IN THE SUPREME COURT OF FLORIDA

MERLY NUÑEZ,

Appellant,

vs. CASE NO. 12SC-650

GEICO GENERAL INSURANCE COMPANY,

Appellee.
_____/

BRIEF OF AMICI CURIAE
FLORIDA JUSTICE REFORM INSTITUTE
FLORIDA INSURANCE COUNCIL
PERSONAL INSURANCE FEDERATION OF FLORIDA

CYNTHIA S. TUNNICLIFF
Florida Bar No. 0134939
GERALD DON NELSON BRYANT IV
Florida Bar No. 58288
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street, Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: 850/222-3533
Facsimile: 850/222-2126
E-Mail: cynthia@penningtonlaw.com
jbryant@penningtonlaw.com

TABLE OF CONTENTS

PAGE

CITATION OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

FLORIDA LAWS

CITATION OF AUTHORITIES continued

FLORIDA STATUTES

SECONDARY SOURCES

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Florida Justice Reform Institute (the "Institute") is an advocacy organization for civil justice and tort reform, comprised of concerned citizens, businesses, business leaders, and others aligned in their mission to promote fair and equitable legal practices within Florida's civil justice system. The Institute works to restore faith in the Florida judicial system and protect Floridians from the social and economic toll that is incurred from rampant litigation. The Institute regularly appears before legislative, executive, and judicial tribunals in support of PIP reforms, including the use of examinations under oath ("EUOs").

The Florida Insurance Council ("FIC") and the Personal Insurance Federation of Florida ("PIFF") are associations of insurance companies doing business in Florida. A substantial number of FIC and PIFF members are insurers writing motor vehicle insurance coverage which includes personal injury protection ("PIP") coverage. Consequently, FIC and PIFF members have a real interest in the interpretation of section 627.736, Florida Statutes, and will be bound by the decision of this Court in the above-styled case. Both FIC and PIFF advocate for PIP reform before the legislative, executive, and judicial tribunals.

SUMMARY OF ARGUMENT

The legislative history of section 627.736 – part of Florida's Motor Vehicle No-Fault Law – evinces a clear intent to permit insurers to contractually condition payment of PIP benefits on the insured's attendance at an examination under oath.

The Motor Vehicle No-Fault Law (the "Law") was enacted in 1972 to ensure that injured drivers receive prompt payment of benefits for medically necessary treatment while minimizing the costs of automobile insurance for all Florida citizens. However, in the forty years since the Law took effect, the goal of minimizing insurance costs has consistently been undermined by fraud and abuse of the system. A review of the legislative efforts to combat such fraud and abuse reveals that, from the very beginning, the Legislature intended to permit insurers to condition payment of PIP benefits on EUOs.

In 1975, not long after the passage of the No-Fault Law, the Miami-Dade County Grand Jury recognized that statements under oath – or EUOs – should be used to combat PIP fraud. Courts had long recognized EUOs as a permissible tool to combat other types of insurance fraud, so it was logical to employ them in the PIP context. Thus, when the Legislature passed significant reforms to the No-Fault Law the following year, the reforms did not address the use of EUOs because insurance contracts conditioning coverage on EUOs had been consistently permitted by courts even absent statutory authority permitting same.

The Legislature similarly did not address the use of EUOs in any of the relatively minor No-Fault Law reforms over the next two decades or in the major reforms in 2001 and 2003. Again, the legislative silence can be attributed to case law recognizing the use of EUOs – this time specifically in the context of PIP insurance – as well as evidence showing the Legislature was aware of, and approved, the use of PIP-specific EUOs. Consequently, it was not until 2012 that the term "examination under oath" appeared in the No-Fault Law at section 627.736(g) – and then only to clarify any doubts about the permissibility of EUOs that had been raised by Custer Med. Ctr. v. United Auto Ins. Co. Thus, when one examines the entire legislative history of the No-Fault Law, it is clear that from the very beginning the Legislature intended to permit insurers to contractually condition payment of PIP benefits on the insured's attendance at an examination under oath.

ARGUMENT

I. The Early History of the No-Fault Law

The Florida Automobile Reparations Reform Act – later renamed the Florida Motor Vehicle No-Fault Law (the "No-Fault Law" or "Law)" – was enacted in 1971 to replace the traditional tort system of recovery for automobile accidents.[1] When the Law took effect on January 1, 1972, Florida became only the second state to adopt a no-fault system of personal injury protection ("PIP") automobile insurance.[2] In ruling on the constitutionality of the Law, the Florida Supreme Court explained the legislative objectives as follows:

> [T]he legislative objectives involved here included a lessening of the congestion of the court system, a reduction in concomitant delays in court calendars, a reduction of automobile insurance premiums and an assurance that persons injured in vehicular accidents would receive some economic aid in meeting medical expenses and the like, in order not to drive them into dire financial circumstances with the possibility of swelling the public relief rolls. Additionally, it is suggested that the Legislature considered recent contentions that the traditional tort system of reparations has led to inequalities of recovery, with minor claims being overpaid and major claims underpaid in terms of their true value, that the tort system of reparation was unduly slow and inefficient and that the preexisting automobile insurance system was unduly costly; it has also been suggested that the pressing necessity of paying medical bills often forced an injured party to accept an unduly small settlement of his claims. These and other perceived drawbacks in the 'fault' system have been abundantly discussed in the legal literature on the subject.[3]

---

[1] 1971 Laws of Fla. ch. 252.

[2] Florida Senate Committee on Banking and Insurance Report Number 2006-102, Florida's Motor Vehicle No-Fault Law (Nov. 2005).

[3] Lasky v. State Farm Ins. Co., 296 So.2d 9, 16 (Fla. 1974).

Thus, the inadequacies of the traditional tort system prompted the Legislature to adopt a no-fault system which guaranteed Floridians the right to quick payment of medical bills by their insurers in exchange for the loss of their right to seek recovery in tort.

Not long after the Law took effect, evidence began to emerge showing that the PIP system was susceptible to fraud and abuse.[4] In 1975, the Miami-Dade Grand Jury reported:

> The Grand Jury has heard testimony concerning the practice of a small group of lawyers, physicians, osteopaths, chiropractors and hospitals who work together to inflate or outright falsify personal injury claims. … The more typical practice is described as follows:
>
> The runner for a lawyer will contact a person involved in an auto accident. The person will have little or no injuries. He would not have otherwise contacted an attorney. The person contacted will usually be in a low income group and unsophisticated about legal or business matters. He will, of course, also have to have a little larceny in his heart.
>
> The runner will advise the prospective client that he stands to make a few thousand dollars if he signed with lawyer "X" and does what the lawyer tells him to do.
>
> The client signs. The runner sends him to a doctor who is usually the same doctor the lawyer uses for his other clients. The client will oftentimes not otherwise have even seen a doctor following the accident which is maybe just a minor fender bender. The lawyer and doctor then tell the client he will have to enter the hospital and take

[4] Miami-Dade Co. Grand Jury, Final Report of the Grand Jury, 5 (Aug. 11, 1975) available at http://www.miamisao.com/publications/grandjuryreports.htm (last accessed July 17, 2012).

> some time off from work. Hospitalization isn't necessary, but the lawyer needs to show expenses in excess of the $1000 threshold limit set by F.S. 637.737. Only if expenses exceed this limit may the client collect for pain and suffering under Florida's "no fault" insurance law.
>
> Usually the same hospital is used again and again by the same doctor-lawyer combination. Traction or muscle relaxants may be prescribed to give some basis for hospitalization.
>
> After discharge from the hospital, the client will be told to return to the doctor's office regularly. The client will rarely see the doctor, but a nurse will administer therapy. The therapy may consist simply of sitting in front of a machine which purportedly administers "deep heat" treatment. After two or three months of such therapy the patient will be discharged. The doctor will submit detailed reports to the lawyer. At least one doctor submits the same report for all such patients to the lawyer with whom he does business, with only the name of the patient changed.
>
> The lawyer submits the bills and reports to the insurance company. The insurance company knows something isn't right but it would cost more in legal fees to litigate the case than to settle for the few thousand dollars usually paid out in these cases. If the insurance company pays $3000 in such a case, the lawyer will get a $1000 fee for about an hour's worth of work. The doctor will receive $700 or so, the hospital a similar sum and the client the balance.[5]

The Grand Jury made a number of recommendations to combat such fraud, among them that the insured "should be required to state under oath in the initial statement that he did in fact have symptoms from the accident and who referred him to the attorney. The making of a false statement should constitute perjury."[6]

[5] Id. at 6-7.
[6] Id. at 9-10.

The Grand Jury's recommendation was not novel. An insurer's right to contractually condition payment on the insured's taking of an examination or statement under oath had long been permissible in other insurance contexts.[7] Indeed, the U.S. Supreme Court *in the nineteenth century* recognized that the examination under oath permits the insurer "to possess itself of 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*."[8] Thus, it is no surprise that almost immediately after the No-Fault Law was conceived, requiring an examination under oath as a condition precedent to the receipt of PIP benefits was deemed to be a natural, necessary and legal means of achieving the Law's goals.

In 1976, the year after the Miami-Dade Grand Jury Report was released, the Legislature amended the No-Fault Law to address the increase in PIP premiums attributed to bill-padding and overutilization of medical benefits.[9] Significantly, the Legislature eliminated claimants' ability to sue in tort for pain and suffering if their damages exceeded $1,000 – the so-called "$1,000 threshold" – with a "verbal threshold" providing that the claimant could sue only if he or she suffered death or

---

[7] See, e.g., S. Home Ins. Co. v. Putnal, 49 So. 922, 932 (Fla. 1909) (recognizing condition in fire insurance policy that insured submit to an examination under oath).

[8] Claflin v. Commonwealth Insurance Co., 110 U.S. 81, 94-95 (1885) (emphasis supplied).

[9] Supra n. 2 at 10.

serious injury.[10] The Legislature also created the Division of Insurance Fraud within the Department of Insurance specifically to combat automobile insurance fraud.[11] The Law continued to be modified frequently – though not always substantially – over the course of the next twenty-five years.[12] The most significant of these reforms was the Motor Vehicle Insurance Reform Act of 1988. The Act, however, primarily addressed issues caused by uninsured motorists and not personal injury protection coverage.[13] It was not until 2001 – following the release of a statewide grand jury report documenting widespread automobile insurance fraud – that systemic reforms to the PIP system were enacted.

II. The 2001 and 2003 Reforms

The Fifteenth Statewide Grand Jury released its Report on Insurance Fraud Related to Personal Injury Protection in August of 2000.[14] The Grand Jury began its report thusly:

---

[10] Id. The U.S. Department of Transportation estimated that the verbal threshold led to a 58.3% reduction in the percentage of automobile negligence suits to total cases in Dade County and a similar 39.3% reduction in Duval County between 1976 and 1980. Id.

[11] Fred Schulte & Jenni Bergal, *Cracking Down on Insurance Cheats an Ongoing Battle*, S. FLA. SUN-SENTINEL, Dec. 20, 2000, at 1A, available at http://articles.sun-sentinel.com/2000-12-20/news/0012200127_1_no-fault-insurance-insurance-fraud-auto-fraud (last accessed July 17, 2012).

[12] Supra n. 2 at 11-14.

[13] 1988 Laws of Fla. ch. 370; supra n. 2 at 12.

[14] Fifteenth Statewide Grand Jury Report, Report on Insurance Fraud Related to Personal Injury Protection (Aug. 2000) (on file with Clerk, Fla. Sup. Ct.).

> All drivers in Florida are required to carry a minimum of $10,000 in PIP insurance with a maximum deductible of $2,000. The object is to have all drivers and their passengers at least minimally covered for injuries suffered as a result of a motor vehicle accident. The $10,000 personal injury policy is intended to provide not only protection and peace of mind for the insured, it also relieves taxpayers from shouldering the burden of caring for injured drivers and passengers, who do not otherwise have health care insurance.
>
> Unfortunately, a number of greedy and unscrupulous legal and medical professionals have turned that $10,000 [personal injury protection] coverage into their personal slush fund. Paying kickbacks for patients, abusing diagnostic tests, grossly inflating costs by engaging in sham transactions and filing fraudulent claims of injury, these individuals think nothing of enriching themselves by exploiting the misfortunes of others. The result is loss of coverage and marginal medical treatment for those who are injured, as well as higher insurance rates for all drivers.
>
> Over 20 years ago a Dade County Grand Jury criticized this practice of "ambulance chasing." At that time, mandatory PIP coverage was only $1,000 not the $10,000 minimum we have today. Unfortunately not much else has changed as "ambulance chasing" is alive and well throughout Florida.[15]

The Grand Jury made seven recommendations to the Legislature, six of which were adopted in whole and the other in part during the 2001 session.[16] In 2003, additional reforms were passed in response to the findings and recommendations of a Senate Select Committee on Automobile Insurance PIP

---

[15] Id.

[16] Id.; 2001 Laws of Fla. ch. 271. The Legislature only adopted a fee schedule for a limited number of procedures, not the more complete fee schedule recommended by the Grand Jury.

Reform Report and both supplemented and clarified the 2001 reforms.[17] The 2003 amendments added the following provision at section 627.736(4)(g):

> Benefits shall not be due or payable to or on the behalf of an insured person if that person has committed, by a material act or omission, any insurance fraud relating to personal injury protection coverage under his or her policy, if the fraud is admitted to in a sworn statement by the insured or if it is established in a court of competent jurisdiction.[18]

This amendment marks the first appearance in the No-Fault Law of the term "sworn statement" in regard to a submission from an "insured." Previously, the term only appeared in section 627.736(6)(a) (2003), requiring the insured's employer to submit "a sworn statement of the [insured's] earnings," and section 627.736(6)(b) (2003), requiring health care providers seeking reimbursement to submit "a sworn statement that the treatment or services rendered [to the insured] were reasonable and necessary" if requested by the insurer. Outside of these three subsections, the term – or one of its substantive equivalents – was absent from the Law.[19]

III. The Legislature Acknowledges and Approves the Use of Examinations Under Oath

Following enactment of the 2003 amendments, the No-Fault Law remained unchanged in 2004 and 2005. However, in late 2005 the Senate Committee on

[17] Supra n. 2 at 16; 2003 Laws of Fla. ch. 411.
[18] 2003 Laws of Fla. ch. 411.
[19] See Chapter 627, Part IX, Florida Statutes (2003).

Banking and Insurance released a Report on Florida's Motor Vehicle No-Fault Law.[20] The Committee – after making a number of significant findings regarding what it perceived to be major issues with the no-fault system – included a category in its Report titled "Additional Issues under the Current PIP Law."[21] The Committee identified described one of these additional issues as follows:

> Current law is not clear regarding which persons are subject to an examination under oath. Additionally, there is no set hourly rate payable to a person for an examination under oath, which can lead to excessive charges.[22]

To address this issue, the Committee offered the following recommendation:

> Specify which persons are subject to an examination under oath and specify the hourly rate payable to a person for an examination under oath.[23]

While these entries constitute the entirety of the Committee's discussion of examinations under oath, the very use of the term "examination under oath" is significant. The term simply does not appear in the 2005 version of the No-Fault Law. Moreover, the term does not appear in *any* prior version of the Law. Yet it is highly unlikely that the Committee would address a statutory provision that does not exist. Instead, it is evident that the Committee was using the term

[20] Supra n. 2.
[21] Id. at 76.
[22] Id. at 77.
[23] Id. at 99.

interchangeably with the only other term in the Law that is substantively equivalent: the "sworn statement" of sections 627.736(4)(g) and (6)(a)-(b).

This conclusion is bolstered by the fact that, as discussed supra, the term "sworn statement" is used in connection with submissions from the insured's health care providers. Thus, when the Committee states that the law is "not clear regarding which persons are subject to an examination under oath" and "there is no set hourly rate payable to a person for an examination under oath," the Committee is clearly referring to which individual from the health care provider's office – e.g., records custodian, office manager, physician – must submit the statement under oath, and at what rate such individual may charge for giving such statement. Moreover, the Committee's use of the term "examination under oath" – although admittedly somewhat imprecise – is understandable in light of the fact that insurers routinely required a sworn statement from the insured – typically by way of an examination under oath – as a contractual condition to payment of PIP benefits.[24] Indeed, numerous reported appellate cases between 1999 and 2005 recognized the use of contractual examinations under oath in PIP claims.[25] And the first reported case mentioning the requirement of an examination or statement under oath in the

[24] See Marlin Diagnostics v. State Farm Auto. Ins. Co., 897 So. 2d 469 (Fla. 3rd DCA 2004); January v. State Farm Mut. Ins. Co., 838 So. 2d 604 (Fla. 5th DCA 2003); United Auto. Ins. Co. v. STAT Technologies, Inc., 787 So. 2d 920 (Fla. 3rd DCA 2001) Amador v. United Automobile Ins. Co., 748 So. 2d 307 (Fla. 3rd DCA 1999).

[25] See cases cited supra n. 24.

context of an automobile policy containing PIP benefits was released in 1975.[26] Given this backdrop, it would be unreasonable to suggest that the Committee – and therefore the Legislature – was not well aware of the widespread use of examinations under oath as contractual conditions precedent to PIP coverage. And, given the Committee's recommendation that the statute simply clarify which health care provider-employees are subject to examinations under oath and at what rates they may charge, it would be unreasonable to suggest that the Committee – and therefore the Legislature – did not already approve of insurance policies requiring examinations under oath.

IV. The 2012 Reforms Were a Direct Response to the Uncertainty Created by Custer

In 2012, the Legislature enacted further amendments to the No-Fault Law.[27] These amendments include a provision which explicitly requires an insured seeking PIP benefits to "comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath."[28] As discussed in detail in Appellee's Answer Brief, this provision was enacted to eliminate any uncertainty regarding the permissibility of EUOs created by the dicta in a footnote in Custer Med. Ctr. v. United Auto Ins. Co., 62 So.3d 1086, 1089 n. 1 (Fla. 2010).

[26] Travelers Ins. Co. v. Lee, 358 So.2d 88, 89 (Fla. 3rd DCA. 1978).
[27] 2012 Laws of Fla. ch. 197.
[28] Fla. Stat. §627.736(6)(g) (2012).

The importance of eliminating any uncertainty surrounding the legitimacy of EUOs was well understood by the 2012 Legislature in light of the 2011 Report on Florida Motor Vehicle No-Fault Insurance issued by the Florida Office of the Insurance Consumer Advocate.[29] The Report found that "in the last two years, the No-Fault system has been stressed to a point that is inflicting staggering rate increases on consumers."[30] The dramatic increase in rates has been necessitated by the corresponding increase in PIP losses suffered by insurers. As the Report notes:

> Based on 2010 financial data reported to the NAIC, insurance companies reported losses exceeding $2.2 billion, up from average losses of $1.6 billion each year from 2006 to 2007. Furthermore, insurance companies paid out $2.7 billion in 2010 for losses and expenses not including overhead expenses. Simply put, for every dollar of premium taken in by insurance companies, $1.15 was paid out in losses and expenses not including overhead expenses.[31]

Importantly, the Report found that this trend "cannot be explained by increases in auto crashes" because "the frequency of auto crashes per 100 licensed drivers has been decreasing or constant during the same time period PIP losses were increasing dramatically."[32] Instead, the Report concluded that fraud was one of the leading causes of these rate increases. The Report states:

> Between 2009 and 2010, the Division of Insurance Fraud under the Department of Financial Services reported a statewide 44 percent

[29] Report on Florida Motor Vehicle No-Fault Insurance, Florida Office of the Insurance Consumer Advocate (December 2011).
[30] Id. at 2.
[31] Id.
[32] Id. at 7.

> increase in PIP fraud referrals, and represents 49 percent of all fraud referrals to date in 2011. … The National Insurance Crime Bureau (NICB) reported to the Working Group that Florida ranks first in the nation in the number of staged accidents involving questionable medical claims. NICB provided data that questionable auto insurance claims in Florida rose by 34 percent between 2008 and 2010, with Miami, Tampa and Orlando ranking among the top five cities in the nation for questionable claims.[33]

The Report also discusses the legislative measures previously taken to combat such fraud:

> The Legislature has made numerous attempts at addressing the fraud and abuse in the No-Fault system. **Over the years, stronger provisions have been added to the claims handling process, including** the introduction of the fee schedule, **examinations under oath** and independent medical exams to help combat fraud and abuse.[34] (Emphasis supplied.)

The Report goes on to state that "EUOs are a valuable tool for insurers to determine appropriate payment of the claim and to combat fraud."[35]

Again, the term "examination under oath" did not appear in the No-Fault Law prior to the enactment of section 627.726(6)(g) in 2012; nevertheless, like the Senate Committee on Banking and Insurance in its 2005 Report, the Consumer Advocate's Report indicates that examinations under oath have already been legislatively prescribed. The reason, as discussed supra, is that EUOs were regarded as substantively equivalent to the "sworn statement" already permitted by

[33] Id. at 3.
[34] Id. at 33.
[35] Id. at 34.

section 627.726(4)(g) (2003). Thus, while the Consumer Advocate's Report at the time served to reinforce the importance of EUOs in combating PIP fraud, it also now serves as confirmation that the Legislature intended EUOs to be permissible conditions precedent to payment of PIP benefits under the pre-2012 version of the Florida No-Fault Law.

CONCLUSION

For the foregoing reasons and those set forth in Appellees' Answer Brief, the Amici respectfully request that the Court uphold the right of insurers to contractually condition payment of PIP benefits on the insured's submission to an examination under oath under the pre-2012 version of section 627.736, Florida Statutes.

Respectfully submitted this _____ day of July, 2012.

CYNTHIA S. TUNNICLIFF (0134939)
Florida Bar No. 0134939
GERALD DON NELSON BRYANT IV
Florida Bar No. 58288
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street, Second Floor (32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095
Telephone: 850/222-3533
Facsimile: 850/222-2126
E-Mail: cynthia@penningtonlaw.com
jbryant@penningtonlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to JUAN C. MONTES, ESQUIRE, of Lidsky & Montes, 145 East 49th Street, Hialeah, Florida 33013; SUZANNE YOUMANS LABRIT, ESQUIRE, of 4301 West Boy Scout Boulevard, Suite 300, Tampa, Florida 33607; MARLENE S. REISS, ESQUIRE of Marlene S. Reiss, P.A., 9130 Dadeland Boulevard, Suite 1612, Miami, Florida 33156; DOUGLAS G. BREHM, ESQUIRE, of Shutts & Bowen, LLP, 201 South Biscayne Boulevard, Suite 1500, Miami, Florida 33131; and PETER J. VALETA, ESQUIRE, of Meckler, Bulger, Tilson, Marick & Pearson,, LLP, 123 North Wacker Drive, Suite 1800, Chicago, Illinois 60606, this ____ day of July, 2012.

_____

CERTIFICATE OF COMPLIANCE

In compliance with Fla. R. App. P. 9.210(a), the font size used in this *Amici Curiae* Brief is Times New Roman, size 14.

_____