

SUPREME COURT OF FLORIDA

No. SC16-1100

**MARKLEY CHIROPRACTIC & ACUPUNCTURE, LLC, as assignee of
Ilene Chavez, and DIAGNOSTIC IMAGING CONSULTANTS OF ST.
PETERSBURG, P.A., as assignee of Yosley Gonzalez,
Petitioners,**

v.

**ALLSTATE INDEMNITY COMPANY, and
ALLSTATE INSURANCE COMPANY,
Respondents.**

Fla. 2d DCA Case Nos. 2D14-3818, 2D14-6058

**RESPONDENTS' REPLY TO PETITIONERS' RESPONSE TO ORDER TO
SHOW CAUSE**

In *Allstate Ins. Co. v. Orthopedic Specialists*, SC15-2298, 2017 WL 372092, *3 (Fla. Jan. 26, 2017), this Court held that Allstate's policy language "provides legally sufficient notice of Allstate's election" to apply the PIP authorized fee schedules, which "satisfy the PIP statute's reasonable medical expenses coverage mandate." In the instant case, the Second District Court of Appeals considered the same Allstate policy language and held that it "gave its insureds, and their respective medical-care providers, legally sufficient notice as required by [*Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147 (Fla. 2013)], of its election to use the Medicare fee schedules." *Allstate Indem. Co. v. Markley Chiro. & Acupuncture*,

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LLC, __ So. 3d __, 2016 WL 1238523, *4 (Fla. 2d DCA 2016). There is nothing about this case to distinguish it from *Orthopedic Specialists*. In fact, Petitioner moved for a stay of the instant appeal claiming that this appeal involves “the same material facts and the same legal issues presented in the *Orthopedic Specialists* case.” (See paragraph 6 of “Petitioners’ Unopposed Motion to Stay Appeal Pending Final Disposition of Case No. SC15-2298” filed in the instant matter on June 23, 2016.) Petitioner’s Response to the April 11, 2017 “show cause” order identifies no difference with *Orthopedic Specialists* that would warrant a different result. Petitioner is really asking this Court to again rehear arguments previously considered and rejected in *Orthopedic Specialists*. Accordingly, this Court should decline to exercise jurisdiction as the issue of law presented was fully decided in *Orthopedic Specialists*.¹

Petitioner argues that this Court should exercise jurisdiction in this case because “the Second District's decision in *Markley* expressly and directly conflicts with the numerous appellate decisions on the same questions of law, including but not limited to: *Geico General Insurance Co. v. Virtual Imaging Services, Inc.*, 141 So.3d 147 (Fla. 2013); *Washington Nat. Ins. Corp. v. Ruderman*, 117 So.3d 943 (Fla.

¹ Petitioner also adopts and incorporates the arguments presented in the response to the order to show cause filed by the petitioners in *Stand-Up MRI of Tallahassee, P.A. v. Allstate*, Case No. SC15-962. Allstate filed its reply to the *Stand-Up* response and incorporates by reference its reply, attached hereto as “Exhibit A.”

2013); and *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.*, 63 So.3d 63 (Fla. 4th DCA 2011), *rev. den.*, 86 So.3d 1113 (Fla. 2012). Petitioner merely rehashes the arguments previously and rejected in *Orthopedic Specialists*.

Petitioner argues that *Markley* conflicts with *Virtual Imaging* because it rejected Petitioner's argument that Allstate's fee schedule language did not make a clear election between the two methodologies for determining reasonableness of charges for medical services. However, in *Orthopedic Specialists* this Court addressed that very issue and concluded that *Virtual Imaging* did not require that the insurer state it will not pay eighty percent of reasonable charges. "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. *See Virtual Imaging*, 141 So. 3d at 155." 2017 WL 372092, *4. This Court rejected Petitioner's argument that Allstate's election was insufficient and ambiguous because its election of "all fee schedules" encompassed both fee schedules listed in section 627.736(5)(a)1. and fee schedules listed in section 627.736(5)(a)2.

In the context of Allstate's policy, the endorsement unambiguously references "any and all limitations, authorized by section 627.736, . . . including . . . all fee schedules." (Emphasis added.) A review of section 627.736 reveals that the only fee schedule limitations applicable to insurer payments contained within that statute are located in section 627.736(5)(a)2. See § 627.736(5)(a)2., Fla. Stat. ("The insurer may limit

reimbursement to 80 percent of the following schedule of maximum charges” (emphasis added)); § 627.736(5)(a)3.-5., Fla. Stat. (referencing the fee schedule limitations contained within section 627.736(5)(a)2.). The “fee schedules” referred to in subsection (a)1. are not within the category of “limitations” referred to in the policy endorsement. In explaining the factors that are relevant to determining what constitutes a reasonable charge, subsection (a)1. 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 fee schedules referred to in subsection (a)2.—do not operate as “limitations” on charges.

2017 WL 372092, *5 (emphasis added).²

Petitioner also complains that *Markley* conflicts with *Ruderman* and other decisions because there are supposedly multiple reasonable interpretations for Allstate’s language creating ambiguity.³ Petitioner attempts to parse Allstate’s fee

² Accordingly, Petitioner’s assertion that ambiguity exists because Allstate’s language elects “any and all limitations,” and other “limitations” appear in subsection (5)(a)1 (and elsewhere). Because Allstate’s language expressly refers to “limitations” to be applied to “amounts payable,” the other “limitations” Petitioner refer to are not referenced. Moreover, they clearly do not conflict with an insurer’s election to limit medical expense reimbursement to the fee schedules set forth in Subsection (5)(a)2. It is ludicrous to suggest that Subsection (5)(a)1. contains fee schedule **limitations** merely because it uses the words “fee schedules.” Subsection (5)(a)1. does not authorize insurers to apply any payment **limitations**, in the form of fee schedules or otherwise.

³ Petitioner suggests that because *Orthopedic Specialists* was a 4-3 decision, that demonstrates there are multiple reasonable interpretations for Allstate’s language. That absurd argument would mean that that a decision finding contract or statutory language unambiguous must be **unanimous**. Numerous cases have held no

schedule language into “sections” to suggest different reasonable meanings are possible. (Response, ¶ 30.) But it never explains how this “parsing” creates reasonable, different, and inconsistent meanings that make it ambiguous. This Court rejected arguments to create ambiguity by reading separate portions of that language because “insurance contracts must be read as a whole and not in isolated parts,” and the meaning must be determined “within the full context of Allstate’s PIP policy.” 2017 WL 372092, *4.

Petitioner incorrectly asserts that this Court should exercise its jurisdiction here because insurance policy ambiguities are to be construed in favor of the insured. The issue about construing ambiguities in favor of insureds was fully briefed in *Orthopedic Specialists*. (See *Orthopedic Specialists* briefing: IB at 35-39; AB at 23-24; RB at 14-15.) And, while there is no ambiguity in the policy, Allstate urged the Court to adopt an insured-favorable construction if any ambiguity was found. (*Orthopedic Specialists* IB at 35-36.) The problem for Petitioner, of course, is that an insured-favorable construction warrants rejection of its argument and claim here.

ambiguity exists in split decisions. See, e.g., *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1137–38 (Fla. 1998) (holding a policy exclusion unambiguous in a 5/2 split decision); *In re McCollam*, 612 So. 2d 572 (Fla. 1993) (finding statute unambiguous in a 4/3 split decision). As Petitioner’s own authority acknowledges: “You might be tempted to say, ‘If the language were plain and unambiguous, we wouldn’t be arguing about it, would we?’ Banish the thought: Lawyers argue about plain and unambiguous language all the time.” A. Scalia and B. Garner, *Reading Law: The Interpretation of Legal Texts* 52 (2012).

(*Id.*) See also *Ortho. Spec. v. Allstate Ins. Co.*, 177 So. 3d 19, 30 (Fla. 4th DCA 2015) (May, J., dissenting) (“[The provider] look[s] to get paid as much as possible, but that does not inure to the insured’s benefit. The less costly the services provided, the more services the insured can receive.”).

Moreover, in *Orthopedic Specialists*, this Court did not disregard precedent about the principle that ambiguities in an insurance policy must be construed in favor of the insured. In fact, this Court actually acknowledged that principle as it had been reiterated in *Ruderman. Orthopedic Specialists*, 2017 WL 372092, *2.

Instead, this Court simply rejected Petitioner’s arguments that there were any ambiguities to be construed. This Court:

- rejected the claim that Allstate’s policy was ambiguous because it fails to state that Allstate will not actually pay eighty percent of reasonable charges. “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. See *Virtual Imaging*, 141 So. 3d at 155.” 2017 WL 372092, *4;
- rejected the claim that Allstate’s policy was ambiguous because it did not state that calculate benefits only under the permissive Medicare fee schedules. “[A] PIP policy cannot state that the insurer will calculate benefits solely under the Medicare fee schedules contained within section 627.736(5)(a)2. because the Medicare fee schedules are not the only applicable mechanism for calculating reimbursements under the permissive payment methodology. See [*Virtual Imaging*] at 159 (explaining that ‘the Medicare fee schedules are not the only mechanism for calculating reimbursements’).” 2017 WL 372092, *4;
- rejected the claim that Allstate’s policy was ambiguous because the term “shall” can reasonably be construed as “must” or “may.” “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.” 2017 WL 372092, *5;

- rejected the claim that Allstate’s policy was ambiguous because “all fee schedules” includes both the non-Medicare fee schedules listed in section 627.736(5)(a)1. “A review of section 627.736 reveals that the only fee schedule limitations applicable to insurer payments contained within that statute are located in section 627.736(5)(a)2.” 2017 WL 372092, *5.

In short, this Court did not act inconsistently with prior precedent regarding construction of insurance policies. *Orthopedic Specialists* did not construe ambiguities in Allstate’s policy.⁴ It merely rejected Petitioner’s claims that any ambiguities existed. Nor did this Court construe any policy language in a manner that was against the insureds’ interests.

Petitioner attempts to suggest that Allstate’s language should be held insufficient because it is “no better (if not worse) than the Geico policy language that was invalidated in *Virtual Imaging*.” (Response, p. 21.) However, *Virtual Imaging* did not invalidate any Geico policy language. Geico’s policy had no language giving notice of an election to use the authorized reimbursement limitations. Geico argued that “it was permitted to calculate reimbursements in

⁴ This case, like *Orthopedic Specialists*, presented the question of whether Allstate’s policy language “provides legally sufficient notice of the insurer’s election to use the permissive Medicare fee schedules identified in section 627.736(5)(a)2., *Florida Statutes* (2009), to limit reimbursements for medical expenses.” 2017 WL 372092, *1. This presented an issue of statutory construction, not a question of construing policy language in favor of the insured. That issue was whether an insurer’s election must disclaim the PIP statute coverage mandate to pay “reasonable” medical expenses. This Court said the statute did not, and could not, require that.

accordance with the Medicare fee schedules because the 2008 amendments were incorporated into its policy.” 141 So. 3d at 158. This Court held that it was the lack of language giving notice that prohibited Geico’s use of those limitations.

There is no reason why the issue in *Markley* is not controlled by *Orthopedic Specialists*. This Court should decline to exercise jurisdiction to hear any further appeal of this matter.

Respectfully submitted,
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Exhibit A

SUPREME COURT OF FLORIDA

No. SC15-962

**STAND-UP MRI OF TALLAHASSEE, P.A.,
Appellees/Petitioners**

v.

**ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY,
Appellants/Respondents**

**L.T. NOS.: 1D14-1213,1D14-1215, 1D14-1216, 1D14-1217,
1D14-1218, 1D14-1219, D14-1220, 1D14-1221, 1D14-1222,
1D14-1223, 1D14-1224, 1D14-1225, 1D14-1226, 1D14-1227**

RESPONDENTS' REPLY AS TO WHY *ALLSTATE INS. CO. v. ORTHOPEDIC SPECIALISTS* IS CONTROLLING AND THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION

In *Allstate Ins. Co. v. Orthopedic Specialists*, SC15-2298, 2017 WL 372092, *3 (Fla. Jan. 26, 2017), this Court held that Allstate's policy language "provides legally sufficient notice of Allstate's election" to apply the PIP authorized fee schedules, which "satisfy the PIP statute's reasonable medical expenses coverage mandate." In the instant case, the First District Court of Appeals considered the same Allstate policy language and held that it was unambiguous and a "legally sufficient notice to its insureds of its election to use the Medicare fee schedules as required by [*Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147 (Fla. 2013)]." There is nothing about this case to distinguish it from *Orthopedic*

Specialists. Petitioner’s Response to the April 11 “show cause” order identifies no difference with *Orthopedic Specialists* that would warrant a different result. Petitioner is really asking this Court to again rehear arguments previously considered and rejected in *Orthopedic Specialists*. Accordingly, this Court should decline to exercise jurisdiction as the issue of law presented was fully decided in *Orthopedic Specialists*.

Petitioner argues that this Court should exercise jurisdiction in this case to reconsider a purported “decisional conflict” created by *Orthopedic Specialists*. It asserts that conflict arises because this Court “ignored undeniably clear rules involving construction of statutory meaning¹ concerning ambiguity in insurance contracts and this disregarded a substantial body of precedent...” Response, p. 3. The precedent Petitioner refers to are those cases that present the principle that ambiguities in an insurance policy must be construed in favor of the insured.

Petitioner’s argument merely rehashes the arguments presented by the provider in its Motion for Rehearing in *Orthopedic Specialists* (p. 19), which was

¹ This case, like *Orthopedic Specialists*, presented the question of whether Allstate’s policy language “provides legally sufficient notice of the insurer’s election to use the permissive Medicare fee schedules identified in section 627.736(5)(a)2., Florida Statutes (2009), to limit reimbursements for medical expenses.” 2017 WL 372092, *1. This presented an issue of statutory construction, not a question of construing policy language in favor of the insured. That issue was whether an insurer’s election must disclaim the PIP statute coverage mandate to pay “reasonable” medical expenses. This Court said the statute did not, and could not, require that.

denied on March 27, 2017. (Copy attached as Exhibit A.) Moreover, the issue about construing ambiguities in favor of insureds was fully briefed in *Orthopedic Specialists*. (See *Orthopedic Specialists* briefing: IB at 35-39; AB at 23-24; RB at 14-15.) And, while there is no ambiguity in Allstate’s policy language, Allstate urged the Court to adopt an insured-favorable construction if any ambiguity was found. (*Orthopedic Specialists* IB at 35-36.) The problem for Petitioners, of course, is that an insured-favorable construction warrants rejection of its argument and claim here. (*Id.*) See also *Ortho. Spec. v. Allstate Ins. Co.*, 177 So. 3d 19, 30 (Fla. 4th DCA 2015) (May, J., dissenting) (“Respondent “look[s] to get paid as much as possible, but that does not inure to the insured’s benefit. The less costly the services provided, the more services the insured can receive.”).

Moreover, in *Orthopedic Specialists*, this Court did not disregard precedent about the principle that ambiguities in an insurance policy must be construed in favor of the insured. In fact, this Court actually acknowledged that principle as it had been reiterated in *Washington Nat. Ins. Corp. v. Ruderman*, 117 So.3d 943 (Fla. 2013). *Orthopedic Specialists*, 2017 WL 372092, *2.

Instead, this Court simply rejected Petitioner’s arguments that there were any ambiguities to be construed. This Court:

- rejected the claim that Allstate’s policy was ambiguous because it fails to state that Allstate will not actually pay eighty percent of reasonable charges. “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. *See Virtual Imaging*, 141 So. 3d at 155.” 2017 WL 372092, *4;

- rejected the claim that Allstate's policy was ambiguous because it did not state that calculate benefits only under the permissive Medicare fee schedules. “[A] PIP policy cannot state that the insurer will calculate benefits solely under the Medicare fee schedules contained within section 627.736(5)(a)2. because the Medicare fee schedules are not the only applicable mechanism for calculating reimbursements under the permissive payment methodology. *See [Virtual Imaging]* at 159 (explaining that ‘the Medicare fee schedules are not the only mechanism for calculating reimbursements’).” 2017 WL 372092, *4;
- rejected the claim that Allstate's policy was ambiguous because the term “shall” can reasonably be construed as “must” or “may.” “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.” 2017 WL 372092, *5;
- rejected the claim that Allstate's policy was ambiguous because “all fee schedules” includes both the non-Medicare fee schedules listed in section 627.736(5)(a)1. “A review of section 627.736 reveals that the only fee schedule limitations applicable to insurer payments contained within that statute are located in section 627.736(5)(a)2.” 2017 WL 372092, *5.

In short, this Court did not act inconsistently with prior precedent regarding construction of insurance policies. *Orthopedic Specialists* did not construe ambiguities in Allstate's policy. It merely rejected Petitioner's claims that any ambiguities existed. Nor did this Court construe any policy language in a manner that was against the insureds' interests. There is no decisional conflict created by *Orthopedic Specialists*. This Court should decline to exercise jurisdiction to hear any further appeal of this matter.

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Exhibit A

Supreme Court of Florida

Case No. SC15-2298

ALLSTATE INSURANCE COMPANY,
Petitioner,

vs.

ORTHOPEDIC SPECIALISTS, et al.,
Respondents.

RESPONDENTS' MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure 9.330, the Respondents, Orthopedic Specialists, et al., respectfully move for rehearing concerning this Honorable Court's January 26, 2017 appellate Opinion and order denying Respondents' motion for appellate attorneys' fees, and state:

Preliminary Statement

1. The arguments in this motion are made in good faith, after a thorough analysis and with the undersigned attorneys' genuine beliefs in the merits of this motion. We respectfully submit that the Court's Opinion will be widely read in the legal community to represent a genuine legal inconsistency in the law of Florida as to the proper methodology for interpreting insurance policies and ambiguities therein. We make this motion with the sincere understanding that this Court desires to achieve coherent and consistent applications of Florida law as to the

interpretation of insurance policies that all motorists must purchase, so that insurers, insureds, and health care providers may anticipate and secure the just, speedy, and inexpensive determination of every coverage dispute.

2. Well settled case law explains that a statutory or contractual provision is ambiguous whenever reasonable people can disagree as to its meaning. *See, e.g., State v. Huggins*, 802 So.2d 276, 277 (Fla.2001) ("Ambiguity suggests that reasonable persons can find different meanings in the same language." (*quoting Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452 (Fla.1992))).¹ In this case, the Court reversed the Fourth District's conclusion that Allstate's policy is ambiguous, and the Court's decision is based on a 4-to-3 vote, with four Justices concluding that Allstate's insurance policy language is unambiguous, and three Justices concluding that Allstate's policy is ambiguous. In arriving at this one-vote margin, we respectfully submit that the Majority has overlooked or misapprehended some important points of law and fact, including the principles of law which govern the identification and interpretation of an

¹ In *Crews v. State*, 183 So. 3d 329, 334 (Fla. 2016), *cert. denied*, 137 S. Ct. 379 (2016), Justice Canady, writing for the majority, recognized and adopted this same principle when he cited to 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 45.2 (7th ed. 2014) ("[A]mbiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."); and Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 425 (2012) ("[A]mbiguity [is] [a]n uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations.").

ambiguous insurance policy provision.

Grounds for rehearing

3. At page 5 of the Opinion, the Majority correctly holds that insurance policy language is ambiguous if the language is susceptible to more than one reasonable interpretation. Opinion at p. 5, *citing, Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779, 785 (Fla. 2004), and *Swire Pac. Holdings v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla. 2003). *See also, Sebo v. Am. Home Assurance Co., Inc.*, SC14-897, -- So.3d --, 2016 WL 7013859, at *2 (Fla. Dec. 1, 2016) (when insurance policy language "is susceptible to more than one reasonable interpretation and is therefore ambiguous, the policy will be strictly construed against the insurer and in favor of the insured").

4. However, the Majority's decision overlooks the principle of insurance policy construction identified by Justice Labarga when writing for the majority in *Washington Nat. Ins. Corp. v. Ruderman*, 117 So.3d 943, 948 (Fla. 2013). *Ruderman* holds that courts must read an insurance policy "as a whole, endeavoring to give **every** provision its **full** meaning and operative effect" and "**avoid** simply concentrating on certain limited provisions to the exclusion of the totality of others." *Id.*, 117 So. 3d at 948 (emph. added).

5. This well settled axiom of contract construction is described in many appellate decisions. For example, Justice Quince likewise relied on the same principle when writing for a majority of this Court in *Intervest Construction of Jax*,

Inc. v. Gen. Fidelity Ins. Co., 133 So.3d 494 (Fla. 2014), and explained:

Courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." ... Further, "in construing insurance policies, courts should read each policy as a whole, endeavoring to give **every** provision its **full** meaning and operative effect." ...

Id., 133 So.3d at 497-498 (Quince, J., majority decision) (citations omitted).

6. In this case, when Allstate's insurance policy provision is read "as a whole, endeavoring to give every provision its full meaning and operative effect" without "simply concentrating on certain limited provisions to the exclusion of the totality of others," one must conclude (as the three dissenting Justices must have concluded) that Allstate's policy provision is susceptible to multiple different reasonable interpretations. These multiple interpretations are easy to identify.

Allstate's insurance policy provision states:

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.

(Emph. added). If one follows the instructions provided by Justice Labarga in *Ruderman* and Justice Quince in *Intervest*, and gives every word its full meaning and operative effect, this insurance policy provision yields at least three different reasonable interpretations:

(a) "Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736...."

(b) "Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, ... including ... all fee schedules."

(c) "Any amounts payable under this coverage shall be subject to ... 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."

Importantly, as explained below, each of these three different interpretations of Allstate's policy provision necessarily includes the fact dependent methodology described in Section 627.736(5)(a)1, Florida Statutes (2008-2012).

7. The first interpretation listed above ("Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736...") is not mentioned or considered by the Majority's Opinion. However, this interpretation necessarily includes "all limitations" found anywhere in the PIP statute. The fact dependent methodology of Section 627.736(5)(a)1 clearly includes such limitations. For example, Section 627.736(5)(a)1 states, "In no event ... may such a charge be in excess of the amount the person or institution customarily charges for like services or supplies." Accordingly, by adopting "all limitations, authorized by section 627.736," Allstate's policy has clearly adopted all limitations found in the fact dependent method of (5)(a)1 which allow the insurance company to limit payment to the health care provider based on its "customar[y] charges for like services and supplies," as well as all other limitations

contained in (5)(a)1 and anywhere else in the PIP statute.² Contrary to the interpretation principle described by Justice Larbarga in *Ruderman* and Justice Quince in *Intervest*, this is one reasonable interpretation of Allstate's policy language, which the Majority's Opinion has overlooked.

8. The second interpretation listed above ("Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, ... including ... all fee schedules") is the interpretation which the Majority suggests is the only possible interpretation of Allstate's policy language. Opinion at p. 13-14. Because the Majority's interpretation does not give "full meaning and operative effect" to the provisions omitted by the ellipses³ and instead "concentrat[es] on certain limited provisions to the exclusion of" the provisions

² At p. 14, the Majority Opinion states that "the only fee schedule limitations applicable to insurer payments contained within [the PIP] statute are located in section 627.736(5)(a)2" and that the fee schedules "referred to in subsection (a)1 are not within the category of 'limitations' referred to in the policy endorsement." However, Allstate's policy refers to "all limitations" and there are indeed limitations found in subsection (5)(a)1, such as the one which prohibits a provider's charges from ever exceeding its customary charges. Such a limitation on the amount that a provider can charge is, by its very nature, also a limitation on the insurer's payment obligation, and is well within the category "all limitations" in the PIP statute.

³ Specifically, the ellipses used by the Majority at p. 14 of the Opinion omit the following provisions highlighted in bold italics: "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." It is indeed telling that one must skip over and omit all of these words in order to arrive at the Majority's suggested sole interpretation.

omitted by ellipses, the *Ruderman* and *Intervest* interpretation principle confirms that this cannot be the only possible reasonable interpretation of Allstate's policy (or even a correct interpretation of it). However, if this is the only possible reasonable interpretation, it necessarily includes the "customarily charges" limitation found in the fact dependent method of Section 627.736(5)(a)1, and not just the "fee schedule" limitations found in Section 627.736(5)(a)2. Thus, even under the interpretation offered by the Majority at p. 14 of the Opinion, Allstate's policy refers to "all limitations" found in both the fact dependent method of Section 627.736(5)(a)1 and the schedule of maximum charges method of Section 627.736(5)(a)2.

9. The third interpretation listed above ("Any amounts payable under this coverage shall be subject to ... 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") focuses on the language which the Majority's Opinion omits with ellipses contrary to the principle described by Justice Labarga in *Ruderman* and Justice Quince in *Intervest*. The "Florida Motor Vehicle No-Fault Law" referenced in this provision is comprised of twelve different statutes, including the PIP statute. *See*, §627.730, Fla. Stat. ("Sections 627.730-627.7405 may be cited and known as the 'Florida Motor Vehicle No-Fault Law.'") As noted at p. 13-14 of the Majority's Opinion, the fact dependent method of Section 627.736(5)(a)1 includes "non-Medicare fee schedules," when it refers to

"various federal and state medical fee schedules applicable to automobile and other insurance coverages...." So, when Allstate's policy states that its payments "shall be subject to ... all fee schedules" found in any "provisions of the Florida Motor Vehicle No-Fault Law," Allstate is giving itself the option to rely on the non-Medicare fee schedules described in the fact dependent method of Section 627.736(5)(a)1, as well as the Medicare fee schedules and payment limitations⁴ described in the "schedule of maximum charges" of Section 627.736(5)(a)2.a-f.

10. The Majority's Opinion concludes that the Respondents' interpretation of Allstate's policy language "would effectively make the provision meaningless." Opinion at p. 13. Yet, the Majority's own interpretation omits with ellipses and effectively renders completely meaningless the portion of Allstate's policy which states that PIP benefits "shall be subject to ... any other provisions of the Florida Motor Vehicle No-Fault Law...." Thus, under the Majority's own analysis (and the principle described in *Ruderman* and *Intervest*), the Majority's interpretation is not the only possible reasonable interpretation of Allstate's policy provision. Because

⁴ At page 10 of the Opinion, the Majority correctly cites to Section 627.736(5)(a)2.a, d-f as "referring to Medicare fee schedules" but incorrectly cites to Section 627.736(5)(a)2.b and c as "referring to the non-Medicare fee schedules." In reality, Section 627.736(5)(a)2.b and c refer to "usual and customary charges" of a billing hospital, and the "usual and customary charges in the community" for various physicians and dentists. Those "usual and customary charges" are not "fee schedules," but rather are "payment limitations" for certain types of emergency services and care. We know this because Section 627.736(5)(a)3 refers to the schedule of maximum charges as "the applicable fee schedule[s] or payment limitation[s]" set forth in subsection (5)(a)2. Likewise, Section 627.736(5)(a)4 refers to "the allowable payment limitations of subparagraph [(5)(a)]2...."

Allstate's policy provision leads to at least three different reasonable interpretations, it is ambiguous (*see, e.g., Huggins; Forsythe; Crews*), and must be construed in favor of the insured. As acknowledged by the Majority at p. 5 of the Opinion, "[A]mbiguous insurance policy exclusions are construed against the drafter and in favor of the insured." *Citing, Auto-Owners Ins. Co. v. Anderson*, 756 So.3d 29, 34 (Fla. 2000). Indeed, as recently held by this Court, "ambiguous 'exclusionary clauses are construed *even more strictly* against the insurer than coverage clauses.'" *Sebo v. Am. Home Assurance Co., Inc.*, -- So.3d --, 2016 WL 7013859, *2 (Fla. Dec. 1, 2016) (emph. added).

11. The Majority's decision also concludes that the phrase "shall be subject to" can only have one meaning that is "mandatory" in nature, and it, therefore, requires "that benefits must or will be made in accordance with" the terms and conditions described thereafter. *See*, Opinion at p. 13 (emph. original). Although the Respondents respectfully maintain that "shall be subject to" can also have permissive meaning, we will not belabor that point, but if Allstate's "shall be subject to" provision can only be given a mandatory meaning, then according to the Majority's Opinion, Allstate "must or will" rely on "all limitations" found anywhere in the PIP statute (including the "customarily charges" limitation described in the fact dependent method of Section 627.736(5)(a)1), and Allstate "must or "will" rely on "all fee schedules" found in "any other provisions of the Florida Motor Vehicle No-Fault Law" (including the non-Medicare fee schedules

described in in the fact dependent method of Section 627.736(5)(a)1). So, even the Majority's interpretation compels the conclusion that Allstate's provision conflates both methods, instead of electing one method or the other.

12. In summary, after giving effect and meaning to all provisions of Allstate's policy provision (including those portions omitted by ellipses in the Majority's Opinion) as required by *Ruderman* and *Intervest*, as well as the mandatory connotation which the Majority has placed on the "shall be subject to" provision, we see that all three possible interpretations listed above require Allstate to rely on provisions found in both the fact-dependent method described Section 627.736(5)(a)1, and the "schedule of maximum charges" method described in Section 627.736(5)(a)2.a-f.

13. Allstate's conflation of the two statutory payment calculation methods is important because everyone in this case (including the Majority and the Dissent) agree that *Geico General Insurance Co. v. Virtual Imaging Services, Inc.*, 141 So. 3d 147 (Fla. 2013) controls the outcome of this appeal. One of the main issues decided in *Virtual Imaging* was whether the 2008 amendments to the PIP statute created one single method or two separate and distinct methods. The PIP insurance company in that case (i.e., Geico) was attempting to conflate the two methods into one single method. This Court rejected that attempt:

... GEICO contends that there are not two methodologies for determining reasonableness. Four district courts of appeal cases, however, have all concluded the opposite; that is, that there are two

methodologies. We agree with the district court decisions in this line of cases and conclude that the 2008 amendments provided an alternative, permissive way for an insurer to calculate reimbursements to satisfy the PIP statute's reasonable medical expenses coverage mandate, but did not set forth the only methodology for doing so.

.....

... The permissive language of the 2008 amendments ... plainly demonstrates that there *are* two different methodologies for calculating reimbursements to satisfy the PIP statute's reasonable medical expenses coverage mandate. See *Kingsway [Amigo Ins. Co. v. Ocean Health, Inc.]*, 63 So.3d 63, 67 (Fla. 4th DCA 2011)].

Virtual Imaging, 141 So.3d at 156 (italics in original; underline added). In this case, the Majority's Opinion agrees that "that there are two different methodologies...." Opinion at p. 6. Likewise, in Justice Canady's dissenting Opinion in *Virtual Imaging*, he pointed out that the majority Opinion in that case rests on the premise that sections 627.736(5)(a)1 and 2 "respectively establish *mutually exclusive* payment methodologies." *Virtual Imaging*, 141 So.3d at 160 (Canady, J., dissenting) (emph. added).

14. Because there are two "alternative" or "mutually exclusive" methods to determine the amount of PIP benefits, *Virtual Imaging* absolutely requires PIP insurers to "elect" or make "a choice" between one method or the other:

... Accordingly, we 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. ...

.....

Accordingly, we conclude that the 2008 amendments 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. ...

Virtual Imaging, 141 So.3d at 150, 157 (emph. added). In this case, the Majority's Opinion embraces this requirement and holds numerous times that Allstate was required to "elect" or make an "election" of one of the two methods.⁵

15. It should be noted that Justice Canady's dissent in *Virtual Imaging* expressed strong disagreement with the notion that a PIP insurer must elect or choose only one method. According to that dissent:

Nothing in the statute suggests that an insurer must make a one-time election between section 627.736(5)(a)1 and section 627.736(5)(a)2. Nor does anything in the statute suggest that section 627.736(5)(a)2 is operative only if it is specifically referred to in the text of the relevant policy. ...

Virtual Imaging, 141 So.3d at 161 (Canady, J., dissenting). Because the Majority's Opinion in the instant case follows the *Virtual Imaging* "election" and "choice" requirement, and rejects the single method approach suggested by Geico and

⁵ See, e.g., Opinion at p. 2 ("we hold that Allstate's insurance policy provides legally sufficient notice of Allstate's *election* to use the permissive Medicare fee schedules identified in section 627.736(5)(a)2. to limit reimbursements"); Opinion at p. 3 ("To *elect* a payment limitation option, the PIP policy must do so 'clearly and unambiguously.'"); Opinion at p. 7 ("In *Virtual Imaging*, this Court 'h[eld] 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."); Opinion at p. 7 ("*election* in the policy, is necessary"); Opinion at p. 8 ("the insurer cannot take advantage of the Medicare fee schedules to limit reimbursements without notifying its insured by *electing* those fee schedules in its policy"); Opinion at p. 8 ("when the plain language of the PIP statute affords insurers two different mechanisms for calculating reimbursements, the insurer must clearly and unambiguously *elect* the permissive payment methodology in order to rely on it").

Justice Canady's dissenting Opinion in *Virtual Imaging*, we know that Allstate's policy is required to make a "mutually exclusive" election or choice between either the fact dependent method of Section 627.736(5)(a)1 or the schedule of maximum charges method of Section 627.736(5)(a)2.

16. There is a very simple way to determine whether the PIP insurer has made such a choice or election. If you read the insurance policy and are certain that the insurance company will be paying PIP benefits only by using the schedule of maximum charges described in Section 627.736(5)(a)2.a-f, then there is an election of the schedule of maximum charges. On the other hand, if you read the policy and are uncertain as to what amount will be paid, there is not an election of the schedule of maximum charges.

17. In this case, instead of making a mutually exclusive choice or election between one method or the other, each of the three different possible interpretations listed above confirms that Allstate's policy language is so broad that it captures both statutory methods at the same time and conflates them into a single method. That was the same problem presented by Geico's insurance policy in *Virtual Imaging*.

18. In *Virtual Imaging*, this Court reviewed and rejected as an insufficient election 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 Imaging, 141 So.3d at 151. In this case, Allstate's policy language states:

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.

Allstate's policy language, for all intents and purposes, has the same meaning as the Geico policy language that this Court rejected in *Virtual Imaging*, and therefore, Allstate's policy language is an sufficient election under *Virtual Imaging*.

19. The Geico policy and the Allstate policy 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 "any and all limitations" in Section 627.736 (i.e., the PIP statute). But because the PIP statute is one of the statutes included within the Florida Motor Vehicle No-Fault Law, Allstate's reference to limitations in Section 627.736 adds nothing to Geico's provision. Allstate's endorsement also refers to "all fee schedules," but because "all" of the fee schedules within Section 627.736(5)(a)1 and 2 are also within the Florida Motor Vehicle No-Fault Law, Allstate's reference to "all fee schedules" likewise adds nothing to Geico's provision. Because *Virtual Imaging* held that Geico's policy provision is insufficient to clearly and unambiguously elect the schedule of maximum charges, Allstate's provision is likewise insufficient.

20. The Majority's Opinion also concludes that "a PIP policy cannot state that the insurer will calculate benefits solely under the Medicare fee schedules contained within section 627.736(5)(a)2 because the Medicare fee schedules are not the only applicable mechanism for calculating reimbursement under the permissive payment methodology." Opinion at p. 10. The Respondents do not contend the "schedule of maximum charges" (a.k.a. the "Medicare fee schedule method," a.k.a. the "fee schedule method," a.k.a., the "permissive method") contains only those subsections of (5)(a)2.a-f which use a "Medicare" component.

21. Consistent with this Court's decision in *Virtual Imaging* and the decisions of many other courts, the Respondents have sometimes referred to the entire list of fee schedules and payment limitations enumerated in the "schedule of maximum charges" as the "Medicare fee schedules," as one and the same, instead of itemizing each particular fee schedule and particular payment limitation listed in subsections (5)(a)2.a-f. This is because the type of medical services rendered in this particular case come within the ambit of the "Medicare" fee schedule described in (5)(a)2.f. Indeed, based on that same factual context, this Court likewise used the term "Medicare fee schedules" interchangeably with the (5)(a)2 method in rephrasing the certified question in *Virtual Imaging*. In any event, there is no dispute that subsection (5)(a)2 contains subparagraphs which do not contain a "Medicare" component, and the Respondents do not contend that only those subparagraphs of (5)(a)2 containing "Medicare" components can be elected for

calculating reimbursements.

22. No matter what the (5)(a)2 method is labeled, the Respondents agree that a PIP policy cannot state that the insurer will calculate benefits only using the Medicare fee schedules listed in Section 627.736(5)(a)2.a-f, because there are indeed non-Medicare payment limitations within the schedule of maximum charges for other different types of services which are not involved in this case. Accordingly, in order to address the entire panoply of medical services described in (5)(a)2.a-f, the rationale of *Virtual Imaging* requires that a PIP insurer must provide notice in its policy of an election to use the entire schedule of maximum charges described in the permissive payment methodology of subsection (5)(a)2 as the basis for calculating reimbursements.

23. Although Allstate suggests that it is impossible, it is actually a very simple task for a PIP insurer to adopt the entire permissive payment methodology of Section 627.736(5)(a)2.a-f in clear and unambiguous words, to the exclusion of the fact dependent method of Section 627.736(5)(a)1. As one example, a PIP insurance policy could simply state:

All amounts payable under this coverage will be calculated using the schedule of maximum charges described in Section 627.736(5)(a)2.a-f, Florida Statutes (2008-2012).

24. Far from being impossible, the record on appeal in this case confirms that in 2013, Allstate itself abandoned the ambiguous policy provision at issue in this case, and replaced it with a provision which exclusively adopts the schedule of

maximum charges method. Allstate's amended policy (which is in the record) states:

PART III, Personal Injury Protection, Coverage VA

The Personal Injury Protection, Coverage VA insuring agreement is substantially revised. Pursuant to the requirements of the Florida Motor Vehicle No-Fault Law, we will pay medical expenses benefits of 80 percent of reasonable expenses for medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and ambulance, hospital and nursing services; which are medically necessary; only if the injured person received initial services and care within 14 days after the motor vehicle accident.

The methodology for determining the amount we will pay for medical expenses benefits shall be pursuant to the fee schedule limitations under the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law ("Florida Motor Vehicle No-Fault Law"), and shall be limited to 80 percent of the following schedule of maximum charges

(R 74-75, 87-88). Moreover, as demonstrated by the Respondents' notice of supplemental authority filed on September 8, 2016, other insurance companies (such as Windhaven, Southern-Owners, and Nationwide) have also been able to make a clear and unambiguous election in their PIP insurance policies. Despite the ability to "clearly and unambiguously" elect one method or the other, the Majority's Opinion is now allowing Allstate to do the same thing this Court held in *Virtual Imaging* that Geico could not do.

25. In closing, the Respondents respectfully submit that Allstate's slim margin of victory in this case actually illustrates and confirms the ambiguous nature of Allstate's policy language. This Court's 4-to-3 vote--with four Justices

concluding that Allstate's insurance policy language is unambiguous and three Justices concluding that Allstate's policy is ambiguous--confirms there is an ambiguity because reasonable people can (and do) disagree as to its meaning. *Huggins*, 802 So.2d at 277. *See also, Crews*, 183 So.3d at 334 (Canady, J. writing for the majority) citing 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 45.2 (7th ed. 2014) ("[A]mbiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 425 (2012) ("[A]mbiguity [is] [a]n uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations."). Indeed, seven Supreme Court Justices and dozens of learned and respected District Court of Appeal Judges, Circuit Court Judges, and County Court Judges across the State of Florida have reached different reasonable interpretations of Allstate's insurance policy provision. If nothing else, these different interpretations by so many reasonable jurists manifest an ambiguity.

26. Justice Pariente's dissenting Opinion in this case and the Fourth District's decision below explained the ironic and illogical nature of this situation:

... "If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to

see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it."

Opinion at p. 17 (Pariente, J., dissenting); quoting *Orthopedic Specialists v. Allstate Ins. Co.*, 177 So.3d 19, 26 (Fla. 4th DCA 2015); quoting *State Farm Fire & Cas. Ins. Co. v. Deni Associates of Florida, Inc.*, 678 So.2d 397, 408 (Fla. 4th DCA 1996).

27. In concluding that there is only one possible reasonable interpretation of Allstate's policy, the Majority: (a) overlooks or misapprehends the existence of the different reasonable interpretations illustrated by this Court's 4-to-3 vote and the statewide disagreement between dozens of other judges, (b) overlooks the interpretation principle described by Justice Labarga in *Ruderman* and Justice Quince in *Intervest* which explains that all language in Allstate's policy provision must be given its full meaning and effect, instead of using ellipses which render the omitted words meaningless and invisible, and (c) misapprehends the principle that ambiguities in an insurance policy must be construed in favor of the insured. Surely, this Honorable Court does not intend to avoid, abandon, or reverse these well-settled principles of contract construction. Decisions which do not uniformly apply these principles in all insurance policy interpretation disputes lead to more confusion and litigation in the lower courts, instead of the clarity requested when a district court of appeal certifies conflict or certifies a question to this Court.

WHEREFORE, the Respondents respectfully request this Honorable Court

to grant rehearing, adopt Justice Pariente's dissenting Opinion as the Court's majority decision, affirm the Fourth District's decision below, and grant the Respondents' motion for appellate attorneys' fees.

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'Conner, 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; and Richard C. Godfrey, Esquire, *richard.godfrey@kirkland.com*; Kirkland & Ellis, LLP, 300 North LaSalle, Chicago, IL 60654; on this 7th day of February, 2017.

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