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 AMENDED MEMORANDUM AND RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, GEICO GENERAL INSURANCE COMPANY (GEICO), by and through its undersigned counsel, hereby submits Defendant's Amended Memorandum and Response to Plaintiff A&M Gerber Chiropractic LLC a/a/o Conor Carruthers (Gerber)'s Motion for Partial Summary Judgment ECF No. [59]. As explained more fully herein, Plaintiff's motion should be denied for three reasons. First, the motion is premature because GEICO has filed a Rule 23(f) petition requesting appellate review of this Court's June 7, 2017 order on class certification and a ruling on the merits at this juncture would potentially violate the rule against one-way intervention. Second, Gerber's motion should be denied because the disputed language of GEICO's FL PIP (01-03) Amendment ("Amendment") does not address and has no effect on the insured's responsibility for the 20% copayment. Third, all GEICO PIP policies issued after January 1, 2013 contain Fee Schedule Endorsement M608 (01-13) ("Endorsement") which controls over any alleged ambiguity in the FL PIP (01-03) Amendment and clearly states that

GEICO will pay no more than 80% of a reasonable charge. GEICO requests a hearing on this matter because the motions concern a dispositive issue of law and this Court's ruling will directly impact the many thousands of claims of the individual class members.

STATEMENT OF MATERIAL FACTS
(S.D. Fla. L. R. 56.1)

1. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 1.

2. GEICO agrees with Plaintiff's statement at ECF No. [59] at ¶ 2.

3. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 3 except that the complete copy of the policy is filed at ECF No. [67-1].

4. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 4 except that the relevant policy provisions are located at ECF No. [67-1] at 12-18, 29-39, 51-52.

5. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 5 except that the relevant policy provisions are located at ECF No. [67-1] at 12-18, 29-39, 51-52.

6. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 6 except that the relevant policy provision is located at ECF No. [67-1] at 31.

7. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 7.

8. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 8 except to the extent that the provisions of the FL PIP (01-13) amendment were clarified by the M608 (01-13) endorsement. *See* ECF No. [67-1] at 51-52.

9. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 9.

10. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 10.

11. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 11.

12. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 12.

13. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 13.

14. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 14.

15. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 15 except that Reason Code "BA," which stands for "Billed Amount," is not utilized to pay, limit, reduce, or calculate PIP and/or Medpay insurance claims. Rather, Reason Code "BA" is only an explanation code. "BA" is generated on Explanation of Review forms after a particular claim line meeting certain criteria is processed. For example, the FLPIP policy for medical benefits incorporates a 20% co-insurance amount applicable to all Personal Injury Protection benefits. (The co-insurance amount can be reduced by the insured's purchase of additional coverage.). Thus, where the co-insurance amount is not reduced by additional coverage (i.e. MedPay and/or Additional PIP) AND assuming that no other reasons for denying or reducing a particular claim line exist – for those charges received which are less than the schedule of maximum charges (as detailed in the FLPIP policy) and/or less than the maximum reimbursable allowance under the workers' compensation fee schedule (as detailed in the FLPIP policy) -- GEICO will issue a draft (in this case directed to the medical provider) representing 80% of the billed amount. GEICO will then generate an Explanation of Review document containing the "BA" reason code for that particular line item charge. *See* Defendant's Answers to Plaintiff's Interrogatories at 1, 4.

16. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 16.

17. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 17 except that for charges exceeding the fee schedule, GEICO is only required to pay 80% of the fee schedule rate. This assumes that no other reasons exist for denying or reducing the claim. *See* ECF No. [67-1] at 12-18, 29-39, 51-52.

18. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 18.

19. GEICO agrees with Gerber's statement at ECF No. [59] at ¶ 19.

20. The 2012 amendment to section 627.736(5)(a)5., Florida Statutes, 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).

21. 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.

22. All GEICO PIP policies issued after January 1, 2013 contain Fee Schedule Endorsement M608 (01-13) which states that GEICO "will limit reimbursement to 80 percent of a properly billed reasonable charge, but in no event will [GEICO] pay more than 80 percent of" the statutory fee schedules. ECF No. [67-3] at 2.

23. GEICO "issued or mailed the M608 (01-13) Endorsement to all policyholders for all new business effective on and after January 1, 2013 and renewal policies effective on and after January 1, 2013." ECF No. [67-3] at 2.

24. GEICO's M608 (01-13) Endorsement substantially adheres to the OIR-12-02M form language and was approved by the Office of Insurance Regulation. [67-1] at 51-52; [67-3] at 2; [67-4] at 1.

25. Gerber's second amended complaint seeks class certification under Rule 23(b)(2) or alternatively Rule 23(b)(3) and also asks this Court to require notice to all class members. ECF No. [23] at ¶¶ 28-30 and p.12.

26. On June 7, 2017, this Court issued an order granting Gerber's motion to certify the class under Rule 23(b)(2). *A&M Gerber Chiro., LLC v. GEICO Gen. Ins. Co.*, Case No. 16-cv-62610, 2017 U.S. Dist. LEXIS 87029 (S.D. Fla. June 7, 2017), ECF No. [65].

27. Pursuant to Rule 23(f), GEICO filed a petition for permission to appeal the class certification order. *See GEICO General Ins. Co. v. A&M Gerber Chiropractic, LLC*, Case No. 17-90015 (11th Cir.) which is pending at this time.

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. When deciding whether summary judgment is appropriate, all evidence and reasonable factual inferences drawn therefrom are reviewed in a light most favorable to the non-moving party." *Witter v. Delta Airlines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998) (citations and quotations omitted); *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1325-26 (11th Cir. 2005).

ANALYSIS

For the reasons stated herein, GEICO respectfully requests that this Court deny Gerber's motion for summary judgment.

I. Gerber's motion for summary judgment is premature.

First, this Court should deny Gerber's motion for summary judgment as premature because GEICO has filed a Rule 23(f) petition requesting appellate review of this Court's June 7, 2017 order on class certification which is pending at this time. GEICO contends that the class is not certifiable under Rule 23(b)(2). If the appellate court agrees and reverses the certification order, Plaintiff may seek certification under its alternatively pled Rule 23(b)(3) theory which affords opt-out rights to putative class members. Thus, a ruling on the merits at this juncture

would potentially violate the rule against one-way intervention. *See Alhassid v. Bank of Am., N.A.*, CASE NO. 14-CIV-20484-BLOOM/Valle, 2015 U.S. Dist. LEXIS 185092 (S.D. Fla. 2015).

" 'One-way intervention' occurs when the potential members of a class action are allowed to 'await . . . final judgment on the merits in order to determine whether participation [in the class] would be favorable to their interests.' " *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1252 (11th Cir. 2003) (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)). "The result is that putative class members can simply observe the proceedings without assuming any risk that their individual claims may be precluded by an adverse ruling on the merits." *Newton v. S. Wood Piedmont Co.*, 163 F.R.D. 625, 630 (S.D. Ga. 1995) *aff'd*, 95 F.3d 59 (11th Cir. 1996). "That is, because without class certification, the absent plaintiffs would not be bound by the court's ruling on the merits." *Alhassid*, 2015 U.S. Dist. LEXIS 185092. "Rule 23(c)(2)'s requirement that, in opt-out class actions, notice be given to all class members as soon as practicable was intended by Congress to prevent one-way intervention." *London*, 340 F.3d at 1252-53 (citing *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("[D]istrict courts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified.")).

For example, in *Alhassid*, the plaintiff filed a motion for summary judgment while its motion for class certification was pending. The defendant moved to strike the motion for summary judgment as premature. This Court granted the defendant's motion to strike, finding that the motion for summary judgment violated the rule against one-way intervention. This Court reasoned:

> [T]here exist virtues of addressing class certification before there is an adjudication on the merits. It promotes judicial efficiency by postponing merits

> rulings until such time as all potential parties may be bound by the court's rulings. In addition, it promotes fairness by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings. . . . [T]he Motion for Summary Judgment seeks rulings on the named Plaintiffs' individual claims which Plaintiffs may later seek to apply to now-putative class members if the Court grants class certification. This implicates both the economy and fairness issues which the rule against one-way intervention protects.

Alhassid, 2015 U.S. Dist. LEXIS 185092 at *4-5.

Similarly, in this case, Gerber's motion for summary judgment should be denied until the appellate proceedings under Rule 23(f) are concluded. As stated, Gerber's amended complaint seeks certification under rule 23(b)(2) or alternatively 23(b)(3). GEICO disputes that the class can be certified under rule 23(b)(2) will seek appellate review on that issue. There does not appear to be any appellate authority from the Eleventh Circuit authorizing certification of a class under Rule 23(b)(2) for declaratory relief where the obvious purpose is to enable class members to assert individual claims for money damages over which the Court would lack jurisdiction. This Court's certification order relies on other district court decisions (ECF No. [65] at 18) but the legal issue does not appear to have been resolved by the Eleventh Circuit. Thus, interlocutory review is appropriate here because it involves an unsettled legal issue whose resolution will help resolve the case. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) ("[I]nterlocutory review under Rule 23(f) seems more appropriate if the unsettled issue relates specifically to the requirements of Rule 23 or the mechanics of certifying a class, given that one of the primary justifications for Rule 23(f) was a concern over the perceived lack of a substantial body of case law addressing the Rule 23 standards.").

If the appellate court rules that the class cannot be certified under rule 23(b)(2), then presumably Gerber will proceed on its alternative claim for class certification under rule 23(b)(3) which requires notice and affords opt-out rights to the putative class members. *See* Fed. R. Civ.

P. 23(c)(2)(B). Thus, ruling on the policy interpretation issue at this juncture will permit putative class members to "simply observe the proceedings without assuming any risk that their individual claims may be precluded by an adverse ruling on the merits." *Alhassid*, 2015 U.S. Dist. LEXIS 185092 (quoting *Newton*, 163 F.R.D. at 630). Therefore, this Court should deny Gerber's motion for summary judgment.

II. Gerber's Interpretation is Incorrect.

If this Court intends to rule on the merits of the policy interpretation issue before the Rule 23(f) proceeding concludes, it should deny Gerber's motion for summary judgment because Gerber's interpretation of the disputed language in GEICO's FL PIP (01-13) Amendment is incorrect.

A. Rules of Policy Interpretation

"Because federal jurisdiction over this matter is based on diversity, Florida law governs the determination of the issues on this appeal." *State Farm Fire and Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004). Under Florida law, "[t]he central concern in interpreting insurance contracts is the intent of the parties." *Travelers Ins. Co. v. Bartoszewicz*, 404 So. 2d 1053, 1054 (Fla. 1981) (citing *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla.1979). "Florida courts start with the plain language of the policy as bargained for by the parties." *Steinberg*, 393 F.3d at 1230. "If that language is unambiguous, it governs." *Id.* "If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous, and must be interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Id*. (quoting *Auto-Owners Ins. Co. v Anderson*, 756 So. 2d 29, 34 (Fla. 2000)) (internal quotation marks omitted). "However, the directive to

interpret insurance policies liberally in favor of the insured applies '[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction.' " *Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1220 (11th Cir. 2015) (quoting *Excelsior Ins. Co. v Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979)). "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.' " *Id.* (quoting *Dahl-Eimers v. Mut. Of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993)). "[C]ourts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 965 (11th Cir. 2014) (quoting *Taurus Holdings, Inc. v. U.S. Fidelity and Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)) (internal quotation marks omitted).

Further, "where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become a part of the contract." *Grant v. State Farm Fire & Cas. Co.*, 638 So. 2d 936, 938 (Fla. 1994) (quoting *Standard Marine Insurance Co. v. Allyn*, 333 So. 2d 497 (Fla. 1st DCA 1976)). "Any 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." § 627.7402(2), Fla. Stat. "Legislative intent, as always, is the polestar that guides a court's inquiry under the Florida No-Fault Law . . . ." *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82, 85 (Fla. 2001). "Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law." *Id.*

B. The FL PIP (01-13) Amendment

With these general concepts in mind, the GEICO FL PIP (01-13) Amendment states in pertinent part:

> PAYMENTS WE WILL MAKE
>
> The Company will pay in accordance with the Florida Motor Vehicle No Fault Law (as enacted, amended, or newly enacted), and where applicable in accordance with all fee schedules contained in the Florida Motor Vehicle No Fault Law, to or for the benefit of the injured person:
>
> (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 sub-sub-subparagraphs (II) and (III).
>
> . . .
>
> However, if such services, supplies, or care is not reimbursable under Medicare Part B (as provided in section (A)6. above), we may limit reimbursement to eighty percent (80%) of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 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 is not required to be reimbursed by us.
>
> . . .
>
> **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).

The FLPIP (01-13) Amendment essentially reproduces, incorporates, and adopts the nearly identical language of section 627.736(5)(a), Florida Statutes, which states in pertinent part:

> 1. The insurer may limit reimbursement to **80 percent** of the following schedule of maximum charges:
>
> . . .
>
> f. 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 sub-sub-subparagraphs (II) and (III).
>
> . . .
>
> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 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 is not required to be reimbursed by the insurer.
>
> . . .
>
> 5. 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. **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.**

§ 627.736(5)(a), Fla. Stat. (emphasis added). Thus, for all intents and purposes, an interpretation of GEICO's FL PIP (01-13) Amendment is also an interpretation of section 627.736(5)(a)5. which would apply to all Florida PIP insurers.

C. The Two-Step Process for Adjusting Claims

In interpreting the PIP statute, the Florida Supreme Court has held that "the PIP statute sets forth a basic coverage mandate: every PIP insurer is required to . . . reimburse **eighty**

percent of 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.

Each of these steps will be addressed in turn.

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 ("[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."). For example, in *Allstate*, No. SC15-2298, 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.* (emphasis added).

Because section 627.736(5)(a)5 utilizes the same kind of permissive language which, according to *Virtual*, requires policy amendment and election, 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." FLPIP (01-13) at 3. In this case, Gerber does not dispute that GEICO's policy properly elected the statutory fee schedule. 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 paragraphs (1)(a) & (b) of section 627.736. *See Allstate Ins. Co. v. Jones*, 700 So. 2d 110, 111 (Fla. 1st DCA 1997); *see also 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 this case, the parties agree that Conor 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* ECF No. [67-1] at 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% copayment for all charges not exceeding 200% of Medicare Part B. However, contrary to Gerber's argument, the 2012 amendment adding section 627.736(5)(a)5 did not address coinsurance provisions and Gerber has presented no legislative history suggesting that the legislature intended for this amendment to alter the applicability of PIP coinsurance. The disputed provision of GEICO's policy simply notifies providers that charges not exceeding the fee schedule "shall be paid" in the amount of the charge submitted. It does not address how much "shall be paid" by GEICO and how much "shall be paid" by the insured. To determine this ratio, the Court must look to the coinsurance provisions of the statute and policy which in this case, clearly show that all reimbursements are subject to a 20% copayment. The coinsurance provisions of the policy are not implicated or affected by the disputed language. *See* 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)).

Gerber claims that the disputed provision creates an exception to the PIP coinsurance percentage requiring the insurer to provide coverage for uncontracted risk; coverage for which

the insured has not paid. *See QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, Inc.*, 94 So. 3d 541, 554 (Fla. 2012). Such a result changes the apportioned risk between the insured and insurer as determined by the application of coinsurance, a basic principle of insurance law already embodied in the Florida Motor Vehicle No-Fault Law. Accordingly, Gerber's interpretation would not serve the goals of having the insured share in the risk and threatens to render coinsurance a nullity in this context. 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 v. Gov't Emples. Ins. Co.*, 993 So. 2d 597, 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). This Court should reject Gerber's strained interpretation of the policy language which reads a nonexistent coinsurance waiver into the policy language.

Further, "[i]t 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	Maximum reasonable charge pursuant to 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

"[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% copayment provision.

After the 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).

A similar situation was presented in *Millennium Diagnostic Imaging Ctr., Inc. v. Sec. Nat'l Ins. Co.*, 882 So. 2d 1027 (Fla. 3d DCA 2004). In 2001, the Legislature enacted section 627.736(5)(b)5 to provide consumer price index (CPI) adjustments for magnetic resonance imaging (MRI) reimbursements in PIP claims. *Altamonte Springs Imaging, L.C. v. State Farm Mut. Auto. Ins. Co.*, 12 So. 3d 850, 852 (Fla. 3d DCA 2009). Although the statutory language was refined over the next few years, a number of PIP insurers and MRI providers sparred over the manner in which the CPI adjustments should be computed and paid. *Id.* at 857. The Third District settled the issue by finding the legislative history and language of the 2003 amendment to section 627.736(5)(b)5 was a clarification of the legislature's original intent and not a substantive change. *Millennium*, 882 So. 2d at 1029 ("Given the cavalcade of litigation regarding this issue, we believe that the amendment was enacted as a clarification of the legislature's intent

on what an 'allowable amount' would be.") (citation omitted). The Third District also looked to the legislative staff analysis to the amendment which stated that "[t]he bill *clarifies* that the allowable amounts for medically necessary nerve conduction tests, under specified conditions, will be under the 'participating physician fee schedule' of the Medicare Part B fee schedule and adjusted annually on August 1 to reflect the prior calendar year's changes in the Medical Care Item of the Consumer Price Index (CPI) for All Urban Consumers in the South Region as determined by the Bureau of Labor Statistics. The CPI provisions also pertain to MRI services." *Id.* (quoting Senate Staff Analysis and Economic Impact Statement, CS/SB 32-A, § 8 (2003)). Thus, the Third District concluded that "the purpose of the amendment was to clarify that the participating fee schedule was the proper fee schedule under the original statute." Id. at 1030 (citing *Gay v. Canada Dry Bottling Co.*, 59 So. 2d 788, 790 (Fla. 1952) (holding that the interpretation of a statute by a legislative department goes far to remove doubt about the meaning of the law)). As in *Millennium*, this Court should consider the legislative and legal history surrounding the enactment of section 627.736(5)(a)5.

Because Gerber's interpretation of the policy language finds no support in the language of the statute or policy, the legislative history, or custom or usage, and leads to an absurd result, Gerber's motion for summary judgment should be denied.

III. The M608 (01-13) Fee Schedule Endorsement

Regardless of the language of the FL PIP (01-13) Amendment, Gerber's argument fails because all GEICO PIP policies issued after January 1, 2013 contain Fee Schedule Endorsement M608 (01-13) ("Endorsement") which clearly states that GEICO "will limit reimbursement to 80 percent of a properly billed reasonable charge, but in no event will [GEICO] pay more than 80 percent of" the statutory fee schedules. *See* ECF No. [67-3] at 2; [67-4] at 1. The M608 (01-13)

Endorsement controls over any alleged ambiguity in the FL PIP (01-03) Amendment and clearly states that GEICO will pay no more than 80% of a reasonable charge.

Under Florida law, "[e]ven if there were an ambiguity between the endorsement and the body of the policy, the endorsement, which is clear, controls." *Family Care Ctr., P.A. v. Truck Ins. Exch.*, 875 So. 2d 750, 752 (Fla. 4th DCA 2004) (citing *Fireman's Fund Ins. Co. v. Levine & Partners, P.A.*, 848 So. 2d 1186 (Fla. 3d DCA 2003); *Steuart Petroleum Co. v. Certain Underwriters at Lloyd's London*, 696 So. 2d 376 (Fla. 1st DCA 1997)); *see also* 3-21 *New Appleman on Insurance Law Library Edition* § 21.02[2] (2016) ("Endorsements are also often issued to modify or remove the effect of existing terms or exclusions contained in the policy form. In these instances, such an endorsement will supersede the term or exclusion in question."). Thus, regardless of the language on page 3 of the FLPIP (01-13) Amendment, the M608 (01-13) Fee Schedule Endorsement controls. The M608 (01-13) unambiguously states that GEICO will pay no more than 80% of a provider's charge.

Gerber does not address the M608 (01-13) Endorsement in its motion for summary judgment. In fairness, this is probably because Gerber prematurely filed its motion for partial summary judgment before obtaining a certified copy of Conor Carruthers' insurance policy. Instead, Gerber relies solely on ECF No. [27-1] which is the FL PIP (01-13) Amendment but is not a complete copy of Carruthers' PIP policy. GEICO has filed a complete certified copy of Carruthers' PIP policy. ECF No. [67-1]. GEICO has also provided an affidavit of its Manager of Underwriting Research Danielle Franklin explaining that GEICO "issued or mailed the M608 (01-13) Endorsement to all policyholders for all new business effective on and after January 1, 2013 and renewal policies effective on and after January 1, 2013." ECF No. [67-3] at 2.

Accordingly, the M608(01-13) Endorsement is part of Carruthers' policy and the policies of all putative class members.

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 (available at http://www.floir.com/siteDocuments/OIR-12-02M.pdf (last visited June 8, 2017)).[1] GEICO's M608 (01-13) Endorsement substantially adheres to the OIR-12-02M form language and was approved by the Office of Insurance Regulation.

Given the foregoing, Gerber's motion for summary judgment should be denied because it has not met its summary judgment burden of proving the nonexistence of all genuine issues of material fact. *See Witter*, 138 F.3d at 1369; *Guideone Elite Ins. Co.*, 420 F.3d at 1325-26.

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

1. 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)).

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

Pursuant to the foregoing points and authorities, GEICO respectfully requests that this Court deny Plaintiff's motion for summary judgment as premature. Alternatively, GEICO respectfully requests that this Court deny Plaintiff's motion for summary judgment on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on **July 31, 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.
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