

SUPREME COURT
STATE OF FLORIDA

GEICO INDEMNITY COMPANY,

Petitioner,

CASE NO.: SC12-477
L.T. Case No.: 3D10-2595

v.

VIRTUAL IMAGING SERVICES,
INC., a/a/o Mereles Gomez,

Respondent.

_____/

**JURISDICTIONAL BRIEF BY RESPONDENT,
VIRTUAL IMAGING SERVICES, INC.**

ON REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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ISSUE

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN GEICO INDEMNITY CO. V. VIRTUAL IMAGING SERVICES, INC., 79 So.3d 55 (FLA. 3d DCA 2011), CONFLICTS ON THE SAME QUESTION OF LAW WITH DECISIONS BY THIS COURT OR OTHER DISTRICT COURTS OF APPEAL?

SUMMARY

Respondent Virtual Imaging Services, Inc. (Virtual Imaging) respectfully suggests that absolutely no conflict exists and that jurisdiction should be denied.

ARGUMENT

The two cases below were claims against the PIP insurer, GEICO Indemnity Co. (GEICO), by Virtual Imaging, a medical provider, seeking payment of its bills for MRI services. No issues were presented on the necessity for the medical treatment. GEICO paid only a portion of the reasonable amount charged and Virtual Imaging successfully sued for the balance which it was due pursuant to § 627.736(1)(a). The PIP statute under this section still requires payment of the "reasonable expenses" for medical care.

The county court held that GEICO wrongly relied upon the undisclosed reduced Medicare fee schedule contained in § 627.736(5)(a)(2) of the 2008 PIP statute as a limitation on the reasonable charges for these necessary medical services. The county court's judgment in favor of Virtual Imaging was

certified to the Third District Court of Appeal at GEICO's request and the District Court ruled in favor of the medical provider and against the insurance company.

The matter became a test case in the Third District Court of Appeal with 12 insurance companies and an association of insurance companies joining as amicus on behalf of appellant GEICO which is the Petitioner here. The issue addressed by the Third District was whether GEICO could rely on the new 2008 statutory fee schedule without notifying its policyholders or the medical providers that it would be using the new lower schedule. The Third District adopted the Fourth District's position from Kingsway Amigo Ins. Co. v. Ocean Health Inc., 63 So.3d 63 (Fla. 4th DCA 2011) and held that GEICO was required to give notice of its reliance on the new Medicare fee schedule which was included in the 2008 statute as a "permissive methodology" along with the previous and still existing requirements of § 627.736(1)(a) mandating payment of 80% of "reasonable expenses for medically necessary...services." Virtual Imaging also relied upon the language of the GEICO policy stating that "The company [GEICO] will pay...80% of medical expenses," defining "medical expenses" as "reasonable expenses for necessary medical, surgical, [and] x-ray...services."

The Third District analyzed all of the arguments by GEICO and the amicus and held "A provision indicating that an insurer may limit reimbursements leaves unclear whether this option will be exercised and therefore provides no indication to policyholders as to a crucial aspect of their policies: the amount the insurer will pay for necessary medical services."

The Third District went on to recognize in footnote 1 that this case had been brought by the medical service provider rather than the policyholder but that "the distinction is immaterial" because Virtual Imaging was the assignee beneficiary of the policyholder and as the assignee stands in the shoes of the assignor. The Jurisdictional Brief now before this Court makes the generalized assertion at page 7 that paying medical providers at reduced rates is required by the case law but gives no detail on how this supposed "precise rationale" is actually stated in the case-law as a legal requirement.

The Third District recognized the established view stated by this Court in State Farm Mutual Auto Insurance Co. v. Menendez, 70 So.3d 566, 570 (Fla. 2011) that ambiguities in insurance policies must be resolved in favor of the insured. The Third District concluded that even if § 627.736(5)(a)(2) is incorporated into the policies the resulting ambiguity regarding which method GEICO would use in determining reimbursement

supports the conclusion that GEICO should have reimbursed Virtual Imaging for the higher amount consistent with the language of the policy and the language of the PIP statute.

ASSERTED CONFLICTS

GEICO asserts conflict with Allstate Ins. Co. v. Holy Cross Hospital, Inc., 961 So.2d 328 (Fla. 2007); Allstate Ins. Co. v. Holy Cross Hospital, Inc., 895 So.2d 1241 (Fla. 4th DCA 2005); Kingsway Amigo Ins. Co. v. Ocean Health, Inc., 63 So.3d 63 (Fla. 4th DCA 2011); and Nationwide Mut. Ins. Co. v. Jewell, 862 So.2d 79 (Fla. 2d DCA 2003). There is absolutely no conflict with any of these cases and indeed the Fourth District's Kingsway case was heavily relied upon by Virtual Imaging in its brief and the Third District's opinion in question states that Kingsway is "directly on point."

Allstate Ins. Co. v. Holy Cross Hospital, Inc., as decided by this Court in 2007, obviously does not apply or construe the 2008 amendments to the PIP statutes which incorporated the Medicare fee schedule. There can be absolutely no conflict on the same point of law because the 2007 opinion concerned a previous version of the PIP statutes. In addition, this Court's 2007 Holy Cross opinion directly held that the parties thereto had binding agreements between themselves that the medical provider Holy Cross Hospital would accept a prearranged lesser

payment from this particular insurance company Allstate. These binding agreements between these two parties were the entire basis for this Court's Holy Cross opinion. The Holy Cross opinion actually uses the words "contract" or "contractually" 32 times. Further, the 2007 Holy Cross decision and the 2003 Jewell decision both discussed reduced payment rates under preferred provider policies and the Supreme Court concluded that § 627.736(10) did not prevent an insurer and a medical provider from entering into valid contracts to accept payment for services at a reduced rate which would be considered reasonable based on the binding agreement. Holy Cross at p.335. This Virtual Imaging case simply does not involve a binding agreement between the parties or a preferred provider policy. Thus the opinions do not even deal with the same subject matter.

On page 1 of the Jurisdictional Brief GEICO relies upon and cites to Kingsway; United Auto Insurance Co. v. Hallandale Beach Orthopedics, Inc., Case No.: SC12-3 and United Auto Insurance Co. v. Millennium Radiology, LLC, Case No.: SC12-105, pointing out that all three of these cases were pending on review before this Court. This Court denied review in the Kingsway case on March 16, 2012, denied review in Hallandale Beach Orthopedics, Inc. on March 23, 2012 and denied review on Millennium Radiology, LLC on March 19, 2012. Hallandale Beach and

Millennium Radiology were lower court affirmances citing to Kingsway. Thus, the Third District's Virtual Imaging decision relied upon the Kingsway decision as did the Hallandale Beach Orthopedics, Inc. decision and the Millennium Radiology, LLC decision. It appears obvious that this Court has already concluded that none of these cases are in conflict and do not warrant review before this Court.

There are two curious comments on page 5 of the GEICO brief. In discussing the 2007 Holy Cross decision, GEICO states that this 2007 decision was entered "notwithstanding the absence of a direct contract between provider and insurer." This is an apparent misreading of the 2007 Holy Cross decision which made repeated specific reference to the presence of direct contracts between the provider and the insurer. Further on page 5 GEICO argues conflict with Holy Cross "because the PPO framework is functionally equivalent to Medicare, under which providers routinely accept preset reduced rates for particular services." GEICO here seems to recognize the existence of the preset reduced rates from the Holy Cross situation but now asserts that the contractual situation in Holy Cross was the functional equivalent of Medicare. There is absolutely nothing in this case indicating that this is true but even if true, it has nothing to do with the Virtual Imaging decision. Again, there

simply were no direct contracts between Virtual Imaging and GEICO Insurance Co. Virtual Imaging never agreed to be paid at a reduced rate.

GEICO owes Virtual Imaging the "reasonable expenses" for this medical care pursuant to § 627.736(1)(a) and pursuant to the actual terms of this policy which does not mention the Medicare schedule. The fact that some other medical provider such as Holy Cross Hospital agreed in writing to take less from a particular insurance company (Allstate) simply has no impact on all the other medical providers without contracts in the state of Florida. This is the result GEICO now seeks. Both the Holy Cross decision and the Kingsway decision fully support the Third District's decision herein.

There are simply no cases in the state of Florida holding that a medical provider has inferior rights to the policyholder and this is what GEICO asserts in arguing at page 6 that Virtual Imaging's "construction" is in conflict with the Second District's Jewell decision. Again, Jewell was a case discussing PPO policies and "contractual" reduced rates, neither of which are even involved in the Virtual Imaging facts. It must also be recognized that § 627.736(5)(c)1 requires that the medical provider rather than the insured submit the statement of charges to the insurer, which must directly pay the provider.

This Court's conflict jurisdiction is limited by the 1980 Constitutional changes regarding conflict review. At that time the new Article V required that District Court opinions alleged to be in conflict had to decide "the same question of law." Conflict jurisdiction must be founded on an express discussion of the basis on which the District Court of Appeal affirmed or reversed and the legal principles applied by the Court in reaching that decision. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981). The holding for which review is being sought must be facially irreconcilable as to the same question of law with another district court decision. Aravena v. Miami-Dade County, 928 So.2d 1136 (Fla. 2006). When a supposed conflicting decision can be fairly distinguished on facts or law, this Court lacks jurisdiction under Article V, § 3(b)(3). Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). This Court should thus decline to accept this case for review as it has recently done in the three other similar cases: Kingsway, Hallandale Beach Orthopedics, Inc. and Millennium Radiology, cited at page 4 of this brief. Also see MGA Insurance Co. v. All X-Ray Diagnostic Services, 2012 WL 1150475 (Fla. 3d DCA Feb. 27, 2012), concurred in by Judges Rothenberg, Salter and Schwartz, where the Third District again adopted Kingsway as the governing law in the Third District.

CONCLUSION

Review should be denied and attorneys' fees granted to the Respondent based on the separate motion for fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 16th day of April, 2012.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

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