IN THE SUPREME COURT OF FLORIDA

MERLY NUÑEZ,
Appellant,
vs. **Case No: SC12-650**

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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BRIEF OF *AMICI CURIAE* PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AND ALLSTATE INSURANCE COMPANY IN SUPPORT OF APPELLEE GEICO GENERAL INSURANCE COMPANY

Peter J. Valeta
Florida Bar No. 327557
Meckler Bulger Tilson Marick & Pearson LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-7900

ATTORNEYS FOR *AMICI CURIAE*
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA and
ALLSTATE INSURANCE COMPANY

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STATEMENT OF INTEREST OF AMICI CURIAE

This Brief is submitted by PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA ("PCI") and ALLSTATE INSURANCE COMPANY ("Allstate") as *Amici Curiae*, in support of the position of Appellee GEICO General Insurance Company.

PCI is committed to promoting and protecting the viability of a competitive insurance market for the benefit of consumers and insurers. PCI is composed of more than 1000 member companies, constituting the broadest cross section of insurer of any national trade association. Member companies collectively write over 38.3 percent of the nation's property casualty insurance, over 44.3 percent of the U.S. automobile insurance market, 31.6 percent of the homeowners market, 36.3 percent of the commercial property and liability market, and 42.6 percent of the private workers compensation market. PCI has 406 member companies writing in Florida, representing 40.4% of the property casualty market and writing more than $15.1 billion in premiums. Allstate is one of the largest writers of automobile insurance in the State of Florida.

This appeal relates to Personal Injury Protection ("PIP"). PIP is a mandatory coverage under automobile insurance policies issued by Allstate and PCI member companies in Florida. Automobile policies issued by Allstate and many PCI member companies in Florida have included provisions permitting the insurer to

request that PIP insureds submit to Examinations Under Oath ("EUOs") in connection with any proof of a loss covered by the policy for many years.[1] As such, PCI member companies and Allstate have serious interests that would be affected by this decision because it would apply to a significant volume of claims for PIP coverage.

In its April 23, 2012 ruling, the United States Court of Appeals, Eleventh Circuit, asked this Court to answer 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?

The validity and enforceability of policy provisions authorizing EUOs has had a significant and direct impact on the handling of PIP claims throughout the state. PCI member companies and Allstate have received many thousands of PIP claims each year. They have relied on the use of EUOs in appropriate cases to obtain relevant, needed information not only for the assessment of claimed losses, but for the prevention of fraud and abuse of the PIP system.

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[1] For example, Allstate's policy forms include among their "General Provisions":

> We may require any person making a claim to file with it a sworn proof of loss. We may also require that person to submit to examinations under oath, separately and apart from others, and to sign the transcript.

Fraud has been and continues to be a significant issue for PIP claims. The Florida Division of Insurance Fraud reports that over half of the referrals for suspected insurance fraud for fiscal 2011-12 were for PIP fraud.[2]

EUOs have been used for many years with apparent judicial blessing, both in the PIP context and otherwise. Accordingly, many years of significant claims processing and fraud investigation by PCI member companies and Allstate would be adversely impacted by a pronouncement that EUOs cannot be properly used in connection with PIP claims handling.

SUMMARY OF ARGUMENT

The United States Court of Appeals, Eleventh Circuit, asked this Court to answer 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?

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[2] *See* http://www.myfloridacfo.com/fraud/. A recent study by the National Insurance Crime Bureau about "Questionable Claims" reviewed "staged accident activity" in Florida in 2008 and 2009, and found a 52% increase in the number of staged accident Questionable Claims for PIP losses during that time period. *Staged Accidents Analysis – Florida 2008*-2009, NICB Forecast Report, June 23, 2010. *Available at* https://www.nicb.org/newsroom/news-releases/florida-staged-accidents. "Staged accident fraud is not the only PIP crime reported, and is actually third in number of referrals behind fraud by claimant and fraud by provider." *The PIP Source*, Florida Division of Insurance Fraud, Vol. 1, Issue 3, September, 2010." (*Available at* http://www.myfloridacfo.com/fraud/Newsletters/PIPSource/PipSourceSept2010.pdf.

It did so because of a footnote reference in *dictum*[3] by this Court in *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1089 (Fla. 2010) n.1, stating: "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."

In fact, there is no express prohibition of EUOs in the Florida PIP statute. To the contrary, use of EUOs for gathering information to both process and pay PIP claims and investigate potential fraud has been contemplated by and is consistent with the Florida PIP statute and Florida public policy. The challenges to use of EUOs are not based on impermissible restrictions on a mandated coverage, but are about alleged abuses of EUOs by insurers. "Complaints" about alleged abuses of EUOs do not present issues about limitations on coverage beyond the statutorily mandated requirements, but are entirely separate questions concerning claims handling in specific cases.

Requirements that insureds submit to EUOs have been long recognized as valid insurance policy provisions. Florida appellate courts have regularly approved EUO requirements in connection with PIP claims handling. The most recent

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[3] The Eleventh Circuit noted that: "Since the reference to EUOs [in the *Custer* opinion] is in a footnote and the [Florida Supreme Court] itself states that EUOs are not relevant to the appeal in *Custer*, this footnote is *obiter dictum* and not binding on any court." *Nunez v. GEICO General Insurance Company*, --- F.3d ---, 2012 WL 2548404, *3 (11th Cir. April 3, 2012).

amendment of the PIP statute clarified and confirmed that insureds seeking PIP benefits "must comply with the terms of the policy, which include but are not limited to submitting to an examination under oath." Insurers have previously enforced policy terms requiring attendance at EUOs based on the previously unquestioned case law acknowledging use of such policy terms as proper. A determination that such reliance on EUO requirements was improper would unfairly expose insurers to entirely unanticipated litigation and claims and potential liability for years of PIP claims where those policy terms were enforced.

ARGUMENT

I. THE FLORIDA PIP STATUTE DOES NOT PROHIBIT EUOs.

"A policy may contain additional provisions not inconsistent with this code and which are: … (3) Desired by the insurer and neither prohibited by law nor in conflict with any provisions required to be included therein." Fla. Stat. § 627.414 (3). The plain language of Fla. Stat. § 627.736 does not contain any prohibition against the use of EUOs by PIP insurers. Nor is an EUO requirement in conflict with other policy provisions required by the PIP statute. Therefore, on its face, there is no statutory basis for a declaration that policy provisions requiring PIP insureds to attend EUOs are invalid.

In connection with coverages required by statute, there is "no blanket prohibition against the inclusion of general conditions affecting coverage, or even

exclusions, so long as the limitation was consistent with the purposes of the statute." *Vasquez v. Mercury Cas. Co.*, 947 So. 2d 1265, 1269 (Fla. 5th DCA 2007). Possible restrictions on statutorily mandated coverage like PIP are to be scrutinized to determine whether their enforcement would be contrary to the statutory purpose. *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 745 (Fla. 2002).

In this case, Appellant Nuñez only asserts that other various exclusions or limitations to PIP coverage have been rejected by Florida courts from time to time. However, she never articulates how enforcement of an EUO requirement is so contrary to the purposes of the PIP statute that it must be invalidated.[4] *Amicus* Floridians for Fair Insurance, Inc. ("FFI") argues that EUO requirements must be invalidated because they are contrary to PIP statute's purpose to ensure the "speedy payment" of benefits recognized by this Court in *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 15 (Fla. 1974). (FFI *Amicus* Brief, p. 5.) *Amicus* FFI asserts that: "The imposition of an EUO—and under most insurance policies, as many EUOs as

[4] "Extreme caution" should be used when determining a contractual provision void as contrary to public policy. *See Bituminous Casualty Corp. v. Williams*, 154 Fla. 191, 17 So.2d 98, 101-102 (1944) ("Courts, therefore, should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties *sui juris*."); *Florida Windstorm Underwriting Ass'n. v. Gajwani*, 943 So.2d 501 (Fla. 3d DCA 2005) ("The court should not strike down a contract, or a portion of a contract, on the basis of public policy grounds except in very limited circumstances.").

the insurer 'reasonably' requires—serves no purpose other than to delay the payment of PIP benefits indefinitely." (FFI *Amicus* Brief, p. 6.) However, that claim is without support and flatly contradicted by the recognized uses of EUOs.[5]

EUO requirements have been long recognized as valuable investigatory tools to enable an 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." *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 94-95, 3 S. Ct. 507, 516 (1884). For any insurance claim, an insurer must be permitted to investigate the facts surrounding the claim. Insurers are entitled to ensure that all prerequisites to coverage are satisfied before making payment. And an insurer is certainly entitled to determine whether the claim is legitimate and not the product of fraud or deceit. There is nothing in the PIP statute or its purposes to justify denying insurers the use of EUOs to investigate claims simply because PIP coverage is at issue.

In fact, the PIP statute specifically contemplates that insurers would be able to collect information in order to make determinations about whether PIP coverage is available for claims. Section 627.736 (4)(b) provides that PIP benefits are due to be paid within 30 days of written notice and proof of a covered loss. But that duty to pay is superseded (*i.e.*, payments are not "overdue") when the insurer has

[5] And as noted *infra*, the PIP statute already provides remedies for any such alleged abuses.

"reasonable proof to establish that the insurer is not responsible for the payment." *Id.*

There is no statutory limitation on the sources or forms of proof which insurers may rely upon, other than it be "reasonable". Certainly the information about a claim that is known to or available from the insured could be part of such "reasonable proof". Section 627.736 does not contain any prohibition that denies insurers any right to obtain such information.

Moreover, the PIP statute expressly contemplates that insurers could obtain and use sworn statements from PIP insureds. Section 627.736(4)(h) specifically states that:

> 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.

Id. (emphasis added). This is a direct expression of the legislature's intention that insurers be able to obtain sworn testimony from insureds in connection with PIP claims. It would be wholly inconsistent with this express legislative intent to prevent insurers using EUOs to obtain sworn statements and testimony from insureds.

The Florida legislature has amended the PIP statute numerous times since PIP was first enacted. Throughout those years, insurers have used EUOs to collect

information about PIP claims, and the legislature has never acted to limit or prohibit their use.[6] To the contrary, in 2012, after this Court's *Custer* opinion was issued, the legislature adopted the most recent amendments to the PIP statute, and confirmed that insureds must comply with all policy terms which include EUO requirements.

The manner in which the legislature confirmed this is telling. The legislature added a new subsection 6(g), Fla. Stat., § 627.736 (6)(g), which provides : "An insured seeking benefits ... must comply with the terms of the policy, which include but are not limited to, submitting to an examination under oath." Ch. 2012-197, § 10, at 29, Laws of Florida. This new statutory language does not "authorize" insurers to include EUO requirements. Rather, it affirmed a basic principle of contract law that the insured "must comply with the terms of the policy." The legislature did not state anything new by this enactment. PIP insureds have always been required to comply with the contractual terms of their policies. The fact that the legislature enacted an express confirmation that PIP insureds must comply with all policy terms, including EUO requirements, reflects not a change in existing law,

[6]). "If the legislature wishes to prohibit something, it is perfectly capable of saying so." *Nationwide Mut. Ins. Co. v. Jewell*, 862 So. 2d 79, 85 (Fla. 2d DCA 2003).

but an affirmation that policy terms such as EUO requirements are appropriate and enforceable.[7]

The simple fact is that nothing in the PIP statute prohibits use of EUOs. Gathering information about PIP claims by this method does not reduce the coverage afforded to an insured in any way. EUOs are simply a mechanism by which an insurer can obtain information relevant to determining the availability and extent of coverage. PIP benefits are not simply an "automatic" payment. Insurers are required to process and pay PIP benefits within the statutory time limits prescribed, and are entitled to rely on "reasonable proof" to deny benefits where appropriate. The PIP statute contemplates that insurers can obtain sworn statements from insureds, and the legislature has most recently affirmed that insureds must comply with their policies' contractual terms, including EUO requirements. Accordingly, the certified question should be answered in the affirmative.

II. EUOs ARE IMPORTANT TOOLS BOTH FOR OBTAINING CLAIM INFORMATION AND COMBATING FRAUD, AND ARE CONSISTENT WITH PUBLIC POLICY.

[7] This is particularly true where this enactment followed this Court's recent *Custer* decision in which a question about use of EUOs was indicated. An amendment following controversies about judicial interpretation of a statute can be deemed clarification of the interpretation of the original act rather than a substantive change to it. *Lowry v. Parole and Probation Comm'n*, 473 So. 2d 1248, 1250 (Fla. 1985).

The Florida legislature has repeatedly acknowledged that problems with fraud have frustrated the goals of the PIP statutory scheme.

> The 2001 legislative findings surrounding section 627.736, detailed in Section 1 of Senate Bill 1092, said, among other things:
>
> > The Legislature finds that the Florida Motor Vehicle No–Fault Law is intended to deliver medically necessary and appropriate medical care quickly and without regard to fault, and without undue litigation or other associated costs. The Legislature further finds that this intent has been frustrated at significant cost and harm to consumers by, among other things, fraud, medically inappropriate over-utilization of treatments and diagnostic services, inflated charges, and other practices on the part of a small number of health care providers and unregulated health care clinics, entrepreneurs, and attorneys.
>
> The Legislature also made reference to, and incorporated into its findings, the Report of the Fifteenth Statewide Grand Jury. That body harshly criticized the disappointing history of PIP fraud and indicated that "a number of greedy and unscrupulous legal and medical professionals have turned that $10,000 coverage into their personal slush fund." According to the Grand Jury, this resulted in the "loss of coverage and marginal medical treatment for those who are injured, as well as higher insurance rates for all drivers." *See also Regional MRI of Orlando, Inc. v. Nationwide Mut. Fire Ins. Co.*, 884 So.2d 1102, 1111 (Fla. 5th DCA 2004); *cf., United Auto. Ins. Co. v. Stat Techs, Inc.*, 787 So.2d 920 (Fla. 3d DCA 2001), *review denied*, 817 So.2d 850 (Fla.2002). Similarly, when the Legislature enacted the Florida Motor Vehicle Insurance Affordability Act in 2003, which again amended the PIP statute, it once again

> declared that the goals underpinning the no-fault laws "have been significantly compromised due to the fraud and abuse that has permeated the PIP insurance market."

Chiropractic One, Inc. v. State Farm Mut. Auto., --- So. 3d ---, 2012 WL 2465012, *3 (Fla. App. 5th Dist., June 29, 2012). And again in connection with the 2012 amendments, the legislature noted that fraud continued to be a significant problem, citing findings from the Florida Office of Insurance Regulation ("OIR") "Report on Review of the 2011 Personal Injury Protection Data Call" that "PIP fraud remains a significant issue" and that "the number of PIP referrals to the Division of Fraud within the Department of Financial Services increased by more than 60 percent" between July 2007 and April, 2010. House of Representatives Final Bill Analysis (May 7, 2012), CS/CS/HB 119, at 6.

"EUOs are a valuable tool for insurers to determine appropriate payment of the claim and to combat fraud." Office of the Insurance Consumer Advocate, *Report on Florida Motor Vehicle No-Fault Insurance*, December, 2011, p. 34. Use of EUOs to obtain sworn statements and testimony from insureds is entirely consistent with the purposes and goals of the PIP statute.[8] Section 627.736(4)(h)

[8] It is also consistent with the mandate that insurers maintain specialized units to investigate fraudulent claims. *See* Fla. Stat. § 626.9891. It would make no sense to require insurers to investigate fraud while tying their hands by preventing them from using a valuable tool like EUOs. *See N.J.A.F.I.U.A. v. Jallah*, 256 N.J. Super.134, 140-42, 606 A.2d 839 (App. Div. 1992) (PIP insurers are justified in

[originally subsection (4)(g)] was enacted as part of the "Florida Motor Vehicle Insurance Affordability Reform Act", Ch. 2003-411, Laws of Florida. There the Florida legislature specifically recognized that the goals behind the adoption of the PIP statute "have been significantly compromised due to the fraud and abuse that has permeated the PIP insurance market." *Id.*, §1 (2) (c). It further observed:

> Motor vehicle insurance fraud and abuse, other than in the hospital setting, whether in the form of inappropriate medical treatments, inflated claims, staged accidents, solicitation of accident victims, falsification of records, or in any other form, has increased premiums for consumers and must be uncovered and vigorously prosecuted.

Id., §1 (2) (d). As a result, it determined: "it is necessary to enact the provisions contained in this act in order to prevent PIP insurance fraud and abuse and to curb escalating medical, legal, and other related costs." *Id.*, §1 (2) (g).

The legislature's recognition that the use of sworn statements taken under oath is a necessary tool to help prevent fraud and curb rising medical costs should not be lightly disregarded. It confirms that use of such tools is not a term or limitation "more restrictive than permitted under the statutory provisions." Any

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seeking EUOs in light of insurers' statutory obligations to investigate insurance fraud).

other conclusion would ignore the plain language of §627.736 (4)(h) and would constitute judicial legislation.[9]

Detection and investigation of PIP fraud is a serious matter as a matter of recognized Florida public policy. Use of EUOs is directly consistent with that purpose. Accordingly, this Court should answer the certified question in the affirmative.

III. PURPORTED "INDUSTRY ABUSES" OF EUOs ARE EXAGGERATIONS THAT CAN BE REMEDIED WITHOUT ELIMINATING EUOs.

Appellant Nuñez's and *amicus* FFI's exaggerated complaints about abuses of EUOs are not only speculative,[10] but ignore the fact that the PIP statute already provides for any necessary and appropriate remedies. First and foremost, insurers are required to pay PIP benefits within 30 days of receiving written notice and proof of a covered loss. Fla. Stat. § 627.736(4)(b). If an insurer fails to pay a covered claim within the first 30 days after receipt, statutory interest at 10% is imposed. *Id., §* 627.736(4)(d). Furthermore, insurers are subject to paying

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[9] *Brown v. State,* 629 So. 2d 841, 843 (Fla. 1994) (the Florida Constitution and the Supreme Court of Florida do not allow courts to engage in "judicial legislating"); *State v. Global Communications Corp.*, 622 So. 2d 1066, 1080 (Fla. 4th DCA 1993), *aff'd,* 648 So. 2d 10 (Fla. 1994) ("[i]t is a time-honored principle of Florida law that it is not the role of a court to rewrite a statute").

[10] Indeed, Appellant Nuñez never explains how insurers' use of EUOs is abusive, and *amicus* FFI only points to 2 or 3 individual, isolated cases where disputes over an insured's compliance with an EUO requirement resulted in litigation through appeal over a several year period.

attorneys' fees if litigation is required to establish entitlement to PIP benefit payments. *Id., §* 627.736(8). The legislature has established those as the penalties for late payment of benefits caused by the insurer's investigation of a claim beyond 30 days. *See January v. State Farm Mut. Ins. Co.*, 838 So. 2d 604, 607 (Fla. 5th DCA 2003) (where insurer delays payment of PIP benefits more than 30 days after proof of loss is submitted while investigating claim through EUO from insured, the legislature has prescribed statutory penalties of interest and fees) A goal of "swift payment" does not mean EUOs are prohibited. *United Auto. Ins. Co. v. STAT Technologies, Inc.*, 787 So. 2d 920, 922 (Fla. 3rd DCA 2001) ("we are not unmindful that the purpose of the PIP statute is to provide a swift and virtually automatic payment of PIP benefits. [Citations omitted.] However, as obviously contemplated by the legislators in providing insurers with a 30 day investigatory period, the policy to ensure swift payment must be balanced against **the policy to prevent improper claims**") (emphasis added).

Moreover, in the event such delays become some form of "abuse", other remedies are provided. The PIP statute expressly establishes that failures to pay PIP benefits "with such frequency so as to indicate a general business practice" constitutes a "prohibited unfair and deceptive practice" subjecting the insurer to statutory penalties. Fla. Stat. § 627.736(11). In short, in individual situations where EUOs have not been properly sought, insureds can obtain their benefits with

interest, and any insurer which engages in "abuse" by frequent and excessive use of EUOs would be subject to additional penalties.

There is simply no "parade of horribles" demonstrated to justify a prohibition of use of these valuable investigatory tools. Accordingly, this Court should answer the certified question in the affirmative.

IV. RETROACTIVELY DECLARING EUOs IMPROPER FOR PIP CLAIMS WOULD BE UNREASONABLE BECAUSE FLORIDA COURTS HAVE TREATED THEM AS VALID FOR DECADES.

Insurers' use of EUOs in claims handling has been long recognized as a valuable contractual right in Florida. *See, e.g., Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 303 (Fla. 4th DCA 1995) (citing numerous decisions recognizing EUO requirements); s*ee also Amica Mut. Ins. Co. v. Drummond*, 970 So. 2d 456, 460 (Fla. 2nd DCA 2007) (citing numerous decisions holding failure to attend EUO precludes benefits); *Starling v. Allstate Floridian Ins. Co.*, 956 So. 2d 511, 513 (Fla. 5th DCA 2007) (same); *Fassi v. Amer. Fire & Cas. Co.*, 700 So. 2d 51 (Fla. 5th DCA 1997).

More importantly, Florida courts have regularly and repeatedly recognized the validity of EUOs in PIP claim handling without question. *See, e.g., Shaw, D.C., P.A v. State Farm Fire and Casualty Co.*, 37 So. 3d 329, 331 (Fla. 5th DCA 2010) ("It 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 [PIP] policy

benefits".) ; *Marlin Diagnostics v. State Farm Auto. Ins. Co.*, 897 So. 2d 469, 470 (Fla. 3rd DCA 2004) (acknowledging that the insurer has a good defense to a PIP claim if the **insured** refuses to attend an EUO); *January v. State Farm Mut. Ins. Co.*, 838 So. 2d 604, 608 (Fla. 5th DCA 2003) (acknowledging that failure to appear for examination under oath could be a material breach of PIP policy that would bar recovery of benefits); *United Auto. Ins. Co. v. STAT Technologies, Inc.*, 787 So. 2d 920, 922 (Fla. 3rd DCA 2001) (where insurer pays PIP benefits more than 30 days after proof of loss is submitted while investigating claim through, *inter alia*, EUO from insured, interest on overdue PIP benefits is not charged until 31 days after the claim is submitted because "we do not believe the legislators intended to punish insurers for undergoing the appropriate investigation contemplated under the statute"); *Amador v. United Automobile Ins. Co.*, 748 So. 2d 307 (Fla. 3rd DCA 2000), *rev. denied*, 767 So. 2d 469 (Fla. 2000) (insurers "may request information that will aid it in the investigation of a [PIP] claim" through EOUs requested within the 30 day period for payment of PIP claims).

During the past decade and more, insurers could reasonably believe, in light of these repeated judicial decisions accepting and endorsing the use of EUOs in PIP claims handling, that use of EUOs was proper. It would be manifestly unfair to suddenly, without a hint of warning in the case law announced by the appellate courts of Florida, declare that this long-recognized staple of insurance claim

investigation was improper for insurers to use in PIP claims. Indeed, not only was there no suggestion from the courts that EUOs could not be used for PIP investigations, but the legislature never chose to "correct" those decisions upholding use of EUOs for PIP claims by declaring them invalid for PIP even though it amended the PIP statute multiple times during those years.

There simply has been no indication the EUOs were improper for PIP claims handling from the courts or the legislature prior to this Court's comment in the *Custer* footnote. To the contrary, multiple decisions acknowledged and accepted the use of EUOs for PIP claims without question. In light of such judicial history and precedent, it would be unfair to now declare past use of EUOs improper, potentially exposing insurers to liability for possibly thousands of past claims. Accordingly, this Court should answer the certified question in the affirmative.

V. OTHER PIP/NO-FAULT JURISDICTIONS HAVE CONCLUDED THAT EUOs DO NOT VIOLATE OR UNDERMINE SIMILAR STATUTORY SYSTEMS.

Courts in other jurisdictions where PIP and no-fault statutes are in place have regularly concluded that EUOs are proper for use in investigating PIP claims. *See, e.g., Fox v. Rivera,* 14 Mass.L.Rptr. 223, 2001 WL 1771984, *2 (Mass. Super. 2001) (the fact that the insured submitted all information needed to investigate medical reports and bills with the PIP application did not preclude insurer's right to conduct investigation through use of EUO); *Cruz v. State Farm Mut. Auto. Ins.*

Co., 466 Mich. 588, 648 N.W.2d 591 (2001) (EUOs cannot be used to avoid insurers' duty to pay PIP benefits when due or to avoid penalties for slow payment, but are properly used to provide the insurer with "information relating to proof of the fact of loss and of the amount of the loss sustained" without violating purposes of PIP statute); *Barabin v. AIG Hawai'i Ins. Co.*, 82 Hawai'i 258, 262-63, 921 P.2d 732, 737-38 (1996) (PIP policy provisions enforceable where not inconsistent with legislative purpose); *N.J.A.F.I.U.A. v. Jallah*, 256 N.J. Super.134, 141, 606 A.2d 839 (App. Div. 1992) (potential concerns for fraud justify insurers' use of EUOs in PIP claim investigations). Such decisions recognize the basic principle at issue here. EUOs serve a valuable purpose in fact investigation and fraud detection in connection with PIP claims. *See Cruz*, 648 N.W.2d at 595-96 (in light of "the potential ability of EUOs and other discovery vehicles to address [fraudulent claims], 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 purchased at the insured's discretion, their potential value is even greater when the coverage is, as in this case, mandated by law") (citations omitted).

Use of EUOs for such purposes is not inconsistent with statutory schemes like Florida's that are designed to provide prompt payment of benefits. Accordingly, this Court should answer the certified question in the affirmative.

CONCLUSION

There are, in fact, legitimate reasons reflected in the PIP statute, in its legislative purposes, and in relevant case law to support the application and enforcement of EUO requirements. The PIP statute already provides remedies for any "abuse" of EUOs. Given the long acceptance by Florida courts of the use of EUOs in PIP claims handling, it would be manifestly unfair to impose retroactive liability on insurers who have historically used EUOs in reliance on such apparent judicial endorsement. Accordingly, PCI and Allstate request that this Court answer the question certified to this Court by the Eleventh Circuit in the affirmative.

Respectfully submitted,

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Peter J. Valeta

Peter J. Valeta
Florida Bar No. 327557
Meckler, Bulger Tilson Marick & Pearson LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-7895

ATTORNEYS FOR *AMICI CURIAE* PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA and ALLSTATE INSURANCE COMPANY

CERTIFICATE OF SERVICE

I, Peter J. Valeta, an attorney, hereby certify that a true and correct copy of the foregoing Brief of *Amici Curiae* Property Casualty Insurers Association of America and Allstate Insurance Company in Support of Appellee GEICO General Insurance Company has been served upon the following attorneys:

Juan C. Montes
LIDSKY & MONTES
ATTORNEYS AT LAW, P.A.
145 East 49th Street
Hialeah, FL 33013

Marlene S. Reiss, Esq.
MARLENE S. REISS, P.A.
9130 S. Dadeland Blvd., Suite 1612
Miami, FL 33156

Suzanne Youmans Labrit, Esq.
SHUTTS & BOWEN, LLP
4301 W. Boy Scout Blvd, Suite 300
Tampa, FL 33607

Douglas G. Brehm, Esq.
Frank Zacherl, Esq.
SHUTTS & BOWEN, LLP
201 S. Biscayne Blvd., Suite 1500
Miami, FL 33131

Cynthia S. Tunnicliff
PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.
215 South Monroe Street, Second Floor
(32301)
Post Office Box 10095
Tallahassee, Florida 32302-2095

by depositing the same in the U.S. Mail Chute located at 123 North Wacker Drive, Chicago, Illinois, postage pre-paid, prior to the hour of 5:00 p.m. on this 26th day of July, 2012:

_____
Peter J. Valeta

Peter J. Valeta
Florida Bar No. 327557
Meckler, Bulger Tilson Marick & Pearson LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-7895

Attorneys for *Amici Curiae*
Property Casualty Insurers
Association of America and
Allstate Insurance Company

CERTIFICATE OF COMPLAINCE WITH FLA. R. APP. P. 9.210(a)(2)

I, Peter J. Valeta, an attorney, hereby certify that the foregoing Brief of *Amici Curiae* Property Casualty Insurers Association of America and Allstate Insurance Company in Support of Appellee GEICO General Insurance Company complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

_____
Peter J. Valeta

Peter J. Valeta
Florida Bar No. 327557
Meckler, Bulger Tilson Marick & Pearson LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-7895

Attorneys for *Amici Curiae*
Property Casualty Insurers
Association of America and
Allstate Insurance Company