



**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,

Case: 1DC13-1355

vs.

L.T. 2013-CA-0073

ROBIN A. MYERS, A.P., et. al.,
Appellees.

**APPELLEE’S RESPONSE TO ORDER TO SHOW CAUSE WHY
APPELLANT’S MOTION FOR REVIEW OF ORDER VACATING
AUTOMATIC STAY AND REQUEST FOR EXPEDITED TREATMENT
SHOULD NOT BE GRANTED**

Pursuant to this Court’s Order of April 25, 2013, Appellees, Robin A. Myers, et al., herein submit this Response to Appellant, Kevin M. McCarty’s Motion for expedited review of the trial court’s April 17, 2013, order vacating the automatic stay of the temporary injunction on appeal. [Appellant’s Appendix 1 (Stay Order)]. In response thereto, Appellees would state as follows:

I. INTRODUCTORY STATEMENT

Through undersigned counsel, Appellees respectfully request that this Court Deny Appellant’s Motion to Review the Trial Court’s Order Vacating the Appellant’s Notice of Automatic Stay because, having considered the filings and the evidence, being in the best position to weigh that evidence, and after evaluating

the equities and determining that the harm to the Appellees outweighs the harm to the Appellant, the Trial Court, acting within its discretion, vacated the Notice of Automatic Stay. See Order Granting Motion to Vacate Automatic Stay [Appellant's Appendix 1 (Stay Order)]. Appellants (hereinafter, the "OIR" or "McCarty") ask this Court to return to a "status quo" that the Trial Court already found harmed the citizens of Florida. The whole point to a temporary injunction is to protect parties from irreparable harm, even when that harm arises from an inappropriate legislative act. The government is no superior position to any party whose acts and conduct result in irreparable harm to others.

Accepting the Appellant's argument on its face would lead to the inequitable and improper result that the legislative or the executive branches of government could nullify the judiciary's efforts to protect parties through the power of a temporary injunction *at will*, even while the judiciary is being called upon to protect constitutionally guaranteed rights. Such an approach, particularly in the instant action, would result in a manifest injustice, and such efforts should be rejected by this Court.

II. COURSE OF PROCEEDINGS

The progression of this matter began when predecessors to the Appellees, faced with the loss of their livelihoods and the other irreparable harm caused by the 2012 PIP Act amendments (the "challenged legislation") originally filed their first

complaint in the case of *Mooneyham, et al., v. McCarty*, Case No. 37 2012 CA 003060, Leon County Circuit Court. A copy of the Docket Sheet from this action is included as Appellees' Appendix 1.

The original complaint was filed on September 12, 2012, well in advance of the January 1, 2013 deadline for enforcement of the 2012 PIP Act amendments. Counsel for the OIR appeared on October 12, 2012, and, shortly thereafter, on October 23, 2012, an amended complaint was filed, asserting the same challenges to the challenged legislation, but reflecting only a change in the named Plaintiffs. On October 25, 2012, the Plaintiffs in that case filed Plaintiffs' Motion for Temporary Injunction with Incorporated Memorandum of Law. From October 25, 2012, until November 19, 2012, counsel for the Plaintiffs in the original action made repeated attempts to schedule a hearing on the Motion for Temporary Injunction in front of the assigned Judge, however such efforts were frustratingly unsuccessful. The situation became such that, other than simple phone calls, communication via e-mail became necessary.

Despite explaining the impending deadline, the earliest date the court indicated was available was "the end of January." Finding this to be problematic, particularly since an e-mail dated November 5, 2012, explained the emergency nature of the relief at issue, which went unanswered for over two weeks, it was determined that the Federal Court might be more responsive of the important

constitutional issues involved. The e-mail exchanges between counsel and the original Judge's office are found at Appellees' Appendix 2.

In mid-November, original counsel, Luke Lirot, made the acquaintance of Dr. Adam Levine, an M.D. who was also an attorney, and a professor at Stetson College of Law, and it was determined that the "property rights" inherent in one's medical license would provide a sufficient basis to invoke the jurisdiction of the United States District Court. On November 19, 2013, the Plaintiffs in the original action sent via Fed-X, filed a Notice of Voluntary Dismissal Without Prejudice, which was "clocked in" on November 20, 2012. See Appellees' Appendix 3. Strangely, the Notice of Voluntary Dismissal, already sent out, was docketed *the same day* that the original trial court's judicial assistant indicated that the Court would allow an hour on December 5, 2012, for a one hour hearing. Counsel for Plaintiffs for discussion notified the original circuit court that the case had already been Dismissed without Prejudice. The OIR has consistently made every effort to mischaracterize this sequence of events. No Plaintiff was ever dilatory in trying to seek a hearing well before the January 1, 2013 deadline. To the contrary, the sequence of events described below shows a steady and tenacious effort to remedy the harm caused by the 2012 PIP Act amendments.

Three days later, on November 23, 2012 (the Friday after Thanksgiving), aware of the urgent nature of the approaching deadline, Plaintiffs from the Tampa

Bay Area (the same Plaintiffs that comprise Appellees in the instant action), filed their complaint in the United States District Court for the Middle District of Florida, *Myers, et al., v. McCarty*, Case No. 8:12-cv-02660-RAL-TBM. The Docket Sheet for this Federal Case is found at Appellees' Appendix 4.

On Friday, November 30, 2012, the Federal Plaintiffs filed their Motion for Preliminary Injunction, and on the following Monday, December 3, 2012, the Federal Court imposed a deadline of December 11, 2012 for the OIR to file a response to the motion, setting a hearing on the Motion for December 12, 2012. Unfortunately, on December 12, 2012, the Federal Court disagreed that there were any "federal issues" to be evaluated, and issued an Order Denying Motion for Preliminary Injunction. On December 21, 2012, the Federal Plaintiffs filed a Motion for Reconsideration (Appellees' Appendix 5). Thereafter, the Federal Court, on December 27, 2012, entered an Order Dismissing the Plaintiffs' Federal Counts and "dismissing without prejudice" the state court counts. A copy of this Order is found at Appellees' Appendix 6.

Immediately thereafter, the named Federal Plaintiffs filed the complaint in the instant action on January 8, 2013, followed shortly thereafter with Plaintiffs' Motion for Temporary Injunction, filed on January 16, 2013. Shortly after having requested and securing a date for a hearing on the motion, the Trial Court provided

the date of February 1, 2013 for the hearing, which was the subject of Notice having been sent out on January 28, 2013.

On February 1, 2013, the Trial Court entertained the Plaintiffs' Motion for Temporary Injunction, indicating that time would be necessary to digest and evaluate the evidence and testimony presented. Both parties filed supplemental memoranda, and on March 15, 2013, docketed on March 18, 2013, the Trail Court entered the Order Granting in Part the Plaintiffs' Motion for Temporary Injunction. In support of the Motion for Injunction, counsel for Appellees filed 63 separate affidavits from "similarly situated" healthcare professionals, all describing their own experiences with the devastation brought about by the 2012 PIP Act amendments. Three days later, the OIR filed their Notice of Appeal and Notice of Automatic Stay, which was docketed in this Court on March 25, 2013.

On the same date, the Plaintiffs filed their Emergency Motion to Vacate Defendants Notice of Automatic Stay, which was heard on April 1, 2013, by the Trial Court. A copy of the transcript of this Hearing is found at Appellees' Appendix 7.

Notably, in response to the testimony of Sandra Starnes, Director of the Property and Casualty Property Review Unit, who testified that lifting the stay would result in an "administrative nightmare," the Plaintiffs below filed the Affidavit of Patrick Joe Tighe, on April 18, 2013. This Affidavit showed that,

contrary to the position taken by Ms. Starnes during the hearing on the motion to lift the automatic stay, a simple letter *could* be used to inform policy holders and insurance company employees that the necessity of showing the undefined “emergency medical condition” would not be a prerequisite to receiving the full \$10,000 in PIP coverage, and that licensed massage therapists and acupuncturists *could* continue to be reimbursed for their medical services, just as before the adoption of the 2012 PIP Act amendments. A copy of this Affidavit and the letters from State Farm Insurance Company filed therewith are found at Appellees’ Appendix 8.

On April 17, 2013, the Trail Court granted the Motion to Vacate the Automatic Stay, which was followed on April 19, 2013, with the filing of the Appellant’s Motion for Review of Order Vacating Automatic Stay and Request for Expedited Review.

The primary reason for articulating in such detail the procedural development of these matters is to dispense, with finality, the OIR’s argument that, “if Appellees are suffering harm *their own delays are to blame.*” (Motion at p. 16, emphasis added). There are no words strong enough to criticize such a misstatement, but suffice it to say that it is simply and completely incorrect. The parties herein have been diligent in the pursuit of their rights, as any honest reading of the procedural status of their efforts set forth above clearly shows.

The bottom line is that the 2012 PIP Act amendments facially violated the protections and rights guaranteed by the Florida Constitution and Plaintiffs below pursued these actions to prevent irreparable harm. Because Appellees sufficiently demonstrated to the Trial Court that there existed no adequate remedy at law, that the Appellees were likely to succeed on the merits, that a temporary injunction would best support the public interest, and that the threatened harm to the Appellees outweighed any harm to the Appellant, the Trial Court entered, in sufficient part, the requested temporary injunction after, "...consider[ing] the evidence, the written and oral arguments of counsel and the authorities cited...I find that the motion [for temporary injunction] should be granted because the Act violates Article I, Section 21 of the Florida Constitution." See Order Granting Temporary Injunction, Appellant's Appendix 4. Based on the standard of review being an "abuse of discretion," both for the entry of the temporary injunction and, arguably, the order lifting the stay that gave meaning to the injunction, should be governed by the same standard of review.

III. THE TRIAL COURT POSSESSED THE AUTHORITY TO VACATE THE AUTOMATIC STAY AND EXERCISED THIS AUTHORITY APPROPRIATELY

Contrary to the OIR's efforts to paint the Trial Court's reasoned decision to vacate the automatic stay as some amazingly inappropriate or unprecedented action, Appellees would stress that the Trial Court undeniably possessed the

authority to vacate the Appellant's Notice of Automatic Stay. Pursuant to Rule 9.310(b)(2), Fla. R. App. P., a trial court, "may extend a stay, impose any lawful conditions, or **vacate the stay.**" Rule 9.310(b)(2), Fla. R. App. P. (**emphasis added**). In *Reform Party of Florida*, despite a convoluted procedural course through the First District Court of Appeals, the United States District Court for the Northern District of Florida, and the Florida Supreme Court, a Circuit Court in Leon County ultimately retained the authority to vacate an automatic stay. *Reform Party of Florida v. Black*, 885 So. 2d 303 (Fla. 2004). In contrast, the devastation suffered by the instant Appellees as a result of the 2012 PIP Act amendments exceeds even the most persuasive factual basis to lift the stay found in any cited authority.

Additionally, the OIR requests a return to the "status quo." From a legal standpoint, the only justly considered "status quo" should be a return to the PIP Act as it existed before the adoption of the 2012 PIP Act amendments. The *status quo* should be maintained until this case reaches trial to protect the health, safety, and well-being of all Floridians. The 2012 PIP Act dramatically changes the manner that each and every person injured as a result of a motor vehicle injury is evaluated and treated without providing any peer-reviewed or best-practices medical evidence that either the current system is medically flawed or that the new, improved system will benefit patients. Maintaining the *status quo* by temporary

injunction allows the continued protection of the health, safety, and well-being of all Floridians injured as a motor vehicle collision, in the same manner that has developed over the past few decades, while continuing to promote the unfettered access to efficient care that was “traded” in return for limiting Floridian’s access to the courts.

In the matter before the Trial Court, the *status quo* meant that Plaintiffs below would be allowed to continue in their lawful medical and business practices, pursuant to the licenses already granted them by the State of Florida. It was argued that Plaintiffs below should be allowed to continue to provide and, in the case of Jane Doe, receive necessary medical evaluation and treatment for the injuries sustained during motor vehicle collisions before the wholesale elimination of valuable treatment modalities and the imposition of arbitrary limitations by a legislative body with no basis to impose such a blanket and unfairly imbalanced restriction.

The status quo preserved by a temporary injunction is the last peaceable non-contested condition that preceded the controversy. See *Bowling v. National Convoy & Trucking Co.*, 135 So. 541 (Fla. 1931). One critical purpose of temporary injunctions is to prevent injury so that a party will not be forced to seek redress for damages *after* they have occurred. See *Lewis v. Peters*, 66 So.2d 489 (Fla. 1953); see also *Bailey v. Christo*, 453 So.2d 1134 (Fla. 1st DCA 1984).

In the instant action, the last “peaceable non-contested condition” that preceded this controversy was that these medical professionals were operating, lawfully, and enjoying their rights to engage in the lawful provision of medical treatment to patients with PIP coverage, enjoying both their business and property rights and the fruits of their industry. Obviously, no such status quo would give any Plaintiffs the right to violate any other existing statutes. The status quo that should have been effected was exactly what the Trial Court provided, which preserved the Plaintiffs’ rights by the issuance of the temporary Injunction.

Granting a the temporary injunction and maintaining the *status quo ante*, by lifting the automatic stay did not result in any disservice to the public interest because the public interest is best served by protecting the rights and privileges afforded by the Florida Constitution and because the public interest is best served by protecting the health, safety, and well being of its citizens.

To date, without any discovery, the Trial Court already heard and ruled in favor of Appellees’ Motion for Temporary Injunction. Such motion is also presently on appeal with this Court. No briefs have yet been filed. With Appellants Notice of Appeal, Appellants also filed a Notice of Automatic Stay. This Motion was heard by the Trial Court and the Automatic Stay was vacated. Evidence was provided to the Trial Court contemporaneously with the Trial Court’s Order vacating the stay, that the Appellant’s position regarding insurance

companies in Florida was not correct because at least one of the larger insurers was complying with the temporary injunction and not following any stay. See Affidavit of Patrick Joseph Tighe, Appellees' Appendix 8.

Among the Plaintiffs, Appellees filed suit on behalf of Jane Doe representing all those individuals injured by motor vehicle collisions. Appellant OIR raised issues related to standing during the hearing for temporary injunction. Appellees anticipate that these issues will be addressed by Appellants during their present appeal and more completely described in their Brief; however, in one critical and unassailable "finding of fact," the Trial Court specifically addressed standing for all the Plaintiffs:

"I first address the standing issue raised by the [Appellant]. Because the [Appellees] are seeking to enforce a right vested in members of the public at large, they must allege and establish some special injury different in kind from the injury suffered by members of the public. The complaint alleges, and the evidence showed, that the [Appellees], as health care providers for automobile accident victims, derive a substantial percentage of their income through PIP insurance payments. Because the Act, as revised, prohibits or severely limits future payments from PIP insurance for such treatment, they have a sufficient interest in the outcome of the case, as well as an injury that is distinct from that of the public at large. I thus find that [Appellees] have standing and will address the merits..."

Appellant OIR attempts to misconstrue the Trial Court's findings by referring to "hypothetical claimants." See Appellant's Motion, page 1. In fact, the

Trial Court already recognized Jane Doe as a claimant and clearly indicated that, “The reason for issuing the injunction was to protect [the constitutional right of citizens to seek redress in the courts if they are wrongfully injured] and prevent the potential harm to citizens injured in automobile accidents, who, under the present PIP statute, may not receive necessary medical care.” See Order Vacating Stay, Appellant’s Appendix 1. Respectfully, this Honorable Court should deny Appellant’s Motion to Review the Trial Court’s Order Vacating the Notice of Automatic Stay because the Trial Court was in the best position to weigh the evidence and balance the equities having heard testimony from both witnesses for the Appellees and the Appellants, having considered written Motions and Memoranda of Law, and having had the opportunity to question, *sua sponte*, both Appellees’ and Appellant’s witnesses. Such in depth fact finding should not be disturbed, and certainly not under the applicable standard of review, discussed in the next section.

IV. A FAIR APPLICATION OF THE APPROPRIATE STANDARD OF REVIEW WILL SHOW THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ENTERING THE TEMPORARY INJUNCTION, NOR BY LIFTING THE AUTOMATIC STAY GIVING LIFE TO THE INJUNCTION

Circuit Courts possess discretionary authority to vacate automatic stays “under compelling circumstances.” *Gervais v. Melbourne*, 890 So. 2d 412, 414 (5d DCA 2004) referencing *State of Fla., Dept. of Env’tl. Prot. v. Pringle*, 707 So. 2d

387 (Fla. 1d DCA 1998); *St. Lucie County v. North Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4d DCA 1984) rev denied. 453 So. 2d 45 (Fla. 1984). A determination of compelling circumstances essentially requires a balancing of harm. *Tampa Sports Authority v. Johnston*, 914 So. 2d 1076, 1082 (Fla. 2d DCA 2005). Quoting the Fourth District Court of Appeals in *St. Lucie County*, the First District “explain[ed] that [an] automatic stay is based upon a policy rationale and...that planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference.” *State Department of Environmental Protection v. Pringle*, 707 So. 2d 387, 390 (Fla. 1d DCA 1998) quashed by 743 So. 2d 1189 reversing injunction, quoting *St. Lucie County v. North Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4d DCA 1984) rev denied. 453 So. 2d 45 (Fla. 1984). In contrast to these cases, the instant action is not a “planning level decision,” it is a legislative act that bears down on a select few, and destroys their livelihood and the access to appropriate medical care that, previous to the adoption of the 2012 PIP Act amendments, was a decision left to the consumer.

Rule 9.310(f) Fla. R. App. P. requires that orders for Stay entered by the trial court be reviewed by this Court by motion. Because either the Trial Court or this Court may consider a stay accorded a public body and because the Trial Court already weighed the evidence and heard testimony, this Court should only reverse

the Trial Court's Order for a legal error or an abuse of discretion, neither of which are present. "Two principal considerations govern the decision whether to vacate a stay: the likelihood of irreparable harm if the stay is not granted and the likelihood of success on the merits by the entity seeking to maintain the stay. *Tampa Bay Sports Authority* at 1079 quoting *Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005) citing *Perez v. Perez*, 769 So. 2d 389, 391 (Fla. 3d DCA 1999)).

The OIR, apparently desperate to please the insurance companies that their office is trying to protect, challenges the Trial Court's decision to lift the automatic stay by cloaking any real issues regarding the stay with the clear approach of assailing the order granting in part the temporary injunction itself. For this reason alone, the motion should be denied; however, since the OIR argues in this direction, Appellees will point out where these efforts are equally misplaced.

As this Court will see, the trial court entered the injunction on a correct application of law, and properly exercised its discretion in doing so. Restated, the OIR is destined for failure in this appeal, and, having "smuggled" its appeal in under the cloak of seeking a reinstatement of the stay, the OIR is constructively forcing the "expedited" approach to these issues that should be the subject of discussion, not the forced subject of a response. Notwithstanding this unique strategy, Appellees will still show (i) the trial court properly found that the

egregious flaws in the 2012 PIP Act Amendments justified a rejection of the presumption of constitutionality afforded *this* statute; (ii) the Injunction Order had sufficient factual findings, (iii) the trial court sufficiently addressed and reserved on a bond requirement, (iv) the trial court was explicit in describing the specific conduct enjoined; and (v) the trial court was spot on in its analysis of the relevant legal principles regarding standing and access to courts.

Here, the Trial Court held that the Appellees were likely to prevail on the merits and that the Appellees were likely to sustain irreparable harm in the absence of a temporary injunction and vacation of the automatic stay. Although Appellants alleged that Appellees were likely to fail, Appellants failed to allege irreparable harm. As a result, the Order Vacating the Automatic Stay should be left in place and the temporary injunction allowed to remain in force.

**V. THE APPELLANT “OIR” IS NOT LIKELY TO
SUCCEED ON APPEAL**

Appellant has wholly failed to demonstrate that the Trial Court’s Order Vacating the Automatic Stay resulted from an incorrect application of law or that the Trial Court abused its discretion. See *Tampa Bay Sports Authority* at 1079. In fact, the Trial Court considered the oral argument and written motions of both Appellees and Appellant, both containing discussions related to “planning level deference.” Having considered and weighed the evidence, and having determined that the Plaintiffs below had established standing, the Trial Court held that, “the

legal issue here, and the focus of my injunction, is the constitutional right of citizens to seek redress in the courts if they are wrongfully injured.” Additionally, Appellant fails to address how it might sustain harm if the very automobile insurers that it regulates are able to comply with the Trial Court’s Temporary Injunction with something as simple as a letter to their insureds and their employees. See Affidavit of Patrick Tighe, Appellees’ Appendix 8.

A. The Trial Court Considered the Presumption of Constitutionality Afforded To All Statutes and Properly Concluded that such a Manifest Injustice Clear on the Face of the Challenged Legislation Justified the Issuance of the Temporary Injunction and the Lifting of The Automatic Stay .

Appellees challenged the 2012 PIP Act amendments alleging that they violated procedural and substantive due process rights by taking away Appellees’ ability to contract and to earn a living; violated substantive due process because it was not rationally related to a legitimate public policy or objective; violated the single subject rule and separation of powers; violated the right of the people to access the courts to seek redress for their injuries. See Order on Temporary Injunction. After considering the law and after providing appropriate legislative deference, the Trial Court held that the Appellees only met their burden for a Temporary Injunction based upon their allegations related to access to the courts.

Appellant relies upon *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263, So. 2d 797 (Fla. 1972), a decision rendered

related to apportionment of legislative districts at a time of racial unrest, to provide the legislature with virtually limitless power unchecked by judicial review. However, that same decision affords trial courts the ability to invalidate state statutes. “It is well settled that the state Constitution is not a grant of power but a limitation upon power. Unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the Constitution, the courts have no authority to pronounce it invalid. *Id.* at 805 citing *Harry E. Prettyman, Inc., v. Florida Real Estate Commission*, 92 Fla. 515 (1926) and *State ex rel. Jones v. Wiseheart*, 245 So. 2d 849 (Fla. 1971). This is exactly the approach taken by the Trial Court:

The fundamental right to seek redress for injuries received at the hands of another is a cornerstone of our legal system. This principle is embedded in our state constitution in Article I, Section 21, which provides in part: The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay...The 1971 [no fault] legislation took away or severely limited the right of a person injured in a Motor vehicle accident to seek redress in court for injuries wrongfully caused by another, relieving the wrongdoing of responsibility for his conduct, and granting him immunity from civil liability...This clear impingement upon...Article I, Section 21...was rationalized by asserting that the legislation was providing a ‘reasonable alternative’ to the common law tort recovery system...The question raised in this case by the [Appellees’] complaint is whether the [2012 PIP Act is no longer a reasonable alternative to common law tort...I conclude that it is not a reasonable alternative and

that it violates Article I, Section 21 of the Florida Constitution]. See Order Granting Temporary Injunction.

Because the Trial Court found that the 2012 PIP Act so severely restricted the intent of no-fault insurance resulting in its no longer being a “reasonable alternative” to accessing the courts, and because the Trial Court found that the Appellant failed to restore citizens’ access to the courts under Article I, Section 21 of the Florida Constitution, the Trial Court reasonably held that portions of the 2012 PIP act were not constitutional and were invalid.

Contrary to the argument asserted by the OIR, the “presumption of validity” that attaches to legislation is not impenetrable:

“Although the Court’s review is de novo, statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome. See *City of Gainesville*, 918 So.2d at 256 (quoting *Fla. Dep’t of Revenue v. Howard*, 916 So.2d 640, 642 (Fla.2005)). As this Court has stated, “[s]hould any doubt exist that an act is in violation... of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law.” *Franklin v. State*, 887 So.2d 1063, 1073 (Fla.2004).” – *Crist v. Florida Ass’n of Criminal Defense Lawyers, Inc.*, 978 So.2d 134, 140 (Fla.2008).

In the instant action, the Trial Court identified, with crystal clarity, exactly what was wrong with this legislation on its face, set forth above. There was a finding that the 2012 PIP Act amendments violated the Florida Constitution on their face, thus the “presumption of validity” that attaches to legislation was found to be properly rebutted. The process is clear, and it has been clear for years. A trial

court has every right to make judicial inquiry into the constitutionality of the challenged legislation and the substance of the constitutional deprivations inflicted by the legislation:

“Statutory enactments are prima facie and presumptively valid unless they are patently invalid on their face; and all statutes are subject to appropriate judicial inquiry into their constitutionality as to the form of the enactment as well as to the substances of it.” – A. M. Klemm & Son v. City of Winter Haven, 192 So. 652, 656 (Fla.1939).

B. The Trial Court’s Order Was Sufficiently Specific and Met All Prerequisites for Validity and Enforceability

1. The Trial Court Specifically Enjoined the Appellant From Enforcing “those sections of the law which require a finding of emergency medical condition as a prerequisite for payment of PIP benefits or that prohibit payment of benefits for services provided by acupuncturists, chiropractors and massage therapists.”

Appellant’s arguments relating to the Order Granting Temporary Injunction should be considered only when Appellant provides the initial brief and Appellees have a reasonable chance to respond and answer. That being said, Appellant’s argument that the Order Vacating the Stay should be reversed because the Temporary Injunction Order is too vague fails because, first, it is fundamentally incorrect, and, most importantly, to date, at least one major automobile insurance company that Appellant is responsible for regulating and who Appellant has shown it represents for the purposes of this action are complying with the Trial Court’s Temporary Injunction Order. See Affidavit of Patrick Tighe, Appellees’ Appendix

8. Indeed, this letter shows that honoring the terms of the temporary injunction is neither “unclear,” nor prohibitively difficult. As the State Farm letter states:

“This notice is to advise you due to ongoing litigation in Myers and McCarty (Case No. 2013-CA-0073) (Fla. 2d Jud’s Cir.), at this time, the limit for medical expenses under No-Fault coverage and Medical Payments Coverage will be applied without regard to Emergency Medical Condition. We will also consider reasonable, related and necessary massage therapy and acupuncture provided other uncontested aspects of the statute do not prohibit coverage for these services. If the court’s ruling on this litigation alter(s) the way we administer your benefits you will be notified in writing.” See Affidavit of Patrick Tighe, Appellees’ Appendix 8.

The ease with which State Farm understood and effected the scope of the temporary injunction belie several aspects of the OIR’s arguments. Additionally, the Order Granting Temporary Injunction does not refer to any pleading, it referred specifically to the *Statute* that it declared, in part, invalid. Specifically, the Order enjoined, “those sections of the law which require a finding of emergency medical condition as a prerequisite for payment of PIP benefits or that prohibit payment of benefits for services provided by acupuncturists, chiropractors and massage therapists.” Although Appellant argues otherwise, enjoining the sections of the law noted above merely restored the status quo prior to January 1, 2013 in Florida – something every automobile insurer was familiar with and something that at least one large insurer is complying with, as established by the attachments to the Affidavit of Patrick Tighe, Appellees’ Appendix 8.

Additionally, the argument that the “portions” of the law enjoined are “not directly enforced by the Office,” is an effort to confuse this Court with minutia. The scope of the injunction applies to the Florida Office of Insurance Regulation. This state agency is responsible for, as stated on its own website:

“The Office serves Floridians through its responsibilities for regulation, compliance and enforcement of statutes related to the business of insurance. The Office is also entrusted with the duty of carefully monitoring statewide industry markets.”

One might think the Office may be confused with the statement about the Office being there to serve “Floridians,” since the gist of the arguments presented by the OIR are not to serve Floridians, but, apparently, “to avoid continued disruption and uncertainty in Florida’s *insurance market*.” No *Floridian* has suffered any “disruption” or “uncertainty,” and the OIR’s argument, exaggerated and false (as shown by the State Farm letter bringing back the rights of consumers with nothing more than a letter) shows that the OIR has no compunction abandoning its “mission statement” by transparently trying to protect the insurance industry it is supposed to “regulate,” at the expense of the Floridians suffering from the harms caused by the 2012 PIP act amendments. The Trial Court acted appropriately, and properly found that the compelling circumstances established by the irreparable harm inflicted by the “amendments” were a sufficient basis to lift

the automatic stay. Sec. 20.121. Department of Financial Services, sets forth the scope of the Office of Insurance Regulation:

There is created a Department of Financial Services.

...

(2) Divisions.--The Department of Financial Services shall consist of the following divisions:

(a) *Structure.*--The major structural unit of the commission is the office. Each office shall be headed by a director. The following offices are established:

1. *The Office of Insurance Regulation, which shall be responsible for all activities concerning insurers and other risk bearing entities, including licensing, rates, policy forms, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements, premium financing, and administrative supervision, as provided under the insurance code or chapter 636. The head of the Office of Insurance Regulation is the Director of the Office of Insurance Regulation, who may also be known as the Commissioner of Insurance Regulation.*

...

(c) *Powers.*--Commission members shall serve as the agency head for purposes of rulemaking under ss. 120.536-120.565 by the commission and all subunits of the commission. *Each director is agency head for purposes of final agency action under chapter 120 for all areas within the regulatory authority delegated to the director's office.*

Also, the OIR has confessed its extensive participation in the data used in the adoption and implementation of the 2012 PIP Act amendments. Simply stated,

based on the scope of the legislation challenged and the scope and applicability of the injunction sought, the Appellees have clearly “sued” the proper party, and this Byzantine effort to avoid liability and responsibility of the OIR is irreconcilable with the mission statement and statutory responsibilities of the OIR.

2. The Trial Court Appropriately Addressed the Issue of a Bond

The OIR makes much ado about the alleged “lack” of a bond, in the Order on the temporary Injunction, but the Trial Court did address the issue of a bond in the Order Vacating the stay. The scope of the injunction, and particularly the complete absence of the OIR having to do anything other than its “job,” militate against any bond being made a necessity. In a case showing the rationale behind the state not having to post a bond, it is clear that the issue to be considered is whether there is evidence to demonstrate that a party would incur losses because of injunction:

“Appellants next argue that the trial court abused its discretion in not requiring the state to post a bond. We find no abuse of discretion. See Fla. Rule of Civ. P. 1.610(b). Appellants rely on *Dep’t of Legal Affairs v. Bradenton Group, Inc.*, 727 So.2d 199 (Fla. 1998), but the case is distinguishable. According to the lower court’s opinion which led to the supreme court opinion, “the defendants produced evidence that they had incurred substantial operating losses during the twelve months the injunction had been in place, and that more losses were expected should the injunction remain.” See *Bradenton Group v. Dep’t of Legal Affairs*, 701 So.2d 1170, 1180 (Fla. 5th DCA 1997), approved in part, quashed in part, 727 So.2d 199 (Fla. 1998). In the instant case, *appellants put on no evidence to demonstrate that they would incur losses because of injunction.*” – *Bee Line Entertainment Partners v. State*, 791 So.2d 1197, 1205 (Fla. 5th DCA 2001) (emphasis added).

In the instant action, the concept of a bond was discussed, but the Trial Court established that the “administrative nightmare” being threatened as a result of the lifting of the automatic stay was really nothing more than the OIR “doing its job,” as shown in the April 1, 2013, hearing:

MR GRAY: We would also like to note that if Your Honor is going to lift the stay and vacate the stay, that there is no bond that was required in Your Honor's injunction ruling. The rule is clear that if you have a -- that if you issue a temporary injunction that you must have a bond. We think the bond should not be a de minimus bond because of the cost to the Office in terms of reviewing what would have to be a whole new batch of filings. As well as --

THE COURT: Why would there have to be a whole new batch of filings?

MR. GRAY: Because we're now entering into an entirely new landscape. They just can't revert to their old filings.

THE COURT: I thought the law required them to reduce it by 10 or give you a reason why they couldn't?

MR. GRAY: And so, now --

THE COURT: That's still in effect.

MR. GRAY: So now that that's all undone --

THE COURT: Why is it all undone?

MR. GRAY: Let me make this point since we're in --

THE COURT: Well if I've got to make the decision, you should want to answer my question. Why would that undo it? If the law still requires them to do that, how can they come out and say, "Well, yeah, but this Judge over here ruled these things not affable so we want to change our rate?" I guess they could --

MR. GRAY: They could --

THE COURT: Ms. Starnes says they could come in if they want to every day of the week and file for a rate filing, but there's no reason why they would have to.

MR. GRAY: Let me answer it this way, is that I got a letter yesterday or over the weekend from my pest control company that said, "You've been at \$70 and we're only going to raise your rate by \$5, but we're going to charge new customers \$90." Well, that's a \$15 savings to me. But what we're talking about is, we're talking about now we're having all new customers come in and being covered by the rate filings that would have to be revised to reflect the increased cost that would have been reflected had they not been mandated to reduce their cost or explain otherwise.

The companies are entitled to a rate of return and protection on their capital which is what Ms. Starnes' office goes through. Simply -- we simply contend that the current status quo is what should be maintained, because if we're in

an equitable proceeding, which an injunction is, the record clearly shows that this could have been decided before January the 1st, and then wouldn't have nearly the confusion and chaos that we are going to have if the injunction is vacated. One final request, Your Honor, is that if you are going to vacate the injunction we would request that you delay the vacation for 10 days to allow us to file an emergency motion with the DCA to address that ruling.

See Appellees' Appendix 7, Transcript of April 1, 2013 hearing, pp. 52-56.

The Trial Court considered the concept of a bond, and stated, "I will reserve as to the amount of Bond, of any, that should be required of Plaintiffs." See Appellant's Appendix 1, p.2. Because there was no loss or damage caused to the OIR for, as Ms. Starnes testified to, was simply doing her job, the Trial Court was correct in not assessing any bond against the Plaintiffs below.

"In challenging the order on the ground that no injunction bond was required, appellants contended that the complaint failed to make a showing of poverty or other reason sufficient to excuse noncompliance with that requirement. See § 64.03, Fla.Stat., F.S.A. Appellees argued that no injury or loss could result from the issuance of the injunction, and that in certain instances injunction bonds have been held not to be necessary. Those arguments of appellees do not constitute a sufficient answer to the problem. The bond is to pay costs, damages, and expenses which may result to the defendants in the event the injunction is dissolved or the cause dismissed, and it could not be determined with any certainty, before the injunction was issued, that no such costs, damages or expenses could result therefrom. The contrary is presumed by the legal requirement for an injunction bond, which is mandatory unless a showing is made in the complaint sufficient to dispense with bond. The complaint here made no attempt at any such

showing.” *Metropolitan Dade County v. Polk Pools, Inc*, 124 So.2d 737, 740-41 (Fla. 3d DCA 1960).

In the instant action, the dispatch of the responsibilities of the OIR, which would be the only impact of the relief requested by the Appellees, should not result in the reinstatement of the automatic stay. In the alternative, should this Court find that a bond is required, this matter can always be remanded with directions to post a nominal bond, which is all that should be required, if at all, under these circumstances.

3. The Trial Court Did Not Misapply Legal Principles

In an effort to challenge the core ruling by the Trial Court, the OIR attempts to rehash all the same arguments deemed unpersuasive by the Trial Court. Briefly, since this material will presumably be argued in the actual appeal briefs, only a brief articulation of why the Trial Court “got it right,” will be set forth herein. Personal Injury Protection (PIP) Insurance was introduced in Florida in 1971 as a no-fault scheme to provide Floridians injured as a result of motor vehicle collisions with rapid access to third party healthcare payment. PIP insurance was initially challenged because it impermissibly limited access to the courts. However, PIP insurance was ultimately upheld because its accommodation for efficient, unfettered access to healthcare payment constituted a sufficient alternative to court access. *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9 (Fla. 1974).

In a laudable effort to decrease PIP insurance premiums by decreasing PIP insurance fraud, the Florida Legislature proposed a variety of modifications to the PIP statutes leading to the 2012 PIP Act that was signed by Governor Scott on May 4, 2012. In return for broad, sweeping changes to the PIP Statutes, PIP insurers were required by the 2012 PIP Act to decrease PIP insurance premiums. Unfortunately, not only did that not happen, the State actually approved PIP insurance premium rate increases. (Insurers File For PIP Rate Increases, Tia Mitchell, Miami Herald October 10, 2012 last accessed January 6, 2013: <http://www.miamiherald.com/2012/10/01/3029716/insurers-file-for-pip-rate-increases.html>).

Without any evidence or suggestion of fraud prevention and in the absence of any peer-reviewed, published medical literature contesting the validity or benefit of Acupuncture, Massage Therapy, or Chiropractic, the 2012 PIP Act alters four (4) separate titles of the Florida Statutes including those for Motor Vehicles, Public Health, Insurance, and Crimes by amending ten (10) distinct sections of the Florida Statutes and creating two (2) new sections and absolutely prohibits any further compensation for either Acupuncture or Massage Therapy and severely limits Chiropractic care.

Plaintiffs below agree that PIP and PIP insurance are created by statute. Plaintiffs take issue with the fact that the 2012 PIP Act excludes them from any

compensation when PIP is merely another third party payor for healthcare services. During PIP's statutory creation and initial legal defense, PIP was meant to provide unfettered, efficient access to healthcare – like any other third party payor. Because purchase of PIP insurance is mandated by state statute, and because PIP insurance provides the sole form of compensation for evaluating and treating motor vehicle collision victims, Plaintiffs' unilateral exclusion from PIP insurance compensation is unfair, and unjust; especially when Plaintiffs historically provided such care, more so than many that were included. The bottom line is that the original rationale for validating the “deal” that was PIP, the “accommodation for efficient, unfettered access to healthcare payment (that) constituted a sufficient alternative to court access” has now been eviscerated and, as a result of the 2012 PIP Act amendments, results in a bad deal for Florida consumers, a horrible deal for the Plaintiffs below, and only a benefit to the insurance companies that the OIR is presumably there to regulate, not protect at the expense of Florida citizens.

**VI. APPELLEES CLEARLY SUFFER GREATER HARM THAN
THE OIR IF THE STAY IS REINSTATED**

Evaluation of compelling circumstances requires an evaluation of the harm suffered by the Appellants compared to the harm suffered by the Appellees. When the harms balance, there exists no such compelling circumstances, and a stay should not be vacated. See *St. Lucie County*. However, *in the absence of evenly*

balanced harms, the party suffering greater harm is entitled to protection. In *Tampa Sports Authority*, the Second District agreed with *St. Lucie County* that a stay should not be vacated when the harm balanced, but it also concluded that an automatic stay should be vacated, and a temporary injunction allowed to remain in place, when the harm leading to the need for injunctive relief were, “overwhelmingly tilted against maintaining the stay,” despite any, “judicial deference to planning-level governmental decisions.” 914 So. 2d 1076, 1083. Unbalanced harms should be resolved in favor of the party subject to the greater harm, and that rationale is clearly applicable to the instant scenario.

Although Appellant’s argued from some planning level deference, Appellants argued that their harm resulted from, “Voiding...PIP coverage limits...[that would] result in market wide disruption to the automobile industry in Florida.” See Response to Emergency Motion to Vacate Stay. Despite Appellant’s argument for harm, however, one large automobile insurer published the following:

This notice is to advise you due to ongoing litigation in Myers v. McCarty (Case No. 2013-CA-0073)(Fla. 2d Jud’l Cir.), at this time, the limit for medical expenses under No-Fault Coverage and Medical Payments Coverage will be applied without regard to Emergency Medical Condition. We will also consider reasonable, related, and necessary massage therapy and acupuncture provided other uncontested aspects of the statute do not prohibit coverage for these services. If the court’s ruling on this litigation alter

the way we administer your benefits you will be notified in writing. See Affidavit of Patrick Tighe, Appellees Appendix 8.

Thus, the potential “harm” argued by the Appellant does not appear to be a legitimate concern, as evidenced by the simple and effective “fix” implemented by at least one large automobile insurer.

CONCLUSION

As the Second District held in *Tampa Sports Authority* and the Fourth District held in *St. Lucie County*, EVEN WHEN THE GOVERNMENT IS INVOLVED, when the harm to one party significantly outweighs the harm to the other (even after the grant of injunctive relief), the party bearing the grater harm should be entitled to protection. Logically, compelling circumstances and a determination of harm must be similar to those same allegations, proofs, and circumstances necessary to fulfill the requisite elements of a temporary injunction. These circumstances include the concepts of irreparable harm, the absence of an adequate remedy, the substantial likelihood of the petitioner’s success, and a consideration of whether the temporary injunction or vacation of an automatic stay will or will not disserve the public interest. In this instance, the life altering harm being suffered by the Plaintiffs clearly supports the vacation of the stay in this action.

The background of this action fully supports vacation of the stay. Plaintiffs below filed a Declaratory Action seeking temporary injunctive relief to protect themselves from Defendants' actions; actions that this Court determined violated the explicit provisions of Article I, Section 21 of the Florida Constitution. The Trial Court's Order made the following findings of fact: "Plaintiffs have alleged and proven irreparable harm and inadequate legal remedy," further finding that, "There appears to be no adverse consequence to the public interest in maintaining the status quo." This Court further held, "I find that the Plaintiffs have met their burden...[in proving that the 2012 PIP] Act violates the right of people to have access to the courts to seek redress for their injuries."

The OIR actually pled that they enacted these statutory changes to protect the Plaintiffs below (and all citizens of Florida) by reducing the cost of PIP insurance. This "legislative predicate" may have sounded encouraging when initially asserted, but the fact is that PIP insurance rates actually increased since the enactment of the 2012 PIP Act. The OIR has failed to concede (perhaps purposely) that the harm created by requiring Floridians to purchase a commercial insurance product worth ten thousand dollars (\$10,000.00) on paper, but limiting such coverage to two thousand five hundred dollars (\$2,500.00), absent a time consuming, resource consuming, effort to establish the undefined "emergency medical condition," results in harm to every consumer in the state. Because

Plaintiffs below clearly suffer irreparable harm, the OIR, as a governmental entity, need not post a bond for their injuries. Equally, since the implementation of the injunction calls for nothing more than the implementation and administration of “paperwork” the OIR already has the responsibility to administer, the Plaintiffs should have no obligation to post a bond. Once out of business, nothing can remedy the Plaintiffs’ losses.

When considered in conjunction with the fact that the injunction does not disserve the public interest and the fact that the Plaintiffs are likely to prevail, the Plaintiff’s irreparable harm and the absence of an adequate legal remedy significantly outweigh any potential harm to the OIR, especially when they are only due some “planning-level deference” and the OIR never complained of any harm, nor can they show any tangible harm by a return to the *status quo ante*. This Court should find that the issuance of the temporary injunction, as well as the vacation of the automatic stay, were not any type of “abuse of discretion,” and the Motion seeking to reinstate the stay should be denied.

Respectfully Submitted on this 6th Day of May 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic service on this 6th Day of May, 2013 to:

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