UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-62610-BLOOM/Valle

A&M GERBER CHIROPRACTIC LLC, A/A/O CONOR CARRUTHERS, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant.
_____/

DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

Defendant, GEICO GENERAL INSURANCE COMPANY (GEICO), hereby files this Motion for Final Summary Judgment against Plaintiff, A&M Gerber Chiropractic, LLC a/a/o Conor Carruthers (Gerber). As explained more fully herein, GEICO is entitled to final summary judgment because GEICO paid Gerber more than Carruthers' policy limits before this lawsuit was filed. Because Gerber suffered no harm from the application of the coinsurance, its claim is not justiciable and the elements for declaratory relief are not present. Alternatively, GEICO is entitled to final summary judgment because Gerber's interpretation of Carruthers' policy is incorrect. Gerber improperly asks this Court to construe the disputed language in the FL PIP (01-13) amendment in isolation without reference to the 20% coinsurance provision or the M608 (01-13) endorsement which states that GEICO will pay no more than 80% of a reasonable charge. Construing the policy in its entirety leads to only one reasonable interpretation: the 20% coinsurance applies to all charges.

BACKGROUND[1]

Conor Carruthers was insured under a policy with GEICO which provided personal injury protection (PIP) motor vehicle insurance benefits. ECF No. [67-1] at 12-18, 29-39, 51-52. Carruthers' policy contained amendment form FL PIP (01-13) which extended policy limits from $2,500 to $10,000 only if an authorized health care provider determined that he had an emergency medical condition (EMC). ECF No. [67-1] at 32. The FL PIP (01-13) amendment further stated that benefits would be paid pursuant to the "schedule of maximum charges" contained in section 627.736(5)(a), Florida Statutes. ECF No. [67-1] at 31. However, charges lower than the fee schedule rate would be paid in the amount of the charge submitted. *Id.* Reimbursement was also subject to a 20% coinsurance. *Id.*

Carruthers' policy also included "Fee Schedule Endorsement" M608 (01-13) which stated that GEICO would limit reimbursement of medical expenses to 80 percent of a properly billed reasonable charge but would in no event pay more than 80 percent of the fee schedule. ECF No. [67-1] at 51. GEICO issued or mailed endorsement M608 (01-13) to its policyholders as an attachment to all new policies effective on or after January 1, 2013 and as an attachment to all renewal policies effective on and after January 1, 2013. *See* Exhibit A at ¶ 4.

On or about March 18, 2015, Carruthers was involved in a motor vehicle accident and sought medical services from Gerber. ECF No. [23] at ¶ 12-13. Gerber charged GEICO $60.00 four times for services billed under CPT code 97110 and GEICO paid $48.00 per charge. *Id.* at ¶ 14. Gerber also charged GEICO $45.00 one time for services billed under CPT code 97140 and

1. Pursuant to Local Rule 56.1 and this Court's scheduling order (ECF No. [21] at 2), GEICO filed a Statement of Material Facts in Support of Defendant's Motion for Final Summary Judgment as a separate filing.

GEICO paid $36.00. *Id.* at ¶ 15. Thus, GEICO paid 80% of each of these charges which were lower than the fee schedule rates. *See* ECF No. [60], [60-1] and [60-2].

GEICO did not receive a medical report diagnosing Carruthers with an EMC related to the March 18, 2015 accident. *See* Exhibit B at ¶ 5. However, GEICO paid Gerber a total of $7311.85 in benefits. *See* Exhibit B at ¶ 6. Thus, GEICO paid Gerber $4,811.85 more than Carruthers' $2500 policy limit. ECF No. [67-1] at 32; Exhibit B at ¶ 5-6.

Thereafter, Gerber filed the instant class action suit, claiming that GEICO should not have applied the 20% coinsurance to the 97110 and 97140 charges. *See* ECF No. [23] at ¶¶ 11-16, 36-37. Doing the math, it appears that Gerber's complaint accuses GEICO of underpaying a total of $57.00 on Gerber's claim. ECF Nos. [23] at ¶¶ 12-14, [23-2] at 1, 4-5, 7-8.

LEGAL STANDARD

"Summary judgment is appropriate if the record shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Witter v. Delta Airlines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998) (citations and quotations omitted).

ANALYSIS

For the reasons stated herein, final summary judgment should be entered for GEICO.

I. Gerber is not entitled to declaratory relief.

First, GEICO is entitled to final summary judgment because Gerber's claim for declaratory relief is not justiciable and Gerber cannot establish the elements required for declaratory relief. GEICO paid Gerber more than Carruthers' policy limits. Therefore, Gerber suffered no harm from the application of the coinsurance. Without harm, there is no case or controversy, Gerber lacks standing, and the Court lacks jurisdiction to proceed.

"Any time doubt arises as to the existence of federal jurisdiction, we are obliged to address the issue before proceeding further." *Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409, 414 (11th Cir. 1995) (citing *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1542 (11th Cir. 1993); *Ashcroft v. Mattis*, 431 U.S. 171, 172, 97 S. Ct. 1739, 1740, 52 L. Ed. 2d 219 (1977) (raising jurisdictional issue *sua sponte*)). "In all cases arising under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1988), the threshold question is whether a justiciable controversy exists." *Id.* (citing *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 272, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941); *United States Fire Ins. Co. v. Caulkins Indiantown Citrus*, 931 F.2d 744, 747 (11th Cir. 1991)). "Congress limited federal jurisdiction under the Declaratory Judgment Act to actual controversies, in statutory recognition of the fact that federal judicial power under Article III, Section 2 of the United States Constitution extends only to concrete 'cases or controversies.' " *Id.* (citing *Tilley Lamp Co. v. Thacker*, 454 F.2d 805, 807-08 (5th Cir. 1972)). For a controversy to exist, the plaintiff must show that "at the time the complaint was filed, [it] suffered some actual or threatened injury resulting from the defendant's conduct, that the injury fairly can be traced to the challenged action, and that the injury is likely to be redressed by favorable court disposition." *Id.* (citing *Caulkins Indiantown Citrus*, 931 F.2d at 747). To determine whether the plaintiff has met this burden, we "look to the state of affairs as of the filing of the complaint; a justiciable controversy must have existed at that time." *Id.* (quoting *International Harvester v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980)).

"[E]very court has an independent duty to review standing as a basis for jurisdiction at any time, for every case it adjudicates." *Wilson v. Everbank, N.A.*, 77 F. Supp. 3d 1202, 1229 (S.D. Fla. 2015) (quoting *Florida Ass'n of Med. Equip. Dealers v. Apfel*, 194 F.3d 1227, 1230 (11th Cir. 1999)). A named plaintiff "in a class action who cannot establish the requisite case or

controversy between himself and the defendants simply cannot seek relief for anyone — not for himself, and not for any other member of the class." *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987). "It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Prado-Steinman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000). "[S]peculation based on [an] insurance company[y's] dealings with other insureds does not present a concrete case or controversy." *Atlanta Gas Light Co.*, 68 F.3d at 415.

In this case, Gerber complains that GEICO misapplied the 20% coinsurance to several charges. ECF No. [23] at ¶¶ 11-16, 36-37. However, there is no justiciable controversy because at the time that Gerber filed its complaint in this action, GEICO had already paid Gerber more than Carruthers' policy limits. *See* Exhibit B at ¶ 6. Under section 627.736(1)(a)3-4, Florida Statutes, as adopted in Carruthers' PIP policy (ECF No. [67-1] at 32), "when no EMC diagnosis has been provided by an authorized medical provider as required by section 627.736(1)(a)(3), the available PIP medical benefits are limited to $2,500." *Progressive Am. Ins. Co. v. Garrido*, 211 So. 3d 1086, 1093 (Fla. 3d DCA 2017); *Med. Ctr. of the Palm Beaches v. USAA Cas. Ins. Co.*, 202 So. 3d 88, 93 (Fla. 4th DCA 2016) ("[B]enefits above $2,500 are available only where a medical provider determines an emergency medical condition exists."); *Robbins v. Garrison Prop. & Cas. Ins. Co.*, 809 F.3d 583, 588 (11th Cir. 2015) ("[W]e hold that Fla. Stat. § 627.736, as amended, limits an insurer's obligation to provide personal injury protection benefits to $2,500, unless one of the medical providers listed in subparagraph (1)(a)(3) has determined that the injured person had an emergency medical condition."). No EMC diagnosis was provided to

GEICO for Carruthers' alleged March 18, 2015 accident. *See* Exhibit B at ¶ 5. Therefore, Carruthers' policy limit was $2,500. However, GEICO paid Gerber over $7000 on Carrruthers' claim. Therefore, regardless of how this Court answers the policy interpretation question posed in Gerber's complaint, Gerber will not be entitled to recover any additional benefits from GEICO. For this reason, summary judgment should be entered for GEICO Gerber's complaint should be dismissed for lack of jurisdiction. *See Atlanta Gas Light Co.*, 68 F.3d at 415.

Gerber similarly cannot satisfy the elements required for declaratory relief. "To plead a claim for declaratory relief, a plaintiff must plead facts to show: (1) there is a bona fide, actual, present practical need for the declaration; (2) the declaration deals with a present, ascertained or ascertainable state of facts or present controversy; (3) some right or privilege of the complaining party is dependent upon the facts or the law applicable to the facts; (4) there is some person who has an actual, present adverse interest in the subject matter; (5) all adverse parties are presently before the court; and (6) the relief sought is not merely seeking an advisory opinion." *MetLife Ins. Co. USA v. Larose*, No. 16-61051-CIV, 2017 U.S. Dist. LEXIS 72084, at *8 (S.D. Fla. May 9, 2017) (citing *Trianon Condo. Ass'n v. QBE Ins. Corp.*, 741 F. Supp. 2d 1327, 1330-1331 (S.D. Fla. 2010) (citing *May v. Holley*, 59 So. 2d 636 (Fla. 1952))). Here, Gerber has not met any of these elements because it was not harmed by the alleged misapplication of the 20% coinsurance. GEICO paid Gerber far more than it was entitled to under Carruthers' policy regardless of the applicability of the 20% coinsurance. Therefore: (1) no present controversy exists between Gerber and GEICO; (2) Gerber has not shown an actual, present need for the declaration or an actual, present adverse interest between in the subject matter; and (3) Gerber improperly asks this Court for an advisory opinion. *See id.* Because Gerber failed to state a claim for declaratory relief, summary judgment should be entered for GEICO.

II. Gerber's Interpretation of the FLPIP (01-13) Amendment is Incorrect.

Alternatively, GEICO is entitled to final summary judgment because Gerber's interpretation of Carruthers' policy is incorrect. Gerber asks this Court to construe the disputed language in FL PIP (01-13) amendment in isolation without reference to the 20% coinsurance provision or the M607 (01-13) endorsement. However, when read as a whole, GEICO's policy unambiguously states that the 20% coinsurance applies to all charges.

A. Rules of Policy Interpretation

Section 627.419(1), Florida Statutes, provides that "every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto." § 627.419(1), Fla. Stat.; *Landmark Am. Ins. Co. v. Pin-Pon Corp.*, 155 So. 3d 432, 437 (Fla. 4th DCA 2015). "[I]n construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). "Terms and phrases cannot be viewed in isolation; courts must construe an insurance contract in its entirety, striving to give every provision meaning and effect." *Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1221 (11th Cir. 2015) (quotation omitted). "Only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite." *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979) (citations omitted). "Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible." *Id.* (citations omitted).

" 'Policy' means a written contract of insurance or written agreement for or effecting insurance, or the certificate thereof, by whatever name called, and includes all clauses, riders,

endorsements, and papers that are a part thereof." § 627.402(3), Fla. Stat. (formerly § 627.402(1), Fla. Stat.).

> Insurance policies consist of several parts. The first part is the declarations page, colloquially known as the "dec page." The dec page sets forth the most basic facts regarding the policy—its nature, limits, effective period, and who it insures. **Many endorsements will typically be attached to the policy at its inception. These will often, but not always, be listed on the dec page, but this is not always the case.**

3-21 New Appleman on Insurance Law Library Edition § 21.01 (2016) (emphasis added). "It is the general rule that an endorsement or rider attached to an insurance policy becomes and forms a part of the contract; that the policy and the endorsement or rider shall be construed together; and that where the provisions in the body of the policy and those in the endorsement or rider are in irreconcilable conflict the provisions contained in the endorsement or rider will prevail over those contained in the body of the policy." *Nat'l Union Fire Ins. Co.*, 385 F.3d at 55 (quoting *Farmers Ins. Exch. v. Ledesma*, 214 F.2d 495, 498 (10th Cir. 1954)); *Capitol Specialty Ins. Corp. v. Royal Crane, LLC*, No. 14-CIV-60815-BLOOM/Valle, 2015 U.S. Dist. LEXIS 23983, at *18-19 (S.D. Fla. Feb. 26, 2015) ("Even if there were an ambiguity between the endorsement and the body of the policy, the endorsement, which is clear, controls.") (quoting *Family Care Ctr., P.A. v. Truck Ins. Exch.*, 875 So.2d 750, 752 (Fla. 4th DCA 2004)). "An endorsement becomes part of the insurance contract to the same extent as if it were actually embodied therein, provided, of course, that the endorsement [1] has been lawfully and sufficiently attached to the policy, or [2] referred to in the policy, or [3] both attached and referred to in the policy[.]" *Children's Friend & Serv. v. St. Paul Fire & Marine Ins. Co.*, 893 A.2d 222, 230 (R.I. 2006) (internal brackets omitted) (quoting 2 *Couch on Insurance* § 18:17 at 18-24-26 (Lee R. Russ, 3d ed. 2005)). *Rapid Leasing, Inc. v. Nat'l Am. Ins. Co.*, 263 F.3d 820, 825-26 (8th Cir. 2001) (While "an endorsement is effective when it is made part of the policy and incorporated by reference, it is also clear that

an endorsement need not be [both] attached *and* incorporated by reference to be effective."); *Nautilus Ins. Co. v. Our Camp, Inc.*, 136 F. App'x 134, 137 n.1 (10th Cir. 2005) ("It is undisputed that the S 051 endorsement was physically attached to the policy. Nautilus Insurance directs us to the principle that although 'generally, an endorsement will be referenced in the policy declarations,' 'to be effective the endorsement must be attached to the policy.' ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D, § 20.1 at 153 (1998). The exclusion's physical attachment to the policy further supports a conclusion that the exclusion is effective."); *Nat'l Union Fire Ins. Co. v. Lumbermens Mut. Cas. Co.*, 385 F.3d 47, 54 (1st Cir. 2004) ("We think that the mere fact that the main body of the policy contains no reference to the endorsement does not, in and of itself, conclusively establish that the main policy and the endorsement are not part of a single document.") (citingRestatement (Second) of Contracts § 132 (1981)).[2] "To be effective, a rider need not be physically attached to the policy through staples,

2. In a prior filing, Gerber suggested that because the M608 (01-13) was not listed in Carruthers' declarations page, it was not part of his policy. ECF No. [70] at 4. In support of this argument, Gerber cites section 627.413(1)(g), Florida Statutes, which states: "Every policy shall specify: . . . (g) The form numbers and edition dates or numeric code indicating edition dates, when such code has been supplied to the office, of all endorsements attached to a policy. This requirement applies to life insurance policies and health insurance policies only at the time of original issue." § 627.413(1)(g)., Fla. Stat. By its terms, section 627.413(1)(g) appears inapplicable here because it only to applies to original (not renewal) life and health insurance policies. Moreover, the provision does not refer to declarations pages. *Cf.* § 627.421(4)(e), Fla. Stat. ("If the insurer elects to post insurance policies and endorsements on its Internet website in lieu of mailing or delivery to insureds, the insurer must . . . (e) On each declarations page issued to the insured, the insurer must clearly identify the exact policy form and endorsement form purchased by the insured."). Further, any violation of section 627.413(1)(g) would not void the endorsement because "[a]ny insurance policy, rider, or endorsement otherwise valid which contains any condition or provision not in compliance with the requirements of this code shall not be thereby rendered invalid . . . but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code." § 627.418, Fla. Stat.; *cf. QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n*, 94 So. 3d 541, 554 (Fla. 2012) ("[A]n insurer's failure to comply with the language and type-size requirements established in section 627.701(4)(a) does not render a noncompliant hurricane deductible provision in an insurance policy void and unenforceable,

glue, paper clips or the like." *Crocker v. Roach*, 766 So. 2d 672, 676 (La. App. 2d Cir 2000). "The intent of the statutory scheme requires only that to be effective the insured must be in possession at all times of the entire evidence of the insurance contract." *Cf. id.* (citation omitted); *accord* § 627.421(1), Fla. Stat.

B. The Policy Language

With these principles in mind, the pertinent language from Carruthers' policy states:

The FLPIP (01-03) Amendment	**The M608 (01-13) Endorsement**
PAYMENTS WE WILL MAKE . . . (A) **Eighty percent (80%)** of medical benefits which are medically necessary, pursuant to the following schedule of maximum charges contained in the Florida Statutes § 627.736(5) (a)1., (a)2. and (a)3.: . . . 6. For all other, medical services, supplies, and care, 200 percent, of the allowable amount under: (I) The participating physicians fee schedule of Medicare Part B, except as provided in sections (II) and (III). . . . **A charge submitted by a provider, for an amount less than the amount allowed above, shall be paid in the amount of the charge submitted.** (emphasis added). ECF No. [67-1] at 31 (emphasis added).	FEE SCHEDULE ENDORSEMENT USE OF MEDICAL FEE SCHEDULE FOR PERSONAL INJURY PROTECTION CLAIMS THIS NOTICE IS ENCLOSED IN COMPLIANCE WITH FLORIDA STATUTE 627.736 Effective January 1, 2013 **The Company will limit reimbursement of medical expenses to 80 percent of a properly billed reasonable charge**, but in no event will the Company pay more than 80 percent of the following schedule of maximum charges: . . . 6. For all other medical services, supplies, and care, 200 percent of the allowable amount under: (I.) The participating physicians fee schedule of Medicare Part B, except as provided in sections (II.) and (III.) ECF No. [67-1] at 51 (emphasis added).

because the Legislature has not provided for this penalty."). Gerber cites to no statutory provision imposing a penalty of voiding an endorsement for failure to list it on the declarations page. In fact, the only penalty Gerber has identified for failure to list forms on a declarations page is a fine. *See* § 69O-142.011(11)(a)16. and (b)2., Fla. Admin. Code.

Gerber and GEICO disagree on whether the 20% coinsurance applies to charges that are less than 200% of the Medicare Part B fee schedule. *See* ECF No. [59] at 7. Gerber asks this Court to read the last paragraph of the above-quoted excerpt from FL PIP (01-13) amendment in isolation without reference to the "80%" language at the top of the page and without reference to the M608 (01-13) endorsement. However, "[e]very provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible." *See Excelsior Ins. Co.*, 369 So. 2d at 942.

Gerber's myopic reading of the policy language should first be rejected because it ignores the alignment of the paragraphs in FL PIP (01-13). *See* ECF No. [67-1] at 31. The first paragraph contains the 80% language. *Id.* The following paragraphs are indented and contain the statutory fee schedule language. *Id.* The disputed paragraph is also indented and aligned with the fee schedule paragraphs. *Id.* Gerber claims that the disputed paragraph supersedes the 80% language from the main paragraph. However, Gerber's interpretation runs contrary to the "scope of subparts canon" which holds that "[m]aterial within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts." *Melchert v. Pro Elec. Contractors*, 892 N.W.2d 710, 733 (Wis. 2017) (quoting Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 156-60, 221 (2012)); *Pirani v. Baharia (in re Pirani)*, 824 F.3d 483, 495 (5th Cir. 2016) ("[A]n indented subpart relates only to that subpart[.]"); *Scherer v. Volusia Cty. Dep't of Corr.*, 171 So. 3d 135, 141 (Fla. 1st DCA 2015) (Ray, J. dissenting); *Holl v. UPS*, 140 So. 3d 1062, 1064 (Fla. 1st DCA 2014) (Thomas, J. dissenting). Gerber's interpretation turns the scope of subparts canon on its head by suggesting that the indented subparagraph modifies everything preceding it, including the 80% language in the main paragraph. However, "[f]ollowing the logic of

[Gerber's] reasoning, if [GEICO] intended the final paragraph to simply modify what preceded it, the most appropriate course would have been not to indent it." *See Aquilino v. Marin Cty. Employees' Ret. Ass'n*, 60 Cal. App. 4th 1509, 1522, 70 Cal. Rptr. 2d 870, 878 (1998). Because GEICO did not do so, the disputed paragraph does not affect the applicability of the coinsurance language.

Furthermore, the disputed provision of the FL PIP (01-13) amendment does not address whether or not the 20% coinsurance applies. It simply provides notice of the reimbursement rate to providers. *See Geico Gen. Ins. Co. v. Virtual Imaging Servs.*, 141 So. 3d 147, 160 (Fla. 2013) ("[T]he provider also needs notice of the reimbursement rate because it is the provider who is forced to accept the lower payment rate after rendering services in reliance on the terms of the policy."). The provision states that charges that are less than the fee schedule "shall be paid" at the charged amount but does not indicate what percentage "shall be paid" by the insurer and what percentage "shall be paid" by the insured. To determine this ratio, the Court must look to the coinsurance provisions of the policy which in this case, clearly show that all reimbursements are subject to a 20% coinsurance. *See* ECF No. [67-1] at 31, 51; ECF No. [67-2] at 1-2 (*Physicians Group, LLC a/a/o Jimetra West v. GEICO Indem. Co.*, Case No. 16-CC-019155 (Hillsborough Cty. Ct. Feb 6, 2017)).

The M608 (01-13) endorsement reinforces this interpretation by informing the reader that GEICO "will limit reimbursement of medical expenses to 80 percent of a properly billed reasonable charge, but in no event will the Company pay more than 80 percent of the following schedule of maximum charges[.]" ECF No. [67-1] at 51. A proper reading of the policy as a whole includes reading the M608 (01-13) endorsement in conjunction with the FL PIP (01-13) amendment to arrive at the intent of the parties. *See Excelsior Ins. Co.*, 369 So. 2d at 942. Here,

the M608 (01-13) endorsement clarifies any alleged ambiguity in the FL PIP (01-13) amendment by indicating that GEICO will pay no more than the lesser of 80% of a reasonable charge or 80% of the fee schedule. ECF No. [67-1] at 51.

The M608 (01-13) endorsement was issued pursuant to the 2012 amendment to section 627.736(5)(a)5., Florida Statutes, which sated:

> Effective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. A policy form approved by the office satisfies this requirement.

Ch. 197 Laws of Fla. § 10 (2012) (HB 119). Pursuant to this statutory requirement, the Florida Office of Insurance Regulation issued Informational Memorandum OIR-12-02M which directed insurers to submit endorsements for approval and included "Sample Fee Schedule Endorsement" language. *See* ECF No. [67-4] at 1-2 (available at http://www.floir.com/siteDocuments/OIR-12-02M.pdf (last visited July 1, 2017)).[3] GEICO's M608 (01-13) endorsement substantially adheres to the OIR-12-02M form language and was approved by the Office of Insurance Regulation. *Id.*; Exhibit A at ¶ 5. GEICO issued or mailed the M608 (01-13) endorsement in compliance with Florida Statute 627.736 and Florida HB119 to its policyholders as an attachment to all new policies effective on or after January 1, 2013 and as an attachment to all renewal policies effective on and after January 1, 2013. *See* Exhibit A at ¶ 4. Accordingly, the M608(01-13) Endorsement is part of Carruthers' policy and the policies of all putative class members.

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3. Pursuant to Fed. R. Evid. 201, GEICO requests that this Court take judicial notice of the Florida Office of Insurance Regulation Informational Memorandum OIR-12-02M. "It is well established that records, reports, and other documents on file with administrative agencies . . . are judicially noticeable." *S.F. Baykeeper v. W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 732 (N.D. Cal. 2011) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001)); R.S.B. Ventures, Inc. v. FDIC, 514 F. App'x 853, 856 n.2 (11th Cir. 2013) ("As requested by RADC, for purposes of this appeal we take judicial notice of the information found on the FDIC's website.").

C. The Two-Step Process for Adjusting Claims

Gerber's interpretation also departs from the statutorily prescribed process for adjusting PIP claims. The Florida Supreme Court has held that "the PIP statute sets forth a basic coverage mandate: every PIP insurer is required to . . . reimburse [1] **eighty percent** of [2] **reasonable expenses** for medically necessary services." *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 976 (Fla. 2017) (emphasis added) (quoting *Geico Gen. Ins. Co. v. Virtual Imaging Servs.*, 141 So. 3d 147, 155 (Fla. 2013)). Thus, assuming that the claim is otherwise compensable, the adjustment of a PIP claim generally involves a two-step process:

- Step 1 – Determine the reasonable allowable amount;
- Step 2 – Apply the 20% coinsurance.

Step 1 – Determine the Reasonable Allowable Amount

"[T]here are two different methodologies for calculating reimbursements to satisfy the PIP statute's reasonable medical expenses coverage mandate." *Virtual*, 141 So. 3d at 156. Under the first payment methodology contained within section 627.736(5)(a), "reasonableness is a fact-dependent inquiry determined by consideration of various factors." *Id.* at 155-56. Under the alternative, permissive payment methodology contained within section 627.736(5)(a)(1), "insurers '**may** limit reimbursement' to eighty percent of a schedule of maximum charges set forth in the PIP statute." *Id.* at 154 (quoting § 627.736(5)(a), Fla. Stat.) (emphasis added). To limit reimbursement to the fee schedule, insurers must provide notice to insureds and medical providers in their policies that they elect the fee schedule method of reimbursement. *Id.* at 150, 160. For example, in *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975 (Fla. 2017), the following language in Allstate's policy was deemed sufficient to elect the statutory fee schedules: "Any amounts payable under this coverage **shall** be subject to any and all limitations,

authorized by section 627.736 . . . including, but not limited to, all fee schedules." *Id.* at 979 (emphasis added).

Section 627.736(5)(a)5 utilizes the same kind of permissive language which, according to *Virtual*, requires policy amendment and election. § 627.736(5)(a)5, Fla. Stat. ("If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer **may** pay the amount of the charge submitted.") (emphasis added). Therefore, GEICO amended its policy to elect it: "A charge submitted by a provider, for an amount less than the amount allowed above, **shall** be paid in the amount of the charge submitted." ECF No. [67-1] at 31 (emphasis added). In this case, Gerber does not dispute that GEICO's policy properly elected the statutory fee schedule. ECF No. [59] at 2 ¶ 5. Accordingly, for all charges greater than or equal to 200% of Medicare Part B, the reasonable allowable amount is 200% of Medicare Part B. For all charges lower than 200% of Medicare Part B, the reasonable allowable amount is the amount of the charge submitted.

Step 2 – Apply the 20% Coinsurance

Coinsurance percentages determine the portion of any claim for PIP medical benefits which is otherwise covered but is not payable due to the coinsurance provisions of paragraph (1)(a) of section 627.736. *See Allstate Ins. Co. v. Jones*, 700 So. 2d 110, 111 (Fla. 1st DCA 1997); *Christian v. Colonial Penn Ins. Co.*, 537 So. 2d 623, 625 (Fla. 4th DCA 1988). Coinsurance percentages limit payments of PIP benefits to 80% of reasonable and necessary medical expenses. *See* § 627.736(1)(a), Fla. Stat. An insured, as the co-insurer, is responsible for the remaining 20% of reasonable and necessary medical expenses. The incorporation of coinsurance, similar to a deductible, allows an insured to incur lower premiums by sharing in the risk insured against by the policy. *Cf. Hannah v. Newkirk*, 675 So. 2d 112, 114 (Fla. 1996) ("In

electing a PIP deductible, an insured pays a lower premium for PIP coverage, and yet will still be substantially compensated by PIP for any damages sustained.").

In this case, Carruthers' PIP policy is an 80/20 policy where the insurer pays 80% of the reasonable allowable amount and the insured pays the remaining 20% as coinsurance. Gerber has not alleged that Carruthers' policy is an "APIP" policy in which the insured pays an additional premium in exchange for the insurer's obligation to pay 100% of the reasonable allowable amount for medical services. *See e.g.*, *Flaxman v. Gov't Emples. Ins. Co.*, 993 So. 2d 597, 598 (Fla. 4th DCA 2008). Nor has Gerber invoked the Medical Payments Coverage provisions of the GEICO policy which states: "We will pay, subject to the coverage limit shown in the policy declarations . . . [t]he portion of any claim for Personal Injury Protection medical benefits otherwise covered but not payable due to the coinsurance provision of Personal Injury Protection. This is the twenty percent (20%) of medical benefits not covered in SECTION II: PART I - PAYMENTS WE WILL MAKE[.]" *See* Exhibit 1, FLPIP (01-13) at p.8. Instead, Gerber essentially argues that the language of GEICO's policy adopting section 627.736(5)(a)5 constitutes a waiver of the 20% coinsurance for all charges not exceeding 200% of Medicare Part B. Gerber's interpretation would require the insurer to provide coverage for uncontracted risk for which the insured has not paid an additional premium. *See QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, Inc.*, 94 So. 3d 541, 554 (Fla. 2012). Accordingly, Gerber's interpretation would not serve the goals of having the insured share in the risk. If GEICO had intended to waive the coinsurance requirement, it would have done so expressly and charged the insured an additional premium as it does for its additional personal injury protection (APIP) policy. *See e.g., Flaxman*, 993 So. 2d at 598 (Fla. 4th DCA 2008) (interpreting GEICO's APIP policy which expressly states that GEICO will pay "100%" rather than 80% of the medical expenses).

"It is a general rule of law that terms of an insurance policy must be construed to promote a reasonable, practical and sensible interpretation consistent with the intent of the parties." *United States Fire Ins. Co. v. Pruess*, 394 So. 2d 468, 470 (Fla. 4th DCA 1981) (citing *General Accident Fire and Life Assurance Corp. v. Liberty Mutual Insurance Co.*, 260 So.2d 249 (Fla. 4th DCA 1972)). While "fanciful, inconsistent, and absurd interpretations of plain language are always possible[, i]t is the duty of the trial court to prevent such interpretations." *Am. Med. Int'l, Inc. v. Scheller*, 462 So. 2d 1, 7 (Fla. 4th DCA 1984). Insurance policies "should be interpreted reasonably, not absurdly[.]" *Discover Prop. & Cas. Ins. Co. v. Beach Cars of W. Palm, Inc.*, 929 So. 2d 729, 733 (Fla. 4th DCA 2006). The following hypothetical demonstrates the absurdity of Gerber's position:

	Total billed amount for services	200% of the Medicare Part B Fee Schedule	GEICO's reimbursement amount
Provider A	$100	$100	$80
Provider B	$99	$100	$99

As the above example shows, Provider B billed $1 less than Provider A. However, Gerber's interpretation would counterintuitively require GEICO to reimburse Provider B's lower charge at a 20% higher rate than Provider A's higher charge. This is an absurd and unreasonable result which does not comport with logic and common sense.

D. The Legislative History

Furthermore, Gerber's interpretation finds no basis in the legislative history of section 627.736(5)(a)5. "[W]hile we acknowledge the duty to give effect to the 'plain language' of the policy, automobile insurance litigation is infused with considerations of public policy, and our determination of the rights and obligations of the parties must also take into consideration relevant legislative enactments, established custom and usage in the insurance industry, and the body of case law touching upon coverage questions similar to the one before us." *Nat'l Merch.*

Co. v. United Serv. Auto. Asso., 400 So. 2d 526, 530 (Fla. 1st DCA 1981). Regarding the 2012 enactment of section 627.736(5)(a)5., the legislative history contains no evidence that the legislature intended to create a waiver of the 20% coinsurance provision.

After the PIP fee schedule provisions were enacted in 2008, certain court rulings referred to the "schedule of maximum charges" under section 627.736(5)(a) as "the minimum amount due" for medical services and supplies. *See Nationwide Mut. Fire Ins. Co. v. AFO Imaging, Inc.*, 71 So. 3d 134, 137-38 (Fla. 2d DCA 2011); *SOCC, P.L. v. State Farm Mut. Auto. Ins. Co.*, 95 So. 3d 903, 909 (Fla. 5th DCA 2012). In cases where the charges were lower than the fee schedule rate, these rulings seemed to require insurers to adjust-up and pay more than the charge submitted. However, in 2012, the legislature amended the PIP statute to clarify that "[i]f a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer **may** pay the amount of the charge submitted." Ch. 197 Laws of Fla. § 10 (2012) (adding § 627.736(5)(a)5., Fla. Stat.) (emphasis added). The obvious intent of this provision was to clarify that insurers, through notice in their policies, may limit payment to the statutory fee schedule rates but are not prevented from paying lower amounts in situations where the providers charge less than the fee schedule rates. When read in context, the amendment merely clarifies that insurers are not required to reimburse at a higher rate than the amount charged. Nothing in the statutory language says that the 20% coinsurance will be waived. "When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Lowry v. Parole & Prob. Comm'ns*, 473 So. 2d 1248, 1250 (Fla. 1985).

IV. Request for Hearing

GEICO requests a hearing on this matter because it is a dispositive issue of law in this case and oral argument will be helpful to address any questions that the Court may have with respect to the issues. Because this is a class action, this Court's ruling will affect thousands of claims. Therefore, it is critical that the parties have a full opportunity to explain their positions to the Court and discuss the issues at hearing. GEICO estimates that one hour will be sufficient to hear the parties' arguments.

CONCLUSION

In conclusion, this Court should grant final summary judgment in favor of GEICO and dismiss Gerber's complaint because this Court lacks jurisdiction over Gerber's non-justiciable claim for declaratory relief which fails to satisfy the elements required for a declaratory action. Alternatively, this Court should grant final summary judgment in favor of GEICO because Gerber's interpretation of the FL PIP (01-13) amendment is incorrect.

Respectfully submitted,

Counsel for Defendant

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on **July 6, 2017**, a true and correct copy of the foregoing was served, via electronic mail, upon the persons on the attached service list.

/s Peter D. Weinstein, Esq.
Attorney for Defendant

SERVICE LIST

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-62610-BLOOM/Valle

A&M GERBER CHIROPRACTIC LLC, A/A/O CONOR CARRUTHERS, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant.
_____/

AFFIDAVIT OF DANIELLE FRANKLIN

STATE OF VIRGINIA)
)
COUNTY OF STAFFORD)

Before me, the undersigned authority, personally appeared Danielle Franklin, who, after being duly sworn, deposes, and states as follows:

1. My name is Danielle Franklin and I am of legal age and competent to testify to the following based on my personal knowledge.

2. GOVERNMENT EMPLOYEES INSURANCE COMPANY currently employs me in the capacity as Manager of Underwriting Research and I have been employed in this capacity since May 2016.

3. I have personal knowledge of GEICO GENERAL INSURANCE COMPANY's policies as written and implemented from 2012 to present, including but not limited to Renewals, Reissues, Transfers, New Policies, Endorsements, and Notices.

4. GEICO GENERAL INSURANCE COMPANY issued or mailed "Important Notice Fee Schedule Endorsement" M608 (01-13) (see attached hereto as Exhibit A) in compliance with Florida Statute 627.736 and Florida HB119 to its policyholders as an attachment to all new policies effective on or after January 1, 2013 and as an attachment to all renewal policies effective on and after January 1, 2013.

5. The M608 (01-13) endorsement was approved by the Florida Department of Insurance on October 26, 2012.

6. As it relates to this lawsuit, the relevant portion of the M608 (01-13) endorsement states in pertinent part:

> The Company will limit reimbursement of medical expenses to 80 percent of a properly billed and reasonable charge, but in no event will the Company pay more than 80 percent of the following schedule of maximum charges:

7. I have reviewed the exhibits attached hereto and hereby attest that: (a) all are true and correct copies of the originals which are kept in the ordinary course of GEICO's business; (b) the records were made at or near the time of the events they record; (c) the records were made by or from information transmitted by a person with knowledge of the events they record; and (d) it is the regular practice of GEICO to make such records.

FURTHER AFFIANT SAYETH NAUGHT.

Signature: Danielle-Lee K

Print: Danielle - Lee Franklin

Sworn to and subscribed before me
this 29 day of June, 2017.

Amber Sparks
Notary Public, State of Virginia

AMBER L SPARKS
NOTARY PUBLIC
REG # 7681772
MY COMMISSION EXPIRES
6/30/2020
COMMONWEALTH OF VIRGINIA

_____ Personally known or ✓ Produced Identification
Type of Identification Produced: VA driver's license

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-62610-BLOOM/Valle

A&M GERBER CHIROPRACTIC LLC, A/A/O CONOR CARRUTHERS, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant.
_____/

AFFIDAVIT OF CATHERINE FUHRMAN

STATE OF FLORIDA)
)
COUNTY OF POLK)

Before me, the undersigned authority, personally appeared Catherine Fuhrman, who, after being duly sworn, deposes, and states under penalty of perjury that the following facts are true:

1. My name is Catherine Fuhrman and I am of legal age and competent to testify to the following based on my personal knowledge.

2. GEICO GENERAL INSURANCE COMPANY (GEICO) currently employs me in the capacity as litigation examiner and I have been employed in this capacity since October 2009.

3. I have personal knowledge of GEICO Claim number 0131371320101048 related to the policy of GEICO insured Conor Carruthers for date of loss March 18, 2015.

4. I have reviewed the claims file for GEICO Claim number 0131371320101048 and am familiar with its contents.

5. GEICO did not receive a medical report diagnosing Carruthers with an emergency medical condition (EMC) related to the March 18, 2015 accident.

6. GEICO paid Gerber a total of $7311.85 in benefits on Carruthers' policy based on the March 18, 2015 accident. *See* attached.

7. I have reviewed the exhibits attached hereto and hereby attest that: (a) all are true and correct copies of the originals which are kept in the ordinary course of GEICO's business; (b) the records were made at or near the time of the events they record; (c) the records were made by or from information transmitted by a person with knowledge of the events they record; and (d) it is the regular practice of GEICO to make such records.

FURTHER AFFIANT SAYETH NAUGHT.

Signature: _____

Print: CATHERINE FUHRMAN

Sworn to and subscribed before me
this 5 day of July, 2017.

Sandra Burnett
Notary Public, State of Florida at Large

SANDRA BURNETT
MY COMMISSION #GG097822
EXPIRES: APR 25, 2021
Bonded through 1st State Insuran

_____ Personally known or _____ Produced Identification
Type of Identification Produced: _____

FPM Information

Interested Party:	Conor Carruthers	Total Replacement Benefits Paid to Date:	$0.00
Claim Number:	0131371320101048	Total Death/Funeral/Survivor Benefits Paid to Date:	$0.00
Date of Loss:	3/18/2015	Total Applicable Deductible Amount:	$0.00
Total Paid To Date:	$7311.85	Total Amount Deductible Applied:	$0.00
Total Medical Paid to Date:	$7311.85	Total Copay Amount:	$0.00
Total Lost Wages Paid to Date:	$0.00	Total Copay Remaining:	$0.00

Medical Bill Details

Date Bill Received	Status	Date(s) of Service	Provider	Charged Amount	Paid Amount	Paid/ Denied Date	Payee	Check Number	Deductible Applied	Co-Pay Applied	Offsets Applied
08/01/2016	Denied	4/1/2015-2/17/2016	A & M GERBER CHIROPRACTIC LLC	$3928.00		2016-08-08			$0.00	$0.00	$0.00
08/01/2016	Denied	2/17/2016-5/6/2016	A & M GERBER CHIROPRACTIC LLC	$8224.00		2016-08-08			$0.00	$0.00	$0.00
07/26/2016	Paid	4/18/2016	A & M GERBER CHIROPRACTIC LLC	$280.00	$188.26	2016-08-15	A & M Gerber Chiropractic Llc	182698830	$0.00	$0.00	$0.00
05/11/2016	Paid	4/29/2016-5/6/2016	A & M GERBER CHIROPRACTIC LLC	$984.00	$644.69	2016-06-05	A & M Gerber Chiropractic Llc	181266739	$0.00	$0.00	$0.00
04/30/2016	Paid	4/25/2016	A & M GERBER CHIROPRACTIC LLC	$328.00	$214.90	2016-05-25	A & M Gerber Chiropractic Llc	181062078	$0.00	$0.00	$0.00
04/25/2016	Paid	4/15/2016-4/22/2016	A AND M GERBER CHIROPRACTIC LLC	$656.00	$429.79	2016-05-14	A & M Gerber Chiropractic Llc	180848495	$0.00	$0.00	$0.00
04/15/2016	Paid	4/8/2016-4/11/2016	A AND M GERBER CHIROPRACTIC LLC	$656.00	$429.79	2016-05-03	A & M Gerber Chiropractic Llc	180619301	$0.00	$0.00	$0.00

04/08/2016	Paid	4/1/2016-4/4/2016	A AND M GERBER CHIROPRACTIC LLC	$671.00	$441.79	2016-05-03	A & M Gerber Chiropractic Llc	180619301	$0.00	$0.00	$0.00
04/04/2016	Paid	3/25/2016-3/28/2016	A AND M GERBER CHIROPRACTIC LLC	$731.00	$493.52	2016-04-19	A & M Gerber Chiropractic Llc	180334299	$0.00	$0.00	$0.00
03/28/2016	Paid	3/23/2016	A AND M GERBER CHIROPRACTIC LLC	$268.00	$166.90	2016-04-15	A & M Gerber Chiropractic Llc	180254660	$0.00	$0.00	$0.00
03/25/2016	Paid	3/21/2016	A AND M GERBER CHIROPRACTIC LLC	$268.00	$166.90	2016-04-15	A & M Gerber Chiropractic Llc	180254660	$0.00	$0.00	$0.00
03/21/2016	Paid	3/11/2016-3/16/2016	A & M GERBER CHIROPRACTIC LLC	$536.00	$333.79	2016-04-05	A & M Gerber Chiropractic Llc	180047541	$0.00	$0.00	$0.00
03/21/2016	Paid	3/18/2016	A & M GERBER CHIROPRACTIC LLC	$353.00	$166.90	2016-04-05	A & M Gerber Chiropractic Llc	180047539	$0.00	$0.00	$0.00
03/14/2016	Paid	3/8/2016-3/9/2016	A & M GERBER CHIROPRACTIC LLC	$496.00	$323.47	2016-03-28	A & M Gerber Chiropractic Llc	179881165	$0.00	$0.00	$0.00
03/07/2016	Paid	4/1/2015-3/2/2016	A & M GERBER CHIROPRACTIC LLC	$818.00	$166.70	2016-03-25	A & M Gerber Chiropractic Llc	179831022	$0.00	$0.00	$0.00
03/03/2016	Paid	2/26/2016-3/1/2016	A & M GERBER CHIROPRACTIC LLC	$804.00	$500.30	2016-03-25	A & M Gerber Chiropractic Llc	179828248	$0.00	$0.00	$0.00
03/02/2016	Paid	2/24/2016	A M GERBER CHIROPRACTIC LLC	$268.00	$166.70	2016-03-20	A & M Gerber Chiropractic Llc	179725142	$0.00	$0.00	$0.00
02/26/2016	Paid	4/1/2015	A & M GERBER CHIROPRACTIC LLC	$275.00	$19.89	2016-03-14	A & M Gerber Chiropractic Llc	179588543	$0.00	$0.00	$0.00
02/26/2016	Paid	2/19/2016-2/22/2016	A & M GERBER CHIROPRACTIC LLC	$536.00	$333.41	2016-03-14	A & M Gerber Chiropractic Llc	179588536	$0.00	$0.00	$0.00
02/22/2016	Paid	2/18/2016	A & M GERBER CHIROPRACTIC LLC	$268.00	$166.70	2016-03-12	A & M Gerber Chiropractic Llc	179568013	$0.00	$0.00	$0.00
02/20/2016	Paid	2/17/2016	A M GERBER CHIROPRACTIC LLC	$443.00	$287.60	2016-03-08	A & M Gerber Chiropractic Llc	179470254	$0.00	$0.00	$0.00

04/27/2015	Paid	4/20/2015	A M GERBER CHIROPRACTIC LLC	$283.00	$178.70	2015-05-18	A & M Gerber Chiropractic Llc	173927944	$0.00	$0.00	$0.00
04/20/2015	Paid	4/10/2015-4/15/2015	A M GERBER CHIROPRACTIC LLC	$849.00	$536.11	2015-05-15	A & M Gerber Chiropractic Llc	173891816	$0.00	$0.00	$0.00
04/13/2015	Paid	4/1/2015-4/8/2015	A M GERBER CHIROPRACTIC LLC	$1546.00	$151.95	2015-05-08	A & M Gerber Chiropractic Llc	173781565	$0.00	$0.00	$0.00
04/10/2015	Paid	4/1/2015-4/6/2015	A M GERBER CHIROPRACTIC LLC	$1271.00	$803.09	2015-05-08	A & M Gerber Chiropractic Llc	173781554	$0.00	$0.00	$0.00