IN THE SUPREME COURT OF FLORIDA

Case Nos. SC05-870,
SC05-871 and SC05-872

FOUNDATION HEALTH, *et al.*
Petitioners,

v.

WESTSIDE EKG ASSOCIATES,
Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF FOR AARP AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

AARP is a non-partisan nonprofit membership organization for people 50 and older, with over 35 million members, including over 2.6 million members in Florida. As the largest membership organization serving older Americans, AARP strongly supports consumer protections for private health insurance, including the enforcement of rights through litigation. AARP previously filed an *amicus* brief in this case before the Florida Fourth District Court of Appeal. AARP has filed numerous briefs around the country in support of rights contained in federal and state laws to protect consumers. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens.

STANDARD OF REVIEW

The standard of review is *de novo*. *Amicus Curiae* AARP adopts the reasoning therefor from the brief of Respondent Westside EKG Associates.

SUMMARY OF ARGUMENT

The issues raised by medical providers in this litigation are of vital importance to insured persons as well. Insured individuals are protected by the statute at issue in this case, the Florida HMO Act, Section 641.3155, Florida Statutes (2003), and therefore may seek to enforce its provisions. Insured persons

have enforced statutes in contract disputes in many Florida cases; so, any decision regarding a private right of action to enforce statutes is important to individuals.

The principle that statutes may be enforced in contract litigation is well established not only in Florida but also throughout the nation. In addition, other jurisdictions have permitted private enforcement of statutes similar to Florida=s HMO statute that mandate prompt payment of claims.

ARGUMENT

I. THE ENFORCEMENT OF FLORIDA=S HMO STATUTE IS OF GREAT IMPORTANCE TO INSURED PERSONS.

While the instant case has been brought by medical providers, the issues at stake in this litigation are of tremendous significance to people who are insured, because they also have a contractual relationship with Health Maintenance Organizations (HMOs). This case addresses whether the prompt payment provision of Florida=s HMO statute, Section 641.3155, Florida Statutes (2003), may be enforced through a contract claim in litigation. In addition to requiring insurance companies to pay claims promptly, Florida=s HMO statute contains many other important consumer protections for insured individuals. Therefore, the issue of whether the HMO statute may be enforced through a contract claim is of vital importance to people who have health insurance.

One reason the HMO statute is important to insured persons is that it prohibits HMOs from engaging in unfair or deceptive acts. This provision requires HMOs to conduct a reasonable investigation to support any denial of a claim and to send patients a reasonable explanation of the denial of a claim without any misrepresentations.[1/] In addition, the statute prohibits HMOs from discriminating against individual beneficiaries based on health status, and the law limits exclusions for pre-existing physical or mental conditions.[2/] The statute also contains consumer protections targeted to older persons, including standards for marketing to persons eligible for Medicare, most of whom are age 65 or older.[3/] Thus, any decision concerning the enforcement of the HMO Act is of great relevance not only to providers but also to their patients.

The fundamental legal principle being litigated in this case, *i.e.*, that statutes are incorporated into contracts, is likewise of vital importance to insured persons. Indeed, many of the contract dispute cases in which Florida courts have enforced

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[1/] '' 641.3901, 631.3903(5), Fla. Stat. (2003).

[2/] '' 641.31071, 641.31073, Fla. Stat. (2003).

[3/] ' 641.309, Fla. Stat. (2003).

this principle were litigated by the insured. Therefore, the instant case will be of great importance to individuals as well as providers.

This Court has applied the important tenet that statutes are incorporated in contracts in disputes between the insured and insurer. For example, in *Grant v. State Farm Fire & Casualty Co.*,[4] this Court implemented Florida=s Financial Responsibility Law in the context of a contract dispute between the insured and the insurer, holding that the statute=s definition of Amotor vehicle@ would be incorporated into the contract. This Court explained that Awhere a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become a part of the contract.@[5]

Another example is *Flores v. Allstate Insurance Co.*,[6] an automobile insurance case litigated by the insured in which this Court enforced a statutory requirement restricting the ability of insurers to limit uninsured motorist protection.

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[4] 638 So. 2d 936, 938 (Fla. 1994).

[5] *Id.* at 937 (quoting *Standard Marine Ins. Co. v. Allyn*, 333 So. 2d 497, 499 (Fla. 1st DCA 1976).

[6] 819 So. 2d 740 (Fla. 2002).

This Court rejected the insurer=s argument that the contract did not require it to provide uninsured motorist coverage under the particular facts of the case, holding that the requirement imposed by statute superceded the efforts of the insurer to construe the contract in a manner that would limit the coverage.[7/]

Numerous cases from Florida=s intermediate appellate courts have incorporated statutes into contracts when deciding disputes between the insurer and the insured, thus demonstrating the importance of the principle to insured parties.[8/] Because these judicial decisions recognized the right of individual beneficiaries to enforce relevant statutes as terms of a contract, insured individuals clearly have a direct interest in this important principle of law at issue in the instant litigation.

[7/] *Id.* at 745; *see also Citizens= Ins. Co. v. Barnes*, 124 So. 2d 722, 723 (Fla. 1929) (reading into a fire insurance contract an ordinance prohibiting the repair of a severely damaged structure, with the effect that the insured was able to recover from the insurer for total loss rather than only partial loss).

[8/] *Allison v. Imperial Cas. & Indem. Co.*, 222 So. 2d 25 (Fla. 4th DCA 1969) (holding that the insured was entitled to enforce Florida=s uninsured motorist law in a contract dispute with insurer and that the Astatute became part of the insurance contract@); *U.S. Fire Ins. Co. v. Van Iderstyne*, 347 So. 2d 672 (Fla. 4th DCA 1977); *Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Serv., Inc.*, 765 So. 2d 836 (Fla. 4th DCA 2000) (allowing insured to enforce Occupational Safety and Health Administration regulations in a contract dispute); *Auto-Owners Ins. Co. v. DeJohn*, 640 So. 2d 158, 161 (Fla. 5th DCA 1994) (finding that an insurance policy excluding coverage for mental pain and suffering of deceased=s survivor violated Florida statutory law and that A[w]hen an insurance policy does not conform to the requirements of statutory law, a court must write a provision into the policy to comply with the law, or construe the policy as providing the coverage required by law@).

II. THE PRINCIPLE THAT RELEVANT STATUTES ARE PART OF A CONTRACT HAS BEEN UPHELD BY COURTS NATIONWIDE.

The United States Supreme Court and state courts nationwide have embraced the principle that statutes are incorporated into contracts in a wide variety of contexts, including employment law, estate planning and probate law, tax law, and insurance law. In *Norfolk and Western Railway Co. v. American Train Dispatchers' Ass'n*, the United States Supreme Court stated the following:

> Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.[9/]

Professor Williston, in his treatise on contracts, elaborates on this well-established rule:

> [T]he incorporation of applicable existing law into a contract does not require a deliberate expression by the parties. . . . This principle applies to the common law in effect in the jurisdiction, as well as to constitutional provisions, statutes, ordinances, and regulations, including provisions which affect the validity, construction, operation, effect, obligations, performance, termination, discharge, and enforcement of the contract.[10/]

[9/] *Norfolk and W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) (quoting *Farmers' and Merchants' Bank of Monroe v. Fed. Reserve Bank of Richmond*, 262 U.S. 649, 666 (1923).

[10/] 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 30:19 (4th ed. 1993 & Supp. 2004); *accord* 17 Am. Jur. 2d Contracts § 371 (2005).

Indeed, the highest courts of forty-nine states and the District of Columbia have held that statutes are incorporated into applicable contracts.[11/] Utah is the only exception.[12/]

[11/] *U.S. Fid. & Guar. Co. v. Couch, Inc.*, 472 So. 2d 614, 618 (Ala. 1985); *Peck v. Alaska Aeronautical, Inc.*, 756 P.2d 282, 288 (Alaska 1988); *Brown v. State Farm Mut. Auto. Ins. Co.*, 788 P.2d 56, 60 (Ariz. 1989); *Harris v. Searcy Fed. Savings & Loan Assn.*, 408 S.W.2d 602, 603 (Ark. 1966); *Freeman v. State Farm Mut. Auto. Ins. Co.*, 535 P.2d 341, 344 (Cal. 1975); *Achenback v. School Dist. No. RE-2, Brush, Counties of Morgan and Washington and State of Colorado*, 491 P.2d 57, 58 (Colo. 1971); *State v. Am. News Co.*, 203 A.2d 296, 302 (Conn. 1964); *Taggart v. George B. Booker & Co.*, 28 A. 2d 690, 693 (Del. 1942); *Dist. of Columbia v. Campbell*, 580 A.2d 1295, 1302 (D.C. 1990); *Grant v. State Farm Fire and Cas. Co.*, 638 So. 2d 936, 938 (Fla. 1994); *Nelson v. S. Guar. Ins. Co.*, 147 S.E.2d 424, 426 (Ga. 1966); *First Ins. Co. v. Lawrence*, 881 P.2d 489, 493 (Haw. 1994); *Star Phoenix Mining Co. v. Hecla Mining Co.*, 939 P.2d 542, 549 (Idaho 1997); *People ex rel Polen v. Hoehler*, 90 N.E.2d 729, 733 (Ill. 1950); *Witherspoon v. Salm*, 243 N.E.2d 876, 878 (Ind. 1969); *Bruton v. Ames Cmty. Sch. Dist.*, 291 N.W.2d 351, 356 (Iowa 1980); *Eidemiller v. State Farm Mut. Auto. Ins. Co.*, 933 P.2d 748, 755 (Kan. 1997); *Nat=l Sur. Corp. v. Morgan County*, 440 S.W.2d 791, 793 (Ky. 1969); *Turner v. S. Wheel and Rim Serv., Inc.*, 332 So. 2d 770, 770 (La. 1976); *Marchiori v. Am. Republic Ins. Co.*, 662 A.2d 932, 935 (Me. 1995); *Concord Gen. Mut. Ins. Co. v. McClain*, 270 A.2d 362, 364 (Me. 1970); *Denice v. Spotswood I. Quimby, Inc.*, 237 A.2d 4, 7 (Md. 1968); *Janes v. The Washburn Co.*, 94 N.E.2d 479, 481 (Mass. 1950); *Oakland County Bd. of County Rd. Comm=rs v. Mich. Prop. & Cas. Guar. Ass=n*, 575 N.W.2d 751, 756 (Mich. 1998); *Schreiner v. C.S. McCrossan, Inc.*, 465 N.W.2d 917, 920 (Minn. 1991); *Hooper v. Walker*, 29 So. 2d 72, 73 (Miss. 1947); *Ragsdale v. Armstrong*, 916 S.W.2d 783, 785 (Mo. 1996); *Sagan v. Prudential Ins. Co. of Am.*, 857 P.2d 719, 721 (Mont. 1993); *Carlson v. Nelson*, 285 N.W.2d 505, 509 (Neb. 1979); *Carson Opera House Ass=n v. Miller*, 16 Nev. 327, 334 (Nev. 1881); *Sleeper v. N.H.F. Ins. Co.*, 56 N.H. 401, 406 (N.H. 1876); *Bayonne v. Palmer*, 221 A.2d 741, 743 (N.J. 1966); *Martinez v. Board of Educ.*, 482 P.2d 239,239 (N.M. 1971); *In re Estate of Havemeyer*, 217 N.E.2d 26, 27 (N.Y. 1966); *McCrater v. Stone & Webster Eng=g Corp.*, 104 S.E.2d 858, 860 (N.C. 1958); *Rettig v. Taylor Pub. Sch. Dist.*, 211 N.W.2d 743, 748 (N.D. 1973); *Wood v. Vona*, 68 N.E.2d 80 (Ohio 1946); *Welty v. Martinaire of Okla., Inc*., 867 P.2d 1273, 1276 (Okla. 1994); *Crawford v. Teachers= Ret. Fund Ass=n*, 99 P.2d 729, 733 (Or. 1940); *Prudential Prop. and Cas. Ins. Co. v. Colbert*, 813 A.2d 747, 750 (Pa. 2002);

Many of the cases in which courts have enforced statutes in contract disputes have involved issues of insurance law,[13] a confirmation that statutes are incorporated into insurance policies just as they are incorporated into other types of contracts.[14] For

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Women=s Dev. Corp. v. City of Central Falls, 764 A.2d 151, 159 (R.I. 2001); *Jordan v. Aetna Cas. and Sur. Co.*, 214 S.E.2d 818, 820 (S.C. 1975); *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 133 (S.D. 1994); *Nat=l Sur. Corp. v. Fischer Steel Corp.*, 374 S.W.2d 372, 377 (Tenn. 1964); *Truck Ins. Exch. v. Seelbach*, 339 S.W.2d 521, 526 (Tex. 1960); *Langrock v. Porter Hosp., Inc*., 227 A.2d 291, 293 (Vt. 1967); *Harbour Gate Owners= Ass=n, Inc. v. Berg*, 348 S.E.2d 252, 257 (Va. 1986); *Mid-Century Ins. Co. v. Henault*, 905 P.2d 379, 382 (Wash. 1995); *Maynard v. Board of Educ.*, 357 S.E.2d 246, 252 (W. Va. 1987); *Gambrell v. Campbellsport Mut. Ins. Co.*, 177 N.W.2d 313, 316 (Wis. 1970); *Allstate Ins. Co. v. Wyo. Ins. Dept*, 672 P.2d 810, 817 (Wyo. 1983).

[12] *Decker v. N.Y. Life Ins. Co.*, 76 P.2d 568, 572 (Utah 1938) (stating that while insurance companies must comply with applicable statutes in their policies, the statute was not considered incorporated into the insurance policy).

[13] *See, e.g., Brown v. State Farm Mut. Auto. Ins. Co.*, 788 P.2d at 60; *Freeman v. State Farm Mut. Auto. Ins. Co.*, 535 P.2d at 344; *Grant v. State Farm Fire and Cas. Co.*, 638 So. 2d at 938; *Nelson v. S. Guar. Ins. Co.*, 147 S.E. 2d at 426; *First Ins. Co. v. Lawrence*, 881 P.2d at 493; *Eidemiller v. State Farm Mut. Auto. Ins. Co.*, 933 P.2d at 756; *Fister v. Allstate Life Ins. Co.*, 783 A.2d 194, 199-201 (Md. 2001); *Marchiori v. Am. Republic Ins. Co.*, 662 A.2d at 935; *Concord Gen. Mut. Ins. Co. v. McClain*, 270 A.2d at 364; *Sagan v. Prudential Ins. Co. of Am.*, 857 P.2d at 721; *Sleeper v. N.H.F. Ins. Co.*, 56 N.H. at 406; *Wood v. Vona*, 68 N.E.2d at 96; *Prudential Prop. and Cas. Ins. Co. v. Colbert*, 813 A.2d at 750; *Jordan v. Aetna Cas. and Sur. Co.*, 214 S.E.2d at 820; *Truck Ins. Exch. v. Seelbach*, 339 S.W.2d at 526; *Mid-Century Ins. Co. v. Henault*, 905 P.2d at 382; *Gambrell v. Campbellsport Mut. Ins. Co.*, 177 N.W.2d at 316; *Allstate Ins. Co. v. Wyo. Ins. Dep=t*, 672 P.2d at 817.

[14] *See also* 9 Couch on Ins. § 122:27 (3d ed. 2004) (AAll policies issued after the effective date of a the [sic] statute are read as including all statutory provisions whether actually present in the policy or not.@).

example, in *Eidemiller v. State Farm Mutual Automobile Insurance Co.*,[15/] an insured individual in Kansas claimed that he should be able to stack insurance benefits from three separate policies, since the insurance contract did not contain any provision prohibiting stacking. The insurance company denied his request for stacking benefits, relying upon a Kansas law prohibiting the stacking of claims, Kan. Stat. Ann. ' 40-284(d) (2002). The Supreme Court of Kansas stated that Awhen, therefore the insured and defendant entered into this contract, the statute wrote itself into and formed a part of the contract, and the cause of action is not strictly created by the statute, but by the contract containing the statute as one of its provisions.@[16/] In addition to affirming the rule that relevant statutes constitute implied terms in contracts, the Kansas case demonstrates that the incorporation of a statute into a contract provides a cause of action for enforcement of the statute via a contract claim.

Similarly, in *Fister v. Allstate Life Insurance Co.*,[17/] a Maryland statute permitted insurers to sell life insurance policies that excluded coverage for suicide. The terms of the insurance contract in question excluded coverage for suicide as permitted by the statute, but the definition of Asuicide@ was in dispute, as the insured had convinced a friend to kill her. Maryland=s highest court rejected the insurance

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[15/] 933 P.2d 748 (Kan.1997).

[16/] *Id*. at 754.

company=s efforts to inject its own definition of Asuicide@ into the contract, which would have precluded coverage, holding instead that the statutory definition of Asuicide@ governed the contract.[18/]

Moreover, in *Concord General Mutual Insurance Co. v. McClain*,[19/] the Supreme Judicial Court of Maine permitted an insured to enforce a statute that was deemed to be a part of the contract. The court invalidated a provision in a motor vehicle insurance policy denying coverage to any automobile owned by the insured, because this provision violated Maine=s financial responsibility law, Me. Rev. Stat. Ann. tit. 29 ' 781 (1969). The Supreme Judicial Court of Maine stated:

> Existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are pertinent and applicable as fully as if such provisions were written into them. 43 Am. Jur. 2d., Insurance

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[17/] 783 A.2d 194 (Md. 2001).

[18/] *Id.* at 199-201.

[19/] 270 A.2d 362 (Me. 1970).

> ' 289. Applying this principle to contracts of automobile insurance, the coverage required by the financial responsibility law forms a part of all policies tendered in compliance with the statute and affords coverage co-extensive with that required by the statute.[20/]

The court found that incorporating the statute into the insurance contract upheld the purpose of the statute to protect the public from the damaging operation of motor vehicles.[21/]

The Supreme Court of Wyoming likewise emphasized the importance of public policy in its holding that statutes are incorporated into insurance policies. In *Allstate Insurance Co. v. Wyoming Insurance Department*,[22/] the court invalidated a household exclusion provision in an insurance policy, because the provision conflicted with the minimum coverage mandated by Wyoming=s compulsory insurance statute, Wyo. Stat. Ann. ' 31-4-120 (Michie 1977). The Court explained:

[20/] *Id*. at 364.

[21/] *Id*. at 364-65.

[22/] 672 P.2d 810 (Wyo. 1983).

> It is uniformly held that the compulsory insurance statute and policies issued thereunder must be construed in the light of the purpose and public policy of the statute and liberally to advance the aim sought. The policy and the compulsory insurance statute relating thereto must be read and construed together as though the statute were part of the contract.[23/]

Thus, it is well established that insurance contracts are construed nationwide to incorporate relevant statutory provisions and, as a result, statutes may be enforced by private parties in contract litigation.

III. COURTS IN OTHER STATES HAVE ENFORCED PROMPT PAYMENT STATUTES IN LITIGATION BROUGHT BY PRIVATE PARTIES.

Throughout the United States, legislatures have passed statutes placing numerous requirements on insurers, including extensive consumer protections. Florida is joined by many of her sister states in protecting consumers by requiring prompt payment of claims.[24/] Many state courts have awarded damages pursuant to prompt payment statutes. In *Christian v. American Home Assurance Co.*,[25/] for example, an Oklahoma prompt payment statute required insurance companies to pay claims

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[23/] *Id*. at 817 (citations omitted).

[24/] *See, e.g.*, La. Rev. Stat. Ann. 22:658(a)(1) (2003); Md. Code Ann. Ins. ' 15-1005(c) (West 2003); Mass. Gen. Laws Ann., ch. 175 ' 110(g) (2003); Mich. Comp. Laws Ann. ' 500.3142 (West 2005); Mont. Code Ann. ' 33-18-232(1) (2003); N.Y. Ins. Law ' 5106(a) (McKinney 2003); Okla. Stat. tit. 36 ' 4405 (2005); Tenn. Code Ann. ' 56-32-226 (2003); Tex. Ins. Code Ann. ' 542-058 (Vernon 2005); Vt. Stat. Ann. tit. 8 ' 4065(8) (2004).

immediately upon receipt of due written proof of the loss. When the insured brought suit against the insurer for failure to pay his claim upon receipt of such proof, the court awarded not only consequential damages for breach of contract but also punitive damages for breach of the duty of good faith on the part of the insurer. In recognition of the importance of holding an insurance company to its duties under a prompt payment statute, the court noted the following:

> This statutory duty imposed upon insurance companies to pay claims immediately, recognizes that a substantial part of the right purchased by an insured is the right to receive the policy benefits promptly. Unwarranted delay precipitates the precise economic hardship the insured sought to avoid by purchase of the policy.[26/]

Similarly, in *Wallace v. State Farm Mutual Automobile Insurance Co.*,[27/] Louisiana=s intermediate appellate court affirmed an award of penalties against an insurance company for failing to promptly pay medical bills resulting from an automobile accident. The court stated that the Louisiana prompt payment statute imposed Aa duty to pay claims timely@ and to conduct a reasonable investigation of the claim.[28/] The court affirmed the award of penalties under the prompt payment statute

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[25/] 577 P.2d 899 (Okla. 1977).

[26/] *Id.* at 903.

[27/] 821 So. 2d 704 (La. Ct. App. 2002).

[28/] *Id*. at 713

after the insured proved in a jury trial that the insurance company had violated the prompt payment statute.[29/]

Likewise, in *St. Clare=s Hospital v. Allstate Insurance Co.*,[30/] an intermediate appellate court in New York affirmed an award of interest on overdue no-fault insurance claims that were not timely paid, pursuant to New York=s prompt payment law. The court stated: Athe defendant failed to pay the claim or to deny the claim within thirty days of its submission. Having found that the denial of the claim was improper, the court was obligated by the statute to award the appropriate interest@ to the insured.[31/]

Texas=s intermediate appellate court also upheld an award of damages against an insurance company, including interest, for failing to promptly pay a claim in violation of Texas=s prompt payment statute.[32/] A federal district court similarly found that a private party could obtain damages under Texas=s prompt payment statute.[33/] The district court noted that the penalty provisions of the Texas prompt payment

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[29/] *Id*. at 713.

[30/] 628 N.Y.S.2d 128 (N.Y. App. Div. 1995).

[31/] *Id*. at 128.

[32/] *J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280 (Tex. App. 2000).

[33/] *Primrose Operating Co. & CADA Operating, Inc. v. Nat=l Am. Ins. Co.*, No. Civ. A. 5:02-CV-101-C, 2003 U.S.Dist. LEXIS 12447 (N.D. Tex. July 15, 2003), *aff'd in part, rev'd in part on other grounds*, 382 F.3d 546 (5th Cir. 2004).

statute Aapply automatically if the insurer has been found liable for violations@ of the statute.[34/]

In sum, extensive case law, both in Florida and throughout the nation, establishes that private parties may bring a contract action to enforce applicable statutes, including prompt payment statutes. Therefore, the district court clearly erred in dismissing the instant case for lack of a cause of action and the Fourth District Court of Appeals correctly reversed that decision.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* AARP respectfully requests that this Court affirm the decision of the Fourth District Court of Appeal, reversing the dismissal of the case by the trial court. AARP urges this Court to hold that private parties have a cause of action to enforce Florida=s prompt payment statute.

34/ *Id* at *6.

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I hereby certify that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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