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IN THE SUPREME COURT OF FLORIDA

Case No. SC-18-1390
L.T. No. 2D-16-4036

MRI ASSOCIATES OF TAMPA, INC.,
d/b/a PARK PLACE MRI,
Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

ON REQUEST FOR DISCRETIONARY REVIEW
OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF

Chris W. Altenbernd
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, Florida 33602

D. Matthew Allen
CARLTON FIELDS JORDEN BURT P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, Florida 33607

Marcy Levine Aldrich
Nancy A. Copperthwaite
AKERMAN LLP
Three Brickell City Centre
98 SE Seventh Street, Suite 1100
Miami, Florida 33131

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PRELIMINARY STATEMENT

This appeal arises from a decision of the Second District Court of Appeal. *See* State Farm Mut. Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc., 252 So. 3d 773 (Fla. 2d DCA 2018) (the "Opinion"), *rev. granted*, No. SC-18-1390, 2019 WL 3214553 (Fla. July 17, 2019). This brief refers to petitioner MRI Associates of Tampa, Inc., d/b/a Park Place MRI, as "Park Place" and to respondent State Farm Mutual Automobile Insurance Company as "State Farm."

Record citations are to the item number and first page of the circuit court Record (R) or to the first page of the district court Record (RII). Unless otherwise indicated, all emphasis in quotations is added by counsel.

This case concerns the interpretation of the Florida No-Fault ("PIP") Statute and of State Farm's automobile insurance policy (the "Policy"). The applicable versions of the Statute and the Policy appear in State Farm's appellate Appendix. *See* Fla. Stat. § 627.736 (2013) (SF App., Tab A) & Policy (SF App., Tab B) (RII-143).

I. INTRODUCTION

Two years ago, in a similar case, this Court found that an automobile policy provided proper notice of the insurer's intent to limit reimbursements based on the schedule of maximum charges (the "Schedule") in the PIP Statute. *See* Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973 (Fla. 2017) (addressing prior version of PIP Statute). Based on that precedent, the Second District correctly concluded that State Farm's Policy equally notifies insureds and providers of its intent to limit medical reimbursement based on the Schedule in the current version of the PIP Statute. *See* MRI Associates, 252 So. 3d 773; *see also* Fla. Stat. § 627.736(5)(a)1. (2013) (setting forth Schedule); GEICO Gen. Ins. Co. v. Virtual Imaging Servs., Inc., 141 So. 3d 147 (Fla. 2013).

As this Court held in Orthopedic Specialists and Virtual Imaging, Florida insurers have the option to limit PIP medical reimbursements based on the statutory Schedule, which caps payments at specified amounts based on the type of medical services rendered. State Farm's Policy communicates its election of the Schedule payment limitation: (a) by quoting the Schedule; and (b) by using notice language suggested and approved by the Florida Office of Insurance Regulation ("OIR"), specifying that "in no event will [State Farm] pay more than" the amounts in the Schedule. Contrary to Park Place's claim, State Farm's policy

language – like the language approved by this Court in Orthopedic Specialists – is clear and consistent in its Schedule election.

II. STATEMENT OF THE CASE AND OF THE FACTS

Because Petitioner's Statement of the Case and Facts omits certain key facts, State Farm submits its own Statement. *See* Am. Initial Br. at 1-5.

A. THE CIRCUIT COURT ACTION.

In 2014, State Farm filed this action against Park Place, seeking declaratory relief under Chapter 86 of the Florida Statutes. In response to State Farm's amended complaint, Park Place asserted a counter-claim for contrary declaratory and injunctive relief.[1]

At issue are bills that Park Place submitted to State Farm for magnetic resonance imaging ("MRI") services rendered to State Farm insureds in connection with 19 individual PIP claims. The State Farm insureds: (a) were injured in auto accidents in 2013; (b) subsequently received MRIs from Park Place; and (c) executed assignments of PIP benefits to Park Place. *See* MRI Associates, 252 So. 3d at 774. State Farm limited payment for each bill based on the Schedule, and "Park Place disputed the amounts paid by State Farm." Id.

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[1] *See* Am. Compl. Decl. Relief (R-2-8); Park Place's Second Am. Countercl. (R-6-176).

State Farm sought a declaration that it properly reimbursed Park Place for these services pursuant to the PIP Statute and its Policy. *See* id. Park Place requested "a declaration of its rights and obligations under the State Farm policy and the PIP statute and an injunction to prevent State Farm from limiting its payments" based on the Schedule. Id. The same Policy and the same (2013) version of the PIP Statute apply to all of the underlying claims.

In 2016, the parties filed cross-motions for summary judgment along with a joint statement of stipulated facts.[2] Attached to the Joint Statement are several documents including: (a) the State Farm Policy; (b) Informational Memorandum OIR-12-02M (the "OIR Memorandum") issued by the Florida OIR in May 2012; and (c) legislative history relating to 2012 amendments to the PIP Statute. *See* Joint Statement Exs. 1-2 & 5 (R-8-207); OIR Mem. (SF App., Tab C).[3]

As stipulated below, Park Place charged **$2240** for each MRI. *See* Joint Statement ¶ 12 & Ex. 3 (R-8-207). Park Place therefore sought a PIP payment of **$1792** from State Farm (80% of the billed amount) and a co-pay of **$448** from each insured (20% of the billed amount). *See* id. ¶ 13 & Ex. 3.

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[2] *See* Pl.'s Mot. Summ. J. (the "SF Motion") (R-11-490); Def.'s Mot. Final Summ. J. (the "PP Motion") (R-10-453); Stips. Fact Related Cross-Mots. Summ. J. (the "Joint Statement") (R-8-207).

[3] *See also* Notice Filing (with additional legislative history) (R-9-371).

State Farm paid approximately **$900** for each MRI – 80% of the maximum amount allowed for MRIs in the Schedule. *See* id. ¶¶ 13-14 & Exs. 3-4. These lower Schedule payments resulted in correspondingly lower co-pays (of about **$225**) for the insureds. *See* id.[4] State Farm's Schedule election benefitted its insureds in two other ways: (a) the lower payments resulted in a slower depletion of their PIP benefits; and (b) they were not subject to balance-billing for amounts in excess of the Schedule. *See* Fla. Stat. § 637.736(5)(a)4.

PIP insurers that elect to limit medical reimbursements based on the Schedule are required to pay 80% of the Schedule amounts. *See* Fla. Stat. § 627.736(1)(a) & § 627.736(5)(a)1. For the MRI charges in this case (and for many other medical services), the Schedule provides for a maximum charge equal to 200% of the amount authorized by Medicare for the same service. *See* id. § 627.736(5)(a)(1)f. State Farm, therefore, paid Park Place 160% (80% of 200%) of the amount that it would receive under Medicare.

In its motion for summary judgment, State Farm pointed out that its Policy, which was approved by the OIR, limits medical reimbursements based on the Schedule. *See* SF Mot. at 12-16 (R-11-490). The Policy expresses this

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[4] Some insureds purchased optional Medical Payment ("MedPay") coverage under which State Farm covers co-payments. *See* Joint Statement ¶¶ 13-14 & Exs. 3-4 (R-8-207).

limitation repeatedly, including through its incorporation of the OIR's suggested language for such notice.

The circuit court granted Park Place's motion for summary judgment and denied State Farm's motion.[5] The court accepted Park Place's argument that State Farm "adopted an unauthorized hybrid method" for calculating PIP medical benefits in that its Policy includes "elements from both" the "Schedule Method" and "the fact-dependent Reasonable Amount Method."[6] The circuit court issued its ruling in 2016, several months before this Court approved Allstate's Schedule election in Orthopedic Specialists.

B. THE DISTRICT COURT APPEAL.

State Farm sought review of the circuit court's ruling by the Second District.[7] In May 2018, the district court issued its Opinion, reversing the Final Judgment and approving the notice provision in the Policy. *See* MRI Associates, 252 So. 3d at 774 ("Because the express language of State Farm's PIP policy does clearly and unambiguously elect to limit reimbursement payments for medical expenses to the schedule of maximum charges, we reverse.").

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[5] *See* Order Granting PP Mot. Denying SF Mot. (R-30-1163).

[6] Final Decl. J. ¶ 2(b) (the "Final Judgment") (R-31-1165).

[7] *See* Notice Appeal (R-32-1167 & RII-7).

The Second District based this decision on several factors. First, it noted that, in Orthopedic Specialists, this Court "expressly rejected the argument urged by Park Place in this appeal, that an insurer's policy must completely disclaim the reasonable charge methodology to elect the schedule of maximum charges limitation." Id. at 777 (citing 212 So. 3d at 975).

Second, the district court "reject[ed] Park Place's argument that State Farm's policy contains an 'unlawful hybrid method' of reimbursement calculation and is therefore impermissibly vague." Id. at 778. The court noted that it is not inconsistent for the Policy to quote both the statutory definition of "reasonable charges" and the Schedule. *See* id. ("State Farm's inclusion of the statutory factors in its definition of reasonable charges tracks the PIP statute and is not inconsistent with the policy language limiting reimbursement to the [Schedule].").

Third, the district court pointed to the Policy's "mandatory language expressly limiting reimbursement for reasonable medical expenses to the [Schedule]." Id. (finding Policy language "even more clear and unambiguous than that at issue in Orthopedic Specialists" and thus "sufficient to place insureds and service providers on notice" of Schedule election).

The Second District also certified a question concerning the 2013 PIP Statute, noting that this Court's opinions address the prior version of the Statute. *See* id. at 777 ("Significantly, neither Virtual Imaging nor Orthopedic Specialists

applies to policies created after the 2012 amendment to the PIP statute, which the State Farm policy at issue in this case was."). The court certified the following question:

> DOES THE 2013 PIP STATUTE AS AMENDED PERMIT AN INSURER TO CONDUCT A FACT-DEPENDENT CALCULATION OF REASONABLE CHARGES UNDER SECTION 627.736(5)(a) WHILE ALLOWING THE INSURER TO LIMIT ITS PAYMENT IN ACCORDANCE WITH THE SCHEDULE OF MAXIMUM CHARGES UNDER SECTION 627.736(5)(a)(1)?

Id. at 778-79.[8]

In connection with this question, the district court observed that the Legislature re-numbered Section 627.736(5) as part of the 2012 PIP amendment by moving the "reasonable charge" definition from prior sub-section (5)(a)1. to part (5)(a). Id. at 777-78. As a result, the Schedule of maximum charges –which previously was in sub-section (5)(a)2. – now is located in sub-section (5)(a)1.

C. RELATED APPEALS.

In 2017, months before the Second District ruling, an Orange County circuit court appellate panel issued a decision addressing the same Policy, the same version of the PIP Statute and the same question presented in this case. *See* State Farm Mut. Auto. Ins. Co. v. Fla. Emergency Physicians Kang & Assocs., M.D., P.A., No. 16-CV-0024, 2017 WL 6453737 (Fla. 9th Cir. Dec. 18, 2017)

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[8] State Farm proposes a re-phrased question. *See infra* Argument § A.

("State Farm v. FEP"). The FEP court reached the same conclusion that the Second District later did – that "State Farm's policy gives adequate notice of its election of the PIP fee schedules to limit reimbursements for purposes of [the PIP Statute] and *Orthopedic Specialists*." Id., 2017 WL 6453737, at *3.

In response to provider FEP's motion for rehearing, the circuit court panel stayed the appeal pending the outcome of this case; its decision therefore is not yet final. There are about 20 other circuit court appeals, around the state, that involve the same issue and that also are stayed (formally or informally), awaiting this Court's ruling.

D. THE SUPREME COURT PROCEEDING.

After the denial of its request for rehearing in the district court, Park Place sought to invoke this Court's discretionary jurisdiction on two grounds – the certified question and a purported express and direct conflict between the Opinion and other decisions. *See* Notice Invoke Fla. Supreme Ct.'s Discretionary Juris. (Aug. 15, 2018). State Farm urged the Court to decline to take jurisdiction because it "answered the same question just last year [in Orthopedic Specialists] with regard to the earlier version of the [PIP] Statute." Answer Br. Juris. at 1 (Oct. 8, 2018). This Court accepted jurisdiction as to the certified question (by a 4-3 vote) and unanimously declined Petitioner's request to review the alleged conflict. *See* Order, 2019 WL 3214553 (Fla. July 17, 2019).

III. SUMMARY OF THE ARGUMENT

This Court should answer the district court's question (as re-phrased below) affirmatively. The Opinion correctly finds that the Policy – like the policy approved by this Court in Orthopedic Specialists – clearly notifies insureds and providers of State Farm's intent to limit medical reimbursements based on the PIP Statute's schedule of maximum charges.

Contrary to Park Place's primary claim, there is nothing uncertain or improper about State Farm's election of the Schedule. State Farm's policy language is consistent with the statutory mandate that an insurer pay reasonable medical expenses. Its Policy respects this coverage mandate while clarifying that State Farm will not pay any bill in excess of the amounts set forth in the PIP Schedule. This is not a "hybrid" approach, but simply a required and appropriate statement of State Farm's contractual and statutory obligations.

Further, the Policy was approved by the OIR and uses the OIR's suggested notice language to indicate its election to limit payment pursuant to the Schedule of maximum charges. In the amended PIP Statute, the Florida Legislature delegated authority to the OIR to determine compliance with the statutory notice provision. Hence, the OIR's approval of State Farm's Policy confirms that the Policy satisfies the statutory notice requirement.

Park Place's alternate arguments also lack merit. First, it challenges the district court's observation that the re-numbering of the PIP Statute reflects the Legislature's intent to stress the Statute's reasonable coverage mandate. But the court's comment regarding the re-numbering (in *dicta*) does not affect its holding. The Opinion applies this Court's precedent, properly finding that State Farm's Policy satisfies the notice test established in Virtual Imaging and clarified in Orthopedic Specialists.

Second, Park Place is mistaken that State Farm must adopt the Schedule charges as an "all or nothing" proposition. This view is at odds with the PIP Statute, the Policy and precedent – including this Court's decision in Orthopedic Specialists. In addition, Park Place's complaints about individual payment issues are irrelevant in that they relate to the technical *application* of the Schedule rather than to State Farm's policy *election* of the Schedule – which is the legal issue before this Court.

Finally, Park Place makes the peculiar claim that approval of State Farm's Schedule election would increase PIP litigation – when in fact the opposite is true. The Legislature amended the PIP Statute to add the Schedule option to reduce litigation and thereby to benefit insureds – by reducing premiums, conserving benefits and combatting fraud.

IV. STANDARD OF REVIEW

The parties agree that the standard of review in this case is *de novo*. *See* Initial Br. at 5-6; *see also* Allstate v. Orthopedic Specialists, 212 So. 3d at 975 ("Because the question presented requires this Court to interpret provisions of the Florida Motor Vehicle No-Fault Law – specifically, the PIP statute – as well as to interpret the insurance policy, our standard of review is de novo.") (citation & internal punctuation omitted).

In analyzing State Farm's insurance contract, the Court should read the Policy "as a whole, endeavoring to give every provision its full meaning and operative effect." Id. at 976 (citation & internal punctuation omitted). And where the policy language is unambiguous, as in this case, the Court "must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." Id. at 975-76 (citation & internal punctuation omitted).

V. ARGUMENT

A. REVISED QUESTION.

State Farm suggests that the Court re-phrase the Second District's certified question to eliminate its reference to a "fact-dependent calculation." This term derives from Park Place's claim that the Policy is an improper "hybrid" policy (*see infra* Argument § C-2). But the issue of great public importance is not the narrow (and misleading) question presented by Park Place. This Court, instead,

should consider the broader question of whether an insurance policy may both elect the authorized Schedule to limit reimbursements and retain the mandatory statutory language agreeing to pay for reasonable charges.

State Farm, therefore, suggests the following revised question:

> DOES STATE FARM'S 2013 INSURANCE POLICY – WHICH QUOTES THE PIP STATUTE'S SCHEDULE OF MAXIMUM CHARGES, USES LANGUAGE SUGGESTED AND APPROVED BY THE OFFICE OF INSURANCE REGULATION AND CONTAINS THE STATUTORY LANGUAGE ABOUT PAYING REASONABLE CHARGES– PROVIDE LEGALLY SUFFICIENT NOTICE OF THE INSURER'S ELECTION TO USE THE SCHEDULE TO LIMIT REIMBURSEMENTS FOR MEDICAL EXPENSES (PURSUANT TO SECTION 627.736(5)(A)5. OF THE FLORIDA STATUTES)?

This question incorporates several key issues missing from the proposed question – such as the application of sub-section (5)(a)5. of the PIP Statute, State Farm's use of the suggested OIR election language and the OIR's approval of the Policy. The revised question also corresponds with this Court's analysis and holding in Orthopedic Specialists. *See* 212 So. 3d at 974 (identifying issue under review & stating holding).

B. A PIP INSURER CAN ELECT TO LIMIT REIMBURSEMENT BASED ON THE STATUTORY SCHEDULE BY INCLUDING A "SIMPLE NOTICE" OF THAT ELECTION IN ITS POLICY – AS STATE FARM DID.

The Florida Legislature, the Florida OIR and this Court have clarified how an insurer may elect to limit medical reimbursements based on the PIP Statute's Schedule of maximum charges. All that is required is a "simple notice"

such as that suggested by the OIR and found in State Farm's Policy. Orthopedic Specialists, 212 So. 3d at 977.[9] State Farm's policy language gives notice of its election to limit reimbursement for medical charges based on the Schedule while otherwise honoring the PIP Statute's reasonable coverage mandate.

1. THE PIP STATUTE'S REASONABLE COVERAGE MANDATE.

The PIP Statute imposes dual obligations, requiring: (a) Park Place and other medical providers to charge reasonable amounts to PIP insureds and insurers; and (b) insurers to reimburse 80% "of all reasonable expenses for medically necessary" services. Fla. Stat. §§ 627.736(1)(a) & 627.736(5)(a); *see also* Virtual Imaging, 141 So. 3d at 155 ("[T]he PIP statute sets forth a basic coverage mandate: every PIP insurer is required to – that is, the insurer 'shall' – reimburse eighty percent of reasonable expenses for medically necessary services."). "This provision – the reasonable medical expenses coverage mandate – **is the heart of the PIP statute's coverage requirements.**" Orthopedic Specialists, 212 So. 3d at 976 (quoting Virtual Imaging, 141 So. 3d at 155) (internal punctuation omitted).

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[9] In Orthopedic Specialists, this Court approved a First District decision and quashed a conflicting Fourth District decision. *See* Allstate Fire & Cas. Ins. Co. v. Stand-Up MRI of Tallahassee, P.A., 188 So. 3d 1 (Fla. 1st DCA 2015), *rev. denied*, No. SC-15-0962, 2017 WL 3326809 (Fla. Aug. 4, 2017); Orthopedic Specialists v. Allstate Ins. Co., 177 So. 3d 19 (Fla. 4th DCA 2015).

The Florida Legislature provided guidance about how to determine the "reasonableness" of medical charges under the PIP Statute. Specifically, the Statute states that providers may not charge PIP insureds and insurers more than what is customarily charged for similar services and that insurers may consider reimbursement levels in the community, federal and state medical fee schedules, and other relevant information in determining the reasonableness of medical charges. *See* Fla. Stat. § 627.736(5)(a).

2. THE LEGISLATURE AMENDED THE 2008 PIP STATUTE BY ADDING THE SCHEDULE OF MAXIMUM CHARGES.

In 2008, concerned about rising medical expenses and their impact on insurance premiums, the Florida Legislature added a "schedule of maximum charges" to the PIP Statute. *See* Fla. Stat. § 627.736(5)(a)2. (2008). For the MRI services at issue here, the payment amount in the Schedule is generous – **double what Medicare allows for the same treatment**. The question of when and how Florida auto insurers could use the Schedule nonetheless created controversy and substantial litigation. As Park Place itself observes, "costly legal battles over the reasonableness of medical bills were the norm" prior to 2008. Am. Initial Br. at 44. The Schedule, which was intended to **resolve** billing disputes, ended up

giving rise to litigation over its implementation – including whether insurers properly elected to limit reimbursements based on the Schedule.[10]

In Virtual Imaging, this Court described the two payment methods that an insurer could use to satisfy the PIP Statute's reasonable medical expenses mandate. *See* 141 So. 3d at 156 (discussing "fact-dependent inquiry determined by consideration of various factors" and "alternative mechanism for determining reasonableness: by reference to the [Schedule]"). The Court held that an insurer must provide an election in its policy to limit medical reimbursements based on the Schedule of maximum charges. *See* id. at 160. Four years later, the Court clarified its earlier decision (and resolved a conflict among the district courts) by ruling that this "simple notice requirement" is satisfied by a provision limiting payment based on the statutory Schedule. *See* Orthopedic Specialists, 212 So. 3d at 977 (citing Stand-Up MRI, 188 So. 3d at 3).

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10 *See* Robin Smith Westcott, Fla. Ins. Consumer Advocate, REPORT ON FLORIDA MOTOR VEHICLE NO-FAULT INSURANCE (*PERSONAL INJURY PROTECTION)* at 2 (Dec. 2011) ("The implementation of the fee schedule which was intended to resolve billing disputes and litigation has instead become the dominant issue associated with litigation. This has led to a significant increase in PIP premiums, which translates into a 'fraud tax' of nearly $1 billion on Floridians.") (available at https://www.myfloridacfo.com/division/ICA/docs/PIP Working Group Report 12.14.2011.pdf); *see also* Altamonte Springs Imaging, L.C. v. State Farm Mut. Auto. Ins. Co., 12 So. 3d 850, 857 (Fla. 3d DCA 2009) (lamenting "potential for thousands of micro-lawsuits" spawned by ambiguity in earlier MRI fee schedule).

3. In 2012, the Legislature Amended the PIP Statute Again and Added the Notice Provision.

In 2012, the Florida Legislature again amended the PIP Statute. It retained a schedule of maximum charges similar to that in the 2008 version of the Statute. *See* Fla. Stat. § 627.736(5)(a)1. ("The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges: [sub-parts a-f.]"). And it added a provision (the "Notice Provision") addressing when and how an insurer may limit payment pursuant to the Schedule:

> Effective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. **A policy form approved by the [OIR] satisfies this requirement**.

Id. § 627.736(5)(a)5.

Shortly before the Notice Provision took effect, the OIR issued a memorandum "to assist insurers with the filings necessary to implement the notice requirement" in the Notice Provision. OIR Mem. (SF App., Tab C) (RII-143). The Memorandum includes a Sample Fee Schedule Endorsement (the "Endorsement") with the following suggested policy language: "[The insurer] will limit reimbursement of medical expenses to 80 percent of a properly billed reasonable charge, but in no event will [the insurer] pay more than 80 percent of the following schedule of maximum charges: [quoting Schedule]." Id.

The Florida Legislature enacted the 2012 amendments to the PIP Statute in response to a statewide crisis affecting both insureds and insurers. The Final Bill Analysis cites an OIR report of data collected from PIP insurers for the period 2006 to 2010. *See* Legis. History Ex. 1 at 6 & Ex. 2 at 6 (R-9-371). The OIR found that "the number of drivers in Florida has remained stable, the number of accidents has decreased, but . . . the frequency and severity of PIP claims has increased significantly." Id. For example, between 2006 to 2010, the number of Florida PIP claims increased by **28%** and the number of PIP lawsuits against insurers increased by **387%**. *See* id. And in just two years, between 2008 and 2010, PIP benefits paid by insurers increased by **70%** (from $1.43 to $2.37 billion). *See* id. At about the same time, between 2007 and 2010, the number of PIP referrals to the Division of Fraud increased by more than **60%**. *See* id.

Based on these trends, the OIR predicted a 19% increase in PIP claims paid by insurers and a 29% increase in premiums paid by insureds in the next year. *See* id. The Legislature took action to try to reverse this trend – to reduce premium costs, to conserve benefits and to combat fraud and billing abuses:

> Fraud and abuse in no-fault motor vehicle insurance, personal injury protection (PIP), has led to significant increases in PIP premiums and has made the coverage unaffordable for an increasing number of Floridians. Reform efforts over the years have had varying degrees of success, but PIP fraud remains rampant. . . . [T]he bill addresses cost drivers in the PIP system, and is expected to have a positive fiscal impact on motor vehicle insurance policyholders.

Id. Ex. 5 (Staff Analysis) at 1.

4. STATE FARM'S PIP POLICY QUOTES BOTH THE SCHEDULE AND THE OIR ENDORSEMENT.

State Farm's Policy – which was filed with and approved by the OIR – provides no-fault coverage for reasonable medical expenses in the initial PIP Insuring Agreement section: "***We*** will pay in accordance with the ***No-Fault Act*** properly billed and documented ***reasonable charges*** for ***bodily injury*** to an ***insured*** caused by an accident resulting from the ownership, maintenance, or use of a ***motor vehicle***[.]" Policy at 14 (SF App., Tab B) (RII-143).[11] This general statement is consistent with the reasonable coverage mandate noted by this Court in Virtual Imaging (141 So. 3d at 155) and Orthopedic Specialists, 212 So. 3d at 976. And the Policy tracks the PIP Statute in defining "reasonable charge" as

[11] Certain defined terms appear in the Policy in bold italic type. Any such emphasis (bold and italics) in Policy quotations is original.

> an amount determined by ***us*** to be reasonable in accordance with the ***No-Fault Act***, considering one or more of the following:
>
> 1. usual and customary charges;
> 2. payments accepted by the provider;
> 3. reimbursement levels in the community;
> 4. various federal and state medical fee schedules applicable to ***motor vehicle*** and other insurance coverages;
> 5. the schedule of maximum charges in the ***No-Fault Act***,
> 6. other information relevant to the reasonableness of the charge for the service, treatment, or supply; or
> 7. Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, if the coding policy or payment methodology does not constitute a utilization limit.

Policy at 5 (emphasis in original); *see also* Fla. Stat. § 627.736(5)(a).

The PIP Insuring Agreement is subject to the provisions of the later PIP Limits section, which quotes the full Schedule and elects to limit reimbursement based on the Schedule, using the suggested notice language of the OIR Endorsement:

> ***We*** will limit payment of **Medical Expenses** described in the **Insuring Agreement** of this policy's No-Fault Coverage to 80% of a properly billed and documented ***reasonable charge***, but in no event will ***we*** pay more than 80% of the following ***No-Fault Act*** "schedule of maximum charges" including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers: [quoting Schedule].

Policy at 16 (underlining added) (SF App., Tab B) (RII-143).[12] The Policy also notes that coverage is based on the PIP Statute. *See* id. at 15 ("***We*** will not pay any charge that the ***No-Fault Act*** does not require ***us*** to pay, or the amount of any charge that exceeds the amount the ***No-Fault Act*** allows to be charged.").

C. AS THE SECOND DISTRICT FOUND, STATE FARM PROPERLY ELECTED TO LIMIT PIP PAYMENTS BASED ON THE SCHEDULE OF MAXIMUM CHARGES.

State Farm's Policy contains the "simple notice" that is required to elect the PIP Schedule. The Policy – like the Allstate policy approved in Orthopedic Specialists – uses mandatory language to express its election and even quotes the Schedule. Park Place wrongly describes the Policy as a "hybrid" because it incorporates elements of the PIP Statute's reasonableness standard. But as this Court stressed, the reasonableness standard applies to **all** PIP claims, regardless of the reimbursement method elected by the insurer.

1. THE POLICY GIVES NOTICE OF STATE FARM'S ELECTION OF THE STATUTORY SCHEDULE.

In the PIP Limits section of its Policy, in simple language that can be understood by insureds and providers, State Farm gives notice of its election to limit reimbursement based on the Schedule of maximum charges. This provision, which follows the OIR Endorsement, provides "legally sufficient notice of the

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[12] The underlining reflects the Policy's quotation of the Endorsement.

insurer's election to use the permissive [Schedule] . . . to limit reimbursements for medical expenses." Orthopedic Specialists, 212 So. 3d at 974.

This Court and other Florida courts have approved similar schedule election language in other policies. In Orthopedic Specialists, this Court approved Allstate's notice provision: "Allstate's policy clearly and unambiguously states that any amounts payable for medical expense reimbursements shall be subject to any and all limitations, authorized by section 627.736, including all fee schedules." Id. at 977 (internal punctuation omitted); *accord* S. Fla. Wellness, Inc. v. Allstate Ins. Co., 89 F. Supp. 3d 1338, 1341 (S.D. Fla. 2015). And the Southern District of Florida approved Progressive's policy language – which is substantially like that of State Farm – finding that it "plainly satisfies the [statutory] notice requirement." John S. Virga, D.C., P.A. v. Progressive Am. Ins. Co., 215 F. Supp. 3d 1320, 1325 (S.D. Fla. 2016) (considering provision: "we will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges: [quoting Schedule]").

As this Court observed, there are no "magic words" or special forms required to satisfy Virtual Imaging's "simple notice requirement." Orthopedic Specialists, 212 So. 3d at 977 ("Virtual Imaging requires no other magic words from Allstate's policy and its simple notice requirement is satisfied by Allstate's unambiguous language limiting any amounts payable to the fee schedule-based

limitations found in the statute.") (citing Stand-Up MRI, 188 So. 3d at 3) (internal punctuation omitted).

Allstate's policy language is less detailed than that of State Farm (and Progressive) and does not quote the Schedule of maximum charges. *See* MRI Associates, 252 So. 3d at 778 ("State Farm's policy language is even more clear and unambiguous than that at issue in Orthopedic Specialists[.]"); State Farm v. FEP, 2017 WL 6453737, at *3 ("The Court finds the State Farm notice in the instant case to be at least as clear as the Allstate notice in *Orthopedic Specialists*."). Yet, this Court found there was no ambiguity about Allstate's payment election based on the mandatory terminology in its policy:

> Nothing within Allstate's policy indicates that this Court should construe the word "shall" contrary to its normal usage. Given the context of the policy provision, the only reasonable interpretation of the term "shall" is as "must" or "will."
>
> * * * * * * * * * * * * * * *
>
> Here, in the context of Allstate's PIP policy, the only reasonable interpretation of the phrase "shall be subject to" is as a mandatory command. . . . Allstate's policy endorsement states in mandatory language that benefit payments must or will be made in accordance with such limitations.

Orthopedic Specialists, 212 So. 3d at 978-79 (emphasis in original). The Southern District of Florida agreed:

> Plaintiffs move through each word or phrase in the relevant policy language arguing that each provides a basis for the Court to find that the provision is ambiguous. . . . However, the Court is not persuaded by Plaintiffs' effort, and instead finds that the provision makes clear that the Subsection 5(a)(2)

> method of limiting reimbursements *will* be used. In stating that the amounts payable "*shall* be subject to any and all limitations . . . including . . . all fee schedules," **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.**

South Fla. Wellness, 89 F. Supp. 3d at 1341 (italics in original).

State Farm's notice provision similarly "leaves no wiggle room" as to whether it elected to cap reimbursements pursuant to the PIP Schedule. Id. First, State Farm's Policy includes the OIR's proposed notice provision. Second, the Policy quotes the full Schedule of maximum charges. And third, like Allstate, State Farm uses mandatory terminology ("but in no event") – suggested by the OIR – to indicate its election of the Schedule payment method. The "only reasonable interpretation" of this phrase "is as a mandatory command. . . . that benefit payments must or will be made in accordance with such limitations." Orthopedic Specialists, 212 So. 3d at 979 (emphasis in original).[13]

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[13] Like the OIR, the Florida Legislature has used the phrase "but in no event" to limit payments. *See* Fla. Stat. § 627.6402(1) (2019) (stating "but in no event" shall insurance rebate for healthy lifestyle exceed 10% of paid premiums); id. § 1009.92(7) (2019) (providing "but in no event" may student loan insurance premium exceed maximum provided by federal law); *see also* Harvard Farms, Inc. v. Nat'l Cas. Co., 555 So. 2d 1278, 1278-79 (Fla. 3d DCA 1990) (interpreting "but in no event" provision in insurance policy as mandatory coverage exclusion).

2. THE POLICY DOES NOT ADOPT AN IMPROPER HYBRID PAYMENT METHODOLOGY.

Park Place claims that State Farm uses an improper "hybrid" method of calculating medical reimbursements because its Policy (a) adopts the PIP Statute's definition of "reasonable charges" in the general Definitions section and (b) elects the Schedule in the Limits section. *See* Am. Initial Br. at 8-10 & 24-34.[14] Park Place's "hybrid" argument is flawed in several respects.

First, Park Place relies on an argument that this Court "expressly rejected" in Orthopedic Specialists. MRI Associates, 252 So. 3d at 777. Under Park Place's view, to elect the PIP Schedule payment method, State Farm would have to eliminate all policy references to paying a "reasonable" amount of medical expenses. But State Farm cannot ignore the issue of reasonableness, nor excise it from the Policy. As this Court stressed, reasonableness is "the heart" of PIP coverage and all PIP coverage is subject to that "mandate." *See* Orthopedic Specialists, 212 So. 3d at 977 ("A PIP policy cannot contain a statement that the insurer will not pay eighty percent of reasonable charges because no insurer can disclaim the PIP statute's reasonable medical expenses coverage mandate.").

State Farm promised to comply with the coverage mandate by paying "properly billed and documented ***reasonable charges*** for ***bodily injury*** to an

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[14] Sub-sections (b), (d), (e) and (f) of Park Place's Argument all relate to this "hybrid" issue.

insured caused by an accident." Policy at 14 (SF App., Tab B) (RII-143); *see also* State Farm v. FEP, 2017 WL 6453737, at *4 ("State Farm's policy definition of 'reasonable charge' is wholly proper and **is indeed required under Florida law**.").

Second, by claiming that State Farm must adopt the Schedule as an "exclusive" payment methodology (Am. Initial Br. at 31), Park Place again contradicts the Court's ruling in Orthopedic Specialists. *See* 212 So. 3d at 975 (reversing Fourth DCA's holding that insurer electing to limit payment based on Schedule must "substitute the Medicare fee schedules as the exclusive form of reimbursement"). As this Court repeatedly observed, the Schedule option involves the election of a **limitation** on the reasonable medical expense coverage that underlies every PIP policy. *See* id. at 974 (considering whether policy "provides legally sufficient notice of the insurer's election to use the [Schedule] to **limit** reimbursements for medical expenses"); id. at 977 & 979 ("Allstate's PIP policy provides legally sufficient notice of Allstate's election to use the [Schedule] to **limit** reimbursements."); *see also* Virtual Imaging, 141 So. 3d at 157 ("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.").

The Schedule option does not require that an insurer pay the Schedule amount in every instance. Indeed, the PIP Statute contemplates scenarios where an

insurer (even one that elects the Schedule) may pay less than the base Schedule amount. *See* Fla. Stat. § 627.736(5)(a)5. ("If a provider submits a charge for an amount less than the amount allowed [in Schedule], the insurer may pay the amount of the charge submitted."); id. § 627.736(5)(a)3. (providing insurers are not prohibited from applying Medicare coding and payment methodologies to Schedule amounts).

Third, contrary to Park Place's claim, State Farm is allowed to consider various factors when analyzing a provider's charge. *See* Fla. Stat. § 627.736(5)(a). In Orthopedic Specialists, the provider also argued that Allstate's policy was ambiguous because it allegedly commingled the factors that an insurer may consider in assessing the reasonableness of a charge (in sub-section 5(a)) and the Schedule of maximum charges. *See* 212 So. 3d at 979. This Court disagreed and explained the difference between the two approaches, noting that the Schedule limits the insurer's payment obligation:

> In explaining the factors that are relevant to determining what constitutes a reasonable charge, [sub-section 5(a)] simply provides that "consideration may be given" to various relevant factors, including "various federal and state medical fee schedules applicable to automobile and other insurance coverages." **These fee schedules may be considered in determining the amount of reasonable charges, but they – unlike the [Schedule of maximum charges] – do not operate as "limitations" on charges.**

Id.

Fourth, Park Place wrongly focuses on a general definition ("reasonable charge") that is located in the introductory DEFINITIONS section of the Policy and that applies to the entire Policy, not only to PIP coverage. *See* Policy at 5 (noting that State Farm may consider various factors in assessing whether charge is reasonable) (SF App., Tab B) (RII-143). This definition expresses State Farm's PIP insuring obligations (which are contained in the PIP provisions of the Policy). More importantly, this definition is subject to the subsequent **Limits** provision of the PIP section of the Policy. In the **Limits** section, State Farm clarifies and caps its payment obligation by saying that it will not pay any more than its statutory obligation. *See* id. at 15. And the Policy then elects to limit reimbursement by quoting the full Schedule of maximum charges and by stating that "in no event" would State Farm "pay more" than the amounts in the Schedule. Id. at 16. As the FEP court observed, "it is difficult to imagine how State Farm's notice could have been clearer in expressing its intent to limit payment pursuant to the [Schedule]." 2017 WL 6453737, at *3 (internal punctuation omitted).

In the analogous Virga case, the provider claimed that Progressive's policy was ambiguous and did not clearly elect one of the two PIP payment methods. *See* 215 F. Supp. 3d at 1324 ("Plaintiff attempts to paint the policy as 'ambiguous' by arguing that the policy refers to both the fact-based method of

calculation and the fee schedule.”). The federal court rejected this claim, finding that there was no ambiguity created by the policy’s reference to an insurer’s statutory obligation to pay “reasonable expenses” in view of its clear election of the PIP Schedule:

> Plaintiff’s assertion that the policy refers to the fact-based method seems to be limited to the policy’s definition of “medical benefits” as “80 percent of *all reasonable expenses* incurred for **medically necessary** . . . services.” However, this language does not ostensibly refer to the reasonableness, fact-based method, as Plaintiff asserts. This language merely states the Defendant’s statutory obligation to pay eighty percent of all reasonable expenses for medically necessary services. The policy then goes on to detail the manner in which Progressive determines what qualifies as reasonable pursuant to [the PIP Statute]. In so doing, the policy clearly states the Defendant will be using the schedule of maximum charges . . . . This plainly satisfies the notice requirement.

Id. at 1325 (italics & bold in original; citations & internal punctuation omitted).

The Virga court’s conclusion is consistent with this Court’s finding that the “plain and obvious meaning” of the “Limits of Liability” section of Allstate’s policy “is that reimbursements will be made in accordance with all of the fee schedule limitations contained within” the Schedule. Orthopedic Specialists, 212 So. 3d at 977. As this Court recognized, Allstate’s agreement to pay “reasonable expenses” was subordinate to the Limits section of its policy, which imposed a cap based on the Schedule. *See* id. at 979; *see also* Stand-Up MRI, 188 So. 3d at 4 (“[W]e 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.**").

The same reasoning applies here. State Farm's Policy properly notes its statutory obligation to pay reasonable expenses and "then goes on to detail the manner" in which it will do so – namely, by electing the Schedule of maximum charges. Virga, 215 F. Supp. 3d at 1325. The general "reasonable charges" definition thus is subordinate to the detailed **Limits** provision.

3. THE OIR'S APPROVAL OF THE POLICY CONFIRMS THAT THE PAYMENT ELECTION IS EFFECTIVE.

State Farm's election of the PIP Schedule is confirmed by the OIR's approval of its Policy. The Florida Legislature expressly delegated authority to the OIR to determine compliance with the new statutory Notice Provision. *See* Fla. Stat. § 627.736(5)(a)5. ("A policy form approved by the office satisfies this [notice] requirement."). The OIR approved State Farm's Policy, including its notice provision (which essentially re-states the OIR's proposed language).[15]

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[15] Park Place makes the misleading comment "that State Farm's policy language is materially different from the statutory language" of the Notice Provision. Am. Initial Br. at 35 (Argument § (g)). Park Place fails to mention that the Policy provision is **virtually identical** to suggested notice language in the OIR Endorsement. *Compare* Policy at 16 (SF App., Tab B) (RII-143) *with* OIR Mem. (SF App., Tab C).

Hence, as a matter of law, the Policy provides proper notice of State Farm's intention to limit reimbursement of medical expenses by applying the PIP Schedule. *See* State Farm v. FEP, 2017 WL 6453737, at *3 ("In the instant case, it is undisputed that its policy, which includes the notice, was approved by the [OIR]. Thus, as a matter of law, State Farm's notice satisfies [the Notice Provision].").

The OIR's jurisdiction over policy forms is well established. "The business of insurance in Florida is regulated by an extensive statutory framework." Bristol Hotel Mgmt. Corp. v. Aetna Cas. & Sur. Co., 20 F. Supp. 2d 1345, 1350 (S.D. Fla. 1998). Within this framework, the OIR has broad authority to enforce the Insurance Code. *See* Fla. Stat. § 624.307 (2019); Land O'Sun Mgmt. Corp. v. Commerce & Indus. Ins. Co., 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007) ("The legislature . . . has determined that the [OIR] must review and approve insurance policies drafted by insurance companies doing business in Florida."). In particular, the Legislature has given the OIR the power to adopt rules and regulations relating to policy notice provisions.[16]

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[16] *See* Fla. Stat. § 626.9201 (2019) (notice of cancellation or non-renewal); id. § 627.4133 (2019) (notice of cancellation, non-renewal or renewal premium); id. § 627.4143 (2019) (outline of coverage); id. § 627.711 (2019) (notice of premium discounts for hurricane loss mitigation); id. § 627.7277 (2019) (notice of renewal premium); id. § 627.7281 (2019) (cancellation notice); id. § 627.7282 (2019) (notice of additional premium).

The OIR regularly publishes regulations and bulletins on insurance rates, policy forms, premiums and underwriting rules. In 2012, shortly before the effective date of the Notice Provision, the OIR issued a memorandum "to assist insurers with the filings necessary to implement the notice requirement" in the Notice Provision. OIR Mem. (SF App., Tab C) (RII-143). The OIR Memorandum contains the sample Endorsement that State Farm followed in its Policy:

> Among the various provisions of this legislation is a new statutory requirement that insurers provide a notice of the schedule of medical charges or "fee schedule" to insureds if the insurer is limiting reimbursement. **The Office of Insurance Regulation (Office) has analyzed the revisions and is sending the attached sample endorsement language for inclusion of the schedule of charges** specified in Section 627.736(5)(a), Florida Statutes.

Id. Pursuant to the Legislature's delegation, the OIR approved State Farm's Policy. That approval indicates that the Policy satisfies the statutory notice requirement, in accordance with Section 627.736(5)(a)5.

D. PETITIONER'S OTHER ARGUMENTS LACK MERIT.

Throughout its rambling brief, Park Place attempts to distract the Court from the single legal issue presented by discussing a number of irrelevant points. Further, State Farm takes issue with the tone of the brief, which accuses it

of obtaining "unlawful windfall profits" and other unsubstantiated misconduct. Am. Initial Br. at 6.[17]

1. THE DISTRICT COURT'S COMMENT ABOUT THE RE-NUMBERING OF THE PIP STATUTE DOES NOT AFFECT ITS HOLDING.

Park Place objects at length to the Second District's observation that the re-numbering of the PIP Statute clarified the Legislature's intent. *See* Am. Initial Br. at 10-24 (Argument § (c)). But that observation was not central to the district court's Opinion, which otherwise carefully analyzes the history of the PIP Statute and correctly applies the controlling cases from this Court – the very cases that Park Place claims that the court ignored.

As the Second District noted, in the 2012 PIP amendments, the Legislature re-numbered Section 627.736(5) to clarify and to stress the Statute's reasonable medical expenses coverage mandate. *See* MRI Associates, 252 So. 3d at 778 ("Based on the current construction of the PIP statute, we conclude that there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer."). Park Place raises three primary

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[17] For example, Park Place starts its Argument with a specious reference to an internet article that does not mention Florida PIP claims and that focuses on a different carrier's adjustment of homeowners' insurance claims. *See* Am. Initial Br. at 6-7 (citing Mollie Reilly & Max J. Rosenthal, Insurance Claim Delays Deliver Massive Profits to Industry by Shorting Customers, HUFFINGTON POST (Dec. 13, 2011)).

objections to this comment: (a) that the district court went "beyond the scope" of its appellate review; (b) that the court's analysis is incorrect; and (c) that its holding rests on this "re-numbering" issue. Am. Initial Br. at 11. Park Place is wrong on all counts.

First, this case involves a single stipulated legal issue as to whether State Farm's Policy properly elects to limit PIP reimbursements based on the statutory Schedule. This issue was "presented to the trial judge," briefed by the parties on appeal and resolved by the district court. Id. The Second District thus acted within the scope of its appellate authority by finding that State Farm's Policy satisfies the "simple notice" requirement approved by this Court in Orthopedic Specialists, 212 So. 3d at 977. The court's finding on this critical legal question would not be affected even if this Court were to disagree with the district court's comment about the statutory re-numbering.

Second, the district court certified a question to this Court about the amended PIP Statute and added its own comment (as *dicta*) for the Court's consideration. The court noted that the Legislature re-numbered Section 627.736(5) in 2012 and that this re-numbering confirms that all PIP payments, including those made pursuant to the Schedule, are subject to the reasonable medical expenses mandate. State Farm does not know whether the court's comment is a correct statement of legislative intent, but the legislative history of

the 2012 PIP amendments certainly shows that the Legislature acted to address the excessive litigation that had arisen regarding insurers' election of the Schedule. *See* Legis. History Ex. 1 at 6 & Ex. 2 at 6 (R-9-371).

Third, Park Place spends 15 pages of its Argument on this re-numbering issue – even though it is not the basis for the Second District's holding. Contrary to Park Place's claim, the district court never said that the amended Statute "manifests any intent to legislatively overturn the appellate decisions concerning the fee schedule method." Am. Initial Br. at 17. Rather, the court **held** that State Farm's Policy provides proper notice of its Schedule election, based on the notice test established in Virtual Imaging and clarified in Orthopedic Specialists. The court thus applied this Court's precedent to approve State Farm's Policy election. It then made an unrelated comment about the re-numbering issue.

2. PARK PLACE RAISES IRRELEVANT AND IMPROPER PAYMENT ISSUES.

Park Place next tries to complicate this appeal by raising irrelevant and odd complaints that State Farm **overpaid** the bills at issue. *See* Am. Initial Br. at 39-41 (Argument § (h)); *see also* id. at 36-37. Specifically, Park Place argues that State Farm improperly applied Medicare's 2007 Limiting Charge Fee Schedule to the underlying MRIs. Park Place also contends that, in other cases, State Farm applied certain payment discounts authorized by Medicare. *See* id. at 37 & 40-41.

Park Place claims that these payments are inconsistent with State Farm's election to limit reimbursement based on the Schedule and the Policy's statement that "in no event" will State Farm pay more than the Schedule. State Farm disputes that its payments were inappropriate or in conflict with its election of the Schedule. More importantly, any factual disputes about individual payment amounts have no bearing on the general legal question presented in this appeal regarding the Policy's Schedule election. *See* MRI Associates, 252 So. 3d at 774 n.1 ("[W]hether the amount actually paid by State Farm complies with the [Schedule] was not before the trial court and is thus outside the scope of our appellate review."). Regardless of whether State Farm paid more or less than the Schedule on occasion, those payments cannot alter its policy language. And as this Court has held, an insurer's election to limit reimbursement based on the Schedule must be made in its policy. *See* Orthopedic Specialists, 212 So. 3d at 977; Virtual Imaging, 141 So. 3d at 158. The payment issues identified by Park Place relate to the technical **application** of the Schedule and not to State Farm's **election** of the Schedule.

(a) Medicare Limiting Charge Fee Schedule.

To the extent that this Court finds the issue relevant, State Farm correctly applied the Schedule. In calculating the underlying reimbursements to Park Place, State Farm had to consider two different provisions of the PIP Statute.

First, it looked at the relevant part of the Schedule – sub-section (5)(a)1.f. of the PIP Statute, which authorizes insurers to reimburse MRI services based on Medicare rates:

> 1. 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:
>
> (I) The participating physicians fee schedule of Medicare Part B . . . .

Fla. Stat. § 627.736(5)(a)1.f.(I). Second, State Farm consulted sub-section 5(a)2. of the Statute, which requires insurers to apply 2007 Medicare schedules, if they would result in **higher** reimbursements than the current schedules:

> For purposes of subparagraph 1., the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect on March 1 of the year in which the services, supplies, or care is rendered and for the area in which such services, supplies, or care is rendered, and the applicable fee schedule or payment limitation applies throughout the remainder of that year, notwithstanding any subsequent change made to the fee schedule or payment limitation, **except that it may not be less than the allowable amount under the applicable schedule of Medicare Part B for 2007** for medical services, supplies, and care subject to Medicare Part B.

Id. § 627.736(5)(a)2.

Although sub-section (5)(a)1.f. references a specific fee schedule for the current year (the "participating physicians fee schedule of Medicare Part B"), sub-section (5)(a)2. is not as specific for the year 2007; it simply refers to "the

applicable fee schedule." Faced with that lack of specificity, State Farm considered and compared payments based on the three possible Medicare Part B schedules: (i) 80% of 200% of the 2013 (current year) Medicare Participating Physicians Fee Schedule; (ii) 80% of 200% of the 2007 Medicare Participating Physicians Fee Schedule; and (iii) 80% of 200% of the 2007 Medicare Limiting Charge Fee Schedule. *See* Joint Statement Ex. 3 (R-8-207). In an abundance of caution and an effort to avoid litigation, State Farm reimbursed Park Place based on the **highest** of these schedule payments – using the 2007 Medicare Limiting Charge Fee Schedule. In other words, consistent with Section 627.736(5)(a)2., State Farm applied the schedule that most would benefit Park Place.

The application of the Limiting Charge Fee Schedule in this circumstance is **not** inconsistent with State Farm's election to limit reimbursement based on the Schedule. It is – at most – an issue about State Farm's technical application of the Schedule to the MRI charges at issue. If Park Place thinks that State Farm misapplied the Schedule, it can raise that claim in a different lawsuit – but it is unlikely to do so, given its view that State Farm's payments may have been too generous.

(b) <u>Medicare Payment Discounts.</u>

In addition to complaining that State Farm sometimes pays more than the Schedule requires, Park Place claims that State Farm sometimes pays "*less* than

the minimum amount allowed by the schedule of maximum charges." Am. Initial Br. at 37 (emphasis in original). Again, as with the limiting charge issue, Park Place raises an irrelevant complaint regarding State Farm's technical application of the Schedule rather than its Policy election of the Schedule.

The cases cited by Park Place on this point involve disputes between State Farm and providers as to certain payment reductions taken in accordance with Medicare guidelines. For example, in the FEP v. State Farm case, the medical services were rendered by a physician's assistant or nurse practitioner rather than by a physician. *See* 2017 WL 6453737, at *1. As a result, State Farm applied a 15% reimbursement reduction based on Medicare guidelines for such services, its Policy language and the PIP Statute. *See* id. The PIP Statute permits insurers to use such "Medicare coding policies and payment methodologies . . . to determine the appropriate amount of reimbursement[.]" Fla. Stat. § 627.736(5)(a)3.[18]

State Farm's policy language tracks the OIR's Endorsement and the PIP Statute, both of which contemplate that insurers may not *always* pay the

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[18] Park Place cites two other cases involving alleged underpayments. *See* Am. Initial Br. at 37 & 40-41 (citing Coastal Wellness Ctrs., Inc. v. State Farm Mut. Auto. Ins. Co., No. 17-61950-CIV, 2018 WL 3089321 (S.D. Fla. Apr. 3, 2018), & Crespo & Assocs., P.A. v. State Farm Mut. Auto. Ins. Co., No. 16-CC-03496, 25 Fla. L. Weekly Supp. 107d (Fla. 13th Cir. Mar. 7, 2017)). Coastal Wellness concerns a 2% payment reduction for chiropractic services and Crespo, like FEP, involves the 15% reduction for physician's assistant or nurse practitioner services (both pursuant to Medicare guidelines).

scheduled amount. *See* Fla. Stat. § 627.736(5)(a)5. ("If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted."). Pursuant to the Notice Provision, if "the insurance policy includes a notice at the time of issuance or renewal . . . the insurer **may** limit payment pursuant to the schedule of charges[.]" Id. The Legislature could have required notice that the insurer "will" limit payment in every instance, but instead chose the permissive "may" terminology, implying that the insurer may choose not to use the Schedule in certain instances.

As it did below, Park Place erroneously asserts that the Schedule sets a *minimum* reimbursement amount. *See* Am. Initial Br. at 13, 35 & 38 (citing Nationwide Mut. Fire Ins. Co. v. AFO Imaging, Inc., 71 So. 3d 134 (Fla. 2d DCA 2011)). AFO Imaging does not support Park Place's claim. More importantly, that case – which arose under a prior version of the PIP Statute – does not apply under the current version of the Statute.

AFO Imaging is another case addressing the technical application of the Schedule. Nationwide's policy election to limit payment based on the Schedule was not contested; the case addressed only the insurer's ability to apply the Medicare Outpatient Prospective Payment System ("OPPS") reduction. The Second District determined that Nationwide could not apply OPPS to reduce the "minimum" Schedule amounts, because the 2008 PIP Statute "did not authorize a

PIP insurer to utilize any restrictions or limitations applicable to the Medicare program when determining the amounts due." 71 So. 3d at 135. But the 2012 PIP amendments include a provision allowing insurers to use "Medicare coding policies and payment methodologies." Fla. Stat. § 627.736(5)(a)3. Hence, AFO Imaging is superseded by statute and is inapplicable to our case, which involves the current version of the PIP Statute.

In sum, if Park Place wants to challenge certain State Farm payments as being too generous or too low, it can do so on a case-by-case basis. But such a challenge has no bearing on the general contractual and statutory interpretation issues before this Court. *See* MRI Associates, 252 So. 3d at 774 n.1.

3. THIS COURT SHOULD CONSTRUE THE POLICY IN FAVOR OF THE INSUREDS AND IN ACCORDANCE WITH THE LEGISLATURE'S GOALS.

State Farm agrees with Park Place on one point – that the "ramifications" of the Second District's decision "are far-reaching and significant." Am. Initial Br. at 41. But contrary to Park Place's claim, affirmance of the Opinion would have purely positive ramifications. *See* id. at 41-46 (Argument § (i)). By affirming the Opinion and approving the Policy's Schedule election, this Court would: (a) reduce the wasteful litigation over the PIP Schedule election issue that continues to clog Florida's county courts; (b) benefit Florida insureds by lowering their premiums and co-payments and preserving their limited PIP

benefits; and (c) thus fulfill the legislative intent underlying the 2012 PIP amendments.

(a) Approval of the Policy's Election Provision Would Reduce PIP Litigation.

This Court should reject Park Place's claim that affirmance of the Second District's Opinion would "turn back the clock to the pre-2008 situation, where costly legal battles over the reasonableness of medical bills were the norm." Id. at 44; *see also* id. at 5 (claiming affirmance would "return PIP litigation to the pre-2008 situation and confuse medical billing and collection practices"). To the contrary, it is Park Place that favors confusion and "costly legal battles," apparently in the belief that the pre-2008 system would result in higher provider payments. *See* id. at 7 n.3.

The Opinion – like this Court's decision in Orthopedic Specialists – cleared up the confusion created by a split among lower courts. Providers and insureds now have clarity as to State Farm's Policy election to limit reimbursement based on the Schedule. Providers are on notice that, if they bill amounts in excess of the Schedule, their bills will be limited. This much-needed clarity should reduce litigation and thus reduce policy premiums – one of the legislative goals underlying the PIP amendments.

(b) The Policy's Schedule Election Benefits Insureds.

State Farm's OIR-approved Policy properly and unambiguously limits reimbursement based on the PIP Schedule of maximum charges. But if this Court were to find any ambiguity in the Policy, it should resolve that ambiguity in favor of the insured. *See* Orthopedic Specialists, 212 So. 3d at 976. In this case, **the insureds are the State Farm policyholders, not Park Place**.

If this Court were to find that State Farm could not limit reimbursement based on the PIP Schedule, that would mean that Park Place would seek 80% of its billed charge from State Farm and the remaining 20% as a co-payment from the insureds. State Farm's Schedule reimbursement places the insureds in a much better position than Park Place's suggested approach. Higher provider payments mean that an insured's limited PIP benefits are depleted faster.[19] For example, pursuant to the Schedule, State Farm paid Park Place approximately $900 for each MRI, which was billed at $2240. Park Place claims that it should have been paid 80% of the billed amount or $1792. State Farm's Schedule payment thus preserved some $900 of benefits for the insured (for other medical

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[19] PIP medical benefits are capped at $10,000 upon proper certification "that the injured person had an emergency medical condition." Fla. Stat. § 627.736(1)(a)3. Otherwise, benefits are limited to $2500. *See* id. § 627.736(1)(a)4.; Med. Ctr. of Palm Beaches v. USAA Cas. Ins. Co., 202 So. 3d 88 (Fla. 4th DCA 2016).

bills or lost wages), and reduced the insured's out-of-pocket co-pay by about $223, from $448 to $225.[20]

And as Park Place concedes, the Schedule reimbursement method further benefits insureds because the PIP Statute insulates them from excessive balance-billing for such payments:

> If an insurer limits payment as authorized by sub-paragraph 1. [the Schedule], **the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits**, except for amounts that are not covered by the insured's [PIP] coverage due to the coinsurance amount or maximum policy limits.

Fla. Stat. § 627.736(5)(a)4.; *see also* Am. Initial Br. at 42 (noting "balance-billing prohibition" for Schedule payments). Hence, to construe the Policy in favor of the insured, this Court would have to find that it limits reimbursement based on the PIP Schedule. *See* Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979) ("Moreover, even were we to find that the policy is ambiguous, . . . we would still have to prefer [the insurer's] interpretation because it maintains the widest range of coverage and is therefore actually the more favorable to the insured.").

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[20] State Farm's reimbursements ranged between $860 and $940 depending on the MRI coding, so the figures cited are approximations. *See* Joint Statement ¶¶ 13-14 & Exs. 3-4 (R-8-207).

Park Place may dislike State Farm's application of the Schedule and the resulting lower payments. But State Farm's insureds undoubtedly appreciate that the Schedule election lowers their co-payments and extends their limited PIP benefits – which was the legislative intent behind the PIP amendments.

Park Place is able to sue State Farm directly pursuant to the assignments of benefits executed by the insureds. In other words, Park Place "stands in the shoes" of the insureds. *See* Price v. RLI Ins. Co., 914 So. 2d 1010, 1013 (Fla. 5th DCA 2005) ("An assignment is a transfer of all the interests and rights to the thing assigned. The assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in his own name.") (citations omitted). In this dispute, those shoes are an uncomfortable fit. The policy construction that would benefit the insured the most is the one that would limit payment based on the PIP Schedule – not the one urged by Park Place. Park Place's self-interested interpretation of the Policy is at odds with the interests of State Farm's insureds.

(c) Affirmance Would Fulfill Legislative Intent.

Finally, State Farm's Policy construction fulfills the legislative intent, which favors swift payment of the insured's bills, stabilizing premiums, maximizing benefits and minimizing co-payment obligations. Park Place's approach simply encourages more litigation and ignores the Legislature's goal in

amending the PIP Statute to add the PIP Schedule, Notice Provisions and other new sections.

As Fourth District Judge May observed in her dissent in Orthopedic Specialists – which this Court later approved – the time has come to stop the seemingly endless semantic battle over PIP policy provisions:

> Since its inception, the PIP statute has been the playing field where providers and insurers battle over the meaning of its language. The legislature continues to amend the PIP statute so that it serves the purpose for which it was intended. Indeed, the majority notes the numerous times the PIP statute has been amended. Each time that happens, insurers are required to review their policies and change language. That comes at a cost. And it is the insured that bears that cost.
>
> Yet, time after time, the battle rages on. As the Pope once asked Michelangelo during the painting of the Sistine Chapel: "When will there be an end?"

177 So. 3d at 30 (May, J., dissenting). Affirmance of the Second District's Opinion would help to end the battle (that continues even after this Court's decision in Orthopedic Specialists) and to achieve the "end" intended by the Legislature when it enacted the 2012 amendments to the PIP Statute.

VI. CONCLUSION

For these reasons, the Court should affirm the Second District's Opinion.

Respectfully submitted,

Chris W. Altenbernd
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, Florida 33602
Telephone: 813-574-8562
CAltenbernd@bankerlopez.com

D. Matthew Allen
CARLTON FIELDS JORDEN BURT P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, Florida 33607
Telephone: 813-223-7000
MAllen@carltonfields.com

/s/ Nancy A. Copperthwaite
Marcy Levine Aldrich
Nancy A. Copperthwaite
AKERMAN LLP
Three Brickell City Centre
98 SE Seventh Street, Suite 1100
Miami, Florida 33131
Telephone: 305-374-5600
Marcy.Aldrich@akerman.com
Nancy.Copperthwaite@akerman.com
Debra.Atkinson@akerman.com

Counsel for Respondent State Farm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this 25th day of October 2019 to all persons on the Service List.

/s/ Nancy A. Copperthwaite
Nancy A. Copperthwaite
Florida Bar No. 549428

CERTIFICATE OF COMPLIANCE

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

/s/ Nancy A. Copperthwaite
Nancy A. Copperthwaite

PARK PLACE SERVICE LIST

David M. Caldevilla, Esq.
DE LA PARTE & GILBERT, P.A.
P.O. Box 2350
Tampa, Florida 33601-2350
Phone: 813-229-2775
caldevilla@dgfirm.com
serviceclerk@dgfirm.com

Stuart C. Markman, Esq.
Kristin A. Norse, Esq.
KYNES, MARKMAN & FELMAN, P.A.
P.O. Box 3396
Tampa, Florida 33601-3396
Phone: 813-229-1118
SMarkman@kmf-law.com
KNorse@kmf-law.com

Craig E. Rothburd, Esq.
CRAIG E. ROTHBURD, P.A
320 W. Kennedy Blvd., Suite 700
Tampa, Florida 33606
Phone: 813-251-8800
CRothburd@e-rlaw.com

John V. Orrick, Jr., Esq.
JOHN V. ORRICK, P.L.
6946 W. Linebaugh Avenue
Tampa, Florida 33625-5800
Phone: 813-283-5868
JOrrick@jvolaw.com

Edward H. Zebersky, Esq.
ZEBERSKY PAYNE, LLP
110 SE Sixth Street, Suite 2150
Fort Lauderdale, Florida 33301
Phone: 954-989-6333
ezebersky@zpllp.com

D. Matthew Allen, Esq.
CARLTON FIELDS JORDEN BURT P.A.
4221 West Boy Scout Blvd., Suite 1000
Tampa, Florida 33607
Phone: 813-223-7000
MAllen@carltonfields.com
EJones@carltonfields.com

Kenneth P. Hazouri, Esq.
DE BEAUBIEN, KNIGHT, SIMMONS,
MANTZARIS & NEAL, LLP
332 North Magnolia Avenue
Orlando, Florida 32801
Phone: 407-422-2454
KPH47@dbksmn.com
Iquezada@dbksmn.com

Chris W. Altenbernd, Esq.
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, Florida 33602
Phone: 813-221-1500
CAltenbernd@bankerlopez.com

Scott R. Jeeves, Esq.
THE JEEVES LAW GROUP
954 First Avenue North
St. Petersburg, Florida 33705
Phone: 727-894-2929
SJeeves@jeeveslawgroup.com

Lawrence M. Kopelman, Esq.
LAWRENCE M. KOPELMAN, P.A.
7900 Peters Road, Suite B-200
Plantation, Florida 33324
Phone: 954-462-6855
LMK@kopelblank.com

Melisa Coyle, Esq.
THE COYLE LAW FIRM, P.A.
407 Lincoln Road, Suite 8-E
Miami Beach, Florida 33139
Phone: 305-604-0077
MCoyle@thecoylelawfirm.com

Mac S. Phillips, Esq.
PHILLIPS TADROS, P.A.
12 SE Seventh Street, Suite 803
Fort Lauderdale, Florida 33301
Phone: 954-642-8885
MPhillips@phillipstadros.com

Maria Elena Abate, Esq.
COLODNY FASS
1401 NW 136th Avenue, Suite 200
Sunrise, Florida 33323
Phone: 954-492-4010
mabate@colodnyfass.com

Stuart L. Koenigsberg, Esq.
STUART L. KOENIGSBERG, P.A.
8877 SW 131st Street
Miami, Florida 33176
Phone: 305-899-8900
Stuart@koenigsberglaw.com

Kenneth J. Dorchak, Esq.
BUCHALTER, HOFFMAN & DORCHAK
1075 NE 125th Street, Suite 202
N. Miami, Florida 33161
Phone: 305-891-0211
KDorchak@bhdlawfirm.com