IN THE SUPREME COURT OF FLORIDA

Case No. SC-12-905
L.T. No. 3D-11-0581

GEICO GENERAL INSURANCE COMPANY,
Petitioner,

v.

VIRTUAL IMAGING SERVICES, INC.,
as assignee of Maria Tirado,
Respondent.

AMICUS BRIEF
IN SUPPORT OF PETITIONER

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I. STATEMENT OF INTEREST

Personal Insurance Federation of Florida ("PIFF") and National Association of Mutual Insurance Companies ("NAMIC") submit this Amicus Brief in support of petitioner GEICO General Insurance Company ("GEICO").

PIFF is a non-profit coalition of property and casualty insurers. Its purpose is to create a dynamic, efficient and competitive marketplace for personal insurance products for the benefit of all Floridians. NAMIC is a national trade association that represents insurers providing property and casualty insurance products in Florida as well as in every insurance regulatory jurisdiction in the United States.

The members of PIFF and NAMIC (collectively, the "Amici") account for a large majority of the national markets and underwrite a substantial portion of the property and casualty policies in Florida, including No-Fault Personal Injury Protection ("PIP") coverage written in conjunction with automobile insurance policies.[1] These members, including entities based in Florida, range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, PIFF and NAMIC advocate sound public policies

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[1] PIFF alone represents 45% of the Florida automobile market and more than 25% of the homeowners market.

on behalf of their members in legislative and regulatory forums and file amicus briefs in significant federal and state court cases.

This proceeding – which involves issues affecting PIFF and NAMIC members as well as millions of Floridians – arises from a county court suit brought by respondent Virtual Imaging Services, Inc. ("Virtual"), an MRI provider. Virtual sued GEICO under Section 627.736 of the Florida Statutes (the "PIP Statute"), seeking the difference between the reimbursement paid by GEICO (80% of 200% of the maximum amount under the physician fee schedule for Medicare Part B (the "Fee Schedule")) and the higher amount claimed by Virtual (80% of the billed amount).

As the Third District Court of Appeal found, this is a case of great public importance. PIFF and NAMIC members are involved in thousands of Florida lawsuits in which the Fee Schedule is at issue. The resolution of the certified question will have a significant impact on their members' policyholders, the financial health of the industry and the members' ability to comply with recent amendments (effective July 1, 2012 and January 1, 2013, collectively the "Amendments") to the PIP Statute.

II. SUMMARY OF THE ARGUMENT

PIFF and NAMIC support the position of GEICO and urge this Court to answer the certified question in the affirmative. The Amici present three points for the Court to consider in making its ruling.

First, contrary to Virtual's claim, the issue raised by the certified question was ***not*** rendered moot by the Amendments to the PIP Statute. Virtual concedes that an insurance company now may rely on the statutory Fee Schedule if its policy provides notice it will limit payment to this schedule. But there is no indication that ***other*** medical providers would make a similar concession regarding use of the Fee Schedule under the revised PIP Statute. Further, Virtual fails to recognize that there are **tens of thousands** of pending and prospective cases in which trial courts will have to determine whether insurers may use the Fee Schedule for policies in effect under the 2007 PIP Statute. Hundreds of such cases are being filed daily and will continue to be filed for the foreseeable future.

Second, the Amici ask that the Court consider how its opinion might affect these pending and potential suits, especially those involving different carriers and different policy language. For example, unlike the GEICO policy at issue here, other Florida auto policies mention federal and state fee schedules, including the Fee Schedule contained in the PIP Statute. It is important that the Court recognize these critical policy language distinctions. Otherwise, there is a

risk that the Court's Opinion would be viewed too broadly – either as prohibiting consideration of the Fee Schedule in determining "reasonable" payment or as requiring payment under the Fee Schedule in all circumstances, even when policy language (and the PIP Statute) would be inconsistent with such a requirement.

Finally, the Amici encourage this Court to craft an opinion that recognizes that, even if an insurer is not entitled to "use" the Fee Schedule, it is not required to pay based on the full billed amount in all cases. Instead, the "reasonableness" of payment under the PIP Statute and the relevant policy language depends on the reasonableness of the provider's charges – a factual issue to be determined in each case by the fact-finder.

III. ARGUMENT

A. THE 2012 AMENDMENTS TO THE PIP STATUTE DO NOT MOOT THE ISSUE RAISED BY THE CERTIFIED QUESTION.

Virtual has moved to dismiss this proceeding, incorrectly claiming that the Florida Legislature already "answered" the Third DCA's certified question:

> The Florida legislature has now directly answered the supposed certified question from Virtual Imaging II by enactment of Chapter 2012-197, s.10, Laws of Florida (2012).

> Section 627.736(5)(a)5 now mandates that insurance companies can only rely upon the Medicare fee schedule contained in the 2008 PIP statute if a "notice" is included in the policy that the company "will limit payment pursuant to the [Medicare] schedule."[2]

Contrary to Virtual's contention, the Legislature's recent Amendments to the PIP Statute do not render moot the issue raised by the certified question.

Virtual concedes that, after July 1, 2012, an insurance company may rely on the Fee Schedule if its policy provides notice it will limit payment accordingly. But Virtual is just one of thousands of medical providers, and its concession does not bind other providers. Even though the revised PIP Statute states that an insurer may elect in its policy to limit payments to the statutory Fee Schedule, Florida's litigious providers may continue to sue PIP insurers over this issue.

Further, the Florida Legislature addressed the issue raised by the certified question ***prospectively*** only. In its Motion to Dismiss, Virtual fails to note that there are **tens of thousands** of pending and future cases in which trial courts will have to decide whether insurers may use the Fee Schedule for policies in effect prior to July 1, 2012. Hundreds of such cases are being filed every day and will continue to be filed until the statute of limitations expires on claims under the

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[2] Mot. to Dismiss by Virtual Imaging Services, Inc. (the "Motion to Dismiss") at 2 (Aug. 10, 2012) (brackets in original).

old statute in 2017.[3] Florida PIP insurers are accumulating approximately 8000 lawsuits per month.[4] At this rate, the volume of PIP lawsuits over the next several years would be 96,000 annually.

The number of lawsuits filed monthly more than doubled after the Fourth District's May 2011 opinion in Kingsway Amigo Insurance Co. v. Ocean Health, Inc., 63 So. 3d 63 (Fla. 4th DCA 2011), *rev. denied*, 86 So. 3d 1113 (Fla. 2012).[5] Before Kingsway, many providers accepted payment from PIP insurers based on the statutory Fee Schedule. The Kingsway court found that payment pursuant to the Fee Schedule was not *per se* "reasonable" under the PIP Statute if the policy did not expressly permit the insurer to rely on the schedule. *See* id. at 67-68. This holding resulted in thousands more lawsuits by providers seeking to recover more than what had been paid to them based on the statutory Fee Schedule.

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[3] The statute of limitations for claims on a written contract, such as an insurance policy, is five years. *See* Fla. Stat. § 95.11(2)(b) (2012).

[4] The Florida Department of Financial Services receives service of process on behalf of insurance companies doing business in Florida. Its records, which are available online (www.myfloridacfo.com/sitePages/agency/sections/LegalServices.aspx), reflect a large increase in PIP litigation starting in late 2009 and continuing to date. *See* Office of Ins. Consumer Advocate, Report on Fla. Motor Vehicle No-Fault Ins. (Personal Injury Protection) (the "PIP Working Group Report") at 35-40 (Dec. 2011). Excerpts from this Report are attached hereto as Exhibit A.

[5] *See* PIP Working Group Report at 36 (noting more than 9200 PIP filings in August 2011 alone – three months after the issuance of Kingsway).

This Court's ruling on the certified question – whether answered affirmatively or negatively – will significantly affect pending and prospective lawsuits arising under the former version of the PIP Statute. If the certified question were answered YES, then thousands of pending lawsuits would be resolved and the volume of new lawsuits should decrease to pre-Kingsway levels. Even a NO answer to the certified question would assist with the resolution of pending lawsuits by providing guidance regarding the payment of PIP benefits.[6]

B. THIS COURT SHOULD CONSIDER THE EFFECT OF ITS RULING ON OTHER PIP INSURERS WITH DIFFERENT POLICY PROVISIONS.

Not every PIP insurance policy has the same provisions or the same language. In fact, policy language can vary significantly – a fact this Court should consider as it reviews the Record and writes its Opinion. For example, the PIP policies of some Amici members specifically mention federal and state fee schedules, including the Medicare Fee Schedule.

If this Court were to answer NO to the certified question, the Court should limit its Opinion to the GEICO policy and language before it. Otherwise, there would be a risk that providers (and lower courts) would view the Opinion as prohibiting PIP insurers from ***ever*** considering the statutory fee schedule in

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[6] As noted above, the Court should not decline to answer the certified question because the issue is not moot and requires resolution.

determining payment – even where policies explicitly state that an insurer may consult federal and state schedules like the statutory Fee Schedule. Further, if the Court were to answer YES to the certified question but not recognize distinctions among policies, its Opinion also could be misinterpreted as requiring PIP insurers ***always*** to pay the statutory Fee Schedule amount.

Claims for PIP benefits are contractual and depend on the terms of the insured's policy. The interpretation of an insurance contract is a question of law to be determined by the court. *See* Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005). In construing insurance policies, "courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000).

In this case, the courts to date have looked only at the underlying GEICO policy. But one company's recent litigation experience illustrates the key distinctions in policy language of different PIP insurers. As noted in a 2010 federal court decision, the policy of State Farm Mutual Automobile Insurance Company ("State Farm")[7] contained the following provisions:

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[7] State Farm is a member of both PIFF and NAMIC.

> To determine whether a charge is reasonable we may consider usual and customary charges and payments accepted by the provider, reimbursement levels in the community and **various federal and state medical fee schedules applicable to automobile and other insurance coverages**, and other information relevant to the reasonableness of the reimbursement for the service, treatment or supply.
>
> We will not pay any charge that the ***No–Fault Act*** does not require us to pay, or the amount of any charge that exceeds the amount the ***No–Fault Act*** allows to be charged.

MRI Assocs. of St. Pete, Inc. v. State Farm Mut. Auto. Ins. Co., 755 F. Supp. 2d 1205, 1210 (M.D. Fla. 2010) (emphasis added, italics in original, note omitted).

As Judge Moody of the Middle District of Florida found, this language puts providers on notice that State Farm may consult federal and state fee schedules (including the Medicare Fee Schedule) "in determining the reasonableness of a reimbursement":

> Even if the new fee schedule is not incorporated into the policy by operation of law, Plaintiff's argument also assumes Defendants are not allowed to use the schedule in determining a reasonable amount. This assumption is contrary to the language of the policies which allow Defendants to consider "various federal and state medical fee schedules applicable to automobile and other insurance coverages" in determining the reasonableness of a reimbursement.

MASPI v. State Farm, 755 F. Supp. 2d at 1210. And Judge Ungaro of the Southern District of Florida reached the same conclusion based on the same policy language. *See* All Family Clinic of Daytona Beach, Inc. v. State Farm Mut. Auto. Ins. Co., 280 F.R.D. 688, 693 (S.D. Fla. 2012) ("In summary, the Court finds that

§ 627.736(4)(b) permits State Farm, barring a contractual provision stating otherwise, to consider the 'reasonableness' of each charge 'at any time,' including the present litigation.") (denying provider's motion for class certification); All Family Clinic of Daytona Beach, Inc. v. State Farm Mut. Auto. Ins. Co., No. 09-60902-CIV, 2012 WL 2297734, at *1 (S.D. Fla. June 13, 2012) (denying provider's motion for summary judgment).

These federal court rulings confirm that an insurer's payment obligation is governed by the written agreement between the insurer and the insured. In State Farm's case, the insurer's obligation is to pay 80% of reasonable expenses, based on its consideration of a variety of sources including federal and state medical fee schedules.[8] Different policies may give rise to different obligations, and the Court should not assume that GEICO's policy is the same as that as of other carriers. These differences may be outcome determinative.

[8] The Legislature intended that insurers should consult the Fee Schedule in determining a reasonable reimbursement amount. But the Fee Schedule is not a "floor" for the payment of medical expenses. If the Legislature had intended to make the permissive amount a "floor," then it would not have listed other factors that may be considered in the reasonableness determination. Indeed, payment pursuant to the Fee Schedule arguably would be more than reasonable in many, if not all, circumstances.

C. THE REASONABLENESS OF PROVIDER BILLS AND INSURER REIMBURSEMENTS IS A FACTUAL ISSUE.

Regardless of its ruling on the certified question, this Court should acknowledge that the amount billed to a PIP insurer by a medical provider is not *per se* reasonable. In this case, GEICO did not challenge the reasonableness of Virtual's bill (for $3600). This parties' stipulation was solely for the purpose of narrowing the dispute to the purely legal question of whether a PIP insurer may pay based on the statutory Fee Schedule.[9] GEICO did not concede that the amount billed by Virtual was reasonable. Neither do the Amici, who maintain that the reasonableness of payment under the PIP Statute requires an individual factual determination by the finder of fact.

Indeed, it is the fact-finder's job to evaluate all the factors listed in the PIP Statute and the relevant insurance policy and to make a determination of what is a reasonable amount to be paid. *See* State Farm Mut. Auto. Ins. Co. v. Sestile, 821 So. 2d 1244, 1246 (Fla. 2d DCA 2002) ("The fact-finder must construe the word 'reasonable' and determine whether the insurance company's evaluation of medical bills fits the definition on a case-by-case basis."); *accord* Shenandoah Chiropractic, P.A. v. Nat'l Specialty Ins. Co., 526 F. Supp. 2d 1283, 1285-86 (S.D. Fla. 2007). And as with other elements of its claim, it is the provider's burden of

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[9] *See* Initial Br. at 2 n.2.

proof to show that an insurer breached the policy by failing to pay a reasonable amount:

> In a lawsuit seeking benefits under the statute, both reasonableness and necessity are essential elements of a plaintiff's case. There is nothing in the PIP statute suggesting a legislative intent to alter the normal dynamics of a lawsuit by placing the burden on the defendant in a PIP case to prove that a proposed charge was unreasonable or that a given service was not necessary.

Derius v. Allstate Indem. Co., 723 So. 2d 271, 272 (Fla. 4th DCA 1998); *accord* Auto Owners Ins. Co. v. Marzulli, 788 So. 2d 1031, 1034 (Fla. 2d DCA 2001).

Both the PIP Statute and policy language may give an insurer the discretion to consider many factors in determining what would be a reasonable expense. The ultimate question therefore is whether, as a matter of law, an insurer breached its promise to its insured to pay a reasonable amount after taking into account evidence of usual and customary charges, payments accepted by the provider, reimbursement levels in the community, various federal and state medical fee schedules applicable to automobile, and other coverages and other information relevant to the reasonableness of the reimbursement. *See* MASPI, 755 F. Supp. 2d at 1210 ("The proof and ultimate result in this case will turn on whether the amount calculated by Defendants was, in fact, 80% of a reasonable amount. If not, the contract was breached.").

This determination can never be made as a matter of law. The weighing of the factors outlined in the PIP Statute requires a weighing of evidence. Only a fact-finder can determine whether a provider charge and an insurer's evaluation of the medical bill and reimbursement fit the definition of reasonable. This must be done on a bill-by-bill, case-by-case, jurisdiction-by-jurisdiction basis. Indeed, reasonable reimbursement rates vary in different parts of the state.

In its Opinion, this Court should point out that "reasonableness" is a factual determination. If it does not do so, providers may continue to challenge PIP insurers whenever they do not pay 80% of the billed amount.

IV. CONCLUSION

For these reasons and those expressed in the Initial Brief and other amicus briefs in support of petitioner GEICO, PIFF and NAMIC request that this Court answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this 24th day of September 2012 to all persons on the following service list.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is printed in Times New Roman 14-point font in compliance with the requirements of the Florida Rules of Appellate Procedure.

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