IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC00-111
Lower Tribunal No: 3D99-01348

UNITED AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

MARISOL RODRIGUEZ,

Respondent.

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

PETITIONER'S REPLY BRIEF

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CERTIFICATE OF COMPLIANCE

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

REPLY TO ARGUMENT

Rodriguez argues that the Third District was correct that absent "reasonable proof" obtained within 30 days of receipt of invoices for medical services, an insurer is precluded from contesting the reasonableness or necessity of those medical charges. Rodriguez asserts that such "reasonable proof," a term which is otherwise undefined by the statute, must be a report of a medical expert as set forth in § 627.736(7)(a). This argument is not derived from any analysis of the statutory language. Rather, it is based on a suggestion that such an interpretation is what the legislature meant, even if that is not what it actually said. UAIC submits, however, that this interpretation is contrary to legislative intent and should be overruled in favor of the decisions of the Fourth and Fifth District that more closely follow the legislative language.

Based upon the plain meaning of the legislative language, an insurer is subject to the statutory penalties of interest and, if applicable, attorney's fees in the event that it is does not have reasonable proof, within 30 days after a medical bill is received, that it is not liable for the payment.[1] No other consequences appear to arise from the plain language of the statute. The statute is intended to provide payment of reasonable and

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[1] In addition, if the Department of Insurance determines that the failure to pay on a timely basis is unwarranted and otherwise constitutes a general business practice, it can deem such conduct to be a violation of the Insurance Code. Furthermore, section 626.95451(i) provides for certain unfair claims settlement practices, which include failure to timely investigate or otherwise pay claims. Under § 624.155, these violations might give rise to a civil action, as well, if it constitutes a general business practice.

necessary medical bills related to or otherwise arising from the ownership, maintenance, or use of a motor vehicle, not all medical bills regardless of amount.[2] Benefits are "overdue" if not paid within 30 days, but "any payment shall not be deemed overdue" if the insurer had reasonable proof that it is not responsible for payment. If not deemed overdue, the foregoing potential sanctions do not apply. Such an interpretation of the statute promotes rather than frustrates, the goals of the legislation by imposing interest and other penalties as an incentive to make prompt payments of reasonable and necessary charges.

The phrase "reasonable proof" is undefined and, therefore, is a fact-dependent determination in each particular case. The Legislature did not require that the only proof that would be reasonable is a medical expert report under § 627.736(7)(a), Fla. Stat. (1997), although it certainly could have done so. Rather, the provisions of

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[2] In a lawsuit seeking PIP benefits, numerous courts have held that the plaintiff has the burden to show that the charges are reasonable, necessary, and related to a covered accident. *See, e.g. Derius v. Allstate Indemnity Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA 1998) ("Under this statute, an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary. In a lawsuit seeking benefits under the statute, both reasonableness and necessity are essential elements of a plaintiff's case. There is nothing in the PIP statute suggesting a legislative intent to alter the normal dynamics of a lawsuit by placing the burden on the defendant in a PIP case to prove that a proposed charge was unreasonable or that a given service was not necessary." *Id.* at 272. Whether a charge is reasonable or necessary is a fact question for the jury. *Id.* at 274, *citing Donovan v. State Farm Mut. Auto. Inc. Co.*, 560 So. 2d 330, 331 (Fla. 4th DCA 1990); *Farmer v. Protective Cas. Ins. Co.*, 530 So. 2d 356 (Fla. 2d DCA 1988); *Banyas v. American Mut. Fire Ins. Co.*, 359 So. 2d 506, 507 (Fla. 1st DCA 1978)).

subsection (7)(a) only applies in those circumstances where future medical payments are withdrawn. *See Nationwide Mut. Fire Ins. Co. v. Southeast Diagnostics, Inc.*, 25 Fla. L. Weekly D316 (Fla. 4th DCA, February 2, 2000). In addition to an expert report, an insurer could request an IME, discover additional information, review standardized payment schedules, or obtain peer review to support a conclusion that further medical payments would not be appropriate. If the decision of the Third District is upheld, these other methods to adequately investigate a claim and ensure that only the statutorily required reasonable and necessary charges are paid, would be thwarted . It would also create an undue burden upon both the insureds and the insurers and ultimately could result in an unwarranted increase in the cost of providing PIP insurance benefits, reduce the ability to evaluate fraudulent or overstated claims, and otherwise decrease rather than expand available coverage to Florida's citizens.

The Third District's decision, which was based on its en banc ruling in *Fortune Ins. Co. v. Pacheco*, 695 So. 2d 394 (Fla. 3d DCA 1997), differs from other District Courts, that conclude that the failure to pay within thirty days only subjects an insurer to statutory penalties of interest and attorney's fees but does not strip an insurer of its defenses to the claim. *See Derius v. Allstate Indemnity Co.*, 723 So. 2d 271 (Fla. 4th DCA 1998); *Jones v. State Farm Mutual Automobile Ins. Co.*, 694 So. 2d 394 (Fla. 5th DCA 1997); *Fortune Insurance Co. v. Everglades Diagnostic, Inc.*, 721 So. 2d 384 (Fla. 4th DCA 1998); *AIU Ins. Co. v. Daidone*, 25 Fla. L. Weekly D. 1625 (Fla.

4th DCA July 5, 2000). UAIC submits that the decisions of the Fourth and Fifth District Courts of Appeal more appropriately follow the legislative intent as set forth in the specific statutory language at issue.

Under applicable principles of statutory construction, the legislature is assumed to have expressed its intent through the words found in the statute. *See, e.g.*, *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998) (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931)) ("When construing a statutory provision, legislative intent is the polestar that guides our inquiry and thus 'when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction.'"). Words in statutes must be given their plain and ordinary meaning, unless otherwise specifically defined, or a clear meaning to the contrary otherwise appears. *Green v. State*, 604 So. 2d 471 (Fla. 1992). As stated by the Fourth District in *Nationwide*:

> If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving construction or speculating as to what the legislative intended. *See Zuckerman v. Alter*, 615 So. 2d 661, 663 (Fla. 1993). If the statute is clear and unambiguous, the court is not free to add words to derive a meaning that its plain wording does not supply. *See James Talcott, Inc. v. Bank of Miami*, 143 So. 2d 657, 659 (Fla. 3d DCA 1962). The court is also not free to edit statutes or to add requirements that the legislature did not include. *See Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999).

25 Fla. L. Weekly at D317.

Until the decision below, numerous cases read the statutory language to require that the 30-day period began upon submission of "reasonable proof" by the insured of the claimed expenses, which period could not be tolled by any action of the insurer unless the statute provided such tolling. *See Dunmore v. Interstate Fire Insurance Co.*, 301 So. 2d 502 (Fla. 1st DCA 1974); *Margiotta v. State Farm Mut. Auto. Ins. Co.*, 622 So. 2d 135 (Fla. 4th DCA 1993); *Gov't. Empl. Ins. Co. v. Gonzalez*, 512 So. 2d 269 (Fla. 3d DCA 1987). *Crooks v. State Farm Ins. Co.*, 659 So. 2d 1266 (Fla. 3d DCA 1995); *Martinez v. Fortune Insurance Company*, 684 So. 2d 201 (4th DCA 1996); *Fortune Insurance Company v. Pacheco*, 695 So. 2d 394 (Fla. 3d DCA 1997). These cases decided whether the insurer was subject to the statutory penalties of interest or attorney's fees when it initially failed to pay the claims within the 3-day time frame but then subsequently paid the claims. In later cases that decided whether there were any additional penalties for non-payment, however, the courts refused to further extend the clear legislative language.

In *Jones v. State Farm Mut. Auto. Ins. Co.*, 694 So. 2d 165 (Fla. 5th DCA 1997), the Court concluded that the failure to timely respond to a claim for benefits, although exposing the insurer to the statutory penalties attendant to an overdue claim, did not prevent the insured from requiring an IME or defending the claim and arguing that there was no coverage under the policy.

In *Fortune Insurance Co. v. Everglades Diagnostics, Inc.*, 721 So. 2d 384 (Fla. 4th DCA 1998), the Fourth District Court of Appeal reached a similar conclusion as the Court in *Jones,* when it stated that "the providers have simply read too much into the 30 day overdue provision" and held:

> Section 627.736(4)(b) says that PIP benefits paid under this section" shall be overdue if not paid within 30 days. . . . " 627.736(4)(c) says that "all overdue payments shall bear simple interest at the rate of 10 per cent per year." As we understand these two provisions, they merely make the PIP insurer liable for interest on such claims if payment is not made within 30 days from notice. *See Martinez v. Fortune Ins. Co.*, 684 So. 2d 201 (Fla. 4th DCA 1996) (statute makes claims for PIP benefits overdue when not paid within 30 days from receipt; failure of insured to pay claim within 30 days subjects insurer to interest on claim). *Hence, appropriately read, the function of the statute is to define when interest begins to accrue on unpaid PIP benefits.*

721 So. 2d at 384.[3]

Although the District Court below refused to follow these decisions, that conclusion was itself rejected in the most recent decision from the Fourth District Court of Appeal on the issue in *AIU Ins. Co. v. Daidone*, 25 Fla. L. Weekly D. 1625 (Fla. 4th DCA July 5, 2000). As the Court stated:

> We disagree with Perez and hold that the thirty-day period for payment in the PIP statute applies only to bills for treatment which is reasonable and necessarily incurred as a result of the accident. Inaction by the insurer does not result in the insurer having to pay a bill which it otherwise would not have to pay.

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[3] *Cf. Pioneer Life Insurance Co. v. Heidenfeldt*, 25 Fla. L. Weekly D231 (Fla. 2d DCA January 9, 2000); *AIU Insurance Co. v. Block Marina Investment, Inc.*, 544 So. 2d 998, 999 (Fla. 1989).

Id. at D1625.

In *Daidone*, the county court certified a question of great public importance that is nearly identical to the question decided below. That question was:

> Does a PIP insurance carrier lose its right to contest the necessity of care or the reasonableness of the bill rendered for that care, where the carrier fails to obtain a report stating that such care is unnecessary or the bill was unreasonable within 30 days of the carrier's receipt of the bill in question?

Id.

The Court answered the certified questions in the negative and certified direct conflict with the decision under review. In so doing, the court engaged in an analysis of the various cases that is essentially the same as petitioner's analysis here. As the court stated:

> The *Perez* court relied on *Fortune Insurance Co. v. Pacheco*, 695 So. 2d 394 (Fla. 3d DCA 1997). *Pacheco*, however, was distinguishable because in that case the insurer agreed that the benefits were due. The only issue was when the benefits were due. It also relied on *Dunmore v. Interstate Fire Insurance Co.*, 301 So. 2d 502 (Fla. 1st DCA 1974), but in *Dunmore*, as in *Pacheco*, the no-fault benefits were owed. The issue was whether, where the insurer did not pay the claim within thirty days, it had to pay attorney's fees under section 627.428, Florida Statutes.
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> In *Jones v. State Farm Mutual Automobile Insurance Co.* 694 So. 2d 165 166 (Fla. 5th DCA 1997), the insured sent the insurer a bill for knee surgery. In response, the insurer scheduled the insured for a physical examination about six weeks later. The insured responded with a lawsuit, refused to attend the physical examination, and the trial court granted the insurer's motion for summary judgment. The fifth district reversed the summary judgment in favor of the insurer, finding issues of fact, but made it clear that the insurer did not "lose its right to contest the claim."

> In *Fortune Insurance Co. v. Everglades Diagnostics Inc.* 721 So. 2d 384, 385 (Fla. 4th DCA 1998), this court considered the provisions of section 627.736(4)(b) and (c) in determining whether the thirty-day overdue provision applied to demands for arbitration under section 627.736(5). We construed subsection (4)(b) and (c) as "merely" making the insurer liable for interest if payment is not made within 30 days from the notice. We observed that: "the function of the statute is to define when interest begins to accrue on unpaid PIP benefits." *Id*. at 385.
>
> We conclude that the thirty-day period in section 627.736(4) applies only to benefits which are reasonable and necessary as a result of the accident. Section 627.36(4), Florida Statutes begins with the words "benefits due" and states in subsection (b) that "personal injury protection benefits paid pursuant to this section shall be overdue if not paid within thirty days." If an insured submits a bill for medical treatment which is not related to the accident, there are no "benefits due." If benefits are not due, they cannot be "overdue." As we observed in a PIP case involving a different issue: "an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary." *Derius v. Allstate Indem. Co.*, 723 So. 2d 271 272 (Fla. 4th DCA 1998).
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> *We interpret section 627.736(4) to mean that if PIP benefits are payable, they are due within thirty days after notice. If the insurer has refused to pay the bill within thirty days and does not have reasonable proof to establish that it is not responsible, then the insurer is liable for ten percent interest when the bill is paid. Failing to obtain proof that it is not responsible for payment, however, does not deprive the insurer of its right to contest payment.*
>
> We agree with *Jones* and answer the certified question in the negative.

Id. at 1626.

Despite the efforts of the respondent and *amicus* to somehow distinguish *Daidone*, the issues are the same and the analysis, which is based upon a plain reading of the statute, is correct and should be adopted and approved by this Court.

In her brief, Rodriguez concedes that "coverage defenses" other than reasonableness and necessity remain viable even if the carrier has not obtained the report specified under Section 627.736(7) within thirty days of written notice of the fact of a covered loss and the amount of the same. UAIC accepts Rodriguez's concession, but disputes her conclusion regarding reasonableness and necessity. Receipt of a report would certainly be reasonable proof sufficient to toll the thirty day payment period. Nevertheless, the converse is not also true because there is simply no language in subsection (7) that adopts, engrafts or otherwise references the requirements of subsection (4) with respect to the thirty day time frame. *See, Fortune Ins. Co. v. Everglades Diagnostics, Inc.; Nationwide*; *Daidone*.

In addition, both Rodriguez and the *amicus* assert that the statutory penalties of attorney's fees and interest are no penalties at all, because interest and attorney's fees is available anyway. This argument clearly misconstrues the statute. As both Rodriguez and the *amicus* recognize, the provision that states that overdue payment shall bear interest at the rate of 10% has been in existence since the statute was first enacted and at the time exceeded the statutory interest rate in Florida. The interest provisions in the PIP statute is intended to compensate the insured for payments made after the date payments are deemed statutorily "overdue" and apply a specific statutory penalty that applies regardless of whether suit is brought and judgment is later entered.

In that respect, it follows the statutory goal of providing full recovery of major and salient economic losses to an insured.

As reflected in *Chapman v. Dillon*, 415 So. 2d 12 (Fla. 1982), even when the legislature lowered the PIP benefits and increased the PIP deductible, it did not violate the prompt payment purposes behind the statute. This was further supported by the likely existence of other collateral sources sufficient to pay medical benefits not covered by PIP insurance. *Id*. at 17. As the court noted, its prior decision in *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974), was *not* predicated "upon a motorist being insured for the full amount of his medical expenses . . . Instead, the crux in *Lasky* was that all owners of motor vehicles were required to purchase insurance which would assure injured parties recovery of their major and salient economic losses." *Id*. Although respondent and *amicus* focus on this prompt payment aspect of the *Lasky* decision, they ignore the additional conclusion in *Lasky* that (1) there was only a limited denial of access to courts under the no-fault insurance statutes; (2) that the legislature's classification was reasonable, in part, because it provided for payment of only *reasonable and necessary* medical expenses, 296 So. 2d at 15;[4] and (3) that:

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[4] As the Court stated:

> We also deem worthy of note that § 627.736(1) and (1)(a) specify as to medical expenses that these must be such as are "*reasonable*" and that such expenses shall be "for *necessary* medical, etc." services.

296 So. 2d at 15. (emphasis in original).

> In exchange for his former right to damages for pain and suffering in the limited category of cases where such items are preempted by the Act, *[the insured] receives not only a prompt recovery of his major, salient out-of-pocket losses -- even where he is at fault -- but also an immunity from being held liable for pain and suffering and the other parties to the accident if they should fall within this limited class where such items are not recoverable*.

296 S. 2d at 14.

In a tort action, only reasonable, necessary, and related medical expenses are recoverable. Nothing in the legislation suggests that a different standard applies to insurers. In addition, the suggestion that countervailing principles of statutory construction related to the constitutionality of a particular statute override those principles of statutory construction petitioner's previously set forth are simply unavailing. An interpretation that requires the payment of all medical benefits regardless of whether or not they are reasonable and necessary and prevents an insurer from otherwise defending on that basis is itself contrary to the legislative intent that this Court has already held to be constitutional.

Furthermore, Rodriguez's convoluted argument that under certain circumstances a jury will determine whether an insurer had "reasonable proof" within thirty days, ignores the holding of the district court that if an insurer does not have a report complying with Section 627.736(7) within the thirty-day period, no jury question would ever arise. Although the Third District previously held in *Viles*, relying on *Derius*, that an insurer may not withdraw payments and then defend at trial without such a report,

Rodriguez concedes that those cases neither held that such a report is required to be obtained within thirty days, nor equated that report with the "reasonable proof" requirement of subparagraph (4). Because the legislature did not define the phrase "reasonable proof" in subsection (4) to mean only the expert report identified in subsection (7) when it added that subsection many years later, any "proof" that is "reasonable" is sufficient to avoid the statutory penalties for an overdue claim. Even if the payment is deemed overdue and statutory penalties apply, the insurer can still defend on the basis that the charges are not reasonable and necessary, and, therefore, not recoverable. Any issue regarding that conclusion should be determined at trial in accordance with the standard burdens of proof. Despite Rodriguez's contrary suggestions, there is no dispute that UAIC had several expert reports stating that the charges were not reasonable and necessary, but was precluded from defending on that basis, as a matter of law. Because that legal ruling was wrong, the factual dispute that Rodriguez concedes should result in a jury trial on the issues, should also have prevented entry of summary judgment in her favor.

Additional *amicus curiae* in support of Rodriguez[5] also assert that a New York statute and a New York case contained within the Appendix to its Brief, applies to the instant action. Nevertheless, neither the New York statute at issue, which was

[5] This court has not granted this second *amicus*' motion to appear and UAIC joins in State Farm's objections to that appearance. Nevertheless, it responds briefly here in the event the court accepts the brief.

interpreted in several inapplicable regulations, nor the cited decision itself, are dispositive. That case dealt with the application of a statutory exclusion related to intoxication and a “complex sequence and interplay” of statutory and regulatory requirements with respect to the manner in which that exclusion could be investigated and proven. Furthermore, the court noted that the statute and the regulation provide for interest only with regard to "overdue payments" and allow for attorney's fees only when a "valid claim" was denied or overdue. Accordingly, the court recognized that untimely denials might suffer no sanctions in situations where the insurer is not required to pay the claim or where the claim is ultimately deemed invalid. The court concluded that the statutory and regulatory remedies were not exclusive and it could adopt an additional common law preclusionary rule to provide further incentive for insurers to promptly pay valid claims. Nevertheless, it noted that the statute was a “Rube-Goldberg-like maze,” which it "earnestly" invited the legislature to study and remedy if "more harmony and clarity are to be achieved." 683 N.E. 2d at 7.

In Florida, PIP insurers are only obligated to pay a valid claim for reasonable and necessary expenses related to or arising out of covered automobile accidents. If those claims are not paid timely, the legislature has already determined the appropriate penalty. The ruling of the district court below does not correctly promote the underlying goals of the legislative. In fact, it provides incentives to submit stale, inflated, or even fraudulent claims in the hope that the insurer will not obtain an

appropriate expert review within thirty days. As a result it serves to increase, not reduce, litigation.

Finally, the respondent and *amicus* wrongly suggest that the statutory changes promulgated in 1998, which do not apply to accidents or claims prior to October 1, 1998, support their position. The changes to section 627.736(5)(b), Fla. Stat. (Supp. 1998), which Rodriguez concurs was added in 1998 to respond to the decision in *Pacheco,* strengthens the conclusion that only reasonable and necessary charges that are submitted on a timely basis pursuant to established guidelines should be paid. If the charges do not comply, the insurer should not have to pay them and the insured should not even be billed for them. If the district court's ruling is upheld and an insurer cannot contest the claim absent a report obtained within thirty days of notice, then these newly enacted provisions, which are intended to provide a further ability for insurers to adequately investigate claims and assure that only valid claims are being paid, would be thwarted.

CONCLUSION

WHEREFORE, the petitioner, United Automobile Insurance Company, respectfully requests that this Court quash the decision of the district court below, approve the decisions of the Fourth and Fifth Districts on the issue, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was faxed and mailed this 1st day of August, 2000 to: **John H. Ruiz, Esq.**, 198 N.W. 37th Avenue, Miami, FL 33125; **Amado Alan Alvarez, Esq.**, 198 N.W. 37th Avenue, Miami, FL 33125; **James Clark, Esq.,** Clark, Robb, Mason & Coulombe, 19 West Flagler Street, Suite 720, Biscayne Building, Miami, FL 33130; **Arthur Joel Berger, Esq.,** 11621 S.W. 105th Terrace, Miami, Florida 33176; **Robert A. Robbins, Esq.**, Robbins & Reynolds, P.A., 9200 South Dadeland Blvd., Suite 400, Miami, Florida 33156; **Peter J. Valeta, Esq.**, Ross & Hardies, 150 North Michigan Avenue, Suite 2500, Chicago, Illinois 60601; **David B. Shelton, Esq.**, Rumberger, Kirk & Caldwell, P.O. Box 1873, Orlando, Florida 32802; **Howard W. Weber, Esq.**, Two Urban Centre, Suite 240, 4890 West Kennedy Blvd., Tampa, FL 33609; and **Philip Burlington, Esq.,** Caruso, Burlington, Bohn & Compiani, P.A., Suite 3A/Barristers Bldg., 1615 Forum Place, West Palm Beach, Fl 33401.

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