

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

NATIONWIDE MUTUAL FIRE :
INSURANCE COMPANY, :
 :
 Petitioner, :
 : CASE NO. SC03-_____
v. :
 : DCA CASE NO. 5D02-826
CENTRAL FLORIDA PHYSIATRISTS, :
P.A., :
 :
 Respondent. :
_____ :

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Thousands of suits are currently pending in the Florida courts alleging that insurers have violated section 627.736(10) of the Florida Insurance Code by paying PIP medical providers at rates the providers contractually agreed to accept in contracts with provider networks. The present case involves one of those suits:

CFP [Respondent, Central Florida Physiatrists, P.A.] filed suit against Nationwide [Petitioner, Nationwide Mutual Fire Insurance Company] in county court seeking payment for medical services provided to Nationwide's PIP insured, Therese Jivoïn. The pleadings explained that Jivoïn had received medical treatment from CFP for injuries she sustained in an automobile accident. The payment for such treatment was covered by Jivoïn's PIP policy.

Nationwide Mut. Fire Ins. Co. v. Central Fla. Physiatrists, P.A., 851 So. 2d 762 (Fla. 5th DCA 2003).

County courts, including the county court in the present case, have certified these cases to their respective district courts of appeal as involving an issue of great public importance. The Second and Fifth District Courts of Appeal accepted jurisdiction to review the issue.

The present case was the second case to reach the district court of appeal. In the first, Nationwide Mutual Insurance Co. v. Jewell & Hudson/Nationwide Mutual Fire Insurance Co. v. Davis, Case Nos. 2D01-5714 & 2D02-871 (consolidated), the Second

DCA agreed to answer the following as an issue of great public importance:

WHETHER DEFENDANT, NATIONWIDE MUTUAL INSURANCE COMPANY, CAN PAY PERSONAL INJURY PROTECTION (PIP) BENEFITS AT REDUCED PREFERRED PROVIDER (PPO) RATES WITHOUT OFFERING A PREFERRED PROVIDER PIP POLICY OF INSURANCE AND/OR WITHOUT COMPLYING WITH THE REQUIREMENTS OF FLORIDA STATUTES § 627.736(10).

The parties briefed the issue, and the Second DCA held oral argument on February 25, 2003. The Second DCA's decision remains pending.

In the present case, the Fifth DCA agreed to answer the same substantive question as an issue of great public importance:

IS AN INSURER REQUIRED TO COMPLY WITH THE PROVISIONS OF SECTION 627.736(10), FLA. STAT. (1999) IN ORDER TO TAKE PREFERRED PROVIDER REDUCTIONS IN THE PAYMENT OF PIP BENEFITS FOR MEDICAL SERVICES RENDERED TO ITS INSUREDS?

Central Fla. Psychiatrists, 851 So. 2d at _____. After briefing, the Fifth DCA heard oral argument on April 23, 2003, almost two months after oral argument in the Second DCA.

However, the Fifth DCA answered its certified question first. The court answered the question in the affirmative and invalidated Nationwide's program, under which Nationwide insureds were entitled to covered treatment at lower cost. See Central Fla. Psychiatrists, P.A., 851 So. 2d at _____.

Nationwide timely moved the Fifth DCA to certify that its decision in this case passed on an issue of great public importance. Nationwide noted that the court had accepted jurisdiction over the case on the grounds that it involved an issue of great public importance, that the same issue remained pending in the Second DCA, and that further appeals were likely as the legions of remaining cases made their way through the county courts.

The Fifth DCA, however, denied Nationwide's motion on August 8, 2003. Nationwide then timely invoked this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

Because the Fifth DCA's decision in the present case expressly addresses a question of law -- namely, whether a PIP insurer must comply with section 627.736(10), Florida Statutes, to offer its insureds covered treatment at reduced cost -- this Court has jurisdiction over the case. The Second DCA's decision in Jewell & Hudson/Davis may create express and direct conflict on the same issue of law, and will therefore impact this Court's decision whether to exercise its discretion to review and resolve this issue of great public importance.

Given the potential conflict of the Second and Fifth DCAs on the identical question of section 627.736(10)'s scope,

Nationwide requests that this Court postpone its decision on whether to exercise jurisdiction over this case until after the Second DCA renders its decision. Without such a postponement, Nationwide could suffer serious injury: the Second DCA might rule in its favor, creating an express and direct conflict, but too late for Nationwide to seek review in this Court of the Fifth DCA's adverse ruling in the present case. A brief postponement of this Court's decision on whether to accept jurisdiction will avoid this injustice.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review decisions of the district courts of appeal that expressly and directly conflict with a decision of this Court or another district court of appeal on the same question of law. See Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

Nationwide invokes this Court's jurisdiction under Article V, section 3(b)(3), of the Florida Constitution. That constitutional provision comprises two concepts: "The first is a general grant of discretionary subject-matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be exercised." Florida Star v. B.J.F.,

530 So. 2d 286, 288 (Fla. 1988).

The grant of subject-matter jurisdiction to resolve conflicts in Florida case law is, in this Court's words, "necessarily...very broad." Id. This Court's subject-matter jurisdiction extends to "any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself....That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests." Id. (internal footnote omitted). Only decisions without opinion or citation (such as per curiam affirmances) are outside this Court's conflict jurisdiction. See id. at 288 n.3.

The Fifth DCA's decision in the present case falls easily within this Court's conflict jurisdiction. The Fifth DCA held that:

section 627.736(10) of the Florida Statutes (1999) provides the exclusive means by which an insurance company can pay PPO rates for PIP benefits, and that since Nationwide had failed to comply with the terms of the statute, it was not entitled to pay CFP at the reduced PPO rate.

Central Fla. Psychiatrists, 851 So. 2d at _____. The Fifth DCA went on to hold that "Nationwide was required to comply with the provisions of section 627.736(10) in order to take advantage of the option of paying reduced PPO rates for payment of PIP

benefits." Id. These statements of law confer subject-matter jurisdiction on this Court to review the Fifth DCA's decision in this case.

Nationwide appreciates that, at this moment, the Fifth DCA's decision does not conflict with any decided case. However, "[i]t is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." Florida Star, 530 So. 2d at 288.

Here, the existence of a conflict case is more than hypothetical. The fact that the identical issue remains pending before the Second DCA creates the very real possibility that the Second DCA's decision will expressly and directly conflict with the Fifth DCA's decision in the present case.

The existence of actual conflict does not govern whether this Court, in fact, has jurisdiction; it only guides this Court's discretion whether to exercise that jurisdiction. See Florida Star, 530 So. 2d at 288-89.

Under the circumstances of the present case, this Court should exercise its discretion to postpone the decision whether to review the Fifth DCA's decision. Because the Second DCA will eventually render a decision on the same issue of law,

fundamental fairness requires this brief delay. Indeed, this Court's holding in Florida Star recognized the "procedural quagmire" that would result from a more limited interpretation of conflict jurisdiction. See 530 So. 2d at 289.

Nationwide now faces the same procedural predicament. Jewell & Hudson/Davis was briefed and argued in the Second DCA some two months before oral argument in this case. But, although the Second DCA has not yet ruled, the Fifth DCA rendered its initial decision on June 27, 2003. The Second DCA's decision in Jewell & Hudson/Davis could well conflict with the Fifth DCA's decision in the present case. Only time will tell.

The order of decisions in the two DCA cases puts Nationwide in a procedural quandary unless this Court grants the requested postponement. The rules require that Nationwide invoke this Court's jurisdiction now, see Fla. R. App. P. 9.120(b) (requiring jurisdiction to be invoked within 30 days of rendition of DCA's decision), before it knows whether the Second DCA's decision in Jewell & Hudson/Davis will expressly and directly conflict with the Fifth DCA's decision in the present case. Had the Fifth DCA rendered the same decision after a contrary decision by the Second DCA, Nationwide would have been able to demonstrate an express and direct conflict without

seeking a postponement of this Court's decision on jurisdiction. Similarly, had the Fifth DCA's decision been first, but favorable to Nationwide, Nationwide could simply wait to seek review of an adverse decision by the Second DCA.

As it now stands, however, unless this Court grants a postponement, the Second DCA might decide in Nationwide's favor, creating an express and direct conflict, but will do so outside the time for Nationwide to demonstrate the conflict to this Court. Nationwide's right to seek review in this Court, and ultimately to show that the Fifth DCA's decision is an incorrect statement of Florida law, should not hinge on such a technicality. This is particularly true where, as here, both the Second DCA and the Fifth DCA undertook review of county court cases on the grounds that the cases presented an issue of great public importance.

This Court has recognized that such uncertainty is to be avoided. See Florida Star, 530 So. 2d at 289. This, coupled with the fact that the time for making a decision on jurisdiction is entrusted to the discretion of this Court, compels the conclusion that this Court should postpone its decision to exercise jurisdiction over the present case until the Second DCA renders its decision in Jewell & Hudson/Davis.

CONCLUSION

Under Florida Star, this Court clearly has jurisdiction to review the Fifth DCA's decision. The Second DCA's decision in Jewell & Hudson/Davis may establish express and direct conflict and thereby influence this Court's discretion to exercise that jurisdiction.

Were this Court make its jurisdictional decision now, Nationwide would lose its right to seek this Court's review of the Fifth DCA's adverse decision if the Second DCA -- considering the exact same issue -- decides in Nationwide's favor. The validity of Nationwide's network provider program will be left in legal limbo, with thousands of cases clogging the lower courts outside the jurisdiction of the Second and Fifth DCAs. Thus, this Court's decision whether to exercise its jurisdiction over the present case should await the Second DCA's decision in Jewell & Hudson/Davis.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail on September _____, 2003, to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, in compliance with Florida Rule of Appellate Procedure 9.200(a)(2), the foregoing brief was printed in Courier New 12-point font.

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B	Order denying Motion for Certification	August 8, 2003