IN THE COUNTY COURT OF
THE SEVENTEENTH JUDICIAL CIRCUIT, IN
AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 08-14117 COCE (53)
JUDGE: ROBERT W. LEE

MRI SERVICES, I, LLC, d/b/a
C & R IMAGING OF HOLLYWOOD,
as assignee of Yunona Baranovskaya,
Plaintiff,

vs.

MERCURY INSURANCE COMPANY OF FLORIDA,
Defendant
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on October 28, 2009 for hearing of the Defendant's Motion for Summary Judgment, and the Court's having reviewed the Motion, the entire Court file, and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, the Court finds as follows:

Background: This case involves a relatively narrow issue: which "fee" applies from the Medicare Part B participating fee schedule for payment of an MRI bill in a PIP case. Notwithstanding recent efforts of the Florida Legislature to simplify payment amounts due under the PIP statute, the parties have pointed out this one contentious area where confusion unfortunately continues to have a hold.

The Plaintiff MRI provider rendered services on May 2, 2008 to the insured patient, Yunona Baranovskaya. The Plaintiff filed this lawsuit after Mercury paid less for magnetic resonance imaging ("MRI") than what the Plaintiff billed. According to the Plaintiff, Mercury

failed to pay "the allowable amount of the participating physicians schedule under Medicare Part B," as required by Section 627.736(5), Florida Statutes (2007-2008), and instead based its payment on the lower amount specified in Medicare's "OPD fee schedule," which pertains to the Hospital Outpatient Prospective Payment System ("OPPS"). On the other hand, Mercury argues that the "allowable amount" referred to in the statute is the OPPS amount which is included as part of the participating physicians schedule for MRIs.

The crux of this dispute is whether the statutory language "allowable amount of the participating physicians schedule" refers to: (a) the amounts listed in "the participating physicians schedule for Medicare Part B" as the "Non-Facility Price," or (b) the amounts listed in "the participating physicians schedule for Medicare Part B" as the "OPPS Non-Facility Payment Amount" that the federal government is required to pay Medicare recipients.

The Plaintiff contends that the Florida PIP statute expressly requires Mercury to calculate benefits based on a specific fee schedule amount, and does not authorize Mercury to limit, restrict, or otherwise cap that fee schedule amount by rules or procedures that the federal government uses when it limits or restricts Medicare benefits, such as the "special rule" promulgated for MRI services.

On February 17, 2009, Mercury served its motion for summary judgment, claiming that it reimbursed the MRI provider in accordance with Section 627.736(5)(a), Florida Statutes (2007-2008), because it paid the MRI provider according to Medicare's Outpatient Prospective Payment System (OPPS) cap amount. As explained below, Mercury's motion should be granted.

Conclusions of Law. To analyze this issue, the Court initially looks at the controlling language of the statute:

> The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> [. . .] 200 percent of the *allowable* amount under the participating physicians schedule of Medicare Part B.

Fla. Stat. §627.736 (5)(a)(2) (2008) (emphasis added).

Importantly, the statute does not obligate the insurer to pay what is listed on the participating physicians schedule of Medicare Part B; rather, the statute requires that the insurer pay what is "allowable" under that schedule. The insurer is not obligated to pay the "full" fee schedule amount, as argued to the contrary by the Plaintiff.[1] Moreover, the word "full" does not appear in the Florida Statute; rather, the word "allowable" appears.

The word "allowable" is not defined in the statute. Its ordinary meaning is "to provide," as in, to provide the needed amount. *See* American Heritage Dictionary of the English Language 35 (1976). Therefore, the statute is consistent with the Defendant's position that the amount due under the fee schedule is the amount that is actually "allowed" to the provider. If the Florida Legislature had not intended to have the word "allowable" mean anything, it could have just as easily eliminated the word from the statute. The word is there, however, and its placement is not viewed by this Court as an accident.

The Medicare rules provide a formula to calculate the amount payable (allowable) for an MRI. *See* 42 USC §1395w-4(4)(A).[2] Although the formula references "hospital outpatient

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[1] Indeed, the CMS refers to the "Non Facility Fee Schedule Amount" as being the "full fee schedule amount" subject to the application of the OPPS cap for an MRI. *See* Annual Physician Fee Schedule Payment Amount File (Downloadable Version) Calendar Year 2009.

[2] This section of the federal statute reads:

> (4) Special rule for imaging services
> (A) In general

department services" as part of the formula, the context of the rule clearly does not limit the resulting calculation only to MRIs provided in a hospital outpatient setting. Under the federal statute, the amount to be paid (the "allowable" amount) is the lesser amount of two calculations. Both of these amounts appear in the participating physicians fee schedule. In the case of the Fort Lauderdale geographic area, the lesser amount is the OPPS amount. As the parties conceded at the hearing, in other geographic areas, the lesser amount may instead be the Non-Facility amount. In the Court's view, the amount required to actually be paid under the schedule is the "allowable" amount, and as a result, the amount on which to base payment in a Florida PIP case.

The Plaintiff goes to great lengths to discuss the Legislature's clarification of an earlier version of this statute when the Legislature added the expression "participating physicians schedule." The Plaintiff argues that this clarification reveals the Legislature's intent that the fee schedule be looked at to determine the amount to be paid. In the Court's view, this discussion misses the mark. There is no dispute that the fee schedule is to provide the determinative amount. Rather, the dispute is what figure to use when the fee schedule provides more than one amount.

In the case of imaging services described in subparagraph (B) furnished on or after January 7, 2007, if –

(i) the technical component (including the technical component portion of a global fee) of the service established for a year under the fee schedule described in paragraph (1) without application of the geographic adjustment factor described in paragraph (1)(C), exceeds

(ii) the Medicare OPD schedule amount established under the prospective payment system for hospital outpatient department services under paragraph (3)(D) of section 1395l(t) of this title for such service for such year, determined without regard to geographic adjustment under paragraph (2)(D) of such section,

the Secretary shall substitute the amount described in clause (ii), adjusted by the geographic adjustment factor described in paragraph (1)(C), for the fee schedule amount for such technical component for such year.

The Court notes that this statute clearly reveals that the "Medicare OPD fee schedule" is merely part of the formula to calculate the amount due for an MRI; the OPD fee schedule is not, as the Plaintiff suggests, the same as the OPPS resulting calculation under the participating physicians fee schedule for an MRI.

Once it is determined what the "allowable" amount is that is due under the fee schedule, then that figure is the "maximum" amount that the insurer *must* pay. The insurer "may" pay more than that amount if desired. *See* Fla. Stat. §627.736(5)(a)(2) (2008).

The Plaintiff argues that the "full fee amount" and the "OPPS fee schedule" are actually two separate fee schedules, with the latter being based on a calculation involving the former. The unrebutted evidence establishes, however, that the OPPS fee amount is in fact either the actual "participating physicians schedule" amount; or one of at least two amounts which are part of the participating physicians schedule, with the OPPS amount being the amount "allowed" to physicians in some geographic areas. The unrebutted evidence presented to the Court is that both of these amounts are considered by the Centers for Medicare & Medicaid Services (CMS) to be part of the "participating physicians schedule." The Legislature specified that the amount to be paid would be the "allowable amount due" under this schedule. Only one of these amounts is allowable, and the OPPS happens to be the allowable amount for the Fort Lauderdale geographic area.

The parties agree that the "Physicians Fee Schedule" is now available only online. Additionally, both parties produced to the Court the results of a Fee Schedule search for the CPT codes at issue in this case. The results clearly demonstrate that several amounts are listed on the "Physicians Fee Schedule" for an MRI. However, only one of these amounts is "allowable" for the Fort Lauderdale area – the OPPS amount.

The Plaintiff further argues that the OPPS payment amount is implemented by means of a "special rule" or as Plaintiff calls it, a "payment limitation" that is exempt from application under the Florida PIP statute. The Court does not view subsection (5)(a)(4) of the statute[3] as being

[3] The section reads:

applicable to this situation because the "special rule" in question in the Medicare fee schedule is neither a "limitation on the *number* of treatments or other *utilization* limits," nor a "restriction or limitation on the *type* or *discipline* of health care providers" (emphasis added). Rather, the special rule is a means to calculate the fee due unrelated to these statutory parameters. The "special rule" applies to *all* MRIs, regardless of the type or discipline of the provider utilizing the tool. In this regard, this Court respectfully disagrees with the contrary conclusion reached by the Honorable William P. Levens in *AFO Imaging, Inc. v. Alpha Property & Casualty Ins. Co.*, 16 Fla. L. Weekly Supp. 533 (13th Cir. Ct. 2009). Accordingly, it is hereby

ORDERED and ADJUDGED that the Defendant's for Summary Judgment is GRANTED.

DONE AND ORDERED this 4th day of November, 2009 in Fort Lauderdale, Broward County, Florida.

JUDGE ROBERT W. LEE
ROBERT W. LEE
County Court Judge

Copies furnished to:
Christopher Calkin, Attorney for Plaintiff, Tampa
Russel M. Lazega, Attorney for Plaintiff, North Miami
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Subparagraph 2 does not allow the insurer to apply any limitation on the number of treatments or other utilization limits that apply under Medicare [. . .]. An insurer that applies the allowable payment limitations of subparagraph 2 must reimburse a provider who lawfully provided such care or treatment under the scope of his or her license, regardless of whether such provider would be entitled to reimbursement under Medicare due to restrictions or limitations on the types or discipline of health care providers who may be reimbursed for particular procedures or procedure codes.

Fla. Stat. §627.736(5)(a)(4) (2008).