IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-2298

L.T. CASE NO.: 4D14-287

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

ORTHOPEDIC SPECIALISTS a/a/o Kelli Serridge,

Respondent.

On Review from the District Court of Appeal, Fourth District, State of Florida

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

Petitioner (Appellee/Defendant below) is Allstate Insurance Company and is referred to as "Allstate." Respondent (Appellant/Plaintiff below) is Orthopedic Specialists, as assignee of Kelli Serridge, and is referred to as "the Provider." Citations to the single volume record on appeal appear as R.___.

The decision on review is *Orthopedic Specialists a/a/o Serridge v. Allstate Insurance Co.*, 177 So. 3d 19 (Fla. 4th DCA 2015), *rehearing and rehearing en banc denied* (Fla. 4th DCA Nov. 12, 2015) ("*Serridge*"). Citations are to the published opinion, a copy of which is included in the Appendix hereto along with a conformed copy of the opinion. Unless otherwise indicated, all references to the Florida Motor Vehicle No-Fault Law (§§ 627.730-627.7405, Florida Statutes) are to the 2009 version of the statute, which was in effect as of the date of loss and is the version cited in the decision on review.

STATEMENT OF THE FACTS AND CASE

This case presents a pure question of law: Does Allstate's personal injury protection ("PIP") policy give notice of Allstate's election to limit medical provider reimbursements as authorized by section 627.736(5)(a)(2), Florida Statutes, in conformity with this Court's holding in *Geico General Insurance Co. v. Virtual Imaging Services, Inc*., 141 So. 3d 147 (Fla. 2013) ("*Virtual III*" or "*Virtual Imaging*")?

Allstate's PIP policy provides coverage for "[e]ighty percent of all reasonable expenses for medically necessary...services" and—central to this appeal—includes an endorsement stating that:

> Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736 or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited to, all fee schedules.

Serridge, 177 So. 3d at 21.

The Provider rendered medical services to Allstate's insured under an assignment of benefits and billed Allstate $5057; Allstate limited the Provider's reimbursement to $2291.24, which is eighty percent of two hundred percent of the allowable amount under the participating physicians fee schedule of Medicare Part B, calculated as authorized by section 627.736(5)(a)2.f. R. 37, ¶¶ 2, 6. The Provider sued, arguing that Allstate could not use the statutorily authorized fee schedules to limit reimbursement because its fee schedule election notice is

"ambiguous." *Serridge*, 177 So. 3d at 21. The county court disagreed with the Provider, granted summary judgment for Allstate and certified the following question of great public importance to the Fourth DCA:

> Whether [Allstate's] PIP insurance policy language is legally sufficient to authorize Allstate to apply the Medicare fee schedule reimbursement limitations set forth in 627.736(5)(a)2., Florida Statutes.

Id. at 20-21 (internal alterations omitted).

While this case was pending, the First DCA reviewed an indistinguishable certified question regarding Allstate's PIP policy. *See Allstate Fire & Cas. Ins. Co. v. Stand-Up MRI of Tallahassee, P.A.*, No. 1D14-1213, 2015 WL 1223701, at *1 n.1 (Fla. 1st DCA Mar. 18, 2015), *reh'g and reh'g en banc denied* (Fla. 1st DCA Apr. 24, 2015), *petition pending*, No. SC15-962 ("*Stand-Up*"). The First DCA analyzed Allstate's policy language and applied *Virtual III* to "find no ambiguity in this provision's notice of Allstate's election to use the fee schedules … and conclude[d] that Allstate's policy language gave legally sufficient notice of its election to use the fee schedules as required by *Virtual Imaging*." *Id*. at *3.

Examining the same language, however, a divided panel reached the opposite conclusion in *Serridge* and certified conflict with *Stand-Up*. 177 So. 3d at

26. Judge Ciklin principally relied on a county court opinion[1] that pre-dated *Stand-Up* to declare Allstate's policy language ambiguous and insufficient to provide notice of its fee schedule election. *Id*. at 24-25. Judge Levine specially concurred, applying a different analysis to find the language ambiguous and legally insufficient. *Id*. at 26-29. Based on their ambiguity findings, Judges Ciklin and Levine concluded that the policy must "be construed in favor of the Provider[]" to allow "more expansive insurance coverage." *Id*. at 26, 28. Judge May dissented, opining that Allstate's notice is unambiguous and meets the requirements of *Virtual III*, and that construing the fee schedule election notice favorably to the Provider "does not inure to the insured's benefit." *Id*. at 30, 31.

Allstate timely invoked this Court's jurisdiction by notice filed December 11, 2015. This Court accepted jurisdiction by order dated January 20, 2016.

SUMMARY OF THE ARGUMENT

In *Virtual III*, this Court observed that the provision of the PIP statute permitting insurers to limit reimbursements for medical services based on fee schedules was part of a legislative effort "to regulate the amount providers could charge PIP insures and policyholders." 141 So. 3d at 153. This Court concluded that, to implement the legislature's announced public policy to regulate PIP

[1] *Synergy Chiro. & Wellness Co. a/a/o Lindor v. Allstate Prop. & Cas. Ins. Co*., 22 Fla. L. Weekly Supp. 750a (Fla. Broward Cnty. Ct. Jan. 20, 2015), *appeal pending*, Seventeenth Circuit Appellate Division Case No. 15-2820 CACE (AP).

provider charges, an insurer must provide policy-based notice that it is electing to apply the fee schedule limitations. *Id.* at 160. The sole issue in this appeal is whether Allstate has provided such notice.

This Court made clear that an election notice need not "specifically elect[]" those fee schedules and that insurers do not choose paying at fee schedule "rather than" paying reasonable medical costs. *Id.* at 150 and n.3. An insurer need only "provide notice of its election to use fee schedules" (*id.* at 159), as Allstate has done here. Allstate's policy provides a fee schedule election notice by stating that amounts payable for medical expense reimbursements "shall be subject to...any and all limitations, authorized by section 627.736...including, but not limited to, all fee schedules." *Serridge*, 177 So. 3d at 21. This provision is not ambiguous because it is susceptible of only one reasonable interpretation: payments will be subject to limitations authorized by the PIP statute, including all fee schedules.

Under *Virtual III*, the question—which does not involve coverage limitations or exclusions, since $10,000 in benefits is always available to the insured; the statutory limitations determine how much (not whether) a provider will be paid—is if Allstate's policy notifies its insureds that medical provider payments will be limited as authorized by section 627.736, including in accordance with the fee schedules. By stating that "all fee schedules" are included in the

"limitations" that payments "shall be subject to," Allstate definitively notified its insureds (and their assignee providers) that fee schedule limitations will be applied.

The *Serridge* majority held that Allstate's notice would be unambiguous only if Allstate affirmatively disclaims coverage for eighty percent of reasonable medical expenses, in contravention of the statutory "basic coverage mandate" recognized in *Virtual III*. However, insurers cannot disclaim their statutory obligation to satisfy that coverage mandate.

Both the *Serridge* majority and special concurrence conclude that Allstate's fee schedule election notice means only that Allstate reserved its right to apply limitations authorized by law without actually electing to do so. This is an unnatural interpretation that rewrites what Allstate's notice says, disregards the words used, and renders the entire provision meaningless, in violation of well-settled principles of policy construction. When the language is read in its entirety, given its plain meaning and taken in context, there is only one reasonable interpretation: "Allstate's policy language gave legally sufficient notice to its insureds of its election to use the Medicare fee schedules." *Stand-Up*, 2015 WL 1223701, at *3.

The fact that different courts have reached divergent conclusions as to the legal sufficiency of Allstate's fee schedule election notice does not render it ambiguous. Conflicting judicial opinions suggest ambiguity only where there are

competing **reasonable** interpretations. Because the interpretations espoused in *Serridge* are unreasonable as a matter of law, no ambiguity can be found on the basis of conflicting decisions.

Finally, the quest for ambiguity is fruitless. Ambiguous policy language must be construed for the benefit of the insured. Thus, even if Allstate's notice were ambiguous, construing it for the benefit of the insured here requires limiting provider reimbursement in accord with the fee schedules.

In sum, the First DCA in *Stand-Up* correctly interpreted Allstate's policy language, finding it unambiguous and compliant with the requirements articulated in *Virtual III*. Led astray by the Provider's misguided ambiguity argument, and relying on inapposite authority, the *Serridge* majority and special concurrence parsed individual words and phrases and construed them in isolation to rewrite the plain language of Allstate's notice and find Allstate's fee schedule election notice legally insufficient. This conclusion is not only predicated on a misapplication of established principles of policy construction, it is at odds with the PIP statute's coverage mandate and the holdings of *Virtual III*, and it ignores the plain language used in Allstate's policy. This Court should approve the First DCA's unanimous opinion in *Stand-Up* and quash the majority decision in *Serridge*.

ARGUMENT

I. STANDARD OF REVIEW.

This Court must interpret Allstate's PIP policy and the PIP statute, so the standard of review is de novo. *Virtual III,* 141 So. 3d at 152.

II. UNDER *VIRTUAL III*, THE ONLY QUESTION IS WHETHER THE POLICY PROVIDES "NOTICE" OF AN ELECTION TO USE THE STATUTORILY AUTHORIZED FEE SCHEDULE LIMITATIONS.

A. *Stand-Up* Correctly Applied *Virtual III* to Conclude That "Simple Notice" is Legally Sufficient.

Stand-Up held that *Virtual III*'s "simple notice requirement is satisfied by Allstate's language limiting "[a]ny amounts payable" to the fee schedule-based limitations found in the statute." *Stand-Up*, 2015 WL 1223701, at *2. The *Serridge* majority disagreed, stating that "[a] policy is not sufficient unless it plainly and obviously limits reimbursement to the Medicare fee schedules exclusively." 177 So. 3d at 25-26. This is facially incorrect, since the payment limitations authorized by section 627.736(5)(a) are not "exclusively" the Medicare fee schedules; which limitations apply is determined by the nature of the service at issue and they include limitations based on "usual and customary" payments, as well as the worker's compensation framework. *See* §§ 627.536(5)(a)2.b., 2.c. & 2.f., Fla. Stat. Furthermore, *Virtual III* is fairly read just as the First DCA explained: simple notice is all that is required, a conclusion this Court reinforced by rephrasing the certified question in *Virtual III*.

The Third DCA framed the certified question presented in *Virtual III* as whether insurers can apply the fee schedules "even if the policy does not contain a provision **specifically electing those schedules**…." *Virtual III*, 141 So. 3d at 149 n.2 (emphasis added). This Court eliminated the reference to "specifically electing" and changed the question to whether an insurer can apply the fee schedules "without providing **notice in its policy of an election to use**" the fee schedules. *Id*. at 150 (emphasis added). *Virtual III* thus generally holds that policy-based notice is required, but does not prescribe any "specific" election requirement. *Stand-Up*, 2015 WL 1223701, at *2 ("*Virtual Imaging* requires no other magic words from Allstate's policy and its simple notice requirement is satisfied by Allstate's language limiting '[a]ny amounts payable' to the fee schedule-based limitations found in the statute."); *see also S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 89 F. Supp. 3d 1338, 1341 (S.D. Fla. 2015) (acknowledging import of rephrasing certified question and concluding that *Virtual III* requires only a "mere election to use fee schedules").

In concluding that simple notice is sufficient, the First DCA (like U.S. District Judge Dimitrouleas) recognized persuasive dicta[2] from this Court suggesting that language similar to Allstate's is sufficient to provide notice of an election to use the fee schedules. *See Stand-Up*, 2015 WL 1223701, at *2; *S. Fla. Wellness*, 89 F. Supp. 3d at 1342. In *Virtual III*, this Court noted the GEICO policy had been "amended to include an election of the Medicare fee schedules as the method of calculating reimbursements." 141 So. 3d at 150.[3] The First DCA examined the amended GEICO policy, which provides that "Geico will pay in accordance with the Florida Motor Vehicle No-Fault Law... and where applicable *in accordance with all fee schedules* contained in the Florida Motor Vehicle No-Fault Law...80% of medical expenses." *Stand-Up*, 2015 WL 1223701, at *2 n.2 (emphasis in original). The First DCA found it

> relevant that th[is] Court...distinguished between two different versions of GEICO's policy language: earlier language that did **not** refer to fee schedules and amended language that did. Th[is] Court found only GEICO's former policy language deficient, while recognizing that its amendment included an "election of the Medicare fee schedules as the method of calculating reimbursements."

[2]Because of its source, "supreme court dictum, is to say the least, most persuasive." *U.S. Fid. & Guar. Co. v. State Farm Mut. Auto Ins. Co.*, 369 So. 2d 410, 411 n.1 (Fla. 3d DCA 1979) (citing *Horton v. Unigard Ins. Co.*, 355 So. 2d 154, 155 (Fla. 4th DCA 1978)); *see also Nunez v. GEICO Gen. Ins. Co.*, 117 So. 3d 388, 391-92 (Fla. 2013) (noting that numerous courts properly treated dicta from an earlier opinion of this Court as "persuasive").

[3]The medical provider filed the amended GEICO policy in this Court in support of its motion to dismiss *Virtual III* as moot.

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> Allstate's policy substantially resembles Geico's amended policy, both subjecting reimbursements to "all fee schedules" provided in the law.

Id. at *2 (citing *Virtual III*) (internal footnote and citations omitted) (emphasis in original); *see also S. Fla. Wellness*, 89 F. Supp. 3d at 1342 ("[I]f the amended GEICO policy language provided sufficient notice, the Allstate language at issue likely would as well.").

The current scenario begs the question of whether **any** form of notice will be deemed legally sufficient to authorize PIP insurers to use the statutory reimbursement limitations as the Legislature authorized. Given the unilateral attorneys' fee-shift provisions of sections 627.428 and 627.736(8), Florida Statutes, medical providers are incentivized to seek higher payments and the "battle rages on. As the Pope once asked Michelangelo during the painting of the Sistine Chapel: "When will there be an end?"" *Serridge*, 177 So. 3d at 30 (May, J., dissenting). Allstate respectfully submits that the "battle" should end now. This Court should confirm, as it foreshadowed in *Virtual III* (and as the First DCA and U.S. District Judge Dimitrouleas held), that a policy provision stating payments "shall be subject to any and all limitations, authorized by section 627.736 … including, but not limited to, all fee schedules" is legally sufficient notice that payments will be limited in accordance with the statutory fee schedules.

B. ***Virtual III*** **Does Not Require A "Traditional" Coverage Ambiguity Analysis.**

Traditionally, the analysis of whether an insurance policy is ambiguous is devoted to interpreting coverage-determinative policy provisions. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Menendez*, 70 So. 3d 566, 570 (Fla. 2011) (policy is ambiguous if susceptible of differing reasonable interpretations, "one providing coverage and the other limiting coverage") (quoting *Swire Pac. Holdings v. Zurich Ins. Co*., 845 So. 2d 161, 165 (Fla. 2003)); *U.S. Fire Ins. Co. v. J.S.U.B., Inc*., 979 So. 2d 871, 877 (Fla. 2007) (ambiguities in insurance policies are construed "**in favor of coverage**") (emphasis supplied). That analysis is not applicable here because this is not a coverage case and no limitations or exclusions are involved.

Like all Florida PIP policies, Allstate's policy provides benefits with a $10,000 coverage limit. Regardless of whether reimbursement limitations in section 627.736(5)(a)2. apply, the insured always receives $10,000 in coverage benefits. Allstate's policy language giving notice that the section 627.736(5)(a)2. limitations will be applied does not change the amount of those benefits in any way. Notice that Allstate will apply reimbursement limitations only determines how much (not whether) a provider will be paid from those PIP benefits, and in no way reduces or limits the coverage available to the insured.

As the *Serridge* dissent aptly notes, "[t]he **issue is not whether the policy is ambiguous, but rather whether the policy adequately put the insured on**

notice of the insurer's election to limit reimbursements according to the Medicare fee schedules set forth in section 627.736." *Serridge*, 177 So. 3d at 30 (May, J., dissenting) (citing *Virtual III*) (emphasis added). As the First DCA, District Judge Dimitrouleas and multiple circuit court appellate panels[4] correctly have concluded, Allstate's policy language unambiguously provides notice.

The *Serridge* majority and special concurrence focus on purported ambiguity of Allstate's policy fee schedule election notice without recognizing this distinction. In so doing, they mistakenly rely on discussions in *Virtual III* about the pre-*Virtual III* holdings in *Kingsway Amigo Insurance Co. v. Ocean Health, Inc.*, 63 So. 3d 63 (Fla. 4th DCA 2011) ("*Kingsway*") and *GEICO Indemnity Co. v. Virtual Imaging Services, Inc.*, 79 So. 3d 55 (Fla. 3d DCA 2011) ("*Virtual I*").

[4] *Allstate Indem. Co. v. Gables Ins. Recov., Inc. a/a/o Jimenez*, 22 Fla. L. Weekly Supp. 1146a (Fla. 11th Cir. Ct. June 8, 2015); *Allstate Ins. Co. v. Fla. Hosp. Med. Ctr. a/a/o Eula Henderson*, 23 Fla. L. Weekly Supp. 5a (Fla. 9th Cir. Ct. Apr. 9, 2015); *Allstate Prop. & Cas. Co. v. Royal Diag. Ctr., Inc. a/a/o Leon,* 22 Fla. L. Weekly Supp. 787a (Fla. 11th Cir. Ct. Jan. 29, 2015); *Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI LLC a/a/o Politesse*, 21 Fla. L. Weekly Supp. 989a (Fla. 11th Cir. Ct. June 23, 2014); *Allstate Prop. & Cas. Ins. Co. v. Royal Diag. Ctr., Inc. a/a/o Mondy,* 21 Fla. L. Weekly Supp. 627a (Fla. 11th Cir. Ct. Apr. 3, 2014); *Allstate Fire & Cas. Ins. Co. v. Ortho. Spec. a/a/o Spyropolous*, 21 Fla. L. Weekly Supp. 470a (Fla. 6th Cir. Ct. Dec. 10, 2013); *see also Excellent Health Servs., Corp. v. United Auto Ins. Co*., 2014 WL 2516476, at **2, 4 (Fla. 11th Cir. Ct. June 3, 2014) (holding that language "strikingly similar" to Allstate's "clearly and unambiguously elects the fee schedule methodology"). Copies of the foregoing opinions are included in the Appendix to this brief.

In *Kingsway*, the Fourth DCA opined that reimbursement for 80% of reasonable medical expenses constituted "greater coverage" than reimbursement limited in accordance with the provisions of section 627.736(5)(a)2. *Kingsway*, 63 So. 3d at 68. On the basis of that conclusion, the court held that an insurer whose policy covered 80% of reasonable medical expenses but contained no reference whatsoever to the fee schedules could not use the fee schedules to limit provider reimbursements. *Id.* In essence, *Kingsway* concluded that section 627.536(5)(a)2. established a minimum coverage requirement and that absent policy language electing that minimum, GEICO's policy (which stated that it covered 80% of reasonable expenses) provided "greater coverage" than the minimum required by the statute.

This "greater coverage" notion is, of course, misguided, given that $10,000 in coverage for reasonable medical expenses is the basic coverage mandate imposed by section 627.736(1)(a) and is provided by every Florida PIP policy. *See Virtual III*, 141 So. 3d at 155. The *Kingsway* court performed no ambiguity analysis and made no ambiguity finding, as it held the insurer could not use the fee schedules absent a policy-based notice; because there was no such notice, there was no language to construe.

In *Virtual I*, a split panel of the Third DCA held that an insurer whose policy did not reference the fee schedules could not use them, but for different reasons

than expressed in *Kingsway*. The *Virtual I* majority opined that "ambiguities necessarily result from incorporating section 627.736(5)(a)(2) into [PIP] policies under 627.7407(2)." 79 So. 3d at 58. On that basis, the *Virtual I* majority found the policy ambiguous and held that it should be construed to reimburse the provider "for the greatest amount possible." *Id*.

Kingsway and *Virtual I* mistakenly treated the issue as whether GEICO's policy should be interpreted to provide "greater coverage" or "the greatest amount possible", meaning "greater coverage" than afforded by reimbursement limited under section 627.736(5)(a)2. In *Virtual III*, this Court answered the question the Third DCA certified in *Geico General Insurance Co. v. Virtual Imaging Services, Inc*., 90 So. 3d 321 (Fla. 3d DCA 2012) ("*Virtual II*"), regarding whether an insurer whose policy made no reference to the fee schedules could use them. This Court answered in the negative, but performed no ambiguity analysis and made no ambiguity finding with respect to the policy at issue, because it rejected—**without** adopting *Virtual I*'s ambiguity rationale—arguments that the policy incorporated the fee schedule reimbursement limitations by reference or operation of law. 141 So. 3d at 158.

Describing *Virtual III*, Judge Ciklin stated that this Court "**held** that in order to limit coverage to the Medicare fee schedules, "the insurer must clearly and unambiguously elect the permissive payment methodology."" *Serridge*, 177 So. 3d

at 24 (emphasis added); *id*. at 25 ("*Virtual Imaging*'s central holding is clear: to elect a payment limitation option, the PIP policy must do so 'clearly and unambiguously.'"). The internally quoted language in both passages is from the trial court order the Fourth DCA affirmed in *Kingsway*, which this Court examined in *Virtual III*. However, because the polices at issue in *Kingsway* and *Virtual III* contained no reference to the fee schedules or any other notice regarding an election to use them, neither the *Kingsway* court nor this Court made any "holding" regarding ambiguity, or the form or specific requirements of a fee schedule election notice.

This Court's stated holding in *Virtual III* is as follows:

> [W]e **hold** that under the 2008 amendments to the PIP statute, **a PIP insurer cannot take advantage of the Medicare fee schedules to limit reimbursements without notifying its insured by electing those fee schedules in its policy. Because the policy in this case did not reference the permissive method of calculation based on the Medicare fee schedules, GEICO could not limit its reimbursement based on those fee schedules**. Accordingly, **we adopt the reasoning of the Fourth District in *Kingsway***, answer the rephrased certified question in the negative, approve the result of the Third District's decision in *Virtual II*, and **approve** the district court decisions in ***Kingsway, Virtual I***, and *DCI MRI* **to the extent** those decisions are **consistent with this opinion**.

141 So. 3d at 160 (emphasis added). Allstate respectfully submits that the "reasoning" this Court adopted from *Kingsway* is that a policy's general incorporation of the entire PIP statute (by reference or operation of law) does not

constitute an "election" to use the fee schedule limitations; an insurer wishing to do so must provide policy-based notice of such an election.

The *Serridge* majority's ambiguity analysis was not relevant to a determination of whether Allstate gave notice of an election to use the fee schedules. Such notice either was given, or it was not. Here, it was and that should have ended the inquiry.

III. ALLSTATE COMPLIED WITH *VIRTUAL III*'S REQUIREMENT TO PROVIDE POLICY-BASED NOTICE OF AN ELECTION TO USE THE FEE SCHEDULES.

The issue in *Virtual III* was whether an insurer whose PIP policy did not reference the fee schedules **at all** could use them to limit PIP medical provider reimbursements. GEICO argued that policy-based notice of a fee schedule election was unnecessary because the PIP statute was incorporated to the policy by reference and operation of law. 141 So. 3d at 158. This Court held that "under the 2008 amendments to the PIP statute, a PIP insurer cannot take advantage of the Medicare fee schedules to limit reimbursements without notifying its insured by electing those fee schedules in its policy." *Id*. at 160. Allstate's policy provides such notice by stating that amounts payable for medical expense reimbursements "shall be subject to…any and all limitations, authorized by section 627.736...including, but not limited to, all fee schedules."

A. Under Well-Settled Principles of Construction, Allstate's Notice is Not Ambiguous Because the Plain Meaning of its Language is Susceptible of Only One Reasonable Interpretation.

It is fundamental that "if the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." *Menendez*, 70 So. 3d at 569-570 (Fla. 2011) (quoting *Travelers Indem. Co. v. PCR, Inc*., 889 So. 2d 779, 785 (Fla. 2004)). Courts must give effect to all provisions and read each policy "as a whole and avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire*, 845 So. 2d at 165; *see also* § 627.419(1), Fla. Stat. (2009) ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto."); *Excelsior Ins. Co. v. Pomona Pk. Bar & Pkg. Store*, 369 So. 2d 938, 941 (Fla. 1979) (all policy provisions "should be given meaning and effect and apparent inconsistencies reconciled if possible") (citations omitted).

"Notably, simply because a provision is complex and requires analysis for application, it is not automatically rendered ambiguous." *Swire*, 845 So. 2d at 165 (citation omitted). Similarly, "that a provision in an insurance policy could be more clearly drafted does not necessarily mean that the provision is otherwise inconsistent, uncertain or ambiguous." *State Farm Mut. Auto Ins. Co. v. Pridgen*,

498 So. 2d 1245, 1248 (Fla. 1986). Courts should "not put strain and unnatural construction on the terms of a policy in order to create uncertainty and ambiguity." *Thomas v. Prudential Prop. & Cas*., 673 So. 2d 141, 142 (Fla. 5th DCA 1996).

Against this backdrop of interpretive principles, Allstate's fee schedule election notice language is ambiguous only if it is susceptible to more than one **reasonable** interpretation. *Menendez*, 70 So. 3d at 570; *Swire*, 845 So. 2d at 165; *see also BKD Twenty-One Mgmt. Co. v. Delsordo*, 127 So. 3d 527, 530 (Fla. 4th DCA 2012) (Because "fanciful, inconsistent and absurd interpretations of plain language are always possible[,]…contractual language is ambiguous only if it is susceptible to more than one *reasonable* interpretation.") (emphasis in original) (citations omitted); *cf. Sullins v. Allstate Ins. Co.*, 667 A. 2d 617, 624 (Md. Ct. App. 1995) (alternative **reasonable** interpretations of the same language may indicate ambiguity). Accordingly, "where one interpretation…would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner." *Delsordo*, 127 So. 3d at 530 (citation omitted).

Neither the *Serridge* majority nor the special concurrence identifies any alternative reasonable interpretation for Allstate's notice language. The *Serridge* majority opined that Allstate's fee schedule election notice would be unambiguous only if Allstate disclaimed the PIP statutory mandate to provide coverage for eighty percent of reasonable medical expenses. 177 So. 3d at 24, 26. However,

this conclusion contradicts the plain text of section 627.736(1)(a), Florida Statutes and diverges from *Virtual III* because there is not—nor can there be—any requirement that Allstate disclaim the statutory mandate that its PIP coverage pay 80% of reasonable medical expenses. The *Serridge* special concurrence described the phrase "shall be subject to" as "an amalgamation of both mandatory commands and specific suggestions" and opined that the resulting "ambiguity" should be resolved against Allstate and "for more expansive insurance coverage." 177 So. 3d at 27, 28 (Levine, J., specially concurring). That conclusion is incorrect because it ignores the plain meaning of Allstate's language and improperly construes the purported ambiguity against the insured's interests.

Serridge's central conclusion is that Allstate's fee schedule election notice merely "incorporates the PIP statute (including but not limited to all fee schedules)" (*id*. at 25, n.2) and does not mean "that [Allstate] must or will pay according to the limitations authorized by the statute." *Id*. at 29. This interpretation disregards the plain meaning of the words used, is predicated on a strained and unnatural interpretation of isolated terms, and renders the entire notice provision meaningless. Neither the majority nor the special concurrence articulates an alternate, **reasonable** interpretation to that of the First DCA: "Allstate's policy language gave legally sufficient notice to its insureds of its election to use the Medicare fee schedules." *Stand-Up*, 2015 WL 1223701, at *3.

B. The *Serridge* Interpretation is Unreasonable Because Insurers Cannot Disclaim The Basic Coverage Mandate.

Judge Ciklin, writing for the *Serridge* majority, opined that Allstate's fee schedule election notice would be unambiguous only if it "make[s] it inescapably discernible that [Allstate] will not pay the 'basic' statutorily required coverage and will instead substitute the Medicare fee schedules as the exclusive form of reimbursement." 177 So. 3d at 26; *id*. at 24 (Allstate's policy "fails to state anywhere in explicit...words that Allstate will not pay 80% of reasonable charges and will actually limit payment to [the statutory fee schedules].") (quoting *Synergy Chiro*., 22 Fla. L. Weekly Supp. 750a). This interpretation is unreasonable as a matter of law because it (a) runs directly afoul of the "basic coverage mandate" in section 627.736(1)(a), pursuant to which all PIP insurers "shall" reimburse 80% of reasonable medical expenses and (b) contradicts *Virtual III*'s holding that fee schedule payments satisfy the "basic coverage mandate" where policy-based notice of a fee schedule election is given. *See Virtual III*, 141 So. 3d at 155, 157 n.8.

Neither Allstate nor any other insurer can issue a PIP policy disclaiming the "basic coverage mandate" of section 627.736(1), Florida Statutes. As this Court explained in *Virtual III*, section 627.736(1)(a) requires all PIP insurers—including Allstate—to "reimburse eighty percent of reasonable expenses for medically necessary services." 141 So. 3d at 155. *Virtual III* thus confirms what the statutory text plainly states: PIP insurers "shall" provide coverage for 80% of reasonable

medical expenses. Accordingly, insurers do not—indeed, cannot—choose to pay fee schedule amounts "instead of" reasonable expenses.

This conclusion is reinforced by this Court's rephrasing of the certified question it reviewed in *Virtual III*:

Question certified by the 3d DCA	Question as rephrased by this Court
With respect to PIP policies issued after January 1, 2008, **may the insurer compute provider reimbursements based on the fee schedules** identified in Section 627.736(5)(a), Florida Statutes, even if the policy does not contain a provision specifically electing those schedules **rather than "reasonable medical expenses" coverage based on Section 627.736(1)(a)**?	With respect to PIP policies issued after January 1, 2008, may an insurer limit reimbursements based on the Medicare fee schedules identified in Section 627.736(5)(a), Florida Statutes, without providing notice in its policy of an election to use the Medicare fee schedules as the basis for calculating reimbursements?

Virtual III, 141 So. 3d at 150, 150 n.2 (emphasis added). This Court thus eliminated any suggestion that there must be a "choice" between fee schedule reimbursement limitations "rather than" the "reasonable medical expenses coverage" mandate.

Indeed, the "very reason" this Court rephrased the certified question was that it did "**not** conclude that limiting reimbursement pursuant to section 627.736(5)(a)2. would never satisfy [the] reasonable medical expenses coverage mandate." *Id*. at 157 n.8 (emphasis in original).As this Court explained, the issue

> **is not whether an insurer can compute reimbursements based on the Medicare fee schedules "*rather than*" provide reasonable medical expenses coverage**…but whether the insurer can use the...fee

> schedules as a method for *calculating* the "reasonable medical expenses" coverage….

Id. at 150 n.3 (italics in original; bold emphasis added).

Summarizing, the *Serridge* majority's holding that Allstate's policy is ambiguous or otherwise deficient because it does not state that Allstate "will not pay the 'basic' statutorily required coverage" (177 So. 3d at 26) disregards the statutory mandate (confirmed in *Virtual III*) that Allstate must pay 80% of reasonable medical expenses. It also contradicts *Virtual III*'s holding that fee schedule payments satisfy the basic coverage mandate if policy-based notice of a fee schedule election is given. Because *Serridge's* interpretation is unreasonable as a matter of law, it cannot support any ambiguity finding.

C. The Terms "Shall" and "Subject to" Do Not Create Ambiguity.

1. The Term "Shall" is Mandatory.

In finding Allstate's fee schedule election notice ambiguous, the *Serridge* majority and special concurrence focused on the phrase "shall be subject to." *See Serridge*, 177 So. 3d at 27-29. Both opinions concluded that the term "shall" means something other than "must." Finding the word "shall" to be "meaningless" because it is followed by the words "be subject to," Judge Ciklin opined that Allstate's language "just incants a statutory truism, namely that all PIP policies are subject to the PIP statute." *Id*. at 24 (quoting *Synergy Chiro*., 22 Fla. L. Weekly Supp. 750(a)). This conclusion rests on a misapprehension of Allstate's actual

language, as the following sentence from the opinion demonstrates: "The policy text does not say that the limitations 'shall be applied'; only that they **shall be *subject to* being applied.**" *Id*. at 25 (italics in original; bold emphasis added). However, Allstate's policy does **not** say fee schedule limitations are "subject to being applied." It says "**amounts payable...shall be subject to** any and all **limitations** authorized by section 627.736...**including...all fee schedules**." Judge Ciklin's conclusion requires rewriting the policy language, adding words that do not appear in Allstate's fee schedule election notice and ignoring the plain meaning of the words Allstate actually used.

In his special concurrence, Judge Levine concluded that the word "shall" denotes something other than a "mandatory command," relying in part on a passage from a treatise authored by the late Justice Scalia and Bryan Garner to the effect that "even the solitary use of the word "shall" is…a semantic mess." 177 So. 3d at 27, 29 (Levine, J., specially concurring) (citing Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 11 at 113 (2012 ed.)). However, as that very treatise explains, "[m]andatory words impose a duty...The traditional, commonly repeated rule is that *shall* is mandatory....when the word *shall* can reasonably be read as mandatory, it ought to be so read." *Id*. at 112, 114 (emphasis in original).

Consistent with this prescription, Florida precedent establishes beyond debate that "[t]he word 'shall' is mandatory in nature." *Sanders v. City of Orlando*, 997 So. 2d 1089, 1095 (Fla. 2008) (citation omitted); *S.R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977) (""shall" … is normally meant to be mandatory in nature"); *City of Orlando v. Cnty. of Orange*, 276 So. 2d 41, 43 n. 4 (Fla. 1973) ("shall" has mandatory connotation in normal usage) (citing *Neal v. Bryant,* 149 So. 2d 529, 532 (Fla. 1962) ("'shall' … according to its normal usage, has a mandatory construction")); *Forman v. Tay,* 180 So. 3d 1221, 1222 (Fla. 4th DCA 2015) (same); *Psychiatric Inst. of Delray, Inc. v. Keel*, 717 So. 2d 1042 (Fla. 4th DCA 1998) (same) (quoting Black's Law Dictionary 1233 (5th ed. 1979) ("As used in statutes, contracts, or the like, [the] word shall is generally imperative or mandatory.")); *Kelly v. State*, 795 So. 2d 135, 136 (Fla. 5th DCA 2001) (same); *State v. Harper*, 792 So. 2d 1243, 1245 (Fla. 2d DCA 2001) (use of "shall" instead of "may" signifies mandatory requirement); *Brookwood-Jackson Cnty. Convalescent Ctr. v. Dep't of Health and Rehab. Servs.*, 591 So. 2d 1085, 1087 (Fla. 1st DCA 1992) (shall indicates an "unconditional requirement"); *City of Coral Gables v. Dodaro*, 397 So. 2d 977, 978 n.3 (Fla. 3d DCA 1981) (""Shall" is mandatory, not discretionary or directory language.") (emphasis in original).

Indeed, this Court in *Virtual III* construed the word "shall" as mandatory. *See Virtual III*, 141 So. 3d at 155 (discussing the "basic coverage mandate" of

section 627.736(1)(a): "every PIP insurer is required to—that is, the insurer "shall""). And the United States Supreme Court adheres to construing the word "shall" to indicate that action is mandatory, not optional or discretionary. *See, e.g.*, *Sebelius v. Auburn Reg'l Med. Ctr.*, — U.S. —, 133 S.Ct. 817, 824 (2013) (referring to "the mandatory word 'shall'"). Here, the term "shall" can and should be read in the conventional manner—it **mandates** that amounts payable under Allstate's PIP coverage are "subject to" the statutorily authorized fee schedule limitations.

The *Serridge* special concurrence also cites various decisions for the proposition that "'shall be subject to' is not mandatory." 177 So. 3d at 28 (Levine, J., specially concurring). Respectfully, this analysis is both inapposite and legally flawed. The only Florida case Judge Levine cites is *Fallis v. City of N. Miami*, 127 So. 2d 883 (Fla. 1961), which is distinguishable on its facts. There, taxpayers argued that revenue certificates a municipality issued were invalid because no referendum was held. One provision of the municipal charter provided that bonds or other evidence of indebtedness "shall be subject to referendum" but specified several exceptions. Other charter provisions established criteria for when a referendum was required. Reading both parts of the charter *in pari materia*, the Court explained that the charter's reference to "shall be subject to referendum" was "not mandatory; it is obviously intended to *permit* a referendum on a bond

ordinance when such is demanded in accordance with other provisions of the municipal charter." *Id*. at 884 (emphasis in original). Thus, the Court concluded that "shall" would mandate a referendum for the revenue certificates if the statutory prerequisites for a referendum applied. *Fallis* thus does not contradict the overwhelming majority rule that "shall" is mandatory; it reinforces that "shall" is properly interpreted as "not mandatory" only where the context requires such an interpretation.

The remaining cases the special concurrence cites on this point are also distinguishable, and do not involve Florida law or bind any Florida court. Two are unpublished trial court orders interpreting forum selection clauses, which are interpreted narrowly as a matter of public policy. *See Pace Props., Inc. v. Excelsior Constr., Inc.*, 2008 WL 4938412, at **1, 3 (N.D. Fla., Nov. 18, 2008) (provision stating that disputes "shall be subject to litigation in state court in Escambia County" did not, under federal procedural law, constitute an agreement to litigate exclusively in state court and thus did not preclude removal to federal court); *Mena Films, Inc. v. Painted Zebra Prods., Inc*., 831 N.Y.S. 2d 348 (N.Y. Sup. Ct. 2006) (provision stating that agreement "shall be governed by California law and shall be subject to the jurisdiction of the Federal and State courts located in Los Angeles County" did not confer exclusive jurisdiction in California courts) (applying California and New York law). In *City of Rochester v. Corpening*, 907 A.2d 383

(N.H. 2006), a divided court held that a statute stating that violations of specified prohibitions "shall be subject to" civil penalties authorized, but did not require, the trial court to impose such penalties); likewise, in *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), the **dissent** argued that a similar penal statute should be construed to allow, rather than require, imposition of civil penalties.

Allstate's notice language mandates that reimbursement limitations be applied to PIP benefits payable. There is no basis or justification to interpret Allstate's use of the term "shall" other than as mandatory.

2. The First DCA Correctly Interpreted "Shall Be Subject To."

In the special concurrence's only reference to *Stand-Up*, Judge Levine stated that the First DCA found Allstate's election notice sufficient "without analyzing [the] phrase "shall be subject to."" 177 So. 3d at 28 (Levine, J., specially concurring). This is simply incorrect. The First DCA explained its analysis at length, as follows:

> **Our conclusion stems from the policy's plain statement that reimbursements "shall" be subject to** the limitations in § 627.736, including "all fee schedules." *See Virtual Imaging*, 141 So. 3d at 157 (quoting...[*Menendez*, 70 So. 3d at 569-70] ("If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written.))
>
> ***
>
> **Stand-Up MRI argues that Allstate's use of the phrase "subject to...all fee schedules" fails to provide sufficient notice that reimbursements will always be limited to the fee schedules**...[and]

> means only that Allstate had the option to limit reimbursements per the Medicare fee schedule, not that it would so limit reimbursements. But **we see no ambiguity here because the language of the policy makes reimbursements subordinate to the fee schedules in rather unmistakable terms**. When expressing the hierarchical effect of overlapping provisions, the phrase 'subject to' is very commonly used to signal subordination. *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 616 (2011 ed.); *see also St. Augustine Pools, Inc. v. James M. Barker, Inc*., 687 So. 2d 957, 958 (Fla. 5th DCA 1997) (citing Black's Law Dictionary 1425 (6th ed. 1990)).

Stand-Up, 2015 WL 1223701, at *2-3 (emphasis added).

Allstate's fee schedule election notice states "all fee schedules" are included in the "limitations" that payments "shall be subject to." Interpreting this language—as the *Serridge* majority did—to mean that Allstate reserved its right to apply limitations authorized by law, but did not "elect" to apply such limitations (177 So. 3d at 24), is a strained and unnatural construction which assumes the provision was included without purpose or practical effect.

As a matter of common sense, Allstate would not draft its policy to notify insureds that (i) it might possibly calculate provider reimbursements pursuant to statutorily authorized fee schedule limitations but (ii) would not do so immediately or perhaps ever. No reasonable reader would interpret the policy in this way; no reasonable business operates this way. Indeed, ascribing this meaning renders the notice provision altogether meaningless, illogical and absurd. There would be no need for the provision at all if it states no more than what is already Florida law—

namely, that "the Medicare fee schedules set forth in section 627.736(5)(a)2. provide an option for insurers." *Virtual III*, 141 So. 3d at 159.

3. In The Context Of Insurance Policies, "Subject To" Means "Governed By."

To support its conclusion that "the subject to provision is intrinsically ambiguous" (177 So. 3d at 24), the *Serridge* majority relied on a county court order noting several Black's Law Dictionary meanings for the term "subject to." *Id*. at 24-25 (quoting *Synergy Chiro*., 22 Fla. L. Weekly Supp. 750a (quoting *Affinity Internet Inc. v. Consolidated Credit Counseling Services, Inc*., 920 So. 2d 1286, 1289 (Fla. 4th DCA 2006)). As an initial matter, *Affinity Internet* and the other two cases[5] cited in the county court order quoted by the majority are readily distinguishable from the instant case. Those decisions hold that making a subcontract or collateral agreement "subject to" general provisions of a master agreement containing an arbitration provision does not establish an independent agreement to arbitrate disputes arising between the parties to the subcontract or collateral agreement. The principal issue was whether a subcontract or collateral agreement sufficiently incorporated an arbitration provision from the master agreement to constitute a binding agreement to arbitrate disputes, where at least one of the parties to the subject dispute was not a party to the master agreement.

[5]*BGT Grp. Inc. v. Tradewinds Eng. Servs., LLC*, 62 So. 3d 1192 (Fla. 4th DCA 2011) and *St. Augustine Pools, Inc. v. James M. Barker, Inc.*, 687 So. 2d 957 (Fla. 5th DCA 1997).

Here, of course, there is no collateral agreement, so the incorporation analysis is altogether inapposite. Furthermore, there is no issue of "incorporation by reference" because the "subject to" provision does not purport to "incorporate" the fee schedule limitations or anything else; on the contrary, it directly and specifically **identifies** the governing "limitations" as those authorized by section 627.736, including the fee schedules.

Putting aside these distinctions, Florida law is well-established that where a word or phrase has multiple dictionary meanings, those definitions must be considered in the **context** where the words are used. *See, e.g., E.A.R. v. State*, 4 So. 3d 614, 632 (Fla. 2009) (relying on "germane" dictionary definitions of "reason"); *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) (applying dictionary meaning for "repair" based on context). Otherwise, any word that has multiple dictionary meanings would be inherently ambiguous. As one judge put it:

> Ambiguity does not result automatically just because a word in the English language has more than one possible meaning. Out of such stuff poetry and puns are made. For example, the word "embrace" used as a verb has four similar, but different meanings, and the word "bottom," used as a noun, has nine. Whether what is meant is the posterior end of the trunk or the trousers of pajamas depends upon the context in which the word is used.

Davis v. Nationwide Life Ins. Co., 450 So. 2d 549, 552 (Fla. 5th DCA 1984) (Sharp, J., dissenting).

In **this** context, the only reasonable choice from the Black's definitions quoted in *Affinity Internet* ("liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable") is "governed or affected by." The term "subject to" is ubiquitous in insurance policies and it uniformly means "governed by." *See, e.g., Certain Interested Underwriters at Lloyd's London v. Pitu, Inc.*, 95 So. 3d 290, 293 (Fla. 3d DCA 2012) (homeowner's policy stating "loss(es) paid arising out of, or caused by, water damage **shall be subject to** a maximum amount of $25,000 during the policy term" clearly and unambiguously limited reimbursement of losses for water damage to $25,000) (emphasis added); *Century Sur. Co. v. Seductions, LLC*, 609 F. Supp. 2d 1273, 1281 (S.D. Fla. 2009) (insurance policy stating that Medical Expense Limit was "subject to" the General Aggregate Limit was clear and unambiguous), *aff'd*, 349 F. App'x 455 (11th Cir. 2009); *St. Paul Travelers Cos .v. BK Marine Constr., Inc.*, No. 05-61099, 2007 WL 676100, at *3 (S.D. Fla. Feb. 28, 2007) (insurance policy, which included the phrase "[s]ubject to the Limit of Liability stated on the Declaration page," was clear and unambiguous).[6]

[6]Notably, this Court routinely uses the phrase "subject to" to mean "governed by"; for instance, when it states that a claim is "subject to" a statute of limitations. *See, e.g., Florida House of Representatives v. Crist*, 999 So. 2d 601, 630 (Fla. 2008) (claim was "subject to a four year statute of limitations"); *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 378 (Fla. 2005) (claim was "subject to the longer statute of limitations").

In the context of Allstate's PIP policy, the words "subject to" are not conditional or indefinite. By saying that "amounts payable shall be subject to any and all limitations authorized by section 627.736," Allstate's policy states in mandatory language that benefit payments will be "governed by" such limitations.

In essence, the *Serridge* majority and special concurrence expressed the belief that Allstate could have drafted the notice differently or more clearly. But "the mere fact that a provision in an insurance policy could be more clearly drafted does not necessarily mean that the provision is otherwise inconsistent, uncertain or ambiguous." *Pridgen,* 498 So. 2d at 1248. The interpretations the *Serridge* majority and special concurrence offer are unreasonable as a matter of law. The majority would require Allstate to disclaim the basic coverage mandate, and both opinions conclude that saying benefits payments "shall be subject to...limitations...including, but not limited to, all fee schedules" somehow means Allstate may not use the fee schedules to limit calculate provider reimbursements.

Instead of reading Allstate's policy as a whole and giving its terms ordinary, context-based meaning to determine whether the language provided notice that benefits payments would be limited under the statutory fee schedules, the *Serridge* majority and special concurrence "parsed" individual words and phrases (177 So. 3d at 24) and construed them in isolation to find ambiguity and render the entire provision meaningless. But when the language is read in its entirety, given its

plain meaning and taken in context, there is only one reasonable interpretation: "Allstate's policy language gave legally sufficient notice to its insureds of its election to use the Medicare fee schedules." *Stand-Up*, 2015 WL 1223701, at *3.

D. Divergent Conclusions By Different Courts Does Not Establish Ambiguity.

Judge Ciklin describes "a sharp divide" among "dozens" of courts that have analyzed Allstate's notice of its fee election. 177 So. 3d at 26. Those "dozens" of courts are in fact several county court judges who, before *Stand-Up*, issued multiple orders finding Allstate's notice insufficient. But until *Serridge*, only **one** outlier appellate decision did so[7]; the remaining appellate panels that reviewed Allstate's language, as well as U.S. District Judge William Dimitrouleas, uniformly held Allstate's notice unambiguous and legally sufficient.[8]

In any event, "that different judges may have reached different interpretations of similar policy language does not necessarily mean that the language is ambiguous." *Office Depot, Inc. v. Nat'l Union Fire Ins. Co. of*

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[7]*Allstate Fire & Cas. Ins. Co. v. Neal Clinic*, 21 Fla. L. Weekly Supp. 603a (Fla. 1st Cir. Ct. 2013). *Neal*—which was necessarily overruled by *Stand-Up*—was a single-judge decision that (like the *Serridge* majority) incorrectly failed to follow *Virtual III*'s rejection of the notion that insurers must choose between paying "reasonable" **or** fee schedule rates.

[8]*See* cases collected at note 4, *supra*. In December 2015, an appellate panel of the Eleventh Judicial Circuit departed from four prior decisions of that appellate division and applied *Serridge* to find Allstate's language legally insufficient. *Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI LLC, a/a/o Blake*, No. 13-461-AP (Fla. 11th Cir. Ct. Dec. 7, 2015), *petition pending*, No. 3D16-0038.

Pittsburgh, Pa., 734 F. Supp. 2d 1304, 1315 (S.D. Fla. 2010) (applying Florida law) (citation omitted), *aff'd*, 453 F. App'x 871 (11th Cir. 2011). Appellate review of ambiguity questions would be negated if disagreement among judges automatically established that language was ambiguous. *See Trinity Universal Ins. Co. v. Robert P. Stapp, Inc.*, 177 So. 2d 102, 105 (Ala. 1965) (explaining why no such *per se* rule of ambiguity exists: "To carry it to its logical conclusion, it would mean that every time two reasonable courts (or even two reasonable men) disagreed on the interpretation of a policy of insurance, the issue should be resolved in favor of the insured.").

At most, conflicting judicial opinions **might** be an indicator of ambiguity. However, "a true ambiguity does not exist … merely because … [a policy] can be interpreted in more than one manner." *Dirico v. Redland Estates, Inc.*, 154 So. 3d 355, 357 (Fla. 3d DCA 2014) (citing *Delsordo*, 127 So. 3d at 530); Instead, "[a]mbiguity exists only when [policy] language "is susceptible to more than one **reasonable** interpretation."" *Id*. (emphasis added) (quoting *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010)); *see also Menendez*, 70 So. 3d at 570 (same); *Swire*, 845 So. 2d at 165 (same).

Consistent with this principle, Florida courts considering divergent interpretations of identical legal text have found ambiguity only where there were competing reasonable interpretations. In *Sec. Ins. Co. of Hartford v. Inv.*

Diversified Ltd., 407 So. 2d 314, 316 (Fla. 4th DCA 1983), the Fourth DCA construed a provision excluding coverage for misappropriation of property "entrusted" to another. Noting that ambiguity was suggested by conflicting opinions, the court held both interpretations reasonable and interpreted the exclusion in favor of coverage. By contrast, in *Prudential Ins. Co. v. Bellar*, 391 So. 2d 737 (Fla. 4th DCA 1980), the Fourth DCA noted that conflicting interpretations of a policy exclusion could be argued as a basis for ambiguity. However, the court ultimately found no ambiguity because there was only reasonable interpretation, which was that the exclusion was enforceable.

Neither the *Serridge* majority nor the special concurrence explains how Allstate's policy language reasonably means something other than "we're going to limit reimbursements based on fee schedules." There is not really a competing interpretation. Conflicting judicial interpretations do not establish ambiguity because there simply is not an alternate **reasonable** interpretation of Allstate's policy language.

IV. IN ANY EVENT, AMBIGUITY MUST BE CONSTRUED FOR THE INSURED, NOT THE PROVIDER.

If, *arguendo*, the ambiguity analysis is relevant and Allstate's policy is deemed ambiguous, it must be construed in favor of the **insured**. 177 So. 3d at 23. (citing *Discover Prop. & Cas. Ins. Co. v. Beach Cars of W. Palm, Inc.*, 929 So. 2d 729, 732 (Fla. 4th DCA 2006)). This "rule of last resort" only applies where

ambiguity "remains after resort to ordinary rules of construction." *Office Depot*, 734 F. Supp. 2d at 1315 ("To find in favor of the insured under the rule of *contra proferentem*, the policy must actually *be* ambiguous") (emphasis in original) (citing *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005); *Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Co.*, 711 So. 2d 1135 (Fla. 1998)). The rule is intended to preserve and maximize coverage and benefits for insureds. *See, e.g., McCreary v. Fla. Res. Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 694-95 (Fla. 4th DCA 1999) (discussing insured-favorable rule; noting that policies are "construed in the broadest possible manner to affect the greatest extent of coverage"); *Miller Elec. Co. of Fla. v. Employers' Liab. Assur. Corp.*, 171 So. 2d 40, 43 (Fla. 1st DCA 1965) (ambiguous terms are construed favorably to insureds "to effect the primary purpose of payment to the insured"). Here, if ambiguity is found in Allstate's policy, proper application of this rule requires interpreting Allstate's policy provisions as notice of an election to use the fee schedules because that interpretation favors the insured.

The Provider is not the insured, and its interests are at odds with the insured. Judge May explained the tension: "Providers...look to get paid as much as possible, but that does not inure to the insured's benefit. The less costly the services provided, the more services the insured can receive." *Serridge*, 177 So. 3d at 30 (May, J., dissenting). In other words, requiring insurers to pay higher rates to

medical providers is detrimental to insureds, whose coverage and benefits are maximized by limiting amounts payable to providers. *See also Virtual II*, 90 So. 3d at 327, *approved*, 141 So. 3d 147 (Fla. 2013) ("[I]nterpreting PIP insurance policies in favor of insureds actually requires reading the policies to cover the ***lowest*** amount possible.") (Rothenberg, J., concurring) (emphasis in original); *MRI Scan Ctr., Inc. v. Allstate Ins. Co.*, 2007 WL 2288149, at *2-3 (S.D. Fla. Aug. 7, 2007), *aff'd*, 273 F. App'x 835 (11th Cir. 2008) (insurance policy construction should favor the insured patient, not the assignee medical provider).[9]

Fee schedule limitations benefit insureds in two ways. **First**, they extend PIP benefits by slowing the rate at which benefits are exhausted—when reimbursements are limited, fewer coverage dollars are used and more coverage remains to cover additional medical services *for the benefit of insureds*. *See*

[9]In *Virtual I*, Judge Cortiñas (writing for the majority) declined this interpretation, summarily concluding that "the benefit of the interpretation" inured to the provider because the provider as assignee "stands in the shoes of the insured." 79 So. 3d at 58 n.2. This overlooks that an assignment of PIP benefit payments is just that—the right to receive policy benefits due to the insured. It is not an assignment of the insured's entire contract and in no way places the provider in "the shoes of the insured" to permit an interpretation detrimental to the insured. *See Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.,* No. 2D14-3946, 2016 WL 455723, at *2 (Fla. 2d DCA Feb. 5, 2016) (assignment of "insurance rights, benefits and proceeds pertaining to services provided" was not assignment of the entire policy); *David Shaw, D.C., P.A. v. State Farm Fire & Cas. Co.*, 37 So. 3d 329, 333 (Fla. 5th DCA 2010) ("right of the assignee under the contract is no better than its assignor's rights"). Notwithstanding an assignment of benefits, the insured remains the policyholder, and construction of any ambiguity in the policy must be done to benefit the insured.

Nationwide Mut. Ins. Co. v. Jewell, 862 So. 2d 79, 86 (Fla. 2d DCA 2003) (Canady, J.) (explaining that "more services will be available to the insured within the $10,000 PIP policy limits" when medical services are reimbursed at reduced rates). Approving *Jewell*, this Court confirmed that interpreting the PIP statute to allow application of contractual provider payment limitations benefits insureds. *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 336 n.6 (Fla. 2007). This Court also acknowledged this principle in *Virtual III*, 141 So. 3d at 159-160 (acknowledging that "reduced reimbursement rates are in the best interests of the insured"), but the GEICO policy made no reference to the fee schedules, so there was no language to construe.

Second, when reimbursement limitations are applied, the insured's co-payment is limited based on the lower reimbursement amount and the insured is sheltered from balance billing. *See* § 627.736(5)(a)5., Fla. Stat. The disparity between construing any ambiguity in the fee schedule election notice favorably to the insured versus construing it favorably to the provider is illustrated below:

	Fee Schedule Not Applied	**Fee Schedule Applied**
Total Available Benefits	$10,000	$10,000
Billed Amount	$5057	$5057
Benefits Paid @ 80%	$4045.60	$2291.24
Insured's Remaining PIP Benefits	**$5954.40**	**$7708.76**
Insured's Out of Pocket Co-pay	**$1011.40**	**$572.81**

Here, a construction that does not allow Allstate to use the statutorily authorized fee schedules in accord with its policy-based election notice has a negative financial impact on the insured of over $2000 in lost benefits for future expenses and increased copay—and represents a windfall to the Provider of over $2000. The Provider's payment is over seventy-five percent higher than the fee schedule amount, which itself is twice what Medicare pays for the same routine service. If so-called ambiguities in fee schedule election notices are interpreted favorably to medical providers to the detriment of insureds but under the rubric of an insured-favorable construction, this scenario will repeat in thousands of cases. The result is inflated provider payments that exceed the fee schedule amounts by as much as four hundred percent, costs which "of course, are borne by our citizens in the form of higher PIP premiums." *Virtual II*, 90 So. 3d at 323.

With regard to applying the legislatively authorized PIP payment limitations, the insurer's interests are aligned with the insured, unlike the usual situation where their interests are opposed. Accordingly, any ambiguity in Allstate's language should be construed in favor of the insured, not against Allstate.

CONCLUSION

Stand-Up correctly applied this Court's decision in *Virtual Imaging* to conclude that Allstate's policy provides legally sufficient notice of an election to limit medical provider reimbursement in accordance with section 627.736(5)(a)2.,

Florida Statutes. This Court should reaffirm its holding in *Virtual Imaging* by approving the First DCA's decision in *Stand-Up* and quashing the contrary decision of the Fourth DCA in *Serridge*. *See Miles v. Weingrad*, 164 So. 3d 1208, 1212 (Fla. 2015) (exercising discretionary jurisdiction to resolve conflict between DCA decisions on same legal question, both of which relied on prior Supreme Court decision; quashing DCA decision that was based on misunderstanding of this Court's prior decision).

Respectfully submitted,

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

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