IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,
ALLSTATE INDEMNITY COMPANY,
Petitioners,

CASE NO. SC05-435

v.

CONSOLIDATED

Respondent.
_______________________________________/

HOLY CROSS HOSPITAL, INC.
Cross-Petitioner,

CASE NO. SC05-545

v.

ALLSTATE INSURANCE COMPANY,
ALLSTATE INDEMNITY COMPANY
Cross-Respondents.
_______________________________________/

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

INITIAL BRIEF OF PETITIONERS/CROSS-RESPONDENTS ALLSTATE INSURANCE COMPANY & ALLSTATE INDEMNITY COMPANY

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STATEMENT OF THE CASE AND FACTS

A. NATURE OF THE CASE.

This case arises out of an attempt by a medical provider, Holy Cross Hospital, Inc. ("Holy Cross"), to interpret a statute enacted to benefit insureds in order to nullify a payment schedule for medical benefits to which it contractually agreed. Holy Cross contracted with a network of medical providers named Beech Street Corporation ("Beech Street"). Holy Cross – by contract – agreed and promised to provide medical services at agreed-to, reduced rates as full payment for the services it rendered to patients whose insurance coverage was provided by an insurer that contracted with Beech Street.

Beech Street, in turn, contracted with Petitioners Allstate Insurance Company and Allstate Indemnity Company ("Allstate"), which provide automobile insurance in Florida including personal injury protection ("PIP") coverage. Through its contract with Beech Street, Allstate offered its insureds the option to access the reduced rates of Holy Cross and other medical providers under the contracts with Beech Street. Allstate's PIP coverage did not, however, require any insured to seek medical care from any particular provider. When Allstate insureds were injured and received treatment from Holy Cross, Allstate paid the rates Holy Cross had agreed to in its contract with Beech Street.

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Holy Cross, suing under a purported assignment from the insured patients, now asserts that it is entitled to more money than it agreed to charge in its Beech Street contract. Holy Cross argues that Fla. Stat. § 627.736(10), part of the Florida Insurance Code that regulates PIP insurance, invalidates Allstate's contract with Beach Street. Its argument, however, cannot be squared with the plain text, legislative history, administrative agency interpretation, and underlying purpose of Section 627.736(10). The statute's requirements do not apply to Allstate's program, as both the Second and Fourth District Courts of Appeal have held and confirmed.

Allstate's network program with Beech Street gives insureds complete freedom to choose any provider while offering an alternative option that lessens the financial burden caused by automobile accidents. Far from violating Section 627.736(10), the program furthers the purpose of the Florida Insurance Code. Holy Cross should not be permitted to use this statute, which the legislature did not enact for the benefit of medical providers, to avoid and nullify its own contractual commitments and impose greater costs on Florida's insureds.

B. STATUTORY PROVISION AT ISSUE.

Section 627.736(10) of the Florida Insurance Code ("Subsection 10") is the statutory provision at issue. It provides as follows:

> An insurer may negotiate and enter into contracts with licensed health care providers for the benefits described in this section, referred to in

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> this section as "preferred providers," which shall include health care providers licensed under chapters 458, 459, 460, 461, and 463. The insurer may provide an option to an insured to use a preferred provider at the time of purchase of the policy for personal injury protection benefits, if the requirements of this subsection are met. If the insured elects to use a provider who is not a preferred provider, whether the insured purchased a preferred provider policy or a nonpreferred provider policy, the medical benefits provided by the insurer shall be as required by this section. If the insured elects to use a provider who is a preferred provider, the insurer may pay medical benefits in excess of the benefits required by this section and may waive or lower the amount of any deductible that applies to such medical benefits. If the insurer offers a preferred provider policy to a policyholder or applicant, it must also offer a nonpreferred provider policy. The insurer shall provide each policyholder with a current roster of preferred providers in the county in which the insured resides at the time of purchase of such policy, and shall make such list available for public inspection during regular business hours at the principal office of the insurer within the state.

§ 627.736(10), Fla. Stat.

C. FACTUAL SUMMARY.

Holy Cross entered into a contract with Beech Street Corporation on December 1, 1995. (R1:129, 131-41) In that contract, Holy Cross promised and agreed to provide medical services to covered insureds for injuries from automobile accidents in exchange for agreed-upon amounts set forth in a fee schedule. (*Id.*) Holy Cross contracted to receive these amounts as payment in full for its services. Under its contract with Beech Street, Holy Cross also agreed not to "balance bill" any covered insureds. Specifically, it agreed not to bill an insured

for the difference between the provider's billed rate and the agreed-upon reduced rate. (*Id.*)

Beech Street, in turn, entered into contracts with insurers such as Allstate to create a network of contracts between providers of medical services and insurers to pay agreed-upon rates for the health care provided to covered insureds. (R1:128) Under the network contracts with Beech Street, insurers like Allstate agreed to make a pool of covered insureds available to the network, and thus to providers like Holy Cross. (R1:128) In return, Allstate's insureds received the benefit of the reduced rates providers like Holy Cross agreed to charge under their contracts with Beech Street. (R1:128, 130) The network of contracts benefited insureds by providing greater access to providers at a lower, agreed-upon cost. (R1:130)

In March 2000, Allstate contracted with Beech Street and ADP Integrated Medical Solutions ("ADP"), a firm that marketed Beech Street's network of providers. The Allstate-Beech Street contract allowed Allstate insureds to take advantage of these negotiated rates from providers. (R1:128) This program did not change the standard PIP insurance policy Allstate issued to its insureds. Rather, it was completely voluntary. Insureds always retained the option of using any provider they desired or using a network provider (and thereby paying lower prices for medical services). (*Id.*) The arrangement neither limited insureds' choice of providers (as they did not have to use a provider from the Beech Street

network), nor offered any "preferred provider" option in the Allstate insurance policy. (*Id.*)

The network program was straightforward. Under its contract with Beech Street and ADP, Allstate provided an insured who made a claim with an "800" number operated by Beech Street. (R1:129) An insured could call this number and receive information about providers in her area who had agreed to the reduced rates. (*Id.*) Allstate later included an insert in its mailing list for new policies and renewals explaining the Beech Street program. This information armed Allstate's insureds with the information they needed to alert them to the providers in the Beech Street network. (*Id.*)

Under the network program, Allstate's insureds paid less for their claims and received more insurance coverage. (R1:139-141) The Florida Insurance Code requires PIP insurers to pay 80 percent of an insured's reasonable expenses for necessary medical care, with the insured responsible for the remaining 20 percent. Fla. Stat. 627.736(1)(a). PIP policies also cap coverage at a certain amount, usually $10,000. Because Allstate obtained a lower fee option for its insureds' medical services, the insureds had the option to pay 20 percent of a *reduced* rate, rather than a higher rate charged by the provider. (R1:128-29; R2:391-92) Similarly, because Allstate would pay 80 percent of a lower amount, the insured would have more coverage under the insurance policy for future claims. Thus, the

agreements between Allstate and ADP or Beech Street, on the one hand, and providers like Holy Cross and Beech Street on the other, gave the insureds *more* coverage for *less* cost.

Matthew Winik and Lawrence Weisner were Allstate insureds who benefited from the network program. (R1:2, R2:263) Both were injured in automobile accidents in the Spring of 2001 – Weisner on April 12, 2001, and Winik on May 10, 2001. (R1:2, R2:262) Allstate insured both Weisner and Winik at the time under separate Allstate policies that included PIP coverage. (R1:2, R2:263) Weisner and Winik sought and received treatment from providers at Holy Cross on the same days as their injuries. (R1:9, R2:270) Well before their treatment, Holy Cross contracted with Beech Street to accept reduced rates for its services, and Allstate contracted with Beech Street and ADP to access those rates for its insureds. (R1:129, 131-41)

Allstate received PIP claims from Weisner and Winik, and forwarded those claims to ADP for processing under Beech Street's contract with Holy Cross. (R1:46-47, 71-72, R2:309-10, 334-35) The network program's application to these two insureds illustrates how the program benefits insureds generally. For example, the services Holy Cross performed for Weisner normally would have cost $1,569.03. (R2:310) Holy Cross's contract with Beech Street, however, provided for a fee of $1,077.02 for these services, a savings of almost $500. (R4:439)

Because of this network program, Mr. Weisner personally saved almost $100 out of his own pocket (20 percent of the savings), and had almost $400 more of added coverage under his policy (80 percent of the savings).

Allstate paid both claims according to the terms set forth in the Beech Street-Holy Cross agreement.[1] Along with its payments, Allstate also sent an Explanation of Medical Bill Payment ("EOB") form to both insureds and to Holy Cross, which detailed the fees and explained: "Payments are based on this provider's Beech Street Contract. Patient's responsibility is limited to the difference between the amount paid and the Beech Street contracted fee shown in the billed amount column." (R1:164; R4:439) ((capitalization removed)) After receiving each of the EOBs, Holy Cross accepted and deposited the Allstate checks without protest or complaint. (R1:95-96, R2: 358-59) In fact, prior to filing this lawsuit, there is no evidence that Holy Cross ever questioned, protested or disputed the amounts it agreed and promised to charge under its agreement with Beech Street and which Allstate paid in full. Nor is there any evidence that Holy Cross ever balanced billed either Weisner or Winik for any additional amounts.

[1] As payment for the services to Lawrence Weisner, Allstate sent a check to Holy Cross in the amount of $861.62. Similarly, Allstate paid Holy Cross $186.30 for services rendered to Allstate insured Matthew Winik. (R. 1:164, R4:439)

D. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Holy Cross filed its complaints in the county court in April 2002. (R1:1, R3:262) Holy Cross and Allstate cross-moved for summary judgment. (R1:45, 68; R3:308, 331) On October 21, 2003, the county court granted Holy Cross's motions for summary judgment and entered final judgment in Holy Cross's favor. (R2:251-2, R5:653-4). The county court relieved Holy Cross of its contractual obligations to charge the reduced, specified amounts by holding "that the provisions of Section 627.736(10), Florida Statutes, provide the exclusive means by which an insurance company can contract to pay Preferred Provider rates (PPO rates) on Florida personal injury protection (PIP) coverage." (R2:251, R5:653)

In its orders, the county court also certified the following dispositive legal question as one of great public importance:

> IS AN INSURER REQUIRED TO COMPLY WITH THE PROVISIONS OF SECTION 627.736(10), FLORIDA STATUTES IN ORDER TO TAKE PREFERRED PROVIDER REDUCTIONS IN THE PAYMENT OF PIP BENEFITS FOR MEDICAL SERVICES RENDERED TO ITS INSUREDS?

(R2:252; R5:654) Allstate timely appealed to the Fourth District Court of Appeal and the parties briefed and argued the issue before that court. (R2:255; R5:657) The Fourth District issued its opinion on March 2, 2005, answering the certified question in the negative, reversing the summary judgments in favor of Holy Cross, and certifying a conflict with an opinion in the Fifth District Court of Appeal,

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Nationwide Mut. Fire Ins. Co. v. Central Florida Physiatrists, P.A., 851 So.2d 762 (Fla. 5th DCA 2003) ("*CFP*"). *Allstate Ins. Co. v. Holy Cross Hospital, Inc.*, 895 So.2d 1241 (Fla. 4th DCA 2005). On March 11, 2005, Allstate filed its Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court, and Holy Cross filed its own Notice to Invoke Discretionary Jurisdiction two weeks later. On November 9, 2005, this Court issued an order postponing a decision on jurisdiction and ordering briefing to proceed on the merits.

SUMMARY OF ARGUMENT

This case is an attempt by a hospital to use a PIP statute enacted to benefit insureds, not medical providers, to renege on the payment rates to which the hospital contractually agreed. Various health care providers like Holy Cross voluntarily entered into agreements with provider network groups. Under those contracts, the providers voluntarily promised to accept payment at agreed-upon rates for services rendered to patients covered by an insurer that also contracted with those network groups. The network programs benefited insureds who paid less for the treatment they received, and thus had more coverage available to them in the future.

In this case, Holy Cross, suing under purported assignments from Allstate insureds Wiesner and Winik, seeks to recover amounts above and beyond those to which it contractually agreed to charge under its network contract with Beech

Street. This, it cannot do. This Court should reject Holy Cross's claims and affirm the holding of the Fourth District, which followed an earlier holding by the Second District, as a matter of law for several independent reasons.

First, the plain text, legislative history, and underlying purpose of Subsection 10 make clear that the statute's requirements do not apply to Allstate's program. That conclusion has been confirmed by the Florida Office of Insurance Regulation ("OIR," previously the Department of Insurance), the administrative agency charged with enforcing the statute.

Second, Holy Cross lacks standing. The Florida legislature enacted Subsection 10 to protect insureds, and the statute's plain language grants no rights to medical providers. In addition, Subsection 10 does not provide or allow for any private right of action or enforcement.

Third, Holy Cross has no valid claim or damages. While Holy Cross has sued under a purported assignment from Allstate's insureds, those insureds have received precisely what their policies require and thus have suffered no damages. Moreover, because Holy Cross contractually agreed to accept the negotiated rates under the Beech Street contract, those payments are reasonable under the Insurance Code as a matter of law.

Fourth, Holy Cross cannot avoid Subsection 10's authorization of the network programs by relying on Subsections 1 and 5 of the PIP statute. Fla. Stat.

627.736(1), (5). Subsection 1 and 5 require an insurer to pay eighty percent of "reasonable expenses" for medical services. Fla. Stat. 627.736(1)(a), 5(a). Paying eighty percent of the amount a medical provider contractually agreed to accept is, by definition, paying "reasonable expenses" for medical care.

In sum, Allstate's contract with Beech Street gives Allstate's insureds complete freedom to choose any provider they desire, but also the option to pay less for health care from providers that contracted with Beech Street. The program fulfills the purpose and legislative intent behind Subsection 10; nothing about it violates that provision or any other part of the Insurance Code. Holy Cross should not be allowed to use this section of the Insurance Code, which the legislature did not enact for its benefit, to renege upon and avoid its own contractual promises and agreements to the detriment of Florida's insureds. The Fourth District below properly upheld the network contracts at issue, and this Court should affirm its decision now on appeal.

STANDARD OF REVIEW

This Court applies a *de novo* standard in reviewing the Fourth District's opinion interpreting Subsection 10 and the Florida PIP statute. *B.Y. v. Department of Children & Families*, 887 So.2d 1253, 1255 (Fla. 2004) ("The standard of appellate review on issues involving the interpretation of statutes is de novo.").

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ARGUMENT

I. THIS COURT SHOULD FOLLOW AND AFFIRM THE FOURTH AND SECOND DISTRICTS' OPINIONS AND REJECT THE POORLY-REASONED DECISION FROM THE FIFTH DISTRICT.

Three district courts of appeal – the Second, Fourth, and Fifth Districts – have ruled on the issue now before the Court. The Second District, in *Nationwide Mut. Ins. Co. v. Jewell*, 862 So.2d 79 (Fla. 2d DCA 2003) ("*Jewell")*, issued a comprehensive, well-reasoned holding that (1) insurers could pay PIP benefits at reduced rates under the network contract program, and (2) the rate that a health-care provider contracted to accept is a "reasonable" amount under the PIP statute. The Second District rejected an earlier decision on the same issue from the Fifth District in *CFP*. 851 So. 2d 762 (Fla. 5th DCA 2003). The persuasive holdings of the Second District led the Fourth District, in the decision under review, to "find the *Jewell* decision to be the more persuasive and align ourselves with the Second District on the issue." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 895 So.2d 1241, 1244 (Fla. 4th DCA 2005) ("*Holy Cross*"). The reasoning of *Jewell* is compelling, and this Court should use it to affirm the Fourth District's decision now on appeal.

The *Jewell* decision analyzes and correctly interprets the PIP statute. The *Jewell* court held (i) that neither the plain language of Subsection 10 nor any other provision prohibited the type of network provider programs at issue here, and (ii) that the programs were consistent with the public policy of the PIP statute. The

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Second District disagreed with the Fifth District's decision in *CFP*, which held that "Section 627.736(10) provides the sole language relating to the availability of PPO benefits in PIP cases," that the language was "precise and limited in scope," and that the statute "provides no specific authority for insurance companies to contract with PPO networks." *Id.* at 765.

The reasoning offered by the *CFP* court was extremely brief, and failed to address several important points. The Fifth District did not suggest that any section of the PIP statute expressly prohibited the network provider program. Nor did the Fifth District (i) consider the prior interpretation of Subsection 10 by the OIR, (ii) analyze the subsection's legislative history, which is developed in *Jewell*, or (iii) attempt to square its holding with the PIP statute's policy of increasing coverage for PIP insureds.

The Second District, in contrast, concluded that Subsection 10 does two things. First, Subsection 10 allows insurers to contract with preferred providers using both direct and indirect (such as through networks like Beech Street) contractual arrangements. *Jewell*, 862 So.2d at 83-84. Second, Subsection 10 authorizes insurers to issue preferred provider policies, subject to the statute's requirements. The Second District correctly recognized that an insurer may contract with providers without having to issue preferred provider policies: "Nothing in the text of subsection (10) – or any other provision of the no-fault

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statute – says that an insurer may contract with preferred providers only if the insurer issues preferred provider policies." *Id.* at 85. And so long as the insurer does not issue preferred provider policies, the mandatory requirements of Subsection 10 do not apply. *Id.* Thus, nothing in the statute prohibits the network provider arrangements used by insurers such as Allstate or Nationwide. As the Second District aptly noted, "If the legislature wishes to prohibit something, it is perfectly capable of saying so. Indeed, few words are more common in the language of legislation than the phrases 'may not' and 'shall not.'" *Id.*

After analyzing the language of Subsection 10, the Second District addressed a secondary argument of the *Jewell* plaintiffs – that the reduced rates payments the providers had agreed to were not "reasonable expenses" or a "reasonable amount" under Fla. Stat., 627.736(1)(a), (5)(a). The Second District flatly rejected this argument, explaining that "[i]f a provider has agreed in a valid and enforceable contract to accept payment for services at a particular rate, that rate would necessarily be a 'reasonable amount for the services … rendered' § 627.736(5)(a)." Finally, the court noted that its holding furthered the purposes of the PIP statute by providing lower co-payments to insureds and making more coverage available. *Id.* at 86.

In the decision under review by this Court, the Fourth District surveyed the facts of this case as well as the *CFP* and *Jewell* decisions. The Fourth District

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found "the *Jewell* decision to be the more persuasive and align ourselves with the Second District on the issue." *Holy Cross*, 895 So.2d at 1244. The Fourth District then certified a conflict with the Fifth District and remanded the case for further proceedings. *Id.* at 1245.

In deciding this appeal, the Court should affirm the Fourth District's opinion and adopt the reasoning of the *Jewell* and *Holy Cross* opinions. As the Second District correctly recognized, the first sentence of Subsection 10 permits insurers to enter into the network provider arrangements by which insurers contract indirectly with providers for reduced rates. So long as an insurer does not offer a preferred provider policy, nothing in the plain language of the PIP statute prohibits or imposes any requirements on insurers that enter into network provider arrangements like the one used by Allstate. As explained in greater detail below, the *Jewell* and *Holy Cross* holdings comport with the statute's plain language and are also supported by the OIR, the legislative history, and the policies underlying the PIP statute. For these reasons, this Court should hold that Allstate's network provider program does not violate the PIP statute.

II. SUBSECTION 10 DOES NOT RESTRICT OR LIMIT ALLSTATE'S NETWORK CONTRACTS.

Subsection 10 does not regulate or prohibit the network program challenged by this lawsuit. First, the plain text of Subsection 10 makes clear that its requirements do not apply to network contracts like the ones at issue here. Second,

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Subsection 10 explicitly permits Allstate to contract with Beech Street to take advantage of the reduced rates agreed to by providers like Holy Cross who participate in the Beech Street network program. Third, the legislative history of Subsection 10 confirms the legality of Allstate's network contracts and the Beech Street program. Fourth, the Office of Insurance Regulation, the agency charged with interpreting and enforcing the Insurance Code, previously evaluated the type of network arrangement at issue and concluded that Subsection 10's requirements do not apply to, or proscribe, that arrangement. Finally, striking down the network arrangement would frustrate the statute's underlying policy, which is to benefit insureds through greater choice of providers at lower costs.

A. By Its Plain Terms, Subsection 10's Requirements Do Not Apply To Allstate's Contracts With The Networks.

Courts must interpret and apply statutes according to their plain meaning. *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, 5 (Fla. 2004); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 454-55 (Fla. 1992); *Carson v. Miller*, 370 So. 2d 10 (Fla. 1979). If the language of a statute is clear and unambiguous, it should be applied as written without judicial construction. *Knowles*, 898 So.2d at 5; *Citizens of the State of Florida v. Public Service Commission*, 435 So.2d 784, 786 (Fla. 1983). Furthermore, this Court repeatedly has explained that a court can neither rewrite nor add terms to a statute. *Knowles*, 898 So.2d at 7; *Donato v. AT&T*, 767 So.2d 1146, 1150-51 (Fla. 2000); *Leisure*

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Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

Holy Cross's statutory construction violates this well-established rule by implicitly rewriting the statute to add a statutory prohibition against Allstate's contractual arrangements. Holy Cross asks this Court to interpret Subsection 10 as mandating compliance with all of Subsection 10's requirements whenever an insurer agrees to pay providers at contractually-agreed reduced rates. But the language of the statute unambiguously provides that "[a]n insurer *may* provide an option to an insured to use a preferred provider at the time of purchase of the policy for personal injury protection benefits, *if* the requirements of this subsection are met." § 627.736(10), Fla. Stat. (emphasis added). Thus, under the text of the statute, an insurer need not offer a preferred provider option every time a policy is purchased. *Jewell*, 862 So. 2d at 85 ("Nothing in the text of subsection (10) – or any other provision of the no-fault statute – says that an insurer may contract with preferred providers only if the insurer issues preferred provider policies."). Rather, an insurer must meet the "requirements of this subsection" only "if" an insurer offers preferred provider policies.

On the other hand, if an insurer does not offer a preferred provider policy (and there is no dispute that Allstate does not), then it does not have to comply with Subsection 10's requirements. *Id.* ("The mandatory provisions of subsection

(10) come into play only when an insurer issues a preferred provider PIP policy."). Stated differently, nothing in this statute regulates insurers that do not offer a preferred provider policy or prohibits such insurers from contracting with provider networks. *Id.* ("Absent some clear warrant for doing so in the statutory context, such permissive provisions should not be read to impose an implied prohibition.").

If the Florida legislature had intended for Subsection 10 to have the effect urged by Holy Cross, it could easily have written the statute to convey that meaning. For example, the legislature could have written Subsection 10 to say simply: "An insurer must comply with the requirements of this subsection before negotiating and entering into contracts with licensed health care providers." That the legislature did not use such language shows that it had a different purpose in mind. As the Second and Fourth Districts held, that purpose was to allow insurers to directly or indirectly contract with providers, and only direct insurers to comply with Subsection 10's requirements if they choose to offer preferred provider policies.

Here, Allstate did not give an option to use a preferred provider at the time the insured purchased her policy, but only the option to use a reduced-rate provider at the time the insured presented a claim. (R3:395-6; R1:132-3) Because Allstate did not offer a preferred provider policy when it contracted with networks, the requirements of Subsection 10 do not apply.

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B. Both Statutory And Common Law Permit Allstate To Enter Into Network Contracts.

1. Subsection 10, As Well As General Freedom-of-Contract Principles, Authorize Allstate's Contracts With Beech Street.

The first sentence of Subsection 10 explicitly permits an insurer to "negotiate and enter into contracts with licensed health care providers for the benefits described in this section," such as the network provider arrangements used by Allstate here. *Jewell*, 862 So.2d at 84 ("subsection (10) . . . authorizes PIP insurers to enter contractual arrangements for the provision of preferred provider medical services.") As the Second and Fourth districts held, consistent with the OIR's interpretation, this sentence authorizes both direct and indirect contracts, such as contracts with a provider network. *Id.*; *see infra* at Section II.D (explaining OIR's construction of Subsection 10). This statutory construction is consistent with Florida's freedom-of-contract principle, which fully applies to insurance contracts. *See Green v. Life & Health of America*, 704 So.2d 1386, 1390-91 (Fla. 1998); *Nationwide Mut. Fire Ins. Co. v. Mazzarino ex rel. Mazzarino*, 766 So.2d 446, 449 (Fla. 4th DCA 2000). Allstate's agreement with Beech Street did nothing more than contractually entitle Allstate's insureds to be charged the rates to which Holy Cross agreed under its contract with Beech Street. Neither Subsection 10 nor the Insurance Code limits Allstate's ability to take advantage of these contractually agreed-upon rates.

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2. Holy Cross Cannot Use Inapplicable Canons Of Interpretation To Distort The Plain Meaning Of Subsection 10.

Contrary to Subsection 10's plain text which allows an insurer to "negotiate and enter into contracts," Holy Cross argued below that the *expressio unius* canon implies that the statute only permits "direct" contractual relationships. Not only does Holy Cross's statutory construction rewrite and contradict the unambiguous text of the statute, but its reliance on this canon of statutory construction suffers from three additional defects.

First, the canon simply does not apply. Subsection 10 only says that insurers "may negotiate and enter into contracts with licensed health care providers." *See Jewell*, 862 So. 2d at 84 (noting that the "statute does not refer specifically to direct contracts"). If the Florida legislature had intended to limit contractual arrangements, it could have inserted the word "direct" into the text.

Second, Florida courts reject the canon of *expressio unius* where its use is inconsistent with the statutory text and other interpretive principles. *See, e.g., Swartz v. McDonald's Corp.*, 788 So. 2d 937, 943-45 (Fla. 2001); *Auto Owners Ins. Co. v. Marzulli*, 788 So. 2d 1031, 1033-34 (Fla. 2d DCA 2001); *Grant v. State*, 832 So.2d 770, 773 (Fla. 5th DCA 2002). That is exactly the case here; this canon cannot overcome the authority discussed below establishing that Subsection 10's requirements do not apply to Allstate's program.

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Third, *expressio unius* cannot override a statutory interpretation by the agency charged with filling in any "gaps" in the statute, which is the Office of Insurance Regulation. *Cheney R.R. Co. v. ICC*, 902 F. 2d 66, 68-69 (D.C. Cir. 1990); *see also Whetsel v. Network Prop. Servs., LLC*, 246 F. 3d 897, 902 (7th Cir. 2001). If a gap exists, courts will accept any reasonable interpretation by the agency charged with enforcing the statute rather than resorting to interpretive canons. *State v. Sun Gardens Citrus, LLP*, 780 So. 2d 922, 926 (Fla. 2d DCA 2001). But as discussed in Section II.D., the OIR reached the same interpretation as *Jewell* long before Allstate even began its network program.

C. The Legislative History Of Subsection 10 Supports Allstate's Network Programs.

The statutes' legislative history also supports the plain language interpretation of the Second and Fourth DCAs.[2] The evolution of Subsection 10

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[2] Even though the language of Subsection 10 plainly and unambiguously supports Allstate, considering legislative history, the administrative interpretation by the OIR, and public policy is appropriate because they reinforce the clear text of Subsection 10. Florida courts regularly rely on legislative history and similar resources to confirm an interpretation clear on the face of the statute. *E.g., 1000 Friends of Fla., Inc. v. State Dep't of Cmty. Affairs*, 824 So. 2d 989, 992 (Fla. 4th DCA 2002) (interpreting text of statute and further noting that "the department's interpretation is consistent with the plain language of the statute"); *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) ("In addition to consideration of the plain language…, we find that the legislative history underlying those statutory subsections supports our conclusion…."); *State v. Mark Marks, P.A.*, 698 So. 2d 533, 542 (Fla. 1997) (finding "that the legislative history, like the plain language" supported the court's statutory interpretation); *Burgess v. Burgess*, 447 So.2d 220,

confirms that the Legislature intended to give insureds the widest possible choice of providers. When the Legislature originally passed Subsection 10 in 1991, it explicitly permitted the insurer to provide an option to use a preferred provider "at the time that medical services are sought by the insured." § 627.736(10), Fla. Stat. (amended 1992). But the statute prohibited insurers from requiring policyholders to elect to use a preferred provider at the time they purchased the policy:

> The insurer may provide an option to an insured to use a preferred provider at the time that medical services are sought by the insured for the benefits described in this section. . . . The insurer may not require a policyholder or applicant to make any election in this regard at the time of purchase of the policy or at any time other than at the time that medical services are sought. . . .

§ 627.736(10), Fla. Stat. (1991). Because a provider could not offer a preferred provider policy, the statute did not contain any requirement that an insurer offer a nonpreferred provider policy at that time as well. Thus, this earlier version of the statute explicitly permitted Allstate's network provider program by allowing an insurer to provide "an option to an insured to use a preferred provider at the time that medical services are sought."

By amending Subsection 10 in 1992, the Legislature *expanded* the kinds of programs insurers could offer:

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222 (Fla. 1984) (explaining that court's interpretive conclusions was "supported by strong policy grounds as well as by the literal statutory construction").

> The statute currently provides that the insurer may not require a policyholder to make any election in this regard at the time of purchase of the policy or at any time other than at the time that medical services are sought.
>
> Under the bill, the language of the statute is stricken that prohibits an insurer from requiring a policyholder to make any election at the time of purchase of a PIP policy with regard to a preferred provider option. The bill permits the insurers to offer a policyholder the option to purchase a preferred provider PIP policy, but the insurer must also offer the option of a regular nonpreferred PIP policy.

House of Rep. Comm. on Insur., Final Bill Analysis & Economic Impact Statements, CS/HB 93-H, p. 32-33 (July 10, 1992). Thus, the Legislature did not intend to restrict programs that were permitted under the original version of the statute. Instead, the Legislature changed the statute to permit and regulate policies issued with an express preferred provider option to be elected at the time an insured purchased a policy. *Sutherland Statutory Construction*, §22:30 (6th ed. 2002) ("[A]n amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied."). Eliminating the prohibition against preferred provider policies does not create a prohibition against insurers providing an option to be treated by network contracted providers at the time the insured seeks medical treatment.

Put simply, by amending Subsection 10, the Legislature did not intend to add restrictions to the insurers' ability to enter into contracts whereby PIP insureds have the benefit of reduced rates from healthcare providers. Because the earlier

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version of Subsection 10 permitted network programs like the one at issue here, the current version does so as well.

D. The Florida OIR, Which Administers And Enforces Subsection 10, Previously Affirmed The Validity Of Network Programs Like The One At Issue Here.

Under Florida law, "[a]n agency's interpretation of the statute it is charged with enforcing is entitled to great deference. . . . Further, a court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly erroneous.'" *Miles v. Florida A&M University*, 813 So. 2d 242, 245 (Fla. 1st DCA 2002); *see also BellSouth Telecommunications, Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998); *Florida Interexchange Carriers Ass'n v. Clark*, 678 So. 2d 1267 (Fla. 1996).[3]

The Florida OIR regulates and reviews insurance matters. *See Florida Dept. of Ins. v. Bankers Ins. Co.*, 694 So. 2d 70, 74 (Fla. 1st DCA 1997). Thus, its views are entitled to great deference by Florida courts. *See Fortune Ins. Co. v. Department of Ins.*, 664 So. 2d 312, 314 (Fla. 1st DCA 1995) (following OIR

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[3] *See also Samara Development Corp. v. Marlow*, 556 So. 2d 1097, 1099 (Fla. 1990) ("the administrative interpretations of a statute by the agency required to enforce the statute are entitled to great weight"); *PW Ventures v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988) (agency is afforded discretion in the interpretation of the statute within its area of responsibility and its interpretation should not be overturned unless clearly erroneous); *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985) ("Courts should accord great deference to administrative interpretations of statutes which the agency is required to enforce.").

interpretation of Fla. Stat. 627.062(2)(g), and stating that it "is a well-settled principle that the interpretation of a statute by the agency responsible for its enforcement is entitled to great weight, and will not be overturned unless clearly erroneous"); *American Fin. Sec. Life Ins. Co. v. Department of Ins.*, 609 So.2d 733, 735 (Fla. 1st DCA 1992) (deferring to OIR interpretation of a phrase in insurance statute as "consistent with the intent of" the statute finding that appellant "failed to prove that the Department's interpretation of the statute is clearly erroneous"); *Natelson v. Department of Ins.*, 454 So. 2d 31, 32 (Fla. 1st DCA 1984) (upholding OIR's interpretation of term in insurance statute: "The reviewing court will defer to any interpretation within the range of possible interpretation.")

Long before Holy Cross filed this case below, the OIR examined and approved the type of network program and contractual arrangement at issue here. In response to an inquiry from ADP, the OIR expressly found that Subsection 10 does not apply to or restrict programs like Allstate's, and that such an arrangement does not violate Florida's Insurance Code. (R2:198-205) In fact, the OIR reached the same decision, and employed basically the same analysis, as the Second DCA in *Jewell.*

More specifically, in the summer of 1999, the OIR received several inquires from ADP regarding proposed network programs like the one used by Allstate. On June 18, 1999, Timothy Rundle, an actuary for the OIR, responded that "the

managed care program for PIP claims outlined in your June 1 letter appears to comply with pertinent Florida statutes."

One month later, on July 22, 1999, ADP sent another letter to the OIR further outlining its program. On September 14, 1999, the OIR again affirmed that "the operation of the Program as described in your letter of July 22, 1999 does not result in the creation of a separate preferred provider policy and does not require separate department approval." (R2:204)

Daniel Y. Sumner, the Senior Executive Attorney for External and Regulatory Affairs for the OIR, confirmed this conclusion under oath in his deposition in *Schargel, D.C. v. Progressive Express Ins. Co.*, Case No. 01-18405-SC-DIV (Hillsborough Cty.). (R2:206) Mr. Sumner described the program as follows:

> [T]here was an existing PIP policy, which was available on standard PIP terms to any policyholder who purchased PIP from a particular insurer. . . . There were no alterations in the terms whatsoever. . . . [T]he policyholder, upon making a PIP claim, could seek medical treatment from any provider which was available to them under the general coverage. . . . [T]here would be, within the standard policy, a provider option which would simply be a voluntary service to the insured where that they could receive guidance or information from the insurer as to a list of providers that they could go to . . . .

(R2:220-21) Mr. Sumner explained that the OIR believed that such a program did ***not*** fall within the auspices of Subsection 10:

> First of all, it was our opinion that a separate form filing was not required, that the PIP managed-care program as framed to us was not

> – was not the managed care election – election of an option that was specified in 627.736(10), and therefore it was not the particular program that was being reflected in 627.736(10). . . .

(R2:222-24) Thus, the OIR concluded that preferred provider policies regulated by Subsection 10 were not meant to be the only method by which an insurer could arrange for its insureds to obtain the benefit of contractually-agreed, reduced health care rates. *Id.*[4] This interpretation of Subsection 10 by the state agency charged with enforcing the Insurance Code is consistent with the statutory language and further confirms that Subsection 10 does not prohibit Allstate's network provider program.

E. The Second and Fourth District Decisions Advance The Purpose Of Subsection 10, Which Is To Expand Insureds' Choice Of Providers, Not Invalidate Contracts That Benefit Insureds.

This Court has mandated that the PIP statute be construed to give effect to the legislative purpose of providing broad PIP coverage. *Blish v. Atlanta Cas. Co.*, 736 So. 2d 1151, 1155 (Fla. 1999); *see also Dauksis v. State Farm Mut. Auto. Ins. Co.*, 623 So. 2d 455, 457 (Fla. 1993) ("While insurance companies may not provide less uninsured motorist coverage than required by statute, there is nothing to prevent them from providing broader coverage.").

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[4] *Jewell* later reached the same conclusion, holding that "[n]othing in the text of subsection (10) – or any other provision of the no-fault statute – says that an insurer may contract with preferred providers only if the insurer issues preferred provider policies." 862 So. 2d at 85.

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Here, the plain text of Subsection 10 reveals a purpose consistent with the PIP statute generally: to give insureds as broad a choice of providers as possible. Because preferred provider polices limit an insured's choice of providers, the Florida Legislature was concerned that insurers might enter into contracts with providers and then offer insureds only policies that require them to go to those preferred providers. While insureds would benefit from reduced charges by providers (and thus reduced co-payments), their choice of providers would be limited. To avoid these possible limits on an insured's choice of providers, Subsection 10 provides that if an insurer offers a preferred provider policy, it should also give insureds the option of a policy that pays for *any* provider the insured decides to visit. By requiring an insurer to offer a nonpreferred provider policy along with its preferred provider policy, insureds ultimately can choose any provider they wish.

Allstate's program is consistent with and in no way contravenes this statutory purpose. Under the network arrangement, each insured has an unlimited, unfettered choice of providers and pays reduced co-payments if he or she selects a provider that has its own contract with the network. Thus, the insured receives the best of both worlds through Allstate's network arrangement: complete freedom of choice in providers, and reduced payments if the insured selects a provider who decided to contract with the network. Striking down this program would take

added PIP coverage benefits away from insureds[5] and would not further the purpose of Subsection 10.

Moreover, the specific purposes of Subsection 10 must be interpreted in light of Florida's statutory scheme to provide "swift and virtually automatic payment" of no-fault claims, without litigation. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683 (Fla. 2000). Use of an agreed-upon schedule of fees under the Beech Street contract advances the legislative goal of prompt and efficient payment of insurance claims while minimizing conflicts and litigation over the "reasonableness" of a medical provider's charges.

In short, affirming the Fourth District's decision will preserve the benefits to insureds that the Insurance Code and Subsection 10 seek to protect. By contrast, using Subsection 10 to void Allstate's contracts with Beech Street would not only reduce insureds' choices and their available medical care benefits, but also would increase the likelihood of disputes, litigation, and costs – a result antithetical to the very goals of Subsection 10 and Florida's insurance statutes.

[5] Specifically, rather than an insurer paying 80 percent of a provider's higher rate, under the network programs an insurer will pay 80 percent of a lower, negotiated rate. Likewise, the insured will pay only 20 percent of the lower rate, thus paying less for his or her 20 percent co-payment. The insured can use the extra policy benefits saved under the network program to obtain additional medical care.

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III. HOLY CROSS HAS NO STANDING TO ASSERT CLAIMS UNDER SUBSECTION 10.

Holy Cross lacks standing to bring statutory claims here because Subsection 10 provides it with no private cause of action. To allege and pursue claims under the Insurance Code (or any other statute for that matter), a plaintiff first must have rights conferred upon it by that statute. This is a fundamental principle of standing. Without statutory rights, a plaintiff has no statutory claim. *E.g., Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 986 (Fla. 1994); *May v. Allstate Ins. Co.*, Case No. 00-062969-CIV-Dimitrouleas, slip op. at p. 6 (S.D. Fla. April 14, 2000) (R2:165-72); *JTM, Inc. v. Totalbank*, 795 So. 2d 161, 162 (Fla. 3d DCA 2001); *Fischer v. Metcalf*, 543 So. 2d 785, 788 (Fla. 3d DCA 1989).

Nothing in Subsection 10 gives providers of medical treatment the right to challenge contracts that insurers enter into with provider networks. The Florida Legislature enacted Subsection 10 to "protect insureds from harm as a result of accidents with other drivers, and actions by insurance companies. The statute was ***not*** enacted to ensure that medical providers received what they felt was a reasonable wage." *May v. Allstate Ins. Co.*, Case No. 00-062969-CIV-Dimitrouleas, slip op. at 6 (S.D. Fla. April 14, 2000) (emphasis added). In the process of holding that providers cannot assert a cause of action under Subsection 10, the *May* court distilled the plaintiff providers' claim to its essence: "Allstate is paying certain health care providers reduced rates which those providers *have*

agreed to accept for medical services covered under the Allstate PIP contracts." (R2:169) (emphasis added). The *May* court recognized that the PIP statute was not enacted to benefit medical providers and, as a result, the providers had no cause of action.

Nor can the providers attempt to manufacture rights through a purported assignment from Allstate's insureds. Although Section 624.155, Fla. Stat., allows private civil litigants to bring actions against insurers for violations of several specifically enumerated statutory sections, Subsection 10 is not one of them. *See* § 624.155, Fla. Stat. Where, as here, the Legislature has expressly granted only a limited private right of action under a statute, a court cannot confer any greater rights. *See Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 986 (Fla. 1994); *see also Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372, 1375 (Fla. 2d DCA 1993) ("it is significant that the Act contains a section specifically addressed to private rights of action … Congress having thus specifically addressed the subject of private remedies, it is reasonable to assume that it said all that it intended on that subject") (quoting *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1015 (7th Cir. 1979)). The Florida Legislature could have expressly included Subsection 10 among those provisions listed in Section 624.155, but instead elected to leave its enforcement to the Commissioner of Insurance. *See Friedman v. New Life Ins. Co.*, No. 02-81164-CIV, slip op. at 7-8 (S.D. Fla. Feb.

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24, 2004) (dismissing with prejudice claims based on insurance statutes for which Section 624.155 did not provide a private cause of action). In short, without standing to sue under Subsection 10, individually, or as a purported assignee, Holy Cross cannot bring its claims against Allstate.

IV. HOLY CROSS HAS NO VALID CLAIM OR DAMAGES.

Holy Cross seeks sums in excess of those to which it contractually agreed based on a purported assignment from Allstate's insureds. But Holy Cross's status as an alleged assignee does not give it any actual, recoverable damages on which to base a claim against Allstate. As an alleged assignee, Holy Cross is not entitled to a greater payment than the one provided in the contracts between the insureds and Allstate. *Union Indemnity Co. v. City of New Smyrna*, 130 So. 453, 456 (Fla. 1930) ("The assignee of the contractor could acquire no greater right by reason of an assignment than that which the contractor himself might assert against the owner"); *Department of Revenue v. Bank of America, N.A.*, 752 So. 2d 637, 642 (Fla. 1st DCA 2000); *State v. Family Bank of Hallandale*, 667 So. 2d 257, 259 (Fla. 1st DCA 1995).

Allstate's insureds paid precisely what their policies required – 20 percent of Holy Cross's fees allowed under its Beech Street contract. What Holy Cross seeks by standing in the shoes of the insureds is to increase the amount of its bills, and thus the amount the insureds pay on their 20 percent share. But the insureds could

not be charged more money because Holy Cross explicitly agreed not to balance bill insureds under its agreement with Beech Street. (R1:129, 131-41) Because the insureds paid only the amounts they were required to pay, they have no claim against Allstate, so neither does Holy Cross as an alleged assignee of those claims. *See Angora Enterprises, Inc. v. Cole,* 439 So. 2d 832, 835 (Fla. 1983), *cert. denied*, 466 U.S. 927 (1984); *Gryzmish v. Krim*, 170 So. 717, 720-21 (Fla. 1936); *Carter v. Brady*, 41 So. 539, 541 (Fla. 1906); *Taylor v. Safeco Ins. Co.*, 361 So. 2d 743, 747 (1st DCA 1978).

V. ALLSTATE'S PAYMENTS AT CONTRACTUALLY AGREED-TO, REDUCED RATES COMPLY WITH SUBSECTIONS 1 AND 5.

In an effort to deflect attention from the errors in its interpretation of Subsection 10, Holy Cross also has argued that Allstate's payment at the contractually-accepted rates violates Subsection 1, Fla Stat. 627.736(1). Subsection 1 requires that an insurer pay eighty percent of "reasonable expenses for medically necessary" services. Fla. Stat. 627.736(1)(a). Similar language appears in Subsection 5, limiting providers such as Holy Cross to charging "only a reasonable amount for the services and supplies rendered." Fla. Stat. 627.736(5)(a).

Contrary to Holy Cross's argument, Allstate paid all required "reasonable" expenses. Indeed, Allstate paid 80 percent of the amounts that Holy Cross had *agreed to charge and receive* in its contract with Beech Street. As the *Jewell* court

recognized, rates that a provider agrees to accept are by definition "reasonable" under the PIP statute. *Nationwide Mut. Ins. Co. v. Jewell*, 862 So. 2d 79, 85-86 (Fla. 2d DCA 2003) ("*Jewell*"), *conflict certified with Nationwide Mut. Fire Ins. Co. v. Central Florida Physiatrists, P.A.*, 851 So. 2d 762 (Fla. 5th DCA 2003). Reading the statute to require "that an insurer pay a provider for services at a rate higher than the rate the provider has contractually agreed to accept in payment for such service" is "unreasonable." *Id.* at 86. "If a provider has agreed in a valid and enforceable contract to accept payment for services at a particular rate, that rate would necessarily be a 'reasonable amount for the services … rendered'" under the PIP statute. *Id.*; *see also Botero v. Fidelity Nat'l Ins. Co.*, 4 Fla. Weekly Supp. 440 (11th Jud. Cir., App. Div. Dec. 20, 1996) (holding that where a provider agrees to less than her customary fee, that lesser amount is "reasonable" for purposes of Section 627.736(1)(b)).

CONCLUSION

Allstate's network provider program fully complies with the PIP statute, including Subsection 10 – as two District Courts of Appeal have held. The plain language of the statute, the OIR's interpretation, the legislative history, and the underlying policies of the PIP statute all support the decision on appeal and the Second and Fourth DCA's interpretations. The network programs benefit insureds by providing them with lower co-payments and additional coverage. Holy Cross, a

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medical provider whose interests Subsection 10 did not seek to promote, should not be permitted (i) to use Subsection 10 to invalidate a program that benefits the State's insureds, and (ii) in the process ignore insureds by increasing their cost and reducing their insurance coverage.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Petitioners/Cross-Respondents Allstate Insurance Company and Allstate Indemnity Company has been served by U.S. Mail this 6th day of January, 2006 upon the following attorneys:

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CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with the font requirements of Fla. R. App. P. 9.210(2), the foregoing Initial Brief of Petitioners/Cross-Respondents Allstate Insurance Company and Allstate Indemnity Company, was printed in Times New Roman 14 point font.

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ATTORNEYS FOR APPELLANTS ALLSTATE INSURANCE COMPANY & ALLSTATE INDEMNITY COMPANY

IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, Petitioners,	CASE NO. SC05-435
v.	CONSOLIDATED
Respondent. _______________________________________/	
HOLY CROSS HOSPITAL, INC. Cross-Petitioner,	CASE NO. SC05-545
v.	
ALLSTATE INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY Cross-Respondents. _______________________________________/	

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

REQUEST FOR ORAL ARGUMENT

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Petitioners/cross-respondents Allstate Insurance Company and Allstate Indemnity Company, pursuant to Rule 9.320, Fla. R. App. P., respectfully request oral argument. Oral argument will assist the Court in analyzing and addressing the issues present for consideration.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Request for Oral Argument has been served by U.S. Mail this 6th day of January, 2006 upon the following attorneys:

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