



IN THE FIRST DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA

KEVIN M. McCARTY, in His  
Official Capacity as the Commissioner  
of THE FLORIDA OFFICE OF  
INSURANCE REGULATION,

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

Appellant,

vs.

ROBIN A. MYERS, D.C., et al.,

Appellees.

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*AMICI CURIAE* BRIEF OF THE PERSONAL INSURANCE FEDERATION  
OF FLORIDA AND THE NATIONAL ASSOCIATION OF MUTUAL  
INSURANCE COMPANIES IN SUPPORT OF APPELLANT

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## STATEMENT OF INTEREST

*Amici Curiae*, the Personal Insurance Federation of Florida ("PIFF") and the National Association of Mutual Insurance Companies ("NAMIC"), file this *Amici Curiae* Brief in support of Appellant, Kevin M. McCarty, in His Official Capacity as the Commissioner of the Florida Office of Insurance Regulation ("OIR").

PIFF is a non-profit voluntary coalition of property and casualty insurers. Its purpose is to create a dynamic, efficient and competitive marketplace for personal insurance products for the benefit of all Floridians. NAMIC is a national trade association that represents insurers providing property and casualty insurance products in Florida as well as throughout the United States.

PIFF's and NAMIC's members underwrite a substantial portion of the property and casualty premiums written in Florida, including personal injury protection ("PIP") coverage written in conjunction with private passenger automobile insurance policies. PIFF members insure approximately 45% of the Florida automobile market and more than 25% of the homeowners market. NAMIC's members write more than \$196 billion in premiums accounting for 50% of the automobile and homeowners market nationally. These members, including companies based in Florida and throughout the country, range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, PIFF and NAMIC

advocate sound public policies on behalf of their members in legislative and regulatory forums and file amicus briefs in significant federal and state court cases.

The circuit court's order—which granted Appellees' motion for a temporary injunction against OIR's enforcement of portions of the 2012 PIP Amendments—has created industry-wide confusion and uncertainty. While the order purportedly enjoins OIR enforcement of certain of the 2012 Amendments, the order is vague in direction and the 2012 Amendments remain duly enacted, valid law. The circuit court's ruling creates substantial uncertainty among property and casualty insurers as to whether they must comply with valid law and their OIR-approved contracts with insureds that incorporate the provisions of the 2012 Amendments. Notably, insurers were not a party to the lawsuit and have not been enjoined, and the 2012 Amendments have only been enjoined as to OIR. There has been no final order finding the amendments to be unconstitutional. There are potentially serious repercussions to *Amici's* members and Florida insureds given the unsettled state of the law caused by the order.

## SUMMARY OF THE ARGUMENT

The *Amici* support the position of OIR—this Court should reverse the circuit court's injunction order.

The *Amici* submit this brief, first, to provide background as to one of the main legislative goals of the 2012 Amendments—reduction in PIP premiums. The parts of the 2012 Amendments affected by the injunction order—eliminating reimbursement for non-essential acupuncture and massage therapy services, limiting reimbursement for chiropractic services, and focusing benefits instead on the treatment of emergency medical conditions—are intended to address key cost drivers in the PIP system. In fact, as a result of the 2012 Amendments, a number of insurers have filed and obtained approval of reduced PIP rates. This PIP premium rate reduction may benefit Florida insureds to the extent that the PIP rate decreases help drive down overall auto insurance costs.

The *Amici* also submit this brief to describe the confusion and uncertainty currently being experienced in the insurance industry as a result of the injunction order. The underlying lawsuit is between providers and OIR—not providers and insurers or any particular insurer. Additionally, the injunction order opines that the 2012 Amendments might be unconstitutional; but does not actually declare them to be unconstitutional. Thus, while the injunction remains in effect, insurers must choose between (i) complying with the parts of the 2012 Amendments affected by

the injunction order and the contracts with insureds incorporating them, and (ii) ignoring the duly enacted Amendments and the provisions of their approved contracts. Either choice has considerable repercussions.

This Court should reverse the circuit court's injunction order.

### ARGUMENT

#### I. THE 2012 AMENDMENTS AFFECTED BY THE INJUNCTION ARE INTENDED TO REDUCE PIP COST DRIVERS AND LOWER PIP RATES IN ORDER TO BENEFIT INSUREDS.

As a result of the injunction being granted on an "access to courts" basis, the fact that the Florida Legislature enacted 2012 Amendments after significant public testimony, consideration of myriad reports and studies of the PIP system, and for clearly legitimate purposes has, in some ways, been pushed aside. One goal of the 2012 Amendments is to combat PIP fraud. Another is to reduce or keep PIP premiums in check, which have skyrocketed in recent years. Eliminating reimbursement for non-essential acupuncture and massage therapy services, limiting reimbursement for chiropractic services, and focusing benefits instead on the treatment of emergency medical conditions—all provision of the 2012 Amendments affected by the injunction order—serves that legislative goal. More specifically:

- In 2011, OIR issued a report compiling its findings from 31 insurance companies that had participated in an OIR data call requesting PIP data from 2006-2010. OIR found that, during that time, the number of PIP claims increased by 28%. From 2008-2010, PIP benefits paid by insurers

increased by 70%. "Report on Review of the 2011 Personal Injury Protection Data Call," Florida Office of Insurance Regulation, published April 11, 2011, p. 2-6.<sup>1</sup>

- In December 2011, the Office of the Insurance Consumer Advocate released a detailed 61 page report of a PIP Working Group on Florida Motor Vehicle No-Fault Insurance.<sup>2</sup> That report described how "over-utilization in certain medical procedures," among other things, had "surpassed unprecedented levels" and "led to significant increases in PIP premiums, which translate[d] into a 'fraud tax' of nearly \$1 billion on Floridians." *Id.* (cover letter). It noted that "some Florida families are paying \$3,500 or more in PIP premiums, which is more than one-third of the maximum \$10,000 benefit provided." *Id.* at 2.
- The Working Group also observed that "physical therapy and massage therapy," along with chiropractic care, were the services "most frequently billed." *Id.* The overall growth in utilization was for services "outside of the emergency room setting." *Id.* at 3.
- The Working Group also collected data demonstrating that, while all types of medical care costs under PIP in Florida exceeded the medical inflation rate, the greatest increase was for massage therapy. In 2005, the average charge per claimant for massage therapy was \$2,887. By 2010, the average claimant charge for massage under PIP had risen to \$4,350, a 51% increase after adjusting for medical inflation. *Id.* at 21. For acupuncture, the 2005 average costs per claimant were \$2,754. By 2010, it was \$3,674. *Id.*
- The Working Group also collected data demonstrating that chiropractors are the "largest percentage of medical providers submitting charges for treating PIP claimants and had the highest average total charge per claimant as compared with other medical providers." *Id.* at 20.

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<sup>1</sup> *Available at:* [www.OIR.com/siteDocuments/PIP\\_04-08-2011.pdf](http://www.OIR.com/siteDocuments/PIP_04-08-2011.pdf) (last visited May \_\_, 2013).

<sup>2</sup> Office of Ins. Consumer Advocate, Report on Fla. Motor Vehicle No-Fault Ins. (Personal Injury Protection) (Dec. 2011) (the "PIP Working Group Report"), *available at:* [www.myfloridacfo.com/ica/pipworkinggroup.htm](http://www.myfloridacfo.com/ica/pipworkinggroup.htm) (last visited May \_\_, 2013).

- The Working Group concluded that "utilization protocols" were necessary. It stated: "Absent much-needed changes to our No-Fault system, Florida's consumers will be left with fewer choices, higher rates, or worse, they will choose to go uninsured, which presents a greater financial risk to everyone who gets behind the wheel." *Id.* at 42.
- On March 1, 2012, the Office of the Insurance Consumer Advocate released a supplemental report<sup>3</sup> in response to requests from legislative leaders. That report concluded that, in 2010, soft tissue treatment accounted for 43.4 percent of estimated total loss costs for PIP in 2010. These treatments were associated with 62.4 percent of medical loss costs. Treatment by massage therapists alone represented 21.7 percent of the total PIP costs in 2010. *Id.* at 2. When considered by provider specialty, 35 percent of treatment costs in 2010 were by chiropractors. *Id.* at 4. The report concluded that "effective reform will need to address utilization of this cost driver." *Id.* at 6.
- The Florida House of Representatives Final Bill Analysis CS/CS/HB 119, dated March 19, 2012, cited with approval the foregoing OIR reports.<sup>4</sup>
- OIR also retained Pinnacle Actuarial Resources, Inc. to conduct an independent actuarial study to calculate the savings to be expected as a result of the 2012 Amendments. Pinnacle's report was released August 20, 2012.<sup>5</sup> Pinnacle concluded that the reforms set forth in the 2012 Amendments would result in savings in PIP claims losses of 16.3% to 28.7% and an indicated statewide average savings in PIP premiums of 14% to 24.6%. *Id.* at 4. Pinnacle specifically concluded that the

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<sup>3</sup> *Available at:* [www.myfloridacfo.com/ica/pipworkinggroup.htm](http://www.myfloridacfo.com/ica/pipworkinggroup.htm) (last visited May \_\_, 2013).

<sup>4</sup> *Available at:* [www.myfloridahouse.gov/sections/bills/billsdetail.aspx?BillId=47180](http://www.myfloridahouse.gov/sections/bills/billsdetail.aspx?BillId=47180) (last visited May \_\_, 2013).

<sup>5</sup> "Impact Analysis of HB 119," Pinnacle Actuarial Resources, August 20, 2012, *available at:* [www.OIR.com/siteDocuments/HB119ImpactAnalystFINAL08202012.pdf](http://www.OIR.com/siteDocuments/HB119ImpactAnalystFINAL08202012.pdf) (last visited May \_\_, 2013).

exclusion of massage therapy and acupuncture would likely result in the following savings in claim losses:

Minimum impact	-6.9%
Central impact	-8.7%
Maximum impact	-10.4% <sup>6</sup>

Restricting treatment for non-emergency conditions (which would include most chiropractic care) would result in the following savings in claim loss:

Minimum impact	-9.8%
Central impact	-12.3%
Maximum impact	-14.7%

*Id.* at 12.

In sum, the exclusion of massage therapy and acupuncture from PIP reimbursement and reduction of benefits to chiropractors reflects a legislative determination to control utilization and thereby put the brakes on PIP premium increases, and over time, to decrease PIP premiums. Simply put, by eliminating or reducing benefits for these treatments, the Legislature intended to eliminate substantial PIP cost drivers.

This goal of reducing PIP rates has been realized in part. The Legislature mandated that an insurer either reduce PIP rates by 10% or show cause should

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<sup>6</sup> The report later states it is speculated that some massage therapy codes going forward will be recoded as payable codes; therefore, there will be some "leakage" and not all massage therapy will be eliminated from the system. It accordingly concludes that the indicated savings will be reduced to 7-10%. *Id.* at 5.

reductions not occur as a result of the 2012 Amendments. Section 627.0651, Florida Statutes, provides as follows:

(2) By October 1, 2012, an insurer writing private passenger automobile personal injury protection insurance in this state shall make a rate filing with the Office of Insurance Regulation. A rate certification is not sufficient to satisfy this requirement. If the insurer requests a rate in excess of a 10-percent reduction as applied to the current rate in its overall base rate for personal injury protection insurance, the insurer must include in its rate filing a detailed explanation of the reasons for failure to achieve a 10-percent reduction.

(3) By January 1, 2014, an insurer writing private passenger automobile personal injury protection insurance in this state shall make a rate filing with the Office of Insurance Regulation. A rate certification is not sufficient to satisfy this requirement. If the insurer requests a rate in excess of a 25-percent reduction as applied to the rate in effect as of the effective date of this act in its overall base rate for personal injury protection insurance since the effective date of this act, the insurer must include in its rate filing a detailed explanation of the reasons for failure to achieve a 25-percent reduction.

(4) If an insurer fails to provide the detailed explanation required by subsection (2) or subsection (3), the Office of Insurance Regulation shall order the insurer to stop writing new personal injury protection policies in this state until it provides the required explanation.

As of May 2, 2013, insurers had made one-hundred forty rate filings in accordance with these provisions. "List of Approved Rate Filings to Comply with HB 119 (As of 5/2/13)," Florida Office of Insurance Regulation Communication Office.<sup>7</sup> With regards to the insurers with the largest percentage of the Florida

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<sup>7</sup> Available at: [www.OIR.com/siteDocuments/ApprovedPIPRateFilings\\_12-27-12.pdf](http://www.OIR.com/siteDocuments/ApprovedPIPRateFilings_12-27-12.pdf) (last visited May \_\_, 2013).

market, State Farm's PIP percentage change is +7.9%, but State Farm indicated the percentage change would be +22.0% absent the 2012 Amendments. *Id.* Progressive Select, Progressive American, GEICO and Allstate all met the -10% percentage reduction threshold. *Id.* Forty other rate filings were made meeting the -10% percentage reduction threshold, and three filings were between a -9 and -10 percent reduction. *Id.* Approximately eighty filings did not meet the -10% percentage reduction threshold, but the insurers making these filings indicated that the rate filed was reduced more than 10% (and often much more) from the rate they would have filed absent the enactment of the 2012 Amendments. *Id.* These rate reductions and reduced rate increases, largely attributable to the 2012 Amendments affected by the injunction order, clearly benefit Florida insureds to the extent that they help drive down the overall cost of auto insurance.

## II. THE INJUNCTION ORDER HAS RESULTED IN SIGNIFICANT CONFUSION AND UNCERTAINTY FOR PROPERTY AND CASUALTY INSURERS.

The circuit court injunction order—while technically deficient as explained in OIR's initial brief<sup>8</sup>—has created significant confusion and uncertainty for property and casualty insurance companies that write PIP coverage in Florida. The underlying lawsuit is not the result of an existing controversy between an insurer and a provider—nor was it brought against any particular insurer. Instead, the

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<sup>8</sup> As OIR argues, the circuit court injunction is vague as to which specific provisions are struck down and in which circumstances.

lawsuit was brought by providers against OIR. Consistent with the posture of that lawsuit, the injunction order is not directed to insurers—it is directed to OIR. [*See* Order, OIR App. 1.] *See also* *Trisotto v. Trisotto*, 966 So. 2d 986, 988 (Fla. 5th DCA 2003) ("A Court is without jurisdiction to issue an injunction that interferes with the rights of those who are not parties to the action."). Thus, insurers are faced with a conundrum—do they or do they not comply with the parts of 2012 Amendments affected by the circuit court injunction order, which are incorporated into their contracts with insureds? Either choice has repercussions.

As duly enacted statutes, the 2012 Amendments, in totality, remain in effect until declared unconstitutional by a final appellate decision. *See Deltona Corp. v. Bailey*, 336 So. 2d 1163, 1166 (Fla. 1976) ("[A]n act of the Legislature is presumed constitutional until invalidated by a final appellate decision.") (citing *In re Estate of Caldwell*, 247 So. 2d 1 (Fla. 1971)); *Mallory v. State of Florida*, 866 So. 2d 127, 128 (Fla. 4th DCA 2004) ("Because statutes are presumed constitutional and given effect until they are declared unconstitutional . . .") (citing *Ison v. Zimmerman*, 372 So. 2d 431 (Fla. 1979); *Hillsborough Cnty. Aviation Auth.*, 739 So. 2d 175, 179 (Fla. 2d DCA 1999) ("Until this statute was declared unconstitutional, it was presumed constitutional, and all [affected parties] had a duty to apply it.").

While the circuit court judge stated "I find the motion should be granted in part because the Act violates Article I, Section 21 of the Florida Constitution (Access to Courts)" [Order at 1, OIR App. 1], a statement by a judge in an order granting a temporary injunction does not render a statute unconstitutional. *See TJ Mgmt. Grp., L.L.C. v. Zidon*, 990 So. 2d 623, 625 (Fla. 3d DCA 2008) (stating that the purpose of an injunction is not to resolve disputes, but to maintain the status quo until final relief may be given); *Hu v. Hu*, 942 So. 2d 992, 994 (Fla. 5th DCA 2006) (same).

Thus, while the injunction remains in effect, the insurers must choose between (i) complying with the parts of the 2012 Amendments affected by the injunction order and the contracts with insureds incorporating them, and (ii) ignoring the duly enacted Amendments and the provisions of their approved contracts.

The repercussions are immediate if the insurers choose the former—compliance with the 2012 Amendments and their contracts with insureds. Immediately upon rejecting a PIP claim from an acupuncturist or massage therapist, for instance, the insurer could be sued in county court by the provider, who undoubtedly will argue the 2012 Amendments are unconstitutional and compliance with the Amendments is enjoined. While the individual claims may be for relatively small dollar amounts, the expense to the insurer of each litigation

may far outweigh the cost of simply paying the acupuncturist's or massage therapist's claim—especially given the potential for an award of attorney's fees under the insurance statutes. These expenses are a significant driver in the cost of PIP insurance for Florida insureds. Additionally, due to uncertainties in interpretation of other PIP statutory provisions, the county courts already are taxed by the high volume of PIP lawsuits brought by providers.<sup>9</sup> The uncertainty caused by the injunction will only increase the county court docket overload.

Further, it is uncertain whether insurers will be subject to OIR enforcement actions if they comply with the 2012 Amendments affected by the injunction. The injunction order purportedly enjoins OIR from enforcing certain parts of the 2012 Amendments. Uncertainty exists as to whether this means that OIR instead may enforce the PIP provisions in effect prior to enactment of the 2012 Amendments. In other words, it is uncertain whether OIR can take action against an insurer if they refuse to reimburse PIP provider claims for massage and acupuncture treatments because such reimbursement was permitted prior to the effective date of the 2012 enactments.

There also are repercussions if the insurer chooses to reimburse acupuncture and massage therapy services (for example) in contravention of the 2012 Amendments and their contracts with insureds. The insurers have set, and

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<sup>9</sup> PIP Working Group Report, at 35-40.

obtained approval of, their premium rates based on the assumption the 2012 Amendments would be in effect. The insurers were required by the 2012 Amendments to propose rates to OIR that reflected reductions due to savings incurred as a result of not having to reimburse for acupuncture and massage therapy. These rates, in many instances, are in effect. It is uncertain whether the injunction order means the insurers may now revert to their prior contracts with insureds and the rates charged under those contracts. If the insurers reimburse providers as if those contracts were still in effect, yet are required to charge premium under the new contracts, they will incur losses that could impact reserves and insurance company ratings—thus jeopardizing Florida insureds going forward and causing subsequent increases in premium.

As stated by OIR in its initial brief, the effect of the injunction order is entirely unclear, and this lack of clarity has resulted in confusion and uncertainty in the insurance industry state-wide. The injunction should be reversed.

### CONCLUSION

For the reasons expressed in this *Amici Curiae* Brief and the Initial Brief filed on behalf of Appellant, Kevin M. McCarty, in His Official Capacity as the Commissioner of the Florida Office of Insurance Regulation, the *Amici* respectfully request that this Court reverse the circuit court's order.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically through the First District Court of Appeal's eDCA and e-mailed to Luke Lirot, Esq. (Luke2@lirotlaw.com and jimmy@lirotlaw.com) and Adam S. Levine, Esq. (aslevine@msn.com and alevine@law.stetson.edu) (Attorneys for Appellee) and C. Timothy Gray, Esq. (tim.gray@OIR.com), J. Bruce Culpepper, Esq. (bruce.culpepper@OIR.com), Allen Winsor, Esq. (Allen.Winsor@myfloridalegal.com), Rachel Nordby, Esq. (Rachel.Nordby@myfloridalegal.com) (Attorneys for the Florida Department of Insurance, Office of Insurance Regulation) and Theodore E. Karatinos, Holliday, Bomhoff & Karatinos, P.L., 18920 No. Dale Mabry Hwy., Suite 101, Lutz, FL 33548 (tedkaratinos@hbklawfirm.com) (Attorney for *Amicus Curiae* Florida Acupuncture Association and Florida State Oriental Medical Association) this 30th day of May 2013.

/s/ Nancy M. Wallace  
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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

/s/ Nancy M. Wallace  
NANCY M. WALLACE