IN THE COUNTY COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
COUNTY CIVIL

HEALTHY SUNRISE, INC.,
a/a/o Joanna San Martin,

Plaintiff,

Case No. 08-8955 SP 25

v.

MERCURY INSURANCE COMPANY
OF FLORIDA,

Defendant.
_____/

FINAL SUMMARY JUDGMENT

This matter came on to be heard on July 8, 2009 on the Defendant, Mercury Insurance Co. of Florida's Motion for Summary Judgment. After having reviewed the Defendant's motion, reviewed the affidavits and exhibits in support of defendant's motion, and hearing the argument from counsel for Mercury and Healthy Sunrise, it is **ORDERED AND ADJUDGED** that Defendant's motion for summary judgment is hereby **GRANTED**.

This is an action filed by Plaintiff, Healthy Sunrise, Inc., for personal injury protection benefits arising out of a motor vehicle accident that occurred on January 5, 2008. As a result of the accident Healthy Sunrise's assignor, Joanna San Martin, was injured such that she required treatment or care with the Plaintiff from January 7, 2008 to April 14, 2008, the dates of service in dispute in this litigation. The Defendant, Mercury Insurance Company of Florida ("Mercury"), insured Joanna San Martin at the time of the subject accident under an insurance policy written on October 16, 2007 with a policy term ending April 16, 2008. At the time the policy was issued it did not provide "statutory" personal injury protection coverage because it was written during a period of time known as "the Gap."

That is, the Florida legislature repealed Florida's "old" Motor Vehicle No-Fault Law §§627.730-627.7405, effective October 1, 2007. Ch. 2003-411, §19, Laws of Fla. However, on October 11, 2007 the legislature "revived and reenacted" the "new" No-Fault Law. Ch. 2007-324, §§9-19, Laws of Fla. The "new" No-Fault Law was revived and reenacted, effective January 1, 2008, and all policies in effect on January 1, 2008 were "deemed to incorporate the provisions of the Florida Motor Vehicle No-Fault Law, as revived and amended by this act." Ch. 2007-324, §21(2), Laws of Fla. This time frame between October 1, 2007 and January 1, 2008 is the time frame commonly referred to as "the Gap." For the reasons hereafter stated, the Court finds summary judgment appropriate.

I.

FLORIDA'S REVISED AND REENACTED MOTOR VEHICLE NO-FAULT LAW: PROVIDER REIMBURSEMENT AND MEDICARE FEE SCHEDULES AND INCORPORATION OF LEGISLATIVE REVISIONS AS OF JANUARY 1, 2008.

Significantly, the legislation that revived and reenacted the No-Fault Law also contained the following provision:

> This act revives and reenacts, with amendments, the Florida Motor Vehicle No-Fault Law, which expired by operation of law on October 1, 2007. This act is intended to be remedial and curative in nature and to minimize confusion concerning the changes made by this act to ss. 627.730-627.7405, Florida Statutes. Therefore, the Florida Motor Vehicle No-Fault Law shall continue to be codified as ss. 627.730-627.7405, Florida Statutes, notwithstanding the repeal of those sections contained in s. 19, chapter 2003-411, Laws of Florida.

Ch. 2007-324, §19.

Further, in section 21 of the enacting legislation, the legislature specifically stated:

(2) 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.

...

(4) Each motor vehicle insurer shall provide personal injury protection coverage to each of its motor vehicle insureds who is subject to subsection (1) beginning on January 1, 2008. With respect to a person who does not have a personal injury protection policy in effect on such date, the initial endorsement shall not be considered a new policy and shall be issued for a period that terminates on the same date as the person's other motor vehicle insurance coverage. Except as modified by the insured, the deductibles and exclusions that applied to the insured's previous personal injury protection coverage with that insurer shall apply to the new personal injury protection coverage. The insurer is not required to provide the coverage if the insured does not pay the required premium by January 1, 2008, or such later date that the insurer may allow.

(5) No later than November 15, 2007, each motor vehicle insurer shall provide notice of the provisions of this section to each motor vehicle insured who is subject to subsection (1). The notice is not subject to approval by the Office of Insurance Regulation. The notice must clearly inform the policyholder:

(a) That beginning on January 1, 2008, Florida law requires the policyholder to maintain personal injury protection ("PIP") insurance coverage and that this insurance pays covered medical expenses for injuries sustained in a motor vehicle crash by the policyholder, passengers, and relatives residing in the policyholder's household.

....

(c) That if the policyholder already has personal injury protection coverage, that coverage will be amended effective January 1, 2008, to incorporate legally required changes without any additional premium and that the policyholder is not required to take any further action.

(d) That, if the policyholder does not currently have personal injury protection coverage, the current motor vehicle policy will be amended to incorporate the required

> personal injury protection coverage effective January 1, 2008.
> ....
> (6) This section does not apply the Florida Motor Vehicle No-Fault Law, as revived an amended by this act, prior to January 1, 2008. However, for lawsuits for injuries arising out of an auto accident that occurs between the effective date of this act and December 31, 2007, inclusive, the limitation on lawsuits and tort immunity provided in s. 627.737, Florida Statutes, shall apply if, and only if, the plaintiff and the defendant are insured for personal injury protection coverage that meets the requirements of Florida Motor Vehicle No-Fault Law that was in effect on September 30, 2007.
>
> (7) The Legislature finds that in order to protect the public health, safety, and welfare, it is necessary to revise or endorse policies in effect on January 1, 2008, to add personal injury protection coverage as required by this section, and to provide a uniform date for motor vehicle owners to obtain or continue such coverage and for insurance policies to provide such coverage. In order to avoid revising in-force policies, enforcement would depend on policyholders electing to add such coverage, or providing a nonuniform date for coverage to be mandatory as policies renew which results in unequal treatment under the law, or delaying the effective date for at least 1 year to provide a uniform date after all policies have renewed, any of which options would result in a much greater number of uninsured vehicles, an inability of accident victims to obtain medical care, a greater level of uncompensated medical care, higher costs to other public and private health care systems, and greater numbers of persons being subject to penalties for noncompliance.
> .....

Ch. 2007-324, §21, Laws of Fla. (2008). The law further provided: "This act shall take effect upon becoming a law, except that sections 8 through 20 of this act shall take effect January 1, 2008." Ch. 2008-324, §23, Laws of Fla. The act was approved by the Governor on October 11, 2007.

As noted above, section 21 of the "new" No-Fault Law required the insurers to notify the insureds that the policies would be affected by this change in the law.

Specifically, the insurance company was required to inform the insured: "... if the policyholder already has personal injury protection coverage that coverage will be amended effective January 1, 2008, to incorporate legally required changes without any additional premium and that the policyholder is not required to take any further action." Ch. 2007-324, §21(5)(c), Laws of Fla. In compliance with this provision, the insurer, Mercury, wrote to the insured and advised that the Florida Motor Vehicle No-Fault Law had been reenacted and that their policy would "automatically incorporate all changes and the "new" law without any additional premium." They further advised that "[t]here is no additional action you need to take for your policy to comply with the "new" law."

Here, Mercury's insurance policy is clear in that under Part II – Personal Injury Protection – Coverage P, the Mercury policy states, "We will pay to or on the behalf of the injured person the following benefits.... IN ACCORDANCE WITH THE FLORIDA MOTOR VEHICLE NO-FAULT LAW, *AS AMENDED*, FOR:...." (e.s.) Florida law provides that 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 and Casualty Company*, 638 So. 2d 936, 938 (Fla. 1994) (quoting *Standard Marine Insurance Co. v. Allyn,* 333 So. 2d 497 (Fla. 1st DCA 1976)).

In re-enacting the PIP statute, the legislature amended subparagraph (5) relating to "Charges for Treatment to Injured Persons" and added a new section. The new section provides in pertinent part (the new section is italicized):

> **627.736(5) Charges for treatment of injured persons.--**
>
> (a) 1. Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies

rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment, if the insured receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. In no event, however, may such a charge be in excess of the amount the person or institution customarily charges for like services or supplies. With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

2. 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 applicable Medicare Part B fee schedule.

3. For purposes of subparagraph 2., the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect at the time the services, supplies, or care was rendered and for the area in which such services were rendered, except that it may not be less than the allowable amount under the participating physicians schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.

Since the dates of service at issue in this matter took place after the inception of the "new" No-Fault Law, Mercury paid according to the Medicare Part B Participating Physicians Fee Schedule. All bills were paid at 80% of the allowed amount pursuant to Florida Statute and the Medicare Fee Schedule as outlined by Florida Statute 627.736.

Healthy Sunrise disputes that the amounts paid are correct contending that the insurer is not entitled to limit reimbursement of the charges in accordance with the Medicare Fee Schedule. Although Healthy Sunrise has not pled this issue, nevertheless

Healthy Sunrise contends that the application of the "new" Florida Motor Vehicle No-Fault Law is unconstitutional. While Healthy Sunrise's failure to plead this issue or put the Attorney General's office on notice is noted, this is not dispositive of this Court's ruling on Mercury's Motion for Summary Judgment. Rather, Mercury's motion was considered on the merits of the constitutional issues as presented by both Healthy Sunrise and Mercury.

Healthy Sunrise has urged this Court to follow that line of cases that hold the law in effect at the time the insurance contract was executed governs any issues arising under that contract. *See, e.g. Lumberman's Mutual Casualty Co. v. Ceballos*, 440 So. 2d 612 (Fla. 1993). The Court recognizes Florida's general rule that the statute in effect at the time an insurance contract is executed governs the substantive issues arising in connection with that contract. However, to apply this law in a vacuum without a full understanding of all of the applicable law would be akin to telling someone what a novel is about by just reading a sentence from the novel, but not reading the whole novel.

In this case the legislature has specifically stated that the statute should be applied to existing policies. Thus, the courts are bound to implement the legislative intent, unless to do so would violate constitutional limitations. It is critical to note, however, that courts will not attach the label of "retrospective operation" merely because the statute is applied in a case that arises out of conduct predating its enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994)). This Court finds this case to be distinguishable from those cases which apply the general rule. Rather, this Court agrees with the position taken by Mercury on this issue for the following reasons.

II.

LEGISLATIVE INTENT: ALL INSURANCE POLICIES IN EFFECT JANUARY 1, 2008 INCORPORATE THE PROVISIONS OF THE REVISED AND REENACTED NO-FAULT LAW SUCH THAT PROVIDER REIMBURSEMENT MUST BE MADE IN COMPLIANCE WITH THE STATUTE; CHANGES IN PROVIDER REIMBURSEMENT DO NOT IMPAIR CONTRACT OBLIGATIONS SINCE ANY RIGHT TO NO-FAULT BENEFITS DID NOT VEST UNTIL AFTER THE EFFECTIVE DATE OF THE REENACTED NO-FAULT LAW.

As noted above, Chapter 2007-324 expressly provided that the reenactment of the No-Fault Law was effective January 1, 2008 and specifically provided several expressions of the legislative intent that the changes be applied immediately to all No-Fault claims arising after its enactment. The treatment for which payment is sought in this action occurred after 1/1/08; accordingly, payment for such treatment is controlled by the No-Fault Law, as amended.

In section 21 of the enacting legislation, the legislature specifically stated:

> (2) 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.*

Ch. 2007-324, §21(2), Laws of Fla. (emphasis added).

Section 21 also included the following statement from the legislature:

> (7) The Legislature finds that in order to protect the public health, safety, and welfare, it is necessary *to revise or endorse policies in effect on January 1, 2008, to add personal injury protection coverage as required by this section*, and to provide a uniform date for motor vehicle owners to obtain *or continue* such coverage *and for insurance policies to provide such coverage.* ....

Ch. 2007-324, §21(7), Laws of Fla. (e.s.) The legislature therefore specifically identified the harms sought to be remedied by requiring existing policies to be modified to incorporate the changes in the law.

Moreover, section 21 also required the insurers to notify the insureds that the policies would be affected by this change in the law. Specifically, the insurance company was required to inform the insured: that coverage will be *amended effective January 1, 2008, to incorporate legally required changes* without any additional premium and that the policyholder is not required to take any further action. Ch. 2007-324, § 21(5)(c), Laws of Fla. (e.s.) All of these statements clearly indicate that the changes in the PIP statute were to be incorporated into the policies and to take effect no later than January 1, 2008. To do otherwise would lead to the exact harms sought to be avoided by the legislature.

As the Florida Supreme Court has repeatedly explained:

> Legislative intent is the polestar by which a court must be guided in interpreting the provisions of a law. In ascertaining the legislative intent, a court must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another.

Florida Dep't. of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954, 957 (Fla. 2005) (quoting *Hechtman v. Nations Title Ins. of NY*, 840 So. 2d 993 (Fla. 2003)). *See also Kasischke v. State*, 991 So. 2d 803, 828 (Fla. 2008) (Bell, J, dissenting) ("Our customary approach to statutory interpretation views legislative intent as the polestar that guides a court's statutory construction analysis."); *City of Clearwater v. Acker*, 755 So. 2d 597 (Fla. 1999); *Progressive Auto Pro Ins. Co. v. One Stop Medical, Inc.*, 985 So. 2d 10 (Fla. 4th DCA 2008) (interpreting prior amendments to provisions of section 627.736).

"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." *United Auto. Ins. Co. v. Rodriguez,* 808 So. 2d 82, 85 (Fla. 2001). Furthermore, courts must assume that statutory provisions are intended to have some useful purpose. Courts are not to presume that a statute employs "useless language." *Johnson v. Feder*, 485 So. 2d 409 (Fla. 1946). Moreover, "it is well established that when the constitutionality of a statute is at issue, courts must find the statute valid if there is any reasonable basis for doing so." *State Farm Mutual Automobile Insurance v. Warren,* 805 So. 2d 1074, 1077 (Fla. 2002). Courts must begin the constitutional analysis with a presumption that a statute is valid. *Id.* The burden of proving the unconstitutionality of a statute is upon the party challenging its validity, and this challenger must show that beyond all reasonable doubt the statute conflicts with some designated provision of the constitution. *Id.*

Here, Healthy Sunrise contends that retroactive application of the "new" Florida Motor Vehicle No-Fault Law is an unconstitutional impairment of a vested right under the contract of insurance in violation of article 1, section 10 of the Florida Constitution. A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. *DaimlerChrysler Corporation v. Hurst*, 949 So. 2d 279, 286 (3d DCA), *review denied*, 962 So. 2d 337 (Fla. 2007) (quoting *Lamb v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986)). Healthy Sunrise's argument, however, requires closer scrutiny of case law as it relates to the issues of "vesting" and "impairment" because retroactive application is constitutionally permissible if it does not violate due process by abrogating a vested right. *Promontory v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479, 485 (Fla. 5th DCA 2004).

Retrospective application of a legislative act is invalid only in cases wherein *vested* rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established in connection with previous transactions for which compensation is or may be owed. *Metropolitan Dade County v. Chase Federal Housing Corporation,* 737 So. 2d 494, 503 (Fla. 1999). *See generally* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960) ("A retroactive statute is one that gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute.").

"A vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment.'" *Promontory*, 864 So. 2d at 485 (quoting *City of Sanford v. McClelland*, 121 Fla. 253, 163 So. 513, 514-15 (1935)). " '[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand.'" *Id.* Vested rights are to be distinguished from expectant rights and contingent rights.

Rights are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence upon the occurrence of a relevant and material event or condition which may not happen or be performed until some other event may prevent their vesting. *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1218 (Fla. 2d DCA 2004) (quoting *Pearsall v. Great N. Ry.*, 161 U.S. 646, 16 S. Ct. 705, 40 L. Ed. 838 (1896)).

In the instant case, Healthy Sunrise's right to collect reimbursement under the policy was contingent upon its assignor experiencing a covered event such as a motor vehicle accident, and seeking reasonable, related and necessary treatment under the personal injury protection coverage as the result of the motor vehicle accident. In this case, the assignor's motor vehicle accident occurred in January of 2008 and in January of 2008 Ms. San Martin sought treatment with Healthy Sunrise. Prior to the occurrence of the accident, assignee Healthy Sunrise's right to recover under the "old" personal injury protection coverage was only an expectant right in that its right to recover rested on the mere expectation of a continuance of the law and the policy staying "as is" until the accident occurred. *See Div. of Workers' Comp., Bureau of Crimes Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982) ("[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand, ...").

Section 627.736(5), Florida Statutes (2008) does not alter vested rights, but merely outlines the method for calculation of reimbursement of reasonable charges presented by providers of medical services and treatment, which is consistent with the previous version allowing providers to charge only a "reasonable amount" for services and supplies rendered. *See Fla. Stat.* §627.736 (5)(a) (2007). The revised section neither creates a new right nor eliminates an existing right, and any rights the provider may have had did not vest until after January 1, 2008. If a statute does not alter vested substantive rights, then it applies retroactively. *Ace Disposal v. Holley*, 668 So. 2d 645, 646 (Fla. 1st DCA 1996).

The assignor's only vested right under the contract in this case is $10,000.00 in benefits for bodily injury arising out of the ownership, maintenance, or use of a motor

vehicle. *Fla. Stat.* §627.736(1) (2008). *See American Bankers Ins. Co. v. Little*, 393 So. 2d 1063, 1065 (Fla. 1980) (claimants only vested right is to receive a certain total dollar amount in combined state and federal disability payments and neither suffered diminution of those benefits by subsequent enactment and implementation of offset in source of payments). With this in mind, it cannot fairly be said that the law in effect at the time the insurance contract was entered into etched in stone any particular vested reimbursement entitlement to providers of medical treatment and services. Nothing in limiting reimbursement based on percentages of Medicare fee schedules affected the validity, construction, or enforcement of the contract. The legislature clearly stated the purpose of the revived and reenacted PIP statute was curative and remedial.

In addressing the issue of "vesting," the first inquiry involves a question of statutory construction and legislative intent. If the legislature clearly expresses an intent that the statute applies retroactively, the court must determine whether retroactive application is constitutionally permissible. *Metropolitan Dade,* 737 So. 2d at 499. As it relates to the "new" Florida Motor Vehicle No-Fault Law there is no question but that it was the intent of the Florida legislature for the "new" statute to be incorporated into every personal injury protection policy "in effect on or after January 1, 2008...". *Fla. Stat.* §627. 7407(2) (2008).

Having established the legislative intent for the "new" law to apply to policies such as the one at issue in this case, the second inquiry then must focus on that definition of a "vested" right. As previously noted a substantive vested right is "an immediate right of present enjoyment, or a present, fixed right of future enjoyment." *Promontory,* 864 So. 2d at 485. "[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or

equitable, to the present or future enforcement of a demand..." *Brevda*, 420 So. 2d at 891.

For example, in *Romine v. Florida Birth Related Neurological Injury Compensation Association,* 842 So. 2d 148 (Fla. 5th DCA 2003) a child was born with a neurological injury. The parents claimed that the neurological injury was caused by malpractice. The parents brought a malpractice claim, and after that case settled attempted to bring a claim under the Birth-Related Neurological Injury Compensation Plan (NICA). However, after the child was born with its neurological injury the NICA law changed such that it incorporated an election of remedies provision. That is, under the "new" NICA law that came into existence after the child's birth the parents would have had to collect a malpractice suit against the physician or a claim under NICA, but not both.

The *Romine* court held that to impose the election of remedies found in the new statute would result in an unconstitutional impairment of a vested right. In defining when the right became vested the court stated "[t]he date of the child's birth and the injury sustained at that birth, if any, established the right of the infant to receive NICA benefits and the scope of those benefits. Thus, we conclude the Romines had a substantive, vested right the day [the child] was born, because they had an "a present, fixed right of future enjoyment" to receive NICA benefits if she was otherwise qualified to receive such benefits." *Id.* at 154. Accordingly, to paraphrase the *Romine* court the substantive rights of the parties are fixed by the law in effect on the date of the injury.

The vesting issue was also addressed in *R.A.M. of South Florida, Inc.* In *R.A.M.* the court looked at a scenario where an unlicensed contractor entered into a contract for construction. At the time the contractor entered into the contract for construction Florida

law allowed for the contractor to "cure" his licensure. However, during the course of construction the Florida legislature repealed the "cure" provision of the statute. Thereafter, a dispute arose over the construction project wherein the contracting party sought to be relieved of the contract because the contractor was unlicensed. When the contractor attempted to "cure" his license issues, he was denied because of the change in the law. Accordingly, he claimed that a change in the law resulted in an unconstitutional impairment of his vested right to "cure."

In its decision the Second District Court of Appeal went to great lengths to analyze the legal principles governing the retroactive application of laws passed by the legislature. First, the court noted that the contractor was on "fair notice" that the statutory provision for curing its unlicensed and unlawful status was a matter of legislative grace that could be withdrawn by subsequent legislative action. The court explained that the contractor could have no "settled expectation" or claim of "reasonable reliance" based on the cure provision until the contractor had taken the steps necessary to be legally licensed.

This Court finds that vesting occurred, at the earliest, at the time of the subject loss in January, 2008. Moreover, Healthy Sunrise's vested right could not have possibly accrued until it held an assignment of benefits which occurred on January 7, 2008, the date Healthy Sunrise provided the initial date of service to Mercury's insured. It is only reasonable to assume that Healthy Sunrise was on "fair notice" that the Florida Motor Vehicle No-Fault Law had been revived and reenacted to include the applicable fee schedules.

In *Williams v. American Optical Corporation,* 985 So. 2d 233 (Fla. 4th DCA 2008) the court examined once again when a right "vests." In answering this question the

court stated the right to pursue a cause of action is generally considered to have become vested when the cause of action has accrued. A cause of action accrues when "the last element constituting the cause of action occurs." *Id.* at 30 (citations omitted). It follows that until a covered accident occurs under the policy, the insured's right to recover is "inchoate." Accordingly, the Court finds that prior to January 1, 2008 Healthy Sunrise's rights to recover were inchoate because the right to recover insurance benefits under the policy had not yet accrued and no rights had vested. *Williams,* 985 So. 2d at 27.

In summary, whether the reenacted statute violates article I, section 10 of the Florida Constitution depends on whether the statute attaches new legal consequences to events completed prior to its enactment. *Metropolitan Dade,* 737 So. 2d at 499; *R.A.M. of South Florida, Inc.*, 869 So. 2d at 1216. This Court finds the "new" statute does not attach new legal consequences to the events completed prior to its enactment. That is, when the policy was issued, Mercury agreed to pay a maximum of $10,000 for no-fault benefits. This obligation is unchanged. Mercury is still obligated to pay a maximum of $10,000 for the insured's no-fault benefits. When the policy was issued, Mercury was obligated to pay no-fault benefits for necessary, accident-related medical treatment. This obligation is unchanged. When the policy was issued, Mercury was obligated to pay the no-fault benefits within 30 days of the date the bills and supporting documentation were received, or pay interest on the overdue payments. This obligation is unchanged.

When the policy was issued, Mercury was obligated to pay 60% of any lost wages attributed to the accident. This obligation is unchanged. In sum, despite Healthy Sunrise's protestations, there has been no change to the essential contractual and statutory obligation - i.e., the obligation to pay "reasonable expenses" for "medically necessary" services. The "new" No-Fault Law merely introduces an additional fee schedule that

insurers may consider in determining a "reasonable" reimbursement amount. Accordingly, Healthy Sunrise cannot avoid the use of fee schedules in making determinations of what constitutes payment of "reasonable expenses" for "medically necessary" services in connection with this matter.

The only changes pertinent to this lawsuit and Healthy Sunrise which arise from the "new" statute relate to the amount of money that would be paid for the treatment provided to the insured. However, the policy created no legal right for any provider to be paid any specific amount of money. In fact, the policy created no legal right in any provider at the time it was issued. This provider's rights arose after the accident occurred in January of 2008 when the assignment issued and treatment was rendered. Thus, applying the statute to this claim does not apply the statute to conduct occurring before the amendment.

To conclude, it is the opinion of this Court that Healthy Sunrise's rights did not vest until January 2008, the date of the accident or loss. However, even if the right were "vested," it is the opinion of this Court that they were not "impaired" as that word is defined in Florida law.

In cases that involve a potential dispute over whether a statute constitutes an unconstitutional impairment of contract the Florida courts have adopted an analysis analogous to that used by the United States Supreme Court. *Pomponio v. Claridge of Pompano Condominium, Inc.*, 453 So. 2d 1355 (Fla. 1984). This analysis requires assessing a person's interest to have his contracts honored compared with the state's interest in exercising its legitimate police power. The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* In this matter the Florida legislature explicitly set forth that it had a public purpose in

exercising its legitimate police power. This was specifically set forth in subsection (7) of the "new" No-Fault Law wherein the Florida legislature stated "[t]he Legislature finds that in order to protect the public health, safety, and welfare, it is necessary to revise or endorse policies in effect on January 1, 2008 . . ."

State regulation that restricts a contract right does not necessarily constitute a substantial impairment. If the state regulation constitutes a substantial impairment, the state, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Here there was a social or economic problem: controlling medical charges. This issue was raised by former Governor, Jeb Bush, who vetoed proposed No-Fault legislation in 2006 because the proposed legislation did not contain fee schedules. In fact, the Medicare Part B fee schedules—albeit for MRIs and other diagnostic procedures—have been part of Florida No-Fault law since 2001.

If a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." It "is customary in reviewing economic and social regulation for the courts to defer to legislative judgment as to the necessity and reasonableness of a particular measure."

For example, in applying these factors the United States Supreme Court held that a Kansas statute which imposed price controls on the sale of intrastate natural gas differing from the prices agreed to by the parties was not an unconstitutional impairment of contract. In reaching this decision, the court emphasized "the fact that the parties [were] operating in a heavily regulated industry." *Energy Reserves Group, Inc. v. Kansas*

Power and Light Co., 459 U.S. 400, 414, 103 S. Ct. 697, 706, 74 L. Ed. 2d 569 (1983). The court also reasoned that Kansas had a legitimate state interest in exercising "its police power to protect consumers from the escalation of natural gas prices caused by deregulation." *Id.* at 459 U.S. at 416-17, 103 S. Ct. at 707.

In *USF&G v. Department of Insurance,* 453 So. 2d 1355 (Fla. 1984) the Florida Supreme Court reviewed a scenario where the Florida legislature amended the law requiring an insurer to refund excess profits. The Florida high court held that amendments to the statute governing excess profits realized by motor vehicle insurers, which amendments authorized the Department of Insurance to order refunds of excess profits earned during the three years prior to the amendment, did not constitute an unconstitutional impairment of contract, or violate due process or equal protection.

According to the Court, insurance is a "heavily regulated industry." The panel specifically referred to the Florida Insurance Code, Chapters 624-632, Florida Statutes. The Court noted that for years the legislature has regulated the contents of insurance policies and has authorized the Department to approve or disapprove insurance policy forms. The Court found that when chapter 77-468, Laws of Florida was enacted, insurers were put on notice that any funds received exceeding 5% of their anticipated profits under the statute might be subject to refund orders and therefore they did not obtain a vested right to those funds. The Court explained that since the insurers knew when they entered into these contracts that excess profits might have to be refunded, the statute does not operate as a substantial impairment of a contractual relationship.

Finally, the Court noted that what minimal impairment does exist is outweighed by the state's interest in eliminating unforeseen windfall profits. This Court finds that here the insured knew when it entered into the insurance contract that the "new" No-Fault

Law had been enacted, and that it would be fully incorporated into the policy as statutory personal injury protection coverage on January 1, 2008.

Other Florida courts have consistently approved the application of a statutory amendment to existing insurance policies where the legislature expressly intended that the statute be so applied. *See, e.g. Ruhl v. Perry*, 390 So. 2d 353 (Fla. 1980) (statutory change of limitations period, which shortened contractual limitations period, did not violate Contracts Clause); *Gillette v. State Farm*, 374 So. 2d 525 (Fla. 1979); (statute prohibiting stacking of UM coverage did not impair rights of persons to freely contract); *Manning v. Travelers*, 250 So. 2d 872 (Fla. 1971) (statute imposing minimum limitations period for UM contracts did not impair substantive rights of parties to existing contracts, and therefore did not violate Contracts Clause).[1]

WHEREFORE IT IS ORDERED AND ADJUDGED that the fee schedule established by the 2008 No-Fault Law, as amended, should apply to all treatment rendered after January 1, 2008, the effective date of the statute. The Court finds the legislature clearly expressed its intent that the amendments be applied to all no-fault claims after January 1, 2008. The treatment in issue in this case occurred after January 1, 2008 and thus the amendments should be applied to this treatment.

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[1]The "new" PIP statute does not compare with the substantive, rights-changing statutory revisions that Florida courts have declined to apply to existing insurance contracts. *See,* e.g. *Hassen v. State Farm Mut. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996) (provision substantially changing obligation of UM insurer to pay additional money where it refused to authorize settlement with underlying liability insurer); *State Farm Mutual Auto Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (provision significantly expanding categories of recoverable damages in UM bad faith case cannot apply retroactively to acts performed before the law penalized such acts); *Allstate Ins. Co. v. Garrett*, 550 So. 2d 22 (Fla. 2d DCA 1989) (provision imposing additional obligations on insurer regarding when and under what circumstances insurer can terminate or withdraw future PIP benefits); *Lumbermens Mut. Cas. Co. v. Ceballos*, 440 So. 2d 612 (Fla. 3d DCA 1983) (post underwriting provision adding additional policy application obligations on insurer where it failed to advise insureds of need for collateral coverage to pay for deductible).

IT IS FURTHER ORDERED AND ADJUDGED that no further payments are due and owing from the defendant insurer, Mercury Insurance Company of Florida, and as such, Mercury is entitled to final summary judgment. **WHEREFORE** final summary judgment is hereby entered in favor of the defendant, Mercury Insurance Company of Florida and it shall go hence without day. Healthy Sunrise shall take nothing from this action. The court reserves jurisdiction to determine taxable fees and costs.

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Judge Andrew S. Hague

Judge Andrew S. Hague

cc: Scott W. Dutton, Esq.
Neil M. Gonzalez, Esq.