IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-650

MERLY NUÑEZ a/k/a NUNEZ MERLY,

Appellant,

v.

GEICO GENERAL INSURANCE COMPANY,

Appellee.

On Review of a Certified Question from the United States Court of Appeals for the Eleventh Circuit

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APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

This appeal presents a question certified to this Court pursuant to Fla. Const. art. V, § 3(b)(6) by the United States Court of Appeals for the Eleventh Circuit in *Nunez v. GEICO General Insurance Company*, --- F.3d ---, 2012 WL 2548404 (11th Cir. April 3, 2012). Appellee (defendant below) GEICO General Insurance Company is referred to as "GEICO" or "Appellee." Appellant (plaintiff below) Merly Nuñez is referred to as "Nuñez" or "Appellant." Citations to the Eleventh Circuit's opinion appear as "Opinion, p. __" and citations to the record before the District Court (contained in the Record Excerpts Appellant submitted to this Court with her Initial Brief on Certified Question) appear as "R.E.___, ___."

STATEMENT OF THE CASE AND OF THE FACTS

Because this appeal presents a purely legal question, much of the background in Nuñez's statement of the case and facts (In. Br. at 1-3) is superfluous. Simply put, Nuñez filed a putative class action against GEICO, seeking *inter alia* a declaration as to whether under Florida's PIP statutory framework, insurers may require insureds to attend an examination under oath ("EUO") as a prerequisite to receiving PIP benefits. Opinion, pp. 2-3; R.E. 2, ¶34. After GEICO removed the case to federal court, the District Judge granted GEICO's motion to dismiss (R.E. 5); Nuñez appealed only the dismissal of her claim regarding interpretation of the PIP statute. Opinion, p. 3.[1] On April 3, 2012, the Eleventh Circuit issued the Opinion, delaying final judgment in this case pending this Court's resolution of the following certified question:

> Whether, under Fla. Stat. § 627.736, an insurer can require an insured to attend an EUO as a condition precedent to recovery of PIP benefits?

Opinion, pp. 12-13.

SUMMARY OF ARGUMENT

This Court should answer the certified question in the affirmative. Indeed, the question already **has** been answered, definitively and in the affirmative, by the

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[1] It is perhaps more accurate to say that Nuñez abandoned other grounds for appeal. *See* Nuñez's November 12, 2010 Initial Brief at vii and GEICO's February 3, 2011 Answer Brief at 1.

legislature, which in 2012, amended the No-Fault Law to specifically require insureds to comply with policy conditions, including EUOs, as a condition precedent to receiving benefits. Ch. 2012-197, § 10, at 29, Laws of Fla. Under this Court's precedent, when a statutory amendment follows soon after controversy regarding the meaning of the statute, the amendment is properly viewed as a legislative interpretation of the pre-amendment statute. The amendment does not change the substance of the law, but instead provides needed clarification of the law's original meaning as intended by the legislature. That is precisely what has occurred here.

As the Eleventh Circuit's Opinion indicates, the certified question was occasioned by dicta in *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086 (Fla. 2010), which gave rise to controversy regarding whether an EUO is a permissible condition precedent to recovery of benefits under the PIP statute. Prior to 2012, the PIP statute (including the version applicable here)[2] was silent regarding EUOs. After *Custer* was rendered in November 2010, the legislature amended the No-Fault Law to require insureds to comply with all policy terms -- **specifically including those requiring an EUO** -- as a condition precedent to

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[2] The statute in effect at the time the policy was issued governs. *Menendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 876 (Fla. 2010). Nuñez's policy was issued May 23, 2008 (R.E. 2, Ex. A), so Fla. Stats. §§ 627.730-627.405 (2008) (the "PIP statute" or the "No-Fault Law") applies.

receiving benefits. Ch. 2012-197, § 10, at 29, Laws of Fla. The legislature, which was presumptively aware of *Custer* when it enacted the amendment, thus made its view of the matter clear, and the legislature's expression of its own intent in this manner is entitled to substantial weight.

Custer should not be read to suggest that the pre-amendment PIP statute prohibited EUOs. The EUO provision in *Custer* purported to require the insured to appear without counsel, an undisputedly impermissible requirement that is not at issue here. But, to the extent *Custer* construes the PIP statute as prohibiting EUOs, the legislature has unambiguously expressed its disagreement with such a construction by specifically including EUOs among policy terms with which an insured must comply as a condition precedent to receiving PIP benefits. In so doing, the legislature confirmed its longstanding agreement with a century of Florida case law approving the use of EUOs in a variety of insurance contexts, including PIP.

According to Nuñez, the PIP statute's pre-2012 silence regarding EUOs means that EUOs were prohibited until the amendment. But she misapprehends the amendment, which clarified rather than changed existing law. Moreover, before the amendment the law was well settled (and remains so) that PIP policies may contain exclusions and conditions not specifically mentioned in the statute, so long as the exclusions and conditions are not contrary to the statute's purposes.

EUOs are entirely consistent with the PIP statute's purposes of preventing fraud and allowing for reasonable investigation of claims, while ensuring that legitimate claims are paid promptly. Therefore, an EUO is a valid condition precedent to recovery of PIP benefits, both before and after the amendment. This is further confirmed by decisions from other states, in which courts have deemed EUOs to be appropriate and valid in the context of PIP statutes that do not expressly permit EUOs.

ARGUMENT

I. STANDARD OF REVIEW.

"The determination of the meaning of a statute is a question of law and thus is subject to de novo review." *Osborne v. Dumoulin*, 55 So. 3d 577, 581 (Fla. 2011) (reviewing question certified by Eleventh Circuit Court of Appeals regarding interpretation of Fla. Stat. § 222.25(4)).

II. THE LEGISLATURE HAS ANSWERED THE CERTIFIED QUESTION AFFIRMATIVELY, AGREEING WITH A CENTURY OF CASE LAW REGARDING EUOS.

An EUO is a simple procedure whereby an insured gives information under oath concerning the claimed loss. Its purpose, as the United States Supreme Court recognized long ago, is to enable insurers to gather "all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to

protect them against false claims." *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 94-95, 3 S.Ct. 507, 515 (1884).

Prior to 2012, the PIP statute was silent regarding EUOs. But requiring EUOs as a condition precedent to recovery of benefits is something that "insurance companies have done in this state for over a century." *Shaw v. State Farm Fire and Cas. Co.*, 37 So. 3d 329, 337 (Fla. 5th DCA 2010) (Sawaya, J., dissenting). This established practice has met with longstanding judicial approval, from the beginning of the twentieth century to the end and later. *E.g., Southern Home Ins. Co. v. Putnal,* 49 So. 922, 932-33 (Fla. 1909) (holding that EUO requirement in fire insurance policy was "binding and valid"); *Goldman v. State Farm Fire Gen. Ins. Co.,* 660 So. 2d 300, 303 (Fla. 4th DCA 1995), *rev. den.*, 670 So. 2d 938 (Fla. 1996) ("An insured's refusal to comply with a demand for an examination under oath is a willful and material breach of… [a property] insurance contract which precludes the insured from recovery under the policy."); *Edwards v. State Farm Fla. Ins. Co.*, 64 So. 3d 730, 732 (Fla. 3d DCA 2011) (same).

Florida courts also have recognized the validity of EUOs in the specific context of PIP benefits. *See, e.g., Shaw*, 37 So. 3d at 331, 333 ("[i]t is undisputed that a provision in an insurance policy that requires the insured to submit to an EUO qualifies as a condition precedent to recovery of policy benefits"; holding that assignee of PIP benefits had no duty to attend EUO, but recognizing that

assignee would have no claim for benefits if **insured** refused EUO); *Marlin Diagnostics v. State Farm Mut. Automobile Ins. Co.,* 897 So. 2d 469, 470 (Fla. 3d DCA 2004) (same); *Amica Mut. Ins. Co. v. Drummond*, 970 So. 2d 456, 460 (Fla. 2d DCA 2007) ("submission to "EUOs was a condition precedent to [insurer's] duty to provide coverage" for med pay benefits); *United Automobile Ins. Co. v. STAT Technologies, Inc.*, 787 So. 2d 920, 922 (Fla. 3d DCA 2001), *rev. den.*, 817 So. 2d 850 (Fla. 2002) (EUO recognized as means for insurer to verify if loss was payable or "barred because of fraud or some other policy exclusion, and to determine whether the services provided and the amount of the bill were reasonable, related or necessary"); *January v. State Farm Mut. Ins. Co.*, 838 So. 2d 604, 606, 608 (Fla. 5th DCA 2003) (noting insured's argument that PIP statute "did not contemplate" EUOS and declining to "gainsay trial court's conclusion" that insured's refusal to attend EUO was a breach of policy condition barring recovery; remanding for factual determinations regarding timing of request for EUO and insured's refusal thereof); *see also Hungerman v. Nationwide Mut. Fire Ins. Co.*, 11 So. 3d 1012, 1013 (Fla. 2d DCA 2009) (rejecting insured's contention that EUO was "unauthorized" and affirming declaratory judgment in favor of insurer that required EUO in connection with potential uninsured motorist claim).[3]

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[3] Like the pre-amendment PIP statute, the uninsured motorist ("UM") statute is silent as to EUOs.

When the legislature enacted the PIP statute in 1971 and amended it many times thereafter, it was presumptively aware of the widespread use and judicial approval of EUOs. *Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1976), *dism'd*, 429 U.S. 803 (1976) (recognizing the "principle of statutory construction which provides that the Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted"). At no time did the legislature act to prohibit EUOs in the PIP context or otherwise, thus indicating its agreement with their use. *See Regional MRI of Orlando, Inc. v. Nationwide Mut. Fire Ins. Co.*, 884 So. 2d 1102, 1110 (Fla. 5th DCA 2004) (holding that "global billing" for MRI services was not prohibited under No-Fault Law, where legislature was aware of industry practice of global billing and did not act to prohibit practice despite multiple amendments to PIP statute during relevant period); *Martinez v. Fortune Ins. Co.*, 684 So. 2d 201, 203 (Fla. 4th DCA 1996), *rev. den.*, 695 So. 2d 699 (Fla. 1997) (legislature's non-amendment of payment timing provision in subsection 4(b), despite multiple amendments to other sections of PIP statute, constituted legislature's "implied adoption" of judicial construction of subsection 4(b) and "is the most persuasive evidence of what the legislature intended"); *Zommer v. State*, 31 So. 3d 733, 754 (Fla. 2010), 131 S.Ct. 192 (2010) (construing legislative inaction as agreement with judicial construction of statute).

Far from acting to prohibit EUOs, the legislature in 2012 amended the PIP statute -- which previously made no mention of EUOs -- to expressly state that insureds "must comply with the terms of the policy, which include, but are not limited to, **submitting to an examination under oath…as a condition precedent to receiving benefits**." Ch. 2012-197, § 10, at 29, Laws of Fla. (emphasis added). According to Nuñez, this amendment means that EUOs previously were prohibited because they are "now, for the first time, being added to the statute." In. Br. at 18. Nuñez, who cites no authority for this interpretation, wholly misapprehends the amendment's significance. In reality, the amendment confirmed and codified the longstanding, well-settled permissibility and propriety of EUOs as a condition precedent to recovery of PIP benefits.

As the Eleventh Circuit noted in certifying the instant question to this Court, the permissibility of EUOs under the PIP statute has been a matter of controversy since this Court rendered *Custer* -- which contained dicta about a particular EUO provision -- in November 2010. Opinion, pp. 7, 9-12. Where, as here, a statutory amendment is enacted "soon after controversies as to the interpretation of the original act arise," the amendment may be viewed as a "**legislative interpretation of the original law** and not as a substantive change thereof." *Lowry v. Parole and Probation Comm'n*, 473 So. 2d 1248, 1250 (Fla. 1985) (emphasis added). Such amendments, which serve to "clarify rather than change existing law," are entitled

to "substantial weight in construing the earlier law." *Matthews v. State*, 760 So. 2d 1148, 1150 (Fla. 5th DCA 2000); *see also Ivey v. Chicago Ins. Co.*, 410 So. 2d 494, 497 (Fla. 1982) ("The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.")

Under this Court's precedent, the legislature is "presumed to know the judicial constructions of a law when amending that law." *Zommer*, 31 So. 3d at 754. The legislature was thus presumptively aware of *Custer* when it enacted the 2012 amendment, which is properly construed as a confirmation that EUOs were indeed permissible under the PIP statute prior to the amendment. Under such circumstances, the amendment should be viewed as clarifying the original legislative intent. *See Vasques v. Mercury Cas. Co.*, 947 So. 2d 1265, 1269-70 (Fla. 5th DCA 2007) (holding that court's interpretation of PIP statute in effect prior to an amendment was "validated" by the amendment).

When the legislature amends a statute, it is "presumed to have adopted prior judicial constructions of [the] law unless a contrary intention is expressed in the new version." *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1043 (Fla. 2008). Here, the legislature's intention was expressed with clarity by the 2012 amendment: the legislature agreed with the established body of law ratifying the use of EUOs, and it disagreed with any suggestion in *Custer* that EUOs might not be allowed in the PIP context. *See G.E.L. Corp. v. Dept. of Environmental Protection*, 875 So. 2d

1257, 1262-63 (Fla. 5th DCA 2004) (holding that statutory amendment following administrative decisions "clearly indicates that the Legislature did not agree with those interpretations and sought to clarify the meaning of the statute through the newly enacted provision"); *see also Millennium Diagnostic Imaging Ctr., Inc. v. Sec. Nat. Ins. Co.*, 882 So. 2d 1027, 1029-30 (Fla. 3d DCA 2004) ("Given the cavalcade of litigation regarding this issue, we believe that the amendment was enacted as a clarification of the legislature's intent....")[4]. The 2012 amendment, following so soon after *Custer*, should therefore be taken as a definitive legislative answer to the certified question.

III. *CUSTER* SHOULD NOT BE READ TO PROHIBIT EUOS.

Given this Court's characterization of EUOs as "not relevant"[5] to the appeal in *Custer*, the Eleventh Circuit concluded that the "statements regarding EUOs in *Custer* are *dicta* and not binding." Opinion, pp. 5-6, 9. Even if the Eleventh Circuit's conclusion is deemed inaccurate, the reference in *Custer* to a "purported verbal examination under oath without counsel" has little, if any, bearing here since the certified question does not involve such a condition, and the EUO provision in this case does not contain one.

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[4] As in *Millennium*, "the intention to clarify is further illustrated by the legislative staff analyses to the amendment." *Id.* at 1030. Here, the staff analyses to the 2012 amendment specifically discuss *Custer*. *See, e.g.*, House of Representatives Final Bill Analysis (May 7, 2012), CS/CS/HB 119, at 5.

[5] 62 So. 3d at 1089, n.1.

Custer should not be read to prohibit EUOs in the pre-amendment PIP context because (a) EUOs were not at issue in *Custer* and (b) this Court's discussion of EUOs in *Custer* was limited to a particular EUO condition that purported to exclude the insured's counsel, undisputedly an impermissible requirement. *Custer* arose out of an insurer's denial of PIP benefits based on the insured's failure to attend an independent medical examination ("IME").[6] This Court's analysis focused on the standard for second-tier certiorari and considerations specific to IMEs. The validity of EUOs under the PIP statute was never at issue.

It appears that the principal reason this Court discussed EUOs was the Third District's erroneous description of a letter as relating to an IME, when, in fact, the letter referenced an EUO which prohibited the presence of the insured's counsel:

> Although the district court of appeal mentions a letter of September 9, 2002, that letter is related to a purported

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[6] IMEs and EUOs are functionally distinct in the PIP context. Fla. Stat. § 627.736(7)(a) specifies the requirements for an IME where a PIP insurer withdraws payments to a treating physician; subsection (b) provides that if a claimant "unreasonably refuses" to submit to an IME, the PIP carrier is "no longer liable for subsequent benefits." Id. EUOs enable insurers to determine whether a claim is reasonable, related or necessary for purposes of paying -- or denying -- benefits under Fla. Stat. § 627.736(4)(b). *See Partners in Health Chiropractic v. United Automobile Ins. Co.*, 21 So. 3d 858, 860-861 (Fla. 3d DCA 2009). An IME report may constitute "reasonable proof" supporting denial of benefits under § 627.736(4)(b), but such a report "is not necessary to deny a claim" under subsection (4)(b), which "requires only "reasonable proof" that a claim is not reasonable, related or necessary." *Partners in Health*, 21 So. 3d at 863.

verbal examination under oath with a prohibition of the presence of counsel for the insured, not a medical exam. **The concept of a verbal examination under oath is not relevant due to the posture of this case and positions of the parties.** The only argument in this case at the trial court, circuit court and district court of appeal was based upon medical exams and the failure to attend medical exams. **A purported verbal exam under oath *without counsel* in the PIP context is invalid and more restrictive than permitted by the statutorily mandated coverage** and the terms and limitations permitted under the statutory provisions.

Custer, 62 So. 3d at 1089, n.1 (emphasis added).[7]

For these reasons, *Custer* should not be read to prohibit EUOs in the PIP context. To the extent *Custer* casts doubt upon the permissibility of EUOs in the PIP statutory framework, any such doubt has been unambiguously resolved by the 2012 amendment. The legislature's expression of its own intent should be accorded substantial weight, and the certified question should be answered in the affirmative.

IV. AUTHORIZATION OF IMES IN THE PRE-AMENDMENT STATUTE DOES NOT IMPLY PROHIBITION OF EUOS.

Nuñez argues that because the pre-2012 PIP statute does not mention EUOs, but permits insurers to take "other forms of permissible discovery" including

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[7] *Custer* also mentions EUOs in the "Facts and Procedural History" section of the opinion, 62 So. 3d at 1091, pointing out that the Third District quashed the circuit court's appellate decision based on *Griffin v. Stonewall Ins. Co.*, 346 So. 2d 97 and *Goldman,* 660 So. 2d 300. This Court clarified and distinguished those opinions, but as the Eleventh Circuit observed, this was primarily to "outlin[e] the complex procedural history of the case." Opinion, p. 6.

IMEs, the statute must be construed to prohibit EUOs as a condition precedent to recovery of PIP benefits. In. Br. at 8-10. Nuñez is mistaken.

As an initial matter, Nuñez relies exclusively on *Industrial Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337 (Fla. 1983), which held that the "authorization of deductibles in the enumerated situations implies the prohibition of them in all other situations according to the rule of statutory construction *inclusio unis est exclusio alterius*." But *Kwechin* is distinguishable because the applicable version of the PIP statute is altogether silent as to EUOs. Therefore, the *inclusio unius* principle cannot be invoked to "imply" that EUOs are somehow prohibited. *E.g., U.S. Sec. Ins. Co. v. Cahuasqui,* 760 So. 2d 1101, 1105 (Fla. 3d DCA 2000), *rev. dism'd*, 796 So.2d 532 (Fla. 2001) ("[t]his rule that the inclusion of one means the exclusion of another, however, does not mean that the application of one precludes the additional application of another"; finding that where legislature did not specify that § 627.428 was the **only** fee authorizing statute, offer of judgment statute also could apply in dispute over PIP benefits).

Nuñez's argument that since the statute "permit[s]" PIP insurers to require IMEs but does not mention EUOs, EUOs are somehow prohibited or are an "impermissible" condition (In. Br. At 9-10) is likewise flawed. Fla. Stat. § 627.736(7)(a) is permissive, not mandatory, and "permissive provisions should not be read to impose an implied prohibition" absent some "clear warrant for doing

so in the statutory context." *Nationwide Mut. Ins. Co. v. Jewell*, 862 So. 2d 79, 85 (Fla. 2d DCA 2003), *approved*, *Allstate Ins. Co. v. Holy Cross Hospital, Inc.*, 961 So. 2d 328 (Fla. 2007).[8] There is no "clear warrant" to prohibit EUOs in the PIP context.

Furthermore, as the *Jewell* court aptly explained, "[i]f 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.* In other words, if the legislature had intended to prohibit EUOs, it could have done so; it did not, and its authorization of IMEs in no way supports the conclusion that EUOs were intended to be prohibited. In fact, as discussed above, the legislature's recent amendment to the PIP statute wholly supports the conclusion that EUOs always have been permissible.

V. EUOS ARE CONSISTENT WITH THE PURPOSES OF THE PIP STATUTE.

Even if the 2012 amendment is not taken into account (though it clearly should be), EUOs are a valid condition precedent to recovery of PIP benefits under

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[8] In *Jewell*, the Second District found that preferred provider contracts, under which medical providers agreed to accept reduced rates, did not violate the PIP statute *inter alia* because no "provision of the no-fault law" or of the applicable policies prohibited such action. 862 So. 2d at 83. This Court approved *Jewell* in *Holy Cross,* finding that even though the subject PIP policies did not mention preferred providers, the PIP statute did not expressly prohibit preferred provider contracts, so an insurer could "contract with a provider to create an agreed-upon fee schedule for reduced rates." *Holy Cross*, 961 So. 2d at 335.

the pre-amendment statute. The applicable version of the statute is silent as to EUOs. Since there is no "actual language of the statute" to construe, Nuñez's argument regarding construction of statutory language (In. Br. at 7-8) is irrelevant. Instead, the inquiry is whether a policy term requiring an insured to attend an EUO is a valid condition precedent to recovery of PIP benefits. It is.

As this Court has explained, in the context of statutorily mandated coverage like PIP and UM, there is no "blanket prohibition against an insurance policy containing general conditions affecting coverage or exclusions on coverage as long as the limitation is consistent with the purposes of the [PIP] statute." *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 745 (Fla. 2002); *see also* Fla. Stat. § 627.414(3) (authorizing insurers to include in policies "additional provisions not inconsistent with the code and which are…[d]esired by the insurer and neither prohibited by law nor in conflict with any provisions required to be included therein").

In *Flores*, this Court outlined a two part test to determine the validity of policy conditions affecting statutorily mandated coverage: the reviewing court must "determine whether the condition or exclusion unambiguously excludes or limits coverage, and…if so, whether enforcement of…[it] would be contrary to the purpose" of the statute. *Id.*; *see also Vasques,* 947 So. 2d at 1269 (applying *Flores* test in PIP context). Here, there is no issue as to ambiguity, so the question is whether enforcement of an EUO condition is "contrary to the purpose" of the PIP

statute. It is not. On the contrary, EUOs are indispensable tools for preventing insurance fraud, and they are consistent with the prompt investigation and payment of claims.

A. Prevention of Fraud.

EUOs are entirely consistent with the clear legislative intent to eliminate "significant dishonesty in connection with the claiming of PIP benefits." *Chiropractic One, Inc. v. State Farm Mut. Automobile, Inc.*, --- So. 3d ---, 2012 WL 2465012, *3 (Fla. 5th DCA June 29, 2012); *see also Flores*, 819 So. 2d at 751, n.7 ("We recognize, of course, that this State strongly discourages insurance fraud"); *U.S. Sec. Ins. Co. v. Cimino*, 754 So. 2d 697, 702 (Fla. 2000) (the "potential for fraud at the confluence of medical, legal, and insurance industries is virtually unlimited") (citation omitted). During the 2001 amendments to the No-Fault Law, the legislature included "findings stating the purpose of the law and voicing its growing concern regarding fraud in PIP benefits." *Regional MRI of Orlando,* 884 So. 2d at 1110; *see also Chiropractic One, Inc.,* at *3-4 (in 2003 amendments to the PIP statute, legislature "declared that the goals underpinning the no-fault laws have been significantly compromised due the fraud and abuse that has permeated the PIP insurance market"); *Geico Gen. Ins. Co. v. Virtual Imaging Svcs., Inc.*, --- So. 3d ---, 2012 WL 1414694, *8 (Fla. 3d DCA April 25, 2012), *review pending*, Case No. SC12-905 (2007 amendments/reenactment of PIP

statute occurred "[a]gainst a backdrop of widespread billing fraud") (Rothenberg, J., concurring). And the 2012 amendments to the No-Fault Law -- which include the provision requiring insureds to comply with EUO provisions "as a condition precedent to receiving benefits" -- are primarily directed to curtailing PIP fraud. *E.g.*, Senate Committee on Banking and Insurance, 2012 Summary of Legislation Passed, CS/CS/HB 11, at 1-2; House of Representatives Final Bill Analysis (May 7, 2012), CS/CS/HB 119, at 5.

EUOs effectuate the state's interest in preventing PIP fraud by enabling an "insurer to corroborate the claim by obtaining information that is primarily or exclusively within the possession of the insured." *State Farm Mut. Auto. Ins. Co. v. Curran*, 83 So. 3d 793, 819 (Fla. 5th DCA 2011) (Sawaya, J., dissenting), *review granted*, 86 So. 3d 1114 (Fla. Feb. 29, 2012). EUOs also, quite simply, "afford the insurer an opportunity [to] investigate whether or not the insured was and is telling the truth." *Id.* at 820 (citation omitted). Indeed, over a century ago, the United States Supreme Court recognized the self-evident utility of EUOs to fraud prevention. *See Claflin,* 110 U.S. at 94-95 (stating that EUOs protect insurers against "false claims").

The importance of EUOs in combating fraud was cogently discussed in *Cruz v. State Farm Mut. Automobile Ins. Co.,* 648 N.W.2d 591 (Mich. 2002), a decision involving a no-fault statute that, like the pre-2012 Florida statute, was silent

regarding EUOs.[9] *Id.* at 592. In *Cruz*, the Michigan Supreme Court granted leave to "determine whether…the legislature's silence regarding what the parties could agree to with regard to claim discovery should be held to have precluded all methods not mentioned, including EUOs," (*i.e.*, exactly the argument that Nuñez here makes). *Id.* at 593. Concluding that EUOs were enforceable as long as they did not conflict with statutory requirements, the Court explained the long history and beneficial purposes of EUOs:

> Examination under oath provisions, which require the insured to answer questions about the accident and damages claimed, existed in many types of insurance policies long before the advent of no-fault automobile insurance. Their **purpose, in part, was to enable insurers to gather facts so as to discover and eliminate fraudulent insurance claims. The general difficulty of determining when a claim was not valid has been described in scholarly writings in the insurance field as being of "staggering proportions."** Given this problem, and the potential ability of EUOs and other discovery vehicles to address it, EUOs in policies have been viewed favorably by courts. Furthermore, **as beneficial as EUOs and similar discovery vehicles have been when employed in policies that may be**

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[9] The Michigan No-Fault Law is quite similar to Florida's in numerous other respects. Michigan (1) deems PIP benefits overdue if not paid within 30 days (*see* Mich. Comp. Laws §500.3142; Fla. Stat. § 627.736(4)(b)); (2) authorizes insurers to require "reasonable proof" of the legitimacy of a claim (*id.*); (3) allows IMEs (*see* Mich. Comp. Laws §§500.3151-.3152; Fla. Stat. §627.736(7)(a)); (4) disallows coverage on the basis of fraud (*see* Mich. Comp. Laws §500.2103(1)(c); Fla. Stat. § 627.736(4)(h)); and (5) seeks to balance the tension between deterrence of fraud and swift payment of benefits. *Compare* Mich. Comp. Laws §§500.3142, 500.2103(1)(c) *with* Fla. Stats. §§627.736(4)(b), (4)(h).

> **purchased at the insured's discretion, their potential value is even greater when the coverage is, as in this case, mandated by law.**

Id. at 595-96 (emphasis added) (internal citations omitted).

As the Michigan Court further explained, EUOs in the PIP context protect the interests of insureds as well as insurers:

> [T]his **decision affords insurers access to one potentially valuable tool to prevent fraud**. Further, it does so only under circumstances that are consistent with the requirements of the no-fault statute. To characterize this as any kind of "tilting" [in favor of the insurer] is to misunderstand the importance of eliminating fraud, **not just to insurers, but also to those other insureds who pay higher insurance premiums when fraud goes undetected**.

Id. at 598 (emphasis added);[10] *see also Allstate N.J. Ins. Co. v. Saddle Brook Pain Ctr.*, 2009 WL 2455532, **1, 5 (N.J. Sup. Ct. App. Div. 2009) (holding that insurer may deny PIP benefits based on insured's failure to attend EUO, and noting "the public policy of combating insurance fraud, curbing abuse of the no-fault system and reducing insurance premiums"); *Barbosa v. Metro. Prop. And Cas. Ins.*

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[10] *Cruz* reflects that State Farm could not "on the facts [t]here presented" condition benefits payments on submission to an EUO. 648 N.W.2d at 601. Although the opinion is not explicit on this point, it appears that State Farm received "reasonable proof" of the claim, but did not timely request an EUO. *Id.* at 600. And the intermediate opinion reflects that State Farm did not deny PIP benefits until over a year after the accident. *See Cruz v. State Farm*, 614 N.W.2d 689, 692 (Mich. Ct. App. 2000). Thus, despite its holding establishing the propriety of EUOs, the Michigan Supreme Court held that State Farm could not enforce the EUO as a condition precedent to payment of benefits in that specific factual setting.

Co., 1998 WL 845896, *3 (Mass. Super. 1998) ("Allowing an insurer to ferret out potentially false or exaggerated claims through an examination under oath is consistent with, and indeed a necessary part of, the statutory no-fault scheme designed to guarantee the prompt payment of PIP benefits by the insurer without regard to fault."); *Barabin v. AIG Hawaii Ins. Co.*, 921 P. 2d 732, 734-735, 737 (Haw. 1996) (rejecting argument that EUO policy provision was void as not legislatively 'authorized' and affirming summary judgment in favor of insurer that denied PIP benefits based upon insured's refusal to submit to EUO).

If an insured's refusal to attend a timely requested EUO is held not to support denial of PIP benefits, the legislative objective of preventing PIP fraud will be profoundly disserved.

B. Investigation and Payment of Claims.

EUOs are also consistent with the specific directives of the PIP statute with respect to validating and paying claims. PIP benefits are "due and payable as loss accrues, upon receipt of **reasonable proof** of such loss…" Fla. Stat. § 627.736(4)(b) (emphasis added). The insurer's right to reasonable proof affords an insurer "investigative rights" to authenticate the claim. *Amador v. United Automobile Ins. Co.*, 748 So. 2d 307, 308 (Fla. 3d DCA 2000), *rev. den.*, 767 So. 2d 469 (Fla. 2000). As the Third District recognized, "an insurer may define 'reasonable proof' in its policy and, furthermore, may request information that will

aid it in the investigation of a claim." *Id.* The *Amador* court specifically acknowledged that "reasonable proof" could include the requirement that an insured submit to an EUO. *Id.*; *see also United Automobile Ins. Co. v. Rodriguez*, 808 So. 2d 82, 87 (Fla. 2002) (rejecting attempt to limit the term "reasonable proof" in PIP statute to a "medical report").

EUOs do not interfere with the PIP statute's objective of requiring swift payment of benefits. "[T]he policy to ensure swift payment must be balanced against the policy to prevent improper payments." *STAT Technologies, Inc.*, 787 So. 2d at 922. PIP benefits are "overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and the amount of same." Fla. Stat. § 627.736(4)(b). Failure to timely pay benefits that are due exposes an insurer to penalties, including interest, attorneys' fees and costs. *January,* 838 So. 2d at 607; Fla. Stat. § 627.736(4)(g).

The thirty-day period cannot be tolled unless within that time, the "insurer has **reasonable proof** to establish that it is not responsible for the payment." *Crooks v. State Farm Mut. Automobile Ins. Co.*, 659 So. 2d 1266, 1269 (Fla. 3d DCA 1995), *review dism'd*, 662 So. 2d 933 (Fla. 1995) (quoting § 627.736(4)(b)) (emphasis in original); *Amador*, 748 So. 2d at 308 ("The insurer cannot use its investigative rights to extend the 30-day period without reasonable proof that it is not responsible for the claim"); *Palmer v. Fortune Ins. Co.*, 776 So. 2d 1019, 1022

(Fla. 5th DCA 2001), *rev. den.*, 791 So. 2d 1096 (2001) (the "burden is on the insurer to authenticate a claim within the 30-day period....[the insurer] should have either paid the...claims or denied coverage before the 30-day period expired"). Benefits "shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for payment." *Rodriguez*, 808 So. 2d at 86, n.6 (quoting § 627.736(4)(b)); *United Automobile Ins. Co. v. Santa Fe Med. Ctr.*, 21 So. 3d 60, 64 (Fla. 3d DCA 2009) (*en banc*), *rev. den.*, 64 So. 3d 118 (Fla. 2011) ("Section 627.736(4)(b) imposes on the insurer a thirty-day time period in which to pay PIP benefits, **if** the claim is reasonable, related and necessary...a claim is due within the thirty-day period **only** if it is reasonable, related and necessary") (emphasis in original); *Progressive Amer. Ins. Co. v. Stand-Up MRI of Orlando,* 990 So. 2d 3, 8 (Fla. 5th DCA 2008) (since insurer provided "reasonable proof" why it had not paid claims, provider's bills were "never overdue"); *see also Menendez*, 35 So. 3d at 878 (explaining interplay between statutory presuit notice requirements of §627.736(10) with timing provisions of §627.736(4)(b)).

In this context, the propriety of requiring an insured to submit to an EUO as a condition precedent to recovery of benefits is clear. Quite simply, as our legislature has affirmatively recognized, PIP insureds should not be entitled to benefits if they refuse to comply with policy conditions that enable the insurer to evaluate and pay the claim without a lawsuit. *See Curran*, 83 So. 3d at 820-822

(discussing utility of EUOs as investigative tool, propriety of EUOs as a condition precedent to benefits, and noting that prejudice to insurer is inherent when insurer is deprived of right to properly investigate and evaluate a claim before suit is filed) (Sawaya, J., dissenting).

Any contention otherwise should be regarded as a smokescreen. The process is fair and straightforward: upon notice of the claim, the insurer has 30 days to verify that the claim is covered and reasonable, related or necessary, and either pay or deny benefits. Obviously, if benefits are paid, litigation is unnecessary. If the insurer denies benefits based on information obtained *via* a timely requested EUO, the condition precedent is met and the claimant may proceed to a suit on the merits (and if the insurer is wrong about denial, the insurer must pay the claim and applicable penalties). Of course, an insurer that denies payment on a claim and only requests an EUO **after** the 30 day payment period does so at peril of not only paying the claim, but also paying the statutory penalties.

In sum, the law is and should be that EUOs are wholly consistent with the PIP statutory framework, the underlying legislative intent and with case law interpreting EUO conditions in the context of statutorily mandated coverages, including PIP.

VI. NUÑEZ'S CASES ARE INAPPOSITE.

Nuñez cites various cases for the proposition that Florida courts will "invalidate[] exclusions on coverage that are contradictory to the purpose of the statute that imposes the coverage." In. Br. at 10-13. As discussed above, EUOs are consistent with, not contradictory to, the purpose of the PIP statute and are thus permissible under this Court's holding in *Flores*. Moreover, Nuñez's cases are readily distinguishable.

The first two cases warrant little discussion, as they involved policy language that altogether excluded coverage for certain categories of UM claimants. *Salas v. Liberty Mut. Fire Ins. Co.*, 272 So. 2d 1 (Fla. 1972) and *Mullis v. State Farm Mut. Automobile Ins. Co.*, 252 So. 2d 229 (Fla. 1971). In both cases, this Court held that "no policy exclusions contrary to the statute of any of the class of family insureds are permissible" because the UM statute provides for uniform and standard benefits that protect insureds as "if the uninsured motorist had carried the minimum limits of an automobile liability policy." *Salas,* 272 So. 2d at 5 (quoting *Mullis,* 225 So. 2d at 238). Plainly, EUOs do not seek to "exclude" any class of claimants from coverage.

Nuñez also cites *Diaz-Hernandez v. State Farm Fire and Cas. Co.*, 19 So. 3d 996 (Fla. 3d DCA 2009) and *Vasques*, 947 So. 2d 1265, for the general proposition that policy provisions contrary to the public policy of a statute are invalid. In. Br.

at 13. Neither case supports Nuñez's argument. *Diaz-Hernandez* addressed State Farm's policy requirement that an insured to join the uninsured motorist in any action against State Farm for UM benefits. 19 So. 3d at 999. The Third District held this requirement invalid, because it imposed additional burdens on the insured "contrary to the salutary rule that UM coverage contemplates neither no less nor no more than a simple contractual action against the carrier, which may not be turned into a charade in which it is implied to the jury that any other entity's interests are actually involved." *Id.* at 1001. Obviously, EUOs in the PIP context involve no considerations relevant to joinder of tortfeasors in an insured's suit for UM benefits.

Vasques is similarly irrelevant to the issues at hand. There, the Fifth District quashed a circuit court appellate decision affirming denial of PIP benefits where the insureds -- but not the claimant -- lied to the insurer about the accident. The court held that allowing denial of "PIP benefits where someone other than the claimant makes a false statement for the purpose of defeating coverage would violate the well-articulated public policy considerations" underlying PIP. 947 So. 2d at 1270. Again, this scenario has nothing to do with the propriety of an EUO as a condition precedent to recovery of PIP benefits. Furthermore, as discussed above, *Vasques* supports the conclusion that, by the 2012 amendment, the legislature confirmed the propriety of EUOs as a condition precedent to PIP

benefits. *See id.* at 1269-1270 (noting that **after** claim arose, legislature amended PIP statute to limit denial of benefits based on fraud to "circumstance where the one seeking the benefits is the person that committed the fraud").

Nuñez also cites a number of cases to support her contention that Florida courts "reject[] insurers' constant attempts to alter, limit or eliminate [their] obligation to pay PIP claims." In. Br. at 14-16. Putting aside the inflammatory rhetoric, none of Nuñez's cases hold or even suggest that attendance at an EUO is not a valid condition precedent to recovery of PIP benefits.

Nuñez first cites *Crooks*, 659 So. 2d 1266. *Crooks* involved the propriety of an award of attorney's fees to an insured after the insurer refused to "recognize [PIP] claims until they were submitted on a particular in-house claims form," and only paid the claims after suit was filed. *Id.* at 1269. Significantly, the insurer "neither alleged nor attempted to prove that it had 'reasonable proof' that it was not responsible for the underlying claims." *Id.* Instead, the insurer's sole reason for non-payment was that the bills were not submitted on the particular form that the insurer had developed. Had the Court condoned this practice, providers could conceivably have been required to complete a different claims form for each different insurer, which presumably could be changed at any time. EUOs present no such practical challenges and can be jugular to determining whether benefits are due.

Nuñez next cites the First District's decision in *Kaklamanos v. Allstate Ins. Co.*, 796 So. 2d 555 (Fla. 1st DCA 2001). Curiously, Nuñez fails to discuss this Court's decision in the same case, *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003). This Court's opinion makes clear that the issue was whether an insured had standing to sue the insurer when benefits had been denied, but the insured had neither made payment to nor been sued by the provider and the policy provided for indemnification if the insured subsequently were sued. The question presented here has nothing to do with standing, nor whether legally-cognizable damages have been stated, and no indemnification provision is at issue.

Nuñez's reliance on *Amador,* 748 So. 2d 307, is also misplaced. *Amador* involved a PIP insurer's request for an EUO as an attempted retroactive cure for failure to pay claims within the 30 day statutory period. In *Amador*, the insurer (1) received notice of the claims; (2) failed to pay within 30 days; and (3) several months later requested an EUO. *Id.* at 308-309. Not surprisingly, the Third District rejected the insurer's argument that the insured's failure to attend an EUO barred his claim for benefits -- benefits that were owed and past due well prior to the request for an EUO. Nothing in *Amador* suggests that EUOs are inappropriate in the context of PIP benefits. Rather, *Amador* merely holds that a PIP insurer cannot deny a claim on the basis of the insured's refusal to attend an EUO, when the EUO was requested after benefits were already overdue and unpaid.

Ortega v. United Automobile Ins. Co., 847 So. 2d 994 (Fla. 3d DCA 2003), *rev. dism'd*, 859 So. 2d 516 (Fla. 2003) is likewise inapplicable. That case involved a dispute regarding whether an insured had the burden to prove licensure of a medical provider, or whether lack of licensure was an affirmative defense, for which the insurer carried the burden of proof. This obviously has nothing to do with EUOs.

Finally, *Martinez,* 684 So. 2d 201, *Fortune v. Pacheco*, 695 So. 2d 394 (Fla. 3d DCA 1997) and *Palmer,* 776 So. 2d 1019 (In. Br. at 15) all stand for the undisputed proposition that insurers must authenticate PIP claims (and pay benefits that are owed) within the statutory time period. In *Pacheco,* the insurer attempted to circumvent the 30 day time period for authenticating and paying claims based on the insured's failure to submit supporting medical records within 30 days of the notice of loss. The court determined that the insured "fulfills his obligation to furnish medical records upon signing a waiver of confidentiality that allows the insurer to procure the records directly from the provider…." *Id.* at 396. Notably, *Pacheco* undercuts Nuñez's argument that absent express statutory authorization, no conditions can be placed on an insured making a claim for PIP benefits (In. Br. at 8-10), because the PIP statute contains no express requirement that an insured sign a waiver like the one featured in *Pacheco*.

In short, Nuñez's cases in no way establish that EUOs are not a valid condition precedent to recovery of PIP benefits or that EUOs are otherwise impermissible in the PIP context. To the extent Nuñez's cases are at all relevant, they support the conclusion that EUOs are a valid condition precedent to recovery of PIP benefits.

CONCLUSION

For each and all of the foregoing reasons, GEICO respectfully requests that this Court answer the certified question in the affirmative, and remand this case to the Eleventh Circuit for further proceedings consistent with such resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that this brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) because it was prepared using Times New Roman 14-point font.

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