Supreme Court of Florida

Case No. SC15-2298

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

ORTHOPEDIC SPECIALISTS, et al.,
Respondents.

RESPONDENTS' SUR-REPLY BRIEF

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Argument

After Respondents filed their answer brief, the Second District issued *Allstate Indem. Co. v. Markley Chiropractic & Acupuncture, Inc.*, --- So.3d ---- 2016 WL 1238533 (Fla. 2d DCA Mar. 30, 2016) (motion for rehearing and rehearing en banc pending, and "subject to" revision or withdrawal), which certified conflict with the Fourth District's decision below in *Orthopedic Specialists v. Allstate Ins. Co.*, 177 So.3d 19 (Fla. 4th DCA 2015). Thereafter, Allstate filed its reply brief, relying on *Markley*.

Markley is based on the erroneous conclusion that the PIP statute "does not provide any other fee schedules apart from those contained in subsection (5)(a)(2)...." *Markley* at *3. This error sheds light on why Allstate's endorsement provision is insufficient.

In *Markley*, the Second District acknowledged this Court's decision in *Geico General Insurance Co. v. Virtual Imaging Services, Inc.*, 141 So.3d 147 (Fla. 2013) controls. *Virtual* involved a provision in Geico's insurance policy, which stated:

> Under Personal Injury Protection, the Company [Geico] will pay, in accordance with, and subject to the terms, conditions, and exclusions of the Florida Motor Vehicle No–Fault Law, as amended, to or for the benefit of the injured person ....

Virtual, 141 So.3d at 151. *See also, Markley,* at *3.

Virtual held the PIP statute (§627.736, Fla. Stat. (2008-2011)) provides "two" different methods of determining the reasonable amount of PIP benefits that must

be paid: (a) the longstanding preexisting fact-dependent methodology in subsection (5)(a)1, and (b) a new alternative permissive methodology based on a list of set, predetermined rates, and other terms and conditions in subsections (5)(a)2 through 5. *Virtual*, 141 So.3d at 155-156. *Virtual* also held that Geico's policy provision did not properly elect the new permissive alternative method based on the "Medicare" fee schedules listed in Section 627.736(5)(a)2 and explained:

> ... **[W]e conclude** that the insurer was required to give notice to its insured **by electing** the permissive **Medicare** fee schedules in its policy before taking advantage of the **Medicare** fee schedule methodology to limit reimbursements. ... 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. [141 So.3d at 150.]
>
> . . . . .
>
> ... **[W]e conclude** that the 2008 amendments [to the PIP statute] were clearly permissive and offered insurers **a choice** in dealing with their insureds as to whether to limit reimbursements based on the Medicare fee schedules **or** whether to continue to determine the reasonableness of provider charges for necessary medical services rendered to a PIP insured based on the factors enumerated in section 627.736(5)(a)1. ... [141 So.3d at 157.]
>
> . . . . .
>
> ... **[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.... [141 So.3d at 160.]

Virtual, 141 So.3d at 150-160 (emph. added; footnotes and citations omitted).

In so holding, this Court recognized the PIP statute refers to "fee schedules" in

both the fact-dependent method of subsection (5)(a)1 **and** in the permissive method of subsection (5)(a)2. In fact, *Virtual*, **twice** quoted the portion of the subsection (5)(a)1 fact-dependent method which allows consideration of the ***non***-Medicare[1] "federal and state medical **fee schedules** applicable to automobile and other insurance coverages...." *Virtual*, 141 So.3d at 155 (emph. added). In contrast, the subsequent portions of *Virtual* explained the alternative permissive method of subsection (5)(a)2 is based on "***Medicare*** fee schedules." *Virtual*, at 156-160.

Likewise, at page *2 of *Markley*, the Second District quotes subsection (5)(a)1 of the PIP statute, including the part referring to the ***non***-Medicare "federal and state medical **fee schedules** applicable to automobile and other insurance coverages," and then quotes the part of subsection (5)(a)2 referring to the "participating physician **schedule** of Medicare Part B." Thus, *Markley* illustrates that "fee schedules" are referenced in **both** subsections (5)(a)1 **and** (5)(a)2 of the PIP statute. Nonetheless, a few paragraphs later, *Markley* concludes:

> We must agree with Allstate that the trial court misapplied Virtual Imaging. Allstate provided notice of its election to use the alternative method of benefit calculation, stating in the policy endorsement that "[a]ny 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

[1] As explained at p. 21 of our answer brief, the "federal and state medical fee schedules applicable to automobile and other insurance coverages" in subsection (5)(a)1 of the PIP statute are ***non***-Medicare fee schedules. The "***Medicare***" fee schedules are only referenced in subsection (5)(a)2.a-f of the PIP statute.

> otherwise continued in the law, including but not limited to, all fee schedules." (Emphasis added.) As the Miami-Dade Circuit Court recently remarked, **"[g]iven that the No-Fault Act does not provide any other fee schedules apart from those contained in subsection (5)(a)(2)**, said language is devoid of ambiguity." Excellent Health Servs., Corp. v. United Auto Ins. Co., No. 13-2221 SP 24 (01), 2014 WL 2516476, at *3 (Fla. 11th Cir. Ct. June 3, 2014). We, too, conclude that Allstate's policy language unmistakably makes reimbursements subject to the Medicare fee schedules. ...

Markley at *3 (underline original; bold added). In this analysis, the Second District erroneously concludes "the No-Fault Act does not provide any other fee schedules apart from those contained in subsection (5)(a)(2)...." In reality, as quoted in *Markley* at *2, the PIP statute *also* refers to fee schedules in subsection (5)(a)1.

So, by referring to "*all* fee schedules," Allstate's endorsement refers to the fee schedules in *both* subsections (5)(a)1 *and* (5)(a)2, and fails to "clearly and unambiguously" choose between one method or the other, as required by *Virtual*. Accordingly, the error in *Markley* illustrates that Allstate's endorsement is the basically same as the Geico policy provision which this Court rejected in *Virtual*:

Geico's policy, as quoted in *Virtual* and *Markley*:	**Allstate's endorsement in this case:**
Under Personal Injury Protection, the Company [Geico] will pay, in accordance with, and subject to the terms, conditions, and exclusions of the Florida Motor Vehicle No–Fault Law, as amended, to or for the benefit of the injured person	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.

The Geico policy and the Allstate endorsement both say payment of PIP benefits will be "subject to" everything in the Florida Motor Vehicle No-Fault Law (i.e., §§ 627.730-627.7405, Fla. Stat.). Allstate's endorsement adds a reference to everything in Section 627.736 (i.e., the PIP statute), but since the PIP statute is one of the statutes included within the Florida Motor Vehicle No-Fault Law, Allstate's reference to Section 627.736 adds nothing to Geico's provision. Allstate's endorsement also refers to "all fee schedules," but since "all" of the fee schedules are within Section 627.736(5)(a)1 and 2, which are within the PIP statute and within the Florida Motor Vehicle No-Fault Law, Allstate's reference to "all fee schedules" likewise adds nothing to Geico's provision.[2] Because *Virtual* held Geico's policy provision is insufficient to elect the "Medicare" fee schedules, the error in *Markley* illustrates that Allstate's endorsement is likewise insufficient. Contrary to *Virtual*, Allstate never "clearly and unambiguously" elected the "Medicare" fee schedules as its methodology for calculating reimbursements.

Conclusion

WHEREFORE, the Respondents respectfully request this Court to affirm the Fourth District's decision in *Orthopedic*.

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[2] For example, the phrase "everything in your house" and the phrase "everything in your house, including but not limited to all furniture," both mean the same thing.

Certificate of Filing and Service

I hereby certify that in compliance with Fla. R. Jud. Adm. 2.515 and 2.516, a copy hereof was electronically filed at the Florida Courts E-Portal, and electronically served on Douglas G. Brehm, Esq., *dbrehm@shutts.com*, and Suzanne Y. Labrit, Esq., *slabrit@shutts.com*, Shutts & Bowen, 201 S. Biscayne Blvd., Ste. 1500, Miami, FL 33131, Peter J. Valeta, Esq., *pvaleta@cozen.com*, COZEN O'CONNOR, 123 N. Wacker Dr., Ste. 1800, Chicago, IL 60606, Edward H. Zebersky, Esq., *ezebersky@zpllp.com,* Zebersky Payne, LLP, 110 SE 6th St., Suite 2150, Ft. Lauderdale, FL 33301; and Lawrence M. Kopelman, Esq., *lmk@kopelblank.com*, One W. Las Olas Blvd., Suite 500, Ft. Lauderdale, FL 33301; on this 2nd day of MAY, 20 16.

Certificate of Compliance

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

Respectfully submitted,

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District Court of Appeal of Florida,
Second District.

ALLSTATE INDEMNITY COMPANY, Appellant,
v.
MARKLEY CHIROPRACTIC & ACUPUNCTURE, LLC, as assignee of Ilene Chavez, Appellee.
Allstate Insurance Company, Appellant,
v.
Diagnostic Imaging Consultants of St. Petersburg, P.A. as assignee of Yosley Gonzalez, Appellee.

Nos. 2D14–3818, 2D14–6058.
|
March 30, 2016.

Synopsis
Background: Assignees of insureds brought action against automobile insurer seeking payment of personal injury protection (PIP) benefits. The County Court, Hillsborough County, Herbert M. Berkowitz, J., granted summary judgment in favor of assignees and certified a question to the District Court of Appeal. Insurer appealed.

Holding: The District Court of Appeal, LaRose, J., held that policy language provided insureds with legally sufficient notice of its elections to use statutory Medicare fee schedules in determining reimbursement of medical expenses.

Reversed and remanded; certified question answered.

West Headnotes (1)

[1] Insurance
Amounts payable in general

Automobile insurance policy language provided insureds with legally sufficient notice of insurer's election to use statutory Medicare fee schedules in determining amount of reimbursement of medical expenses; policy endorsement stated that "any amounts payable under this coverage shall be subject to any and all limitations, authorized by [statute containing fee schedules], 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." West's F.S.A. § 627.736.

Cases that cite this headnote

Appeals from the County Court for Hillsborough County; Herbert M. Berkowitz, Judge.

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Opinion

LaROSE, Judge.

*1 Allstate Indemnity Company and Allstate Insurance Company (collectively, Allstate) appeal the trial court's final summary judgments in favor of Markley Chiropractic & Acupuncture, LLC (Markley), as assignee of Ilene Chavez, and Diagnostic Imaging Consultants of St. Petersburg, P.A. (Diagnostic), as assignee of Yosley Gonzalez. Markley and Diagnostic each sued Allstate for payment of Personal Injury Protection (PIP) insurance benefits.[1]

EXHIBIT
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The trial court in each case certified to us, as a matter of great public importance, the following question:

> Does a PIP policy that expressly states that "any amounts payable under this coverage shall be subject to any and all limitations authorized by Fla. Stat. § 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," clearly and unambiguously notify the insured of the methodology the insurer will apply in limiting reimbursement of PIP benefits?

See Fla. R.App. P. 9.030(b)(4)(A), 9.160(d). Because the trial court erred in granting final summary judgments against Allstate, we reverse.

The facts are straightforward and not in serious dispute. Allstate issued separate automobile insurance policies, with PIP benefits, to Ms. Chavez and to Mr. Gonzalez. While the policies were in effect, each insured was involved in a motor vehicle accident. They suffered injuries that were covered under the PIP portion of their respective policies. Markley treated Ms. Chavez; Diagnostic treated Mr. Gonzalez. Each insured received services that were reasonable, medically necessary, related to the subject accidents, and covered by their policies. Each executed a valid assignment of benefits to their respective medical-service provider. The assignments enabled Markley and Diagnostic to bill and receive payment directly from Allstate for the services they rendered to each insured. Allstate paid PIP benefits, but not in the amounts sought by Markley and by Diagnostic.

Markley and Diagnostic each sued Allstate for breach of contract, alleging that Allstate failed to pay the full amount of benefits required by the policies and by section 627.736, Florida Statutes (2010). The legal issue before us is important; the financial stakes are slight. The combined unpaid benefits in controversy are less than $264. Markley billed Allstate $3522 and Diagnostic billed $165. They argue that, under the reasonable-expenses provisions of the policies and section 627.736(1), Allstate should have paid them eighty percent of the billed amounts, $2817.60 and $132. Allstate claims that it correctly paid $2628.44 and $57.74 under the alternative fee-schedule provisions of section 627.736(5)(a)(2)(f) and the policy endorsements set forth below.

Section 627.736[2] provided, in pertinent part, as follows:

> (1) REQUIRED BENEFITS.—Every insurance policy ... shall provide personal injury protection to the named insured ... as follows:
>
> *2 (a) *Medical benefits.*—Eighty percent of all reasonable expenses for medically necessary medical ... services....
>
> ....
>
> (5) CHARGES FOR TREATMENT OF INJURED PERSONS.—
>
> (a) 1. Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered.... With respect to a determination of whether a charge ... is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.
>
> 2. *The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:*
>
> ....
>
> f. *For all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. ...*

(Emphasis added.)

The PIP portion of each policy included the following provision reflecting the language of section 627.736(1):

> Allstate will pay to or on behalf of the injured person the following benefits:
>
> 1. Medical Expenses
>
> Eighty percent of all reasonable expenses for medically necessary medical ... services....

But, an endorsement in each policy added the following

provision, consistent with limitations contained in section 627.736(5)(a)(2):

> 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.

In both cases, the parties agreed that the sole legal issue for resolution by the trial court was whether Allstate's policy language permitted it to limit reimbursement according to the Medicare fee schedule of maximum charges described in section 627.736(5)(a)(2)(a)-(f).

Relying, as they did in the trial court, on *Geico General Insurance Co. v. Virtual Imaging Services, Inc.*, 141 So.3d 147 (Fla.2013), Markley and Diagnostic argue that Allstate's policy language was ambiguous and insufficient to permit application of the endorsement's reimbursement limitation. In *Virtual Imaging*, the supreme court held that subsections 627.736(5)(a)(1) and (5)(a)(2) describe distinct methodologies for the insurer to determine a reasonable charge for medical services. *Virtual Imaging*, 141 So.3d at 155–58. The first method, described in section 627.736(5)(a)(1), determines reasonableness by "a fact-dependent inquiry determined by consideration of various [enumerated] factors." *Virtual Imaging*, 141 So.3d at 155–56.

***3** Alternatively, under section 627.736(5)(a)(2), reasonableness is determined "by reference to the Medicare fee schedules." *Virtual Imaging*, 141 So.3d at 156. Use of these fee schedules predetermines "reasonable expenses" for covered services. This predetermination promotes a key purpose of the PIP statute, to provide "swift and virtually automatic payment" of benefits. *See Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 683–84 (Fla.2000) (quoting *Gov't Emps. Ins. Co. v. Gonzalez*, 512 So.2d 269, 271 (Fla. 3d DCA 1987)).

As here, the dispute in *Virtual Imaging* focused on the insurer's reliance on subsection (5)(a)(2)(f) to limit reimbursement to "200 percent of the allowable amount under the participating physicians schedule of Medicare Part B." *See Virtual Imaging*, 141 So.3d at 156 (quoting § 627.736(5)(a)(2)(f)). The policy in *Virtual Imaging* provided that the insurer would pay PIP benefits of eighty percent of all reasonable expenses for medically necessary medical services "in accordance with, and subject to the terms, conditions, and exclusions of the Florida Motor Vehicle No–Fault Law, as amended." *See id.* at 157–58.

"[T]he policy did not reference the permissive Medicare fee schedule method of calculating reasonable medical expenses" to notify its insured and providers "regarding the amount of PIP coverage the insurer will provide." *Id.* at 158. Consequently, the supreme court held that the insurer could not rely on the alternative method to limit PIP reimbursements. *Id.* The court rejected the insurer's argument that it incorporated the fee schedules by general reference to "the Florida Motor Vehicle No–Fault Law, as amended." *Id.* To take advantage of the Medicare fee schedules, the insurer must, in its policy, elect to use the permissive fee-schedule calculation method. *Id.*

Virtual Imaging is not as convincing as Markley and Diagnostic urge. The Allstate policies before us specifically provide that "[a]ny 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, ... *including but not limited to, all fee schedules.*" (Emphasis added.) The trial court found that this language did not "constitute a [clear and unambiguous] valid notice of intent to select a specific methodology of reimbursement." Seemingly, the trial court understood *Virtual Imaging* to require an express and specific election of the Medicare fee schedules or section 627.736(5)(a)(2)-(5).

We must agree with Allstate that the trial court misapplied *Virtual Imaging*. Allstate provided notice of its election to use the alternative method of benefit calculation, stating in the policy endorsement that "[a]ny 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.*" (Emphasis added.) As the Miami–Dade Circuit Court recently remarked, "[g]iven that the No–Fault Act does not provide any other fee schedules apart from those contained in subsection (5)(a)(2), said language is devoid of ambiguity." *Excellent Health Servs., Corp. v. United Auto. Ins. Co.*, No. 13–2221 SP 24(01), 2014 WL 2516476, at *3 (Fla. 11th Cir.Ct. June 3, 2014). We, too, conclude that Allstate's policy language unmistakably makes reimbursements subject to the Medicare fee schedules. *See Allstate Fire & Cas. Ins. v. Stand–Up MRI of Tallahassee, P.A.*, —— So.3d ——, ——, 40 Fla. L. Weekly D693, D694, 2015 WL 1223701 (Fla. 1st DCA Mar. 18, 2015); *but see Orthopedic*

Specialists v. Allstate Ins. Co., 177 So.3d 19, 21 (Fla. 4th DCA 2015) (finding identical policy language "inherently unclear"; certifying conflict with *Stand–Up MRI*).

***4** We do not quarrel with *Virtual Imaging*'s holding that notice to the provider is required. However, *Virtual Imaging* did not dictate a form of notice. *S. Fla. Wellness, Inc. v. Allstate Ins. Co.,* 89 F.Supp.3d 1338, 1341 (S.D.Fla.2015). It seems clear to us that "*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." *Stand–Up MRI,* —— So.3d at ——, 40 Fla. L. Weekly at D694, 2015 WL 1223701 at 2; *see Excellent Health Servs.,* 2014 WL 2516476, at *3 ("*Virtual Imaging* does not require insurers to specifically state the word 'Medicare.' "). "Allstate leaves no wiggle room as to whether fee limitations may be utilized—both providers and insured are on notice that 'all fee schedules' 'shall' be applied." *S. Fla. Wellness,* 89 F.Supp.3d at 1341.

Allstate's policy language gave its insureds, and their respective medical-care providers, legally sufficient notice, as required by *Virtual Imaging,* of its election to use the Medicare fee schedules. Accordingly, we answer the certified question in the affirmative, reverse the trial court's orders granting summary judgment against Allstate, remand these cases for further proceedings, and certify conflict with *Orthopedic Specialists,* 177 So.3d 19.

Reversed and remanded for further proceedings consistent with this opinion; certified question answered; conflict certified.

VILLANTI, C.J., and SALARIO, J., Concur.

[1] We agreed to hear these cases and exercise our jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(4)(A) (pass-through from county court).

[2] The legislature amended section 627.736. Ch. 2012–197, § 10, at 2737–56, Laws of Fla. Among other changes, the amendment renumbered subsections so that sections (5)(a)(1) and (5)(a)(2)(f) above, applicable here, became sections (5)(a) and (5)(a)(1)(f), respectively. *See id.*

All Citations

--- So.3d ----, 2016 WL 1238533, 41 Fla. L. Weekly D793

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