NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GEICO INDEMNITY COMPANY,

Appellant,

v.

PHYSICIANS GROUP, LLC, a/a/o Paul Androski,

Appellee.

Case No. 2D09-1165

Opinion filed August 13, 2010.

Appeal from the County Court for Sarasota County; Kimberly C. Bonner, Judge.

Charles W. Hall and Mark D. Tinker of Banker Lopez Gassler, P.A., St. Petersburg, for Appellant.

Thomas Andrew Player of Weiss Legal Group, P.A., Maitland; Anthony D. Barak of Barak & Ziutani, L.L.C., Sarasota; and David M. Caldevilla of de la Parte & Gilbert, P.A., Tampa, for Appellee.

J. Kurt Kaple of The Kaple Law Firm, P.A., Aventura, for Amicus Curiae 21st Century Insurance Company.

Douglas H. Stein of Seipp & Flick, Miami, for Amicus Curiae Progressive American Insurance Company.

Jose Pagan of Allen, Kopet & Associates, PLLC, Tallahassee, and Aaron E. Leviten of Allen, Kopet & Associates, PLLC, Winter Park, for Amicus Curiae American Independent Insurance Company.

Gary M. Farmer, Jr. of Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, PL, Fort Lauderdale, and Edward H. Zebersky of Zebersky & Payne, LLP, Hollywood, for Amicus Curiae The Florida Medical Association.

MORRIS, Judge.

GEICO Indemnity Company seeks this court's discretionary review of an order of the county court entering final declaratory judgment in favor of Physicians Group, LLC, on Physicians Group's complaint against GEICO for further payment of medical bills for care provided by Physicians Group to GEICO's insured. GEICO claimed that a 2008 amendment to the personal injury protection (PIP) statute, section 627.736, Florida Statutes (2008), allowed GEICO to reduce payment to Physicians Group. The county court ruled that the amendment did not apply to the insurance policy in this case because the policy was in effect prior to the effective date of the amendment. Pursuant to Florida Rule of Appellate Procedure 9.030(b)(4)(A), the county court certified the following question to be of great public importance:

> DOES THE LEGISLATURE'S JANUARY 1, 2008, REENACTMENT/REVISION TO THE FLORIDA NO-FAULT LAW APPLY TO ALL DATES OF TREATMENT OCCURING [SIC] ON OR AFTER JANUARY 1, 2008, OR DOES IT APPLY ONLY TO THOSE INSURANCE POLICIES WHICH WERE IN EFFECT ON OR AFTER JANUARY 1, 2008?

In answering the certified question, we hold that the 2008 version of section 627.736 was not made retroactive by the legislature and that it therefore applies only to insurance policies that were in effect on or after January 1, 2008. We accordingly affirm the judgment of the county court.

On September 5, 2006, Paul Androski was injured in an automobile accident. At that time, he was insured by GEICO for PIP coverage pursuant to a policy in effect from August 23, 2006, to February 23, 2007.[1] Androski received medical treatment for his accident injuries from Physicians Group beginning on January 24, 2007. On that date, he assigned his right and benefits under the policy to Physicians Group. The policy provided that GEICO "will pay, in accordance with the Florida Motor Vehicle No-Fault Law, as amended, . . . 80% of *medical expenses*." This was consistent with the 2006 version of the PIP statute, which required insurers to pay 80% "of all reasonable expenses for medically necessary medical . . . services." § 627.736(1)(a), Fla. Stat. (2006). Accordingly, GEICO paid Physicians Group 80% of the full amount billed for medical services provided to Androski for the year 2007.

On January 1, 2008, the new Florida Motor Vehicle No-Fault Law, including a new PIP statute, went into effect. See ch. 2007-324, § 13 at 15, § 20 at 34, Laws of Fla. The new PIP statute contains the same language as quoted above but also provides that for nonemergency, nonhospital services (like those rendered in this case), a PIP insurer "may limit reimbursement to 80[%] of . . . 200[%] of the allowable

[1]Androski's policy with GEICO was renewed after February 23, 2007; however, that fact is irrelevant because it is well settled that "upon each renewal of an insurance policy[,] an entirely new and independent contract of insurance is created." Marchesano v. Nationwide Prop. & Cas. Ins. Co., 506 So. 2d 410, 413 (Fla. 1987). The policy in question in this case is the one that was in effect at the time of the accident.

amount under the participating physicians schedule of Medicare Part B" or if the services are "not reimbursable under Medicare Part B, . . . 80[%] of the maximum reimbursable allowance under worker's compensation." § 627.736(5)(a)(2)(f), Fla. Stat. (2008).

On January 7, 2008, Physicians Group performed an arthroscopic procedure on Androski for an accident-related injury. GEICO, applying the new 2008 statute, did not pay 80% of the billed amount for the 2008 surgery. Instead, GEICO reduced payment to 80% of 200% of the Medicare Part B fee schedule or $1122.86 of the $13,500 bill. Payment of 80% of the bill under the 2006 PIP statute would have been $10,800.

Physicians Group filed a complaint against GEICO in county court, seeking a declaratory judgment that GEICO is prohibited from retroactively applying the 2008 amendment to claims based on a policy that was in effect prior to the amendment. Both parties filed motions for summary judgment. The county court granted Physicians Group's motion and denied GEICO's motion, ruling that the 2006 statute controls the rights and liabilities of the parties because it was the law in effect at the time the insurance policy was executed. The trial court also ruled that the 2008 amendment was substantive and not remedial and should not be applied retroactively. Upon motion by GEICO, the county court certified the above issue as one of great public importance in its final declaratory judgment.

"[I]t is generally accepted that the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." Hassen v. State Farm Mut. Auto. Ins. Co., 674 So. 2d 106, 108 (Fla. 1996)

(citing Lumbermens Mut. Cas. Co. v. Ceballos, 440 So. 2d 612, 613 (Fla. 3d DCA 1983)); see Esancy v. Hodges, 727 So. 2d 308, 309 (Fla. 2d DCA 1999). In Menendez v. Progressive Express Insurance Co., 35 So. 3d 873 (Fla. 2010), the supreme court outlined a two-part test to determine whether a statute that was enacted after the issuance of an insurance policy should have retroactive effect on claims arising out of that policy. First, a court must determine whether the legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the court must determine whether the retroactive application would violate any constitutional principles. Id. at 877 (citing Metro. Dade Cnty. v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 (Fla. 1999)).

A statute will not be determined to be retroactive unless its terms clearly show that the legislature intended such. Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994).

> "Requiring clear intent assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to [the legislature] responsibility for fundamental policy judgments concerning the proper temporal reach of statutes . . . ."

Id. at 425 (alterations in original) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 272-73 (1994)).

A plain reading of the 2008 law does not indicate a legislative intent that the amendments apply retroactively. In fact, section 627.7407(2), Florida Statutes (2008), adopted in 2007 and titled "Application of the Florida Motor Vehicle No-Fault Law," specifically provides that "[a]ny personal injury protection policy in effect on or

after January 1, 2008, shall be deemed to incorporate the provisions of the Florida Motor Vehicle No-Fault Law, as revived and amended by this act." See ch. 2007-324, § 21 at 44, Laws of Fla. It is clear that the legislature intended for the amendments to have prospective application only.

Even if the legislature intended the statute to apply retroactively, retroactive application of the statute will be rejected "if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." Menendez, 35 So. 3d at 877; see also Esancy, 727 So. 2d at 309-10 ("[C]hanges in statutes that occur between policy renewals cannot be incorporated into an insurance policy without unconstitutionally impairing the obligation of the parties to the insurance contract." (citing Hassen, 674 So. 2d at 108)). Significantly limiting the amount an insurer will reimburse providers for medical expenses by thousands of dollars is clearly a substantive change that would impair the vested rights of the insured if applied retroactively.

Accordingly, we answer the certified question by holding that the 2008 version of section 627.736(5)(a)(2)(f) does not retroactively apply to an insurance policy that was in effect and that expired before the statute's effective date of January 1, 2008. The judgment of the county court is affirmed.

WALLACE and KHOUZAM, JJ., Concur.