Supreme Court of Florida

No. SC15-2298

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

ORTHOPEDIC SPECIALISTS, et al.,
Respondents.

ANSWER BRIEF OF RESPONDENTS

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Statement of Case and Facts

We generally accept Allstate's statement of case and facts. But Judge Levine did not have a different analysis than Chief Judge Ciklin. In fact Judge Levine explicitly said: "I concur *with the majority opinion*."[1] [e.s.] He expounded on additional reasons for ambiguity in using the term ***shall***. Both Judges unreservedly agreed in a majority Opinion for the Court.

We must add that Allstate's principal coverage clause for PIP medical benefits is entitled "Part III, Personal Injury Protection Coverage", and begins on page 12 of the form policy.[2] In what the Table of Contents refers to as the "Insuring Agreement," the policy says that: "Allstate ***will*** *pay* to or on behalf of the insured person the following benefits: Eighty percent of reasonable expenses for medically necessary [covered services]." [e.s.] Many pages later in a separate Endorsement that begins with "The Limits of Liability," the policy is amended by the following (not-otherwise defined) limitation:

> "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*." [e.s.]

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[1] *Orthopedic Specialists v. Allstate Ins. Co.,* 177 So.3d at 26. Judge Levine did not say that he concurred only in the result. The term "concurring specially" has no particular meaning because any concurrence in an appellate opinion must be read to ascertain the actual extent of the concurrence.

[2] Allstate's main policy text is 24 pages with the PIP coverage on page 12. The Florida Endorsement adds a new 10 pages, and the provision purporting to adopt all fee schedules is on page 7 thereof in un-emphasized print.

This is the identical text reviewed in *Allstate Fire & Casualty Ins. v. Stand-Up MRI of Tallahassee P.A.*, --- So.3d ---, 2015 WL 1223701, 40 Fla. L. Weekly D693 (Fla. 1st DCA Mar. 18, 2015), wherein the First District held this text to be sufficient under *Virtual Imaging* for Allstate to calculate benefits solely under the Medicare fee schedules.[3] That Court reasoned: "Allstate's policy expressly limits reimbursements by '***all*** *fee schedules*' in the statute, which is consistent with *Virtual Imaging*'s ***simple*** notice requirement."[4] Allstate's policy text was sufficient because it used the word "***shall***" to emphasize notice of the ***Medicare*** fee schedules.

Ironically, in light of the Court's construction of ***subject to*** in that case, this Court should note the legend appearing above the First District's opinion in Westlaw's non-permanent report: "This opinion has not been released for publication in the permanent law reports. Until released, it is ***subject to*** revision or withdrawal.[5] [e.s.] With the Court's meaning of ***subject to***, the legend may surely be read that it will be revised or even withdrawn.

Months later the Fourth District released *Orthopedic Specialists v. Allstate Insurance Co.*, 177 So.3d 19 (Fla. 4th DCA 2015),[6] involving the identical policy text. The Fourth District disagreed with *SUMRI* and explained:

> "A policy is not sufficient unless it ***plainly and obviously*** *limits reimbursement to the Medicare fee schedules* ***exclusively.*** … The

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[3] Hereafter "*SUMRI.*" 2015 WL 1223701 at *3.

[4] 2015 WL 1223701 at *2.

[5] 2015 WL 1223701 at *1. The legend text is actually all in capital letters. As of this writing the opinion still is not in the permanent reports.

[6] Hereafter *Ortho*.

> *policy must make it **inescapably discernible*** that it will not pay the 'basic' statutorily required coverage and will instead substitute the Medicare fee schedules as the exclusive form of reimbursement." [e.s.] 177 So.3d at 26.

The Court also stated:

> "Although … *Virtual Imaging* … took note that the policy at issue was devoid of any indication that the insurer elected the ***Medicare*** fee schedules, this does not in turn mean that any type of reference to the fee schedules will suffice. … *A policy is not sufficient unless it **plainly and obviously** limits reimbursement to the Medicare fee schedules exclusively*." [e.s.] *Id.*

As to the policy's use of the word ***shall***, the Court held:

> "read in the context of the entire policy, [the word "shall"] does not transform an ambiguous provision to one that is unambiguous. The word 'shall' is meaningless because it simply emphasizes the obvious. Broken down to its most simple form, Allstate's policy says that 'any amounts payable under this coverage ***shall be subject to*** any and all limitations' in the PIP statute. The policy text does not say that the limitations 'shall be applied'; only that they shall be ***subject to*** being applied. The word "shall" does not make it clear whether Allstate will utilize the alternative method or is simply recognizing its entitlement to do so." [emphasis in original] 177 So.3d at 25.

Assessing the legal rationale in *SUMRI*, with which it certified conflict, the Fourth District held:

> "*A policy is not sufficient unless **it plainly and obviously limits** reimbursement to the Medicare fee schedules **exclusively***. The policy cannot leave Allstate's choice of reimbursement method in limbo under the guise of the words, 'subject to' without incorporating specific words to that effect. *The policy must make it **inescapably discernible** that it will not pay the 'basic' statutorily required coverage and will instead substitute the Medicare fee schedules as the exclusive **form** of reimbursement*." [e.s.]

177 So.3d at 25-6. The Court certified conflict with the First District's decision,

thereby establishing jurisdiction in this Court to resolve the issue.

Issue[7]

> *Is Allstate's PIP policy text sufficiently* clear and unambiguous *to allow application of the limitations for calculating benefits under the Medicare fee schedules in § 627.736(5)(a)2., Fla. Stat. (2008-11), as construed by this Court in* Geico General Ins. Co. v. Virtual Imaging Services Inc.*, 141 So.3d 147 (Fla. 2013)*.[8]

Standard of Review

This case presents an issue of law as to which this Court owes no deference to any decision of any lower court, trial or appellate, Florida or Federal. In *Virtual Imaging* this Court said the issue involves construction of the Florida No-Fault PIP statute and the insurance policies, for which the standard of review is de novo. 141 So.3d at 152.

Summary of Argument

The First District's decision is clear error; the Fourth District's decision is correct. Under many holdings of this Court, a policy is ambiguous if it is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage. The ambiguity must be liberally construed in favor of coverage

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[7] On conflict review, the only issue is the nature of the conflict and how it must be resolved. The Initial Brief atomizes one issue into protons and neutrons of many issues. We respond within a single issue, adding suitable tags addressing Allstate's sub-issues.

[8] In 2012, the Legislature amended and renumbered various subsections of the PIP statute. *See*, Ch. 2012-197, Laws of Fla. (2012). Unless otherwise indicated, all citations herein to the PIP statute (§627.736) and any subsections thereof refer to the versions in effect from January 1, 2008 through June 30, 2012. This appeal does not involve the current version of the PIP statute adopted in 2012.

and strictly against the insurer.

A PIP policy stating *both* that it ***will*** pay 80% of reasonable charges for covered medical services *and* that it "***shall be subject to***" calculating much lower sums for benefits under the all fee schedules, without any specification or explanation as to which will actually control calculation of the amount paid, cannot possibly be read to give each provision full meaning and operative effect as required by this Court's many decisions. Such a policy states alternative, but conflicting methods of calculating reimbursements and fails to make clear the one that will be applied and that the other will not. No insured or provider can be sure about how to calculate reimbursements.

Allstate relies on selected decisions of trial courts favoring its interpretation (one by a federal trial judge) and ignores as many decisions favoring a contrary interpretation. Allstate's failure even to mention *Washington Nat'l Insurance Corp. v. Ruderman*, 117 So.3d 943, 948-951 (Fla. 2013), in spite of the Fourth District's explicit reliance on it, evinces the weakness of its argument. Allstate's policies are very unclear as to which method it will use to calculate benefits. So Allstate must apply the statute's required method.

Argument

Simple Notice

Ruderman restated and stressed the principles for detecting and resolving ambiguities in insurance policies:

> "In construing insurance contracts, 'courts should read each policy

> as a whole, endeavoring to *give **every** provision its full meaning and operative effect*.' Courts should '***avoid** simply concentrating on **certain limited provisions** to the exclusion of the totality of others*.' Policy language is considered to be ambiguous ... if the language 'is *susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.*'"
>
> . . .
>
> "As recently as 2011, this Court again voiced the longstanding tenet of Florida law that '*where the policy language is susceptible to more than one reasonable interpretation*, one providing coverage and ... another limiting coverage, the insurance *policy is considered ambiguous' and must be construed against the drafter and in favor of the insured*.'
>
> . . .
>
> [W]here an insurance policy is 'drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, *the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.*'" [e.s.]

117 So.3d at 948-51. This Court has insisted on these principles "many times." 117 So.3d at 949. And "[i]t has ***long been** a tenet of Florida insurance law*" that policy language "is to be construed liberally in favor of the insured and strictly against the insurer." 117 So.3d at 950.

In *Geico General Insurance Co. v. Virtual Imaging Services Inc*., 141 So.3d 147 (Fla. 2013), this Court held that the 2008 amendments to the No-Fault PIP statute now allow insurers to "elect" an alternative method for calculating the required benefits for covered medical services.[9] This Court recognized that they are now

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[9] *See* § 627.736(1)(a), Fla. Stat. (2008-11): "(1) ***Required benefits***.– An insurance *policy* complying with the security requirements of s. 627.733 ***must provide personal injury protection*** … as follows: (a) Medical benefits.– ***Eighty percent of all reasonable expenses** for medically necessary **medical … services***." [e.s.] In this brief "the required coverage" means the above quoted provision.

allowed to calculate PIP benefits under the ***Medicare*** fee schedules – but ***only if*** they "***clearly and unambiguously*** draft a policy provision to achieve that result." 141 So.3d at 157. In fact *Virtual Imaging* twice stated that any election (simple or complex) of the alternative method to calculate benefits must be clear and unambiguous.

The 2008 addition to the No-Fault statute at issue in this case did not repeal the long-standing original provision *requiring* benefits paying 80% of reasonable charges to be included in every PIP policy. For that reason *Virtual Imaging* holds that a PIP policy is ambiguous if it does not "clearly and unambiguously" specify that the ***Medicare*** fee schedules will be the only method to calculate benefits. Nothing in *Virtual Imaging* gives any indication that this Court intended that just any form incanting "fee schedules" would suffice.

Allstate's describes its "Insuring Agreement" in this policy as paying 80% of reasonable charges for covered medical services and supplies. It does not matter whether the policy's "insuring agreement" in this litigation is about *coverage* or *benefits* or *payment* or *reimbursement*. Whichever construct is used, this Court's decisions require that *all* limitations regarding an insured's entitlement to benefits be clear and unambiguous.

No policy can be "clear and unambiguous" if first it says that it "***will pay***" 80% of any reasonable charge for required benefits, but then (under "coverage limits" in a separate Endorsement) attempts to say that it "limits" the calculation of

benefits to a much lesser sum under "all fee schedules."[10] That is *Virtual Imaging*'s crucial holding. With Allstate's policies stating that the calculation of benefits "***shall** be subject to … **but not limited to*** all fee schedules," Allstate can reasonably be understood to say that it may rely on any fee schedules anywhere in a No-Fault statute[11] to calculate any particular charge. One reasonable construction of Allstate's limiting provision is that it still leaves open the possibility that it ***will pay*** the required benefits. The policy is the perfect model of ambiguity.

Allstate's argument is that it's election requires only "*simple*" notice that fee schedules will be the basis for calculating the benefit rather than 80% of the amount reasonably charged by the provider. Yet *Virtual Imaging* ***never*** – not even once – described the election requirement as "simple". Indeed the word "simple" appears nowhere in *Virtual Imaging*.

The First District's decision in *SUMRI* held that *Virtual Imaging* did not require "magic words" to elect "the fee schedules." Because no magic words are necessary, that Court reasoned, *Virtual Imaging*'s "*simple* [sic] notice requirement is satisfied by Allstate's language limiting '[a]ny amounts payable' to the fee schedule-based limitations found in the statute." 2015 WL 1223701 at *2. What it described as

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[10] The Initial Brief does not even mention the words "Allstate ***will pay***" in the main body of its policy. It states that "the PIP policy provides coverage" to that effect, hoping thus to bury policy text and that no effect will be given to its actual words.

[11] Actually some fee schedules apply only to assessing the reasonableness of the sum charged when the insurer has not elected the alternative method. *See,* footnote 27 herein.

"simple notice" is achieved by merely referring to the fee schedules in the statute. In short *SUMRI* holds that the permissive, alternative limitation to calculate benefits did not have to be stated "clearly and unambiguously" despite this Court's repeated insistence that it does. Under *SUMRI* it would now be possible to employ a mere reference to "all fee schedules" to elect to calculate benefits only under the ***Medicare*** fee schedules.

SUMRI's "simple election" wording is patently in conflict with *State Farm Mutual Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245 (Fla. 1986); *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 36 (Fla. 2000); and *Deni Assocs. of Fla. Inc. v. State Farm Fire & Cas. Ins. Co*., 711 So.2d 1135 (Fla. 1998), among many others, holding that limitations on benefits must be clear and unambiguous. Another "long held tenet" of this Court is "to abide by former precedents … where the same points come again in litigation … and not [be] liable to waiver with every new judge's opinion." *Tyson v. Mattair*, 8 Fla. 107, 124, 1858 WL 1642 (1858).

In *Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002): this Court has instructed:

> "Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, *the court is to apply our express holding in the former decision* until such time as this Court recedes from the express holding." [e.s.]

810 So.2d at 905. This Court framed its direction in mandatory terms. If Allstate's argument is accepted it would present a formidable problem of *stare decisis* with decisions holding "many times" that utter clarity in policy language is required to

limit benefits. *Puryear* simply does not allow lower courts to adopt a "simple notice" in ambiguous terms.

Allstate's Interpretation

Allstate's rationale for its odd mixture of coverage and limiting provisions is that there is no semantic difficulty with using "***shall be*** *subject to, but not limited to*" to calculate benefits under the ***Medicare*** fee schedules because all the words have clear meanings; and, anyway, ***shall*** is emphatic.[12] In order to assess the validity of this semantic argument about textual meaning, it is necessary and appropriate to consult semantic and usage references commonly relied upon to ascertain the "popular or generally accepted plain meaning" of the words on which a party claims to rely. This custom of using such references has a long history in the construction of insurance policies.[13]

Clarity is not always possible even when common words used in a certain context are widely used and understood one-syllable words. In English, the meaning of words is not prescribed but arises from usage. Dictionaries and similar references

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[12] But, as the Fourth District pointed out in *Ortho*, Allstate's policy does not ever mention ***Medicare*** fee schedules in the policy. The policy refers "all fee schedules" named in the PIP Statute – many of which have nothing to do with Medicare and some of which may be used only when the insurer is determining whether an amount charged under the required benefit is reasonable. *See*, footnote 27 herein.

[13] *See Penzer v. Transp. Ins. Co*., 29 So.3d 1000, 1005 (Fla. 2010) ("When interpreting insurance contracts, we may consult references commonly relied upon to supply the accepted meanings of words" (citing *Garcia v. Federal Ins. Co.*, 969 So.2d 288, 291-2 (Fla. 2007)); *see also Van Pelt v. Hilliard*, 78 So. 693 (Fla. 1918) (undefined words must be given their popular or generally accepted meaning).

deal with how words are commonly understood in usage. They do not purport to prescribe that usage.

These references demonstrate that Allstate's terms have multiple contradictory meanings. As discussed in the ensuing parts, there is no commonly accepted, recognized meaning supporting Allstate's interpretation.

Disclaiming the Required Benefit

Insureds and providers reading the policy may reasonably wonder why the required benefit is not being paid when an alternative permissive method of calculation is not clearly stated as such in the policy. And so insurers can avoid any uncertainty in electing to calculate benefits under the permissive Medicare fee schedules – despite the statute's eradicable provision for the required coverage – simply by affirmatively stating that payment will be calculated only under the ***Medicare*** fee schedules.[14]

Under the PIP statute the nominal benefit paying 80% of reasonable charges absolutely must be stated in the insuring agreement to comply with the No Fault mandate. But the PIP statute also allows the permissive benefit calculation as an

[14] The Legislature does not enact useless provisions. *Heart of Adoptions Inc. v. J.A.*, 963 So. 2d 189 (Fla. 2007). An ancient principle of statutory construction is that significance and effect must be given to every word, phrase and sentence if it can be done without perverting the sense or effect of the written law. *School Bd. of Palm Beach County v. Survivors Charter Schools Inc.*, 3 So. 3d 1220 (Fla. 2009); *see also* § 627.419(1) (Courts must construe policy "according to the entirety of its terms and conditions"). The 2008 amendment makes legal sense only if it allows insurers to elect the alternative fee schedules by rejecting the mandatory coverage.

alternative calculation of benefits. For these reasons, *Virtual Imaging* read the PIP statute to require that an election to calculate payments under Medicare must be impossible to misunderstand. The only sure way to do that is to say in uncomplicated words that the insurer will not actually pay 80% of reasonable charges and instead that it will calculate benefits only under the permissive Medicare fee schedules. Thereby the insured and provider can have no doubt that only the permissive method will determine the amount of the benefits. This is why the Fourth District and *Virtual Imaging* interpreted the statute as they did.

To repeat, the essential reason for that double form of clarity in PIP benefits is this. The statute does not allow PIP policies to omit or refuse to state the statutorily required medical benefit even though it now allows them an alternative to calculate the amount under the Medicare fee schedules method instead.[15] Nothing in *Virtual Imaging*'s rephrasing of the issue in that case changes this necessary construction of the amendment to the PIP statute. Common understandings of specific words in policies determine meanings because context cannot reliably do so.

Because the Legislature adopted the permissive alternative method for calculating benefits, the statute must now be read to permit an insurer to disclaim paying the required benefit based on the prior longstanding method. Otherwise its

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[15] *See* § 627.412(1), Fla. Stat. (2010) (insurance contracts shall contain mandatory provisions required by law); and § 627.7407(2), Fla. Stat. (2010) (every PIP policy is deemed to incorporate the mandatory provision). *Virtual Imaging* made clear, however, that these statutes do not incorporate the Medicare fee schedules into every PIP policy.

permissive alternative would have no meaning or effect. *Virtual Imaging* is clear that insurers do not violate the statute when they clearly and unambiguously "elect" the permissive method. It thus gave effect to the amendment without disturbing the original required benefit. Allstate's errs because the amendment must be given legal effect.

Shall

Allstate centers its appeal on the word ***shall***. With which it persuaded the First District to rule in its favor. But which was rejected by the Fourth District. And so the *nays* have it.

The standard references show that ***shall*** has multiple contradictory meanings and uses. They refute Allstate's contention that the one meaning it has chosen is dispositive. The OXFORD ENGLISH DICTIONARY teaches:

> "The traditional rule in standard British English is that ***shall*** is used with first person pronouns … to form *the future tense*, while ***will*** is used with second and third person forms… . For example: 'I ***shall*** be late.' 'They ***will*** not have enough food.'
>
> However, when it comes to expressing a strong determination to do something, the roles are reversed: ***will*** is used with the first person, and ***shall*** with the second and third. For example: I ***will*** not tolerate such behavior. You ***shall*** go to the ball!
>
> In practice, though, the two words are used more or less interchangeably, and this is now an acceptable part of standard British and U.S. English."[16] [e.s.]

It is not possible to evade this reasonably likely meaning for ***shall*** as a simple verb form merely stating the future tense without any emphatic sense as Allstate argues.

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[16] *See oxforddictionaries.com* (search query: *shall* or *will*).

At the same time, Allstate's use of ***shall*** is also properly read as an auxiliary verb in the third person, passive voice ("amounts ***shall*** *be*"). As the OXFORD ENGLISH DICTIONARY shows, ***shall*** is the common, standard auxiliary verb in the third person, passive voice, for the simple future tense. Thus it is also not at all unreasonable to read the sentence, not as an imperative at all, but instead to state a simple future promise. Applying this standard, customary and applicable rule of grammar and meaning to the term ***shall***, the policy is plainly ambiguous [sic*!*] because *both* future promises cannot be kept.[17]

In fact, as shown by the OXFORD ENGLISH DICTIONARY, the word ***will*** as used in the required benefit can equally be a common imperative form instead of ***shall*** with the first person, indicative voice of the verb. ***Shall*** and ***will*** are twin forms with identical meanings and semantic functions. If ***shall*** can properly be thought an imperative emphasis, then so can ***will***.

Allstate used an indistinguishable form of this imperative earlier in the policy's required benefits clause. That clause proclaims that "Allstate ***will*** pay" 80% of any reasonable charge for covered medical services. This is correctly read as the same imperative form and function with the later endorsement stating that it "***shall*** *be subject to*" any and all limitations under the fee schedules. The two provisions ("***will pay***" in the required benefit, and "***shall be subject to***" in the permissive alternative)

[17] All insurance policies are promises by an insurer that, if *x* happens after the policy is issued, the insurer *will* or *shall* perform in a specified way.

can reasonably be read to emphatically contradict one another.

To be sure, the United States Government's Usage Guide for legal writings teaches this about using ***shall*** as an adverbial imperative in the way Allstate claims in these policies:

> " '***Shall*** has three strikes against it. First, lawyers regularly misuse it to mean something other than '*has a duty to*.' *It has become so corrupted by misuse that it has no firm meaning*.
>
> Second – and related to the first – *it breeds litigation*. There are 76 pages in WORDS AND PHRASES … that summarize hundreds of cases interpreting '*shall*.'
>
> …
>
> For all these reasons, '***must***' is a better choice, and the change has already started to take place. The new FEDERAL RULES OF APPELLATE PROCEDURE, for instance, use '***must***,' not '***shall***.'"[18] [some emphasis added]

Mr. Garner, too, condemns the imperative ***shall*** in legal writing:

> "'***Shall***' isn't plain English.... But legal drafters use '***shall***' incessantly. They learn it by osmosis in law school, and the lesson is fortified in law practice.
>
> Ask a drafter what '***shall***' means, and you'll hear that it's a mandatory word – opposed to the permissive '***may***'. Although this isn't a lie, it's a gross inaccuracy.… Often … '***shall***' is mandatory.… Yet the word frequently bears other meanings – sometimes even masquerading as a synonym of '***may***'.... In just about every jurisdiction, courts have held that '***shall***' can mean … '***may***'."[19] [e.s.]

In short, ***shall*** is widely disapproved in legal writings as an adverbial imperative. These authorities suggest that ***shall*** should be left to its much more understandable

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[18] PLAIN LANGUAGE ACTION & INFORMATION NETWORK: *plainlanguage.gov* (*shall* & *must*).

[19] Bryan Garner, LEGAL WRITING IN PLAIN ENGLISH 105-06 (2001); and Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE 939-42 (2d ed. 1995). *See also* 48A FLA.JUR.2d, *Statutes*, § 137 ("Shall," "may" and "prescribe")).

use in the simple future tense of verbs because the adverbial imperative creates ambiguity.

Unquestionably, as Allstate argues, some Florida decisions do hold that "shall is mandatory." On the other hand, some Florida decisions have also held that "shall" is not mandatory.[20] Together both groups of these cases really show ambiguity in almost any use of *shall*. In writing insurance policies, context is not reliable to fix meaning when the words themselves as used must be "clear and unambiguous."[21]

Subject To

Allstate's meanings become even more enigmatic when the term ***subject to*** is used as the key phrase in limiting coverage. Here again the phrase ***subject to*** is widely understood not to have the single sense Allstate claims and *SUMRI* applied. Leading usage authorities list a variety of permissive meanings (none of them compulsory) as shown here:

> A. MERRIAM-WEBSTER DICT. (search term ***subject to***) "suffering a particular liability *or exposure* (synonyms: *liable*, *exposed*, *open*, *subject to*, *vulnerable*"). [e.s.]

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[20] *See S.R. v. State*, 346 So.2d 1018 (Fla. 1977) ("Although there is no fixed construction of the word "shall," it is normally meant to be mandatory in nature [citing *Neal v. Bryant*, 149 So.2d 529 (Fla. 1962); *Shands Teaching Hosp. & Clinics Inc. v. Sidky*, 936 So.2d 715, 721–22 (Fla. 4th DCA 2006) ("Generally, 'shall' is interpreted to be mandatory where it refers to some action preceding the possible deprivation of a substantive right and directory where it relates to some immaterial matter in which compliance is a matter of convenience").

[21] Perhaps this case is an opportunity for this Court to do away with any single, omnibus legal meaning for ***shall*** in opinion writing. It may be a verb in the simple future tense. In spite of Mr. Garner and the others, it is actually being used adverbially to require or emphasize.

B. OXFORD ENGLISH DICT. (search term: ***subject*** with ***to***) "expressing a relationship of *liability, exposure* or dependence between a person or thing and a state, condition or experience (synonyms: *exposed or open to*¸ *prone to,* or *liable to suffer from something damaging or disadvantageous*). [e.s.]

C. COLLINS ENGLISH DICTIONARY (search term ***subject-to***): "*open to, exposed to, vulnerable to,* susceptible to"). [e.s.]

D. DICTIONARY.COM (search term: ***subject to***): adjective[:] being under domination, control, or influence (often followed by to); being under dominion, rule, or authority, as of a sovereign, state, or some governing power; owing allegiance or obedience (often followed by to); *open or exposed* (usually followed by to): subject to ridicule; being dependent or conditional upon something (usually followed by to): His consent is subject to your approval; being under the necessity of undergoing something (usually followed by to); *liable, prone* (usually followed by to): subject to headaches. [e.s.]

E. ENGLISH LANGUAGE & USAGE STACK EXCHANGE (search term: "*subject to*") (*english.stackexchange.com*)
"***Question***: "What does '*subject to*' + verb mean? …
Answers: Part of the **problem** may be that **this usage pertains to the adjective** *subject* rather than the verb. One definition … for the adjective is … *open* or *exposed* (usually followed by *to*): *subject to ridicule*. **Another** … **problem** with this usage **may be the alternate definitions**. … being *dependent* or *conditional* upon something (usually followed by *to*): 'His consent is *subject to* your approval.' … being 'under the necessity of undergoing something' (usually followed by *to*): 'All beings are *subject to* death.' ***The range of definitions*** *from 'open to, exposed to, being dependent or conditional upon' to 'being under the necessity of undergoing*' ***almost seems designed to confuse***." [e.s.]

These authorities demonstrate that ***subject to***, Allstate's vital linking term, has several commonly accepted contradictory meanings in general, popular usage.

Even if there is an imperative/emphatic sense of ***shall*** that could be applied, under multiple popular, commonly accepted meanings and general usages of ***subject to***,

the only sense thus emphatically asserted would be that Allstate reserves discretion *possibly* to reimburse under any fee schedule in the statute. But that sense would still be in addition to the verb sense of a future promise.[22]

And so we end up with this Court's very clear rule that a policy is legally ambiguous when fairly "susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage."[23] When a policy suffers from that susceptibility, the cases require the application of an outcome default rule that the policy be liberally construed in favor of the benefit and strictly against the insurer.

Again, this is doubly true where (as here) vague, imprecise text has been used to limit or exclude benefits for covered services.[24] With the permissive alternative fee schedules benefits, some medical services reimbursable under the required benefit are not covered by Medicare at all and therefore become non-reimbursable under § 627.736(5)(a)2.f. In its brief, Allstate has deliberately concealed *Ortho*'s reliance

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[22] Allstate's text following *subject to* (the words "*but not limited to*") rob that construction of its effect. The words "*but not limited to*" mean that what precedes them is not exclusive – only possible. Again, this is really just a plain notice that Allstate *might* pay any claim according to any possible limitation recognized by No-Fault statutes it may then choose to apply.

[23] *See State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So.3d 566 (Fla. 2011); *U.S. Fire Ins. Co. v. J.S.U.B. Inc.*, 979 So.2d 871 (Fla. 2007; *Swire Pac. Holdings v. Zurich Ins. Co.*, 845 So.2d 161 (Fla. 2003); *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779 (Fla. 2004).

[24] *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 36 (Fla. 2000); *Deni Assocs. of Fla. Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998); *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245 (Fla. 1986).

on the principle that a *limitation* or *exclusion* from coverage (e.g. reducing benefits by calculating them under the ***Medicare*** Fee Schedules) simply must be ***clear and unambiguous***.[25] In sum, it is inherently ambiguous to state both of the alternative § 627.736 payment methods in the same policy without making a clear, unambiguously stated election of the ***Medicare*** fee schedules exclusively.

The PIP statute's words "reasonable expenses" are not a proxy for the Medicare fee schedules. *Virtual Imaging* did not hold that an insurer may elect to pay "reasonable expenses" (whatever that may mean) as the alternative to the required benefits. The Opinion clearly held the policy "***must clearly and unambiguously elect the*** *permissive payment methodology* in order to rely on it." [e.s.] 141 So.3d at 157, 158. And fairly read Allstate's policy loudly proclaims that it is ***NOT*** making

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[25] The following are from the Majority Opinion in *Ortho*:

"Further, in order for an exclusion or limitation in a policy to be enforceable, the insurer must ***clearly and unambiguously*** draft a policy provision to achieve that result." 177 So.3d at 23.

"If the [insurer] wanted to take advantage of the permissive fee schedule, it should have ***clearly and unambiguously*** selected that payment methodology in a manner so that the insured patient and health care providers would be aware of it." 177 So.3d at 23.

"The court agreed with the reasoning in *Kingsway* and held that in order to limit coverage to the Medicare fee schedules, "the insurer must ***clearly and unambiguously*** elect the permissive payment methodology...." 177 So.3d at 24.

"*Virtual Imaging* and *Kingsway* both make clear that insurance statutes require ***clarity and specificity*** in electing fee schedules with respect to PIP medical benefits coverage. 177 So.3d at 26.

"*Virtual Imaging*'s central holding is clear: To elect a payment limitation option, the PIP policy must do so ***'clearly and unambiguously***.'" 177 So.3d at 25.

"A policy is not sufficient unless it ***plainly and obviously*** limits reimbursement to the Medicare fee schedules exclusively." 177 So.3d at 25. [Emphasis supplied in all]

an election to calculate benefits exclusively under the Medicare fee schedules as *Virtual Imaging* requires.

Allstate persuaded the First District that the ordinary rules of policy interpretation for determining ambiguity and its consequences do not apply to a "simple notice" of election. Allstate offers no basis for thinking that was *Virtual Imaging*'s intention – notwithstanding the clear insistence twice that the notice of election of the alternative method for calculating benefits be "***clear*** and ***unambiguous***." Allstate's entire line of reasoning is – to employ a common legal term – nonsense. Under *Ruderman* and *Virtual Imaging*, Allstate's chosen words must be construed to provide coverage for calculating benefits under the required provision paying 80% of any reasonable amounts charged for covered PIP medical services.[26]

It is important to understand that "***Medicare***" fee schedules are not mentioned anywhere in the PIP statute as it existed when Allstate issued this policy. They *are* mentioned only in the alternative method for benefit calculation in subsection (5)(a)2. The "federal and state medical fee schedules applicable to automobile and other insurance coverages" described in subsection (5)(a)1 are not ***Medicare*** fee schedules. ***Medicare*** fee schedules are listed only in the subsection (5)(a)2 fee schedule method. The Legislature's use of different terms in different parts of the

[26] Allstate rejects *Ruderman*'s standard interpretive methodology for insurance policies. It also thinks this is "not a coverage case and no limitations are involved." This is odd because its policy plainly refers to the two provisions as coverage and limitations provisions.

same statute demonstrates that different meanings were intended.[27] It is critical to understand that when Allstate refers to "all fee schedules," Allstate refers to ***both*** the non-Medicare fee schedules in (5)(a)1 (the original required benefit paying 80% of any reasonable charge for covered services), ***and*** the ***Medicare*** fee schedules listed in (5)(a)2. a, d, e and f (the alternative benefit calculation). In effect, this policy text is specifying coverage of both methods of calculating benefits without "electing" either one exclusively.

Approval of Geico's "New" Text

Allstate makes the preposterous argument that *Virtual Imaging* approved new coverage text (in what really is a *gratis dictum*) with which Geico had replaced the disputed text during the pendency of *Virtual Imaging* in this Court.[28] This Court clearly did not express any approval of any new text because the Opinion does not

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[27] *Rollins v. Pizzarelli*, 761 So.2d 294, 299 (Fla. 2000); *see also Hialeah Medical Assoc. v. United Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 487b (Fla. 11th Cir. App. Div. 2014) (***Medicare*** fee schedules are not relevant in PIP cases under the required benefit for 80% of reasonable amount); *Quantum Imaging Holdings LLC v. United Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 142a (Broward County Ct. Jun. 17, 2014) ("***Medicare*** Fee Schedules are not relevant in PIP where the reasonableness of a medical provider's charge is at issue" [e.s.]); *Physicians Group v. Progressive Select Ins. Co.*, 16 Fla. L. Weekly Supp. 961a (Sarasota County Ct. 2009) (phrase "automobile and other insurance coverages" in § 627.736(5)(a)1 does not include ***Medicare***).

[28] This Court will recall that the respondents used new policy text at issue in *Virtual Imaging* as a basis for a motion to dismiss the case as moot because it had replaced the text. That new policy text was not part of the Record on Appeal in *Virtual* Imaging and had not been presented and litigated in any court. The Third District had framed the question as to whether the Medicare fee schedules could be applied "rather than" the Third District's formulation asking whether they provide "reasonable coverage of medical expenses." 141 So.3d at 150.

even state the exact text specifically and compare it with the disputed text.

In the Opinion's opening paragraphs, *Virtual Imaging* noted that Geico would begin using some new unspecified text in its PIP policies (to replace the text on review) beginning July 1, 2012. The Court also noted the recent amendment of the PIP statute, not effective until July 1, 2012. As the Opinion does not disclose any new text, it is impossible to be certain about what text Allstate contends this Court approved.

An opinion purporting to construe specific policy text has precedential value only to the extent that the words are laid out and the Court pronounces its analysis resolving a pending dispute.[29] Indeed in that case about Geico's policy, *Virtual Imaging* did make clear that its decision:

> "applies only to policies that were in effect from the effective date of the 2008 amendments to the PIP statute that first provided for the Medicare fee schedule methodology, which was January 1, 2008, through the effective date of the 2012 amendment, which was July 1, 2012."

141 So.3d at 150.

If *Virtual Imaging* explicitly applies ***only*** to policies in effect from 2008 through June 30, 2012, how could this Court have conceivably approved new text coming into use only later? Nothing in the opinion approaches a reasonable implication (*much less a real holding*!) that this Court was actually "approving" some new text

[29] *See Cusick v. City of Neptune Beach*, 765 So.2d 175, 177 (Fla. 1st DCA 2000) (citing *Forman v. Florida Land Holding Corp.*, 102 So.2d 596 (Fla. 1958).

to be a clear and unambiguous election of the Medicare fee schedules. Although Allstate has been successful in selling this canard to some Judges, it is at war with inveterate, conflicting principles of appellate review. Never before has this Court tested the legal meaning of disputed policy text in the courts now undergoing appellate review by comparing it with some unspecified new text not yet effective or disputed and determined in any court. This too is nonsense.

Construction in favor of Allstate

Finally, Allstate argues that if the policy is ambiguous it should be construed in its favor – not in favor of the insured or provider – because doing so best serves the insureds' interests. Of course that directly conflicts with *Ruderman*'s powerful confirmation that ambiguous policies are always liberally construed to provide benefits, not take them away. 117 So.3d at 950.

As to this same argument in *Virtual Imaging* this Court noted:

> "this is of particular concern to health care providers, who render services to PIP insureds in reliance on the terms of the insured's policy. … GEICO's justification for its decision to reimburse at reduced rates … – that such reduced reimbursement rates are in the best interests of the insured – ignores the fact that *the provider also needs notice of the reimbursement rate* because it is the provider who is forced to accept the lower payment rate after rendering services in reliance on the terms of the policy." [e.s.]

117 So.3d at 159-60. The policy text is chosen by the insurer, not the insured or a provider. Both insured and provider have a precisely identical interest. They must

rely on the policy as the insurer actually wrote it.[30]

Anyway, *Ruderman* and many other cases of this Court have already settled the issue. Ambiguities result in liberal construction in favor of the insured and against the insurer. They are not resolved to give a benefit to insurers.

Besides which there is the law on assignments. The general rule has always been that the assignee of contract rights steps into the shoes of the assignor.[31] In PIP cases, providers assert a very basic right of insureds to receive the maximum benefit for which they paid the maximum premium. They paid premiums based on the full amount of the required benefit, not a significantly reduced premium allowed when the benefit has properly been limited under the Medicare fee schedules.

Ending Thought

Since the arrival of the alternative, permissive method for calculating benefits, many PIP insurers attempt to do what Allstate has done in these cases. They write policies clearly saying they will pay 80% of any reasonable charge for covered

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[30] Allstate argues that it would benefit the insured to apply the Medicare fee schedules because a greater number of covered treatments would be available. But it is for the insured to decide how much to use PIP benefits, along with other coverages that may be available (Medicare, Affordable Care Act, and employment health care benefits). In any event, *Ruderman* and the many other cases of this Court have already settled the issue. Ambiguities result in liberal construction in favor of the insured and against the insurer. They are not resolved to benefit insurers.

[31] *Continental Cas. Co. v. Ryan Inc. E.*, 974 So.2d 368, 376 (Fla. 2008) (once an assignment is made, assignor no longer has right to enforce the interest because assignee has obtained all rights to the thing assigned); *Shaw v. State Farm Fire & Cas. Co.*, 37 So.3d 329 (Fla. 5th DCA 2010) (right of assignee under assignment is equal to and no better than the assignor's rights).

services, but then in an obscure corner of a lengthy document insert vague terminology about paying only reduced benefits under the fee schedules.

Is it possible there is something purposeful going on here? Are PIP insurers writing policies easily read to declare only the highest level of medical benefits fixed by statute – 80% of any reasonable charge – with an intention of never paying that sharply declared benefit? And if they actually wrote policies clearly stating they will calculate benefits only under the Medicare fee schedules, would these insurers still be allowed to charge the same premium justifiable when they actually pay the full benefit for 80% of reasonable charges?

PIP consumers must wonder if insurers are deliberately hiding their intention in obscure language in a sea of words buried far from insuring clauses. This is for the purpose of collecting higher premiums justified by greater required coverage even though they will pay only much reduced benefits calculated under the Medicare fee schedules. Thereby, they escape having to limit premiums to the reduced benefits they actually pay rather than the full benefit they promise.

Courts should understand there are undesirable consequences from limiting all benefits to amounts calculated under the Medicare fee schedules. Not all medical providers accept Medicare because it is known to pay at least 40% less than prevailing reasonable charges.[32] This restricts the personal autonomy of insureds

[32] *See e.g. Geico Gen. Ins. Co. v. Virtual Imaging Serv. Inc.*, 90 So.3d 321 (Fla. 3rd DCA 2012) (fee schedules 44% less than the reasonable charge); *Geico Indem. Co.*

under PIP because fewer providers accept the lower Medicare rates.[33] With Medicare, Allstate drives insureds to only providers who are willing (and able) to accept lesser reimbursement rates. PIP insureds are therefore denied treatment by other equally qualified providers *whose charges are nonetheless reasonable* yet more than Medicare pays.

PIP insurers cannot explain how eliminating the rest of the available qualified providers from the field for treatment is to the advantage of Florida's motorists. The purpose of PIP is not to further the interests of insurers with the lowest benefits possible. As this Court proclaimed in *Young v. Progressive Southeastern Ins. Co.*, 753 So.2d 80, 83 (Fla. 2000), "[t]he statute is designed for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others."

Under Allstate's nebulous theory, amassing unused benefits left in policy limits is more important to insureds than being able to choose from all providers in the field. They posit that it is more important to insureds to hoard unused available benefits than it is to pay the full benefit reasonably claimed by the chosen provider – as promised in the policy and paid for by the full premium. Anyway, isn't that for

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v. Physicians Group LLC, 47 So.3d 354, 356 (Fla. 2d DCA 2010) (Medicare fee schedules paid $1,122.86 for surgery reasonably charged at $10,800 under prior version of PIP).

[33] *See* § 765.102(1), Fla. Stat. (2012) ("The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment.").

the insured to decide as part of one's autonomous control of what health care to seek, and when, and who should provide it?

Conclusion

Allstate should not be heard to rewrite policy text on appellate review. Allstate's inescapable burden is to state an election of the ***Medicare*** fee schedules "clearly and unambiguously." Nothing in *Virtual Imaging* purports to hold that it is sufficient for an insurer to simply adopt every limitation in the PIP statute, as in truth, Geico tried to do in *Virtual Imaging*. If the alternative calculation of benefits is not clearly and unambiguously elected, then by default the insurer must pay the required benefit calculation. That is the central – indeed the only – holding and teaching of *Virtual Imaging*. In *SUMRI* the First District did not faithfully follow *Virtual Imaging* as it is required to do.

Under *Virtual Imaging* these policies should be construed against Allstate and in favor of the full coverage purchased by the insureds. Under binding precedents of this Court, the decision of the Fourth District should be approved. And the pending (but stayed) decision of the First District in *SUMRI* should be reversed and remanded with directions to affirm the final judgment of the trial court.[34] Respondents' motions for attorneys' fees in both cases should be granted.

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[34] *Stand-Up MRI of Tallahassee P.A. v. Allstate Fire & Cas. Ins. Co.*, case no. SC15-962 (by Dec. 17, 2015 Order, stayed pending disposition in *Allstate Ins. Co. v. Orthopedic Specialists*, case no. SC15-2298).

Certificate re Font

We have set this brief in 14 point Times New Roman, Microsoft Word (2010).

Certificate re Filing and Service

We hereby certify that in compliance with Fla. R. Jud. Adm. 2.515, on March 8, 2016, this Brief was electronically filed at the Florida Courts E-Portal.

We further certify that in compliance with Fla. R. Jud. Adm. 2.516, on March 8, 2016, this Brief was electronically served on all counsel listed on the *Service List* below.

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