STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. PAN AM DIAGNOSTIC SERVICES, INC. a/a/o Cristina Lasaga, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2016-493-AP. L.T. Case No. 2014-3289-SP-23. March 1, 2019. An appeal from a decision by the County Court in and for Miami-Dade County, Florida, Linda Singer Stein, Judge. Counsel: Chris W. Altenbemd, DeeAnn J. McLemore, Charles W. Hall, and Mark D. Tinker, Banker Lopez Gassier, P.A.; and Omar Giraldo, for Appellant. Yigal D. Kahana, Law Firm Yigal D. Kahana, P.A.; and Robert Hauser, Law Offices of Pankauski Hauser, PLLC. for Appellee.

(Before: SCOLA, BUTCHKO, and DIMITRIS, J.J.)

(BUTCHKO, J.) On August 29, 2013, Cristina Lasaga (Lasaga) was involved in an automobile accident. At all relevant times, Lasaga was insured under an automobile policy with personal injury protection (PIP) benefits by Appellant State Farm Automobile Insurance Co. (State Farm). On September 18, 2013, Lasaga had two MRIs performed at Pan AM Diagnostic Services Inc. (Pan Am) and assigned her State Farm PIP benefits to Pan Am, which subsequently billed State Farm for each procedure. In determining a reasonable amount for reimbursement, State Farm applied Multiple Procedure Payment Reduction ("MPPR"). Pan Am filed an action in county court alleging that State Farm breached the terms and conditions of its policy and Florida's No-Fault Motor Vehicle Law.

Pan Am filed a Motion for Summary Judgment and State Farm filed a cross-Motion for Summary Judgment. Pan Am contended that State Farm was required by its policy to reimburse pursuant to the 2007 Medicare Part B Participating Physician's Fee Schedule amounts for the services at issue, and State Farm's use of MPPR to calculate reimbursement violated its policy and Florida's No-Fault Law. State Farm argued that its policy as well as the amended 2012 PIP Statute explicitly allowed it to not only limit reimbursement pursuant to Medicare fee schedules, but according to Medicare coding policies and payment methodologies as well. In addition, State Farm argued that the Legislature provided a specific statutory notice requirement that provides that the required notice is satisfied if the policy form at issue is approved by the Office of Insurance Regulation (OIR).

The trial court's order granting Pan Am's Motion for Partial Summary Judgment as to payment methodology found, as a matter of law, that State Farm's policy is clear and unambiguous regarding its election to pay pursuant to section 627.726(5)(a)(1)(0, Florida Statutes and State Farm clearly elected to pay no less than 80% of "the allowable amount under the 2007 Medicare Part B physicians fee schedule." The trial court also found that State Farm's policy did not clearly elect the MPPR and that State Farm's 9810A policy does not permit it to limit its reimbursement to Pan Am to less than 80% of the allowable amount under the 2007 Medicare Part B physicians fee schedule. The trial court explained that the policy clearly and unambiguously elected the 200 Percent of the Medicare Part B Fee Schedule of reimbursement and there was no clear election for Multiple Procedure Rule or the MPPR reduction. The trial court found that general references regarding Medicare coding policies and procedures discussed in the policy are vague and ambiguous and do not clearly and unambiguously elect to pay pursuant to any other reimbursement methodology besides 80% of 200% of the Medicare Part B Fee Schedule. The trial court's Final Judgment found as a matter of law that there was no material fact dispute based on the evidence in the record that the services at issue were related and necessary. The trial court denied State Farm's cross-Motion for Summary Judgment as to Reimbursement Methodology, and this appeal followed.

Pan Am contends, and the trial court determined, that State Farm's 9810A policy did not clearly and unambiguously elect MPPR payment methodology as the PIP Statute requires, because Form 9810A policy specifically mentions the '200% of Medicare Part B Physician's Fee Schedule' method of reimbursement but does not mention nor specify that State Farm intended to utilize the MPPR method at all. We disagree.

The construction of an insurance policy is a question of law. *Thomas v. Fusilier,* 966 So. 2d 1001, 1002 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2457a]. In construing an insurance policy, the policy is read as a whole, endeavoring to give every provision its full meaning and operative effect. *Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla. 2000) [25 Fla. L. Weekly S211a]. When the policy language is clear and unambiguous, it must be construed in accordance with the plain language of the policy as bargained for by the parties. *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]; *Prudential Prop. & Cas. Ins. Co. v. Swindal,* 622 So. 2d 467, 470 (Fla. 1993); *Gen. Star Indem. Co. v. West Florida Village Inn, Inc.,* 874 So. 2d 26, 30 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1070b]. Policy language is ambiguous ". . . if the language is susceptible to more than one reasonable interpretation . . . ." *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147, 157 (Fla. 2013) [38 Fla. L. Weekly S517a]. Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy. *See State Farm Fire & Cas. Co v. CTC Dev. Corp.,* 720 So. 2d 1072 (Fla. 1998) [23 Fla. L. Weekly S527a]. "Mil order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result." *Virtual Imaging Servs., Inc.,* 141 So. 3d at 157. The statute in effect at the time an insurance contract is executed governs substantial issues arising in connection with the contract. *Lumbermens Mut. Cas. Co. v. Ceballos,* 440 So. 2d 612, 613 (Fla. 3d DCA 1983).

The standard of review when reviewing a lower court's entry of a fmal summary judgment is *de novo,* and we review the instant decision thereby. *See Volusia Cty. v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a; *Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a].

In the instant case, the policy provides "in no event will we pay more than 80% of the . . . No-Fault Act schedule of maximum charges including Medicare coding polices and payment methodologies . . . ." State Farm's policy clearly and unambiguously elects the use of Medicare coding policies and payment methodologies of the Federal Centers for Medicare

and Medicaid services, including applicable modifiers, which include the use of MPPR. State Farm's policy language is even more clear and unambiguous than the language at issue in *Allstate Insurance Co. v. Orthopedic Specialists,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a], which stated that "[a]ny amounts payable for medical expense reimbursements shall be subject to any and all limitations, authorized by section 627.736, . . . including . . . all fee schedules." Unlike Geico's policy language in *Virtual Imaging,* Appellant's policy references the Medicare fee schedule method of calculating reasonable medical expenses. Furthermore, Appellant's policy includes mandatory language expressly limiting reimbursement for reasonable medical expenses to the schedule of maximum charges set forth in section 627.736(5)(a)(1)(a)-(f), Florida Statutes. Contrary to Pan Am's contention, *Virtual Imaging* requires no other magic words from State Farm's policy to provide clear and sufficient notice of the exclusion or limitation to the insured and to the provider rendering services. State Farm stated it will not pay more than 80% of the PIP "schedule of maximum charges" and recited the statutory language of the fee schedules immediately thereafter; State Farm's notice was clear, and unambiguously expressed its intent to "limit payment pursuant to the schedule of charges" for purposes of section 627.736(5)(a) 5., Florida Statutes (2012).

Additionally, the First, Second, Third, and most recently the Fourth District Courts of Appeal have found Allstate's policy is clear and unambiguous as to its election of the Medicare Fee Schedule. *See Allstate Indemn. Co. v. Markley Chiropractic & Acupuncture, LLC,* 226 So. 3d 262 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D793b]; *Orthopedic Specialists,* 212 So. 3d 973; *Fla. Wellness & Rehab. v. Allstate Fire & Cas. Ins. Co.,* 201 So. 3d 169 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1619c]; *Allstate Fire and Cas. Ins. Co. v. Stand-Up MRI of Tallahassee, P.A.,* 188 So. 3d 1 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D693b]. The language in the policy at issue is even more specific than the general reference to "all fee schedules" that was upheld in the cases cited above and is sufficient notice of the method of reimbursement. State Farm's policy, which references "the use of Medicare coding policies and payment methodologies of the Federal Centers for Medicare and Medicaid Services, including applicable modifiers," tracks the language of the 2012 amendment, which states "subparagraph 1. Does not prohibit an insurer from using the Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, to determine the appropriate amount reimbursement for medical services." § 627.736(5)(a)3, Fla. Stat. (2012). We find the plain language of State Farm's Form 9810A PIP policy satisfies *Virtual Imaging's* simple notice requirement and Form 9810A properly complies with the notice provision of section 627.736(5)(a)5, Florida Statutes (2012).

Pan Am raises an additional argument that section 627.736(5)(a)5, Florida Statutes did not delegate authority to the Office of Insurance Regulation (OIR) to interpret insurance policies. However, State Farm satisfied the 2012 statutory notice requirement of section 627.736(5)(a)5, Florida Statutes by having its Form 9810A PIP policy approved by the OIR.[1] The statute is clear that "a policy form approved by the Office satisfies this [notice] requirement." Thus, as a matter of law, State Farm's Form 9810A PIP policy complied with section 627.736(5)(a)5, Florida Statutes.

Next, Pan Am contends that MPPR is a utilization limit that insurers may not employ under the PIP statute because it limits the number of treatments available and State Farm was not permitted to use the MPPR because it is a utilization that applies under Medicare. Pan Am cites *SOCC, P.L. v. State Farm Mutual Automobile Insurance Co.,* 95 So. 3d 903 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1663a] in support of its assertion. However, this case is inapplicable because that court was interpreting 2008 section 627.736 amendment that only allowed reimbursement under the participating physician's schedule of Medicare Part B. The PIP Statute was amended in 2012, substantially amending section 627.736(5)(a), Florida Statutes. Particularly, section 627.736(5)(a)3, Florida Statutes, includes plain language that expressly permits an insurer to use Medicare coding polices and payment methodologies when determining the reasonableness of a medical charge under section 627.736(5)(a)1, Florida Statutes (2013).[2]

Contrary to Pan Am's claim, MPPR does not limit the number of treatments, it merely reduces payment for medical services when two or more services have been provided on the same day to the same patient by the same physician in the same session.[3] We may not diverge from the intent of the Legislature, since it is clear that both the 2012 version of the PIP statute and unambiguous Form 9810A PIP policy allow State Farm the use of Medicare coding polices and payment methodologies of the CMS, including applicable modifiers. State Farm's Form 9810A PIP policy[4] permitted State Farm to limit reimbursements utilizing the 2007 Medicare Part B physician's fee schedule and Medicare's MPPR that allows for reduced payments when multiple procedures are performed at the same time on the same patient by the same medical provider.[5]

We fmd that the MPPR is a coding policy/payment methodology of the CMS and not an improper utilization limit, therefore the statute permits the use of a payment methodology once the fee schedule is properly elected. *Millennium Radiology, LLC a/a/o Angela Renteria v. State Farm Fire & Cas. Co.,* 23 Fla. L. Weekly Supp. 360a (Fla. Miami-Dade Cty. Ct. 2015). There was no evidence presented below to the trial court that the application of the MPPR resulted in any limitation of the services provided to the insured. In calculating the reimbursement in this PIP case, we find that State Farm could properly use MPPR under section 627.736(5)(a)3, Florida Statutes (2012), since it is not an improper utilization limitation. If the Legislature intended to prohibit the use of the MPPR, it would have been done. The trial court erred, because under section 627.736(5)(a)3, State Farm was not prohibited from using Medicare coding policies and payment methodologies of the CMS and applicable modifiers, including application of MPPR.

Accordingly, the Final Judgment and Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment as to Reimbursement Methodology Only is hereby **REVERSED** and this matter is **REMANDED** with instructions to enter judgment in favor of State Farm on its Motion for Summary Judgment. Further,

Pan Am's motion for appellate attorney's fees under Florida Rule of Appellate Procedure 9.400(b) and section 627.428, Florida Statutes (2013) is hereby **DENIED**. (SCOLA and DIMITRIS, J.J. concur)

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[1]The Florida Legislature has granted the Office of Insurance Regulation with the authority to review and approve insurance policies. *See Land O'Sun Mgmt. Corp. v. Commerce & Indus. Ins. Co.,* 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1787a] ("The legislature . . . has determined that the Office of Insurance Regulation must review and approve insurance policies drafted by insurance companies doing business in Florida."). However, the approval by the OIR under section 627.736(5)(a)5 does not validate the policy. *See Gonzalez v. Assocs. Life Ins. Co.,* 641 So. 2d 895 n.1 (Fla. 3d DCA 1994) (approval by the Department of Insurance (OIR's predecessor agency) does not automatically validate the contents of an insurance policy); *Bofshever Wellness Ctr., LLC a/a/o Hermana Polycarpe v. State Farm Mut. Auto. Ins. Co.,* 24 Fla. L. Weekly Supp. 969a (Fla. Broward Cty. Ct. Feb. 8, 2017); *A-Plus Med & Rehab. Ctr. a/a/o Cesar Acevedo v. State Farm Mut. Auto. Ins. Co.,* 24 Fla. L. Weekly Supp. 159b (Fla. Miami-Dade Cty. Ct. Jun. 8, 2016).

[2]The language of the statute provides a guideline for a determination of reasonable medical charges. This statute states in relevant part:

> (5) In determining 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, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment or supply.
>
> (a) . . . 1. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
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> * * *
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> 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-subsubparagraphs (II) and (III).

[3]*Path Medical-Broward v. Progressive Am. Ins. Co.,* 25 Fla. L. Weekly Supp. 122b (Broward Cty. Ct. 2017) (fmding that Medicare MPPR is a payment methodology, not a utilization limit); *Path Medical-Broward v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 894a (Broward Cty. Ct. 2016) (fmding that Medicare MPPR is a payment methodology, not a utilization limit); *SOCC, PL, a/a/o Youssef Assal v. Progressive Am. Ins. Co.,* 24 Fla. L. Weekly Supp. 163b (Fla. 13th Cir. Ct. 2016) (Medical provider's argument that MPPR is a utilization limit simply because it limits reimbursement would mean that any cost containment measure would result in a reduction of remuneration for the medical provider and as a result would have an influence the manner and method of treatment.); *Multicare Rehab., LLC a/a/o Robert Rego v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 171a (Fla. 17th Cir. Ct. 2016) (MPPR is a payment methodology and not a utilization limit, otherwise, the language added by the legislature would be meaningless); *AFO Imaging, Inc. a/a/o Asha Brown v. State Farm Mutual Auto. Ins. Co.,* 24 Fla. L. Weekly Supp. 165b (Fla. 13th Cir. Ct. 2016) ("MPPR does not limit the use or duration of services and does not prevent the insured from accessing any procedure. Rather it simply reduces payment based on the efficiencies achieved from furnishing multiple procedures in a single session on a single day."); and *Millennium Radiology, LLC a/a/o Angela Renteria v. State Farm Fire & Cas. Ins. Co.,* 23 Fla. L. Weekly Supp. 360a (Fla. 1 1th Cir. Ct. 2015) (MPPR is a payment methodology); *but see Advantacare of Fla., LLC., v. Progressive Am. Ins. Co.,* 25 Fla. L. Weekly Supp. 61a (Fla. Volusia Cty. Ct. 2018).

[4]Form 9810A PIP Policy states in pertinent part under No-Fault Coverage . . . Limits:

> We will limit payment of Medical Expenses described in the Insuring Agreement of this policy's No-Fault Coverage to 80% of a properly billed and documented reasonable charge, but in no event will we pay more than 80% of the following No-Fault Act "schedule of maximum charges" including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers. . . .
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> 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-subsubparagraphs (II) and (III).
>
> (II) Medicare Part B, in the case of services, supplies, and care provided ambulatory surgical centers and clinical laboratories.
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> (III) The Durable Medical Equipment Prosthetics/Orthotics and supplies fee schedule of Medicare Part B, in the case of durable medical equipment.
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> For purposes of the above, the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation on effect on March 1 of the year in which the services, supplies, or care is rendered and for the area in which such services, supplies or care is rendered, and the applicable fee schedule or payment limitation applies throughout the remainder of that year, notwithstanding any subsequent change made to the fee schedule or payment limitation, except that it will not be less than the allowable amount under the applicable schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.

[5]The MPPR is a payment methodology of CMS and of Medicare, and when a medical provider or independent diagnostic facility performs multiple services in one day to the same patient, Medicare has determined that there is a cost saving benefit

of performing those multiple services. They break down a CPT code into a professional and a technical component. The MPPR does amount to less than 200% of the 2007 Medicare Part B fee schedule.

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