's decision since there is not an express and direct conflict with decisions of other districts courts of appeal. *See* Art. V, §3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). To constitute such a conflict, the opinion must (1) announce a rule of law that conflicts with other appellate expressions of law, or (2) apply a rule of law to produce a different result in a case involving substantially the same controlling facts as a prior case. *City of Jacksonville v. Florida First Nat'l Bank of Jacksonville*, 339 So. 2d 632, 633 (Fla. 1976). The conflict must appear "within the four corners of the decision." *Reaves*

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v. State, 485 So. 2d 829, 830 (Fla. 1986). Under Rule 9.030(a)(2)(A)(iv), this Court's jurisdiction to review a case involving express and direct conflict is discretionary. Therefore, this Court must decide not only whether jurisdiction exists, but also whether to exercise it.

Contrary to United Automobile's claim the decision under review is not in conflict with *Jones v. State Farm Mut. Auto. Ins. Co.*, 694 So. 2d 394 (Fla. 5th DCA 1997), *Fortune Ins. Co. v. Everglades Diagnostic, Inc.*, **721** So. 2d **384** (Fla. 4th **DCA** 1998), and ***Derius*** *v. Allstate Indemnity Co.*, 723 So. 2d 271 (Fla. 4th DCA 1998). None of the cases cited by United Automobile addresses the issue that was on appeal in the ***sub*** *judice* case; therefore, there is no express and direct conflict with he decisions of the Third District **and** other District Courts.

The first case cited by United Automobile, *Jones* v. *State Farm Mut. Auto. Ins. Co.*, 694 So. 2d 394 (Fla. 5th **DCA** 1997), is factually and legally distinguishable from the case at bar. In *Jones,* the trial court granted the defendant's motion for final summary judgment because the plaintiff had failed to attend an independent medical examination ("IME"). The District Court reversed the trial court since there were issues of fact as to whether Jones' refusal to attend the IME was unreasonable, The Fifth District did not have before it the issue of whether State Farm had to have "reasonable proof' within 30 days of receiving

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notice of a covered loss and amount of same before it could defend on the basis that the medical bills were not reasonable, not related and/or not necessary. The Third District properly found that any discussion by the Fifth District as to consequences of not having "reasonable proof' within 30 days of receiving written notice of the fact of covered loss and amount of same was dicta. *Perez v. State Farm Fire and Cas. Co.*, 1999 WL 816552 (Fla. 3d DCA 1999). Accordingly, there is no express and direct conflict with the *subjudice* opinion.

The second case cited by United Automobile, ***Fortune** Ins. Co. v. Everglades Diagnostice, Inc.*, 721 **So.** 2d 384 (Fla. 4th **DCA** 1998), is also factually distinguishable and legally to the case at bar. In *Everglades* the insurer received medical claims that it denied within thirty days of their receipt, but demanded arbitration a year later. The court decided that the insurer could compel arbitration after thirty days had passed from the date when it received notice of a claim and the amount of same.' The issue was not whether the insured was required to have "reasonable proof" within 30 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

[1] This Court recently decided that the arbitration provision of §627.736, Fla. Stat., was unconstitutional. *Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc.*, *2000* WL 123791 (Fla. 2000).

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did not require that arbitration be requested within thirty days and therefore, there is no "30-day requirement on the enforcement of the subsection (5) arbitration provision." *Everglades* at 385. The *Everglades* case simply dealt with the time frame in which an insurer could demand arbitration. Therefore, the case at bar and *Everglades* reviewed different sections of 5627.736, Fla. Stat., to wit: *Everglades* looked at the arbitration provision under subsection (5) and the *sub judice* decision looked at the conditions precedent an insurer must meet before it can deny a claim under subsection (4). Accordingly, there is no express and direct conflict between the holdings of these two cases.

Similarly, in the third case cited by United Automobile, *Derius v. Allstate* ***Indemnity*** *Co.*, 723 So. 2d 271 (Fla. 4th **DCA** 1998), there is no express and direct conflict with the *sub judice* opinion. In ***Derius,*** the court considered Fla. Stat. §627.736(7) and how that statute affected the traditional notions of burden of proof. Interestingly, the factual account establishes that Allstate paid for three months worth of treatment starting in March of 1994 and obtained a report on June 7, 1994, which arguably constituted "reasonable proof." *Id*. at ***272.*** Hence, there was no 30-day issue because the defendant paid for all the medical bills prior to the IME and cut-off PIP benefits for any medical bills subsequent to the IME. Since the defendant had the requisite IME to cut-off benefits, the issue was whether it

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was the plaintiff or defendant who had the burden to prove the reasonableness and medical necessity of the medical bills. The Fourth District Court of Appeal held that the plaintiff had the burden. Because ***Derius*** involved different issues then the case *sub judice*, there is no express and direct conflict between the case at bar and *Derius.*

United Automobile has not met its burden of proving that there is an express and direct conflict between the opinion the Third District in the case at bar and the opinions of the Fourth and Fifth District. In fact, United Automobile made this same argument to the Third District, which was rejected by the court.

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CONCLUSION

For the foregoing reasons stated above, this Court should decline to exercise jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by mail to: State Farm's co-counsel, James K. Clark, Esquire, James Clark **and** Associates, One **SE** Third Avenue, Suite 1800, Miami, Florida 33131, **and** Shelley Senecal, Esquire, Hightower & Rudd, **P.A.,** 2300 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132 **and** United Automobile's co-counsel, Steven Stark, Esquire, Fowler, White, Bumett, Hurley, Banick & Strickroot, P.A., NationsBank Tower, 17th Floor, 100 SE Second Street, Miami, Florida 33131, and Norma G. Kassner, Esquire, Dracos & Associates, **P.A.,** 3909 **NE** 163rd Street, Suite 204, North Miami Beach, Florida 33160 on this 15th February 2000.

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