

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 09-60902-CIV-UNGARO

ALL FAMILY CLINIC OF DAYTONA
BEACH INC.,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INS., CO.,

Defendant.

ORDER ON MOTION TO CERTIFY

THIS CAUSE is before the Court upon Defendant's Motion to Certify this Court's February 11, 2010 Order for Appeal under 28 U.S.C. § 1292(B) and to Stay Litigation Pending Appellate Review, filed February 25, 2010 (D.E. 54). Plaintiff responded in opposition on March 1, 2010 (D.E. 56), to which Defendant replied on March 8, 2010 (D.E. 59).

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. By way of background, on February 11, 2010, the Court entered its Order on the parties' cross motions for summary judgment, finding that Florida's No-Fault¹ unambiguously identifies the participating physicians schedule as the appropriate schedule for determining MRI reimbursements and Defendant's reliance on the OPPS schedule is inappropriate. (D.E. 52.) Defendant now requests the Court to stay this litigation and certify its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Section 1292(b) requires that a party show that (1) "such order involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Eleventh Circuit has determined that interlocutory appeal should be granted only on (1) pure questions of law, (2) which are controlling of at least a substantial part of the case, (3) and which are specified by the district court in its order, (4) and about which there are substantial grounds for difference of opinion, (5) and whose resolution

¹ Defined terms shall have the meaning ascribed to them in the Court's Order on Cross-Motions for Summary Judgment (D.E. 52).

may well substantially reduce the amount of litigation necessary on remand. *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1264 (11th Cir.2004).

Defendant argues that the Court's February 11, 2010 Order is "tailor-made" for interlocutory review because the question of whether it properly took in account the OPPS adjustment under Florida's No-Fault Statute is a "controlling issue of law," there are diverging authorities on the propriety of a PIP insurer's use of the OPPS cap, and an immediate appeal will materially advance the ultimate termination of litigation because an appellate decision in Defendant's favor would moot the pending motion for class certification in this case and avoid further litigation costs. This Court agrees. It has considered but is not persuaded by Plaintiff's response in opposition to the Motion. Plaintiff cannot dispute that the issue decided in the Court's February 11, 2010 Order is a threshold question in this case and a matter of statutory interpretation that courts have disagreed on. Plaintiff also cannot dispute that a ruling in Defendant's favor would avoid the expense of class certification proceedings, and with it, the possible expense of class notice and discovery.

Accordingly, the Court finds that the resolution on appeal of the issue presented in the parties' cross motions for summary judgment motion and the Court's February 11, 2010 ruling is proper. It is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Certify (D.E. 54) is GRANTED. Interlocutory appeal of this Court's February 11, 2010 Order is permitted, and the Order is hereby amended by inserting the following statement:

In this Court's view, the question of whether Defendant's decision to reimburse Plaintiff in the amount of the OPPS cap was proper under Florida's No-Fault Statute, § 627.736, is a controlling question of law as to which there is a substantial ground for difference of opinion; therefore, an immediate appeal may materially advance the ultimate termination of this litigation.

It is further

ORDERED AND ADJUDGED this case is STAYED pending a decision from the Eleventh Circuit. The parties shall promptly inform this Court of any ruling on this matter from the Eleventh Circuit.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of March, 2010.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record