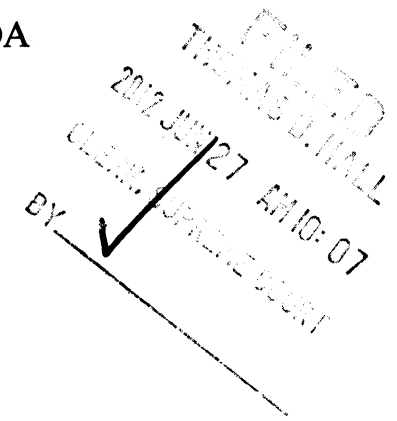
IN THE SUPREME COURT OF FLORIDA

ORIGINAL

CASE NO. SC12-650



MERLY NUNEZ
(a/k/a NUNEZ MERLY),

Appellant,

vs.

GEICO GENERAL
INSURANCE COMPANY,

Appellee.
_____/

BRIEF OF AMICUS
FLORIDIANS FOR FAIR INSURANCE, INC.
IN SUPPORT OF APPELLANT'S INITIAL BRIEF

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STATEMENT OF IDENTITY

Floridians for Fair Insurance (FFI) is a corporation comprised of Florida citizens whose goal it is to ensure that the insurance industry is fairly regulated and deals fairly and in good faith with Florida insurance consumers who purchase all types of insurance from insurers that write policies in Florida, including personal injury protection (PIP) insurance.

FFI's interest in this case is the Court's determination that, within the context of statutory insurance, Examinations Under Oath (EUO) cannot be a condition precedent to either the filing of a claim for Personal Injury Protection (PIP) benefits or to the recovery of such benefits. FFI's interest arises out its concern for Florida consumers that the imposition of an additional "condition precedent," over and above those already imposed by the Florida Legislature, imposes an additional burden on insureds, is subject to rampant abuse on the part of the insurance industry, and enables insurers to delay the payment of PIP benefits which is contrary to the purpose of PIP, i.e., to provide "swift and virtually automatic payment" of medical bills so that an insured may get on with his or her life without undue financial interruption. *Custer Medical Center (a/a/o Maximo Masis) v. United Auto. Ins. Co.*, 62 So.3d 1086 (Fla. 2010), *quoting Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 683-684 (Fla. 2000).

INTRODUCTION

This Amicus Brief is filed on behalf of Floridians for Fair Insurance, Inc., (FFI), to support the Initial Brief of the Appellant, Merly Nunez, who was the named plaintiff in a class action removed from state court to federal court by GEICO.

The district court dismissed the class action with prejudice. On appeal, citing this Court's decision in *Custer Medical Center (a/a/o Maximo Masis) v. United Auto. Ins. Co.*, 62 So.3d 1086 (Fla. 2010), the Eleventh Circuit Court of Appeals has certified to this Court the question of whether an insured is required to attend an EUO as a condition precedent to the recovery of PIP benefits.

The Eleventh Circuit questions the meaning of this Court's discussion of EUOs in the *Custer* decision, and has determined (mistakenly) that only two circuit courts sitting in their appellate capacity have addressed the issue squarely in diverging opinions. *See United Auto. Ins. Co. v. Francisco Diaz*, 18 Fla. L. Wkly. Supp. 348a (Fla. 11th Jud. Cir., February 3, 2011); *State Farm Fire & Cas. Co. v. Suncare Phys. Therapy, Inc. (a/a/o Cedrole Henrisma),* 18 Fla. L. Wkly. Supp. 776a (Fla. 11th Jud. Cir., July 13, 2011).

FFI submits that EUOs cannot be conditions precedent either to the filing of a suit for PIP benefits or to the recovery of such benefits.

ARGUMENT

I. The Purpose of PIP is "Swift and Virtually Automatic" Payment of Medical Bills, Which Cannot Be Delayed Under the Guise of "Investigation"

Florida's Personal Injury Protection (PIP) Statute was first enacted in 1972 for the purpose of providing mandatory limited insurance benefits to persons injured in car accidents, without regard to fault. *See* Fla.Stats. §627.731.[1]

This Court has held that, "[w]ithout a doubt, the purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption'." *Custer Medical Center (a/a/o Maximo Masis) v. United Auto. Ins. Co.*, 62 So.3d 1086 (Fla. 2010), rehearing denied, May 18, 2011; *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 683-684 (Fla. 2000).

In 1974, when the constitutionality of the PIP Statute was challenged in

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[1] The purpose of ss.627.730-730-627.7405 is to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience.

§627.736, Fla.Stats. (2008).

Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974), this Court recognized that the assurance of the "speedy payment" of a claimant's medical bills, in exchange for the loss of the former right to recover for pain and suffering rendered the statute constitutional.

> In exchange for the loss of a former right to recover - upon proving the other party to be at fault - for pain and suffering, etc., in cases where the thresholds of the statute are not met, *the injured party is assured* ***a speedy payment*** *of his medical bills and compensation for lost income from his own insurer*, even where the injured party was himself clearly at fault. ... the provisions of F.S. s 627.737, F.S.A., do provide a reasonable alternative to the traditional action in tort, and therefore do not violate the right of access to the courts guaranteed by Art. I, s 21, Fla. Const.

296 So.2d at 15 (emphasis added).

"Speedy payment" of medical bills in exchange for sacrificing traditional tort remedies is the only thing that stands between the No-Fault law and a determination that the law is unconstitutional. *See also Verdicia v. American Risk Assur. Co.,* 543 So.2d 321, 322 (Fla. 3d DCA 1989)(affirming declaratory judgment that Fla.Stats. §627.739(1) [barring a tort remedy against a tortfeasor for the PIP deductible] is constitutional "because a reasonable alternative is provided therefor by the entire automobile no-fault scheme, namely, prompt payment for a reasonable portion of the damages sustained by the injured party."); *Chapman v.*

Dillon, 415 So.2d 12 (Fla. 1982) (considering the constitutionality of §627.737 [lowering PIP benefits and increasing amount of permitted optional deductibles] : "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. . . . Hence it was the fact that injured parties were assured prompt recovery of their major and salient economic losses, not all of their economic losses, which this Court found dispositive in *Lasky*. ... The amount of PIP coverage that is provided is sufficient to prevent a party from being forced into dire financial circumstances and accepting unduly small settlements. ... Thus we find that in most instances the legislatures objectives of insuring prompt recovery of expenses without protracted litigation are still being met.")

Thus, the virtual guarantee of, and the speed within which, such claims must be paid is fundamental to the Statute's scheme and all of the PIP Statute's provisions must be construed with that statutory scheme in mind. Interpreting the PIP Statute in any other manner renders it unconstitutional. *Ivey, supra*; Fla.Stats. §627.736(7)(a). The Statute was enacted for the benefit of the public, not the insurance industry and, thus, must be interpreted in favor of the insured - - not the insurer.

"Swift and virtually automatic" payment of medical bills must be every

courts' primary concern when interpreting the statute or any insurance policy that is presumed to incorporate the statute. *Ivey, supra.* Since PIP coverage is *mandatory* in Florida, this Court has been particularly mindful of ensuring that Florida citizens get what they are statutorily forced to pay for, limited payment of medical bills for which they were forced to give up their right to traditional tort remedies - - *See Custer, supra; Ivey, supra; Progressive Exp. Ins. Co. v. Louis Menendez*, 35 So.3d 873 (Fla. 2010).

The imposition of an EUO - - and under most insurance policies, as many EUOs as the insurer "reasonably" requires - - serves no purpose other than to delay the payment of PIP benefits indefinitely.

Any information that an insurer allegedly requires within 30 days of receiving notice of a claim can be obtained more quickly, through less intrusive, less intimidating, less time-consuming, and less burdensome methods. Indeed, the "PIP Package" that insureds receive upon making a claim, when coupled with the mandatory IME that an insured must attend provide insurers with more than ample information to "investigate" a PIP claim in order to make "speedy" payment. *See United Auto. Ins. Co. v. Francisco Diaz*, 18 Fla. L. Wkly. Supp. 348a (Fla. 11th Jud. Cir., February 3, 2011).

In *Diaz, supra*, the circuit appellate court determined that United Auto

presented no evidence of prejudice resulting from the insured's missed EUO where United's own adjuster testified that United had already obtained all of the information that it would have obtained from an EUO. The court stated:

> [The adjuster] then testified that the purpose of the EUO is: to check that documents received are accurate and to see the type of treatment the insured is receiving, how the accident happened, whether there are prior injuries or accidents, whether there is any bodily injury claim or other type of suit involved, to verify documents already received, to obtain information about household members, information about the accident, how the accident occurred, the injuries suffered by the insured, the treatment received, whether treatment is helping, whether there are prior injuries unrelated to the auto accident. She further testified that the IME provides United with information about the injuries sustained, information about the accident, and whether treatment and bills are reasonable, related and necessary.
>
> The record demonstrates that United received all of the information that Ms. Meza requested the EUO Department obtain, and more, from the information provided to it by Mr. Diaz in: (1) a Claim Report, which provided the circumstances of the accident and the injuries that Mr. Diaz sustained, the name, address and contact information of the other driver involved in the accident; (2) his attendance at two IMEs; (3) a police report provided by Mr. Diaz at Untied's [sic] request: (4) a Statement of Drive, which provided information about Mr. Diaz, his address, contact information, the location of the accident, the type of vehicle involved in the accident, whether the insured was the driver of the passenger, and information about the other driver; (5) an attending physician's report and Mr. Diaz's medical records from his treating physicians, which provided a

> medical history, including whether Mr. Diaz had any previous accidents or injuries; (6) the medical records also included information about the treatment that Mr. Diaz was receiving and his improvement and progress with the treatment; and, (7) an affidavit provided by Mr. Diaz at United's request, which provided information about Mr. Diaz, his address, vehicles in the household, household members, an application for No-Fault Benefits, provided by Mr. Diaz at the request of United, which provides information about the insured, address, telephone number, date of birth, how the accident happened, the date of the accident, the time of the accident, the address of the accident, if the insured went to the hospital, information regarding the providers, employment information, whether there would be additional medical bills, whether there is worker's compensation available, information about all vehicles in the household, authorization for medical information, authorization for wage and salary information.
>
> The adjuster testified that all of the documents were completed to her satisfaction. She further testified that she never looked at all of the documents that Mr. Diaz provided to United until the day she sent the letter of denial based on the missed EUO.

Diaz, supra.

And, yet, the case was *still* litigated for *six* years over the missed EUO.

Diaz demonstrates that, rather than forcing an insured to lose time from work by traveling to an attorney's office or the insurer's offices to sit in a room for hours on end while submitting to interrogation, an insurer could send written *relevant* questions to its insured, requesting that the questions be answered under

oath.

EUOs themselves can delay payment of PIP benefits, but issues relating to insurer defenses relating to EUOs can delay payment for *years*, as was the case in *Mercury Ins. Co. of Fla. v. Dr. Eduardo Garrido, P.A. (a/a/o Eric Dolz)*, 18 Fla. L. Wkly. Supp. 575a (Fla. 11th Jud. Cir., April 7, 2011), which arose out of a 2005 accident and which medical bills were not finally paid until after *six years* of litigation came to an end.

II. The EUO Process is Subject to Rampant Abuse by Insurers

In citing two circuit court appellate opinions in its order, the Eleventh Circuit overlooked another case, in which a circuit appellate court held that an EUO cannot be a condition precedent to recovery of PIP benefits. *See Mercury Ins. Co. of Fla. v. Dr. Eduardo Garrido, P.A. (a/a/o Eric Dolz)*, 18 Fla. L. Wkly. Supp. 575a (Fla. 11th Jud. Cir., April 7, 2011). The case that the Eleventh Circuit Court of Appeals overlooked is a case that demonstrates the potential for abuse of non-statutory EUOs in PIP.

Dolz, supra, provides the perfect example of the ways in which an EUO, in the context of PIP, may be - - and are - - abused.

The insured *appeared* for his EUO at Mercury's request. When Mr. Dolz's counsel terminated the EUO on the basis that Mercury's counsel insisted on asking

questions that were wholly unrelated to his PIP claim, Mercury refused to pay his medical bills alleging a "failure to cooperate" defense. A jury ultimately determined that the insured *did not* unreasonably refuse to submit to the EUO and Mercury appealed. Affirming the jury's verdict, the appellate court set forth the facts of the case, which demonstrate Mercury's abusive EUO practices. The opinion states, in pertinent part:

> The EUO demonstrates - - and it cannot be disputed - - that Mr. Dolz answered all questions asked of him by Mercury's counsel that related to this accident and prior accident. He answered questions about his injuries; the treatment that he sought; whether he had been involved in an earlier accident; what injuries he sustained in the earlier accident, whether he was treated by the same doctor who treated him for injuries he sustained in the earlier accident; how he came to treat with Dr. Garrido; how long his injuries lasted after this accident; whether he had had any injuries prior to the 2005 accident; why he stopped his treatment; whether he related continuing pain to his doctor; whether he sought any further treatment; how much he paid Dr. Garrido; what his diagnosis was; whether Dr. Garrido had diagnosed him with any medical condition; what kind of treatment he had from the earlier accident; whether he had been involved in any other accidents besides the 2005 accident and the accident two to three years earlier.
>
> The questions that Mr. Dolz was instructed *not* to answer by his counsel were questions about an entirely unrelated EUO that Mr. Dolz had attended after an entirely unrelated car accident, at the request of a *different* insurance company, in a matter completely unrelated to this case. Mercury sought information about the types of

> questions asked of Mr. Dolz by another insurance company at an entirely unrelated EUO, whether Mr. Dolz was represented by counsel at the entirely unrelated EUO; and, whether Mr. Dolz's *father* had ever treated with Dr. Garrido. Throughout the EUO, Mercury's counsel issued no fewer than five (5) warnings the Mr. Dolz's refusal to answer the questions was "*a failure to cooperate.*"
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> * * * * *
>
> Moreover, if EUOs are valid policy provisions at all in the context of PIP, they should not be used for purposes of harassment, intimidation or annoyance, nor should EUOs be employed as a trap for the unwary insured. The only reason offered by Mercury's counsel at oral argument for the questions asked by its counsel at Mr. Dolz's EUO was the Mercury has the right to investigate potential fraud No fraud was alleged or even suggested in this case. EUOs should be used "fishing expeditions." If a higher Court determines unequivocally that EUOs are valid provisions in PIP policies, we are confident that any such Court will determine that, while EUOs may be useful investigative tools for insurers, they should not be abused. This case is a prime example of such abuse.

Dolz, supra at *3-*4.

This Court's opinion in *Custer, supra*, highlights United Automobile Insurance Company's attempt to require its insureds to submit to an EUO without legal representation. *Custer, supra* at 1089, n.1.

The potential for abuse of the EUO process, and evidence of the insurance industry's actual abuse of the process, should militate against a determination that

EUOs are valid policy provision in the context of statutory insurance.

FFI's final word on industry abuses of this "investigatory tool" is the fact that insureds do not have the ability to negotiate the terms of insurance policies. If an insured does not want to be subjected to the EUO process, the insured is powerless to write the EUO out of the contract because insurance contracts are contracts of adhesion. Within the context of statutorily mandated PIP insurance, not only is the insured without any ability to negotiate the terms of the insurance contract, the insured is powerless to reject the insurance outright. Thus, Florida consumers *must* purchase the policy and *must* purchase the policy with no ability to negotiate the contract. Essentially, Florida drivers are at the mercy of the insurance industry.[2]

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[2] An adhesion contract is defined as a "standardized contract form offered to consumers of goods and services on essentially [a] "take it or leave it" basis without affording [the] consumer [a] realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing in the form contract." Black's Law Dictionary, 6th Ed.(1990); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999)(stating definition of adhesion contract), *rev. denied*, 763 So. 2d 1044 (Fla. 2000); *Pasteur Health Plan, Inc. v. Salazar,* 658 So. 2d 543, 544 (Fla. 3d DCA 1995) (also stating the definition of an adhesion contract), *rev. denied*, 666 So. 2d 901 (Fla. 1996).

Florida courts have long held that insurance policies are contracts of adhesion, and as such should be construed in the light most favorable to the insured. *See Firemans Fund Ins. Co. of San Francisco, Cal. v. Boyd*, 45 So. 2d 499, 501 (Fla. 1950) ("[a] contract of insurance prepared and phrased by the insurer is to be construed liberally in favor of the insured and strictly against the

III. EUOs are Contrary to the Statutorily Mandated Coverage and the Terms and Limitations Permitted by the PIP Statute.

Because of the nature of PIP insurance, this Court, and district courts following this Court, have consistently prohibited policy exclusions, limitations, and non-statutory conditions on coverage controlled by statute. *See Custer, supra, citing Flores v. Allstate Ins. Co.*, 819 So.2d 740, 745 (Fla. 2002); *Salas v. Liberty Mut. Fire Ins. Co.*, 272 So.2d 1, 5 (Fla. 1972); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So.2d 229, 232-34 (Fla. 1971); *see also Diaz-Hernandez v. State Farm Fire & Cas. Co.*, 19 So.3d 996, 1000 (Fla. 3d DCA 2009); *Vasques v. Mercury Cas. Co.*, 947 So.2d 1265, 1269 (Fla. 5th DCA 2007).[3]

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insurer, where the meaning of the language used is doubtful, uncertain or ambiguous."); *Mitchel v. Cigna Property & Casualty Ins. Co.*, 625 So. 2d 862, 864 (Fla. 3d DCA 1993) ("insurance policies in general, and exclusions in particular, are interpreted strictly against the carrier"); *Stuyvesant Ins. Co. v. Butler,* 314 So. 2d 567 (Fla. 1975).

[3] In response to the Court's opinion in *Custer, supra*, and at the request of the insurance industry, the Legislature has made compliance with an EUO provision in a PIP policy mandatory in the 2013 PIP Statute. *See* §627.736(6)(g). Compliance with such a policy term is now a condition precedent to recovery of PIP benefits.

The new mandatory provision states, in pertinent part:

> (g) An insured seeking benefits under ss. 627.730 – 627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. The

And, because of the nature of statutorily mandated insurance, this Court has unequivocally held that "PIP insurance is markedly different from homeowner's/tenants insurance, property insurance, life insurance, and fire insurance, which are not subject to statutory parameters and are simply a matter of contract not subject to statutory requirements. *See Custer, supra* at 1089, n.1.

Quashing the Third District's opinion, which held that an IME is a condition precedent to recovering PIP benefits, this Court distinguished those cases, like *Goldman v. State Farm Gen. Ins. Co.*, 660 So.2d 300 (Fla. 4th DCA1995), on which the Third District relied. *See Custer, supra* at 1091.

> *Goldman* involved a *homeowner's* insurance policy and the insured's failure to attend an examination under oath pursuant to the contractual terms of the policy, which has no application in the statutorily required coverage context. ... The Florida No-Fault statute is mandatory and does not recognize such a condition. It is therefore invalid and contrary to the statutory terms.

> scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. Compliance with this paragraph is a condition precedent to receiving benefits. An insurer that, as a general business practice as determined by the office, requests an examination under oath of an insured or an omnibus insured without a reasonable basis is subject to s. 626.9541.

§627.736(6)(g), Fla. Stats. (2013).

Custer, supra at 1091 (italics in original, underscore added).

In FFI's view, this Court has unequivocally held that EUOs are not conditions *at all* - - neither precedent nor subsequent - - in the context of PIP. Indeed, the PIP Statute governs *when* benefits are due, i.e., "as loss accrues, upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy ... ." Fla.Stats. §627.736(4). The statute does *not* say that benefits are due only once an insured attends an EUO.

Yet, notwithstanding that this Court has determined that EUOs in the context of PIP are contrary to the PIP Statute, the Eleventh Judicial Circuit panel in *State Farm Fire & Cas. Co. v. Suncare Phys. Therapy, Inc. (a/a/o Cedrole Henrisma),* 18 Fla. L. Wkly. Supp. 776a (Fla. 11th Jud. Cir., July 13, 2011), while purporting to give "deference" to this Court's perspective, concluded that this Court's discussion of EUOs was "*obiter dicta*," and further concluded that an EUO in a PIP policy "functions as a valid contractual provision," *Suncare, supra* at *2, explicitly referencing the very case that this Court held "has no application in the statutorily required coverage context" - - the *Goldman* case. *Custer, supra* at 1091. Relying on *Goldman, supra*, the *Suncare* panel stated that "[t]he obligation to attend an EUO stems from contract," *Suncare, supra* at *3, notwithstanding that this Court had already determined that EUOs are contrary to the terms of the No-

Fault law.

Similarly, *Shaw v. State Farm Fire & Cas. Co.*, 37 So.3d 329 (Fla. 5th DCA 2010) *en banc*, seems to have added to the Eleventh Circuit Court of Appeals's quagmire because the Fifth District, without benefit of this Court's subsequent opinion in *Custer* six months later, included a statement to the effect that an EUO qualifies as a condition precedent to recovery of policy benefits. *Shaw, supra* at 331. The *Shaw* court - - again without benefit of this Court's subsequent *Custer* opinion - - came to its conclusion by relying upon *Goldman, supra*. Moreover, the parties in *Shaw* did not dispute that an EUO was a condition precedent because that was not the issue presented on appeal.

The Fifth District's decision in *Shaw* should not influence this Court's answer to the certified question for several reasons: (1) the issue of whether an EUO is a condition precedent to recovery of PIP benefits was not the issue presented to the Fifth District; (2) the Fifth District did not have the benefit of this Court's subsequent analysis of statutorily mandated insurance as opposed to non-statutory insurance; and, (3) the Fifth District did not have the benefit of this Court's articulated distinctions between statutory and non-statutory insurance, so *Shaw's* reliance on *Goldman, supra*, would have altered the analysis.

Prior to this Court's opinion in *Custer*, no Florida court had ever been

squarely presented with the issue of whether an EUO can be a condition precedent to recovery of PIP benefits, although many courts had referred to EUOs in passing within myriad decisions dealing with purported EUO defenses.[4] Because this Court has now unequivocally distinguished non-statutory insurance cases from statutory insurance cases, earlier cases that discussed EUOs in the context of PIP, which relied upon non-statutory insurance cases, like *Goldman, supra*, the cases on which courts have relied in the past are no longer applicable.

This Court has now explained why an EUO cannot be a condition precedent to the recovery of statutorily mandated benefits, and should answer the certified question in the negative for all of the reasons explained in the Court's *Custer* opinion.

Finally, as mentioned earlier, the Eleventh Circuit's order mistakenly states that, "[t]o date, *Diaz* is the only Florida case that clearly holds that an EUO cannot

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[4] There can be no question that an EUO cannot be a condition precedent to filing suit for PIP benefits, because the PIP Statute contains only a single condition precedent to filing suit - - and that is the submission of a notice of intent to initiate litigation, commonly referred to as a pre-suit Demand Letter. *See* Fla.Stats. §627.736(10).

be a condition precedent to PIP recovery."[5] (Order at 7).

In addition to *Diaz, supra*, the circuit appellate panel of the Eleventh Judicial Circuit, in *Mercury Ins. Co. of Fla. v. Dr. Eduardo Garrido, P.A. (a/a/o Eric Dolz)*, 18 Fla. L. Wkly. Supp. 575a (Fla. 11th Jud. Cir., April 7, 2011), which was discussed earlier as an example of industry abuse of the EUO process, held that "an EUO cannot be a condition precedent to filing a lawsuit for PIP benefits or to the recovery of PIP benefits, because cases that discuss EUOs as a condition precedent do not deal with statutorily mandated insurance coverage." *Dolz, supra* at *4, *citing Custer, supra.*[6]

Mr. Dolz's medical bills remained unpaid for *six years* during the litigation of Mercury's purported EUO defense.

Affirming a summary judgment in favor of a medical provider on State Farm's purported EUO defense, the circuit appellate panel in *State Farm Mut. Ins. Co. v. All X-Ray Diag. Svcs., Inc. (a/a/o Angel Estafan)*, 19 Fla. L. Wkly. Supp. 170a (Fla. 11th Jud. Cir., November 18, 2011), issued a citation opinion, citing

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[5] *See United Auto. Ins. Co. v. Francisco Diaz*, 18 Fla. L. Wkly. Supp. 348a (Fla. 11th Jud. Cir., February 3, 2011).

[6] *Dolz* was decided a year before the Eleventh Circuit Court of Appeals issued its Order.

Custer, supra, and *Diaz, supra*.[7]

Mr. Estafan's medical bills remained unpaid for *four years* during the litigation of State Farm's purported EUO defense.

Yet another circuit appellate panel in *United Auto. Ins. Co. v. Dr. Marshall Bronstein, D.C. (a/a/o Sherita Small)*, 19 Fla. L. Wkly. Supp. 83b (Fla. 11th Jud. Cir., November 2, 2011), held that an EUO cannot be a condition precedent to recovery of PIP benefits, relying on this Court's discussion in *Custer, supra. See Small, supra* at *3. The Court found that, if an EUO is a valid PIP policy provision at all, it can only be a condition subsequent that would preclude the insured's recovery of PIP benefits subsequent to an unreasonable refusal to submit to an EUO. Notably, the Court affirmed summary judgment in favor of the medical provider because United's policy contained the very language that this Court determined was invalid as a matter of law, i.e., requiring its insured to submit to an EUO without counsel. *Id.*

Ms. Small's medical bills remained unpaid for *six years* during the litigation of State Farm's purported EUO defense.

Finally, *subsequent* to the Eleventh Circuit Court of Appeals's April 3,

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[7] *Estafan, supra*, was decided five months before the Eleventh Circuit Court of Appeals's Order.

2012, order, another circuit appellate panel in the Eleventh Judicial Circuit recently issued an opinion rejecting State Farm's position that an EUO is a condition precedent to recovering PIP benefits. *See Central Therapy Center, Inc. (a/a/o Enrique Arrieta) v. State Farm Fire & Cas. Co.*, FLWSUPP 1908ARRI (Fla. 11th Jud. Cir., April 24, 2012). That circuit court panel determined that this Court's decision in *Custer, supra*, finds that an EUO cannot be a condition precedent to filing suit or to recover of PIP benefits.

Mr. Arrietta's medical bills remained unpaid for *six years* during the litigation of State Farm's purported EUO defense.

CONCLUSION

Floridians for Fair Insurance, Inc., submits that the Court should issue an opinion answering the certified question in the negative for the reasons set forth herein.

EUOs are not included in the PIP Statute; impose additional terms on insureds that were never contemplated by the legislature; are subject to industry abuses; and only serve to delay the payment of PIP benefits.

The insurance industry may employ far less intrusive, intimidating and harassing methods by which to "investigate" PIP claims, allowing for the "swift and virtually automatic" payment of medical bills.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Amicus Brief filed on behalf of Floridians for Fair Insurance, Inc., has been computer generated in Time New Roman 14-point font, in compliance with Fla.R.App.P. 9.210(a).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 25th day of June, 2012, to: JUAN C. MONTES, ESQ., Lidsky & Montes, *Counsel for Appellant Nunez*, 145 East 49th Street, Hialeah, Florida 33013; SUZANNE Y. LABRIT, ESQ., Shutts & Bowen, *Counsel for Appellee GEICO*, 4301 West Boy Scout Boulevard, Suite 300, Tampa, Florida 33607; and FRANK A. ZACHERL, ESQ., Shutts & Bowen, *Counsel for Appellee GEICO*, 201 South Biscayne Boulevard, Miami, Florida 33131.

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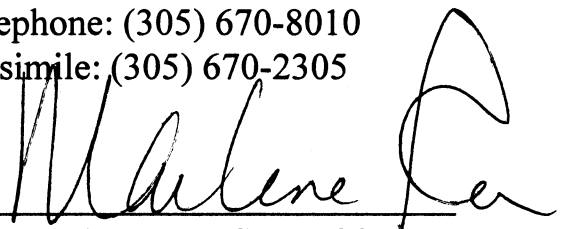
By: 

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