IN THE COUNTY COURT, IN AND FOR
CLAY COUNTY, FLORIDA.

CASE NO. 2016-SC-301 C

MOORE CHIROPRACTIC CENTER, INC.
as assignee for LATOYA BARRINGTON,
Plaintiff,
vs.

PROGRESSIVE SELECT INSURANCE COMPANY,
Defendant.
_____

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This cause came to be heard on the Motions for Summary Judgment filed by both parties asking the Court to determine whether or not the applicable provisions of the Defendant's policy related to Personal Injury Protection Coverage clearly and unambiguously selects the permissive payment method of benefits, and the Court having heard the argument of the parties finds as follows:

Section 627.730 through 627.7405 is known as the "Florida Motor Vehicle No-Fault Law." It includes Section 627.736, "Required personal injury protection benefits; exclusions; priority; and claim." The "Required Benefits" section referenced in Section 627.736(1) includes "personal injury protection" benefits. The term "medical benefits" in Section 627.736(1)(a) requires payment of "eighty percent of all reasonable expenses for medically necessary . . . services." In determining whether a charge is "reasonable," Section 627.736(5)(a) provides that "consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for service, treatment, or supply."

The legislature's "reasonable" standard is fair to all parties involved. This method of determining the proper amount of reimbursement is commonly referred to as the "default" method of payment. Originally, the "default" method was the only method of determining the amount paid to providers. However, the "default" method resulted in an overwhelming amount of litigation regarding individual charges in individual cases. Therefore, the legislature amended the statute in 2008 and allowed insurers to elect to pay benefits to providers based upon Medicare fee schedules. Insurers electing this option could avoid litigation with their insureds and/or the providers who accept an

assignment of benefits because the amount owed is easily calculated, and therefore, not subject to litigation. This method is generally referred to as the "permissive" method.

The "permissive method" is contained in Section 627.736(5)(a)1. If the insurer elects this method then the insurer and the insured are bound by the election. Practically speaking, when this election is made in the policy, it binds the provider who accepts an assignment of the benefits due the insured.

The parties agree that Progressive Policy Endorsement Form "A041 FL (06/11)" is at issue. The form is attached to this Order in its entirety as an addendum.

The form at issue refers to "unreasonable or unnecessary medical benefits." The first sentence of the form says, "If an insured person incurs medical benefits that we deem to be unreasonable or unnecessary, we may refuse to pay for those medical benefits and contest them." Plaintiff's counsel argues that the words "unreasonable" and "contest" show that this is not a clear and unambiguous selection of the permissive payment method.

Instead of attempting to define reasonable benefits, the Defendant defines "unreasonable" benefits as "any charges incurred that exceed the maximum charges set forth in Section 627.736(5)(a)(2)(a through f) of The Florida Motor Vehicle No Fault Law, as amended." [1] The Defendant's Endorsement merely states that any charges that exceed the amounts to be paid under the permissive payment method are not reasonable, and they reserve the right to contest them.

The Plaintiff next takes issue with the sentence in the next to last paragraph "We will reduce any payment to a medical provider under this Part 11(A) by any amounts we deem to be unreasonable medical benefits." Again, by using the definition in the endorsement of the word "unreasonable" in this sentence only means that "any charges incurred that exceed the maximum charges " of the permissive payment method will be reduced.

Finally, the Plaintiff argues that the last paragraph of the endorsement somehow creates an ambiguity. This paragraph protects the insured and has nothing to do with calculation of the amount paid.

This Court believes the above analysis is consistent with Allstate Insurance v. Orthopedic Specialists, 2017 WL 372092 (Fla.2017) and finds that the Defendant's Endorsement Form A041 FL (06/11) clearly and unambiguously selects the permissive payment method allowed by Florida.

[1] In the 2011 Florida Statutes Subsection (5)(a)(2) sets forth the permissive method. In the current statute it is Subsection (5)(a)(1) that sets forth the permissive method.

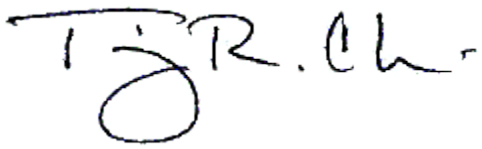
Therefore, it is,

ORDERED AND ADJUDGED:

1. The Plaintiff's Motion for Summary Judgment is DENIED.

2. The Defendant's Motion for Summary Judgment is GRANTED.

DONE AND ORDERED at Green Cove Springs, Clay County, Florida, this 26th day of April, 2017.



TIMOTHY R. COLLINS
COUNTY JUDGE

Copies furnished to:

Shuster & Saben, LLC by email
Andrews, Biernacki, Davis, Miley & Polsky, P.A. by email

Personal Injury Protection Coverage Endorsement

The "Unreasonable or Unnecessary Medical Benefits" provision in Part II(A) is deleted and replaced by the following:

UNREASONABLE OR UNNECESSARY MEDICAL BENEFITS

If an **insured person** incurs **medical benefits** that **we** deem to be unreasonable or unnecessary, **we** may refuse to pay for those **medical benefits** and contest them.

We will determine to be unreasonable any charges incurred that exceed the maximum charges set forth in Section 627.736 (5)(a)(2) (a through f) of the Florida Motor Vehicle No-Fault Law, as amended. Pursuant to Florida law, **we** will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:

a. for emergency transport and treatment by providers licensed under Chapter 401 of the Florida Statutes, 200 percent of Medicare;

b. for emergency services and care provided by a hospital licensed under Chapter 395 of the Florida Statutes, 75 percent of the hospital's usual and customary charges;

c. for emergency services and care as defined by Section 395.002 (9) of the Florida Statutes, provided in a facility licensed under Chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community;

d. for hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services;

e. for hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services; and,

f. for all other medical services, supplies, and care, 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. However, if such services, supplies, or care is not reimbursable under Medicare Part B, **we** will limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under Section 440.13 of the Florida Statutes, and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation will not be reimbursed by **us.**

The applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect at the time the services, supplies, or care was rendered and for the area in which such services were rendered, except that it may not be less than the allowable amount under the participating physicians schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.

We will reduce any payment to a medical provider under this Part II(A) by any amounts **we** deem to be unreasonable **medical benefits**. However, the **medical benefits** shall provide reimbursement only for such services, supplies, and care that are lawfully rendered, supervised, ordered, or prescribed. Any reductions taken will not affect the rights of an **insured person** for coverage under this Part II(A). Whenever a medical provider agrees to a reduction of **medical benefits** charged, any co-payment owed by an **insured person** will also be reduced.

The **insured person** shall not be responsible for payment of any reductions applied by **us**. If a medical provider disputes an amount paid by **us**, **we** will be responsible for resolving such dispute. If a lawsuit is initiated against an **insured person** as a result of the reduction of a medical bill by **us**, other than reductions taken pursuant to Fl St. 627.736 (5)(a)(2) (a through f), **we** will provide the **insured person** with a legal defense by counsel of **our** choice, and pay any resulting judgment. The **insured person** must cooperate with **us** in the defense of any claim or lawsuit. If **we** ask an **insured person** to attend hearings or trials, **we** will pay up to $200 per day for loss of wages or salary. **We** will also pay other reasonable expenses incurred at **our** request.

All other terms, limits and provisions of this policy remain unchanged.