



**IN THE DISTRICT COURT OF APPEAL  
FOR THE FIRST DISTRICT, STATE OF FLORIDA**

KEVIN M. MCCARTY, in his official capacity  
as the Commissioner of the FLORIDA OFFICE  
OF INSURANCE REGULATION,

Appellant/Defendant,

vs.

Case No. 1D13-1355  
L.T. No. 2013-CA-0073

ROBIN A. MYERS, A.P., GREGORY S.  
ZWIRN, D.C., SHERRY L. SMITH, L.M.T.,  
CARRIE C. DAMASKA, L.M.T., John Doe,  
And Jane Doe,

Appellees/Plaintiff.

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***AMICUS CURIA BRIEF OF THE FLORIDA CHIROPRACTIC  
ASSOCIATION OF AMERICA, IN SUPPORT OF APPELLEES***

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## **STATEMENT OF INTEREST**

Amicus Curiae is the Florida Chiropractic Association, Inc., a not-for-profit corporation incorporated in the State of Florida whose membership consists of chiropractic physicians practicing in the State of Florida. Membership includes more than 4,000 chiropractic physicians.

A great number of the Association's members treat patients for injuries sustained in automobile accidents whom are covered under policies issued pursuant to the Florida Automobile No-Fault Law. The 2012 PIP Act limits chiropractic physicians from determining if their patients sustained an “emergency medical condition” thereby limiting up to \$2,500.00 in medical benefits to treat injuries sustained in automobile accidents under §627.736, Fla. Stat. (“PIP” law) in lieu of up to \$10,000 if an “emergency medical condition” is determined. Many patients do not have health insurance or the resources to pay for treatment should the \$2,500.00 limit be reached, thus exposing the treating chiropractor to treatment without payment. This limitation irreparably harms chiropractic physicians.

The Circuit Court order remedies the irreparable harm by enjoining the application as to those sections of the PIP law which require a finding of an emergency medical condition as a prerequisite for payment of PIP benefits.

## **SUMMARY OF ARGUMENT**

The *Amicus* supports the position of the Appellees. This Court should uphold the Circuit Court's injunction order. Chiropractic physicians have been legislatively recognized since 1923 to have unlimited diagnostic authority. Determination of an *emergency medical condition* ("EMC") is within the statutory chiropractic scope of practice and education foundation. The scope of practice of a Chiropractic physician allows and likewise requires them to make diagnoses pertaining to EMCs on a daily basis. The 2012 PIP Act precludes this group of physicians from performing EMC evaluations yet, at the same time, requires them to rule-out EMCs. Not only is this language in the 2012 PIP Act inconsistent, but there was no rational basis in effecting it.

Studies confirm the effectiveness of chiropractic treatment for low back and neck injuries, commonly suffered in automobile accidents. The 2012 PIP Act, by creating the "emergency medical condition" definition, will presumably reduce the majority of accident victims' benefits by 75% while those same policyholders will continue to pay for \$10,000 in PIP premiums. Once the policyholder's PIP benefits exhaust, the policyholder/accident victim will be forced to use health insurance, if health insurance will agree to pay when the full amount of PIP benefits has not been expended. Or, the treating physician, if he or she agrees to wait months or years for reimbursement, can agree to have the patient sign a letter

of protection which promises to pay the physician back for his/her services *if* there is sufficient funds in settlement from the at-fault party. Either of these scenarios not only irreparably harm Floridians, as they are paying for PIP premiums while not obtaining the benefits of treatment or not obtaining sufficient treatment, but it likely irreparably harms the Chiropractic physician who has, for decades, treated accident victims for back and neck injuries.

## **ARGUMENT**

### **I. THE 2011 PIP ACT UNFAIRLY DISCRIMINATES AGAINST CHIROPRACTIC PHYSICIANS IN THE STATE OF FLORIDA AND THERE WAS NO RATIONAL BASIS FOR THE ACT'S LIMITATION ON CHIROPRACTIC PHYSICIANS.**

Chiropractic medicine has been legislatively recognized since 1923.<sup>1</sup> Of the legislatively recognized health care professions, only the professions of pharmacy, nursing and allopathy were legislatively recognized earlier than 1923. The pharmacy profession was recognized in 1915,<sup>2</sup> the nursing profession was recognized in 1919<sup>3</sup> and the allopathic profession recognized in 1921.<sup>4</sup> The

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<sup>1</sup> See Ch. 9330, Laws of Florida 1923.

<sup>2</sup> See Ch. 6890, Laws of Florida 1915.

<sup>3</sup> See Ch. 7831, Laws of Florida 1919.

<sup>4</sup> See Ch. 8415, Laws of Florida 1921. The remaining health care professions were legislatively recognized in the following order by dates: Midwifery Ch. 14760 Laws of Fla. 1931; osteopathy Ch. 12287 Laws of Fla. 1927; naturopathy Ch. 12286 Laws of Fla. 1927; optometry Ch. 12286 Laws of Fla. 1927; dentistry Ch.

diagnostic scope of chiropractic practice is plenary and without limitation. Yet the 2012 PIP Act<sup>5</sup> unfairly discriminates against and limits the chiropractic physicians' scope of practice contrary to Chapter 460, Florida Statutes, when treating patients with No-Fault ("PIP") insurance.

### **a. The History and Diagnostic Scope of Chiropractic Practice**

The diagnostic scope of chiropractic practice is defined at §460.403(9)(b), Florida Statutes. The diagnostic scope is plenary and without limitation. A chiropractic physician<sup>6</sup> may, "examine, analyze and diagnose the human living body and its diseases *by the use of any physical, chemical, electrical, or thermal method; use the X ray for diagnosing; phlebotomize; and use any other general method of examination for diagnosis and analysis taught in any school of*

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14708 Laws of Fla. 1931; chiroprathy (podiatry) Ch. 15911 Laws of Fla. 1933; massage Ch. 22034, Laws of Florida 1943; physical therapy Ch. 57-67, Laws of Florida 1957; dietetics and nutrition Ch. 88-236 at 1315, Laws of Fla. 1988; athletic trainers ss. 320, *et seq.*, Ch. 94-119 at 635, Laws of Florida 1994; orthotics, prosthetics and pedorthics Ch. 97-284 at 5217, Laws of Florida 1997.

<sup>5</sup> The 2012 PIP Act refers to House Bill 119; Motor Vehicle Personal Injury Protection Insurance (2012), Chapter 2012-197, Laws of Fla.

<sup>6</sup> "The term 'chiropractic medicine,' 'chiropractic,' 'doctor of chiropractic,' or 'chiropractor' shall be synonymous with 'chiropractic physician,' and each term shall be construed to mean a practitioner of chiropractic medicine as the same has been defined herein. Chiropractic physicians may analyze and diagnose the physical conditions of the human body to determine the abnormal functions of the human organism and to determine such functions as are abnormally expressed and the cause of such abnormal expression." §460.403(2)(e), Fla. Stat.

*chiropractic.*”<sup>7</sup> The word *any* is all-inclusive, meaning that a doctor of chiropractic medicine is not limited in diagnostic procedures. Further, if a method of diagnosis is not captured in the listed methodology, the phrase, “*and use any other general method of examination for diagnosis and analysis taught in any school of chiropractic*” captures a diagnostic method taught in a chiropractic school that is not listed in the paragraph. Chiropractic physicians may also sign death certificates.<sup>8</sup> Therefore, the diagnostic scope of practice is without limitation.

**b. The Limitation by HB 119 on Chiropractic Physicians To Determine Emergency Medical Conditions Has No Rational Basis.**

The *Automobile No Fault Law* as amended by HB 119 limits the authority of chiropractic physicians to determination of injuries that do not meet the definition of “emergency medical condition” notwithstanding the plenary scope of chiropractic diagnostic practice. There is no legislative record of any testimony or discussion in any Committee or on the Floor of the House of Representatives or the Senate discussing, justifying or presenting a rational explanation or justification for the limitation.

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<sup>7</sup> **460.403 Definitions.**—As used in this chapter, the term:  
(9) (b) Any chiropractic physician who has complied with the provisions of this chapter may examine, analyze, and diagnose the human living body and its diseases by the use of any physical, chemical, electrical, or thermal method; use the X ray for diagnosing; phlebotomize; and use any other general method of examination for diagnosis and analysis taught in any school of chiropractic.

<sup>8</sup> See §460.414, §382.002(12), Fla. Stat.

Specifically, paragraphs (1)(a)3 & 4 of §627.736, Fla. Stat., as created by

HB 119 reads:

3. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. up to \$10,000 if a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or an advanced registered nurse practitioner licensed under chapter 464 has determined that the injured person had an emergency medical condition.

4. Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. is limited to \$2,500 if any provider listed in subparagraph 1. or subparagraph 2. determines that the injured person did not have an emergency medical condition.

Translation: An allopath, osteopath, dentist, physician's assistant or advanced nurse practitioner (no chiropractor) may determine the existence of an emergency medical condition ("EMC"). An allopath, osteopath, dentist, chiropractor, physician's assistant or advanced nurse practitioner may determine that an emergency medical condition does not exist. In other words, a chiropractic physician may not make an EMC determination.

"Emergency medical condition" or "EMC" means a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:

- (a) Serious jeopardy to patient health.
- (b) Serious impairment to bodily functions.

(c) Serious dysfunction of any bodily organ or part.<sup>9</sup>

The 2012 PIP Act requires that a chiropractor understand and have the ability to determine the existence of an EMC for the purpose of ruling it out in order to determine, under the law, that an injury is not an EMC. The chiropractic physician must also fully diagnose the patient to be able to properly treat the patient. So why isn't the chiropractic physician under the 2012 PIP Act able to make the EMC determination? That same chiropractor is, in fact, making EMC determinations on a daily basis. For example, when Patient X comes in to the chiropractor's office following a total loss automobile accident and that patient complains of serious and radiating pain, tingling in the fingers, and significant loss of range of motion, that chiropractic physician has to rule out a herniated disk or neurological dysfunction which may include referring the patient for an MRI or to a neurologist. If the chiropractic physician failed in his/her diagnosis, the patient could later file a claim against the chiropractor for medical negligence. The chiropractic physician evaluates patients for the items listed in the statutory definition of an EMC on a daily basis.

The language in the 2012 PIP Act limiting the chiropractic physicians' ability to make the EMC determination is without a rational basis and discriminates against a class of physicians that regularly treats victims of

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<sup>9</sup> §627.732(16), Fla. Stat.

automobile accidents. This nonsensical and contradictory language in the bill was likely as a result of the rushed and last minute nature of the language we have now come to know as “EMC” in the 2012 PIP Act.

The language in the Bill including this limitation on chiropractors to make the EMC determination was not published until the last day of the 2012 legislative Session when amendment 945239 was filed with the House of Representatives.<sup>10</sup> The amendment deleted the language of HB 119 as amended by the Senate and rewrote the bill, as we now know it. The House concurred in amendment 151913. The Senate concurred with HB 119 as amended by amendment 151913 and passed the bill. There was simply no discussion of the limitation on chiropractic physicians determining EMCs. In other words, there was no rational basis for the limitation on chiropractic.

The scope of practice of a Chiropractic physician allows and likewise requires them to make diagnoses pertaining to EMCs on a daily basis. The 2012 PIP Act precludes this group of physicians from performing EMC evaluations yet requires them to know how to make Non-EMC determinations. It is incongruous to require a Chiropractic physician to be able to rule out an EMC but, in the same law, to prohibit him/her from making an EMC determination. There is no rational basis to omit Chiropractic physicians from only part of these evaluations and, as

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<sup>10</sup> See the legislative history of CS/CS/HB 119 at [www.myfloridahouse.gov/bills](http://www.myfloridahouse.gov/bills).

such, the lower court was correct in entering the temporary injunction.

## **II. CHIROPRACTIC PHYSICIANS THROUGHOUT FLORIDA WILL SUFFER IRREPARABLE HARM SHOULD THE LOWER COURT BE OVERTURNED.**

Longstanding studies confirm the effectiveness of chiropractic treatment for low back and neck injuries, commonly suffered in automobile crashes. However, The 2012 PIP Act reduces most Floridians' PIP benefits by 75%, thus being unable to fulfill treatment of neck and back injuries. Many patients do not have health insurance or the resources to pay for treatment should it be needed once the \$2,500.00 in PIP benefits have been reached. This exposes the treating chiropractor to treatment without payment. Not only does this limitation hurt the average Floridian involved in an automobile accident, but it likewise irreparably harms chiropractic physicians.

### **a. Chiropractic Care Has Long Helped Americans Involved in Automobile Accidents**

There are more than 200,000 car accidents annually in the State of Florida. <http://www.dmvflorida.org/2004-crash-data.shtml>. Of those victims injured in automobile accidents, one of the most common complaints of injury is neck and lower back pain (LBP). Lower back pain, according to a May, 2009 article in the

*American Journal of Lifestyle Medicine*<sup>11</sup> is considered the most prevalent pain complaint affecting the general population, with a reported lifetime prevalence of up to 75 percent. A growing array of studies document that lower back pain is one of the most common conditions for which individuals seek professional care. Articles published in 1995<sup>12</sup> and 1996<sup>13</sup> in the journal *Spine* estimated that between 40 percent and 85 percent of people with LBP have consulted health care professionals about their pain. Surveys have found that chiropractic care is used overwhelmingly by patients with pain and functional complaints related to joints, muscles, nerves and other somatic tissues.<sup>14</sup>

A very recent study published in the *Annals of Internal Medicine*, and funded by the National Institutes of Health, tracked 272 patients with recent-onset neck pain who were treated using three different methods: (1) Medication; (2) Exercise; and (3) a Chiropractor. After 12 weeks the patients who used a chiropractor or exercised were more than twice as likely to be pain free compared to those who relied on medicine. The patients treated by a chiropractor

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<sup>11</sup> Haney, W.J., "Implications for Physical Activity in the Population with Low Back Pain," *American Journal of Lifestyle Medicine*, May 11, 2009.

<sup>12</sup> Carey TS, Evans A, Hadler N, Kalsbeek W, McLaughlin C, Fryer J., "Care-seeking among individuals with chronic low back pain," *Spine* 1995; 20: 312-317.

<sup>13</sup> Carey TS, Evans AT, Hadler NM, Lieberman G, Kalsbeek WD, Jackman AM, et al. "Acute severe low back pain. A population-based study of prevalence and care-seeking," *Spine* 1996; 21: 339-344.

<sup>14</sup> Meeker, W, Haldeman, H, "Chiropractic: A profession at the crossroads of mainstream and alternative medicine," *Annals of Internal Medicine* 2002, Vol. 136, No 3.

experienced the highest rate of success with 32 percent saying they were pain free, compared to 30 percent of those who exercised. Only 13 percent of patients treated with medication said they no longer experienced pain.<sup>15</sup>

In study after study, clinical and cost-effectiveness data on chiropractic continues to accumulate. The following examples represent just a small sample of those findings.

- A. A chronic pain study at the University of Washington School of Medicine compared which treatments were most effective at reducing pain for neuromuscular diseases and found that chiropractic scored the highest pain relief rating (7.33 out of 10), scoring higher than the relief provided by either nerve blocks (6.75) or opioid analgesics (6.37).<sup>16</sup>
- B. In 1993 the province of Ontario, Canada hired the esteemed health care economist Pran Manga, PhD, to examine the benefits of chiropractic care for low back pain (LBP) and to make a set of recommendations on how to contain and reduce health care costs. His report, *A Study to Examine the Effectiveness and Cost-Effectiveness of Chiropractic Management of Low-Back Pain*, cited research demonstrating that: (1) chiropractic manipulation is safer than medical management for LBP; (2) that spinal manipulation is less safe and effective when performed by non-chiropractic professionals; (3) that there is an overwhelming body of evidence indicating that chiropractic management of low-back pain is more cost-effective than medical management; (4) and that there would be highly significant cost savings if more management of LBP was transferred from

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<sup>15</sup> Gert Bronfort, Roni Evans, Alfred V. Anderson, Kenneth H. Svendsen, Yiscah Bracha, Richard H. Grimm; Spinal Manipulation, Medication, or Home Exercise With Advice for Acute and Subacute Neck Pain A Randomized Trial. *Annals of Internal Medicine*. 2012 Jan;156(1\_Part\_1):1-10.

<sup>16</sup> Jensen MP, Abresch RT, Carter GT, McDonald CM, *Arch Phys Med Rehabil* 2005 (Jun); 86(6): 1155–1163, Department of Rehabilitation Medicine, University of Washington School of Medicine, Seattle, WA.

medical physicians to chiropractors. He also stated that "A very good case can be made for making chiropractors the gatekeepers for management of low-back pain in the Workers' Compensation System in Ontario."<sup>17</sup>

- C. In a comparison study between doctors of chiropractic and medical practitioners in 2002, researchers found: "Patients with chronic low-back pain treated by chiropractors showed greater improvement and satisfaction at one month than patients treated by family physicians. Satisfaction scores were higher for chiropractic patients. A higher proportion of chiropractic patients (56 percent vs. 13 percent) reported that their low-back pain was better or much better, whereas nearly one-third of medical patients reported their low-back pain was worse or much worse."<sup>18</sup>

**b. Chiropractic Physicians Treating Auto Accident Victims Are Being Irreparably Harmed by the 2012 PIP Act**

The 2012 PIP Act has effectively reduced most Floridians' PIP benefits by 75%. Floridians are paying for \$10,000 in PIP benefits, but should this Court reverse the lower court's ruling, Floridians will predominantly lose 75% of those benefits.

When an auto accident patient treats at their local hospital following a crash, there is a strong likelihood that the average bill will consume the first \$2,500.00 in

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<sup>17</sup> Manga, Pran, Ph.D. Angus, Douglas E. M.A., Papadopoulos, Costa, MHA, Swan, William, R, *A Study to Examine the Effectiveness and Cost-Effectiveness of Chiropractic Management of Low-Back Pain*, Ministry of Health, Government of Ontario, 1993.

<sup>18</sup> Nyiendo J, Haas M, Goodwin P. Patient characteristics, practice activities, and one-month outcomes for chronic, recurrent low-back pain treated by chiropractors and family medicine physicians: a practice-based feasibility study. *Journal of Manipulative and Physiological Therapeutics* 2000; 23: 239-45.

PIP benefits. Even if that is not the case, an ambulance ride and/or urgent care treatment will quickly consume the \$2,500.00 benefit limitation.

Chiropractic Physicians treat, among many other things, neck and back pain. Neck and back pain are two of the leading resulting injuries from automobile accidents. Common sense dictates that Chiropractic Physicians throughout the State of Florida will not only lose patients because of the fear of being stuck with medical bills at the end of their claim that they can't pay.<sup>19</sup> But, importantly to an entire profession in the State of Florida that has taken care of so many accident victims, Chiropractors will suffer irreparable injury.

Once PIP benefits exhaust on an automobile accident claim, generally two options occur: A provider bills the patient's health insurance, if available or, if the provider agrees to hold off from collecting payment, the patient will sign a Letter of Protection, to promise to pay the physician, without interest, months or even years after the claim has settled or come to verdict. Either option will cause irreparable harm to the Chiropractor. What happens when health insurance disputes the Non-EMC determination and says the auto carrier should continue to pay? Answer: Irreparable harm results. What happens if the patient does not have health insurance and cannot pay? Answer: Irreparable harm results. As for the letter of protection, this method of reimbursement, as stated above, frequently

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<sup>19</sup> Obviously, when this happens, the patient's care deteriorates and the patient may never obtain proper treatment and care.

takes years of wait, without interest, to hopefully obtain usual and customary rates *if* there is enough in settlement proceeds to pay all of the providers.

While the Chiropractors in the State of Florida are just beginning to see denials based upon a “non-emergency medical condition”, they are starting to come en masse from certain auto insurers despite the Injunction being in place. Should this Court reverse the lower court, the floodgates of denials will open and all Chiropractic Physicians treating accident victims in Florida will be irreparably harmed.

### **CONCLUSION**

*Amicus*, respectfully, requests this Honorable Court to uphold the Circuit Court order remedies the irreparable harm by enjoining the application as to those sections of the PIP law which require a finding of an emergency medical condition as a prerequisite for payment of PIP benefits.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of June, 2013.

/s/ Kimberly A. Driggers  
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## CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served by electronic mail on the individuals listed below on this 12<sup>th</sup> day of June, 2013.

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**CERTIFICATE OF COMPLIANCE**

I certify that this Motion was prepared in Times New Roman 14-point font on opaque white, non-glossy paper measuring 8.5 inches by 11 inches with minimum 1 inch borders, and satisfies the font required of Rules 9.100(1) and Rule 9.210(a)(2), Fla. R. App. P.

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