

**County Civil Court:** INSURANCE – Personal Injury Protection – Policy language stating that “any amounts payable under this coverage shall be subject to any and all limitations...including, but not limited to, all fee schedules,” was a clear election by Allstate of its intent to limit reimbursements in accordance with the PIP permissive fee schedule. Reversed and remanded for further proceedings. *Allstate Ins. Co. v. Orthopedic Specialists*, No. 13-000003AP-88B (Fla. 6th Cir. App. Ct. December 10, 2013).

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION**

**ALLSTATE FIRE AND CASUALTY  
INSURANCE COMPANY,**

**Appellant,**

v.

**Ref. No.: 13-000003AP-88B**

**UCN: 522013AP000003XXXXCI**

**ORTHOPEDIC SPECIALISTS,  
as assignee of Eoanna Spyropolous,  
Appellee.**

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**ORDER AND OPINION**

**BACKGROUND**

This appeal involves the interplay between two statutory provisions relating to the method for calculating payment for Personal Injury Protection (PIP) claims: §627.736(1)(a), Fla. Stat. (2011), which requires the insurer to pay 80 percent of reasonable and necessary medical expenses, and §627.736(5)(a)(2), Fla. Stat. (2011), which gives the insurer the option of limiting reimbursement to 80 percent of a stated fee schedule.

On June 9, 2011, Allstate’s insured was involved in a motor vehicle accident and sustained injuries covered under the PIP portion of her insurance policy. The insured received medical treatment from Orthopedic Specialists, which then sought reimbursement from Allstate. Allstate reimbursed Orthopedic Specialists at a reduced rate pursuant to the PIP statute’s fee schedule limitation, and Orthopedic Specialists filed suit claiming that the reimbursement limitation was not authorized under the insurance policy.

The matter was submitted to the trial court on stipulated facts, with the sole issue being whether the insurer was obligated to pay 80 percent of the reasonable medical expenses incurred,

or whether, by including the language of both methods of calculations in its policy, it could choose to reimburse the lesser amount authorized by the fee schedule in section 627.736(5)(a)(2). Granting Orthopedic Specialists' Motion for Summary Judgment, the trial court held that Allstate's policy did not specifically reference the permissive fee schedule methodology of reimbursements as required by Florida's Motor Vehicle No-Fault Law, and therefore Allstate was required to reimburse Orthopedic Specialists at 80 percent of the reasonable medical expenses. As the issue in this case requires the Court to interpret provisions of the Florida Motor Vehicle No-Fault Law and review the trial court's entry of summary judgment, the standard of review is de novo. *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331 (Fla. 2007).

#### ANALYSIS

Subsequent to the filing of this appeal, the Florida Supreme Court, in *Geico General Insurance Company v. Virtual Imagine Services, Inc.*, --So. 3d --, 2013 WL 3332385 (Fla. July 3, 2013) (*Virtual III*), answered the certified question below in the negative:

WITH RESPECT TO PIP POLICIES ISSUED AFTER JANUARY 1, 2008, MAY AN INSURER LIMIT REIMBURSEMENTS BASED ON THE MEDICARE FEE SCHEDULES IDENTIFIED IN SECTION 627.736(5)(a), FLORIDA STATUTES, WITHOUT PROVIDING NOTICE IN ITS POLICY OF AN ELECTION TO USE THE MEDICARE FEE SCHEDULES AS THE BASIS FOR CALCULATING REIMBURSEMENTS?

The Court found that there are two different methodologies for calculating reimbursements under the PIP statute; the reasonable amount method, and the fee schedule method. *Virtual III* at 17. If the insurer wishes to take advantage of the fee schedule method, it must give notice to its insured by electing the permissive fee schedules in its policy. *Id.* at 4. Quoting *Kingsway Amigo Insurance Company v. Ocean Health, Inc.*, 63 So. 3d 63 (Fla. 4th DCA 2011), the Court stated that "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." *Id.* at 21. The insurance policy at issue in *Virtual III* provided that GEICO would make payments as follows:

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:

- (a) 80% of medical expenses; and
- (b) 60% of work loss; and
- (c) Replacement services expenses; and
- (d) Death Benefits.

GEICO argued that the language “in accordance with, and subject to the terms, conditions and exclusions of the Florida Motor Vehicle No-Fault Law” incorporated the fee schedule provision into the policy. The Court rejected this reasoning, holding that “because the policy did not reference the permissive Medicare fee schedule method of calculating reasonable medical expenses, GEICO was not permitted to limit reimbursements in accordance with the Medicare fee schedules.” *Id* at 21.

While the Court made it clear that an insurer may not limit reimbursements based on the Medicare fee schedules without providing notice of the fee schedule election in its policy, the opinion gives little guidance as to what policy language would constitute sufficient notice. The *Virtual III* Court was not presented with that question, as the policy at issue in both *Virtual III* and *Kingsway* contained no reference whatsoever to the fee schedule methodology. The policy in the instant case, on the other hand, does reference the fee schedule methodology. This court must then determine, as have several other courts since the *Virtual III* opinion, whether the language used in the Allstate policy provides proper notice of the fee schedule election as contemplated in *Virtual III*.<sup>1</sup>

The relevant portion of Allstate’s policy provides:

In accordance with the Florida Motor Vehicle No-Fault Law, we will pay to or on behalf of the injured person the following benefits...

1. Medical Expenses.  
Eighty percent of reasonable expenses for medically necessary medical, surgical, x-ray, dental and rehabilitative services...

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<sup>1</sup> Compare *David Wall, M.D. a/a/o Pavel Khvorostov v. Allstate Fire and Casualty Insurance Company*, Case No. 13-002557-SC and *1st Open MRI, LLC a/a/o Tomas Giz vs. Allstate Fire and Casualty Insurance Company*, Case No. 2012-16952-SP-05 (finding policy language identical to that in the instant case to clearly and unambiguously elect the fee schedule methodology); with *Central Florida Medical and Chiropractic Center, Inc., a/a/o Junior Newland v. Allstate Fire and Casualty Ins. Co. and Allstate Fire & Casualty. Ins. Co. v. Neal Clinic of Comprehensive Healthcare, P.I.*, Case No. 2013-AP-000005 (Fla. 1st Cir. Ct. App. Div. October 3, 2013) (finding that policy language did not clearly and unambiguously elect the fee schedule methodology.)

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

Like the Court in *Virtual III*, the court below relied on *Kingsway* for the proposition that, without specific reference in the policy to the permissive fee schedule methodology, the insurer is required to reimburse 80 percent of reasonable medical expenses. However, unlike the policies in *Kingsway* and *Virtual III*, which made no reference to fee schedules whatsoever, the policy in the instant case makes specific reference to the permissive fee schedule. The policy states that “any amounts payable under this coverage *shall be subject to any and all limitations... including, but not limited to, all fee schedules.*” (emphasis supplied) The use of “shall” removes any possible ambiguity regarding whether the fee schedule reimbursement limitations will be applied. This is a clear election which puts the insured on notice of Allstate’s intent to limit reimbursements in accordance with the fee schedules.

Because Allstate’s policy clearly and unambiguously elected the permissive fee schedule payment methodology, Allstate was proper in limiting reimbursements in accordance with the fee schedule.

Accordingly, it is

**ORDERED AND ADJUDGED** that decision of the lower court is REVERSED. This matter is remanded to the lower court for any further proceedings in accordance with this opinion, including a determination of the amount of reasonable attorney’s fees, if any.

**DONE AND ORDERED** in Chambers at St. Petersburg, Pinellas County, Florida, on this \_\_\_\_\_ day of \_\_\_\_\_ 2013.

Original order entered on December 10, 2013, by Circuit Judges Amy M. Williams, Pamela A.M. Campbell, and Peter Ramsberger.

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